UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**Defense Motion** For Appropriate Relief: Enlargement of Time in Which to File Law Motions (on behalf of all accused) 22 Aug 2008

1. **Timeliness**: The Motion is timely filed. *See* Order - Motions for Special Relief D-010 and D-022 (1 July 2008), ¶15.s.

2. **Relief sought:**

a. With the consent of the *pro se* accused, Khalid Sheikh Mohammed and Ali Aziz Abdul Aziz Ali,[1] counsel join with counsel for Mr. Bin al Shibh and Mr. Al Hawsawi to request that the Commission enlarge the time to file the initial defense law motions in this case until and including 25 November 2008. Although motions contesting the jurisdiction of the Commission may be filed "at any stage of the proceedings," RMC 907(b)(1)(A), defense counsel will attempt, to the extent possible, to file jurisdictional motions potentially dispositive of the entire proceedings by that date.

b. We further request, in view of the large number of law motions to be filed, that the Commission implement a staggered schedule of due dates for further law motions (*see* Order - Motions for Special Relief D-010 and D-022 (1 July 2008), ¶15.h). While the exact number cannot be known at this juncture, there is no doubt that there will be far in excess of ten.

[1] Due to limited communications, this motion is filed in advance of Mr. Bin 'Attash's permission in order to preserve his right to file jointly with the co-accused. If Mr. Bin 'Attash decides not to join, then stand-by counsel will withdraw from this motion at that time.

3. **Burden of proof:** The defense bears the burden of proof as the moving party on this motion and the standard is proof by a preponderance of evidence. R.M.C. 905(c).

4. **Relevant background:**

a. These are capital cases. For reasons explained further in the attached declarations and in the Discussion section below, all capital cases require more time – more time to form a relationship with the client, more time to investigate, and more time to research, draft and litigate motions (both "law" and others) – than do noncapital cases. *See* Declaration of Sean O'Brien (Exh. A hereto); Declaration of Richard Burr (Exh. B hereto); Declaration of Russell Stetler (Exh. C hereto). As of 2007, the average time between indictment and trial in federal capital cases generally was approximately 20½ months. *See* Declaration of Kevin McNally (Exh. D hereto).

b. These are not ordinary capital cases, however. In the two recent federal capital prosecutions comparable in legal, evidentiary and logistical complexity to these cases, the time required was far longer – more than four years between indictment and trial in the case of *United States v. Zacarias Moussaoui*, and almost four years between indictment and dismissal of all charges (following suppression of all defendants' statements as the product of torture) in *United States v. Karake*. *See* Declaration of Scott McKay (Exh.E hereto), ¶21; Declaration of Adam Thurschwell (Exh. F hereto). The time required to investigate, litigate pretrial motions, and try these cases will accordingly be significantly great than the typical capital case. Declaration of Timothy Ford (Exh. G hereto), ¶¶ 9, 12; Declaration of Gerry Spence (Exh. H hereto), ¶¶ 6-8.

c. According to the government, the investigation into the crimes charged against the accused has been the largest in United States history. Appellate Exhibit 25 (Government Request

for Protective Order Number 3). Almost seven years have passed since the 9/11 attacks, during which time the government has devoted unprecedented resources to the investigation, capture and trial of the suspects.

d. These resources have been legal as well as investigative. During the past seven years, government attorneys have not only produced reams of memoranda discussing and justifying the legality of the government's investigative techniques and trial plans, they have researched, drafted and then convinced Congress to enact a trial procedure unprecedented in American history, one that – fir the first time – denies fundamental rights of due process to criminal defendants put on trial for their lives in American courts.

e. In contrast to seven years of government preparation, defense counsel have had, as of the date of this motion, three months since the charges were referred to work on their cases. Moreover, as the Commission is aware, most of defense counsel's time during this three months has been taken up addressing significant logistical challenges as well as matters even more pressing than the extensive legal research and writing required to prepare law motions, including the questions of whether and how detailed counsel will represent the accused and the competency of the accused to waive counsel and/or conduct the proceedings on their own behalf. Apart from those issues, the commission trial in *United States v. Salim Hamdan* occupied the full attention of Mr. Aziz Ali's lead detailed attorney until 8 August 2008.

i. Charges were first preferred against the accused on 11 February 2008. New charges were preferred on 15 April 2008. The accused were referred for trial on 9 May 2008.

ii. Although military defense counsel were detailed to the cases in early April 2008, they were denied access to the clients for several weeks pending their review and agreement to a memorandum of understanding. The first associate civilian counsel did not make their first appearances until late May 2008 and others have appeared thereafter. In the case of Mr. Ali, civilian counsel were unable to meet the client until July 2008.

iii. On 14 May 2008, COL Ralph Kohlman detailed himself as Military Judge in these cases and set 5 June 2008 as the date for arraignment.

iv. By motions dated 19 May 2008, defense counsel timely moved to defer the arraignment to a later date on numerous grounds, including the inability to communicate with their clients because of detailed counsel's extremely limited contact with them prior to the arraignment, limitations caused by the by JTF-GTMO restrictions on attorney meeting times and additional security requirements imposed by the Convening Authority (CA); inadequate interpretation services; the lack of required [redacted] security clearances by some detailed counsel; and inadequate facilities for necessary legal preparation at GTMO, among others. Defense counsel's greatest concern expressed in the motion (as well as in conference with the Military Judge) was the impact of the communication and logistical difficulties on the accuseds' right to counsel and, in particular, the accuseds' decisions about their representation at the arraignment. The Commission denied the motion.

v. All accused then petitioned the Court of Military Commissions Review for a writ of mandamus to put off the arraignment, which was also denied.

vi. The arraignment was held on 5 June 2008. Three of the accused (Mr. Mohammed, Mr. Bin 'Attash, and Mr. Aziz Ali) rejected detailed counsel and chose to represent

themselves. One accused (Mr. al Hawsawi) has not yet decided whether he wants to be represented. Mr. Bin al Shibh attempted but was not permitted to waive counsel because of questions about his competence.

vii. On 9 June 2008 the Commission issued its initial scheduling order, which, *inter alia*, required law motions to be filed by 11 July 2008.

viii. Logistical difficulties, including the irregularity of flights to Guantanamo and the inadequacy of the facilities there, continued, limiting defense counsel's ability to meet with the accused and deliver effective assistance. On these and other grounds, the defense moved on 23 June 2008 to modify the initial scheduling order, specifically requesting that the Commission not set a date certain for filing of the law motions until the representation and competence issues could be determined. *See* Defense Motions for Special Relief D-010 and D011.

ix. On 1 July 2008 the Commission issued a new scheduling order, setting, *inter alia*, 30 July 2008 as the deadline for completion of discovery, 8 August as the due date for the full RMC 706 report to be disclosed to Mr. Bin al Shibh's counsel; 15 August 2008 as the date for the competency hearing with regard to Mr. Bin al Shibh; 29 August 2008 as the new due date for law motions; and 10 September 2008 as the new date that discovery motions are due. The Order also specified that "[l]aw motions include motions relative to sentencing." Order re: Motions for Special Relief D-010 and D-011 (1 July 2008) ("1 July Scheduling Order"), ¶ 15.h & note 1.

x. On 29 July 2008 the Commission modified the 1 July Scheduling Order by setting a new due date of 1 September 2008 for the disclosure of the full RMC 706 report and 11

September 2008 for the date of the competency hearing. No change was made to the 29 August or 10 September due dates for law motions and discovery motions, respectively.

f. As of the date of this motion, discovery is not complete and the RMC 706 Board for Mr. Bin al Shibh's competency determination has not yet been constituted. Since the 1 July Scheduling Order was issued, counsel for Mr. Bin al Shibh have been focused on his competency issues, and lead detailed counsel for Mr. Aziz Ali's full attention was committed to the trial of *United States v. Salim Hamdan*, in which he was the lead, and only, detailed military defense counsel. (The *Hamdan* trial concluded on 8 August 2008.)

g. Motions other than law motions have also taken precedence during this early period of the litigation, including motions necessary to obtain expert assistance and other resources as well as motions to address various protective orders which, prior to their recent modification, created significant burdens on defense counsel and additional delays. Discovery issues – made much more difficult by the virtually useless form in which the government has delivered the discovery so far – has also taken up time. These issues are made even more pressing by the current 10 September 2008 deadline for discovery motions.

h. Most importantly, all counsel have of necessity been focused on meeting with the clients and establishing and stabilizing the relationships they were unable to form prior to the arraignment, whether as counsel or as stand-by counsel. This relationship-building has become even more important since the arraignment.

i. Logistics also continue to present major obstacles to meeting the current schedule. The remoteness of the Guantanamo location, combined with security requirements imposed by

the government, have severely impeded defense counsel's ability to represent and/or assist the accused in a timely fashion.

j. During the 9-10 July 2008 hearings, the Military Judge advised the *pro se* accused to work through counsel to file motions. At the hearing, *pro se* accused Mr. Ali pointed out that communications were exceedingly difficult, and has written the Commission and expressed the desire to file motions and to review the motions filed at their direction by counsel. Unfortunately, the government has yet to provide the proper solutions to facilitate communications between standby counsel and the *pro se* accused. Standby counsel and the Chief Defense Counsel have requested a secure phone line to the *pro se* accused. Additionally, standby counsel requested that the JTF-GTMO Commander or the Convening Authority provide these accused with a courier who could send draft pleadings to standby counsel when they are not on the island. Neither of these requests has been acted upon. Consequently, standby counsel have had insufficient contact with them to engage in a motions practice which respects the *pro se* accuseds' desire to direct their defense.

k. Finally, the *pro se* accused have not been provided with even the minimal requirements necessary to research and draft motions on their own behalf, as their *pro se* status entitles them to do. As the Commission is aware, just gaining access to pen and paper has been a major obstacle for the *pro se* accused, and they currently have no access whatsoever to legal materials and resources necessary to effectively represent themselves within the meaning of the Constitution and the MCA.

5. Legal standard:

Tthe military judge should grant a departure from the time requirements of RMC 707 when he finds that interests of justice served by the departure outweigh the best interests of the public and the accused in a prompt trial. RMC 707(b)(4)(E). This Commission has already wisely concluded the commissions process "does not contemplate a truncated process of justice," and that "the investment of a reasonable amount of additional time at this stage of the proceedings is a prudent course of action that will contribute greatly toward the achievement of a just result, and not simply the conclusion of the process one way or another." 1 July Scheduling Order, ¶ 9.

A continuance "should, upon a showing of reasonable cause, [be granted] to any party for as long and as often as is just." RMC 906(b)(1), Discussion; *see also* Military Commissions Act of 2006, 10 U.S.C. §949e. For the reasons stated below, the same overriding considerations of justice previously identified by the Commission require an additional extension of the current schedule.

6. Discussion:

The current 29 August deadline for law motions is impossible for defense counsel to meet. That is so for reasons that are specific to this case and for reasons that relate to capital prosecutions generally. Because the general capital considerations affect all of the case-specific ones, we discuss them first.

One caution: While some of these factors may appear to relate to fact investigation issues and not to legal research and writing, that distinction is illusory. Defense counsel are responsible for *all* aspects of these cases: legal research and motion writing, but also direction of the

investigation, litigation of non-law motions (such as those related to obtaining necessary resources), review of tens of thousands of pages of discovery, and meeting with the accused, experts, and other potential witnesses.[2] Every hour devoted to one of these other tasks – as well as every hour spent on the flights to and from Guantanamo – is time that counsel do not have to spend on writing law motions. With regard to the mitigation investigation (which, as we explain below, is a major reason for the length of pretrial capital proceedings), defense counsel's duty is to begin that investigation immediately upon being detailed. *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (*"ABA Guidelines*"), §10.7.[3] The current schedule is unrealistic given these constraints and we ask that it be modified.

a. Why Capital Cases Require More Time Than Noncapital Cases

Because life is at stake, due process mandates that decision-making in a capital case requires more certainty – and therefore more factual investigation, more legal research, more motions, and more judicial deliberation – than does noncapital decision-making. Almost 200

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[2] Moreover, because of the unique security aspects of these cases, these obligations cannot yet be fully shared with learned counsel, consulting attorneys, mitigation specialists, investigators paralegals, and other members of the defense team, since that would require a discussion, at a bare minimum, of what the client has told detailed counsel. To date, not a single learned counsel or mitigation investigator has received the security clearance required to assume some of these tasks.

