

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

ABD AL HADI AL IRAQI

AE 121

████ Defense Motion
To Compel Appointment and Funding of
Defense Mitigation Expert (Neurosurgery)

18 July 2018

1. **████ Timeliness:**

████ This motion is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court (RC) 3.7.c.(1).

2. **████ Relief Sought:**

████ Mr. Nashwan al-Tamir, by and through counsel, respectfully requests that the Commission order the Convening Authority to approve funding for and appoint ██████████ ██████████ Colonel, United States Air Force, to provide expert assistance to Mr. al-Tamir in the field of neurosurgery.

3. **████ Overview:**

(U) Mr. al-Tamir has the right under the Fifth and Sixth Amendments and Rule for Military Commissions (“RMC”) 703(d) to the assistance of experts that will aid in preparation of his defense, specifically, in the preparation of sentencing mitigation materials.¹ In the past year, despite a recorded history of complaints regarding a degenerative spinal condition dating back over a decade, Mr. al-Tamir endured five serious, emergent surgeries and spent months in the

¹ (U) *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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process of painful recuperation. Expert assistance in the form of consultation with a neurosurgeon regarding Mr. al-Tamir's medical condition and treatment history is necessary to prepare an adequate defense for Mr. al-Tamir, specifically for the preparation of mitigation evidence for sentencing consistent with Rule 1001 of the Manual for Military Commissions ("MMC"). Denial of this motion will violate Mr. al-Tamir's rights guaranteed by the Fifth and Sixth Amendments to the Constitution, the Military Commissions Act of 2009, international law, and fundamental fairness.

4. ~~(U)~~ Burden of Proof:

~~(U)~~ As the moving party, the Defense must demonstrate by a preponderance of the evidence the requested relief is warranted.²

5. ~~(U)~~ Facts:

a. ~~(U)~~ Mr. al-Tamir was arrested in Turkey in October of 2006 and remained in the custody of the Central Intelligence Agency ("CIA") until April of 2007 when he was transferred to the custody of the Department of Defense ("DOD").

b. ~~(U)~~ On 14 June 2014, charges against Mr. al-Tamir were referred to this Military Commission.³ Mr. al-Tamir is currently facing charges of denying quarter; attacking protected property; using treachery or perfidy; attempted use of treachery and perfidy; and conspiracy, based on allegations spanning across Afghanistan, Pakistan, Iraq, Turkey and "elsewhere" from on or about 1996 through on or about 1 November 2006.⁴

c. ~~(U)~~ Mr. al-Tamir informed the JTF-GTMO staff that he had degenerative disc disease of the L4-L5 vertebrae during his intake physical on 26 April 2007.⁵

² ~~(U)~~ RMC 905(c)(2).

³ ~~(U)~~ Charge Sheet.

⁴ ~~(U)~~ *Id.*

⁵ ~~(U)~~ AE 103 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis, Att.

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d. (S) As documented in his medical records, Mr. al-Tamir has sought treatment for chronic and worsening back pain for many years. By June of 2008, Mr. al-Tamir's back pain had increased to include pain that radiated down his right leg.⁶ By August 2008, doctors noted that Mr. al-Tamir "expressed concerns about current back pain and length of time" it has taken to resolve the issue.⁷ Later in 2008, a computerized tomography scan ("CT scan") showed degenerative disc disease between the L4 and LS vertebrae.⁸

e. (S) Medical records reflect that Mr. al-Tamir continued to seek treatment in the following years.⁹ In early 2010, a bulging mass was identified on the left side of Mr. al-Tamir's spine. Doctors performed a biopsy on the soft tissue mass. Pathology reports were negative.¹⁰ Throughout 2010, Mr. al-Tamir continued to be seen for chronic back pain. Throughout 2010, he received physical therapy, traction table therapy, and regular treatments with a Transcutaneous Electrical Nerve Stimulator unit. These therapies and treatments were ineffective.¹¹

f. (S) In September 2010, Mr. al-Tamir's medical records reflect he was diagnosed with spinal stenosis. Spinal stenosis is an abnormal narrowing of the spinal canal. The narrowing of the spine causes a restriction to the spinal canal which, aside from pain, can result in neurological deficits such numbness and loss of motor control. It was at this point, a doctor first proposed the possibility of surgery, though none was performed.¹²

B (Memorandum for the Convening Authority re: Emergency Request for Expert Assistance – Neurological Surgery, dated 1 September 2017, Enclosure D (HADI-1-027741)).

