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

UNITED STATES OF AMERICA v. ABD AL HADI AL IRAQI	AE 150 Defense Motion to Compel Appointment and Funding of Defense Mitigation Specialist 26 April 2019
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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 compel the Convening Authority to approve funding for and appoint a mitigation specialist to provide assistance to Mr. al-Tamir.¹
3. **Overview**: 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 the preparation of his defense.² A mitigation specialist is absolutely necessary to prepare an adequate defense for Mr. al-Tamir. 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 the principles of fundamental fairness.
4. **Burden of Proof**: As the moving party, the Defense must demonstrate by a preponderance

¹ The fact that the Defense has chosen not to file this motion *ex parte* does not constitute a waiver of *ex parte* filing for our past and future motions to compel appointment and funding for expert assistance.

² *Ake v. Oklahoma*, 470 U.S. 68 (1985).

of the evidence that the requested relief is warranted.³

5. Facts:

a. Mr. al-Tamir was “arrested” in Turkey in October of 2006, was transferred to a CIA black site, and was ultimately transferred to Guantanamo Bay in April 2007.

b. On 3 February 2014, charges were sworn against Nashwan al-Tamir in this Commission with one Specification of Denying Quarter (Charge I), one Specification of Attacking Protected Property (Charge II), three Specifications of Using Treachery or Perfidy (Charge III), one Specification of Attempted Use of Treachery or Perfidy (Charge IV), and one Specification of Conspiracy to Commit Offenses Triable by Military Commission (Charge V).⁴ The Charge Sheet contains allegations stemming from “[i]n or about August 1996 . . .” in Afghanistan to “[o]n or about 29 October 2006” in Turkey.⁵

c. These charges carry a maximum term of imprisonment for life. The prosecution has made clear that it intends to seek the maximum punishment.

d. Mr. al-Tamir is accused of committing war crimes including conspiracy that, as charged, spanned across Afghanistan, Pakistan, Iraq, Turkey and “elsewhere” from on or about 1996 through on or about 1 November 2006.⁶

e. On 3 October 2012, Mr. al-Tamir asked the Convening Authority to appoint and fund a mitigation specialist in Mr. al-Tamir’s complex case.⁷

f. On 5 October 2012, the Convening Authority denied Mr. al-Tamir’s request for a mitigation specialist as premature because Mr. al-Tamir had no charges pending at the time.⁸

³ RMC 905(c)(2).

⁴ Charge Sheet, dated 2 June 2014.

⁵ *Id.*

⁶ *Id.*

⁷ Attachment B.

⁸ Attachment C.

g. On 24 March 2017, Mr. al-Tamir renewed the request to the Convening Authority to appoint and fund a mitigation specialist in his case. This request was submitted *ex parte*.⁹

h. On 5 May 2017, the Convening Authority denied the second request for a mitigation specialist.¹⁰

i. On 25 March 2019, Mr. al-Tamir again submitted an *ex parte* request for the Convening Authority to appoint and fund a mitigation specialist in his case.¹¹

j. On 11 April 2019, the Convening Authority denied the third request for a mitigation specialist.¹²

6. **Law:**

As in military and civilian courts, experts must be provided to military commissions defendants as a matter of due process, fundamental fairness, and access to counsel.¹³ 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.”¹⁴ The Military Commissions Act of 2009 elaborates on what constitutes a “reasonable opportunity to obtain witnesses and other evidence,” stating in pertinent part “[t]he 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.”¹⁵

Article III jurisprudence employs a “reasonable attorney” test in assessing the employment of expert consultants. The Article III standard, codified at 18 U.S.C. 3006(e)(1) (2012), states:

⁹ Attachment D.

¹⁰ Attachment E.

¹¹ Attachment F.

¹² Attachment G.

¹³ See, e.g. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986); *United States v. Langston*, 32 M.J. 894, 895 (C.M.A. 1991).

¹⁴ RMC 703.

¹⁵ 10 U.S.C. § 949j; see also RMC 703(a), Discussion.

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

Under the “reasonable attorney” test, necessity is demonstrated when “the defense attorney makes a timely request in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them.”¹⁶ The test places great emphasis upon the representations of counsel and upon counsel’s educated judgment as to how best to prepare for trial.¹⁷ The reasonable attorney test differs from the more formulaic test utilized at courts-martial, wherein an accused must demonstrate (1) that an expert would be of assistance to the defense; and (2) that denial of expert assistance would result in a fundamentally unfair trial.¹⁸

The appropriate standard for the employment of experts in military commissions’ cases is the “reasonable attorney” test. Unlike the Rules for Court-Martial, interpretation of the Rules for Military Commission are subject to the prescription of 10 U.S.C. § 949j(a)(1), which provides that “[t]he 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.” Congress declared that the Defense’s opportunity to obtain witnesses and evidence in a military commission shall be comparable to the opportunity available to a criminal

¹⁶ *United States v. Anderson*, 39 F.3d 331, 334 (D.C. Cir. 1994); see also *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974) (“the trial judge should tend to rely on the judgment of the defense attorney if the latter ‘makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses.’”), citing *United States v. Theriault*, 440 F.2d 713, 717 (5th Cir. 1971).

