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| UNITED STATES OF AMERICA |                                        |
| v.                       | <b>Defense Application for Mental</b>  |
| Mohammed Jawad           | <b>Examination pursuant to RMC 706</b> |
|                          | May 23, 2008                           |

**1. Timeliness:** This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and this Court's orders dated 20 December 2007 and 15 February 2008 and within the specific deadline established for law motions by COL Brownback on 7 May 2008. The motion is filed pursuant to R.M.C. 706 and 909.

**2. Relief Sought:** Defendant seeks a mental health examination from a neutral, Pashto speaking, civilian psychologist.

**3. Overview:** The defense believes that Mr. Jawad is not able to cooperate intelligently in the defense of his case because he is presently suffering from one or more mental health diseases or defects, as a result of the extended and severe conditions of detention to which he has been subjected. Pursuant to R.C.M. 909, no person may be brought to trial by military commission if that person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense of the case.

**4. Burden and Standard of Proof:** Pursuant to R.M.C. 706(a) "If it appears to . . . defense counsel. . . that there is reason to believe that . . . the accused lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted to the authority authorized to order an inquiry into the mental condition of the accused. The

submission may be accompanied by an application for a mental examination under this rule.” “After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge.” R.M.C. 706(b)(2). Under R.M.C. 909 the standard of proof is preponderance of the evidence. “Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or to cooperate intelligently in the defense of the case.”

## 5. Facts:

i. Mohammad Jawad was arrested by Afghan police on December 19, 2002. At the time of his arrest Mr. Jawad was either 16 or 17 years of age.<sup>1</sup> After over seven hours of interrogation by various Afghan authorities, Mr. Jawad was turned over to American authorities on the morning of December 20, 2002. Sometime in February 2003, Mr. Jawad was shipped to Guantanamo Bay, Cuba, where he has been held since. He is currently in<sup>2</sup> [REDACTED]

ii. The conditions of confinement to which Mr. Jawad has been subjected for the last five and a half years are very severe, “more isolating than many death rows and prisons” according to one expert on American prison conditions.<sup>2</sup> He has been in solitary confinement (what the government euphemistically refers to as “single-occupancy”) in a small cell with virtually no amenities for 22 to 23 hours a day. He is allowed out of his cell only to shower, or to be placed in an enclosed, covered exercise area, or for occasional medical or dental appointments. He has not seen the sun or sky more than once since February 2003. During his entire captivity, bright overhead fluorescent lights

<sup>1</sup> The U.S. has acknowledged to the UN Committee on the Rights of Children that Mr. Jawad was under 18 at the time he was captured. Mr. Jawad was subjected by detention authorities to a bone density scan, without his informed consent, for the purpose of determining his age. It is not clear why this test was performed, given the government’s apparent position that Mr. Jawad’s age is legally irrelevant.

<sup>2</sup> William Glaberson, Detainees Mental Health is Latest Battle, NYTimes, April 26, 2008, citing Professor Jules Lobel. (Attachment 3). See generally, CCR Point Paper on Solitary Confinement at Guantanamo Bay (Attachment 4); Cruel and inhuman: Conditions of isolation for detainees at Guantánamo Bay, AMNESTY INT’L 4, April 5, 2007. (Attachment 5)

have been on in his cell 24 hours a day, 365 days a year. The extreme conditions led Mr. Jawad to attempt to commit suicide<sup>1, 6</sup>

1, 2, 6

1, 2, 6

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defense believes this program is what Mr. Jawad was referring to in his statement at the 7 May 2008 hearing where he referred to being repeatedly awakened and moved from cell to cell. Sometime in the past year, Mr. Jawad was issued a sleep mask. Prior to that point, he had no relief from the glaring light. Mr. Jawad has complained of the difficulty in sleeping in his cell and of extreme fatigue.

iii. Mr. Jawad has had very few opportunities to converse with anyone in his native language of Pashto, other than U.S. Government interrogators, for the last five and a half years. Mr. Jawad does not speak any other language. He has not spoken to any member of his family or anyone he knew prior to confinement since his capture, although he is believed to have received half a dozen Red Cross messages from a family member.

