

UNITED STATES OF AMERICA

v.

NOOR UTHMAN MUHAMMED

D- _____

**Defense Motion
For Appointment of Expert Consultant
(Clinical Psychologist)**

18 June 2010

1. **Timeliness:** The Convening Authority denied the Defense request for expert assistance on 15 June 2010. The Defense submits this motion as soon as practicable thereafter.
2. **Relief Sought:** The Defense respectfully requests that this Commission order the appointment of Dr. Jess Ghannam to the defense team as an expert consultant and order that he be authorized to perform up to at least 200 hours of services for the Defense.
3. **Burdens of Proof & Persuasion:** The Defense bears the burden of establishing that it is entitled to the requested relief, R.M.C. 905(c)(2)(A), and bears the burden of demonstrating the necessity for the expert assistance he requests. *United States v. Allen*, 31 M.J. 572 (1990), citing *United States v. Mustafa*, 22 M.J. 165, 167 (C.M.A. 1886); *United States v. Mann*, 30 M.J. 639 (NMCMR 1990); *United States v. True*, 28 M.J. 1057 (NMCMR 1989); *United States v. Tornowski*, 29 M.J. 578 (AFCMR 1989); *United States v. Kinsler*, 24 M.J. 855 (ACMR 1987); *See Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The Defense must show that the expert services requested would be of assistance and that denial of that assistance would result in a fundamentally unfair trial. *Id.* citing *Mann*, 30 M.J. at 641; *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988).

4. **Facts:**

a. Noor has been in the custody of the United States since March 2002. During his detention in [REDACTED] and Guantanamo he has been subjected to [REDACTED]. The exact number of interrogations is unknown to the Defense. The interrogation records, especially from [REDACTED], are woefully deficient.

b. Noor has spent significant time in Camps 5 and 6, under conditions equivalent to [REDACTED]

c. Noor's medical records demonstrate a failure of JTF-GTMO to treat his chronic medical problems. JTF refused counsel's requests to speak with Noor's medical providers about his chronic pain and treatment.¹ Consistent with JTF policy, the Government has redacted Noor's medical records to conceal the identity of the providers and has steadfastly refused the Defense requests for access to these individuals.

d. Noor's cultural, linguistic, and religious background are relevant. Noor was born in an underdeveloped and economically depressed area of Sudan. (Attachment 1)

e. On 4 March 2010 the Defense submitted an ex parte request to the Convening Authority (CA) for the appointment of Dr. Jess Ghannam. The CA replied on 2 April 2010 indicating he would not consider ex parte expert requests. (Attachment 2)

f. On 29 April 2010, the Defense submitted a second request to the CA and to the Government. (Attachment 3)

¹ This refusal was subject to a Motion to Compel which was subsequently withdrawn by the Defense.

g. On 7 May 2010, the Government submitted a response to the Defense request. The Government recommended an alternative psychologist, [REDACTED], from the Walter Reed Forensic Psychiatry department. (Attachment 4)

h. Upon receiving notice of [REDACTED], the Defense conducted a telephonic interview with him to determine his qualifications. Based on this interview, on 14 May 2010, the Defense submitted a supplement to the request for expert assistance explaining that [REDACTED] was not an adequate substitute for Dr. Ghannam. (Attachment 5)

i. After receiving the Defense supplement, the Government attempted to locate another substitute but was unable to find a qualified expert who could satisfy the time requirements involved in this case.

j. Dr. Ghannam is uniquely qualified and the Defense has been unable to locate another expert with similar qualifications. (Attachment 6)

k. Dr. Ghannam has conducted an initial review of Noor's medical records and has provided a declaration indicating his findings and recommendations. (Attachment 1)

l. The Government has provided the Defense a list of 17 statements made by Noor that it intends to introduce in its case-in-chief. The dates of the statements range from 29 March 2002 to 1 July 2004. The Government has also indicated to the Defense that it will submit some of these statements in the upcoming jurisdiction hearing currently scheduled for September 2010.

5. Law and Argument:

Noor “is entitled to an expert’s assistance before trial to aid in the preparation of his defense upon a demonstration of necessity.” *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F 2005). The Defense “must show that a reasonable probability exists ‘both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.’” *Id.* A three-part test is applied to determine if expert assistance is necessary. The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish; and (3) why the defense counsel and staff are unable to gather and present the evidence the expert assistant would be able to develop. *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994), *cert. denied*, 513 U.S. 965 (1994).