¹⁷ *United States v. McVeigh*, 954 F. Supp. 1441, 1445 (D. Colo. 1997).

¹⁸ See *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008). At courts-martial, to establish that an expert would be of assistance to the defense, 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.” *United States v. Breshnahan*, 62 M.J. 137 (C.A.A.F. 2005); see also *Freeman*, 65 M.J. at 458.

defendant in a court of the United States under Article III of the Constitution.¹⁹

Whether using the reasonable attorney test or the three-prong test used in courts-martial, Mr. al-Tamir is entitled to an adequate opportunity to present his case—which in this case means the assistance of a mitigation specialist. The Supreme Court of the United States has held that mere access to the courthouse doors by itself does not assure a proper adversary process.²⁰ A criminal trial is fundamentally unfair when an indigent defendant does not have access to raw materials necessary to build an effective defense.²¹ This includes the assistance of a mitigation specialist to assist in preparing for a sentencing hearing, since Mr. al-Tamir’s counsel has a duty to prepare for sentencing as well as for trial.²²

The Supreme Court has continued a trend of recognizing the need for mitigating evidence at sentencing.²³ The most recent affirmation of this principle came in two non-capital companion cases, *Miller v. Alabama* and *Jackson v. Hobbs*.²⁴ These cases both involved juvenile defendants who were sentenced to statutorily mandated sentences of life without parole for felony murder.²⁵ The Court struck down both sentences as unconstitutional, proceeding from the premise that the Eighth Amendment prohibition against “excessive sanctions” stems “from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and offense.”²⁶

Moreover, the appointment of an expert consultant is protected by the attorney-client and

¹⁹ See 10 U.S.C. §949j.

²⁰ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

²¹ *Id.*

²² *United States v. Kreutzer*, 59 M.J. 773 (U.S. Army Ct. of App. 2004).

²³ See, e.g., *Porter v. McCollom*, 558 U.S. 30, 30-31 (2009) (per curiam) (holding that defense counsel’s failure to “uncover and present” mitigating evidence regarding defendant’s mental health, family background, or military history constituted ineffective assistance of counsel).

²⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

²⁵ *Id.* at 2462-63.

²⁶ *Id.* at 2463 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)).

attorney work-product privileges, and the consultant is not subject to interview by the Prosecution unless the Defense identifies the consultant as a witness.²⁷ The consultant is available to “advise the accused and her counsel as to the strength of the government case and suggest questions to be asked of prosecution witnesses, evidence to be offered by the defense, and arguments to be made.”²⁸ Designation as a person within the Defense privilege is important because:

The expert often will receive confidential communications from the accused and her counsel; and he may have occasion to learn about the tactics the defense plans to employ. If the expert consultant were free to disclose such information to the prosecutor prior to trial, a defense counsel would be placed at a great disadvantage. Indeed, he might hesitate to consult with the expert. The result would be impairment of the accused's right to counsel, because her attorney would be inhibited in the performance of her duties and unable fully to utilize the assistance contemplated by *Ake*.²⁹

7. Argument:

a. Why a Confidential Defense Expert Consultant is Necessary.

The Government has alleged that Mr. al-Tamir is a high-ranking member of the Taliban and Al Qaeda. If convicted, Mr. al-Tamir faces a maximum sentence of life in prison. Defense counsel has a duty to prepare for sentencing as well as for trial. If convicted, Mr. al-Tamir faces sentencing by a panel at a hearing that would occur immediately after a guilty verdict is rendered. Mr. al-Tamir will have to present mitigation evidence to support his arguments for a sentence of less than life as well as to rebut evidence and arguments that the prosecution makes regarding aggravating factors. He must ensure that all relevant information is brought before the panel to support his arguments for leniency at sentencing.

²⁷ Mil. R. Evid. 502; *Langston*, 32 M.J. at 894-95; *United States v. Turner*, 28 M.J. 487, 488-89 (C.M.A. 1989).

²⁸ *Turner*, 28 M.J. at 488-89.

²⁹ *Turner*, 28 M.J. at 489, *citing Ake*, 470 U.S. at 84-85.

b. What the expert will accomplish for the Accused.

A mitigation specialist provides an interdisciplinary, scientific psycho-social history of an accused. This expert conducts a detailed, extensive investigation into the accused's character, background, mental health, and other conditions and factors that relate to his moral blameworthiness. The mitigation specialist also conducts an investigation into aggravating evidence that the prosecution may use to support its argument in favor of the maximum penalty.