⁶ (S) AE 103 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis, Att. B (Memorandum for the Convening Authority re: Emergency Request for Expert Assistance – Neurological Surgery, dated 1 September 2017,

⁷ (S) *Id.*

⁸ (S) *Id.*

⁹ (S) *Id.*

¹⁰ (S) *Id.*

¹¹ (S) *Id.*

¹² (S) *Id.*

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g. (U) In November 2011, Mr. al-Tamir was again diagnosed with lumbar spine disc herniation and spinal stenosis.¹³ During this timeframe, he reported pain radiating to his right buttock.¹⁴ For the remainder of 2011 and through 2012, Mr. al-Tamir was seen for chronic low back pain and pain radiating to his left thigh.¹⁵

h. (U) Mr. al-Tamir's Petitioner's back pain persisted and his health gradually declined throughout 2012. In November 2012, he continued to report radiating pain from his low back down through his thighs, but, for the first time, reported feeling "pins and needles sensations" in his toes.¹⁶

i. (U) A January 2017 CT scan of Mr. al-Tamir's spine showed anterior wedging of T12 and L1 and anterolisthesis on L4 and L5, which had increased since the previous CT scan. Additionally, there were degenerative changes to L4-S1.¹⁷

j. (U) In August 2017, he began to experience an increase in the loss of sensation in both feet. The week of August 7, 2017, during attorney-client meetings in preparation for the August pretrial hearings, Mr. al-Tamir began to feel tingling throughout his body.¹⁸ On August 9, 2017, defense counsel noticed Mr. al-Tamir open and close his left hand repeatedly during the six-hour meeting.¹⁹ Mr. al-Tamir explained that his hand was numb and he was opening and closing it in an attempt to force feeling back into it. By that evening, Mr. al-Tamir's legs had become so weak that he could not stand up straight or walk.²⁰

¹³ (U) *Id.*

¹⁴ (U) *Id.*

¹⁵ (U) *Id.*

¹⁶ (U) *Id.*

¹⁷ (U) *Id.*

¹⁸ (U) AE 103 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis, Att. B (Memorandum for the Convening Authority re: Emergency Request for Expert Assistance – Neurological Surgery, dated 1 September 2017) at p. 4.

¹⁹ (U) *Id.*

²⁰ (U) *Id.*

k. (U) On August 10, 2017, a doctor examined Mr. al-Tamir at his detention location. The doctor determined that Mr. al-Tamir's deteriorating condition required transportation to the hospital for additional tests. Some tests were conducted, but, apparently, a prescribed CT scan could not be performed because the hospital staff failed to properly inject intravenous contrast dye for the scan. Following this hospital visit, Mr. al-Tamir was declared medically unfit for attorney-client meetings.²¹

l. (U) Although his condition did not improve, JTF-GTMO cleared Mr. al-Tamir to attend the 14-17 August pretrial hearings. Due to his constant discomfort and concern over bladder control, he attended only one day of the session—a day his presence was required by the military judge.²²

m. (U) Alarmed by the emergency they had witnessed, and the lack of response by GTMO medical personnel, Petitioner's counsel consulted stateside medical professionals including senior physicians with Physicians for Human Rights ("PHR"). In a letter dated August 31, 2017, those physicians, informed of Petitioner's most recent symptoms, advised that neurosurgical evaluation and intervention was required immediately.²³

n. (U) On 1 September 2017, the Defense submitted an emergency request to the Convening Authority for the appointment of an experienced orthopedic surgeon, Dr. James Cobey.²⁴ In that request, the Defense asserted that expert assistance was necessary "to ensure Mr. al-Tamir can participate in his defense and is physically fit to stand trial."²⁵

²¹ (U) *Id.*

²² (U) *Id.*

²³ (U) *Id.*, Att. B at Enclosure B (Letter from Physicians for Human Rights, dated 31 August 2017).

²⁴ (U) *Id.*, Att. B.

²⁵ (U) *Id.*, Att. B.

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o. ~~(S)~~ On 6 September 2017, the Defense filed an Emergency Motion to Abate the Proceedings Until Mr. al-Tamir is Physically Competent to Stand Trial.²⁶ Therein, the Defense argued that “[i]t is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial,” and that “[c]ourts have recognized that a defendant who is ‘mentally competent’ . . . may yet be ‘physically incompetent’-- unable, by virtue (for example) of a painful physical condition or the temporary effects of narcotics, to participate effectively in his own defense.”²⁷

p. ~~(U//FOUO)~~ In support of the motion to abate, the Defense provided letters from Dr. James Cobey and Physicians for Human Rights, the same letters provided to the Convening Authority in support of the 1 September 2017 emergent request for expert assistance. Dr. Cobey opined that, based on his review of Mr. al-Tamir’s January 2017 CT Scan, “[t]he current treatment plan as reported, consisting of an anesthesiologist visiting in September and a neurosurgeon visiting in October, is unacceptable, inconsistent with the standard of care, and likely to result in permanent neurologic damage.”²⁸ Physicians for Human Rights echoed those concerns, stating that “[b]ased on the reported symptoms, there is a possibility of cauda equina syndrome, which could result in permanent neurologic damage and/or paralysis if not diagnosed and treated immediately.”²⁹ The Government had not informed the Defense that its physicians had performed an emergency operation on Mr. al-Tamir only a day earlier; rather, undersigned

²⁶ ~~(S)~~ AE 099.

