

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
For Appropriate Relief –**

Appointment of Defense Expert Consultant in
Mitigation – Mr. Richard McGough

3 September 2008

1. **Timeliness:** This Motion is timely filed.
 2. **Relief Sought:** Standby defense counsel, in its role as both advisor to Mr. Bin 'Attash in his self-representation and as preparation for the potential withdrawal or removal of his right to self-representation, requests this Honorable Court order the government to appoint and provide Mr. Richard McGough as a defense mitigation expert consultant, pursuant to Rule for Military Commissions (R.M.C.) 701(a)(4), 703(b) and (d), and 905(b)(4), Military Commission Rules of Evidence (M.C.R.E.) 502(a), *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986) and *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989).
 3. **Overview:** Standby defense counsel must be fully prepared to assume the case at any stage of trial, as well as obligated to examine the evidence and be prepared to advise Mr. Bin 'Attash throughout the process. *See* R.M.C. 701(a)(4). These mandates necessitate a defense mitigation specialist to consult with from the earliest stages of trial preparation and throughout the trial, such that standby defense counsel can adequately advise and/or proceed to trial, should the circumstances dictate. The defense respectfully requests an expert mitigation specialist with experience in mitigation investigations and trial preparation for capital cases to assist counsel by conducting and helping to coordinate a comprehensive investigation and evaluation of Mr. Bin 'Attash's life and family history.
 4. **Burden of Proof:** As the moving party, the defense bears the burden of proof.
 5. **Facts:**
 - a. Ten charges were referred capital against Mr. Bin 'Attash to this Military Commission on 9 May 2008. The charges allege a complex conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003. *See* AE 001 and 003.
 - b. On 5 June 2008, Mr. Bin 'Attash was arraigned. During this hearing Mr. Bin 'Attash elected to represent himself. The military judge granted Mr. Bin 'Attash the right to represent himself and appointed LCDR James Hatcher and Capt Christina Jimenez as standby defense counsel, pursuant to R.M.C. 501(b) and 506(c).
 - c. On 10 July 2008, a pretrial hearing was held. During this hearing the military judge told Mr. Bin 'Attash, *inter alia*:
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If you represent yourself, your detailed defense counsel, Lieutenant Commander Hatcher and Captain Jimenez will be designated as standby counsel, and the standby counsel will assist you. And they will also be prepared to assume your defense in the event that the Court terminates your self-representation for the reasons that I talked about before.

BinAttash Transcript 10 July 2008 Session Draft (emphasis added).

d. On 14 August 2008, defense submitted a request to the Convening Authority for a mitigation expert consultant, specifically Mr. Richard McGough. See Attachment A.

e. On 26 August 2008, the Convening Authority denied the defense request for a mitigation consultant. See Attachment B.

6. Law and Argument:

a. In making this request, Mr. Bin 'Attash does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forms.

b. This is a capital case; that fact has profound legal consequences for the military judge's decision on this request. The Supreme Court has long held that in capital cases, "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). As the Court has explained, "the penalty of death is qualitatively different from a sentence of imprisonment, however long," and because of that difference, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This "need for heightened reliability," *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), affects every procedure at a capital trial, including the procedures used to determine guilt and innocence as well as those that apply solely at the sentencing hearing. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("[W]e 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."). In this case, the services of an expert consultant in mitigation are necessary for the defense to properly and adequately investigate, consider and advise on the evidence. See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) (explicitly delineating the need for a qualified mitigation specialist as the required standard of care for capital representation).

c. The offenses alleged against Mr. Bin 'Attash surround the most investigated incident in U.S. history and cannot be trivialized by assertions that two detailed military defense counsel are sufficient to locate, acquire, analyze and advise on the quantity of evidence and potential mitigation evidence that a trained expert can. See Prosecution Motion for Protective Order in *US*

v. Mohammed, et. al., Protection of Government Information and Other Personal Information, dated 1 Aug 08, P005 (asserting as fact that, “[t]he FBI, in conjunction with local and state authorities, other federal agencies, and foreign governmental agencies, immediately initiated the largest criminal investigation in the history of the United States” into the events of 11 Sep 01) (emphasis added).

d. R.M.C. 703(d) provides the procedures and standards for defense expert requests. The Rule provides that when the employment of an expert at government expense is considered necessary by either party, the party submits a request to the convening authority to authorize the employment and fix the compensation. If the convening authority denies a defense request the defense may renew the request before the military judge, “who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the government has provided or will provide an adequate substitute.” *Id.* If the military judge grants the “motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling.” *Id.*

e. When an accused applies for the employment of an expert, he must demonstrate the necessity for the services. *See Garries*, 22 M.J. at 290-91. In showing this necessity, “the defense [must be] specific enough in defining the issues they hope[] to develop with expert assistance ... [and must] demonstrate that they [have] sufficiently educated themselves as to such potential issues that might be developed with expert assistance.” *Tornowski*, 29 MJ at 580-81. Furthermore, “a trial defense counsel who seeks the services of an expert consultant cannot play coy. He must show whatever cards he either thinks he holds or may acquire with such expert assistance.” *Id.* In general, the accused has the burden of demonstrating that the testimony or assistance is relevant and necessary. *See United States v. Van Horn*, 26 MJ 434 (1988); *United States v. Kinsler*, 24 MJ 855 (1987). Once this showing has been made, the Government must either provide the expert or an adequate substitute. *Id.*

f. “An expert may be of assistance to the defense in two ways. The first is as a witness to testify. ... An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.” *United States v. Turner*, 28 MJ 487, 488 (CMA 1989). There is however, a significant distinction between a request for an expert consultant and a request for an expert witness. The distinction between these two types of expert assistance is crucial, as the foundation requirements for motions to provide their services at government expense vary, as do the bodies of precedent used to resolve such motions. *See United States v. Langston*, 32 M.J. 894, 895 (AFCMR 1991).