[3] The ABA Guidelines have "long .. [been] referred [to]" by the Supreme Court "as 'guides to determining what is reasonable,'" *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (*quoting Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). *See also e.g.*, *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th. Cir. 2003), *cert. denied*, 543 U.S. 925 (2004) ("[T]he *Wiggins* case now stands for the proposition that the 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."); *United States v. Karake*, 370 F.Supp.2d 275, 276 (D.D.C. 2005)("[T]he Supreme Court has counseled that the ABA Guidelines for counsel in death penalty cases provide the governing 'norms.'").

years ago, Justice Joseph Story, sitting in circuit, succinctly expressed this principle and its rationale:

> In any case, where a reasonable doubt lingered in my mind, I should pause a long time before I should pronounce judgment. In a capital cause, every motive of humanity and justice, combining with the precepts of the law, would compel me to postpone a decision until all such doubts were dissipated. I never will be instrumental in taking away life, until I am clearly persuaded that the law imposes upon me this painful and melancholy duty. *United States v. Cornell*, 2 Mason 91, 25 F.Cas. 650, 652 (C.C.R.I. 1820).

That principle remains the law today under the Supreme Court's Eighth Amendment jurisprudence, which recognizes a "need for heightened reliability" in capital cases, *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), and thus requires "a greater degree of accuracy and fact finding than would be true in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).

That is the law in capital courts-martial. *United States v. Walker*, 66 M.J. 721, 732 (NMCCA 2008) ("The Supreme Court has continuously echoed one theme since the late 1960s in their decisions in death-penalty cases: 'reliability of result.'"; *quoting*, *United States v. Murphy*, 50 M.J. 4, 14 (C.A.A.F. 1998)). It is the law in capital military commission prosecutions as well. *See Reid v. Covert*, 354 U.S. 1, 77 (1957) (capital military trials of civilians in England and Japan) (Harlan, J., concurring) ("I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . nor is it negligible, being literally that between life and death.").

i. Capital cases are more legally complex than noncapital cases

The legal issues in even run-of-the-mill capital cases are significantly more complex than they are in noncapital cases. This is so, first, because of the special procedures and legal rules applicable to capital sentencing.[4] Capital sentencing statutes involve procedural schemes that are as complex as, if not more so, than the procedures applicable to the guilt/innocence phase determination. The Military Commission Act and the MMC, which are roughly modeled on the military and federal death penalty schemes, are no exception to this general rule. *See* RMC 1004. These special rules and procedures have given birth to a specialized capital jurisprudence that requires a correspondingly specialized expertise on the part of counsel in capital cases.[5] As a result, a constitutionally adequate defense in a typical capital case involves far more and far more complex motions than does the defense of a noncapital case. Capital cases thus require more time devoted to researching, drafting and arguments on motions than is required in noncapital cases.

This extra layer of complexity is compounded by the fact that special rules apply in the guilt/innocence phase of a capital case as well as at the sentencing hearing. The overriding concern for reliability is one reason that additional capital considerations apply at the

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[4] *See* American Bar Association, *Toward A More Just And Effective System of Review in State Death Penalty Cases*, at 43, 49, 50 (Oct. 1989): "[D]eath penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. Not only do the cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case, but they also involve a host of issues that are unique to capital cases."

[5] Indeed, Congress has long recognized that capital cases require such special expertise by guaranteeing to capital defendants the right to two defense attorneys, one of whom is "learned in the law applicable to capital cases," 18 U.S.C. § 3005, and the ABA Guidelines similarly make qualified capital counsel a prerequisite to an adequate capital defense. *ABA Guidelines*, §§ 4.1 & 5.1.

guilt/innocence phase. *See Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("[W]e 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."). Another is the fact that, in a capital trial, there are many legal decisions made in the guilt/innocence phase that potentially affect the death-sentencing phase as well. These extend from discretionary procedural decisions like severance, *see e.g. State v. Howard*, 295 S.C. 462, 473, 369 S.E.2d 132, 138 (1988), *cert denied*, 490 U.S. 1113 (1989) ("We caution the trial bench when considering a capital defendant's motion to sever that the effect of a joint trial on each defendant at both the guilt and sentencing phases must be considered."), to admissibility decisions about evidence that, while not unduly prejudicial to the jury's fact-finding function in the first phase, might prejudicially affect the "reasoned moral judgment," *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), that is the touchstone of the death-sentencing decision.

Apart from the legal complexity, capital cases require more motions because, in virtually every case, there is a great deal of collateral litigation aimed at obtaining the resources that capital defense requires. Ensuring that the capital accused has these resources (through requests and, where necessary, motion practice) is particularly critical at the early stages of the case in order to provide an adequate defense down the line. Thus, especially early on, collateral litigation necessarily takes time away from the other litigation activities.

Finally, there is the fact that the record must be preserved, an obligation that is at its apex in capital cases. Every colorable motion must be thoroughly researched and, where warranted, filed. *ABA Guidelines*, §10.8 ("The Duty to Assert Legal Claims"). That is true even where the law as it currently stands is against the capital defendant, but counsel believes in good faith that

the law may or should develop in a more favorable direction. In those situations as well, counsel is obligated to file appropriate motions so that the defendant is not deemed to have waived or forfeited a ground for reversal. *Id*., §10.8 commentary ("[C]ounsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty. Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices."); *see Smith v. Murray*, 477 U.S. 527 (1986) (defendant executed because of decision by counsel not to press claim in state court appeal not then supported by existing law; subsequently, on post-conviction habeas corpus, the Supreme Court held that claim had been forfeited and permitted execution to go forward even though the claim had by then been held meritorious).

ii. The need for a separate sentencing mitigation investigation

As the Declarations attached as Exhibits A through C hereto explain in greater detail, unless an accused is acquitted of the capital crime, a capital trial involves not one but two very different trials, each of which requires different and extensive preparation. A minimally adequate mitigation case makes a narrative of the defendant's life history that explains that life in a manner that the jury can understand even when they cannot fully sympathize or empathize with it. *ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* (*"ABA Mitigation Guidelines*"), § 10.11(B).

At the outset it is important to dispel a common myth about mitigating evidence: that it is irrelevant if the crime is sufficiently brutal or vicious and the evidence of guilt is overwhelming. The Supreme Court has made it clear that an adequate mitigation defense is a constitutional

requirement regardless of the nature of the crime. *Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654, 1664 (2007) ("[S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.").

But a constitutionally adequate mitigation defense is much more than that. As a practical as well as a legal matter, it is never an inherently empty gesture, no matter how overwhelming the evidence of guilt, how terrible or gruesome the crime, or how futile an attempt to save a capital defendant's life may seem at the outset of a case. A constitutionally adequate mitigation defense always provides a real chance – even if that chance is not realized in every case – of a sentencing verdict less than death. Recent examples, some of them directly related to the instant charges and/or defendants, bear witness to this repeated lesson: Zacarias Moussaoui, described by the government for a time as the "20th hijacker," was sentenced to life despite his efforts to undermine his own defense; the Embassy Bombing defendants, all of whom were likewise alleged to be associated with al Qaeda, were sentenced to life in prison after being convicted in federal court; Terry Nichols, one of the two accused Oklahoma City bombers, was *twice* sentenced to life imprisonment following separate trials and convictions – the second life sentence coming after a trial in Oklahoma state court before an Oklahoma jury that convicted him of 161 counts of murder; and – in a less famous but exceptionally gruesome case – Rudy Sablan, a prisoner who was already serving a life sentence, and who had previously been convicted of attempted murder of a different prisoner, was sentenced in May 2008 to another life

sentence rather than death despite having been convicted of strangling and then disemboweling his cell mate. *See* Declaration of Adam Thurschwell (Exh. F hereto), ¶¶ 21-28.

The task of investigating and telling the defendant's life story is therefore always a critical, and often the most critical, part of any capital defense. But it requires extensive planning, strategizing and investigation independent of the work that goes into defending the guilt/innocence phase.

A full and complete life history investigation is required because in a capital sentencing hearing, jurors must weigh the horror of the crime against the value of the defendant's life in order to determine a sentence. In this balance, any mitigating fact about the defendant's life may be constitutionally adequate to tip the balance toward life for any individual juror. *Lockett v. Ohio*, 438 U.S. 586 (1978). What this means in practice, and in terms of the capital defense attorney's ethical obligations, is that the defense attorney must fully and completely investigate and present the defendant's life to the jurors for their consideration. *Wiggins v. Smith*, 539 U.S. 510 (2003); *ABA Guidelines*, § 11.4.1. This in turn requires an intensive investigation of that life that begins, minimally, with his birth records if they can be located and ideally even earlier, with the vital records of the defendant's parents and other family members (in order to determine the presence of any undiagnosed genetic conditions and give a complete account of the formative influences on the defendant's early life, among other reasons), and continue thereafter with extensive background investigation and interviews with family members and all other witnesses who may be able to relate pertinent life-history facts to the jury. Declaration of Russell Stetler (Exh. C hereto); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (capital counsel required to "fulfill their obligation to conduct a thorough investigation of the defendant's background" in order

satisfy Sixth Amendment right to counsel); *ABA Mitigation Guidelines*, § 10.11. In the typical capital case, the life-history investigation is one of the most time-consuming requirements of an adequate capital defense, both for the attorneys and for the mitigation specialist, investigators, and other experts.

iii. The need to develop a strong personal bond with the accused and with mitigation witnesses

The required life-history investigation cannot even begin, however, unless and until the attorney develops a strong *personal* bond first with the client and then with potential mitigation witnesses. This is so because of the highly sensitive nature of the mitigating evidence that the attorney must muster in order to preserve his or her client's chance to avoid a death sentence. Mitigating facts typically consist of information that the vast majority of people, including capital defendants and their family members, friends and others with first-hand knowledge of their lives, would prefer to keep hidden from public view, whether because it is too intimate, painful or embarrassing to admit, or – as in this case – because disclosing these facts could put the witnesses themselves at risk. *See* Declaration of Russell Stetler (Exh. C hereto), ¶¶ 18-19; Declaration of Richard Burr (Exh. B hereto), ¶ 11.

The process of convincing both the defendant and the witnesses with knowledge of these critical facts, first to disclose them at all, and then to agree that the attorney can disclose them at the penalty hearing, is among the most delicate duties that an attorney can have. It typically requires an enormous amount of personal relationship-building before the issues can even be broached, much less permission granted to testify about it in open court.[6] *Id.*

[6] Nor is the presentation of hearsay testimony an adequate substitute, both because absent a special protective order, the witness's identity will still be exposed, and, more importantly,

b. Why These Cases Require Even More Time Than do Typical Capital Cases

The factors discussed above are compounded exponentially by the unique circumstances of these prosecutions.

i. Legal complexity

These cases are the most legally complex criminal prosecutions ever attempted by the United States government. Limiting the discussion to only those complexities that raise pure questions of law, in authorizing these cases Congress has (1) created an entirely new statutory system of criminal trial and punishment that does not qualify as an Article III court; (2) designed these new procedures to serve national security needs at the expense of traditional judicial concerns for fairness, justice and reliability in a manner that is totally unprecedented; and (3) deliberately denied procedural protections that are guaranteed by the Constitution to other criminal defendants. These are only the problematic legal aspects apparent on the face of the Military Commissions Act itself; the regulations issued under its authority raise even more purely legal issues that will require extensive research and motion practice.

It bears remembering, also, that the current military commissions represent the government's second try at establishing a system to try these accused, the first having been struck down by the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The current system has yet to be tested in any Article III court, and thus the legality of each of these novelties is very much "up for grabs" as defense counsel consider potential challenges to the system. Indeed, in order to preserve the accuseds' right to such Article III court testing, defense counsel are

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because when a defendant is attempting to convince a jury or panel to spare his life, written testimony is no substitute for the affective force of live testimony.

obligated to raise every colorable issue now to ensure that no waiver or forfeiture is later deemed to have occurred. *Smith v. Murray*, 477 U.S. 527 (1986) (even arguments precluded by current authority must be raised or will be deemed forfeited).

Combine these factors with the Supreme Court's recent decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), which defense counsel read as requiring that the Bill of Rights applies in the commission proceedings and the government reads in precisely the opposite fashion, and the level of uncertainty about the legality of the MCA and the Commission rules could hardly be greater.