²⁷ ~~(S)~~ *Id.*

²⁸ ~~(S)~~ *Id.* at ¶¶5(s)-(t).

²⁹ ~~(S)~~ *Id.* at ¶¶5(r).

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counsel first learned of the surgery in a newspaper article published in *The Miami Herald*.³⁰ On 5 September 2017, surgeons performed an emergency L4-L5/L5-S1 laminectomy.³¹

q. (U) On 18 September 2017, JTF-GTMO medical staff performed “a C3-4/C4-5/C5-6 Anterior Cervical Discectomy and Fusion”.³² That procedure was performed on an “accelerated” schedule after Mr. al-Tamir began to experience “progressive symptoms of weakness and numbness.”³³

r. (U) On 21 September 2017, Mr. al-Tamir “was found to have a small sub-segmental pulmonary embolism” and put on an anti-coagulation regimen.³⁴

s. (U) On 23 September 2018, Mr. al-Tamir “developed increased surgical site swelling” which led to the discovery of a post-operative hematoma.³⁵ “He consented to and underwent an incision and placement of a surgical drain.”³⁶

t. (U) On 29 September 2017, the Commission ordered the Government to provide biweekly updates on Mr. al-Tamir’s medical condition and required the Defense to provide updates not included in the Government’s notice.³⁷

u. (U) On 6 October 2017, the Defense filed AE 103 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis. Therein, the Defense explained that expert assistance was “necessary to fully understand Mr. al-Tamir’s medical condition and treatment history and ensure his physical competence to participate in his defense,

³⁰ (U) See AE 099(Sup), Defense Supplement to AE 099 Emergency Motion to Abate the Proceedings Until Mr. al-Tamir is Physically Competent to Stand Trial, ¶ 3.

³¹ (U) AE 099J Government Notice to the Defense and the Commission Pursuant to AE 099I, Att. B.

³² (U) Id., Att. C.

³³ (U) Id.

³⁴ (U) Id., Att. D.

³⁵ (U) Id.

³⁶ (U) Id.

³⁷ (U) AE 099I.

including his fitness to stand trial.”³⁸

v. (S) On 14 November 2017, a multidisciplinary team conducted another emergent surgery on Mr. al-Tamir’s cervical spine.³⁹ Specifically, “[t]he medical team removed the anterior hardware and then fused [Mr. al-Tamir’s] cervical spine from C3-T2 and widened the C5 nerve root foramen in order to provide for stabilization of the spine to reduce the chance of future spinal cord impingement and to improve his radicular symptoms which were likely due to nerve root compression.”⁴⁰

w. (S) On 30 January 2018, over protestations by the Defense, the Commission convened a hearing session in Guantanamo Bay.

x. (S) An MRI of Mr. al-Tamir’s spine was performed on 30 January 2018, during the Commission session.⁴¹ Mr. al-Tamir’s neurosurgeon determined that “surgery was likely” after reviewing the MRI. Mr. al-Tamir’s treating neurosurgeon testified on 4 February 2018. Upon a physical examination, however, the neurosurgeon ultimately concluded the need for surgery was not “imminent”; he reserved his opinion on the need for an additional surgery to stabilize Mr. al-Tamir’s spinal surgery, citing the need for additional testing.⁴²

y. (S) On 9 March 2018, the Commission issued AE 103C Ruling, denying AE 103 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis. In its ruling, the Commission held that “[t]he Defense has requested expert assistance to ‘ascertain whether Mr. al-Tamir is medically able to participate in his defense and is fit to stand trial.’” In denying the requested relief, the Commission noted that “[f]ederal case law indicates

³⁸ (S) AE 102 Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis, p.2.

³⁹ (S) AE 099P Government Notice to the Defense and the Commission Pursuant to AE 099I, Att. B.

⁴⁰ (S) *Id.*

⁴¹ (S) 2/4/2018 Tr.

