

UNCLASSIFIED//FOR PUBLIC RELEASE

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p>AE 103A</p> <p>Government Response to Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis</p> <p>20 October 2017</p>
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1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The Government respectfully requests that the Commission deny the Defense's requested relief.

3. Burden of proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)–(2).

4. Overview

The Defense continues its practice of attempting to apply Article III procedural rules to military commissions, despite unequivocal statutory guidance to the contrary. The Defense cites no authority for its position, except to reference the general language of an isolated provision of the Military Commissions Act of 2009 ("M.C.A.") while ignoring contradictory language in the same section and other sections of the statute, the Regulation for Trial by Military Commission ("R.T.M.C."), and the Rules for Military Commissions ("R.M.C.").

5. Facts

The Government incorporates the facts as laid out in AE 099E, AE 099J, and AE 099K.

6. Law and Argument

The Government will not fully address, at this time, the Defense's baseless allegations in AE 103 regarding the standard of medical care the Accused is receiving. The Accused has a genetic, degenerative condition for which he has been treated routinely during his detention. That it has worsened recently is unfortunate. The Government took immediate steps to mitigate the effects of the Accused's worsening condition, and the Accused is receiving round-the-clock expert medical care and supervision, as required for the humane treatment of law of war detainees.

I. The Correct Test for the Compelled Employment of an Expert Consultant in a Military Commission Is the "Necessity" Test, Not the "Reasonable Attorney" Test

The Government incorporates its legal analysis in sections 6.I. and 6.II. of both AE 086A and AE 090K,¹ but will summarize here for ease of analysis.

A. R.M.C. 703(d) Is the Governing Procedural Rule

Section 949a of the M.C.A. authorizes the Secretary of Defense ("SECDEF") to prescribe "*pretrial, trial, and post-trial procedures . . . for cases triable by military commission . . .*" 10 U.S.C. § 949a(a) (emphasis added). Pursuant to that authority, the SECDEF promulgated the Manual for Military Commissions, which includes the Rules for Military Commissions. *See*

¹ Notwithstanding the Commission granting the Defense's relief requested in AE 086, the Commission did not hold that the required showing for obtaining expert assistance in a military commission was the same as in Article III courts. Rather, the Commission ruled that the *ex parte* provision of the *Garries* analysis applied only to motions to compel before a commission, not to requests to the Convening Authority. *See* AE 086C at 3–6 (citing *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986)).

Foreword, Manual for Military Commissions, 2012 Edition. There is no language anywhere in the M.C.A. or the R.T.M.C. suggesting that the *procedural* rules of Article III courts apply to military commissions. In fact, the opposite is true.

The Secretary's promulgation of pretrial procedural rule R.M.C. 703(d) is consistent with 10 U.S.C. § 949j. Under 10 U.S.C. § 949j, the "opportunity to obtain witnesses and evidence" is "comparable to the opportunity available to a defendant" in Article III courts. Article 46, U.C.M.J., contains virtually identical language² under the caption "Opportunity to obtain witnesses and other evidence." Additionally, Rule for Courts-Martial 703(d) is virtually identical to the military commission version, save for a single comma. Since at least 1969, that particular military procedural rule has met the "similar" opportunity requirement of the U.C.M.J., just as the commission procedural rule meets the "comparable" opportunity requirement of the M.C.A.

B. R.M.C. 703(d) Requires the Defense to Establish the Necessity of the Requested Expert

Admittedly, R.M.C. 703(d) is somewhat confusing since it is titled "Employment of expert witnesses." As such, military courts have stressed the need to distinguish between expert consultants and expert witnesses. *See, e.g., United States v. Langston*, 32 M.J. 894, 896 (A.F.C.M.R. 1991) ("We urge trial practitioners to distinguish between a request for an expert witness and a request for an expert consultant. An expert consultant is provided to the defense as a matter of due process, in order to prepare properly for trial and otherwise assist with the defense of a case."). In *United States v. Warner*, a later iteration of the same court addressed the distinction in the context of the application of R.C.M. 703(d), stating, "In this regard, we also

² Instead of "comparable," the U.C.M.J. uses "similar."

recognize that R.C.M. 703(d) deals with expert witnesses, and does not explicitly address expert consultants or investigative assistants. The inference from case law, however, is that R.C.M. 703(d) is generally applicable to expert consultants and investigative assistants.” *United States v. Warner*, 59 M.J. 573, 578 (A.F.C.C.A. 2003) (rev’d on other grounds) (citing *United States v. Robinson*, 39 M.J. 88, 89 (C.M.A. 1994)).

On its face, R.M.C. 703(d) requires the Defense to show necessity. The seminal military case on this issue is *United States v. Garries*. The *Garries* court, citing specifically to Article 46, U.C.M.J., and R.C.M. 703(d), makes clear that a court-martial accused is entitled to expert assistance as a matter of due process after demonstrating necessity. *United States v. Garries*, 22 M.J. 288, 290–291 (C.M.A. 1986). Since the rules and standards are the same in both military courts-martial and military commissions, it is clear that the Accused before a military commission has the same right. The M.C.A. authorizes SECDEF to “make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.” 10 U.S.C. § 949a(b). SECDEF apparently chose not to make any such exceptions on this issue.