g. This court must begin its inquiry into the defense’s request for the assistance of an expert from the proposition that the defense is entitled to such assistance equally with the government. *See R.M.C. 703(d)*. The defense's right to an expert does not hinge on whether the government uses or intends to use an expert itself but on whether such an expert can assist the defense. *See United States v. Mustafa*, 22 MJ 165 (1986).

h. In *United States v. Burnette*, 29 M.J. 473 (CMA 1990), our highest military court set out the standard for evaluating defense requests for expert consultants. In *Burnette*, the then Court of Military Appeals noted that had the defense provided a showing of necessity for the independent advice they sought, it should have been granted. *Id.* at 475-476; *see also* R.M.C. 703(d); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989). In addressing the issue of necessity, military courts have set forth a three-prong test an accused must satisfy before the appointment of an expert to assist the defense will be justified:

- (1) [W]hy expert assistance is needed;
- (2) [W]hat would expert assistance accomplish for the accused; and
- (3) [W]hy is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.

United States v. Anderson, 47 M.J. 576, 579 (N.M.C.C.A. 1997). In meeting this three-prong test military courts have noted that “[t]he defense need only make a *minimal* showing of need, or necessity for the expert assistance.” *Id.* (emphasis added) [citing *U.S. v. Ingham*, 42 M.J. 218 (CAAF 1995) and *Burnette*, 29 M.J. at 475]. The defense has met this burden, both in its role as standby counsel and counsel, should Mr. Bin ‘Attash’s *pro se* status be removed or withdrawn.

i. The Convening Authority’s denial of the defense request for an expert consultant in mitigation was not based on the merits of its request but a perfunctory response based solely on Mr. Bin ‘Attash’s current *pro se* status. That is not a legitimate basis for denial. The defense is required ethically and constitutionally to be prepared at time of trial; preparedness is the benchmark for a constitutionally adequate sentencing defense. That is why the United States Supreme Court has held the Constitution requires counsel in a death penalty case to, at a minimum, make reasonable efforts to investigate possible sources of mitigation evidence prior to and regardless of whether counsel ultimately make the strategic decision not to use that evidence at trial. *See Wiggins v. Smith*, 539 U.S. 510, 521-34 (2003).

j. In addition, defense counsel are obligated, regardless of Mr. Bin ‘Attash’s *pro se* status, to not only advise, but proceed to trial when circumstances dictate; the government’s denial fails to recognize defenses full role at trial. The military judge has instructed the defense to be prepared to assume the defense, under certain conditions, and that duty entails defense counsel to render effective assistance of counsel. Such effective assistance can only be rendered meaningful if the defense is provided a mitigation specialist; without which counsel will provide ineffective assistance of counsel. Thus the Convening Authority’s failure to address the merits of the request is patently unreasonable and interferes with defenses ability to fully advise Mr. Bin ‘Attash on the evidence, as well as prepare for his defense in a capital case. Moreover, in light of the military judge’s recent “additional guidance concerning how absence from session from the trial could result in the loss of an accused’s right to continue with *pro se* representation,” transmitted on 27 August 2008, the Convening Authority’s denial lacks legal grounds where non-combatative actions may result in a loss of Mr. Bin ‘Attash’s *pro se* status.

k. The defense has met its burden. The defense requested an expert mitigation specialist with experience in mitigation investigations and trial preparation for capital cases. A mitigation specialist will assist counsel by conducting and helping to coordinate a comprehensive investigation and evaluation of Mr. Bin 'Attash's life and family history, taking into account the cultural and religious underpinnings. An expert consultant is additionally necessary to evaluate psychosocial and other extenuating evidence, to advise on the strength of the government's case in findings and sentencing, and assist in preparing questions, strategies, and presentation in defense of Mr. Bin 'Attash, should Mr. Bin 'Attash's election to proceed *pro se* be removed or withdrawn. See D-022, Exh. A (Declaration of Sean O'Brien), ¶¶ 12-17; D-022, Exh. B (Declaration of Richard Burr), ¶¶ 6-13; D-022, Exh. C (Declaration of Russell Stetler), ¶¶ 10-26.

l. Because the government's case is centered on allegations of a complex conspiracy, traversing the world and culminating in the murder of 2,973 individuals in violation of the law of war as well as terrorism surrounding the events on September 11, 2001, the defense requires the assistance of an expert in mitigation to adequately advise and prepare our case in findings and sentencing. A mitigation expert with training and experience in investigating the life history of an accused and identifying issues needing medical evaluations is necessary to ensure the defense appropriately and adequately advises Mr. Bin 'Attash and, if called upon, explores the appropriate issues and presents the appropriate case in both findings and sentencing. Open source documents indicate Mr. Bin 'Attash has been, and continues to be detained within an environment in which systemic abuse and prolonged isolation occurs and that he was subjected to such abuse. These same open source documents also provide some information concerning Mr. Bin 'Attash's country of origin; though scant, this information informs us that a full mitigation investigation will be needed to take into account his religious and socio-cultural heritage.

m. By allowing the defense to fully explore and understand such factors as the interplay between tribal sects within Islam; communicating with one who follows a strict understanding of Sharia in the Muslim faith; the effects and influence of one who was raised within and around wars; and interpreting the impact of these cultural influences will assist the defense in advising Mr. Bin 'Attash and preparing this case for trial. In addition, the span of time across which the alleged offenses occurred, and the speed in which this case is being brought to trial all support the position that Mr. Bin 'Attash's standby military defense counsel require the assistance of a mitigation expert consultant to aid in their advice to Mr. Bin 'Attash and/or assist in preparing counsel to proceed to trial, should the circumstance arise. The breadth of knowledge needed and the time within which to comprehend such materials necessitates Mr. McGough's expertise in order that standby defense may fully advise Mr. Bin 'Attash and/or represent him before a military commission.