A mitigation specialist would provide expertise regarding the mitigation investigation specific to Mr. al-Tamir's case in numerous ways. A representative, although not exhaustive, list of examples of various tasks a mitigation specialist would perform for Mr. al-Tamir's defense team includes:

- Preparing a social history narrative to use during pre-trial, trial, and sentencing;
- Preparing sentencing memoranda;
- Gathering social, psychological, medical, educational, criminal, and statistical records;
- Using forensic psychological expertise to recommend sentencing strategies;
- Building and preparing comprehensive life history investigations;
- Compiling cultural and sociological information relevant to Mr. al-Tamir's background;
- Connecting displayed behaviors to past traumas;
- Finding witnesses to assist when family and friends cannot be reached;
- Providing alternatives to interviewing family and gathering records when they are unavailable;
- Providing international outreach;
- Developing mitigation strategies and evidence surrounding the accused's solitary and incommunicado confinement;
- Developing mitigation evidence and strategies relevant to torture and incommunicado detention;
- Researching and developing mitigation strategies regarding cultural stigmas relating to the accusations;
- Researching and investigating parallels between the accusations and Mr. al-Tamir's background;
- Researching and refuting aggravating sentencing factors;
- Researching the psychological impact of living with chronic pain and the impact chronic pain has on one's behavior and mental health; and
- Building a trusting and reciprocal relationship with the accused.

The particular mitigation specialist who counsel for Mr. al-Tamir has identified in our previous *ex parte* request to the Convening Authority has a background in forensic psychology and in preparing mitigation cases where the government seeks life without parole. In addition to the aforementioned list, her background in forensic psychology will allow her to research the psychological impact of Mr. al-Tamir's prolonged confinement, a significant factor in mitigation. She has been appointed in cases in multiple different state and federal jurisdictions. She has specific expertise in working on cases where cultural differences between the accused and the majority culture is likely to be a factor at sentencing. All of these factors are at issue in Mr. al-Tamir's case.

c. Why the Defense counsel are unable to gather and present the evidence that the expert assistance would be able to develop.

Developing and presenting mitigation evidence is a complex and time-consuming process that requires an expert who has extensive training and experience in that particular discipline. It requires hundreds of hours of work and meticulous attention to detail. The investigation is also multidisciplinary, requiring knowledge of psychological, biological, and social factors that impact a client's functioning.

Mr. al-Tamir's defense team does not have sufficient academic, technical, or practical experience to complete a psychosocial life history, uncover mitigating evidence, and present it to a panel. Unlike a capital defense team, Mr. al-Tamir's counsel are not capital qualified, meaning they have not had extensive training on investigating and preparing a mitigation case on behalf of their client. Such circumstances leave counsel unable to prepare an effective defense, let alone a zealous one. This would result in fundamentally unfair sentencing for Mr. al-Tamir.³⁰

³⁰ *United States v. Robinson*, 39 M.J. 88 (C.M.A. 1994).

The military judge has set a litigation schedule with trial anticipated to begin in less than one year. This means that the already understaffed defense team will have to devote its full attention to preparing for trial, and must delegate the sentencing investigation and preparation of a mitigation case to an individual who has a particular expertise in that field. As previously mentioned, Mr. al-Tamir has made prior requests for a mitigation specialist—one in 2012, which was denied as premature, and one in 2017, which was denied because the Convening Authority believed that other members of the defense team could perform this function. With the current litigation schedule and staffing limitations, that is not the case now. It also means that the litigation team will not be able to step away from preparing for trial in order to obtain the training necessary to conduct a mitigation investigation on its own.

Moreover, Mr. al-Tamir's defense team currently does not have any staff investigators. Mr. al-Tamir's team, through WHS, made an offer to a potential lead investigator in October 2018. That individual received a tentative offer, but still eight months later has not received a final offer and on-boarding date. The team has selected a second investigator in the most recent WHS-approved investigator hiring process, but because of WHS's requirements, no tentative offer has yet been issued and there is no indication of when that individual will be able to start. Regardless, it will be many months, and certainly not in time to adequately assist in the preparation of the defense prior to the trial date. Our team is therefore unable to reassign a non-lawyer member of the defense team to head this essential project. This makes the assistance of a mitigation specialist all the more necessary.

A sentencing phase would proceed immediately upon the rendering of a guilty verdict. This means that the current defense team would not be able to conduct the mitigation investigation after the panel renders its verdict. The defense team must be able to proceed with

sentencing right away. The mitigation investigation therefore must occur concurrently with trial preparation. In light of the current schedule, proceeding to a sentencing hearing immediately after the trial without having had the assistance of a mitigation specialist would necessarily mean that Mr. al-Tamir's defense team would be entering a critical phase of the proceedings wholly unprepared.

8. Conclusion: 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. Expert assistance in the form of a mitigation specialist is necessary in order for Mr. al-Tamir to prepare an adequate defense. Mr. al-Tamir's request meets both the reasonable attorney test and the more formulaic test utilized at courts-martial. This Commission should order the Convening Authority to approve funding and appoint our requested mitigation specialist to provide expert assistance to Mr. al-Tamir.

9. Oral Argument: The Defense is prepared to present oral argument in support of its Motion in the event the Commission is not persuaded on the papers alone.