In *Robinson*, the military’s highest court adopted the Court of Appeals for the Eleventh Circuit’s analysis as to what equals necessity:

[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; . . . [A] fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Robinson, 39 M.J. at 89 (quoting *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (citations omitted)). In *United States v. Gonzales*, the court established a 3-prong for determining

necessity, requiring the Defense to show “First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop.” *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). *See also United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F. 1996). In revisiting the issue in 2001, the court again applied the *Robinson* rationale and the 3-part *Gonzales* test for requested expert assistance. *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001); *See also United States v. Bresnahan*, 62 M.J. 137 (C.A.A.F. 2005). The Convening Authority relied on the *Gunkle* case when analyzing the Defense’s instant request. *See* AE 103, Attachment I. This is well-settled law, interpreting the same procedural rule and the same statutory guidance on the opportunity afforded the Accused in both military systems. The Convening Authority applied the correct standard and law in denying the Defense’s request.

II. The Defense Has Failed to Demonstrate the Necessity of Expert Assistance at This Stage of the Proceedings

The crux of the Defense’s argument on necessity is essentially “we need him because we need him.” The Defense cites no case law or facts currently relevant to the Accused’s military commission case.

A. The Accused’s Competency to Stand Trial Is Currently Not at Issue, and Is Therefore Irrelevant

The Defense avers that the Court must make a determination as to the Accused’s physical competency to stand trial. AE 103 at 9.³ Yet, the Government is in no way attempting to place the Accused on trial while he is physically unable to effectively participate in his own defense or even be present in the courtroom. Indeed, the Accused’s trial is not docketed to occur within the

³ AE 103 contains no page numbers; therefore this cite is an estimate.

next year. Based on the latest information from the Senior Medical Officer, the Accused may be able to be moved to a location where he can have attorney-client meetings in as little as 2 weeks. *See* AE 099K.

The Government is diligently working to resolve the Accused's admittedly serious medical conditions and to effectuate his speedy recovery. In an attempt to treat the Accused's genetic, degenerative condition, he has undergone two surgeries and one procedure and is receiving round-the-clock medical care. *See* AE 099K. Until the Accused has recovered sufficiently to be able to meet with his counsel and prepare for the next pre-trial session of the Commission, the Government anticipates that the Commission will continue to grant the Defense continuances as needed.

Any suggestion that the Accused might not make a full recovery, thereby rendering him physically unable to stand trial at some future date is pure speculation. This is precisely the type of "mere possibility" the 11th Circuit Court of Appeals, the *Robinson* court, and every military court since has deemed insufficient to justify necessity for expert assistance. Physical competency to stand trial is not currently relevant.

B. The Standard of Medical Care the Accused Has Received and Is Currently Receiving Is Not Presently at Issue Before this Commission

The Defense briefly addresses the *Gunkle* [*Gonzales*] factors on pages 12 and 13 of its motion.⁴ In answering the first two prongs, the Defense asserts that it "is obligated to fully explore and evaluate the totality of medical circumstances that resulted in [the Accused] undergoing three emergency surgeries in less than three weeks." *Id.* at 12.⁵ Importantly, the

⁴ *See supra* note 3.

⁵ *See supra* note 3.

Defense fails to state *why* it has such an obligation at this phase of the proceeding, or from where such an obligation derives. It is simply a conclusory statement—“we need it because we need it.” The Defense further states, “The Defense must fully understand [the Accused’s] ongoing medical condition to thoroughly evaluate his ability to participate in his own defense as well as his fitness to stand trial.” In this case, the Defense’s concern appears to be physical competency, as opposed to mental competency. Yet the Accused has been routinely communicating with his counsel, providing them with detailed information on his current condition. *See* AE 102B, Government Response to Defense Motion to Compel Mr. al-Tamir’s Access to Counsel. Again, his current physical fitness to stand trial is not at issue.

C. The Accused’s Treatment, Including His Medical Care While in U.S. Custody, May Be Relevant at Some Point In the Future

The allegation of the Accused’s substandard medical care, which the Government vociferously denies, is irrelevant to the Accused’s current military commission case. Such allegations are perhaps relevant to the Accused’s habeas corpus petition now pending⁶ before the United States District Court for the District of Columbia. The allegations would also potentially be relevant on sentencing as mitigation evidence; thus, expert assistance or testimony may be necessary at that phase. Several members of the current Defense team are currently working the habeas corpus issue, but this Commission does not have the authority⁷ to appoint an expert for

⁶ As a direct result of issues surrounding the Accused’s current medical status, his civilian counsel have initiated a new habeas corpus petition. The previous habeas corpus petition was dismissed without prejudice.

⁷ Concerningly, the Defense states in AE 103, “Pending approval, and to assist in the Commission’s efficient processing of the case, [Dr. Cobey] is working for the Defense on a pro bono basis.” AE 103 at 14. *See supra* note 3. Presuming the Defense meets the requirements of applicable rules, the Government has no objection to Dr. Cobey providing pro bono services. However, because the Defense motion also states, “Dr. Cobey will require a maximum of 30 hours to consult on [the Accused’s] case,” given the “pending approval” language referenced

that purpose. When it comes time for the Defense to begin to prepare for its case in extenuation and mitigation, the Defense may then be able to establish facts sufficient to meet the *Gonzales* test. Until such time, the Defense has failed to demonstrate necessity at this stage of the proceedings.

7. Oral Argument

The Government requests oral argument.

8. Witnesses and Evidence

None.

9. Attachments

A. Certificate of Service, dated 20 October 2017.

Respectfully submitted,

//s//

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earlier, it is not clear how many hours of that 30 hours Dr. Cobey has already worked pro bono. *Id.* This raises potential concerns under 31 U.S.C. § 1341, the Anti-Deficiency Act. It would also potentially raise fiscal law issues were Dr. Cobey to be funded by the Convening Authority for the military commission case if his expertise or analysis were used in the habeas corpus petition.

ATTACHMENT A

Filed with TJ
20 October 2017

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CERTIFICATE OF SERVICE

I certify that on the 20th day of October 2017, I filed **AE 103A, Government Response to Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

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