n. The defense mitigation expert will be utilized in the manner described throughout this motion and as outlined in Attachment A. This includes utilizing Mr. McGough's education in anthropology; experience and in depth study of non-American cultures and war related trauma; and expertise as a mitigation specialist to provide the Defense with an understanding of Mr. Bin 'Attash's particular tribal sect, the Muslim faith and wars surrounding his formative years, which in turn will enable standby defense counsel to accurately communicate and advise Mr. Bin

'Attash throughout his trial and thus present a unified defense at trial, either by Mr. Bin 'Attash as *pro se* or through counsel's representation.

o. Lastly, the third prong is met by the fact that no member of the Defense trial team holds a degree or certification in anthropology, sociology, or medicine, nor have they had any specialized training in such fields or investigatory matters. The detailed military defense counsel do not have capital experience and with the time constraints of trial, cannot locate, acquire, and analyze the quantity of potential mitigation evidence that a trained expert can. The offenses alleged are extremely complex and cover a large span of time; the two detailed military defense counsel are ill equipped to fully and adequately investigate and advise on all matters in defense of Mr. Bin 'Attash. The United States has investigated and prepared its case, with the entire force and backing of the United States government for over seven years. The two detailed defense counsel have neither the resources nor skill set to fully advise and/or defend this case with mere months preparation and without the assistance of a mitigation specialist given the current timeline this case is expected to proceed to trial.

p. In addition, a mitigation expert is required from the earliest stage of trial preparation in order for the defense to provide an integrated theory for both the guilt and punishment phases of a death penalty trial. Furthermore, consultation with the expert consultant will be critical to decision-making in strategic issues for the case. A mitigation specialist has been defined and required in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, as someone "qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments". *Id* at 4.1 B. The Commentary concisely identifies a number of the most significant reasons for this requirement:

A mitigation specialist is ... an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and

works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.

For all of these reasons the use of mitigation specialists has become “part of the existing ‘standard of care’” in capital cases, ensuring “high quality investigation and preparation of the penalty phase.”

Id. (footnotes omitted). The need for at least one mitigation specialist, qualified by training education and experience to assist defense counsel in preparation for a penalty phase of a capital trial, is bedrock. Without this expertise the Defense is unable to adequately prepare a defense, thus causing a fundamentally unfair trial.

q. The three-prong test laid out in *Garries* has been met. The court has provided that if the test is satisfied the accused is not entitled to expert assistance of choice. *Garries*, 22 M.J. at 290-91; *U.S. v. Huerta*, 31 M.J. 640, 643 (N.M.C.M.R. 1990). Rather, the government may meet its obligation by providing the accused with expert assistance from its arsenal of military resources - as long as said expert is provided with an order of confidentiality. *Huerta*, 31 M.J. at 643. The defense request Mr. Richard McGough, or in the alternative, a person meeting all the qualifications outlined in its original request. See Attachment (a).

7. **Request for Oral Argument:** The defense request argument.

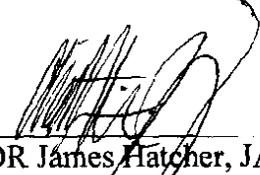
8. **Request for Witnesses:** Mr. Richard McGough.

9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

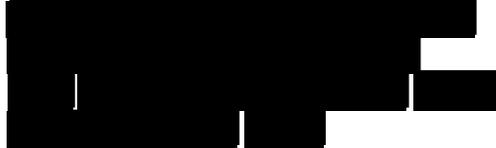
10. Attachments:

- A. Request for Mitigation Expert Consultant – *United States v. Mr. Bin 'Attash*, with attachments, dtd 14 Aug 08, 12 pgs
- B. Memorandum from Convening Authority - Request for Mitigation Expert for Mr. Bin Attash, dtd 26 Aug 08, 1 pg

Respectfully submitted,

BY: 

LCDR James Hatcher, JAGC, USNR
Capt Christina Jimenez, JAGC, USAF
Standby Counsel for Mr. Bin 'Attash



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Attachment A



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

14 Aug 08

MEMORANDUM FOR CONVENING AUTHORITY

FROM: Lieutenant Commander James Hatcher and Captain Jimenez, Standby Defense Counsel

SUBJECT: Request for Mitigation Expert Consultant – *United States v. Mr. Bin 'Attash*

1. Standby defense counsel, in its role as both advisor to Mr. Bin 'Attash in his self-representation and as preparation for the potential withdrawal or removal of his right to self-representation, requests a mitigation expert consultant with the following qualifications, pursuant to Rule for Military Commissions (R.M.C.) 701(a)(4) and 703(b) and (d), Military Commission Rules of Evidence (M.C.R.E.) 502(a), *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986) and *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989). As the Military Judge stated to Mr. Bin 'Attash during the 10 Jul 08 hearing, standby defense counsel must be fully prepared to assume the case at any point, including mid-cross examination. As standby defense counsel are obligated to be fully prepared for trial, regardless of Mr. Bin 'Attash's pro se status, the defense respectfully requests an expert mitigation specialist with experience in mitigation investigations and trial preparation for capital cases. A mitigation specialist will assist counsel by conducting and helping to coordinate a comprehensive investigation and evaluation of the accused's life and family history. Additionally, the mitigation expert consultant must have the requisite qualifications to be qualified as an expert witness, should the need arise, in order to adequately prepare for the military commission in this case. Specifically, the defense requests Mr. Richard McGough, located at [REDACTED] with telephone: [REDACTED]. (Curriculum Vitae at Attachment 1) The methodology and goals of the mitigation investigation are set out in the attached affidavit of Richard McGough. (Attachment 2)

2. R.M.C. 701(a)(4) provides, "In the event that the accused has elected to represent himself and the military judge has approved that election, standby defense counsel *shall examine the evidence and be prepared to provide advice to the accused.*" (Emphasis added). Such an examination and evaluation of the evidence in this case necessarily includes a mitigation specialist to consult with from the earliest stages of trial preparation and throughout the trial, such that standby defense counsel can adequately advise and/or proceed to trial, should the circumstances dictate.