10. Witness and Evidence: None.

11. Conference with Opposing Counsel: The prosecution has informed counsel that it opposes this motion.

12. List of Attachments:

- A. Certificate of Service, dated 26 April 2019.
- B. Request to the Convening Authority to appoint and fund an expert mitigation specialist, dated 3 October 2012.
- C. Convening Authority Denial, dated 5 October 2012.
- D. *Ex Parte* request to the Convening Authority to appoint and fund an expert mitigation

specialist, dated 24 March 2017.

- E. Convening Authority Denial of *Ex Parte* request to the Convening Authority to fund an expert mitigation specialist, dated 5 May 2017.
- F. *Ex Parte* request to the Convening Authority to appoint and fund an expert mitigation specialist, dated 25 March 2019.
- G. Convening Authority Denial of *Ex Parte* request to the Convening Authority to fund an expert mitigation specialist, dated 11 April 2019.

Respectfully Submitted,

//s//

SUSAN HENSLER
Lead Defense Counsel

//s//

DAHOUD ASKAR
Lieutenant, U.S. Navy, JAGC
Detailed Defense Counsel

//s//

CHARLES BALL
Lieutenant, U.S. Navy, JAGC
Detailed Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on **26 April 2019**, I filed **AE 150, Defense Motion** to Compel Appointment and Funding of Defense Mitigation Specialist with the Office of Military Commissions Trial Judiciary and served a copy on the Government counsel of record.

//s//

SUSAN HENSLER
Lead Defense Counsel

ATTACHMENT B



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 22301-1620

October 3, 2012

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: REQUEST TO RETAIN ANNA BULKIN AS A CONFIDENTIAL DEFENSE
MITIGATION SPECIALIST IN THE CASE OF U.S. V. NASHWAN AL BAQI
(ISN 10026)

1. The defense respectfully requests the Convening Authority authorize the retention and employment of Anna Bulkin as a confidential defense expert consultant in the area of mitigation.
2. Qualifications. Anna Bulkin has 10 years of experience as a mitigation specialist, she possesses a TS/SCI security clearance, and she previously worked as the mitigation specialist in the case of United States v. Ghailani. Anna Bulkin's curriculum vitae is enclosed with this request.
3. Why appointment is necessary prior to a charging and referral decision.

I was detailed to the accused's case on April 30, 2012 after the Office of the Chief Prosecutor of Military Commissions notified the Chief Defense Counsel that the government intends on prosecuting the accused and requested a military defense counsel be assigned to the case. During my initial meetings with the prosecution, I was informed that they intend on charging the accused in the near future and plan on seeking a capital referral from the Convening Authority.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases [hereinafter ABA Guidelines], requires that counsel promptly obtain the investigative resources necessary to prepare the case, including at a minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate for the case.¹ The early assignment of a mitigation specialist to a defense team is essential, as the ABA Guidelines require:

*"counsel begin investigating mitigating evidence and assembling the defense team as early as possible - well before the prosecution has actually determined that the death penalty will be sought. These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. The case remains subject to these Guidelines until the imposition of the death penalty is no longer a legal possibility."*² (emphasis added).

¹ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 1.1 (Commentary) (2003).

² *Id.* (History of Guidelines).

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Conducting a mitigation investigation is a time consuming process. The ABA Guidelines for mitigation specialists direct that the mitigation specialist conduct one-on-one interviews with the client and the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews are necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.³ In this case, the effort required to conduct a mitigation investigation is further complicated by the fact that the evidence and witnesses needed are located in different countries. These countries have unique cultural norms and a variety of legal impediments that present difficulties in obtaining the needed information. As one example among many, the process of compiling an accurate social history is even more time-consuming and delicate when interviewing family members from foreign cultures because of the inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Also, the task of gathering documentary evidence of the client's life history is complicated by the fact that the defense is dealing with a variety of foreign and domestic agencies with their own rules, regulations and bureaucracies.

In addition to complying with the ABA Guidelines, the defense requires the assistance of a mitigation specialist at this early stage so that a mitigation package may be assembled and submitted to Convening Authority to assist in his referral decision.⁴ In the federal system, the defense's early presentation of mitigation evidence is a crucial factor in the government's decision on whether to authorize the death penalty, and the government is prohibited from making a decision until the defense has had an opportunity to present such evidence.⁵ The early assembly and presentation of mitigation evidence in this case will allow the Convening Authority to make a more informed referral decision. If the Convening Authority ultimately makes a decision to refer the charges against the accused as capital, the early work of the mitigation specialist will allow the case to move forward without unnecessary delay.

The early appointment of a mitigation specialist will also coincide with the intent of the U.S. Congress when it passed the Military Commission Act of 2009:

“(1) the fairness and effectiveness of the military commissions system under chapter 47A of title 10, United States Code (as amended by section 1802), will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases, under such chapter 47A; and

(2) defense counsel in military commission cases, particularly in capital cases, under such chapter 47A of title 10, United States

³ ABA Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, Guideline 10.11(C) (2008).

⁴ See MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, R.M.C. 406 (2010).