⁴² (S) *Id.*

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that such a [competency] hearing is only required when the judge finds reasonable grounds to believe the accused is incompetent.” Upon “finding [that] there [was] no evidence the Accused [was] unable to participate in his own defense,” the Commission ruled that “the Defense ha[d] not demonstrated why expert assistance is needed.”

z. ■■■ Defense counsel submitted a memorandum to the Convening Authority on 26 April 2018 entitled “Ex Parte Request for Expert Assistance in the Area of Neurosurgery.”⁴³ Dr. ■■■ is a United States Air Force Colonel, who has practiced medicine for over 25 years and completed his residency in neurosurgery in 1998. He currently serves as Consultant to the Surgeon General for Neurosurgery.⁴⁴ The same day the request was submitted, the Defense gave the Government *de minimis* notice that Mr. al-Tamir sent a request for expert assistance to the Convening Authority.

aa. (U//FOUO) On 15 May 2018, the Defense provided notice to the Commission detailing ongoing symptoms and recommendations of an orthopedic surgeon. Mr. al-Tamir “explained [that] he felt a cold, wet sensation along with soreness in his inner thighs between the groin and knees. He also has pain in his neck, back, and feet. When he lays down pain is present from his back down his legs.”⁴⁵ Mr. al-Tamir reported “[t]he numbness in his feet is increasing, and the area of numbness is growing”, and his “balance is getting worse.”⁴⁶ After hearing of the symptoms, Dr. Cobey “advise[d] ‘a more complete laminectomy’ should be performed ‘as soon as feasible,’ and recommends ‘internal fixation with pedical screws.’”⁴⁷

⁴³ ■■■ Attachment B.

⁴⁴ (U) ■■■ *Id.*

⁴⁵ (U) ■■■ AE 099YY, Att. C.

⁴⁶ (U) ■■■ AE 099YY, Att. C.

⁴⁷ (U) ■■■ AE 099YY, Att. B.

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bb. (U//FOUO) On 17 May 2018, the Government provided notice to the Commission of Mr. al Tamir's deteriorating symptoms; the senior Medical Officer (SMO) stated, "Defendant has reported worsening of his sensation in both feet, the anal region, and the upper inner thighs. He reported that the sensation was aggravated while traveling to legal meetings. He stated that the symptoms he is now experiencing are similar to those that occurred prior to his initial surgery for urgent decompression of the cauda equina syndrome."⁴⁸ The SMO further indicated, "The neurosurgeon currently recommends lumbar spine surgery contingent upon confirmation of symptoms during physical exam."⁴⁹

cc. (U//FOUO) Mr. al-Tamir underwent surgery on 19 May 2018.⁵⁰ "The surgery included a L-4 laminectomy; bilateral L4-5 and L5-S1 facetectomies; L4-S1 pedicle screw instrumentation; L4-5 and L5-S1 bilateral interbody insertion; and use of Bone Morphogenetic Protein. Intraoperative findings included severe L4 stenosis; severe bilateral L5-S I foramen stenosis; moderate L4-5 foramen stenosis bilaterally; L4 degenerative spondylolisthesis; and severe bilateral L4-5 facet arthrosis."⁵¹

dd. (U//FOUO) On 24 May 2018, the Convening Authority denied Mr. al-Tamir's request for expert assistance in the field of neurosurgery, finding there was no demonstrated necessity for expert assistance.⁵²

ee. (U//FOUO) To date, the Government has produced 881 pages of medical records to the Defense. In addition, the Government has produced several CT scans and Xrays in their native file format. No one on the Defense team has the necessary subject matter expertise to

⁴⁸ (U//FOUO) AE 099ZZ, Att. B.

⁴⁹ (U//FOUO) AE 099ZZ, Att. B.

⁵⁰ (U//FOUO) AE 099AAA Government Notice to the Defense and the Commission Pursuant to AE 099I, Att. B.

⁵¹ (U//FOUO) *Id.*

⁵² (U//FOUO) Attachment C.

competently evaluate those materials.

6. ~~(S)~~ **Law and Argument:**

~~(S)~~ As in military and civilian courts, experts must be provided to military commissions defendants as a matter of due process and access to counsel.⁵³ The Rules for Military Commissions provide that “[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.”⁵⁴ This provision applies to both the merits as well as sentencing.⁵⁵

~~(S)~~ Rule 1001(c) of the Manual for Military Commissions (“MMC”) states that “[t]he defense may present matters in rebuttal of any material presented by the prosecution and *may present matters in extenuation and mitigation* regardless of whether the defense offered evidence before findings.” Rule 1001(c)(1)(B) provides that “[m]atter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the military commission, or to furnish grounds for a recommendation of clemency.” The “Discussion” section for Rule 1001(c)(1)(B) states explicitly that “[w]hile no credit is given for pretrial detention, *the defense may raise the nature and length of pretrial detention as a matter in mitigation.*”

~~(S)~~ Per AE 103C Ruling, in order to demonstrate the need for expert assistance, “the Defense must satisfy a three-part test demonstrating: ‘(1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop.’ *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).”⁵⁶ As set forth below, the request for the appointment and funding of Dr. ~~(S)~~ satisfies all three prongs of this test.