The facts in support of the three-part test are exhaustively presented in attachments 2 and 4. As the Commission is well aware, there are “inherent dangers in having to reveal strategic information in order to obtain” expert assistance.² However, if the Commission feels additional justification is necessary, the Defense respectfully requests an in camera review of the ex parte submission provided to the CA and/or an ex parte hearing for the Defense to present additional relevant matters to the commission. An ex parte hearing may be necessary in unique cases.³ This is a unique case – unlike any presented in the American justice system. Noor has been held in confinement for over eight years before his trial. He has been subjected to various forms of

² Lieutenant Colonel Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW, May 1998 at n154.

³ See *United States v. Kaspers*, 47 M.J. 176 (1997). See also *United States v. Ruppel*, 45 M.J. 578 (A.F. Ct. Crim. App. 1997) (holding that there is no right to an ex parte hearing). But see *United States v. Garries*, 22 M.J. 280, 291 (C.M.A. 1986) (indicating that the defense may be entitled to an ex parte hearing to demonstrate its need for an expert in "unusual" circumstances, though the court does not define what qualifies as "unusual").

██████████ over the course of several years. His conditions of confinement have frequently been tantamount to ██████████ and included other forms of ██████████ and ██████████

The Government has indicated they will use approximately 17 statements made by Noor during the jurisdiction hearing and case in chief. Dr. Ghannam's assistance is critical to assist the Defense prepare for those hearings and any related motions to suppress the statements. Noor was subjected to numerous interrogations and various methods of interrogation. ██████████

██████████ prevalent during Noor's eight years of detention have a wide range of physical, psychological, emotional, and cognitive consequences. The Defense must be allowed to determine the mental impact of interrogations and methods in order to make arguments regarding the admissibility of statements. Also relevant to admissibility of statements is the mental impact of the conditions of confinement.

The Defense must prepare a case in mitigation for sentencing. Dr. Ghannam's assistance is important for this preparation. Dr. Ghannam is capable of determining Noor's psychological condition prior to committing the offenses alleged by the Government. Dr. Ghannam will also determine the impact of years of interrogation and detention and its relationship to Noor's history of chronic pain. Dr. Ghannam is an expert in the area of chronic pain and eminently qualified to explain the connections between Noor's detention, chronic pain, and psychological condition. Indeed, Dr. Ghannam believes from his preliminary review of the medical records that Noor may be suffering from undiagnosed and untreated Post Traumatic Stress Disorder and/or depression.

An accused has, as a matter of Equal Protection and Due Process, a right to expert assistance when necessary to present an adequate defense. *See United States v. Robinson* 39 M.J. 88 (C.M.A. 1994); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Garries*, 22 M.J.

288 (C.M.A.), *cert. denied*, 479 U.S. 985 (1986). Failure to employ Dr. Ghannam would effectively deprive Noor of his ability to present an adequate defense in this case and would deny him “[m]eaningful access to justice.” *Ake*, 470 U.S. at 77.

The Government, as a matter of routine, summarily stated in the response dated 7 May 2010 that the Defense had not demonstrated necessity. However, realizing this case most likely warranted an expert, located and offered the Defense a proposed adequate substitute. When the Defense explained that this substitute was inadequate, the Government searched for yet another substitute. When the Government could locate a suitable candidate, it changed course and concluded that the Defense was not entitled to expert assistance based on the justification advanced by the Defense. The Convening Authority’s conclusion is undermined by the detailed information provided by the Defense which meets the required necessity threshold. The Convening Authority claims that the Defense has not pointed to any specific portion of the medical records to support its position that expert assistance is necessary. Prior to seeking expert appointment, the Defense requested that Dr. Ghannam review the unclassified medical records and provide the Defense with a preliminary opinion. The Defense outlined Dr. Ghannam’s concerns in a detailed affidavit. It is difficult to imagine a more detailed justification for the provision of expert assistance. The Convening Authority’s denial of the Defense request was an arbitrary decision driven by the failure to locate an adequate Government substitute rather than an assessment of the necessity for expert assistance.