3. This is a capital case. That fact has profound legal consequences for the Convening Authority's decision on this request. The Supreme Court has long held that in capital cases, "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). As the Court has explained, "the penalty of death is qualitatively different from a sentence of imprisonment, however long," and because of that difference, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This "need for heightened reliability," *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), affects every procedure at a capital trial, including the procedures used to determine guilt and innocence as well as those that apply solely at the sentencing hearing. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("[W]e 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.").

4. The services of an expert consultant in mitigation are necessary for the defense to properly and adequately investigate, consider and advise on the evidence. See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003) (explicitly delineating the need for a qualified mitigation specialist as the required standard of care for capital representation). The offenses alleged against Mr. Bin 'Attash surround the most investigated incident in US history and cannot be trivialized by assertions that two detailed military defense counsel without capital experience are sufficient to locate, acquire, and analyze the quantity of evidence and potential mitigation evidence that a trained expert can. See Prosecution Motion for Protective Order in *US v. Mohammed, et. al.*, Protection of Government Information and Other Personal Information, dated 1 Aug 08, P005 (asserting as fact that, "[t]he FBI, in conjunction with local and state authorities, other federal agencies, and foreign governmental agencies, immediately initiated the largest criminal investigation in the history of the United States" into the events of 11 Sep 01). An expert consultant is additionally necessary to evaluate psychosocial and other extenuating evidence, to advise on the strength of the government's case in findings and sentencing, and assist in preparing questions, strategies, and presentation in defense of Mr. Bin 'Attash, should Mr. Bin 'Attash's election to proceed pro se be removed or withdrawn.

5. Although this is an initial request for an expert consultant, as opposed to a request for an expert witness, we anticipate the consultant will be relevant and necessary at trial. In light of the potential Government's witnesses, the nature of testimony expected to be elicited, and the material issues at trial surrounding the complex allegations of conspiracy spanning several years, involving alleged conduct taking place in or about 1996 to in or about May 2003, Defense will request that the Government produce the mitigation consultant as appointed expert consultant at trial. Therefore we request that funding be "pre-approved" in anticipation of that event (funding will be further elaborated below).

6. An accused before military commission is entitled to expert assistance in preparing for trial when necessary for an adequate defense, and the Defense demonstrates the necessity for such assistance. R.M.C. 703(d); *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986); *United States v. Tornowski*, 29 M.J. 578 (A.F.C.M.R. 1989); *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990). In *Garries*, the Court discussed the necessity requirement in terms of three areas of inquiry: (1) The Defense must show why an expert is needed, (2) What the expert will do, and (3) Why Defense counsel cannot perform the services requested. Expert assistance in this case is necessary as a matter of due process. The reasons and authority for this request are set forth below.

Why an Expert is Needed

7. The Air Force Court of Military Review has held that two limitations apply. First, an Accused is not entitled to a particular expert of his choice. See *United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990). Second, an Accused must demonstrate the necessity for expert consultation and assistance. This showing requires more than the mere possibility of assistance from such an expert. See *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). The following factors demonstrate necessity:

8. Mr. Bin 'Attash is accused of, *inter alia*, conspiracy, murder of 2,973 individuals in violation of the law of war, and terrorism surrounding the events on September 11, 2001. Mr. Bin 'Attash faces the maximum punishment of death. The defense requires the assistance of an expert in mitigation to adequately advise and prepare our case in findings and sentencing. A mitigation expert with training and experience in investigating the life history of an accused and identifying issues needing medical evaluations is necessary to ensure the defense appropriately and adequately advises Mr. Bin 'Attash and, if called upon, explores the appropriate issues and presents the appropriate case in both findings and sentencing. Open source documents indicate Mr. Bin 'Attash was detained within an environment in which systemic abuse and prolonged isolation occurred and/or continues to occur, and that he was subjected to such abuse. These same source documents give us some information concerning Mr. Bin

'Attash's country of origin; though scant, this information informs us that a full mitigation investigation will be needed to take into account his religious and socio-cultural heritage

9. Mr. McGough has the appropriate training and experience to assist counsel in coming to understand such factors as the interplay between tribal sects within Islam; communicating with one who follows a strict understanding of Sharia in the Muslim faith; the effects and influence of one who was raised within and around wars; and interpreting the impact of these cultural influences. In addition, the span of time across which the alleged offenses occurred, and the speed in which this case is being brought to trial all support the position that Mr. Bin 'Attash's standby military defense counsel require the assistance of a mitigation expert consultant to aid in their advice to Mr. Bin 'Attash and/or assist in preparing counsel to proceed to trial if necessary. The breadth of knowledge needed and the time within which to comprehend such materials necessitates Mr. McGough's expertise in order that standby defense may fully advise Mr. Bin 'Attash and/or represent him before a military commission.