⁵ See United States Attorney's Manual § 9-10.120, 9-10.130 [USAM]. Under the USAM, the government must balance the aggravating factors with the mitigation factors to determine if the death penalty should be pursued. As such, the presentation of mitigation evidence by the defense is a crucial factor in the government's decision.

SUBJECT: REQUEST TO RETAIN ANNA BULKIN AS A CONFIDENTIAL DEFENSE MITIGATION SPECIALIST IN THE CASE OF U.S. V. NASHWAN AL BAQI (ISN 10026)

Code (as so amended), should be fully resourced as provided in such chapter 47A.⁶

4. Why a mitigation specialist is necessary.

As a matter of due process, an accused charged with an offense is entitled to expert assistance when necessary.⁷ Such assistance is necessary when the defense shows: (1) that expert assistance is needed, (2) how expert assistance will aid the defense, and (3) that the defense cannot perform the services requested on its own without expert assistance.⁸

a. Why the expert consultant is needed:

The United States Supreme Court has repeatedly emphasized that the Sixth Amendment right to effective representation demands, in a capital case, the thorough investigation and development of mitigating circumstances. A defense counsel's failure to conduct such an investigation renders him ineffective.⁹ As such, counsel is required to investigate the client's life history and his emotional and psychological make-up. This is a tenuous and time consuming process requiring specialized skill and knowledge,¹⁰ as the mitigation specialist "coordinates a multi-generational investigation of the defendant's family; identifies medical, psychological, and other issues requiring expert evaluation; and assists attorneys in locating experts and providing documentary materials for the experts to review."¹¹ Without a fully developed life history, it is impossible to ascertain the existence of certain physical injuries, ailments or other life experiences that may sway the referral decision of the Convening Authority and/or the panel's ultimate decision regarding imposition of sentence. In the military, the importance of having a mitigation specialist as part of the defense team has been recognized in a number of capital cases, to include: United States v. Quintanilla, United States v. Roukis, and United States v. Ronghi.¹² Most recently, in the cases of United States v. Akbar, United States v. Martinez, United States v. Al-Nashiri, and United States v. Mohammad, et al., military convening authorities authorized the pre-referral funding of defense mitigation specialists.

Additionally, Military Commission Rule 406 creates a procedural requirement that before charges may be referred for trial by a military commission, they must be referred to the Legal

⁶ Military Commissions Act of 2009, Pub. L. 111-84 § 1807 (2009); see Sen. Rep. No. 110-335, at 863 (2008) ("The conferees further expect the Secretary . . . to give appropriate consideration to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) and other comparable guidelines.").

⁷ R.M.C. 703; see United States v. Burnette, 29 M.J. 473 (C.M.A. 1990).

⁸ United States v. Garries, 22 M.J. 288 (C.M.A. 1986).

⁹ See Wiggins v. Smith, 539 U.S. 510 (2003) (failure of trial attorney to investigate defendant's background and present mitigating evidence violated Sixth Amendment right to effective assistance of counsel); Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); United States v. Kreutzer, 61 M.J. 293 (C.A.A.F. 2005) (denial of mitigation specialist for the appellant amounted to denial of due process).

¹⁰ See Kreutzer, 61 M.J. at 302-03.

¹¹ Jon B. Gould and Lisa Greenman, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, at 74 (September 2010).

¹² See Dwight H. Sullivan, Raising the Bar: Mitigation Specialists in Military Capital Litigation, 12 Geo. Mason U. Civ. Rts. L.J. 199, 227 (2002).

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Advisor for consideration and written legal advice to the Convening Authority. This written advice must make an independent and informed appraisal of the charges and evidence, and should include a discussion of significant aggravating, extenuating, and mitigating factors. Advice that is incorrect or so incomplete as to be misleading may result in the advice, and the subsequent referral, being defective.¹³ It is the Convening Authority's responsibility to consider the case in its entirety, which includes circumstances in aggravation and mitigation, prior to making an informed decision whether to refer this case as capital or non-capital.

As a matter of due process, the defense should be afforded the opportunity to present the Convening Authority with a defense mitigation package for his consideration prior to the referral decision. As stated above, the U.S. Attorney's office is required to consider mitigation evidence submitted by the defense before making the decision to charge a case capital.¹⁴ Without such an opportunity, the Convening Authority's referral decision will be based entirely on information received from the prosecution without the advantage of viewing possible circumstances in mitigation. This will make it impossible for the Convening Authority to render an independent and informed referral decision, and his referral action will amount to a mere rubber stamp for the prosecution.

b. What the expert will accomplish for the accused.

The mitigation specialist will conduct an extensive and detailed investigation into the circumstances of the alleged offenses, the accused's character and background, any evidence relating to the moral blameworthiness of the accused, aggravating evidence that may be used by the prosecutor at the penalty phase to secure a sentence of death, and any additional evidence that would mitigate against a sentence of death.¹⁵ The mitigation specialist will coordinate "a multi-generational investigation of the defendant's family; identify medical, psychological, and other issues requiring expert evaluation; and assist the defense in locating experts and providing documentary materials for the experts to review."¹⁶ The mitigation specialist will also coordinate an investigation of the accused's life history, to include traveling and interviewing family members, friends, acquaintances and others; identifying issues requiring evaluation by psychologists, psychiatrists and other medical professionals; and assisting the defense attorney with preparing a pre-referral submission to the Convening Authority and preparing for trial.