6. **Oral Argument:** The Defense requests oral argument at the next 803 session.

7. **Witnesses & Evidence:** The Defense relies on the attached documents as evidence in support of this motion. The defense will call the following witness:

1. Dr. Jess Ghannam

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

NOOR UTHMAN MUHAMMED

D-023

**Government Response to Defense Motion
for Appointment of Expert Consultant
(Clinical Psychologist)**

25 June 2010

1. **Timeliness.** This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.6.b. The Defense motion was received on 18 June 2010.
2. **Relief Requested.** The Defense motion should be denied.
3. **Overview.** The Defense has not established the necessity of employing its requested expert, nor is it appropriate to allow the Defense to supplement the basis for its request through an additional *ex parte* submission or *in camera* hearing. To the extent that the Commission believes that the Defense has sufficiently raised the issue that the Accused suffers or has suffered from mental health issues, such that he lacked mental responsibility for any offense charged or lacks capacity to stand trial, the appropriate remedy at this stage is to order an inquiry into the mental capacity or mental responsibility of the Accused under R.M.C. 706, not to grant the Defense an independent expert.
4. **Burden and Standard of Proof.** The Defense bears the burden of demonstrating it is entitled to the requested relief, in this case the necessity of employing its requested expert. *See* R.M.C. 905(c), 703(d).

5. **Facts**

a. The Government agrees that since his capture in March 2002 the Accused has remained in detention and has been interrogated on a number of occasions. The Government does not agree with the Defense's characterization of those interrogations as coercive. To the contrary, in at least one interrogation report, which falls roughly in the middle of the Accused's statements that the Government has identified for use in its case-in-chief, the Accused is reported to have affirmatively stated that he had not been tortured or mistreated in U.S. custody:

“MUHAMMED stated his opinion of Americans has changed somewhat since his capture. MUHAMMED was surprised that Americans have been so kind to him and treated him so well. MUHAMMED expected to be tortured and mistreated while in American custody and this has not been the case.”

CITF Form 40 / FBI FD 302 of 21 November 2002 (Attachment A).

b. The Government agrees that the Accused has been held in detention facilities at U.S. Naval Station, Guantanamo Bay, Cuba, but does not agree with the Defense's characterization of those facilities.

c. The Government agrees that the identities of the Accused's medical providers have not been disclosed and that the Defense filed, and later withdrew, a motion to compel direct access to those medical providers. The Government does not agree that JTF-GTMO has been deficient in treating the Accused's medical complaints, which in any event is irrelevant to the Defense's request for an expert clinical psychologist.

d. The Government agrees that the Accused is from the Sudan and notes that, in addition to being represented by four defense lawyers, the Accused has been appointed a Sudanese attorney to serve as a foreign consultant and multiple interpreters to help overcome any cultural, linguistic, or religious barriers that may be associated with the Accused's participation in this case.

e. The Government agrees that the Convening Authority declined to consider the original Defense request *ex parte*, citing R.M.C. 703(d) and court-martial case law in support of its position that the necessity of expert assistance should be established with notice to the opposing party. In his declination letter, the Convening Authority also recommended that any new Defense request include "specific information that leads [the Defense] to question the degree to which [the Accused] is able to assist in his defense and why it would not require an inquiry into the mental capacity or mental responsibility of the accused under R.M.C. 706."

f. The Government agrees that the Defense submitted a second request to the Convening Authority, this time with notice to the Government, which alleged "significant[]" impact[]" to the Accused's mental and physical health while in U.S. custody and included a preliminary assessment from its requested expert, Dr. Ghannam, opining that the Accused may demonstrate symptoms of Post Traumatic Stress Disorder (PTSD) and recommending further psychological evaluation to determine if he is indeed suffering from PTSD or any of a variety of other psychiatric conditions. Declaration of Dr. Ghannam, p. 7. The Defense request did not discuss the specific information that led the Defense to question the degree to which the Accused was able to assist in his defense or why any such information would not require an inquiry into the mental capacity or mental responsibility of the Accused under R.M.C. 706.

g. The Government agrees that its response to the Convening Authority on the second Defense request argued that the Defense had not established the necessity of employing its requested expert and, alternatively, proposed a substitute expert in the event that the expert request were approved.

h. The Government agrees that the Defense supplemented its original request to challenge the adequacy of the Government's proposed substitute expert.

i. The Government agrees that it has made efforts to locate other substitute experts in the event the Defense request, or some portion thereof, is granted. However, as elaborated more fully below, the Government still takes the position that the Defense has not provided sufficient basis to establish the necessity of employing its requested expert.

j. The Government has no basis upon which to admit or deny this assertion of fact.

k. Agreed.

l. Agreed.