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iv. Mr. Jawad had a difficult childhood. His father died when he was very young in the Afghan civil war after the Soviet occupation and his family was forced to flee to a refugee camp in Pakistan. Mr. Jawad was kicked out of his home by his step-father when he was approximately 13. The government asserts that Mr. Jawad has a seventh or eighth grade education. The defense believes this education was received at a religious madrassa at a refugee camp in Amir Shah, Pakistan, where the curriculum largely consisted of oral recitation of the Koran. At the time he was captured, Mr. Jawad was functionally illiterate. During his captivity, Mr. Jawad has developed some limited ability to read and write basic Pashto, but not to the point where he can read age-

<sup>3</sup> To the civilized world, the program would be referred to as torture.

appropriate books which may be available from the prison library. In his cell, Mr. Jawad has no recreation or diversion other than attempting to read the Koran, attempting to communicate with other nearby prisoners through the walls, and praying five times a day.

v. Charges against Mr. Jawad were sworn on 9 October 2007. Mr. Jawad was detained for more than four and a half years before he was charged. He was never provided counsel or allowed to see an attorney until October 2007. Mr. Jawad faces life imprisonment, if convicted of one or more of the three attempted murder specifications.

vi. Mr. Jawad has exhibited signs of physical ailments, mental illness and instability in interviews with his detailed defense counsel. (Attachments 1- 2) Mr. Jawad has complained of severe headaches and fatigue, both in private and publicly at his arraignment, where he took off his headphones and placed his head on the table.

vii. Mr. Jawad has difficulty in fully comprehend the nature of the proceedings against him and has been unable to cooperate intelligently in his defense to date. (Attachments 1-2)

viii. Conditions at Guantanamo are so bad that they have driven many detainees to extreme measures. Prior to June 11, 2006, Guantanamo officials acknowledged that there had been 41 suicide attempts by 25 detainees.<sup>1,2</sup> On June 11, 2006, three detainees committed suicide. (Attachment 6) Another detainee committed suicide on 30 May 2007. (Attachment 7) Suicide attempts continue.

<sup>1, 2</sup> In the summer of 2005<sup>1,</sup>

<sup>1, 2</sup> detainees participated in a hunger strike to protest conditions at Guantanamo.

(Attachment 10) In early 2006, prison authorities broke the hunger strike by establishing a new policy<sup>1, 2</sup>

<sup>1, 2</sup> Despite the<sup>1, 2</sup> policy, more than thirteen detainees launched a new hunger strike in 2007. (Attachment 11)

<sup>4</sup> See, CCR Press Release (Attachment 8). Charges were recently dismissed against Mr. al Qahtani, the alleged "20<sup>th</sup> hijacker" amid allegations of severe mental illness brought on by torture by US authorities. William Glaberson, Case Against 9/11 Detainee is Dismissed, NY Times, May 14, 2008. (Attachment 9)

## 6. Law and Argument:

Any person snatched from his home country, transported halfway around the world to a maximum security prison on an isolated tropical island, and placed virtually incommunicado in solitary confinement under extremely austere conditions for five and a half years would suffer adverse mental health effects, and Mr. Jawad is no exception. The debilitating effects on the mental health prisoners due to long-term confinement and isolation is well-documented and not reasonably subject to dispute.<sup>5</sup> Although not all detainees suffer identical effects and the severity of mental health problems may vary based on individual factors, Mr. Jawad's background, youth and lack of education make him particularly ill-equipped to handle the extreme conditions of his confinement and particularly vulnerable to mental deterioration, as evidenced by his suicide attempt.