But the number and complexity of legal issues in fact is even greater, because this is also a capital case. This is not only a brand new trial procedure, it is a brand new death-sentencing procedure. No matter how much it may resemble the military or federal death-sentencing provisions, the setting of these sentencing procedures in a trial that happens abroad, under unprecedented limitations on access to clients and government evidence, means that legal challenges to its legitimacy are without counterpart in any other capital sentencing system. Legal challenges to death sentencing statutes that have failed elsewhere may well be successful in this new and uniquely onerous (for the capital accused) setting; in any event, they must be raised and argued in order to preserve them for subsequent reviewing courts.

It must be recalled that capital defense lawyers, Congress, state legislatures, and federal and state courts have been at work fine-tuning the structure of capital sentencing law for thirty-six years in the modern, post-*Furman* era, "tinker[ing] with the machinery of death," *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari), in an effort to come up with procedures for imposing death that are reliable, fair, and

constitutional. The intricacies of capital punishment jurisprudence has represented a significant portion of the United States Supreme Court's docket in each of its terms for the past three decades. Yet counsel in these cases have been asked to assess the reliability and fairness of a brand new capital sentencing scheme in a matter of months.

As explained above, every capital cases require more – and more complex – motions than do noncapital cases. At the time, the federal capital prosecution of Timothy McVeigh involved the largest criminal investigation in history, and was among the most legally involved as well. Mr. McVeigh's counsel filed almost 1000 motions before trial began. Declaration of Richard Burr (Exh. B hereto), ¶ 17. The investigation in this case has been larger and the legal issues more uncertain and complex. We need more time.

ii. Unique obstacles to mitigation investigation and development of relationships with client and mitigation witnesses in this case

Developing mitigation cases for the accused in these cases faces enormous obstacles. Some of these obstacles, while unusual, are not entirely unique and have been overcome in other capital cases given sufficient time and adequate resources. These include the wide gulf that separates the accuseds' cultural and religious beliefs from those of their attorneys and from the American justice system generally, and the difficulties arising from the fact that the mitigation investigation must be conducted on foreign territory, under repressive governments that are hostile to the accused and their defense. *See* Declaration of Sean O'Brien (Exh. A hereto), ¶¶ 18-22; Declaration of Adam Thurschwell (Exh. F hereto), ¶¶ 12-20.

Two factors, however, are entirely unique to these cases and present entirely unprecedented and overwhelming problems: (1) the fact that the accused were, according to the consensus of publically available sources, almost certainly physically and psychologically abused

("tortured," according to most definitions, including those used under international norms) by the same government that is now trying them; and (2) the fact that defense team members' communications with the accused, among themselves, and with outside experts has been, to date, stifled and/or entirely precluded by overbroad security classifications and confidentiality orders. We address these obstacles and the addisional issues of (3) cultural difference and (4) extraterritorial investigation under a hostile foreign government below.

(1) The impact of physical and psychological abuse

The Declaration of Katherine Stone Newell (Exh. I hereto) summarizes what is currently reported in publically available sources about the treatment of the accused at CIA "black sites" and other facilities. Most of the hard information about their treatment remains classified and as yet undisclosed. We anticipate that the picture will be much clearer after discovery is complete.[7] Here we briefly summarize the impact of this treatment on the defense team's ability to communicate with the accused and build a mitigation case.

The types of abuse to which the accused are reported to have been subjected are designed to destroy the abused person's sense of himself and personality. Sometimes the goal is to make him compliant; sometimes it is simply cruelty. In any case, the effects on the personality are profound. *See* Declaration of Katherine Porterfield, Ph.D. (Exh. J hereto). Three points need to be emphasized:

[7] To date the government has been extremely reluctant to disclose anything about the treatment of the accused by the CIA and other government agencies. *See* Declaration of Katherine Stone Newell (Exh. I hereto). This information is crucial not only for clinical purposes related to potential mitigation, but to a host of other issues as well, including the question of competency and suppression of evidence. To the extent that the government resists disclosing this evidence and information to the defense, that will also protract the proceedings considerably.

First, and most obviously, an individual who has been abused by American government agents is likely to have difficulty trusting another American government agent or any other American claiming to have his best interests at heart. That is particularly so given some of the reported interrogation techniques, which reportedly involved physical or psychological abuse followed by interrogation by a "good cop" agent feigning sympathy with the accused.

Second, the reported types of systematic abuse are intended to, and do, impact the accused's ability to trust and communicate at a much deeper level as well. Part of the point of these techniques is to destroy the accused's established sense of themselves and their beliefs so that they no longer know what to believe and who to trust. At the same time, they also disorient and impair the victim's cognitive and emotional functioning. An individual reduced to this condition may no longer be competent to communicate or cooperate with an attorney at all, regardless of the attorney's nationality or uniform. *See* Declaration of Allen Keller, M.D. (Exh. K hereto); Declaration of Katherine Porterfield, Ph.D. (Exh. J hereto).

Third, there is a thin line between attempting to destroy an individual's personality and destroying his will to live at all. An individual whose will to live has been compromised is not an individual who will cooperate with his attorneys in an effort to save his life.

Given these typical and predictable effects of the reported abusive techniques, all of the accuseds' decisions to date must be evaluated in this context. Unless and until the reports of deliberate abuse are thoroughly investigated – through discovery, depositions or other means as necessary – and the accused are evaluated by competent experts trained in the Istanbul Protocol, it is impossible to know with any confidence that the accuseds' decisions about representation, about mitigation strategies (or lack thereof), and about other trial strategies and tactics (including

decisions about whether to file particular motions) are simply the products of the abuse they are reported to have suffered.

Conducting those investigations and evaluations takes time, however, as will the process of rebuilding sufficient trust in their counsel or stand-by counsel to allow those counsel to serve their function under the MCA and the Constitution. *See* Declaration of Allen Keller, M.D. (Exh. K hereto); Declaration of Katherine Porterfield, Ph.D. (Exh. J hereto).

(2) The impact of overbroad classification and confidentiality

Much more than in noncapital cases, capital defense is a team endeavor. The ABA Guidelines require in every capital case at least two attorneys, an investigator, and a mitigation specialist. *ABA Guidelines*, §4.1(A)(1). That is the minimum requirement for every capital case; more complicated cases – like these – require larger teams. Virtually every capital case requires, beyond the attorneys, investigator and mitigation specialist, several experts who may serve either as consultants or as testifying witnesses. The ABA Guidelines specify, for example, that "[t]he defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *Id*., §4.1(A)(2).

The need for large numbers of experts in capital cases arises from the special nature of the death-sentencing defense and the types of evidence that the sentencing decision makes relevant. For example, a defendant may have psychological problems that do not arise to the level required to establish a guilt/innocence phase defense of insanity or diminished capacity, and thus expert testimony about his condition may not be relevant in that phase. That same evidence, however, will always be relevant in the sentencing phase, because *any* mental impairment that

could impact on the capital sentencer's determination of the defendant's degree of culpability must be allowed in evidence. The same is true of a capital defendant's cultural or religious beliefs and any other fact about his life that serves to explain his conduct to the jury. Because there are so many potential areas of a capital defendant's life that require evaluation, investigation, and specialized knowledge to understand and/or explain to a sentencing jury, a number of experts are virtually always required.

An effective team defense, including consultations with experts, requires, above all, free communication. Team members need to talk to each other, to the accused, and to experts; and most experts need to talk to the accused as well (especially if they are mental health experts). All team members, including experts, need access to the evidence.

That kind of free communication and regular access is precisely what is made impossible – indeed, illegal – by the classification of so much of the evidence in this case (up to and including, presumptively, every word spoken by the accused). Mitigation specialists and experts with the necessary [redacted] clearances are few and far between, to say the least, and obtaining the necessary clearances for those without them can take months. As a result of these factors, to date not a single accused has met with a mitigation specialist, even though mitigation specialists are the capital team members with the greatest need for regular client contact.

Finally, the relative inaccessibility of the Guantanamo location (including the limited numbers of flights and seating on those flights) and the ongoing logistical difficulties on the island itself constitute another bottleneck in team members and experts' access. *See* Declaration of Scott McKay (Exh. E hereto).

While some of the issues associated with overly broad classification have begun to be addressed, the problems remains enormous and fundamentally unresolved. Apart from over-classification, there are also additional restrictions on the communication of unclassified information imposed by confidentiality orders entered at the government's request. The net effect of these obstacles is that counsel's efforts to begin a constitutionally sufficient sentencing defense have been hamstrung. Unless and until these classification and clearance problems can be resolved, the mitigation investigation will proceed at a snail's pace.

(3) The impact of cultural and religious differences

Capital defendants frequently come from family and cultural backgrounds that differ from their counsel's, and are sometimes unfamiliar with the workings of the American criminal justice system (although more typically they have had extensive experience with it before being charged capitally). The life experiences and cultural beliefs of the accused here, however, are so remote from their counsel and other team members' experiences and beliefs, and from the criminal process that they are now undergoing, that those differences alone create significant obstacles to communication.

Even extreme cultural differences can be overcome, but it takes time – more time than in the case of defendants in which these differences are less pronounced. *See* Declaration of Russell Stetler (Exh. C hereto), ¶20. In these cases, the cultural obstacles are greatly exacerbated by the accuseds' reported experience of abuse and by the limitations on contact with counsel and other team members created by overbroad security restrictions.

(4) The impact of conducting an extraterritorial mitigation investigations in states with hostile and repressive governments

Finally, the fact that the life history investigations in these cases must occur largely in foreign countries ruled by governments that are both hostile to the accused and known to engage in repressive behavior toward their own citizens significantly complicates the conduct of these investigations.

All of the tasks required to prepare a mitigation case – from tracking down relevant documents to locating and contacting life history witnesses to convincing those witnesses to testify at the sentencing hearing – are far more difficult when they must be performed in a foreign country. Language and cultural differences, a lack of understanding of the American criminal justice system in general and the defense function in particular, and similar obstacles must be confronted at every step. In virtually every such case, trustworthy local contacts must be developed to introduce defense counsel, mitigation specialists and investigators to the local culture. All of this takes time. *See* Kuykendall, Amezcua-Rodriguez & Warren, "Mitigation Abroad: Preparing A Successful Case For Life For The Foreign National Client," 36 Hofstra L. Rev. 989, 1009 (2008) ("In light of the many challenges that arise when conducting investigations in a foreign country, it is essential that adequate time and resources be allotted to this critical component of the life-history investigation. Because of the logistical difficulties in finding witnesses and the numerous barriers to disclosure that may exist, completing a competent life-history in a foreign country will likely require multiple visits to that country."); *see also* Declaration of Adam Thurschwell (Exh. F hereto), ¶ 11.

These problems are multiplied tenfold when the foreign government is a repressive one that is hostile to the defendant. Gaining the trust of life history witness is a difficult task under

any circumstances, since the witness is being asked to take the stand on behalf of an individual who will have been convicted of a heinous crime. When that request comes with the additional possibility of danger to the witness or his family's safety, the difficulties become overwhelming. In these circumstances simply getting a potential witness to speak informally to an investigator or attorney can be incredibly difficult, and obtaining their consent to testify publicly – where their activities will of necessity become known to their government – is even more so. And of course the witness's consent is necessary, since foreign witnesses are not subject to the subpoena power of the Commission.

The experience of counsel in the recent case of *United States v. Karake* is instructive in this regard. As related in the Declaration of Adam Thurschwell (Exh. F hereto), *Karake* was a terrorism prosecution that charged three Rwandan citizens with murdering two Americans in Uganda. Prior to and during the period of the investigation and prosecution of the case, the Rwandan government had been regularly cited as a human rights violator by the United States State Department, up to and including "disappearances" and presumed murders of political dissidents. The Rwandan government was cooperating fully with the United States government prosecution team – indeed, the federal judge in that case eventually found that Rwandan agents tortured the defendants in order to get them to "confess" to the charged murders to American FBI agents. *See United States v. Karake*, 443 F.Supp.2d 8 (D.D.C. 2006). The defense, on the other hand, received no assistance whatsoever from the Rwandan government, despite repeated requests.

Counsel had much initial difficulty finding individuals who were willing to help them "on the ground" in Rwanda at all, much less introduce them to potential witnesses. When

trustworthy individuals were finally located and retained, they made it a condition of their cooperation that counsel meet with witnesses secretly, in safe houses where they hoped the government would not discover their activities. These attempts were not always successful: One of the Rwandans who agreed to help – a law professor – eventually began receiving anonymous threats against himself and his family, suggesting that the government was aware of his activities in the case. He now resides in the United States, having received political asylum here. Declaration of Adam Thurschwell (Exh. F), ¶¶ 11-20.