⁵³ ~~(S)~~ See, e.g. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986).

⁵⁴ ~~(S)~~ RMC 703(a).

⁵⁵ ~~(S)~~ RMC 703(b).

⁵⁶ ~~(S)~~ As set forth in AE 102, it is the Defense’s position that the “reasonable attorney” test is the appropriate

(C) With respect to the first prong of the *Bresnahan* analysis, “expert assistance is needed” to effectively “present” Mr. al-Tamir’s pained medical history over the last decade to the Commission as a matter “in mitigation” per Rule 1001(c). Moreover, the discussion section of Rule 1001(c)(1)(B) specifically contemplates that defense counsel present such matters to the Commission—i.e., “the nature and length of pretrial detention”—for its consideration in determining an appropriate sentence. Given that Mr. al-Tamir has been subject to five emergent surgeries in an eight-month period, it would be an exercise in malpractice for the Defense to neglect the evaluation of Mr. al-Tamir’s medical history for its potential significance as mitigation evidence—and, given the subject matter, any competent evaluation of such materials will necessarily rest on a subject-matter expert like Dr. [REDACTED]

[REDACTED] With respect to the second prong of the *Bresnahan* analysis, “expert assistance would accomplish” a competent analysis of Mr. al-Tamir’s condition, and, in particular, whether his treatment (or lack thereof) while in custody aggravated his symptoms and/or prolonged his pain and discomfort. Dr. [REDACTED] could also opine on whether his treatment met the standard of care for his condition, and could testify regarding his conclusions to the Commission.

[REDACTED] With respect to the final prong of the *Bresnahan* analysis, given the medical nature of this mitigation evidence, defense counsel are clearly “unable to gather and present the evidence that the expert assistance would be able to develop”. The Defense is unable to gather relevant evidence on the medical issues and present it to the Commission without Dr. [REDACTED] assistance. Dr. [REDACTED] is a neurosurgeon with extensive experience. [REDACTED]

[REDACTED]

standard for this analysis. However, given the Commission’s recent reliance on an alternative standard, *see, e.g.* AE 103C, that is the standard articulated in this motion.

[REDACTED]

[REDACTED]

[REDACTED]

(U) Unlike defense counsel, Dr. [REDACTED] can evaluate the medical records disclosed in discovery, including MRI reports, CT scans, and other diagnostic testing that defense counsel lack the expertise to meaningfully review. In addition, Dr. [REDACTED] can conduct an in-person examination of Mr. al-Tamir, an exercise defense counsel are abjectly unqualified to perform. Finally, Dr. [REDACTED] can present testimony to the Commission regarding his findings, and, if necessary, assist defense counsel in assessing the testimony of any expert called by the Government to reject any such testimony.

7. ~~(U)~~ **Conclusion:**

[REDACTED] Mr. al-Tamir has endured five serious surgical procedures in the past ten months, including four serious operations on his spine. As discussed above, Mr. al-Tamir's medical records demonstrate that the detention facility staff was aware of Mr. al-Tamir's degenerative disc condition for over a decade before operating, despite a compelling record of regular complaints regarding serious pain. For that reason, an evaluation of Mr. al-Tamir's medical condition, and the treatment thereof, will be central to Defense's mitigation presentation, a presentation that Defense counsel are not qualified to make without assistance. For those reasons, this Commission should order the Convening Authority to approve the funding and appointment of Dr. [REDACTED] as a mitigation expert for the Defense.

8. ~~(U)~~ **Oral Argument:**

[REDACTED] The Defense requests oral argument on this motion.

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9. ~~(U)~~ Witness and Evidence:

~~(U)~~ None.

10. ~~(U)~~ Conference with Opposing Counsel:

~~(U)~~ The Government objects to the requested relief.

11. ~~(U)~~ List of Attachments:

- A. ~~(U)~~ Certificate of Service, dated 18 July 2018.
- B. ~~(U)~~ Defense *Ex Parte* Request for Expert Assistance in the Area of Neurosurgery, dated 26 April 2018.
- C. ~~(U)~~ Convening Authority's Response to Defense *Ex Parte* Request for Expert Assistance in the Area of Neurosurgery, dated 24 May 2018.

Respectfully Submitted,

//s//

BRENT RUSHFORTH
Pro Bono Counsel

//s//

ADAM THURSCHELL
Assistant Detailed Defense Counsel

//s//

YOLANDA MILLER
Maj, USAF
Assistant Detailed Defense Counsel

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~~(U)~~ ATTACHMENT A

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~~(U)~~ CERTIFICATE OF NOTICE

~~(U)~~ I certify that on **18 July 2018**, I filed **AE 121, Defense Motion** to Compel Appointment and Funding of Defense Mitigation Expert (Neurosurgery) with the Office of Military Commissions Trial Judiciary and served a Notice of Filing pursuant to RC 3.7.e.(1) on the Government counsel of record.