¹³ R.M.C. 406(b) (Discussion).

¹⁴ See USAM § 9-10.030.

¹⁵ Wiggins, 539 U.S. at 522 (finding that counsel have a constitutional duty to conduct an investigation into the defendant's background, as well as, to gather evidence relating to the defendant's personal moral culpability); Williams v. Taylor, 529 U.S. 362, 415 (2000) (stating that counsel has a duty to conduct a requisite, diligent investigation into his client's background); Rompilla v. Beard, 545 U.S. 374 (2005) (holding that even when a capital defendant and his family members have suggested that no mitigating evidence is available, defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase); see ABA Guidelines § 11.4.1(B).

¹⁶ Jon B. Gould and Lisa Greenman, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES: UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES, at 74 (September 2010).

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c. Why the defense counsel is unable to gather and present the evidence.

The defense lacks the training and expertise necessary to perform the function of a mitigation specialist. Developing and presenting mitigating evidence is a complex and time-consuming process that requires an expert who possesses extensive training and experience in the defense of capital cases.¹⁷ “Developing mitigation evidence through life-history investigation involves hundreds of hours of work-with meticulous attention to detail, painstaking efforts to decode and decipher old records, patience and sensitivity in eliciting disclosures from both witnesses and the client.”¹⁸

Two features of a life-history investigation render the process too complex for a lay attorney to accomplish. First, the inquiry is multigenerational, requiring expertise to identify genetic predispositions, *in utero* exposures, and historic influences of cultures and subcultures. Second, the investigation is multidisciplinary, requiring expertise to identify biological, psychological, and social factors affecting the client’s functioning.¹⁹

The defense does not have sufficient academic, technical, or practical experience necessary to properly conduct such an investigation. The cost and time for the defense to gain sufficient academic, technical, and practical experience necessary to competently collect and evaluate such evidence in this case would be impracticable. Without the assistance of a mitigation specialist the defense will be unable to prepare an adequate defense, let alone a zealous one, which will result in a denial of due process.²⁰

5. Estimated cost.

Based upon the unique nature and circumstances involving the client’s culture and background, the defense estimates that the initial life history investigation, including the preparation of the bio-psycho-social history, and the identification and consultation with other experts, will initially require approximately 800 hours of the mitigation specialist’s time at \$115 per hour, for a total cost of \$92,000 plus travel expenses. The defense reserves the right to petition the Convening Authority for additional funding if the case is referred capital.

6. The early employment of a defense mitigation specialist is in keeping with the minimum standards required for the defense of a capital eligible case. Anna Bulkin’s expertise will enable the defense to obtain mitigation evidence that is necessary for the Convening Authority to make an informed and balanced decision regarding whether a capital referral is warranted. Additionally, if a capital referral is made, Anna Bulkin’s early work will prevent unnecessary pretrial delays in the proceeding. As such, a denial of this request could result in a violation of the accused’s rights to due process, military due process, equal protection, effective assistance of counsel, compulsory process, and a speedy trial. If this request is denied, the defense respectfully requests the legal basis for the denial.

¹⁷ Id.

¹⁸ Russell Stetler, Mitigation Evidence in Capital Cases, The Champion, Jan./Feb. 1999, at 39.

¹⁹ Russell Stetler, Why Capital Cases Require Mitigation Specialists (visited Oct. 2, 2012), http://www.nlada.org/DMS/Documents/998934720.005/document_info.

²⁰ See United States v. Robinson, 39 M.J. 88 (C.M.A. 1994).

SUBJECT: REQUEST TO RETAIN ANNA BULKIN AS A CONFIDENTIAL DEFENSE
MITIGATION SPECIALIST IN THE CASE OF U.S. V. NASHWAN AL BAQI
(ISN 10026)

7. Please contact me at (703) 696-9490 [REDACTED] or sean.gleason@usmc.mil [REDACTED] if any additional
information is required to evaluate and process this request.

Respectfully submitted,



S. M. GLEASON
Major, U.S. Marine Corps
Detailed Defense Counsel

Enclosure:
Curriculum Vitae of Anna Bulkin

Copy to:
OCDC
OMC-P

Anna Bulkin

PO Box 260, Newton, Massachusetts 02464

Work: (617) 969-0667 • Fax: (617) 969-0911 • E-mail: abulkinsw@comcast.net

HIGHLIGHTS OF QUALIFICATIONS

Mitigation and sentencing advocacy experience
Licensed Social Worker with 15 years of experience in defense-based practice
Skilled in clinical interviewing, alternative sentence planning, and client advocacy
Experienced in forensic evaluation and treatment planning

EXPERIENCE

A.BULKIN CONSULTING, Boston, MA

Sentencing Advocate and Mitigation Specialist, 2002-Present

Develop mitigation for death-eligible and death penalty cases in state (Connecticut and Pennsylvania) and federal (Connecticut, Massachusetts, Puerto Rico, Western District of Pennsylvania, Eastern District of New York, Northern District of New York, Southern District of New York, Western District of Michigan, Vermont) courts. Provide alternative sentencing and dispositional services for juvenile, youthful offender, and adult cases in juvenile, state, and federal courts (Massachusetts, Maine, New Hampshire). Worked on a terrorism case (Southern District of New York) – have TS/SCI clearance.