From the Rwandan government perspective, *Karake* was a low-level case involving virtually anonymous defendants. Rwanda became involved solely at the request of the United States, since it had no independent interest in the defendants. These cases, by contrast, are the most high-profile international prosecutions in recent history, and are politically-charged abroad as well as in the United States. While we cannot know that similar problems will arise until we are able to begin conducting foreign investigations, it appears highly likely that they will – if not death threats to defense investigators, then certainly witness reluctance. If these problems do emerge, they will significantly hamper, and at a minimum slow down, counsel's ability to assemble an adequate sentencing defense.

iii. The timing of comparable cases

Although every case is different, two recent federal capital prosecutions resembled these cases in subject matter and/or the types of factual and legal obstacles presented and may serve as rough benchmarks. Both cases required four years or more after the indictment before they went to trial or were otherwise resolved.

United States v. Moussaoui concerned a defendant who was charged with causing the same 9/11 deaths as those charged here. Mr. Moussaoui rejected counsel, pleaded guilty, and refused to cooperate with his stand-by counsel's attempt to save his life. *Moussaoui* was a case in which the *pro se* defendant eventually lost his *Faretta* right to self-representation because of his antics, and stand-by counsel were required to step in and take over the defense. They were able to carry out their duties only because, despite the defendant's efforts, they had had adequate time to prepare a case for him. The quantity of discovery involved was comparable (indeed, much of it was the same as here), and required at various points the efforts of multiple attorneys and 70 reviewers retained at government expense to examine it. *See* Declaration of Scott McKay (Exh. E hereto), ¶ 21. Even with those resources, as a result of the complexity of the legal proceedings (which stemmed in part from security restrictions on access to witnesses and evidence parallel to, but less restrictive than, the restrictions imposed here) and the quantities and nature of evidence involved, the defendant's sentencing trial did not begin until more than four years after he was indicted. *Id*.

In *United States v. Karake*, the defendants were three Rwandan citizens charged with murdering two Americans in Uganda under a federal long-arm terrorism statute. The indictments were handed up in February 2003, and all charges were dismissed in February 2007 after the trial judge suppressed all defendant statements made to the FBI as the result of torture. *See United States v. Karake*, 443 F.Supp.2d 8 (D.D.C. 2006). Similar to this case, the investigation in *Karake* had to contend with the post-traumatic effects of torture on the client's trust and willingness to communicate and cooperate with counsel; limited and sometimes inadequate translations of the defendant's native language; the need for the mitigation specialist and

attorneys to develop a depth understanding of a very foreign culture; and the need for investigators and attorneys to develop relationships with potential foreign witnesses who were beyond the United States's subpoena power and who lived in the justifiable fear that they were putting their lives at risk from their own government by cooperating with the defense. In other respects, the *Karake* case was far less complex and onerous than this one. Nevertheless, the case was four years old when it was dismissed, long before trial was scheduled to begin. *See* Declaration of Adam Thurschwell (Exh. F hereto), ¶¶ 9-10.

CONCLUSION

The law motions that must be filed in this case are unprecedented in their subject matter and complexity. Moreover, the work that goes into researching and writing them is indivisibly linked all other aspects of case preparation – mitigation investigation, discovery review, witness meetings, and client rapport-building. For the foregoing reasons, the accused respectfully request that the Commission extend the due date for initial law motions until and including 25 November 2008, implement a staggered schedule of due dates for further law motions thereafter, and continue to hold in abeyance any decision about a trial date.

7. **No Request for Oral Argument or Witnesses:** The defense does not request oral argument, unless requested by the government and/or a dispute were to arise as to any material fact necessary for resolution of the issue. If such a dispute were to arise, the defense reserves the right to request production of witnesses and to request a hearing and oral argument.

8. **Conference with Opposing Counsel:** The defense has conferred with the government, which opposes this motion.

9. List of Attachments:

A. Declaration of Sean O'Brien

B. Declaration of Richard Burr

C. Declaration of Russell Stetler

D. Declaration of Kevin McNally

E. Declaration of Scott McKay

F. Declaration of Adam Thurschwell

G. Declaration of Timothy Ford

H. Declaration of Gerry Spence

I. Declaration of Katherine Stone Newell

J. Declaration of Katherine Porterfield, Ph.D.

K. Declaration of Allen S. Keller, M.D.

DATED this 22nd day of August, 2008.

Respectfully submitted,

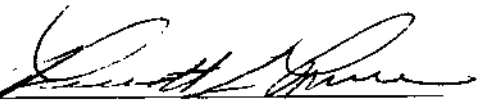

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EXHIBIT A

DECLARATION OF SEAN D. O'BRIEN

I, Sean D. O'Brien, declare under penalty of perjury as follows:

1. I am an attorney duly licensed to practice before state and federal courts in the State of Missouri, the Eighth and Tenth Circuit Courts of Appeals, and the United States Supreme Court. I have specialized in the representation of persons in criminal matters since 1981. Since 1985, my primary area of criminal practice has involved the trial, appeal and post-conviction representation of individuals in capital cases.

2. From 1985 till 1989 I served as the chief public defender in Kansas City, Missouri, where I provided and supervised the direct representation of indigent defendants in all felony and all capital cases in Kansas City, and in most capital trial cases in the western one-third of Missouri. During my tenure as Public Defender, no defendant represented by my office was sentenced to death.

3. In October, 1989, I was appointed Executive Director of the Missouri Capital Punishment Resource Center, currently called the Public Interest Litigation Clinic. I was responsible for recruiting and training attorneys in the representation of prisoners under sentence of death, and I also engaged in the direct representation of condemned prisoners in State and Federal courts, including the United States Supreme Court. Noteworthy cases I have litigated included *Schlup v. Delo*, 513 U.S. 298 (1995), which preserved federal habeas jurisdiction for prisoners who are actually innocent; *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), which preserved habeas jurisdiction over claims of incompetence for execution; and *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), creating the right to habeas corpus relief based on freestanding claims of innocence. I have been appointed *pro hac vice* to represent prisoners under sentence of

death in federal and/or state courts in Arizona, Kansas, Wyoming, and Arkansas, and I have qualified as an expert witness on the performance of counsel in capital cases in state and federal courts in Missouri, Kansas, Idaho and in United States Military Court. I have also testified as an expert on capital punishment issues before the Missouri and Kansas Legislatures.

4. In 1996, the state of Illinois retained me to conduct a study of its system for providing representation in post-conviction capital cases and to make recommendations for reform. I am currently retained by the Administrative Office of the United States Courts to provide training to assistant federal public defenders and counsel appointed under the Criminal Justice Act to represent indigent persons in capital cases.

5. In addition to more than 25 years of practice in capital defense litigation, I have researched and published scholarly articles on issues pertaining to the performance of defense counsel in death penalty cases, including *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams*, 36 HOFSTRA L. REV. 693 (Summer 2008); *Capital Defense Lawyers: The Good, the Bad and the Ugly*, 105 MICH. L. REV. 1 (March, 2007); *Presumed Guilty: Innocence and the Death Penalty*, Address to the Miscarriages of Justice Conference, Current Perspectives (February 20, 2007), *in* 7 J. INST. JUST. & INT'L STUD. 14 (2007); *Attorneys for the Damned*, 58 U.M.K.C. L. REV. 517 (Summer, 1990); and *A Step Toward Fairness in Capital Litigation*, 16 WM. MITCHELL L. REV. 633 (1990).

6. I have lectured nationally on issues relating to the performance of defense counsel and the mitigation function of capital defense teams, including the historical development and professional experiential foundation for the American Bar Association's Guidelines for the Performance of Counsel in Capital Cases; the necessity and protocols for working with

interdisciplinary teams to investigate and develop unifying and consistent defense strategies for a guilt and penalty phase defense; the essential steps for effectively investigating and presenting the narrative of a client's development and functioning, including strategies for overcoming barriers to disclosure of relevant social history information and effective methods for identifying and consulting with appropriate experts; the ethical considerations involved in representing and counseling clients who express a preference for execution over life imprisonment; and the duty to investigate the prosecution's guilt phase evidence and theories of culpability.

7. I have also directed a number of law school clinics providing legal services to indigent persons in criminal matters, including the Public Defender Appeals Clinic (1983-89), the Public Defender Trial Clinic (1985-89), and the Death Penalty Representation Clinic (1990-present) at UMKC School of Law, director of the Capital Defence Interships through Westminster School of Law, London, Amicus and Reprieve (1994-present), and the Death Penalty Representation Externship program through Washburn School of Law (2004-05); and I have taught courses in death penalty jurisprudence as an adjunct professor at UMKC School of Law (1995-2005) and Washburn School of Law (2004-05).

8. I am currently an associate professor at the University of Missouri-Kansas City School of Law, where I teach upper level graduate courses in criminal law, criminal procedure and capital punishment. I received a BA in English from Northwest Missouri State University in 1977, and in 2006 received the Distinguished Alumni Award. I earned a J.D. from the University of Missouri-Kansas City School of Law in 1980, and received the Alumni Achievement Award in 2002. In 2005 I received an Honorary Doctor of Humane Letters from Benedictine College. For my work in the field of capital punishment, I was recognized as

Lawyer of the Year by the *Missouri Lawyer's Weekly* in 2003, and in 2005 I received the Kansas City Metropolitan Bar Association Lifetime Achievement Award.

9. Between 2004 and 2008, at the request of the American Bar Association's Death Penalty Representation Project, I served as the principal investigator on studies examining national standards for the performance of capital defense attorneys and mitigation specialists in the preparation of a penalty phase case. Working with a core team that possessed strong legal and social science research skills, I participated in or supervised interviews with members of capital defense teams in every death penalty jurisdiction in the United States, including the federal capital defense counsel and the U.S. Military; circulated draft guidelines articulating the prevailing standards of performance for the mitigation function of capital defense teams; and conducted follow-up consultation with mitigation specialists, capital defense lawyers and mental health experts who participated in drafting Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. The final version of the guidelines produced from the results of our studies are now published as *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases,* 36 HOFSTRA L. REV. 677 (Spring 2008). The process of researching and articulating standards of performance for the prevailing practices is described in more detail in my article, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Capital Defense Teams,* 36 HOFSTRA L. REV. 693 (Spring 2008).

10. Through my training, education, experience and independent research, I am very familiar with the practical skills, resources and prevailing practice standards necessary for the competent representation of prisoners in proceedings, including trials, in which the government

seeks a judgment authorizing the taking of a human life. In particular, as a capital defense attorney, who has qualified as an expert witness in multiple jurisdictions on the issue of the competent performance of counsel in capital cases, I am thoroughly familiar with federal constitutional standards governing the defense of capital cases.

11. The attorneys who are assisting Mr. Khalid Sheikh Mohammed in pending Military Commission proceedings in Guantanamo Bay have asked me to describe some of the more significant components involved in the effective preparation of a capital defense case and to opine how the ability to perform the defense and mitigation function might be affected by particular circumstances, which they have described to me as being present in this case.

12. A critical aspect of providing competent representation in capital cases is the ability to conduct effective mitigation investigation. The essential importance of the mitigation investigation stems from the fact that it encompasses exploration of both evidence that affirmatively mitigates the defendant's moral culpability (i.e. by demonstrating the "good" in the client's character or the "bad" that affected his upbringing and development) and evidence that may refute the prosecution's theory of legal culpability (e.g., by reducing culpable mental states or disproving purported, inflammatory facts). Decisions regarding the phase in which such evidence may be most effectively deployed require ongoing assessment throughout the substantial completion of the necessary investigation.

13. It has always been understood that sentencers are moved by persuasive evidence that cruel or inhuman parental violence resulted in a defendant's cognitive or developmental disabilities; or that environmental factors such as poor nutrition, substandard education, other consequences of poverty and peer pressure to engage in substance abuse may have led to

unlawful behaviors. Mental health and sociological research, including research sponsored and published by the National Institute of Mental Health has established a direct and undeniable correlation between such factors and contact with the criminal justice system in adulthood. Experienced capital trial lawyers, however, also know that such evidence often can play a crucial role in the jury's determination of guilt or innocence as well. It is therefore imperative that capital defense teams have the ability to effectively investigate and develop evidence of these and other issues that can provide the jury with evidence essential to understanding the defendant and the context for his or her actions.