What the Expert Will Do

10. A defense mitigation expert will be utilized in the manner described above and as outlined in attachment 2. Mr. McGough will utilize his education in anthropology; experience and in depth study of non-American cultures and war related trauma; and expertise as a mitigation specialist to provide the Defense with an understanding of Mr. Bin 'Attash's particular tribal sect, the Muslim faith and wars surrounding his formative years, which in turn will enable standby defense counsel to accurately communicate and advise Mr. Bin 'Attash throughout his trial and thus present a unified defense at trial, either by Mr. Bin 'Attash as pro se or through counsel's representation.

Defense Counsel Cannot Perform the Services Requested

11. No member of the Defense trial team holds a degree or certification in anthropology, sociology, or medicine, nor have they had any specialized training in such fields or investigatory matters. The detailed military defense counsel do not have capital experience and with the time constraints of trial, cannot locate, acquire, and analyze the quantity of potential mitigation evidence that a trained expert can. The offenses alleged are extremely complex and cover a large time span; the two detailed military defense counsel are ill equipped to fully and adequately investigate and advise on all matters in defense of Mr. Bin 'Attash. The United States has investigated and prepared its case, with the entire force and backing of the United States government for over seven years. The two defense counsel have neither the resources nor skill set to fully advise and/or defend this case with mere months preparation and without the assistance of a mitigation specialist given the current timeline this case is expected to proceed to trial.

12. Additionally, without Mr. McGough as a consultant, the defense would not have the ability to adequately advise Mr. Bin 'Attash, nor the means to place the evidence before the military commission, should such occasion present itself, and present a defense. Counsel lacks the experience and scientific expertise to uncover all potentially mitigating events or factors in Mr. Bin 'Attash's life. This difficulty would cause a fundamentally unfair trial because we could not effectively advise and/or represent Mr. Bin 'Attash as either standby defense counsel or counsel.

13. In accordance with M.C.R.E. 502, *Ake v. Oklahoma* 470 U.S. 68 (1985), *United States v. Toledo*, 25 M.J. 270 (CMA 1987) and *Garries*, supra, the defense respectfully requests that the government provide an expert mitigation consultant to assist the defense in assessing what factors may be relevant to the charges, and thus findings and sentencing, in this case. Timely appointment of an expert consultant will ultimately expedite this case and lead to the fair administration of justice. As such a mitigation expert is required from the earliest stage of trial preparation in order for the defense to provide a unified theory for both the guilt and punishment phases of a death penalty trial. Furthermore, consultation with the expert

consultant will be critical to decision-making in strategic issues for the case. The defense requests an expert consultant be appointed as a representative of the defense so any communications between the expert and any member of the defense team will be privileged within the attorney-client privilege outlined in M.C.R.E. 502. See *United States v. Turner*, 28 M.J. 487, (C.M.A. 1989), *United States v. Gordon*, 27 M.J. (C.M.A. 1989), *Toledo*, supra.

14. The defense is willing to accept a qualified and independent military member as a substitute to Mr. McGough, if one exists. However, any expert must have comparable qualifications to Mr. McGough which are the kind of qualifications necessary for the defense of these allegations. A mitigation specialist has been defined and required in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, as someone “qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments”. *Id* at 4.1 B. The Commentary concisely identifies a number of the most significant reasons for this requirement:

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant’s development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client’s life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.

For all of these reasons the use of mitigation specialists has become “part of the existing ‘standard of care’” in capital cases, ensuring “high quality investigation and preparation of the penalty phase.”

Id. (footnotes omitted). The need for at least one mitigation specialist, qualified by training education and experience to assist the defense counsel in preparation for a penalty phase of a capital trial, is bedrock. To that end the mitigation specialist should have:

- a graduate-level degree in social work, psychology, counseling or a related field in the Social Sciences;
- more than 5 years experience working as a mitigation specialist;

- substantial familiarity with the law governing the introduction of mitigating evidence at the penalty phase of a capital case;
- substantial familiarity with the psychological, behavioral and neurological diseases and disorders set forth in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM);
- substantial familiarity with the protocols for interviewing family members, relatives, friends, neighbors, teachers, employers and other potential mitigation witnesses to obtain information regarding the accused's background and evidence to support statutory and non-statutory mitigating circumstances;
- the ability to obtain, analyze and evaluate the accused's records including, but not limited to, educational, employment, medical, social services, military and prison records; and
- the ability to prepare a written summary of interviews conducted with the accused and mitigation witnesses, to compile a comprehensive social history and to prepare other relevant reports, materials or exhibits regarding the accused or the penalty phase of trial.

15. As a matter of due process, an accused is entitled to investigative or other expert assistance when necessary for an adequate defense. *See United States v. Garries*, 22 M.J. 288, 290-91 (C.M.A. 1986). *See also United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989) (“To assure that indigent defendants will not be at a disadvantage in trials where expert testimony is central to the outcome, the Supreme Court has ruled that a defendant must be furnished expert assistance in preparing his defense.”)

However, when an accused applies for the employment of an expert, he must demonstrate the necessity for the services. *Garries*, supra, at 290-91; R.M.C. 703 (d). In showing this necessity, “the defense (must be) specific enough in defining the issues they (hope) to develop with expert assistance (and must) demonstrate that they (have) sufficiently educated themselves as to such potential issues that might be developed with expert assistance.” *United States v. Tornowski*, 29 M.J. 578, 580-81 (A.F.C.M.R. 1989). “An expert may be of assistance to the defense in two ways. The first is as a witness to testify. An expert also may be of assistance to the defense as a consultant to advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.” *Turner*, supra, at 488.

16. Since we are requesting an expert consultant, we are in need of exactly what *Turner* recognized when that court said such a consultant could “advise the accused and his counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.” *Turner*, supra, at 488.