//s//

ADAM THURSCHELL
Assistant Defense Counsel

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~~(U)~~ ATTACHMENT B

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DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

26 April 2018

MEMORANDUM FOR THE CONVENING AUTHORITY

FROM: Defense Counsel for Nashwan al-Tamir

SUBJECT: Ex Parte Request for Expert Assistance in the Area of Neurosurgery

1. Mr. Nashwan al-Tamir (ISN 10026), the Accused in the case of *United States v. Abd Al Hadi Al Iraqi*, by and through counsel, respectfully requests the Convening Authority appoint Dr. [REDACTED] as a confidential expert consultant in the area of Neurosurgery.

2. Overview of Mr. Al-Tamir's Current Medical Condition

a. On 3 September 2017, Mr. al-Tamir suffered from urinary incontinence and saddle anesthesia.¹ "These are symptoms of Cauda Equina Syndrome (CES), a neurologic condition involving pressure and swelling of the nerves at the end of the spinal column... requir[ing] surgical intervention within 48 hours."² On 5 September 2017, surgeons performed an emergency L4-L5/L5-S1 laminectomy.³

b. During the following weeks, Mr. al-Tamir began to experience "progressive symptoms of weakness and numbness," hastening the scheduling of an additional, planned surgery on Mr. al-Tamir's cervical spine.⁴ On 18 September 2017, surgeons performed a C3-4/C4-5/C5-6 Anterior Cervical Discectomy and Fusion.⁵

c. On 14 November 2017, a multidisciplinary team conducted another emergent surgery, a C3-T2 posterior fixation, on Mr. al-Tamir's cervical spine.⁶ Mr. al-Tamir "may require further stabilization surgery in the future."⁷ Mr. al-Tamir's neurosurgeon determined that "surgery was likely" after reviewing the MRI which was taken days before his testimony on 4 February 2018.⁸ Upon a physical examination, the neurosurgeon ultimately concluded the need for surgery was not "imminent"; he reserved his opinion on the need for an additional surgery to stabilize Mr. al-Tamir's spinal surgery, citing the need for additional testing.⁹

3. Dr. [REDACTED] appointment as an expert consultant is necessary.

a. Why is the expert consultant needed? The Defense has a statutory right to the employment of confidential expert consultants and expert witnesses. Chapter 47 A, Title 10 U.S.C.

¹ Declaration of Senior Medical Officer, Camp VII, 5 October 2017.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Declaration of Senior Medical Officer, Camp VII, 28 December 2017.

⁷ *Id.*

⁸ Unofficial/Unauthenticated Transcript, 4 February 2018.

⁹ *Id.*

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SUBJECT: Ex Parte Request for Expert Assistance in the Area of Neurosurgery

§949j(a)(1) provides, "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution." Furthermore, R.M.C. 703(d) lays out the framework for the employment of expert witnesses. The request for Dr. [REDACTED] services arises in the context of a case in which Mr. al-Tamir has suffered extensive medical issues throughout his detention requiring multiple surgeries and resulting in voluminous discovery related solely to these issues. Review of the medical documentation alone requires consultation with a medical provider well versed in neurological disorders and treatment. Therefore, consultation with Dr. [REDACTED] is necessary for basic defense preparation—review of discovery materials. Additionally, Dr. [REDACTED] will be able to opine on not only standard of care, whether it has or has not been provided, but also on additional diagnoses, treatment, etc. which may be used for subsequent litigation and mitigation.

b. What would expert assistance accomplish for the accused? As mentioned above, Dr. [REDACTED] will review medical records and explain them to the Defense. Furthermore, he will assist in ascertaining if additional resources are necessary as it relates to Mr. al-Tamir's medical condition such as diagnostic testing (e.g. X-rays, CT scans, MRIs, EMGs), further procedures (including surgery), and treatment (e.g. the type and duration therapy). He will assist in developing the record as it relates to Mr. al-Tamir's medical issues and help in articulating Mr. al-Tamir's concerns and needs to the Convening Authority, JTF personnel, the military judge, and the panel of members during the military commission.

c. Why is defense counsel unable to gather and present the evidence? No one on the Defense team is a qualified expert in the field of neurology. In fact, no member of the Defense team has attended medical school, or even extended medical training, such as nursing school. While we may be able to gather and even review the medical evidence, we do not have the medical background to completely understand the data. Therefore, without expert assistance, the Defense, is not able to present the evidence in a way most valuable to Mr. al-Tamir. Approval of medical expert consultants is not uncommon in military courts-martial when discovery includes such a large volume of medical documentation. Routinely, in sexual assault cases, the Defense would receive a sexual assault nurse examiner (SANE) as an expert consultant whether the Government intends to call a SANE or not as a witness. Additionally, it must also be noted presentation of evidence includes if reached, the sentencing portion of trial, and the Defense has the right to present any and all mitigation evidence, such as past, present, and foreseeable future health.

4. Dr. [REDACTED] Qualifications.

[REDACTED]

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SUBJECT: Ex Parte Request for Expert Assistance in the Area of Neurosurgery

5. Estimated Cost.

a. Total Hours/Days and Total Cost: The Defense is requesting 250 hours of consultation time, to include review of evidence (medical records received and those we anticipate will receive as the records are provided on a continuous basis), consultation with counsel, client examination, hearing attendance and team meetings. Since Dr. [REDACTED] is a Department of Defense asset, there is no hourly rate, and no additional cost to the Government. Dr. [REDACTED] has notified his chain of command this request is forthcoming and reasonably believes his unit leadership can accommodate this request for assistance.

b. Travel:

i. International Travel: The Defense requests Dr. [REDACTED] travel to Guantanamo Bay Naval Station, Cuba to examine the client and attend trial proceedings, as needed.

ii. Domestic Travel: The Defense requests Dr. [REDACTED] travel from his current duty station [REDACTED] to the Defense office spaces in the National Capital Region for team meetings, discovery review, and security processes.

6. Conclusion. The employment of Dr. [REDACTED] as a confidential expert consultant in neurosurgery is necessary for the Defense to prepare for the upcoming deadlines of trial, with at least a minimum level of competence, as set by the Military Commission. Failure to grant this request will violate Mr. al-Tamir's rights guaranteed by the Military Commissions Act, the Detainee Treatment Act and the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America. The Defense respectfully asks that the Convening Authority consider this submission *ex parte* and approve the expert consultant requested, as such assistance is relevant and necessary for an effective defense. If you do not intend to approve the request, please notify defense counsel not later than 3 May 2018, so that the Defense team may take appropriate and timely action with the Military Commission.

7. If any additional information is required to process this request, please contact the undersigned at [REDACTED] or adam.m.thurschwell.civ [REDACTED]

Respectfully submitted,

//s//

Adam Thurschwell
Assistant Defense Counsel

Attachments listed on following page.

¹⁰ Curriculum Vitae/Resume of Dr. [REDACTED] at Attachment A.

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SUBJECT: Ex Parte Request for Expert Assistance in the Area of Neurosurgery

Attachments:

- A. Curriculum Vitae/Resume of Dr. [REDACTED] (15 pages)
- B. Declaration of Senior Medical Officer [REDACTED] October 2017.
- C. Declaration of Senior Medical Officer, Camp VII, 28 December 2017.
- D. Unofficial/Unauthenticated Transcript, 4 February 2018.

Copy to:
MCDO

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~~(U)~~ ATTACHMENT C

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Convening Authority

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
4800 MARK CENTER DRIVE
ALEXANDRIA, VA 22350-2100

MAY 24 2018

MEMORANDUM FOR MR. ADAM THURSCHELL, ASSISTANT DEFENSE COUNSEL

SUBJECT: Defense *Ex Parte* Request for Expert Assistance in the Area of Neurosurgery –
U.S. v. Hadi al-Iraqi

I have carefully reviewed your *ex parte* request which is dated April 26, 2018, to retain Dr. [REDACTED] as an expert consultant in neurosurgery. For the reasons set forth below, I am unable to grant consideration to your request.

Rule for Military Commissions (R.M.C.) 703(d) establishes the procedure for requesting expert assistance and requires the requesting party to provide notice to the non-requesting party. On July 21, 2017, the Military Judge issued AE 086C concerning submission of expert requests to the Office of the Convening Authority. AE 086C, Ruling, Defense Motion to Require the Convening Authority to Accept *Ex Parte* Requests for Expert Assistance and Other Resources, *United States v. Hadi al-Iraqi* (July 21, 2017). The Military Judge ruled that the Defense "may submit expert requests *ex parte* to the Convening Authority." *Id.* Pursuant to AE 086C, you submitted *ex parte* your request to retain Dr. [REDACTED] as an expert consultant and provided *de minimis* notice to the Prosecution on April 26, 2018. As such, I have accorded *ex parte* consideration to your request. Of note, as discussed below, I find that your request for Dr. [REDACTED] seeks the same expert assistance previously sought in your request for the appointment and funding of Dr. Cobey which was not submitted *ex parte* and was the subject of a motion to compel that was not filed *ex parte* with the Commission.