While at a basic level, Mr. Jawad understands that he is being accused of throwing a hand grenade, even in his moments of relative clarity and lucidity, the legal issues of his case, and the complex legal procedures of the military commission are utterly foreign and completely bewildering to him. With his troubled, fragile, and rapidly deteriorating mental state, he is simply unable to fully understand the nature of the proceedings against him or to meaningfully assist in the preparation of a defense. The defense believes an unbiased mental health examination will confirm this. The defense requests that the military judge order that the board include a neutral, civilian psychologist, completely unassociated with JTF-GTMO. The defense believes it would be impossible for a non-Pashto speaker to professionally and adequately evaluate Mr. Jawad. A proper psychological evaluation requires the psychologist to understand the nuances of language and body language. Only a person fluent in the language and familiar with the culture can perform a complete and reliable examination. The use of an interpreter in

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<sup>5</sup> See, Stuart Grassian, "Psychological Effects of Solitary Confinement", *American Journal of Psychiatry*, 140:1450-1454, 1983; Terry A. Kupers, "The SHU Syndrome and Community Mental Health", *Community Psychiatrist*, summer 1998, Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement", *Crime and Delinquency*, vol.49, no.1 (January 2003).

psychological evaluations invades the doctor-patient relationship and violates patient confidentiality.

Even if the commission ultimately rules that Mr. Jawad is mentally competent to stand trial, the defense believes a complete mental health evaluation will provide important mitigation and extenuation concerning the accused's mental state which would not otherwise be available.

**7. Request for Oral Argument:** If the court is prepared to grant the request based on the written submissions, then the defense does not request oral argument. If the court is undecided based on the written submissions, the defense requests an evidentiary hearing and oral argument at the next scheduled motion hearing.

**8. Request for Witnesses:** The defense requests the government's or the commission's assistance in obtaining a responsible official from JTF-GTMO as a witness to describe the conditions in detention generally and specific aspects of Mr. Jawad's detention history. Depending on the government's reply to this motion, the defense may also request an expert witness on the mental health effects of long-term confinement.

**9. Conference with Opposing Counsel:** The Defense has conferred with the Prosecution. Trial Counsel has indicated that the government does not oppose the court ordering a mental health examination, but does oppose any access to a detainee by a civilian mental health professional that lacks a security clearance. It is anticipated that the government will propose that any board be made up of DoD personnel.

**10. Request for public release:** The defense requests permission to publicly release the government response to this pleading and the court's ruling as soon as possible.

Respectfully Submitted,



By: DAVID R. FRAKT, Major, USAFR  
Office of the Chief Defense Counsel  
Office of Military Commissions



**11. Attachments:**

1. Affidavit of COL J. Michael Sawyers
2. Affidavit of Mr. Nasrum Minallah (signed copy and more legible unsigned copy)
3. News Article: William Glaberson, *Detainees Mental Health is Latest Battle*, NY Times, April 26, 2008.
4. Center for Constitutional Rights Point Paper on Solitary Confinement at Guantanamo Bay
5. Amnesty International Report: *Cruel and inhuman: Conditions of isolation for detainees at Guantánamo Bay*
6. News Article: *3 Prisoners Die in Suicide Pact at Guantanamo*, NY Times June 10, 2006
7. News Article: Josh White, *Death of Detainee is Apparent Suicide*, Washington Post, May 31, 2007.
8. CCR Press Release: *Newly Declassified Notes Reveal Guantanamo Detainee Mohammed al Qahtani Suicidal After Military Commission Capital Charges*, May 20, 2008.
9. News Article: William Glaberson, *Case Against 9/11 Detainee is Dismissed*, NY Times, May 4, 2008.

10. News Article: Carol D. Leonnig, *More Join Guantanamo Hunger Strike: Detainees Demand Hearings Allege Beatings by Guards*, Washington Post, September 13, 2005.
11. News Article: Tim Golden, *Guantanamo Detainees Stage Hunger Strike*, NY Times, April 9, 2007.