17. In order to fully perform his duties of an expert mitigation consultant, Mr. McGough would be required to travel to Guantanamo Bay, Cuba, along with potential trips to Mr. Bin ‘Attash’s homeland in Yemen and other potential countries in the Middle East. Such trips will range from one to two weeks in duration, at a billing rate of \$85.00/hr. In Mr. McGough’s experience, a typical capital case takes approximately one year to prepare and he provides 800 to 1200 hours of work in preparation of such cases. Mr. Bin ‘Attash’s case is not typical in any respect and preparation estimates range from \$75,000.00 to \$120,000.00 to cover both hours and travel-related expenses.

18. In assessing costs, the Supreme Court has stated,

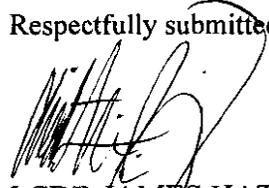
We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial. The variable on which we must focus is, therefore, the probable value that the assistance ... will have in this area, and the risk attendant on its absence.

Ake v. Oklahoma, 470 U.S. 68, 83-84, 105 S.Ct. 1087, 1096 (1985).

19. Lastly, Mr. McGough understands he would need to apply and successfully obtain a TS/SCI clearance in order to fully participate in this case. He is prepared to submit the requisite papers and understands his communications with Mr. Bin 'Attash are conditioned on such a clearance being granted. Due to the already limited time frame in this case proceeding to trial, the expedited approval of this request would assist in the processing of Mr. McGough's clearance papers and his timely assistance on this case.

20. We suggest pre-approval of the expert consultant to travel as consultation will be critical at trial. The defense needs an expert as soon as possible so that we may prepare the best defense possible, and proceed to trial as expeditiously as possible. Thank you for considering this request. If you have any questions, please call me at [REDACTED]

Respectfully submitted,

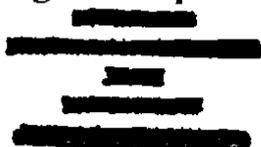


LCDR JAMES HATCHER, JAGC, USNR
Capt CHRISTINA JIMENEZ, USAF
Detailed Military Defense Counsel

Attachments:

1. Curriculum Vitae, Richard McGough, 3 pgs
2. Affidavit of Richard McGough, 3 pgs

Richard McGough Mitigation Specialist



Education

BA in Anthropology 1979 UNC-Chapel Hill

MA in Anthropology 1984 UNC-Chapel Hill

Major area of research in Ecuador, 1979-1981. Research focus on the relationship between theater and local ritual, social change.

Field research in Southern Spain 1978-1979.

Relevant Work Experience

2000-present:

Mitigation investigation and trial preparation in capital cases involving Latino defendants at both the State and Federal level. Field research in El Salvador and Mexico with an emphasis on gangs, gang recruitment, war-related trauma and juror bias in cases involving Latino defendants.

1990-present:

Court appointed mitigation specialist in State and Federal capital murder cases. Extensive field experience over a number of jurisdictions with an emphasis on coordinating the investigation of a defendant's life history, identification of issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and in assisting attorneys in locating documentary materials to review.

1987-1990: Christic Institute, Washington DC

Chief field investigator in Costa Rica and Southern Florida for civil RICO case. Investigative work included case development, search for and interview those involved in illegal arms shipments.

Relevant Skills

20 years experience in investigative research, case analysis and case presentation

Fluent Spanish

Extensive field experience in El Salvador, Mexico, Ecuador and Costa Rica

Professional Affiliations

Member Board of Directors Vinculo Hispano, North Carolina

Member American Society of Trial Consultants

Recent Papers and Presentations

Latino Bias and Voir Dire. NCATEL CLE, Spring of 2004

Latino Bias and Capital Case Jury Selection. NC Association of Public Defenders, Summer 2004

Focus Groups and Voir Dire Strategy. Virginia Trial Lawyers Association CLE Annual May Tort Law Seminar 2005

Capital Voir Dire - Using the Colorado Method in North Carolina. February 2006 Trial Briefs, monthly journal of the NC Academy of Trial Lawyers. Co-authored with Jeff Welty, Atty.

The Limitations of Juror Profiling. February 2006 Campbell Law Observer

Latino Bias and Jury Selection. Virginia Trial lawyers Association CLE, December 2007

References Available Upon Request

Richard McGough References

AFFIDAVIT OF RICHARD MCGOUGH

I, Richard McGough, make the following statement voluntarily:

1.

My name is Richard McGough. My address is [REDACTED]. I am a mitigation specialist and have worked in capital cases in that capacity at both the State and Federal levels since 1990. I have an MA in Anthropology from the University of North Carolina-Chapel Hill. I have conducted extensive investigative research outside of the US both as part of my graduate work and as an investigator and mitigation specialist.

2.

The role of the mitigation specialist in a capital murder case is to assist the attorneys by conducting a thorough social history investigation, identifying factors in the client's background or situation that require expert evaluations; assisting in locating appropriate experts; providing background materials and information to experts to enable them to perform competent and reliable evaluations; consulting with defense counsel regarding the development of the theory of mitigation and coordinating this theory development with the culpability phase theory of defense; developing an effective investigation and trial strategy to present these theories, and assuring coordination of the strategy for the guilt-innocence phase with the strategy for the penalty phase; identifying potential penalty phase witnesses; and working with the client and his family while the case is pending.

3.

At the inception of my involvement in a case, I obtain from defense counsel records related to the case and to the client's criminal history, including but not limited to: charging documents; law enforcement investigation reports relating to the offense(s); newspaper articles relating to the offense; the coroner's report and/or autopsy report; the FBI, state and local criminal history reports on the client; jail booking records; and documents from the state giving notice of the intent to seek the death penalty and providing notice of factors rendering the client eligible for the death penalty, as well as notice of aggravating factors alleged by the state.