14. Experienced counsel are also aware that the investigation necessary to uncover such evidence involves a time-consuming, painstaking process to overcome substantial barriers to disclosure of some of the most compelling types of mitigating evidence. Recounting experiences of trauma can trigger powerful emotional reactions, including shame and embarrassment, so that individuals and families learn to avoid or minimize discussion of such matters. Victims and witnesses, as well as perpetrators of physical violence often initially deny or minimize such behavior. Very harmful interpersonal violence which has been inflicted on multiple generations by perpetrators within or external to the family and community may be regarded and described as "normal" by the families involved. In these and many other circumstances, the lack of appropriate skills can cause an investigator to overlook clinically significant developmental, genetic and cultural contexts, and fail to pursue crucial information.

15. The thorough and competent investigation of such evidence is crucial for a reliable clinical assessment of a client by mental health experts, because such assessments require, at a minimum, consideration of detailed and verifiable information about the client's development.

Many symptoms of mitigating cognitive and mental conditions are manifested by functioning and behaviors that occur during the developmental period, so it becomes important to inquire about significant developmental milestones in the client's life. Documentation, photographs, and eyewitness accounts from caretakers, teachers, ministers, healthcare providers and others are essential sources of potentially significant information that is required for a reliable assessment of the client's functioning and abilities. An unskilled or unduly hurried investigator will fail to appreciate or explore important areas of inquiry, and may fail to recognize significant evidence even if he or she stumbles upon it.

16. The hazards of failing to conduct a thorough and informed mitigation investigation are illustrated by the recent Supreme Court decision in *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2005), in which trial counsel themselves made cursory attempts to conduct family interviews and obtain the background information for their three mental health experts. Counsel's truncated and unskilled investigation produced misleading information from the client's family, who claimed that the client had a normal childhood and otherwise were unable to say much about him. With such a bland historical background, defense experts, in the Court's words, could produce "nothing useful" for the defense. After the defendant was sentenced to death, a competent investigation conducted by post-conviction counsel with the assistance of a qualified mitigation specialist uncovered documents that Mr. Rompilla had been previously hospitalized in a psychiatric institution and diagnosed with schizophrenia and that he grew up in a household with alcoholic parents who were quick to resort to physical violence against their children. The Supreme Court found these lawyers ineffective for failing to conduct a reasonable investigation into the defendant's background. The *Rompilla* case thus reveals that defense teams

who do not devote the time and professional services necessary to conduct an adequate mitigation investigation have a significant blind spot that may unconstitutionally undermine the effective representation demanded in a capital case.

17. The ABA standards for the appointment and performance of counsel in capital cases, which have long-served as a guide for the United States Supreme Court in assessing the performance of trial counsel (*see, e.g., Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003)), as well as the supplemental guidelines addressing the performance of mitigation specialist, emphasize the importance of assembling an interdisciplinary defense team, which includes members possessing specialized expertise in working with mental health experts; and for members of the team to have early, frequent and ongoing access to the client. Extensive communication with the client is recognized as an essential component to building the rapport and relationship necessary to effective representation, including the exploration of sensitive matters and instilling a sense of trust and confidence necessary for the client to rely on counsel's advice in making decisions that have life or death consequences.

18. As I understand the circumstances facing the attorneys who are assisting Mr. Mohammed, their investigation and preparation a defense case will require significant more time than necessary for a capital case that is litigated in a civil court on the mainland of the United States. To begin with, I am struck by the apparent volume of discovery that has been and will likely be provided to the defense, the scope of the investigation that will be necessary and the logistical obstacles impeding effective attorney-client communications. I have been advised by defense counsel that the government has disclosed in excess of tens of thousands of electronic "images" of discovery that were provided in a non-searchable file format. Based on their

consultation with counsel and review of the discovery disclosed by the counsel in *United States v. Moussaoui*, the attorneys in Mr. Mohammed's case also anticipate that the discoverable materials to which they ultimately will be entitled may run over a million pages and include at least an additional several hundred video and audio tapes. Assuming the defense team is composed of highly skilled lawyers, mitigation specialists and paralegals who efficiently work in a concerted manner under optimum conditions, the process of meaningfully reviewing, organizing and assessing such a volume of information would present a daunting task reasonably requiring the expenditure of at least several hundred hours of work by individual team members. Prioritizing and following up investigatory leads identified in the initial review of discovery would then require several hundred more hours.

19. While this would be the time reasonably necessary to accomplish these preliminary tasks under optimal working condition, the circumstances counsel have described to me are substantially less than conducive to the efficient performance of their tasks. I am informed, for example, that defense team access to the client is significantly impeded by the fact that attorney-client communications may be conducted only on an in-person basis with client at Guantanamo; the logistics, including significant travel time necessary to reach Guantanamo from counsel's offices on the mainland; restrictions on visits with team members, which limit interviews with the client to only attorneys with security clearances; severe limitations on the time, place and manner in which even the attorneys who have security clearances may discuss among themselves any information they obtained from the client that may be regarded as "classified"; and a continuing inability to obtain access for qualified experts to conduct confidential, clinical examinations of the client.

20. Experienced capital lawyers who represent clients held in custody at distant and/or remote locations understand that they will need substantial time, beyond that ordinarily expended in a death penalty case, to compensate for the lack of ready access to their clients. Most typically, however, such conditions are found in post-conviction cases, which may be pending for years, sometime decades, and thus permit a slower pace for the development of rapport with the client, and allow for longer periods between meetings. Trial attorneys, on the other hand, understand the importance of proceeding quickly to develop the working relationship necessary to reassure and guide the client through the unfamiliar and anxiety-producing stages and decision making involved in pre-trial and trial litigation.

21. The defense team's performance of their job in a case of this sort is also substantially complicated by additional factors such as cultural and language differences between the client and team members and the possibility that the client was subjected to abusive treatment by government agents in order to obtain incriminating statements. The representation of any capital defendant requires appreciation of and sensitivity to the cultural background and influences that shaped and continue to affect the individual's world view and functioning. The necessity to do so is particularly important with immigrants, foreign nationals and members of insular communities. The sociological barriers to appointed defense counsel's efforts to build trust and rapport with such defendants are monumentally increased where the client has been mistreated by the police. Under such circumstances it is extremely difficult (and certainly not an instinctive reflex) for the defendant to feel a sense of trust in an attorney who is employed by the same government whose agents perpetrated the abuse. The client's trust and confidence may be won only over a lengthy period of time during which the client's opportunity to compare counsel's

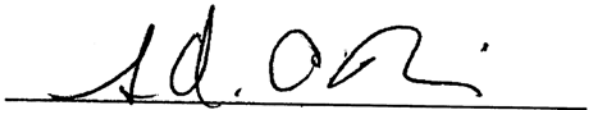
words and deeds leads to the conclusion that counsel is truly committed to protecting the client's best interests.

22. Such trust and confidence are generally regarded as a precondition that enables the client to endure and cooperate with the psychologically intrusive evaluations necessary to assess his or her mental state, including the lasting impacts of any physical abuse or torture. Based on the publicly available information counsel have shared with me regarding this case, it is my professional judgment that no capital trial lawyer worth his or her own salt would feel anywhere near prepared for trial until they had obtained all the discovery and conducted all the investigation necessary to determine whether their client was tortured or subjected to coercive interrogation; learned every significant fact and detail regarding such government misconduct; obtained reliable medical and clinical evaluations of the manner in which such abuse affected the client, including the voluntariness and reliability of any and all statements; and pursued all appropriate motions.

23. It is my professional judgment that all capital defense teams, whether assigned to directly represent or advise defendants facing the death penalty, should be provided sufficient time, funds and ancillary services so that all team members can perform consistently with the ABA guidelines on the appointment and performance of counsel in capital cases as well as with the supplemental guidelines on the defense mitigation function in capital cases. It is also my opinion that depriving capital defense teams of the ability reasonably to comply with these guidelines creates a substantial risk that they will fail to uncover evidence and mitigating factors that are essential under the Sixth, Eighth, and Fourteenth Amendments to a fair and reliable outcome in a capital case.

I declare under penalty of perjury, under the laws of the United States of America and the State of Missouri, that the foregoing is true and correct.

Executed this 20th day of August, 2008, at Kansas City, Missouri.



Sean D. O'Brien

EXHIBIT B

UNITED STATES OF AMERICA,)
)
vs.)
) **Declaration of Richard Burr**
KHALID SHEIKH MOHAMMED, *et. al*)
)
)
_____)

I, Richard Burr, declare under penalty of perjury as follows:

1. I am an attorney in private practice in Houston, Texas. Since 1979, my practice has been devoted entirely to the trial, appellate, and post-conviction representation of defendants in capital cases. During that time, I have represented persons in more than one hundred capital cases in twelve states and in the federal courts. Although my work has been heavily oriented toward post-conviction and habeas corpus proceedings, I have been trial counsel in three capital prosecutions, including *United States v. Timothy James McVeigh*, No. 96-CR-68 (D.Colo.) (the Oklahoma City bombing case), in which I served as lead counsel for the penalty phase and for penalty-related work. I have argued two capital cases before the Supreme Court of the *United States, Ford v. Wainwright*, 477 U.S. 399 (1986), and *Selvage v. Lynaugh*, 494 U.S. 108 (1990), and served as co-counsel on two others, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), and *Tennard v. Dretke*, 542 U.S. 274 (2004).

2. Because of my experience, I have been retained by the Office for Defender Services of the Administrative Office of the United States Courts, along with eight other similarly experienced attorneys, to serve through the Federal Death Penalty Resource Counsel project as an advisor and consultant to court-appointed and federal defender attorneys engaged in the defense of capital cases in the federal courts. Through this project, I work extensively with

counsel appointed to represent people charged in federal capital cases. In a report by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May, 1998) - which was adopted by the Judicial Conference - the work of our project was found to be "essential to the delivery of high quality, cost-effective representation in death penalty cases...." Id. at 50.

3. In addition to my direct representation as counsel of record for capitally charged and sentenced defendants, and the assistance rendered capital trials as a Federal Death Penalty Resource Counsel, I have provided both retained and pro bono assistance in capital cases for scores of defendants in trial and post-conviction death penalty cases.

4. For over twenty years, I have regularly been invited to organize and conduct state and national training programs, seminars and workshops on a variety of topics covering the spectrum of capital case representation including substantive legal principles and the development of practical trial preparation and litigation skills.

5. As a result of my education, training and experience I am familiar with prevailing standards of practice required by the Eighth Amendment to the United States Constitution for the competent trial representation of a capitally charged criminal defendant. Advisory counsel for Khalid Sheikh Mohammed have asked me to describe some of the tasks, and the time frames reasonably necessary to accomplish them, which are required to satisfy the constitutionally mandated standards of practice in a capital case. In answering these questions I have considered publicly disseminated information regarding the charges, government

evidence and scope of investigation in this case, supplemented with information provided to me by advisory counsel and their associates. Consistent with my experience as the lead penalty phase counsel for Timothy McVeigh, it is my professional judgment that the particular circumstances surrounding Mr. Mohammed's case substantially increase a number of tasks and the time required to perform them in competently representing the defendant in a case of this nature compared to a less complex capital prosecution.

6. A principal distinction between the preparation of the defense in capital and non-capital homicide cases is the potential role of mitigating evidence and the corresponding necessity to consider, investigate and integrate strategies for both the guilt and penalty phases of a capital prosecution. The Eight Amendment requires the sentencer to consider and give full effect to any evidence that might "serve as a basis for a sentence less than death." *Tennard v. Dretke*, 542 U.S. at 287, 124 S.Ct. 2562 (quoting Skipper v. South Carolina, 476 U.S. 1, 5, 106 S.Ct. 1669). While mitigation therefore encompasses more than the evidence that would establish a factual or legal defense to the charged offense, a minimally adequate investigation of potential mitigation often leads to evidence that reduces the legal as well as moral culpability of the accused. For example, the standard practice of investigating a client's educational history, occupational experience or drug abuse might reveal evidence relevant to challenging his or her ability to form a requisite mens rea or validly consent to a search. In turn, the timely and adequate development of the evidence to be presented in the event of a penalty phase is necessary to the preparation of a coherent trial strategy that enables counsel to make strategic and tactical decisions in the guilt phase with an eye toward maximizing the effect of the penalty phase evidence.