- Conduct thorough interviews of clients, witnesses and collateral contacts.
- Comprehensive record collection.
- Prepare written assessments, treatment plans, and Aid in Sentencing reports to assist defense attorneys in negotiating plea agreements and sentencing outcomes.
- Work collaboratively with the criminal defense team to develop defense strategies and alternative sentencing options.
- Access resources for clients from a variety of private and public service systems, including corrections, child welfare, mental health, education, substance abuse, and public assistance, to develop alternatives to incarceration.

COMMITTEE FOR PUBLIC COUNSEL SERVICES, Youth Advocacy Project, Boston, MA

Consultant, 2007-2009

Social Work Coordinator, 1999-2003

Social Worker, 1997-1999

Managed all aspects of the social services team of a multi-disciplinary initiative of the Massachusetts public defender agency that provides comprehensive criminal defense and advocacy to court-involved children and young adults in Boston. Participated in the Project's management team with the Director, Supervising Attorney, EdLaw Project Coordinator, and Staff Psychologist.

In addition to working collaboratively with defense teams, conducting interviews, preparing assessments and plans, and accessing resources (described above):

Anna Bulkin, Page 2

- ♦ Testified in court, and advocated for clients with probation officers, prosecutors, and judges.
- ♦ Assisted the Senior Trial Counsel and Trial Unit attorneys with alternative sentencing for adult clients, including a second-degree murder case.
- ♦ Participated in community coalitions and networks, representing the interests of court-involved youth.
- ♦ Supervised staff social workers and interns, and assisted in the training of legal interns.
- ♦ Trained new lawyers agency-wide on working with social workers in defense-based practice.
- ♦ Co-facilitated trainings with an attorney for youth and community youthworkers on the juvenile justice system and the rights of children in Massachusetts.

JUSTICE RESOURCE INSTITUTE, Evaluation Program, Boston, MA

Clinician, 1994-1997

Conducted thorough inpatient evaluations of adolescent male offenders, ages 13-18, in a short-term secure diagnostic setting to assist the Massachusetts Department of Youth Services, the state's youth correctional agency, in making appropriate placement decisions.

- ♦ Provided individual, group and family treatment; clinical case management; aggression control and mastery groups; sex offender specific therapy; social skills enhancement; and educational training.
- ♦ Coordinated the multi-disciplinary treatment team that included clients and their families, clinical and childcare staff, attorneys, caseworkers and other service providers.

ADDITIONAL EXPERIENCE

Head Counselor & Group Facilitator, Ramapo Anchorage Camp, Rhinebeck, NY, 1987-1999

Family Worker & Social Work Intern, Saint Jude's Home For Boys, Detroit, MI, 1993-1994

Social Work Intern, Franklin Wright Settlements, Detroit, MI, 1992-1993

Assistant Teacher, University of Michigan Family Development Center, Ann Arbor, MI, 1991-1992

Youth Worker, Parson's Child & Family Services, Albany, NY, 1988

EDUCATION & LICENSURE

LICSW (Licensed Independent Clinical Social Worker), Commonwealth of Massachusetts, 1996

LCSW (Licensed Certified Social Worker), Commonwealth of Massachusetts, 1994

M.S.W., Social Work – Interpersonal Practice, University of Michigan, Ann Arbor, MI, 1994

B.A., Psychology and Women's Studies, University of Michigan, Ann Arbor, MI, 1992

PROFESSIONAL MEMBERSHIPS & AFFILIATIONS

Vice Chair, National Alliance of Sentencing Advocates and Mitigation Specialists, NLADA, 2008 - 2010

Executive Committee Member, National Alliance of Sentencing Advocates and Mitigation Specialists, NLADA, 2007 – 2010, 2012

Professional Member, National Legal Aid & Defender Association, 2002 - present

Professional Member, National Alliance of Sentencing Advocates and Mitigation Specialists, 1998 - present

Professional Member, National Association of Social Workers, 1993-1996, 2004 - present