6. Law and Argument

Access to funding for expert assistance is governed by Rule for Military Commissions (R.M.C.) 703(d), promulgated by the Secretary of Defense pursuant to authority granted in the Military Commissions Act, 10 U.S.C. § 949a(a). It is taken verbatim from Rule for Court-Martial (R.C.M.) 703(d) and states, in pertinent part:

When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why the employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed 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.

R.M.C. 703(d). Like its counterpart in court-martial practice, R.M.C. 703(d) implements the principle that an accused is entitled to the employment of an expert, premised upon a showing of necessity for the requested expert assistance. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005); *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996); *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994); *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). The Defense request does not make an adequate showing of necessity for the requested expert assistance.

Since the process in R.M.C. 703(d) is consistent with procedures employed by courts-martial for decades, the judicial construction of necessity under R.C.M. 703(d), though not binding, is instructive in this regard. *See* 10 U.S.C. § 948b(c). In *United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005), the Court of Appeals for the Armed Forces explained what is required to demonstrate necessity under the rule:

The accused must show that a reasonable probability exists both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. . . . The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.

Id. at 143 (internal quotations and citations omitted). The Defense request fails to satisfy each prong of the necessity analysis under *Bresnahan*.

a. The Defense has not shown why the expert assistance is needed.

On the first prong of the *Bresnahan* analysis, relating to “why the expert assistance is needed,” it is appropriate to determine whether the Defense has demonstrated that the Accused’s mental health “is likely to be a significant factor in his defense” and has presented some evidence indicating the expert would provide information relevant and material to the Defense. *See*

Bresnahan, 62 M.J. at 143 (request for an expert on false confessions was properly denied where the defense failed to present any evidence the confession was actually false, or the accused had any mental, emotional, or personality problems); *Robinson*, 39 M.J. at 89 (request for secretor test to challenge urinalysis chain-of-custody was properly denied, where the defense showed nothing more than a mere possibility of assistance).

In this case, neither the Defense request nor the expert's Declaration sets forth sufficient basis to demonstrate that the Accused has a mental health problem that is likely to be a significant factor in his defense, justifying the requested expert assistance. For example, while the Defense avers that "Dr. Ghannam's preliminary opinion is that [the Accused] is likely suffering from Post Traumatic Stress Disorder," a careful reading of the Declaration reveals only that the expert raised PTSD as a possible concern, along with "other psychiatric conditions including Anxiety Disorders, Mood disorders, and Pain Disorders Associated with Physical and Psychological Factors." Declaration of Dr. Ghannam, p. 7. Similarly, the expert bases his concerns about the Accused's mental health primarily by reasoning in reverse—concluding the Accused probably has PTSD or some other mental health issue because, based upon undisclosed representations by defense counsel, he believes the Accused was the victim of mistreatment (or torture). Declaration of Dr. Ghannam, p. 6. For example, the expert observes that victims of torture show signs of depression, but he makes no representation that the accused exhibits this symptom. Declaration of Dr. Ghannam, p. 7. This sort of reasoning is purely speculative, and does not demonstrate a substantial basis to believe the expert assistance is required.

To the extent that the expert does point to certain symptoms of the Accused, they are associated with physical ailments (e.g., [REDACTED] [REDACTED]), which do not in and of themselves indicate mental health

issues. Declaration of Dr. Ghannam, p. 3. Other symptoms exhibited by the Accused include “difficulty trusting people wearing military uniform” and “difficulty discussing major parts of his history with his attorneys,” Declaration of Dr. Ghannam, p.7, neither of which is necessarily indicative of mental health problems.