7. From the outset, then, the competent preparation of a capital defense requires the simultaneous, integrated investigation of both guilt phase and penalty phase evidence. For at least a quarter of a century, the starting point for the mitigation investigation has been what Professor Gary Goodpaster described as trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up." Any minimally competent capital trial lawyer is well familiar with Professor Goodpaster's admonition that "[t]here must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." (Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 New York University Law Review 299 (1983) at 323-324.)

8. It is now widely accepted by practitioners, professional associations and courts that the investigation of the client's life necessarily entails thorough inquiry into a variety of areas regarding his or her development and functioning including the client's medical, educational, employment, military and institutional history; the similar history of siblings; multi-generational family history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; and religious, ethnic, racial, cultural, community, socio-economic, historical, and political influences; history of trauma, including physical, psychological and sexual maltreatment and/or neglect; and substance abuse. The requisite medical evidence includes complete prenatal, pediatric and adult health information; as well as indications of

exposure to harmful substances in utero and in the environment.

9. Decades of shared capital litigation experience, including my own, have demonstrated that investigation of a complete life history leads to more than mere evidence of human frailty that calls for a sentence less than death. A comprehensive social history is also necessary for the trier of fact and sentencer fairly to understand the confluence of factors, including the personal, cultural and historical influences that led to the accused person's involvement in the offense. Relying on the standards of practice that are necessary to produce such constitutionally required evidence, the United States Supreme Court has recognized that defense counsel has a duty not only to gather such evidence put to pursue and develop all investigative leads suggested by the evidence. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 542,123 S.Ct. 2527 (U.S. 2003) (citing American Bar Association Guidelines and finding deficient performance where counsel terminated the "investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

10. The social history investigation required in capital cases typically requires counsel to retain and supervise one or more mitigation specialists to conduct interviews, track down, collect, and analyze records pertaining to the client's life, and compile a comprehensive, well-documented psycho-social history. See ABA, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1(A)(1) (Rev. ed. 2003). Although it is a misnomer to speak in terms of an "average" capital case, the scope and complexity of the investigation reasonably undertaken in most cases requires the expenditure of hundreds of hours of mitigation specialists' and attorneys' time. Interviews must be conducted

of all available family members, as well as former teachers, neighbors, co-workers, classmates and others who may have had an opportunity to observe the client's development and functioning across the course of his or her life, and who may provide information necessary to the formulation of reliable expert assessments, and who can offer lay testimony to corroborate the testimony of experts. Any available records about the client and his family must also be analyzed, and persons mentioned in or responsible for creating the records, interviewed, to develop a full understanding of the client.

11. Standard investigative practices are premised on an awareness that the most thorough and reliable information can be gathered only through personal interviews. Telephone interviews are a poor substitute, and widely regarded as bad practice because the subject matters that must be explored are frequently sensitive. For this reason, interviewees must come to trust the interviewer before they are likely to feel comfortable enough to disclose such information. For similar reasons, qualified mitigation specialists understand that because of the natural barriers to the disclosure of deeply personal information, such topics should not be broached during initial interviews with the client or social history witnesses.

12. Contemporaneously with conducting the mitigation investigation, counsel in capital cases must undertake the more familiar investigation of the prosecution's guilt phase evidence and the search for potentially exculpatory evidence. A minimal requirement for constitutionally adequate representation in all serious criminal cases requires counsel to obtain and review discovery materials for indications of the bases for appropriate pre-trial motions, including the exclusions of evidence. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986). Additionally, among other tasks, counsel must organize and review the

discovery and defense-generated evidence to make informed tactical decisions regarding the interview and investigation of the witnesses and other evidence brought to his or her attention; visit and inspect the crime scene(s); examine the physical evidence; and retain and consult pathologists, criminalists and other appropriate forensic experts; and provide such experts with all appropriate case materials for their review and consideration.

13. Reasonably experienced practitioners and prevailing standards of practice recognize that both aspects of the capital case investigation are dynamic processes in which existing evidence indicates investigatory leads, which produce new evidence requiring reevaluation of the significance of existing evidence. Throughout these processes one of counsel's paramount obligations is to maintain frequent communication with the client and to apprise him or her of case developments. The nature, frequency and extent of such communications are necessary to the development of the rapport and trust that are essential to counsel's effective representation of the client and to the client's meaningful participation in the proceedings.

14. While again cautioning that there are no "average" capital cases, a team of competent capital litigators generally would require between twelve and eighteen months to complete the sorts of tasks outlined above. As I previously mentioned, I anticipate that the work and hours necessary to perform such tasks in this case reasonably will be significantly greater due to several circumstances. For example, I am informed that the government has described the criminal investigation conducted by domestic federal and state law enforcement as well as by foreign agencies as being the largest in United States history. The discoverable material generated by such an investigation will likely be exponentially greater than anything

encountered by counsel in any previous case. I am also informed that discovery to date includes in excess of 30,000 pages of material, in addition to dozens of hours of videotape recordings. I am aware from my own experience in the McVeigh prosecution that the reviewing, processing and conducting follow-up investigation of this initial batch of discovery, along with the enormous amount of materials to follow, may reasonably require weeks months of attorney, mitigation specialist, investigator and paralegal time. More specifically, in Mr. McVeigh's case, which involved - by the government's own appraisal -- a relatively smaller investigation than the one undertaken in Mr. Mohammed's case, the defense received approximately 500,000 pages of discovery, which reasonably required a team of 25 attorneys, paralegals and investigators nearly two years to review, follow up with investigation, and prepare for trial.

15. I also have been informed that information from various sources, including public statements by senior government officials, provides a plausible basis for counsel to believe that Mr. Mohammed was subjected to so-called "enhanced interrogation techniques" by agents of the United States government. The techniques, which are said to have included physical and psychological abuse, were also reportedly employed to coerce the defendants to make statements against their will. In any case where the government has appeared to acknowledge, or there are other credible indications of, the use of coercive interrogation by the authorities, defense counsel would be sorely remiss if he or she failed to use all available means to investigate thoroughly the pertinent details of such interrogation. Press accounts and other information known to me indicate that the required investigation may be international in scope and may meet with resistance from the government. Defense counsel therefore reasonably

should be prepared to undertake an extensive investigation, including seeking to identify and interview those who conducted or were present during the interrogations; and to engage in protracted discovery litigation.

16. By comparison, although the representation of Mr. McVeigh did not involve the necessity to investigate reports of coercive interrogations, the pre-trial motions litigation included nearly 1000 motions, and trial did not commence for almost two years following the arraignment.

17. It is also my understanding that in Mr. Mohammad's case client meetings and communications, which are especially crucial to the effective representation of a capital client, face obstacles that are somewhat unique. More particularly, I am informed that communications between the client and defense team are restricted to in-person interviews that may be conducted by only counsel. These in-person interviews are further limited by the logistics and practical difficulties for counsel traveling from the mainland of the United States to the detention facility at Guantanamo Bay, and by the limited availability of suitable interview space at the facility. Limiting client access to only those team members with the necessary security clearance also delays evaluation by appropriate forensic experts.

18. These conditions alone would be expected to extend significantly the time necessary for counsel in a capital case to meet, consult and establish a working rapport with the client. The obstacles facing the development of a necessary rapport in this case also may be further exacerbated by the cultural differences between counsel and client; and by the client's maltreatment while in the custody of counsel's government. Under such circumstances, reasonably experienced capital counsel would be responsive to the need for the additional time

required to earn and reinforce the client's trust.

19. The representation of a defendant in a capital case imposes serious professional obligations to ensure that the defense has the time and resources necessary to vindicate the client's legal rights and to provide the fact-finder and, if need be, the sentencer with the evidence needed to make a reliable determination of guilt and penalty. As demonstrated by the trial of Mr. McVeigh, counsel is obligated to discharge this duty even when the client endorses his guilt and seeks no leniency. Because, as demonstrated by the result in the trial of Zacarias Moussaoui, a fair-minded sentencer, informed of the relevant mitigation, may still conclude that leniency is appropriate.

I declare under penalty of perjury, under the laws of the United States of America and the State of Texas, that the foregoing is true and correct.

Executed this 20th day of August, 2008, in Houston, Texas.

Richard Burr

EXHIBIT C

DECLARATION OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

Background and Qualifications

1. I am the National Mitigation Coordinator for the Federal Death Penalty Resource Counsel and Habeas Assistance and Training Counsel Projects. This national position was created in 2005 in response to the increased demand for effective mitigation preparation in death penalty cases following the February 2003 revision of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the U.S. Supreme Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003). In this capacity, I consult with lawyers, investigators, mitigation specialists, and experts in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus.

2. From1995 to 2005, I served as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New York State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. The Capital Defender Office was charged with creating an effective system of capital defense throughout New York State by providing direct representation and offering assistance to private counsel assigned by the courts to represent indigent capital defendants. I supervised a statewide staff of investigators and mitigation specialists, and I consulted with investigators, mitigation specialists, lawyers, and experts who were retained or employed by the Capital Defender Office or the private bar in connection with death penalty cases.

3. From 1990 to 1995, I served as Chief Investigator at the California Appellate Project,

a nonprofit law office in San Francisco which coordinated appellate and post-conviction representation of all the prisoners under sentence of death in California. In that capacity, I also supervised an in-house staff and consulted with investigators, mitigation specialists, lawyers, and experts outside the office who were retained to assist counsel representing death-sentenced prisoners.

4. I have investigated all aspects of death-penalty cases since 1980, first working in a private office in California and later in institutional offices. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases at trial and on appeal. Most of these conferences were organized and attended by attorneys specializing in capital work.

5. Since 1990, I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have lectured on these subjects not only in New York and California, but in many other death-penalty jurisdictions, including Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. I have also lectured on numerous occasions under the auspices of the Administrative Offices of the United States Courts (in connection with federal death-penalty cases and habeas corpus litigation) and at the Fourth Capital Litigation Workshop of the U.S. Army Trial Defense Service.

6. I have lectured on mitigation investigation at multiple national training conferences sponsored by the following organizations: the NAACP Legal Defense Fund (annual Airlie conferences), the National Legal Aid and Defender Association ("Life in the Balance"), and the National Association of Criminal Defense Lawyers ("Making the Case for Life"). At various

times in the past decade and a half, I have served on the planning committees for these national conferences, as well as the annual Capital Case Defense Seminar sponsored by California Attorneys for Criminal Justice (CACJ) and the California Public Defenders Association (CPDA). I am co-chair of the planning committee for this seminar in 2009. I also teach regularly at the death penalty colleges sponsored by the Santa Clara University School of Law in California and the DePaul University College of Law in Illinois.

7. Since 1993, I have contributed extensively to the California Death Penalty Defense Manual published by the California defense bar (CACJ and CPDA). This four-volume reference has a volume devoted to the investigation and presentation of mitigation evidence which I helped to shape in the 1990s. In 1999, I published articles on *Mitigation Evidence in Death Penalty Cases* and *Mental Disabilities and Mitigation* in THE CHAMPION, the monthly magazine of the National Association of Criminal Defense Lawyers, as well as an article entitled *Why Capital Cases Require Mitigation Specialists* in INDIGENT DEFENSE, published by the National Legal Aid and Defender Association. These and other articles of mine have been cited in the Commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, rev. 2003 (31 HOFSTRA L. REV. 913 (Summer 2003), available at www.abanet.org/deathpenalty). At the request of HOFSTRA LAW REVIEW, I wrote an article for their symposium issue on the revised ABA Guidelines, entitled *Commentary on Counsel's Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*. (31 HOFSTRA LAW REVIEW 1157 (Summer 2003)). At the request of HOFSTRA LAW REVIEW, I also wrote an article for their symposium issue on the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (36 HOFSTRA L. REV. 1067 (Spring 2008)).

8. I am the coauthor of chapters on psychiatric issues in death penalty cases in two books: *Dead Men Talking: Mental Illness and Capital Punishment*, in FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS (Gerald Landsberg, D.S.W., and Amy Smiley, Ph.D., eds.; Kingston, New Jersey: Civic Research Institute, Inc., 2001) and PUNISHMENT, in PRINCIPLES AND PRACTICE OF FORENSIC PSYCHIATRY, 2nd ed. (Richard Rosner, M.D., ed.; London: Arnold Medical Publishing, 2003; U.S. distribution by Oxford University Press).

9. Over the years, I have been directly involved in hundreds of capital cases in California and New York, including dozens of trials and postconviction hearings. I have also been consulted in various capacities on capital cases in numerous other jurisdictions around the country. As an expert witness, I have provided evidence on the standard of care in investigating capital cases and mitigation by live testimony or affidavit in numerous jurisdictions, including Alabama, Arizona, Arkansas, California, Georgia, Mississippi, Missouri, New York, Oklahoma, Pennsylvania, Tennessee, Texas, and Wyoming.

Standard of Care in Capital Cases

10. Investigation of a client's background, character, life experiences, and mental health is axiomatic in the defense of a capital case, and has been for as long as I have done this work. In every seminar I have participated in since 1980, instructors have emphasized the importance of conducting a "mitigation investigation" in preparation for the penalty phase of a capital trial and developing a unified strategy for the guilt-innocence and sentencing phases.

11. As early as 1983, Professor Gary Goodpaster discussed trial counsel's "duty to investigate the client's life history, and emotional and psychological make-up" in capital cases. He wrote, "There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the care with which it is conducted, cannot be overemphasized." (Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-324 (1983).)

12. Since the early 1980s, it has also been standard practice for competent defense counsel to determine whether their capital client suffers from organic brain injury, psychiatric disorders, or trauma outside the realm of ordinary human experience. Whenever brain-behavior relationships are at issue, a thorough investigation of the etiology of brain damage is needed to determine the interplay of genetics, intra-uterine exposure to trauma and toxins, environmental exposures, head injuries, etc. In a capital case, such investigation is particularly important because of the additional mitigating factors which may be disclosed beyond the fact of psychiatric disorder or organicity.

13. In three recent cases, the U.S. Supreme Court has found trial counsel ineffective for failing to investigate potential mitigation evidence: *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Williams*, the Court reaffirmed an all-encompassing view of mitigation and found trial counsel ineffective for failing to prepare the mitigation case until a week before trial and failing to

conduct an investigation of the readily available mitigating evidence (nightmarish childhood, borderline retardation, model prisoner status, etc.) In *Wiggins*, trial counsel were found deficient in their performance, even though they had had their client examined by one mental health expert, because they failed to conduct a complete social history investigation. In *Rompilla*, counsel were found deficient "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting mental health experts.

14. In a capital case, competent defense counsel have a duty to conduct life-history investigations, but generally lack the skill to conduct the investigations themselves. Moreover, even if lawyers had the skills, it is more cost-effective to employ those with recognized expertise in developing mitigation evidence. Thus, competent capital counsel retain a "mitigation specialist" to complete a detailed, multigenerational social history to highlight the complexity of the client's life and identify multiple risk factors and mitigation themes. The Subcommittee on Federal Death Penalty Cases, Committee on Defender Services for the Judicial Conference of the United States, for example, noted that mitigation specialists "have extensive training and experience in the defense of capital cases. They are generally hired to coordinate an investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary material for them to review." This report also bluntly commented, "The work performed by mitigation specialists is work which otherwise would have to be done by a lawyer, rather than an investigator or paralegal." (FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS

CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION, Federal Judicial Conference, May 1998, available at http://www.uscourts/gov/dpenalty/1COVER.htm.)

15. The Revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter, 2003 Revised ABA Guidelines, available at www.abanet.org/deathpenalty) state unequivocally that lead counsel at any stage of capital representation (trial or postconviction) should assemble a defense team as soon as possible after designation with at least one mitigation specialist and at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments (Guideline 10.4), in order to conduct a thorough and independent investigation relating to penalty (Guideline 10.7 and Guideline 10.11). The previous Guidelines, adopted in 1989, similarly required counsel to begin investigation immediately upon counsel's entry into the case and to "discover all reasonably available mitigating evidence." (1989 Guideline 11.4.1.) The 1989 Guidelines also required counsel to retain experts for investigation and "preparation of mitigation" (1989 Guideline 11.4.1.(7)) Notably, the 1989 Guidelines specifically stated that "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." The 1989 ABA Guidelines were recognized by the U.S. Supreme Court in *Wiggins* as "well-defined norms." (539 U.S. at 524). "The new ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence." *Hamblin v. Mitchell*, 354 F.3d 482 at 487 (6th Cir. 2003).[1]

[1]The Supreme Court has consistently used the ABA's standards and guidelines in capital cases to assess the performance of trial counsel who prepared their cases before the relevant

ABA publications had been issued. In *Strickland*, the Court cited standards published by the ABA in 1980 when assessing trial counsel's performance in 1976-77. In *Wiggins*, the Court cited the 1989 ABA Guidelines when assessing trial counsel's performance in 1988-89. In *Rompilla*, the Court used multiple ABA publications from 1980, 1989, and 2003, to assess deficiencies in a 1988 trial. Finally, in *Nixon v. Florida*, 543 U.S. 175 (2004), the Court used the 2003 Guidelines to assess performance in 1984-85.

16. Without a thorough social history investigation, it is impossible to ascertain the existence of previous head injuries, childhood trauma, and a host of other life experiences that may provide a compelling reason for the jury to vote for a life sentence. Moreover, without a social history, counsel cannot make an informed and thoughtful decision about which experts to retain, in order to gauge the nature and extent of a client's possible mental disorders and impairments. Mental health experts, in turn, require social history information to conduct a complete and reliable evaluation. *See* Richard G. Dudley, Jr., and Pamela Blume Leonard, *Getting It Right: Life History Investigation as the Foundation for a Reliable Mental Health Assessment*, 36 HOFSTRA L. REV. 963 (2008); and Douglas Liebert and David Foster, *The Mental Health Evaluation in Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43 (1994).

17. The social history investigation should include a thorough collection of objective, reliable documentation about the client and his family, typically including medical, educational, employment, social service, and court records. Such contemporaneous records are intrinsically credible and may document events which the client and other family members were too young to remember, too impaired to understand and record in memory, or too traumatized, ashamed, or biased to articulate. The collection of records and analysis of this documentation involve a slow and time-intensive process. Many government record repositories routinely take months to comply with appropriately authorized requests. Great diligence is required to ensure compliance. Careful review of records often discloses the existence of collateral documentation which, in turn, needs to be pursued.

18. A social history cannot be completed in a matter of hours or days. In addition to the bureaucratic obstacles to the acquisition of essential documentation, it takes time to establish rapport with the client, his family, and others who may have important information to share about the client's history. It is quite typical, in the first interview with clients or their family members, to obtain incomplete, superficial, and defensive responses to questions about family dynamics, socio-economic status, religious and cultural practices, the existence of intra-familial abuse, and mentally ill family members. These inquiries invade the darkest, and most shameful secrets of the client's family, expose raw nerves, and often re-traumatize those being interviewed. Barriers to disclosure of sensitive information may include race, nationality, ethnicity, culture, language, accent, class, education, age, religion, politics, social values, gender, and sexual orientation.

19. Only with time can an experienced mitigation specialist break down these barriers, and obtain accurate and meaningful responses to these sorts of questions. In my professional opinion, an experienced mitigation specialist requires, at minimum, hundreds of hours to complete an adequate social history – even working under intense time pressure. (One nationally recognized authority in mitigation investigation, Lee Norton, has stressed the cyclical nature of the work and estimated that hundreds of hours will typically be required. *See* Lee Norton, *Capital Cases: Mitigation Investigation*, THE CHAMPION, 43-45 (May 1992).)

20. Mitigation investigation is particularly important when the client does not share the attorney's racial, ethnic, or cultural background. Cultural differences can include not only ethnicity and language, but all of the badges of social identity that define an individual's world and belief system, including politics, religion, and sexual orientation. In those cases where the client does from a different ethnocultural background, attorneys may too readily overlook

symptoms of impairment, attributing them to language difficulties or cultural differences. In my experience, the process of compiling an accurate social history is even more time-consuming and delicate when interviewing clients and family members from foreign cultures, because of inevitable cultural misunderstandings about the nature of the legal process and the purpose of the investigation. Every aspect of the investigation is more difficult abroad, from gathering records to gaining the trust and cooperation of witnesses. I am familiar with the difficulties of conducting investigations in foreign countries from my own personal experience. I have personally traveled to Canada, Germany, Honduras, Nigeria, Puerto Rico, and the Virgin Islands on investigative assignments. I have supervised staff investigators and mitigation specialists in capital cases who have had to conduct investigations in Colombia, the Dominican Republic, Jamaica, Mexico, Peru, and Thailand. These assignments are consistently viewed as the most arduous even among the most seasoned and skilled practitioners.

21. Mitigation evidence is not developed to provide a defense to the crime. Instead, it provides evidence of a disability, condition, or set of life experiences that inspire compassion, empathy, mercy and understanding. Unlike insanity and competency, both of which are strictly defined by statute, mitigation need not involve a mental disease or defect. Nevertheless, in many, many cases, defendants do suffer mental impairments that may not meet the legal definition of insanity or incompetency, but are powerfully mitigating disabilities which are given great weight when juries are charged with assessing individualized culpability.

22. For clients who are psychiatrically disordered or brain damaged, mitigation evidence may explain the succession of facts and circumstances that led to the crime, and how that client's disabilities distorted his judgment and reactions. Of all the diverse frailties of humankind, brain

damage is singularly powerful in its ability to explain why individuals from the same family growing up in the same setting turn out so differently. It is an objective scientific fact. It does not reflect a choice made by the client.

23. Over the years, I have been involved in hundreds of capital cases, including dozens of trials and postconviction hearings. My personal experience of the effectiveness of mitigation evidence accords with the empirical research of social scientists who have studied the decision-making processes of actual jurors in death-penalty cases. *See*, for example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538 (1998) and *The Emotional Economy of Capital Sentencing,* 75 N.Y.U. L. REV. 26 (2000) (concluding that mitigation does matter, especially mental impairment and mental illness).

Standard of Care in Capital Mental Health Evaluations

24. Both anecdotal reports from capital defense practitioners and social science research indicate that defense experts are viewed with great skepticism and often regarded as "hired guns" unless their conclusions are supported by abundant, credible evidence from lay witnesses. (*See*, for example, Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997), finding that two-thirds of the witnesses jurors thought "backfired" were defense experts.) Thus, if only for pragmatic reasons, capital defense counsel are well advised not to rely on expert testimony without the corroborative lay witnesses whose identity and potential evidence can only be learned through life-history investigation. However, it is equally important to offer well-prepared expert testimony to explain the effects of life experiences on an individual's functioning and behavior. Lay witnesses on their own are unlikely to understand the significance of the symptoms and behaviors they

describe, and only an expert is likely to be able to provide an overview of the factors that shaped the client over the course of his life and to be able to offer an empathic framework for understanding the resultant disorders and disabilities. Expert testimony is essential for placing the factual details elicited from lay witnesses into an interpretive context that explains how various life events shaped the capital client's brain and behavior.

25. The proper standard of care for a competent mental health evaluation also requires an accurate medical and social history as its foundation. Because psychiatrically disordered individuals are by definition likely to be poor historians, a reliable evaluation requires historical data from sources independent of the client (for clinical, not simply forensic, reasons). Additional components of a reliable evaluation will include a thorough physical examination (including neurological examination) and appropriate diagnostic testing. The standard mental status examination cannot be relied upon in isolation for reliable clinical assessments any more than the expert can be relied upon in isolation in the courtroom context.

26. Except when clients exhibit such florid symptomatology that immediate clinical intervention is patently warranted, capital defense counsel are well advised to conduct a thorough social history investigation before retaining mental health experts. Only after the social history data have been meticulously digested and the multiple risk factors in the client's biography have been identified will counsel be in a position to determine what kind of culturally competent expert is appropriate to the needs of the case, what role that expert will play, and what referral questions will be asked of the expert. Psychiatrists and psychologists have different training and expertise, and within each profession are numerous subspecialties including neuropsychology, psychopharmacology, and the disciplines which study the effects of trauma on human

development. The potential roles of experts include consultants; fact gatherers needed to elicit, or assess the credibility of, client disclosures; and testifying witnesses, to name but a few. To make informed decisions about the kind of experts who may be needed and the referral questions they will address, counsel first needs a reliable social history investigation.