4.

I obtain other records related to the client and his family, including, but not limited to: birth certificates; birth records from hospitals and physicians; parents' medical records; medical records from childhood and adult years for any hospitalization or treatment, including emergency room records, records of physical examinations and records of any testing, including laboratory, EEG, EKG, CT scans or MRI scans; school records, including transcripts or other performance records, testing, conduct, health screening, immunizations, multi-disciplinary assessments and individualized educational plans for every school attended; social service agency records from any agency that has worked

1

with the client or any member of his family, including welfare or public assistance records, evaluations or testing, counseling, intervention, placement or treatment records; juvenile court and juvenile probation/court services records, including petitions disposition reports, evaluations, supervision records, referrals for services or placement and progress reports; records from any juvenile facility or home, including foster home, in which the client may have been placed, including admission records, progress reports, evaluations, education, medical and conduct records, discharge summaries; employment records for all jobs held, including applications, pay records, descriptions, attendance, performance evaluations, name of employer or supervisor, starting and ending date, and reason for leaving job; military records, including complete record of conduct, places stationed, training, duty, medical, any awards or medals, adult education records, including GED, post-secondary education, such as vocational school, college, Job Corps or other training program; prior jail records; prior prison records, including assessment, classification, conduct, work assignment, participation in programs or services, progress reports, parole reviews and planning, medical, visiting lists, and awards of good time prior probation and/or parole records including conditions of supervision, violations, performance on supervision and services provided; treatment records, including records of any inpatient or outpatient psychiatric, mental health or alcohol and drug treatment provided, including assessment, treatment and discharge records; jail records for current incarceration, including conduct, health, work, programming and visiting lists.

5.

In the case of a defendant that grew up in another country, the types of records described in section 4 above, or their equivalents, can only be obtained through research in the client's native country. In many cases, the types of records we rely on may not exist or be available. More often than not, pertinent records can not be researched through a computerized database as we have here in the US. In such cases I have come to rely even more heavily on interviews with family members, neighbors and other source witnesses in order to best obtain an accurate life history of the client. A phone or mailed request for documents, or a reliance on local "runners" or interviewers, will not allow for a thorough life history investigation of the client. It is imperative that the person conducting such interviews be the same individual that has elicited the life history directly from the client. To maximize efforts in the country of origin, I conduct a number of interviews with the client regarding his childhood years and experiences to develop information including, but not limited to: residential history, including where lived, with whom, for what lengths of time, and under what circumstances; employment history, including name or company or person for whom the client worked, dates of employment, description of job and duties, performance on the job, names of persons familiar with his work, reasons for leaving the job, and any significant job, educational and military experiences. Once identified, I will conduct collateral interviews with the family members and others in the country of origin to supplement and corroborate the information obtained from the client. Persons who should be interviewed include, but are not limited to: parents, siblings, spouses or significant others, children, other relatives such as grandparents, aunts and uncles, cousins; childhood and adult friends and neighbors. When possible, I seek out non-family members of the community that have the type of information and detail about

the client's history that we commonly associate with: school personnel, including teachers, principals, guidance counselors, or social workers, psychologists, coaches; ministers, church personnel; employers, job supervisors and co-workers; social service and court personnel including juvenile or adult probation/parole officers; other service providers, such as counselors; physicians or medical personnel; mental health experts who have assessed the client at any time in the past.

6.

Any mitigation investigation will necessarily involve a close look at local and regional events, such as natural disasters or armed conflict, that may have played a role in the emotional and psychological development of the client. In the case of a client that grew up in another region or country, specific attention must be paid to what is commonly referred to as "cultural differences". The mitigation investigator should attempt to understand, interpret and possibly explain differences in, for example, family structure, religious beliefs and basic socio-cultural orienting concepts that will further an understanding of the client's family and personal history.

7.

The nature and extent of the investigation and assessment necessary to adequately prepare for a capital murder trial, including penalty phase, generally requires a minimum of one year. Factors affecting the length of time and number of hours necessary to prepare include, but are not limited to: the nature and complexity of the case; the prior history of the client including such things as prior offense history, prior incarcerations, history of significant physical or mental health problems, military history, lengthy employment history, frequent changes in residence and schools; the extent of records and documentation that exist and difficulties in locating and obtaining records; the number of collateral interviews that must be conducted; the existence of special conditions. In the case of a defendant from another country, a good deal of planning is required to secure support from local government agencies and officials and to arrange proper help and support from locals familiar with the specific area of the country.

Sworn and ascribed before me this 9th day of AUGUST, 2008.

Martin A. Frost
NOTARY PUBLIC

MARTIN A FROST
NOTARY PUBLIC
ORANGE COUNTY, NC
My Commission Expires 4-20-2011

My commission expires the 20th of APRIL, 2011.

Attachment B



CONVENING AUTHORITY

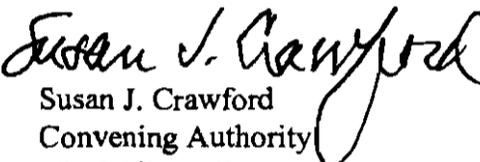
OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

AUG 26 2008

MEMORANDUM FOR: LCDR James Hatcher, Office of the Defense Counsel
Capt Christina Jimenez, Office of the Defense Counsel

SUBJECT: Request for Mitigation Expert for Mr. Bin Attash

I considered carefully your request dated August 14, 2008, for the appointment of a mitigation expert for Mr. Bin Attash, in the case *United States v. Mohammed, et al.* Mr. Bin Attash has elected to proceed *pro se*, and as standby counsel you may not interfere with or deny him this right. There is no indication Mr. Bin Attash directed or consented to your submission of this request. I have not addressed the merits of your request, but I find you are not authorized to act on Mr. Bin Attash's behalf without his consent. For these reasons, your request is denied.


