

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 614F (GOV)

Government Consolidated Reply
To AE 614A (AAA), AE 614B (MAH) and
AE 614C (RBS), Defense Responses to
Government Motion to Compel Notice of
Intent to Introduce Expert Mental Health
Evidence

22 January 2019

1. Timeliness

This Reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (“R.C.”) 3.7.

2. Relief Sought

Pursuant to Rule for Military Commission (“R.M.C.”) 701(g)(2), the Prosecution moves this Commission to order each of the Accused to provide notice of intent to introduce expert mental health evidence at any stage of these proceedings by 1 June 2019.

3. Overview

For the reasons set forth in the Prosecution’s motion, AE 614 (GOV), this Commission should establish a date certain for the five Accused to provide pretrial notice of intent to introduce expert mental health evidence during any phase of this litigation. Pretrial notice is clearly required by R.M.C. 701(g)(2). The Prosecution continues to acknowledge that Fed. R. Crim. P. 12.2 does not apply to these proceedings. Nonetheless, the rationale underlying the rule is instructive to this Commission in establishing a deadline for notice of mental health experts. *See* Fed. R. Crim. P. 12.2 Advisory Comm. Notes (“[T]he objective is to give the government time to prepare to meet the issue.”).

The Defense misses the mark in arguing that, by establishing a deadline for notice of mental health experts, the Commission would be running afoul of R.M.C. 701(g)(2). R.M.C. 701(g)(2) must be interpreted to require that the Defense provide “reasonable notice” of their intent to introduce expert mental health evidence. *See United States v. Walker*, 25 M.J. 713, 717 (A.C.M.R. 1987). What is more, this Commission retains discretion to exclude expert evidence if reasonable notice is not provided. *Id.* at 717 n.6.

Claims that the Prosecution’s motion is premature are also unpersuasive. The Prosecution has provided extensive discovery to the Accused over the course of several years, and continues to fully comply with its discovery obligations. Certain defense counsel have represented their clients for more than a decade and all learned counsel have been on the case since at least the arraignment in 2012. Arguments that they are not yet capable of identifying potential mental health defenses or mitigation are disingenuous at best. Establishing a deadline for notice of intent to introduce expert evidence will be an important and necessary step in moving this case toward trial.

Accordingly, this Commission should reject the arguments of the Accused and grant the Prosecution’s request for notice of mental health experts.

4. Burden of Proof

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

5. Facts

The Prosecution set forth relevant facts in its original motion in this series and incorporates them as if restated herein. The Prosecution filed its Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence on 18 December 2018. AE 614 (GOV). Defense counsel for Messrs. Ali, Hawsawi, and Binalshibh respectively filed timely responses on 15 January 2019. *See* AE 614A (AAA), 614B (MAH), and 614C (RBS).¹

¹ Defense counsel for Mr. Mohammad filed a Notice Regarding Non-Filing of Reply to AE 614 (GOV) on 14 January 2019. Defense counsel for Mr. Bin ‘Attash also filed a Notice of

6. Law and Argument

The Defense asserts that the Prosecution's motion is premature and that it seeks unnecessary or impermissible relief. As discussed below, these arguments are without merit.

I. Necessity

The Defense argues that this Commission may not set a deadline for the Accused to provide notice of intent to introduce expert mental health evidence. At the outset, the Defense argument simply misinterprets the Prosecution's motion by suggesting that it has asked this Commission to apply Fed. R. Crim. P. 12.2. The Prosecution does not request that this Commission strictly apply Rule 12.2. Rather, the Prosecution suggests the Commission use Rule 12.2 as a reference for determining the appropriate and reasonable time at which the Defense must provide expert notices relating to mental health evidence. R.M.C. 701(g)(2) provides no guidance for the timing of defense expert notices, other than to require they be made "before the beginning of trial on the merits." Such an open timeframe is untenable. Reference to Rule 12.2 is useful because the drafters of Rule 12.2 made clear that the purpose of the rule requiring pretrial notice of mental health experts is to give the prosecution the opportunity to respond. *See* Fed. R. Crim. P. 12.2 Advisory Comm. Notes and Notes on 2002 Amendments. The Commission should determine that the purpose of R.M.C. 701(g)(2) is the same.