The Military Commissions Act (M.C.A.) of 2009 states that the Military Judge shall "rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings" and that rulings by the Military Judge on interlocutory questions are "conclusive" and constitute "the ruling of the military commission." Rule for Military Commissions (R.M.C.) 703(d) provides that when a request is denied by the Convening Authority it may be renewed before the military judge, who shall determine whether the expert is necessary and, if so, whether the Government has provided, or will provide, an adequate substitute.

In accordance with this part of the Rule, on October 6, 2017, you filed AE 103, Defense Motion to Compel Appointment and Funding of Defense Expert on an Expedited Basis. Specifically, your motion requested an order compelling the Convening Authority to appoint and fund Dr. James Cobey to serve as an expert consultant in the field of neurological surgery. This motion to compel was filed in response to the prior Convening Authority's previous denial of your request to appoint and fund Dr. Cobey based on the Convening Authority's determination that your request failed to demonstrate a necessity for such expert assistance. Subsequently, on March 9, 2018, the Commission issued AE 103C, his ruling on your motion to compel.

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In comparing the instant request for Dr. [REDACTED] to your previous request and motion to compel funding for Dr. Cobey, I find that the requests seek the same expert assistance, namely assistance in understanding the accused's current medical conditions and assistance in determining the impact of his medical conditions on his ability to prepare his defense and participate in Commission hearings. Consequently and consistent with the procedure established by R.M.C. 703(d), I find that it would be inappropriate for the Convening Authority to grant consideration to a request following a ruling by the Commission of a defense motion addressing the same subject matter of that request. I find it insignificant that AE 103C addresses a motion to compel funding for a different expert since, again, the motion to compel sought the same expert assistance that this request seeks.

While I do not believe that I have the legal authority to consider a matter once it has been presented to the Military Judge, had I been able to address the specifics of your request, I would note that you have not demonstrated a necessity for the expert assistance of Dr. [REDACTED]. An accused is entitled to the employment of an expert, provided that he or she can demonstrate the necessity for the expert assistance. See *Ake v. Oklahoma*, 470 U.S. 68 (1985). As the *Ake* Court explained, an indigent defendant is entitled to access "the raw materials integral to the building of an effective defense." *Id.* at 77. The Court noted that an indigent defendant is not constitutionally entitled to "all the assistance that his wealthier counterpart might buy," but that "fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Id.* Military courts have embraced this rule in a series of opinions spanning decades. See *United States v. Bresnahan*, 62 M.J. 137, 143 (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).

To demonstrate necessity, an accused must show something more than a "mere possibility of assistance from a requested expert." See *Robinson*, 39 M.J. at 89 (citation omitted). An accused must show that there exists a reasonable probability both that the expert would be of assistance to the defense and that denial of the expert assistance would result in a fundamentally unfair trial. See *id.* In demonstrating the necessity for expert assistance, the defense must show: (1) why the expert is needed; (2) what the expert would accomplish for the accused; and (3) why the defense counsel is unable to gather and present the evidence that the expert would be able to develop. See *Gonzalez*, 39 M.J. at 461; *Ndanyi*, 45 M.J. at 319.

In addressing these factors, I find that you have not demonstrated why the expert assistance is needed. Specifically, you do not address why the expert assistance of Dr. [REDACTED] is necessary considering the provision of medical care by the accused, especially in the months following the submission of your request for Dr. Cobey on September 1, 2017. Since that time, the accused has undergone four surgeries to address his medical conditions, and as you indicate in the supplement to the instant request that you provided on May 11, 2018, the accused is scheduled to undergo another surgery in the coming days. You make no argument in your request that the accused is not receiving adequate medical care to an extent that his defense is impacted. Additionally, you indicate that Dr. [REDACTED] would assist the accused in communicating his needs to relevant parties, including the Convening Authority and the Military Judge. However, since undergoing surgery, the record and applicable rulings suggest that the

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accused has been able to communicate effectively with the Commission concerning needed accommodations and he has been able to attend sessions. Also, pursuant to AE 099I, the Government has been providing semi-monthly updates from the Senior Medical Officer to the Commission concerning the accused's medical conditions. Thus, I find that you have not demonstrated why an expert in neurosurgery is necessary considering that the accused's current medical conditions are not impacting his ability to participate in Commission proceedings. Therefore, even if this matter was appropriately before me, I would find that you have failed to establish necessity for the requested expert assistance.

If you file a motion to compel the appointment of Dr. [REDACTED] please ensure that this response is included with any pleadings that you may file with the Commission.


James M. Coyne
Convening Authority
for Military Commissions

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