Susan J. Crawford
Convening Authority
for Military Commissions

UNITED STATES OF AMERICA)	D-038
)	
)	PROSECUTION RESPONSE TO THE
)	DEFENSE MOTION FOR APPROPRIATE
)	RELIEF
)	
)	APPOINTMENT OF DEFENSE EXPERT
)	CONSULTANT IN MITIGATION-MR.
)	RICHARD McGOUGH
v.)	
)	
)	
KHALID SHEIKH MOHAMMED)	
WALID MUHAMMAD SALIH)	
MUBARAK BIN ATTASH)	
RAMZI BINALSHIBH)	
ALI ABDUL AZIZ ALI)	
MUSTAFA AHMED ADAM AL)	
HAWSAWI)	12 September 2008

1. **Timeliness:** This response is not filed within the deadline set forth by the Military Commissions Trial Judiciary Rules of Court. It is two days late.
2. **Relief Requested:** The Prosecution respectfully requests that the Military Judge deny the standby defense counsel’s motion for a mitigation expert to assist standby counsel in their role as advisor and in preparation for the potential withdrawal or removal of the accused’s right to self-representation.
3. **Facts:**
 - i. On 14 August 2008 standby counsel, in its role as both advisor to Mr. Bin ‘Attash and in preparation for the potential withdrawal or removal of his right to self-representation, requested the Convening Authority appoint Mr. Richard McGough as a mitigation expert. This request did not purport to be with Mr. Bin ‘Attash’s consent, or even on his behalf, but rather on standby counsel’s own behalf as advisors and in preparation for the potential withdrawal or removal of

the accused's right to self-representation. (*See* standby defense counsel Attachment A).

- ii. On 26 August 2008 the Convening Authority denied the Defense request for the appointment of a mitigation expert, on the grounds that there was no indication that Mr. bin 'Attash directed or consented to the submission of the request, and found that the standby defense counsel were not authorized to act on Mr. bin 'Attash's behalf without his consent. (*See* standby defense counsel Attachment B).

4. **Argument:**

- a. The Convening Authority was correct in her reasoning for denying standby counsel's request for a mitigation expert (*See* standby defense counsel Attachment B), and the Prosecution respectfully requests the Military Judge deny the motion for the same reasons. Contrary to standby defense counsel's assertions, the Convening Authority's denial was, indeed, based on the merits and not a "perfunctory response based solely on Mr. Bin 'Attash's current *pro se* status." *See* standby defense motion at 4. The Convening Authority's decision was based on the fact that a request by standby defense counsel without authorization of the accused indeed has *no* merit. The denial was not based on the accused's *pro se* status, but rather standby defense counsel's *lack of status* to make such requests.

- b. As Mr. Bin 'Attash has elected to proceed in his trial *pro se*, and LCDR Hatcher and Captain Jimenez's request for expert services does not purport to be with Mr. Bin 'Attash's consent, or even on his behalf (but rather on their own behalf as advisors and standby counsel), the motion should be denied. Standby defense counsel

fail to cite a single case standing for the proposition that standby counsel are entitled, without the consent or request of a *pro se* accused,¹ to a government-funded mitigation expert to assist *them* in *their role* as standby counsel and advisors.

c. If Mr. Bin ‘Attash specifically requests that Mr. McGough be provided as his mitigation expert, or specifically authorizes standby counsel to request an expert on his behalf; or requests a different mitigation expert, the Prosecution would not object to Mr. Bin ‘Attash receiving a mitigation expert in his case.² However, until such a request is made, Mr. Bin ‘Attash’s right to conduct and direct his own defense must not be challenged. It is quite possible that Mr. Bin ‘Attash would want funding for a different expert to assist him in his mitigation case, or he may desire to present no mitigating evidence at all. Whatever Mr. Bin ‘Attash’s choice may be on the matter, to force the United States to fund a mitigation expert for standby counsel who have no active role in the conduct of the defense at this time is not required by law, nor is it a legitimate use of government resources. In effect, if standby counsel, acting without authorization of the *pro se* accused, were all permitted government-funded experts on various issues, at the cost of thousands of dollars, to prepare themselves for a moment that may never come, the government would be forced to fund what would amount to a “shadow defense” for all five accused while still having to fund the actual defense to be presented at trial. Such a result is neither warranted by law or fiscally responsible.

d. Should standby defense counsel become counsel of record for the accused at any stage of the trial the commission can entertain this request at that time. Should this circumstance arise, and assuming for purposes of this motion that Mr. bin ‘Attash would

¹ An Accused, who on the record, specifically disavowed any further involvement from his military standby counsel.

² Assuming that the requested fees and hours are similar to other experts in this field.

not have already been appointed a mitigation expert, the Prosecution would not object to a reasonable amount of time for the mitigation expert to investigate prior to proceeding to the pre-sentencing phase of the trial. This would negate any concern the Defense has of having to perform its duties without adequate preparation.

5. **Conclusion:** The Military Judge should deny the motion for funding of a mitigation expert for standby defense counsel at this time.
6. **Oral Argument:** The Prosecution does not request oral argument.
7. **Witnesses:** None.
8. **Additional Information:** None.
9. **Attachments:** None.
10. **Submitted by:**

By: //s/
Clayton Trivett, Jr.
Prosecutor
Office of Military Commissions