Citing *United States v. Walker*, 25 M.J. 713 (A.C.M.R. 1987), the Defense argues that establishing a pretrial deadline for providing notice of intent to introduce expert mental health evidence would disregard the plain language of R.M.C. 701(g)(2). *See* AE 614A (AAA) at 6; AE 614C (RBS) at 3–4. The Defense misses the mark. In *Walker*, the court found that the trial judge erred by excluding expert psychological testimony where defense counsel gave notice of the testimony five days prior to trial; applying Fed. R. Crim. P. 12.2, the trial judge suggested notice should have been given at the time for filing pretrial motions (approximately five months

Conflict Affecting Representation of Mr. Bin 'Attash's Interests in Filing Pleadings in the AE 614 Motion Series on 15 January 2019. Neither of these filings is responsive to the Prosecution's motion. These requests for delay are entirely without merit. Accordingly, this Commission should reject as untimely any future attempt from Messrs. Mohammad or Bin 'Attash to respond to AE 614 (GOV).

prior to trial). *See Walker*, 25 M.J. at 717 (holding military judge erred by “imposing a narrower notice requirement than that required by the plain language of R.C.M. 701(b)(2)”). Importantly, however, the court also interpreted R.C.M. 701(b)(2) as requiring “*reasonable notice* be given.” *Id.* at 717 (emphasis added). In their responses, the Defense wholly overlooks the “reasonable notice” standard from *Walker*.

In this case, in which the five Accused face capital charges for the largest act of mass murder in the history of this nation, notice of mental health experts must be given well in advance of trial in order to be “reasonable.” Neither *Walker*, nor any other case cited in the Defense filings serves as a viable comparison point. Indeed, there is no comparison case, as this case has an unprecedented amount of classified information possibly at issue in any mental health challenge the Defense makes. For the notice requirements of R.M.C. 701(g)(2) to mean anything, the Defense must provide the notice requested in AE 614 (GOV) (i.e., name and qualifications of the defense expert, a description of the general nature of testing the expert has completed or will complete, and a description of the general nature of the expert’s proposed testimony) far enough in advance of trial that the Prosecution may ensure its own experts hired to rebut the Defense claims have the requisite security clearances to be able to fairly and fully respond to the Defense claims. To hold otherwise would gut R.M.C. 701(g)(2) of any value whatsoever.

Given that the Prosecution has substantially complied with all discovery obligations and believes the time has come for this Commission to establish a trial date, the Prosecution has identified 1 June 2019, as a reasonable date for the Defense to provide notice of its intent to introduce expert mental health evidence. Failure to comply should result in exclusion of evidence, absent a showing of good cause from the Defense. *See Walker*, 25 M.J. at 717 n.6 (noting that exclusion is a remedy of last resort, but is not foreclosed as a possible remedy for failure to comply with notice requirements).

II. Ripeness

Restating well-tread arguments for delay, the Defense also suggests that the Prosecution's motion is premature. Indeed, Defense counsel for Mr. Hawsawi use significant portions of their response to again assert unsupported allegations that the Prosecution has hindered defense counsel's ability to investigate the Accused's background and prepare for trial. The Prosecution has repeatedly debunked these false accusations, and finds no need to address them again here. The facts remain that learned counsel have all been representing the Accused in excess of six years and undoubtedly are intimately familiar with the backgrounds and mental conditions of the Accused. Although no trial date is yet pending, the Prosecution urges this Commission to establish a trial schedule at this time. Even without a date certain for the commencement of trial, taking into consideration that the case has already been in pre-trial hearings for more than six years, this motion is not premature.

Again, the Prosecution emphasizes the need for early notice of mental health experts because, to counter such expert evidence, the Prosecution must take several steps. These will include identifying appropriate rebuttal experts, obtaining security clearances and funding approval for such experts, giving those experts an opportunity to evaluate the Accused, and giving those experts time to prepare for trial testimony. In this time, Prosecutors will also need to educate themselves on the complexities of mental health. Thus, the Prosecution's motion is now ripe.

7. Conclusion

For the reasons set forth above, this Commission should reject the Defense arguments in opposition to the Prosecution's motion and should grant its motion to compel notice of mental health experts.

8. Oral Argument

The Prosecution is prepared to provide the Military Judge any other information he feels he needs to rule on this motion during oral argument, but is not specifically requesting oral argument on this motion.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of January 2019, I filed AE614F (GOV), Government Consolidated Reply To AE 614A (AAA), AE 614B (MAH) and AE 614C (RBS), Defense Responses to Government Motion to Compel Notice of Intent to Introduce Expert Mental Health Evidence, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Clay Trivett
Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions