UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	**DEFENSE MOTION TO ALLOW *IN CAMERA, EX PARTE* REQUESTS FOR EXPERT ASSISTANCE WITH LIMITED NOTICE TO THE OPPOSING PARTY IN COMPLIANCE WITH R.M.C. 703** October 19, 2011[1]

1. **Timeliness**: This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.

2. **Relief Requested**: The defense respectfully requests that the Military Judge allow *ex parte* requests for expert assistance to be submitted *ex parte* by a party to the Convening Authority with notice to the opposing party.

3. **Overview**: R.M.C. 703 governs the procedures by which either party may seek Government funding for expert assistance. The basis of the rule is that "the opportunity to obtain witnesses shall be comparable to the opportunity available to a criminal defendant in a Court of the United States under Article III of the Constitution." R.M.C. 703(a), discussion; *see also* 10 U.S.C. § 949j(a)(1). Accordingly, R.M.C. 703(d) should be read to mirror the procedures in an Article III court wherein a defendant may submit requests for funding of experts *in camera* and *ex parte*, to the funding authority.

4. **Burden of Proof and Persuasion**: The defense bears the burden of persuasion as the moving party on this motion.

[1] This motion was filed outside of normal business hours on 19 October 2011.

5. Facts: Mr. Al-Nashiri has been in the custody of the United States Government since 2002. *See* Summary of Evidence of Combatant Status Review Tribunal, dtd 8 Feb 07 (para. 3n). He has no ability to pay for the assistance that is reasonably necessary to ensure a fundamentally fair trial, and so must depend on the government's financial resources in preparing an adequate defense. In preparing the defense, counsel for Mr. Al-Nashiri anticipate that they will file additional applications for funds for defense expenses and the appointment of various experts with the Convening Authority.

Mr. Al-Nashiri and counsel have identified areas in which expert assistance is required. The defense has identified specific experts who are willing to assist. For the reasons that follow, the defense submits that it must be permitted to make application for experts and defense resources *ex parte* – that is, in the absence of an attorney associated with the prosecution – in order to ensure a fundamentally fair process.

On two occasions, the defense has sought permission from the Convening Authority to submit requests for appointment and funding of experts to be submitted *in camera* and *ex parte.* (*See* Attachment A and B). On both occasions, the Convening Authority refused to grant this request. There is no reason to believe that future similar requests will be granted. On 28 September 2011 the Convening Authority referred the case as a capital case.

6. Argument:

Death is Different

Since this is to be a capital prosecution, exacting standards must be met to assure that it is fair. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson* v. *North Carolina,* 428 U.S. 280, 305 (1976).

Because "death is different," the United States Constitution requires that "'extraordinary measures [be taken] to insure that [Mr. Al-Nashiri] 'is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell* v. *Mississippi,* 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings* v. *Oklahoma,* 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari* v. *Bolden,* 510 U.S. 383, 393 (1994) (quoting *Stricklandv. Washington,* 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)), *see also Kyles v. Whitley,* 514 U.S. 419, 422 (1995) (noting that the Court's duty to search for constitutional error with painstaking care is never more exacting than in a capital case.") (quoting *Burger v. Kemp,* 483 U.S. 776, 785 (1987)); *see also* Colonel Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 41 (2006).[2]

This elevated level of due process applies to all stages of the proceedings. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion, we have invalidated procedural rules that *tended* to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Beck v. Alabama,* 447 U.S. 625, 638 (1980) (emphasis added). Furthermore, the concept that death is different has been adopted in the military court's review of death cases. *See Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (recognizing that the unique severity

[2] Highlighting that the cases of *United States v. Thomas*, 46 M.J. 311 (1997) and *United States v. Simoy*, 50 M.J. 1 (1998), were reversed because the military judge instructed the members to vote on the death sentence first, as opposed to what was required—voting from lightest sentence to the most severe. However, a similar error in a non-capital case, *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986), did not result in reversible error.

of a death sentence infuses the legal process with special protections that ensure a fair and reliable trial); *see also United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008)(recognizing the concept that "death is different" in reviewing capital cases).

A. The Procedures Contemplated by the Defense Provide the Reading of R.M.C. 703(d) that is most Consistent with the Military Commissions Act and that allow for Appropriate Review by the Military Judge.

The defense contemplates the following procedure, which is the reading of Rule 703(d) that is most consistent with its language and the purposes of the Military Commissions Act. If the defense seeks to employ an expert, the defense will submit its detailed request to the Convening Authority. The request would not be served on the prosecution. Only notice, as required by the Rule, would be served upon the prosecution. This will allow the defense to make the thorough showing necessary without disclosing to the prosecution attorney client or work product protected materials.

To clarify what Mr. Al-Nashiri does not seek, this is not a request for the defense to have communications with the commission off the record. Rather, Mr. Al-Nashiri would ask that any representations made by the defense related to the need for experts, investigators, and/or for expenses associated with investigating this case should be on the record, before a court reporter. Any pleadings related thereto and the transcripts of any argument made to the commission and the actions authorized should also be on the record. All the defense asks is that they remain under seal to place the prosecution and defense on a more even playing field.

Of course, the Prosecution may suggest that it will rarely, if ever need to seek government funding for its experts. Most of the experts the Prosecution will seek to employ are already government employees or contractors. To be sure, the Prosecution enjoys the benefit of government-paid investigators, scientists, forensic experts, linguists, and explosive experts who

have worked on this case for over a decade. The government has secured orders and warrants to gather evidence, and investigated the case as it so pleases – all without judicial supervision. As a consequence, if this Commission follows the Convening Authority's present course of conduct, *only* the defense will, as a practical matter, have to disclose its strategy and work product in order to obtain expert assistance. This would give the prosecution an advantage that would render the system unconstitutional and would violate the defendant's rights guaranteed by the Military Commissions Act of 2009, the Detainee Treatment Act of 2005, and the Fifth, Sixth and Eighth amendments to the Constitution of the United States of America.

If the Convening Authority's interpretation of Rule 703(d) is correct, the Prosecution is free to prosecute the case without giving the defense prior blueprint of its theories, witnesses, and evidence. Unlike the defense, the Prosecutor does not have to disclose its case preparation including expert selection. Unlike the defense, the Prosecutor does not have to demonstrate a particularized need for assistance and answer objections from opposing counsel.

The government has had innumerable advantages in the decade that it has prepared its case. While in no way achieving a balance, the adoption of a procedural system allowing *ex parte* requests for expert assistance to the Convening Authority would move the Commission somewhat closer to the balance that fundamental fairness requires and that Congress clearly had in mind when it decided that military commission accused shall have "the opportunity to obtain witnesses and evidence . . . comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution." 10 U.S.C. § 949j(a)(1). Any other holding in a capital case violates the defendant's rights.

B. Ex Parte Submissions Are Standard Practice in Article III Courts, Especially in Death Penalty Cases.

This is a capital case. And the Government of the United States with its power and

resources seeks to kill Mr. Al-Nashiri if he is convicted of any of the capital counts. As stated more fully below, his right to make *ex parte* applications for expert assistance is supported by the United States Supreme Court's decision in *Ake* v. *Oklahoma,* 470 U.S. 68*, 77* (1985) and the requirements set out in the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

It is standard practice in criminal cases in Article III courts for the defense to seek permission for the funding of expert witnesses *in camera and ex parte*. In Article III Courts, *ex parte* requests for expert assistance are governed by 18 U.S.C § 3006A(e). One of Congress' concerns in enacting this legislation was to prevent the defense from being forced to disclose its strategy prematurely simply in order to obtain the resources it needed.[3]

Ex parte treatment is uniformly given in federal capital cases, where there are numerous and on-going requests for expert assistance. To learned counsel's knowledge, there are no federal capital cases where requests for expert assistance were not considered by the Court and the Funding Authority *ex parte*. *See* Declaration of Kevin McNalley, Federal Capital Resource Counsel (Attachment C).

The federal practice is that the prosecution receives notice that an *in camera* and *ex parte* request was filed with the Court. But the defense is not forced, as it is here, to divulge the most intimate details of its strategy, which are often necessary for demonstrating the need for expert assistance. Congress was well aware of this procedure and in requiring that military commission defendants have the same access to resources that they would in an Article III court, a comparable procedure must be required here. *See* 10 U.S.C. § 949j(a)(1).

[3] J. Michael Montgomery, *Death Is Different:* Kreutzer *and the Right to a Mitigation Specialist in Military Capital Offense Cases*, ARMY LAW., Feb. 2007, at 13 n.232.

C. Properly Read, R.M.C. 703(d) Mirrors the Procedures Utilized by Article III Courts.

Rule 703, by its plain terms, applies to both the prosecution and the defense. R.M.C. 703(d) (2010). It provides that when a party seeks to employ an expert or consultant at government expense, a request for funding shall be made of the Convening Authority. This request shall include a complete statement why employment of the expert is necessary and the estimated cost of employment. The rule provides only that "notice" shall be given to the opposing party. It does not provide that the detailed request shall be served upon the opposing party. Under the Rule, it is the responsibility of the Convening Authority to determine if the expert is necessary and if the Government can provide an adequate substitute. An adverse determination by the Convening Authority may be reviewed by the Judge.

In light of Congress' considered judgment to use Article III court procedure as a baseline, Rule 703(d) should be read to mirror the Article III practice rather than court-martial practice. The requirement of "notice" in federal court, unlike the practice in courts-martial, does not support the need for one party to provide its entire expert requests to the other party. This is so for three reasons.

i. The Convening Authority serves a fundamentally different role in a military commission than he or she does in a court-martial.

In a court-martial, the convening authority's *primary* role is to fulfill his or her core military mission. The duty to administer courts-martial is a collateral, *ad hoc* responsibility. The primary mission of the military commander requires that he or she not be burdened with researching the availability of resources for a defendant and the input of counsel for the government serves to augment the convening authority's limited time and expertise in criminal justice matters.

The Office of the Convening Authority for military commissions, by contrast, was created solely to administer military commissions. The Convening Authority here has no other mission. Under the Regulations for Trial by Military Commissions (2007) ("RTMC"), the Office of the Convening Authority's duties include, *inter alia*, the responsibility "to order that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the convening authority for a fair trial" and "employ those experts requested by a party and found by the convening authority to be relevant and necessary." RTMC 2-9, 2-10.

Indeed, the Convening Authority is himself an attorney, whose prior duty in the government was to serve as the Judge Advocate General of the Navy. During his military service, he assisted convening authorities in courts-martial as to whether the defense's requests for resources were appropriate. In short, the Convening Authority, with its extensive staff has no need for input from either party on the other side of the request for expert assistance.

ii. The context of a military commission for the trial of the declared enemies of the United States is fundamentally different than the courts-martial of active members of an all-volunteer military establishment.

Rule 703 is expressly reciprocal. This Rule was drafted in contemplation of trying alleged terrorists. The drafters of the Rule certainly did not want counsel for the accused to have any role in the selection of experts that the Government can utilize. Given that in some circumstances the Prosecution may wish to keep the identity of its experts hidden as long as possible, it is therefore unreasonable to assume that the drafters of this Rule sought to force early disclosure by the Prosecution of the experts it sought to utilize in the preparation of its case. Unless the Commission concludes that the language of Rule 703(d) is a cynical pretext with no real meaning, the only conclusion is that there is a difference between a request, which must be

detailed, and notice, which may be quite terse. The Convening Authority gets the detailed request; the opposing party gets notice.

iii. The input of the prosecution provides no practical benefit that the Convening Authority does not already enjoy.

The Convening Authority has thus far justified his refusal to entertain *ex parte* defense requests for expert assistance on the ground that "[t]he process helps me evaluate the need for the expert assistance and determine whether alternatives are preferable, in order to avoid wasteful expenditures." *See* Attachments A & B. But as stated above Rule 703(d) is reciprocal. If the Convening Authority's interpretation is correct then the defense, or the accused in a *pro se* status, is responsible for providing input to the Convening Authority on the government's expert request in order to come up with preferable "alternatives" or to help in "avoiding wasteful expenditures." Such an interpretation is contrary to the role of defense counsel or the accused. And it is equally contrary to the role of the prosecution in an adversarial criminal trial, where the prosecution is seeking the death of the defendant. Unlike the military units that must administer courts-martial, the Office of the Convening Authority is uniquely structured to consider requests for expert assistance and arrange alternatives, if necessary, for the requested expert services.

D. A Requirement that the Prosecution be Involved in the Decision to Fund Defense Experts Violates the Constitution of the United States.

i. *The Supreme Court's Decisions in Ake* v. *Oklahoma* and *Wardius v. Oregon* Require *Ex Parte* Applications for Services.

Ake v. *Oklahoma,* 470 U.S. 68 (1985), instructs courts to conduct *ex parte* hearings to determine whether the Constitution entitles the defendant to his requested experts. In *Ake,* the Supreme Court determined that due process required the appointment of a mental health expert when a defendant's mental health is likely to be a significant factor at trial. *Id.* at 74. Regarding the procedure to be followed in enforcing this right, the *Ake* Court directed the trial court to

appoint a mental health expert to assist the defendant when the defendant makes an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense. *Id.* at 82-83. The *Ake* Court's explicit reference to an *ex parte* procedure was consistent with its goal of fundamental fairness because it permitted the defendant to retain a mental health expert while safeguarding his defense strategy from the government.

Conversely, the Convening Authority's apparent interpretation of R.M.C. 703 requires Mr. Al-Nashiri to make many disclosures not contemplated by the *ex parte* proceeding contemplated under *Ake*. These disclosures prejudice the defense in several ways. First, the disclosures provide the Prosecution with accelerated discovery of testifying experts. Second, they give the Prosecution a window into defense strategy and potential factual defenses. Third, they give the Prosecution notice of non-testifying defense experts – that is, experts whom the defense ultimately elects not to call at trial. All of these prejudicial disclosures provide the Prosecution a seat at the defense table and plenty of time for preparation relating to those witnesses and may alert the Prosecution to holes in its own case. The Prosecution can then use this knowledge to prepare or tailor its pre-trial investigation, opening and closing statements, presentation of witnesses and evidence, and cross examination.

The R.M.C. 703 process can also provide the Prosecution with notice of witnesses the defense retained to testify at trial, but then withdrew. This may alert the Prosecution that the expert has uncovered damaging evidence that the Prosecution would otherwise not have discovered. Because of the potential for alerting the Prosecution to such damaging evidence, counsel to an indigent accused will be forced to explore potential defenses more conservatively. Thus, in order to comply with the holding and spirit of *Ake,* this commission should follow the procedure set forth in *Ake* and allow for an *ex parte* hearing on Mr. Al-Nashiri's motions for

expert assistance.

While the Supreme Court has never directly addressed the issue of prosecutorial participation in the decisions about expert funding, the Court in *Wardius v. Oregon*, 412 U.S. 470 (1973) addressed a similar issue. In *Wardius*, the Court balanced the state and private interests involved to find that an Oregon "notice of alibi" statute violated a defendant's due process rights because it did not require the prosecution to provide reciprocal discovery once the defendant disclosed his potential alibi witnesses. The Court noted that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id*. at 476.

Prosecutorial participation in decisions regarding expert appointment poses a similar dilemma. In order to obtain expert assistance, Mr. Al-Nashiri is required to disclose material to the Prosecution with, if the Convening Authority is correct, no practical reciprocal benefit, giving the Prosecution a substantial tactical advantage. Although the disclosure by the defendant is not formally compelled, Mr. Al-Nashiri risks not receiving necessary assistance if he does not disclose the nature of his need for assistance with sufficient particularity. The possibility that the defense will be chilled from requesting an expert or other assistance in order to protect the confidentiality of defense information risks burdening Mr. Al-Nashiri's rights to compulsory process, to effective assistance of counsel, against self-incrimination, and to expert assistance at trial. When the defense applies for expert funds and discloses his strategy, work product and client information to the prosecution, the prosecution receives a substantial tactical advantage by providing it with information it can use to tailor its pretrial evidence, and cross-examination.

ii. Requiring the Disclosure of Funding Requests to the Prosecution Violates Mr. Al-Nashiri's Fifth Amendment against Self-Incrimination.

The Fifth Amendment guarantees that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." Several state courts have noted that the prosecution's presence at a hearing for expert assistance can violate the defendant's Fifth Amendment privilege. The Fifth Amendment "protects an accused only from . . . provid[ing] the State with evidence of a testimonial or communicative nature." Testimonial communications are communications that "explicitly or implicitly, relate a factual assertion or disclose information." Thomas Bassett, THE NECESSITY OF EX PARTE PROCEEDINGS FOR INDIGENT CRIMINAL DEFENDANTS, 55 J. MISSOURI B. 32, 33 (1999). Thus, in this case, the explanation for expert services "relate[s] a factual assertion or disclose[s] information," and qualifies as "testimonial" because when defendants explain why an expert is necessary to their case they must disclose facts to support their argument.

Communications during *ex parte* hearings may disclose self-incriminating information because they may concede that a defendant performed a culpable act. Likewise, expert requests may "furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The Supreme Court has therefore insisted on confidentiality procedures when a defendant is compelled to disclose information, which could "furnish a link in the chain of evidence that could lead to prosecution, as well as evidence that an individual reasonably believes could be used against him in a criminal prosecution." *Maness v. Myers*, 419 U.S. 449, 461 (1975). When the Prosecution gets to review all requests for expert funding, it may learn of potential defense strategies and theories about the case. These disclosures are links "in the chain of evidence needed to prosecute the claimant" because they

could alert the prosecution to evidence of which it was previously unaware or allow it to focus its investigation toward rebutting specific theories that the defense discloses at the hearing.

While a defendant's testimony must be compelled in order to qualify for the self-incrimination privilege, certain forms of indirect compulsion occurs when the defendant must give up one constitutional right in order to enforce another. In *Simmons v. United States*, 390 U.S. 977 (1968), the Supreme Court concluded that the state may not force defendants to give up their self-incrimination privilege in order to assert their Fourth Amendment privilege to exclude evidence illegally seized because the practice would compromise defendants' Fourth Amendment rights. The Court in *Simmons* held that the state may not use testimony against the defendant that he made to establish standing to assert his Fourth Amendment right to exclude evidence obtained by an unreasonable search and seizure. Similarly, open hearings for expert assistance force defendants to choose between their Fifth Amendment privilege against self-incrimination and their statutory and constitutional right to expert assistance. Just as the Court in *Simmons* was concerned about the potential chill that the rule at issue would place on defendants' willingness to assert their Fourth Amendment rights, there is a danger that open hearings for expert funding may inhibit defendants' willingness to assert his right to the effective assistance of experts.

To assess whether testimony is indirectly compelled, courts have balanced the defendant's Fifth Amendment interests against the value of the challenged practice. An open hearing forces the defendant to give the prosecution pre-discovery access to defense theories and strategies that may "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Conversely, the Prosecution has no grounds upon which to argue that a particular

expert would be unnecessary to the defense because the Prosecution will know very little about the defense's strategy at that stage of the proceedings.

Indeed, at the earliest stages of this proceeding, the defense may not have a fully formed strategy. The Prosecution's only possible contribution to the hearing would be to urge the court not to waste governmental funds, to request alternative experts or to cynically attempt to gain even more advantage in its effort to prosecute Mr. Al-Nashiri. The Convening Authority is tasked with balancing the government's fiscal interests with Mr. al Nashiri's right to an adequate defense and the Convening Authority's staff can inquire with the relevant governmental departments as to whether alternative experts are available just as easily as attorneys for the Prosecution. In the context of hearings for expert funding, the defendant's Fifth Amendment interest in remaining silent outweighs the Prosecution's interest in participating in the funding decision. Consequently, the procedure contemplated by the Convening Authority for expert funding compels a defendant to disclose self-incriminating testimony and violates the defendant's statutory and Fifth Amendment rights against self incrimination.

iii. Requiring the Disclosure of Funding Requests to the Prosecution Violates Mr. Al-Nashiri's Statutory and Constitutional Right under the Sixth Amendment to the Effective Assistance of Counsel.

An open hearing for expert funding burdens Al-Nashiri's statutory right under the Military Commissions Act and his Sixth Amendment right to effective assistance of counsel. 10 U.S.C. §948k (2009). A defendant's right to effective assistance of counsel is not only violated when the attorney fails to perform as he or she should, but also when the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

In *United States v. Cronic*, 466 U.S. 648 (1984), the Court examined whether the trial judge violated the defendant's right to effective assistance of counsel when it appointed an

inexperienced real estate attorney to defend a complex mail fraud case and gave the attorney only twenty-five days to prepare for trial. The issue was not the attorney's own poor performance but whether the government placed the attorney in such a situation that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id*. at 659-60. The Court's focus was the lawyers particular abilities, but whether the trial court's actions caused a breakdown in the adversarial process.

Similarly, a consideration of expert funding forces the defense to choose between revealing the defense strategy or sacrificing the client's constitutional right to expert or investigative assistance. Should the defense hire an expert who uncovers evidence that is adverse to the defendant's case, the failure to notify the Prosecution that it intends to introduce the expert at trial will alert the prosecution that the expert may have uncovered evidence favorable to its own case. Likewise, defense counsel may forgo a particular line of investigation because they do not want to alert the prosecution to the existence of evidence that may ultimately prove unfavorable.

The Supreme Court's opinions in *Williams v. Taylor,* 529 U.S. 362 (2000) and *Wiggins v. Smith,* 539 U.S. 510 (2003) both establish that counsel has an obligation to conduct a thorough investigation of the defendant's background. In order for counsel's decision to forgo a particular line of mitigation to be deemed reasonable under the performance prong in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), counsel must first have conducted a thorough mitigation investigation. Open consideration of expert funds may force Mr. Al-Nashiri to sacrifice or compromise certain mitigation strategies without investigating their viability and thereby prevent defense counsel from thoroughly investigating their clients' backgrounds. Given that *Wiggins*

and *Williams* require a reasonable mitigation investigation in order for capital counsel's performance to be effective, a practice that routinely dissuades counsel from investigating their clients' backgrounds may constitute a state-imposed impediment to effective assistance of the sort that would be presumed prejudicial under *Cronic*.

Further, the Prosecution's involvement in expert funding requests intrudes into the attorney-client relationship. In *Weatherford v. Bursey* 429 U.S. 545 (1977), the Supreme Court indicated that intentional state intrusion into attorney-client communications may violate the defendant's right to effective assistance of counsel. The Court was concerned that the fear of government intrusion would affect counsel's ability to communicate effectively with the client. The Prosecution's involvement in defense requests for expert assistance allows them to discover preliminary defense strategies that are the product of attorney-client communications and to which the Prosecution could not otherwise gain access. The defense is prejudiced by the disclosures in the way that the defendant in *Bursey* was not, namely that the Prosecution receives a wealth of attorney-client information directly for use at trial. Further, the proposed R.M.C. 703(d) procedure will chill attorney-client communications because the decision not to retain an expert may inhibit the defense from obtaining certain information about the defendant that only an expert would be able to solicit.

iv. Prosecutorial Participation in the Decision to Provide the Defense Expert Assistance Violates The Defendant's Rights To Compulsory Process under the Sixth Amendment and the M.C.A.

A defendant's Sixth Amendment right to compulsory process requires "that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987); *see also Taylor v. Illinois*, 484 U.S. 400, 408 (1988) ("Few rights are more fundamental than that of an accused to

present witnesses in his own defense . . . . Indeed, this right is an essential attribute of the adversary system itself."). The Military Commissions Act protects these rights and provides that the process to compel witnesses, "shall be similar to that which courts of the United States having criminal jurisdiction may lawfully use[.]" 10 U.S.C. 948j(2).

In *Taylor v. Illinois*, 484 U.S. 400 (1988), the defendant asserted that a statute that permitted courts to prohibit the defense from calling witnesses if it did not disclose them prior to trial violated his right to compulsory process. The Supreme Court in *Taylor* balanced the defendant's Sixth Amendment interest in introducing witnesses with the Government's interests in preventing eleventh-hour defenses and excluding unreliable evidence from trial. In that case, the Court rejected the defendant's assertion and determined that, "[t]he State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence." *Id.* at 811-812.

In applying *Taylor's* test, however, to open hearings for expert funding, courts should balance the defendant's interest in obtaining and presenting expert witnesses at trial with the State's interest in the orderly conduct of criminal trials. An open hearing for expert funding may deter a defendant from retaining an expert witness or investigator and thereby prevent the defense from developing all the relevant facts of the case. Mitigation specialists are the only defense team members with the training necessary to elicit all relevant mitigating evidence from a defendant's background. The same is true for investigators, whose training specific to investigating crimes makes them essential members of the defense team. Further, a defendant's interest in introducing expert witnesses is particularly high because expert witnesses often testify to crucial facts and theories, testimony that a lay witness would have difficulty duplicating.

Providing defendants with the right to an *ex parte* submission to the Convening Authority would not foster eleventh-hour defenses or be inefficient; to the contrary. An *ex parte* submission only temporarily prevents the Prosecution from receiving appropriate discovery information because discovery rules compel the defense to disclose its defenses and expert witness information prior to trial. Accordingly, Prosecutorial participation in the defense's request for expert funding violates the defendant's Sixth Amendment right to compulsory process because the defendant's interest in presenting a defense outweighs the limited, indeed virtually non-existent, interest in being a part of the funding process.

E. The Commission must allow *Ex Parte* Applications for Services if Counsel are to Comply with ABA Guidelines.

i. ABA Guidelines Require *Ex Parte* Applications for Services.

The right to an *ex parte* hearing is explicit in the ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which establish the standard of care for capital representation. *ABA Revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) (ABA Guidelines).[4] Indeed, the ABA Guidelines totally remove the government from the equation wherever possible by instructing Responsible Agencies (defined in Guideline 3.1) to construct a Legal Representation Plan that funds defense experts for indigent defendants through entities independent of the prosecutors. Specifically, ABA Guidelines state:

> The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them. . . . Counsel should have the right to have such services provided by

[4] The ABA Guidelines are available online at *http://www.abanet.org/* Legal services/downloads/sclaidl indigentdefense/deathpenaltyguidelines2003.pdf

persons independent of the government.

ABA Guideline 4.1B.

Should the jurisdiction not provide entirely independent access to funds for necessary experts, the Guidelines require counsel to seek funds in an *ex parte* proceeding, so as not to jeopardize the defendant's right to high quality legal representation:

> At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources, it is counsel's obligation to insist upon making such requests ex parte and in camera (emphasis added).

Commentary to Guideline 10.4 (The Defense Team). Furthermore, the requirement that requests for mitigation services be submitted on an *ex parte* basis was made a black-letter rule in the recently released *Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*:

> In performing the mitigation investigation, counsel has the duty to obtain services of persons independent of the government and the right to select one or more such persons whose qualifications fit the individual needs of the client and the case. Applications to the court for the funding of mitigation services should be conducted ex parte, in camera, and under seal.

Supplemental Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677, 680 (2008) ("Supplemental Mitigation Guidelines") (Supplemental Mitigation Guideline 4.1A (The Capital Defense Team: The Role of Mitigation Specialists)).

ii. The ABA Guidelines Apply in Proceedings Before Military Commissions

The ABA Guidelines are recognized as the standard of care for practitioners through their endorsement in United States Supreme Court and military case law. A large portion of the attorneys involved in the Commissions process are mandated by their state and services' ethics rules to abide by these Guidelines. Clearly, the ABA Guidelines must be followed by all counsel

involved in the Commissions process and are not simply aspirational guidance which either counsel or the judiciary can ignore.

iii. ABA Guidelines establish mandatory standards of care for all attorneys.

The ABA Guidelines establish rules for the present rather than aspirations for a legal system we hope to have in the future. The ABA Guidelines "are not aspirational," but rather "embody the current consensus about what is required to provide effective defense representation in capital cases." ABA Guideline 1.1 (Objective and Scope of Guidelines). So too are the Supplementary Guidelines, which explicate the ABA Guidelines by summarizing "prevailing professional norms for mitigation investigation, development and presentation by capital defense teams." Supplemental Mitigation Guideline 1.1(A).

The ABA Guidelines have been consistently held up by Supreme Court and other federal courts as the lens through which counsel's compliance with Rule of Professional Conduct 1.1 will be judged. *See Rompilla* v. *Beard,* 545 U.S. 374 (2005); *Wiggins* v. *Smith*, 539 U.S. 510 (2003) (the Court has long looked to the ABA Guidelines as "well-established norms" for performance of counsel in capital cases). The Seventh Circuit similarly indicated that it looks to the ABA Guidelines to evaluate "the proper measure of attorney performance." *Canaan* v. *McBride,* 395 F.3d 376, 384-85 (7th Cir. 2005). The Sixth Circuit adds, "[T]he ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Hamblin* v. *Mitchell,* 354 F.3d 482,486 (6th Cir. 2003).

iv. The ABA Guidelines are recognized as establishing the standard of care for military justice.

As federal case law moves toward the universal recognition of the ABA Guidelines as the standard of practice, military case law has moved along with it. Gone are the days when a

military court can decline to apply the ABA Guidelines because the Guidelines expressly provide a military exception. *See United States* v. *Loving,* 41 M.J. 213, 300 (C.A.A.F. 1994), *aff'd* 517 U.S. 748 (1996).

The ABA Guidelines have removed the military exception and the military courts increasingly look to the Guidelines for the standard of practice. In fact, the Guidelines' jurisdictional statement specifically notes their applicability to trial by military commission. Guideline 1.1 (History of Guideline). The military courts are enjoined to consider the Guidelines, at a minimum, as "instructive" for military procedures. *See United States* v. *Murphy,* 50 M.J. 4, 9 (C.A.A.F. 1998).

v. The ABA Guidelines are mandatory for most members of the commission's process and Mr. al Nashiri's defense team.

The Air Force Standards for Criminal Justice incorporate the ABA Guidelines as a mandatory standard governing the conduct of Air Force attorneys. *See* TJAG Policy Memorandum TJS-3, Air Force Standards for Criminal Justice (15 Oct. 2002). The Air Force Standards were "directly adapted from the [ABA] Standards for Criminal Justice" and provide, "The following chapters of the *ABA Standards* [*for Criminal Justice*] apply to Air Force practice, except as indicated or qualified in the text[.] Chapter 4 (The Defense Function)." *Id.* at 1-1. Chapter 4 of the Defense Function Standard, in turn, provides:

> Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused. Defense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

ABA Standard of Criminal Justice 4-1.2(c).

The Air Force Standards apply to "all military and civilian lawyers ... in The Judge Advocate General's Corps, USAF." Air Force Standards at 1-1. Consequently, all Air Force

Judge Advocate General Corps officers involved in the Commissions process are obligated to abide by the ABA Guidelines. Many Air Force attorneys such as Maj Allison Danels, Assistant Detailed Defense Counsel, are involved in the Commissions process. Their failure to comply with the ABA Standards may constitute ineffective assistance of counsel and is likely to be viewed, at a minimum, as a dereliction of their professional standard of care.

F. Conclusion

Providing details of potential expert requests to the prosecution hinders the defense's ability to adequately prepare its case by unfairly requiring the defense to disclose its strategy at the risk of foregoing expert assistance. In the context of a capital case, this Hobson's Choice violates the defendant's numerous rights specifically guaranteed to the Defendant. Accordingly, the defense respectfully requests permission to submit any future requests for expert assistance to the Convening Authority *ex parte*.

Because requests for expert properly require disclosure of sensitive information and because it is unfair to require as a price to seek necessary experts, that the work product or attorney client privilege be eviscerated, the procedures sought by the defense are both fair and the most consistent reading off Rule 703(d) and the Military Commissions Act. Denial of this request will violate the defendant's rights guaranteed by the Military Commission Act of 2009, the Detainee Treatment Act of 2005 and the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America.

7. Oral Argument: The Defense requests oral argument in connection with this motion at the time of arraignment.

8. Witnesses: None.

9. Conference with Opposing Counsel: The Defense has notified the Prosecution about the motion and requested relief.

10. List of Attachments:

A. Letter from Convening Authority, dtd May 3, 2011.

B. Letter from Convening Authority, dtd September 26, 2011.

C. Declaration of Kevin McNalley.

//s//
RICHARD KAMMEN
Gilroy, Kammen, Maryan and Moudy
135 N. Pennsylvania St.
Suite 1175
Indianapolis, In. 46204
Civilian Learned Counsel

//s//
STEPHEN C. REYES
Lieutenant Commander
JAGC, USN
Detailed Defense Counsel

//s//
ALLISON C. DANELS,
Major, USAF
Assistant Detailed Defense Counsel

CERTIFICATE OF SERVICE

I certify that on October 19, 2011, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record by e-mail. Service was completed after normal business hours on October 19, 2011.

//s//
STEPHEN C. REYES
Lieutenant Commander
JAGC, US Navy
Detailed Defense Counsel

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

May 3, 2011

MEMORANDUM FOR LCDR Stephen Reyes, USN, Defense Counsel, OMC

SUBJECT: Request for *Ex Parte* Consideration of Defense Experts; *U.S. v. Al-Nashiri*

I received your letter dated April 29, 2011, asking that I consider *ex parte* defense request for experts. Rule for Military Commission 703(d) establishes the procedure for requesting expert assistance and requires each party to provide the opposition notice of such requests. This process helps me evaluate the need for the expert assistance and determine whether alternatives are preferable, in order to avoid wasteful expenditures. *Ex parte* review of a request for expert services would "rarely be appropriate in the military context." *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). You have not demonstrated any unusual circumstances that would justify a departure from the normal process in this case; therefore, I deny your request for consideration *ex parte*.

Bruce MacDonald
Convening Authority
for Military Commissions

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

Convening Authority

September 26, 2011

Richard Kammen, Esq.
Gilroy, Kammen, Maryan and Moudy
135 N. Pennsylvania Street, Suite 1175
Indianapolis, IN 46204

Dear Mr. Kammen:

I considered carefully your letter dated September 20, 2011, asking that I reconsider your request for the opportunity to submit defense request for experts *ex parte*. For the reasons set forth below, I deny your request.

In the Military Commissions Act, 10 U.S.C. § 949a, Congress delegated to the Secretary of Defense the authority to promulgate rules of procedure for military commissions, but directed that he apply the rules of procedure applicable to trials by general courts-martial except in limited circumstances. The Secretary promulgated Rule for Military Commission 703(d), which establishes the procedure for requesting expert assistance. I note the rule applies equally to the prosecution and the defense—it requires each party to provide the opposition notice of such requests.

While the procedure in R.M.C. 703(d) differs from the procedure used in federal court, it is well-suited to the needs of military practice. The (then) Court of Military Appeals, reviewing identical provisions in R.C.M. 703(d), held that *ex parte* review of a request for expert services would "rarely be appropriate in the military context." *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). The process helps me evaluate the need for the expert assistance and determine whether alternatives are preferable, in order to avoid wasteful expenditures.

You have not demonstrated any unusual circumstances that would justify a departure from the normal process in this case. Therefore, I deny your request for consideration *ex parte*.

Bruce MacDonald
Convening Authority
for Military Commissions

cc:
LCDR Reyes
Mr. Mattivi

DECLARATION OF KEVIN McNALLY REGARDING EX PARTE CJA APPLICATIONS IN FEDERAL CAPITAL CASES

1. I currently serve as the Director of the Federal Death Penalty Resource Counsel Project, assisting court-appointed and defender attorneys charged with the defense of capital cases in the federal courts. I have served as Resource Counsel since the inception of the Resource Counsel Project in January, 1992. The Project is funded and administered under the Criminal Justice Act by the Office of Defender Services of the Administrative Office of the United States Courts.

2. My responsibilities as federal resource counsel include the monitoring of all federal capital prosecutions throughout the United States in order to assist in the delivery of adequate defense services to indigent capital defendants in such cases. This effort includes the collection of data on the initiation and prosecution of federal capital cases.[1]

3. In order to carry out the duties entrusted to me, I maintain a comprehensive list of federal death penalty prosecutions and information about these cases. I accomplish this by internet news searches, by reviewing dockets and by downloading and obtaining indictments, pleadings of substance, notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with defense counsel or consultation with chambers. This information is regularly updated and is checked for accuracy by consulting with defense counsel. The Project's information regarding federal capital prosecutions has been relied upon by the Administrative

[1] The work of the Federal Death Penalty Resource Counsel Project is described in a report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May, 1998), at 28-30. www.uscourts.gov/dpenalty/1COVER.htm. The Subcommittee report "urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project ..., which has become essential to the delivery of high quality, cost-effective representation in death penalty cases ...." *Id.* at 50.

Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

4. The routine practice in federal capital cases is for defense funding submissions to be heard *ex parte* by the presiding judicial officer.

5. The information detailed herein is maintained in the ordinary course of business of the Federal Death Penalty Resource Counsel Project, was not prepared in anticipation of its being used in litigation, and is accurate to the best of my knowledge, ability and belief.

I declare under the penalty of perjury under the laws of the United States of American, 28 U.S.C. §1746, that the foregoing is true and correct. Executed this 7th day of October, 2011.

/s/ Kevin McNally
Kevin McNally