Advisory Board Member, Rediscovery House, Cambridge, MA 2001 - 2004

Anna Bulkin, Page 3

PROFESSIONAL PRESENTATIONS

"Interviewing Child Witnesses," Life in the Balance – NASAMS 18th Annual Sentencing Advocacy Training, Orlando 2011
"Differences and Commonalities between Capital Mitigation, Non-Capital Sentencing Advocacy, and Juvenile Sentencing Advocacy," Life in the Balance – NASAMS 18th Annual Sentencing Advocacy Training, Orlando 2011
"Thinking about Mitigation in Our Cases," Rhode Island Public Defenders Office, 2010
"Get in, Get Out: Interviewing Techniques," Life in the Balance – NASAMS 16th Annual Sentencing Advocacy Training, New Orleans 2009
"Navigating the Land of Private Practice," Life in the Balance – NASAMS 16th Annual Sentencing Advocacy Training, New Orleans 2009
"Re-Thinking Report Writing for Courts," Committee for Public Counsel Services – Worcester, MA 2008
"So You Want to Go Into Private Practice – What to Know Before and After Taking the Plunge," National Alliance of Sentencing Advocates and Mitigation Specialists, Baltimore, 2006
"Using Experts in Legal Cases," Boston College Law School, 2003
"DYS: The Final Frontier," Massachusetts Continuing Legal Education, 2002
"Using a Social Worker in Defense-Based Practice," Committee for Public Counsel Services' Attorney Training, Boston, MA, 2000-2002
"Challenge 2006: Building a Safe & Healthy Future for Boston Youth," The Boston Coalition, 2001
"Representation of Juveniles and Youthful Offenders," Committee for Public Counsel Services – Pittsfield, MA 2001
"Kids and the Law," City of Boston Youth Symposium, Boston, MA, 2001
"Understanding the Multi-Systems that Affect Kids' Lives," Teachers' Institute, City on a Hill Charter School, Boston, MA, 2001
"Law and Community-Based Legal Issues," Families First, Boston, MA 2000
"Withstanding Zero Tolerance: Implications and Advocacy Strategies," Massachusetts Bar Association, Boston, MA, 2000

AWARDS

Award for Extraordinary Performance, Committee for Public Counsel Services, 2001
Joe Murphy Award for Outstanding Social Work Performance, Committee for Public Counsel Services, 1999

ATTACHMENT C



Convening Authority

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

October 5, 2012

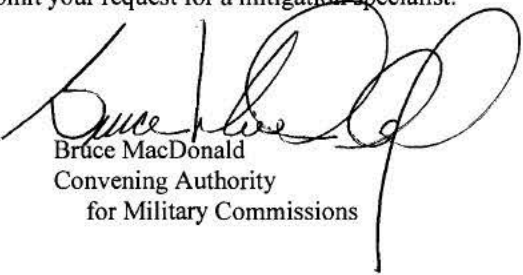
MEMORANDUM FOR MAJOR S.M. GLEASON, USMC, OCDC

SUBJECT: Request for Mitigation Specialist - Al Baqi a/k/a Hadi al-Iraqi

I considered carefully your request dated October 3, 2012, for the appointment of Ms. Anna Bulkin to assist the *Al Baqi* defense team "as a confidential defense expert consultant in the area of mitigation." For the reasons set forth below, I deny your request.

Under Rule for Military Commission 703(d), I may only approve requests for expert assistance where the requesting party demonstrates the necessity for the assistance. In order to demonstrate necessity, a party must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the counsel were unable to gather and present the evidence that the expert would be able to develop. See *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

Your request is premature. There are no charges pending against Mr. Al Baqi. Moreover, according to the prosecution, no decision has been made as to when charges may be sworn against your client or, if sworn, whether such charges would be forwarded with a recommendation for a capital referral. Accordingly, your request fails to demonstrate the necessity for Ms. Bulkin's assistance. See *Bresnahan*, 62 M.J. at 143. If, however, charges are subsequently sworn against Mr. Al Baqi, and forwarded to me with a recommendation for a capital referral, you may, at that time, resubmit your request for a mitigation specialist.


Bruce MacDonald
Convening Authority
for Military Commissions

Copy to:
Trial Counsel

Printed on  Recycled Paper

ATTACHMENT D

United States v. al Hadi

APPELLATE EXHIBIT 150

(Pages 27 - 40)

Ex Parte

Defense Motion

**APPELLATE EXHIBIT 150 is located in the
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. al Hadi

APPELLATE EXHIBIT 150

ATTACHMENT E

United States v. al Hadi

APPELLATE EXHIBIT 150

(Pages 42 - 44)

Ex Parte

Defense Motion

**APPELLATE EXHIBIT 150 is located in the
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. al Hadi

APPELLATE EXHIBIT 150

ATTACHMENT F

United States v. al Hadi

APPELLATE EXHIBIT 150

(Pages 46 - 54)

Ex Parte

Defense Motion

**APPELLATE EXHIBIT 150 is located in the
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. al Hadi

APPELLATE EXHIBIT 150

ATTACHMENT G

United States v. al Hadi

APPELLATE EXHIBIT 150

(Pages 56 - 58)

Ex Parte

Defense Motion

**APPELLATE EXHIBIT 150 is located in the
original record of trial.**

**POC: Chief, Office of Court Administration
Office of Military Commissions**

United States v. al Hadi

APPELLATE EXHIBIT 150