In sum, the Defense has failed to demonstrate a substantial basis to conclude that the accused has mental health problems, or that any such problems will be a significant factor in providing for his defense at trial. This deficiency is all the more highlighted by the Defense’s repeated request, first to the Convening Authority and now to the Commission, that it be allowed to provide supplemental information through an additional *ex parte* submission, which is not provided for under R.M.C. 703(d) and should not be allowed. At best, the Defense has shown only the mere possibility that some mental health issue exists, which in the absence of specific information demonstrating the necessity for expert assistance, fails to satisfy the first prong of the *Bresnahan* analysis. See *United States v. Fontenot*, 26 M.J. 559, 562 (ACMR 1988), *rev’d in part on other grounds*, 29 M.J. 244 (C.M.A. 1989) (“In this case, the accused showed only the ‘possibility’ that he might have ‘some mental disease or defect.’ Such a fishing expedition need not be funded by the government.”)

b. The Defense has not shown what the expert assistance would accomplish for the defense.

While Dr. Ghannam’s declaration includes a long list of services he proposes to provide to the Defense and information he would attempt to develop for them, the request does not show what the expert would actually accomplish for the Defense, as required under the second prong of the *Bresnahan* analysis. Dr. Ghannam proposes to conduct a comprehensive clinical evaluation of the Accused to determine whether he is capable of understanding the proceedings and participating in his defense; however, to the extent the Commission believes these questions

are indeed substantiated at this stage, they would be more appropriately addressed by a board convened pursuant to R.M.C. 706 rather than through a confidential examination of the Accused by a defense consultant with no notice to the Government of the results of the evaluation.

As part of his expert assistance, Dr. Ghannam also proposes to treat the Accused's chronic pain and other medical conditions. Medical treatment of detainees, if required, is the responsibility of JTF GTMO, not the Convening Authority, and certainly not an expert consultant. Medical care and treatment should not be funded through the appointment of an expert consultant.

c. The Defense has not shown why defense counsel are unable to gather and present the evidence that the expert assistance would be able to develop.

The third step in the *Bresnahan* analysis requires a showing of why defense counsel are not able to gather and present the information the expert would develop. The Defense request simply states that counsel cannot gather and present the necessary evidence, but does not explain why they cannot do so. Indeed, many of the services the Defense asks the expert to perform are those normally conducted by counsel, such as establishing the facts surrounding the Accused's detention and reviewing interrogation records to determine the voluntariness of statements made by the Accused or other declarants. There is simply no showing why an expert is required for these tasks, or why the defense counsel themselves cannot perform that function. *See, e.g., United States v. Freeman*, 65 M.J. 451 (C.A.A.F. 2008) (upholding denial of request for expert assistance regarding interrogation techniques used to elicit a confession).

The Defense also asserts the expert is necessary to assist in developing the Defense case in mitigation for sentencing, based on his language skills, his knowledge of the Quran, and his familiarity with the Middle East. However, the Defense already has a Sudanese attorney as a foreign consultant and the assistance of translators to deal with such linguistic, cultural, and

religious factors. There is no demonstration that these resources would not be sufficient to prepare a case in sentencing and to assist the Defense team with any linguistic and cultural issues necessary to prepare its case.

d. The law does not support allowing the Defense to make additional *ex parte* filings with the Commission in order to provide adequate basis for its request.

Finally, the Defense should be held to the language of R.M.C. 703(d), which specifically requires that requests for expert assistance be submitted “with notice to the opposing party,” not *ex parte*. While there is some case law allowing for such foundational showings to be made *ex parte*, see, e.g., *Ake*, 470 U.S. at 82-83 (allowing for *ex parte* threshold showing to the trial court that the defendant’s sanity is likely to be a significant factor in his defense), requests for expert assistance in the military context may be filed *ex parte* only under very limited circumstances. As the U.S. Court of Military Appeals explained in the seminal case of *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), in which it found no error in the military judge’s refusal to require such an *ex parte* hearing:

Although appellant has provided no authority for the use of *ex parte* proceedings in the military, we recognize inherent authority in the military judge to permit such a procedure in the unusual circumstance where it is necessary to insure a fair trial. By its very nature, however, an *ex parte* proceeding may provide undue advantage to one party. Use of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the government of the opportunity to consider and arrange alternatives for the requested expert services.

Garries, 22 M.J. at 291 (citations omitted). Accord *United States v. Kaspers*, 47 M.J. 176, 180 (C.A.A.F. 1997).