Summary of opinions

27. I was asked by counsel for Mr. Khalid Sheikh Mohammed to address the prevailing professional norms regarding the investigation and preparation of mitigation evidence in capital cases today. In addition to my own training and experience in this area, I rely on the standards articulated in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003 rev.), the Commentary to those Guidelines, and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. The Supplementary Guidelines were published in HOFSTRA LAW REVIEW 36:3 (Spring 2008) as part of a symposium issue dedicated to the mitigation function. This symposium issue also includes articles focusing on professional responsibility (Lawrence J. Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities,* 36 HOFSTRA L. REV. 775) and cultural issues (Scharlette Holdman and Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883).

32. The importance of the mitigation specialist is addressed at length in the Commentary to ABA Guideline 4.1:

> A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They

have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may never have disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effects on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation. (Citations omitted; 31 HOFSTRA L. REV. at 959 (2003)).

33. The Commentary to ABA Guideline 10.7 also underscores the importance of obtaining all relevant records:

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

(31 HOFSTRA L. REV. at 1025, emphasis added).

34. Reliable, objective records are critical to life-history investigation because they can reveal what the client and his family are reluctant to disclose because of shame and embarrassment, and what they simply can't disclose because they were too young or too impaired to record the events in memory. They are more credible to fact-finders because they have no inherent bias. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories of past events, or experts offering opinions formed only after the client faces capital charges. They also enable the defense team to interview mitigation witnesses more effectively. The authors of reports and documents are themselves potential mitigation witnesses, otherwise unknown to the client and his family. Siblings' records often reveal insights into family dynamics or help to explain the differences between their life trajectories and that of the capital client. Multigenerational records show inherited predispositions and vulnerabilities, as well as patterns of behavior that are repeated from one generation to the next. Records from multiple family members also provide a context for understanding key changes in the client's life.

35. The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 677 (Spring 2008), explain in detail the duties of counsel to obtain the services of competent team members and to supervise and direct their work. (Supp. Guideline 4.1.A and B, 36 HOFSTRA L. REV. at 680.)

36. The Supplementary Guidelines also provide clear guidance about the qualifications of mitigation specialists. Supplementary Guideline 5.1.C elaborates on the necessary interviewing skills:

> Mitigation specialists must be able to identify, locate and interview relevant persons in a culturally competent manner that produces confidential, relevant and reliable information. They must be skilled interviewers who can recognize and elicit information about mental health signs and symptoms, both prodromal and acute, that may manifest over the client's lifetime. They must be able to establish rapport with witnesses, the client, the client's family and significant others that will be sufficient to overcome barriers those individuals may have against the disclosure of sensitive information and to assist the client with the emotional impact of such disclosures. They must have the ability to advise counsel on appropriate mental health and other expert assistance. (36 HOFSTRA L. REV. at 682)

Guideline 5.1.F discusses the necessary skills in record gathering:

> Mitigation specialists must possess the knowledge and skills to obtain all relevant records pertaining to the client and others. They must understand the various methods and mechanisms for requesting records and obtaining the necessary waivers and releases, and the commitment to pursue all means of obtaining records. (36 HOFSTRA L. REV. at 683)

Neither skill set is of much use without adequate time to gather all the necessary records and to conduct multiple interviews with the individuals who knew the client most intimately over the course of his life.

37. Multigenerational life-history interviewing is essential, involving multiple one-on-one interviews, as succinctly summarized at Supplementary Guideline 10.11.C:

> Team members must conduct in-person, face-to-face, one-on-one interviews with the client, 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 will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation. Team members must endeavor to establish the rapport with the client and witnesses that will be necessary to provide the client with a defense in accordance with constitutional guarantees relevant to a capital sentencing proceeding. (36 HOFSTRA L. REV. at 689)

38. Supplementary Guideline 10.4.A delineates the responsibility of counsel in preparing mitigation evidence as follows:

> Counsel bears ultimate responsibility for the performance of the defense team and for decisions affecting the client and the case. It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore

incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy. (36 HOFSTRA L. REV. at 688)

39. These national standards of practice apply to death penalty cases under any U.S. jurisdiction. The Definitional Notes to ABA Guideline 1.1 state (at Note 2): "By 'jurisdiction' is meant the government under whose legal authority the death penalty is to be imposed. . . . The term also includes the military and any other relevant unit of government (e.g., Commonwealth, Territory)." (31 HOFSTRA L. REV. at 919)

I declare under penalty of perjury under the laws of the State of California, and the United States of America, that the foregoing is true and correct and was executed this 19th day of August 2008 in Oakland, California.

RUSSELL STETLER

EXHIBIT D

DECLARATION OF KEVIN McNALLY

1. I currently serve as the Director of the Federal Death Penalty Resource Counsel Project. This Project assists court-appointed and defender attorneys charged with the defense of capital cases in the federal courts throughout the United States. Declarant has 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 Director of the Federal Death Penalty Resource Counsel Project include, among other duties, the monitoring of all federal capital prosecutions throughout the United States in order to collect information regarding district court practices in federal capital trials.[1]

3. In order to carry out the duties entrusted to us, the Resource Counsel Project maintains a comprehensive list of federal death penalty prosecutions and detailed information regarding district court practices in these cases. We accomplish this by reviewing dockets and by downloading and obtaining indictments, pleadings of substance (including sealed documents), notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with experts, defense counsel and/or consultation with chambers. This information is regularly updated, and is checked for accuracy whenever possible against any available United States government information regarding federal capital prosecutions. The Project's information regarding practices in federal capital

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[1]The work of the Federal Death Penalty Resource Counsel Project is described in the 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. 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. **http://www.uscourts.gov/dpenalty/1COVER.htm**.

prosecutions has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

4. Resource counsel collect comprehensive, accurate data concerning various practices that have emerged since the federal courts resumed trying capital cases in 1990. This collection of data includes the intervals of time between various pretrial milestones and trial. The federal courts have, with few exceptions, permitted considerable time between the indictment and mitigation submission and between the government's notice of intent to seek the death penalty and the commencement of trial.

5. The average time between indictment and trial in federal capital cases is approximately 20.5 months. The average time between notice of intent to seek the death penalty and trial is approximately 12.6 months.

6. Pursuant to declarant's responsibilities as Federal Death Penalty Resource Counsel, declarant has compiled the above information regarding federal capital cases in the regular course of the business of the Federal Death Penalty Resource Counsel Project.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 16th day of October, 2007.

Kevin McNally

EXHIBIT E

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	
	)	**Declaration of Scott McKay**
KHALID SHEIKH MOHAMMED, *et. al*	)	
	)	
	)	
_____	)	

I, Scott McKay, qualified civilian defense counsel and admitted to practice before the Military Commissions, make the following declaration under penalty of perjury:

1. I am an attorney with the law firm of Nevin, Benjamin, McKay & Bartlett LLP in Boise, Idaho. I make this declaration in support of the defense motion for enlargement of time to file motions and to address other scheduling matters including our request that the Commission continue to defer scheduling the trial in this case.

2. On April 21, 2008, I was conditionally admitted into the pool of qualified civilian defense counsel to practice before the Military Commissions pending approval of the security clearance necessary to represent detainees in the above referenced proceedings. On Friday, May 30, 2008, I obtained the necessary security clearance, [redacted], and approval for participation in this case following security briefings by the U.S. Department of Justice and U.S. Department of Defense.

3. On Monday, June 2, 2008, I was permitted for the first time to travel to the United States Naval Station, Guantanamo Bay, Cuba (hereinafter "GTMO"), aboard a military flight arranged by the Military Commissions. I traveled to GTMO with my law partner, David Nevin, who also had previously been conditionally admitted into the pool of qualified civilian defense counsel, received his necessary security clearance and approval on the same day, and

was traveling for the first time to GTMO.

4. On June 3, 2008, while at GTMO, Mr. Nevin and I met with Mr. Mohammed for the first time together with detailed military defense counsel, CAPT Prescott Prince, JAGC, USNR, whom we had been communicating with regarding our efforts to join him in the representation of Mr. Khalid Sheikh Mohammed. Mr. Nevin and I filed notices of appearance with the Military Commission on behalf of Mr. Mohammed that evening.

5. On June 4, 2008, we met for the second time with Mr. Mohammed. That evening, Mr. Nevin and I attended an 802 Conference with the Military Judge, other defense counsel, and members of the prosecution team. Among the matters raised with the Military Judge during this conference were objections by the defense to holding such a conference outside the presence of the Accused. Defense counsel also objected to proceeding with the arraignment scheduled for the following day in light of the very limited time that they had been permitted to meet with the Accused and objected to questioning by the Military Judge of each Accused concerning whether they wished to be represented by defense counsel pursuant to a preprinted document that was provided to counsel that indicated what the Military Judge and the lawyers were to say throughout the proceedings. (A true and correct copy of this document used by the Military Judge at the June 5, 2008 proceeding and styled "Initial Session of Military Commission" is attached hereto as Exhibit "A" to McKay Declaration.) The Military Judge denied the request to delay the proceedings and the request to defer questioning each Accused concerning their election of counsel.

6. On June 5, 2008, counsel for the prosecution and defense were present in the Military Commissions courtroom when Mr. Mohammed and the other accused were brought into the

Courtroom. This occurred approximately 15-20 minutes prior to start of the proceedings at 9 am, EDT. Mr. Mohammed and the other accused were permitted by security present in the Courtroom to speak freely among themselves while in the presence of the prosecution team. In fact, throughout most of the proceedings that day and while in the presence of the Military Judge and the prosecution, the Accused were permitted to speak to each other. Because the Accused were separated by some distance, their conversations were easily overheard by those present in the courtroom.

7. At the outset of the Commission proceedings on June 5, 2008, Mr. Nevin again moved the Military Judge to continue the proceeding until defense counsel had sufficient opportunity to meet with Mr. Mohammed. The Military Judge denied this request and proceeded with the hearing, including questioning Mr. Mohammed about whether he wished to be represented by counsel. Mr. Mohammed eventually informed the Court that he wished to represent himself. The Military Judge thereafter ordered that detailed military counsel for Mr. Mohammed serve as stand by counsel. Mr. Nevin and I were notified that we could serve as civilian attorney advisors to Mr. Mohammed. However, when Mr. Nevin attempted to speak on the record following Mr. Mohammed's expression of his desire to represent himself, the Military Judge ordered him to remain silent for the remainder of the proceedings.

8. Prior to the June 5, 2008 Commission proceedings, Mr. Nevin and I had met with Mr. Mohammed for a total of approximately 5 hours. I am informed and believe that prior to our travel to GTMO on June 3, 2008, CAPT Prince had met with Mr. Mohammed for approximately 20 hours, and that during part of this time, assistant detailed counsel, LTC Michael Acuff, JAGC, USAR, joined him in meeting with Mr. Mohammed. An interpreter is frequently present

and assists with translation when necessary.

9. Following the June 5, 2008 proceeding, the foregoing counsel have made every effort to meet with Mr. Mohammed in preparation for the defense of this case. During meetings with Mr. Mohammed, both CAPT Prince and LTC Acuff are required to be attired in military uniforms. As more fully described herein, there are significant issues associated with arranging such meetings and with assisting Mr. Mohammed with his defense which create the need for a reasonable amount of additional time. To date, no other member of the defense team, including death penalty qualified counsel who are awaiting approval of their security clearances, have been permitted to meet with Mr. Mohammed

10. On July 10, 2008, all of the foregoing defense counsel appeared with Mr. Mohammed before the Military Commission for further proceedings. During these proceedings, Mr. Mohammed was advised by the Military Judge of the severity of the pending charges which he described as factually and legally complex and that such charges require significant legal work. The Military Judge also explained that the sentencing phase of this case would require additional legal work including the presentation of evidence in extenuation of mitigation of the charges for which you were convicted. Mr. Mohammed reaffirmed that he wished to represent himself. During this proceeding, Mr. Mohammed also complained to the military judge of various logistical and other difficulties he was having including difficulties in corresponding with counsel, inability to file motions in light of the security restrictions and a lack of paper upon which to write.

11. During both the proceedings on June 5 and July 10, 2008 at which Mr. Mohammed has been present, there have been a number of problems with the courtroom translation services.

Mr. Mohammed has specifically requested the assistance of such translation services during these proceedings. I am aware that the problems with these services are described in a pending motion to stay these proceedings and are referenced by Mr. Mohammed in a submission to this Court.

12. The prosecution's motion for a protective order filed May 30, 2008 (AE - 25) describes the scope of the criminal investigation at issue in this case. Specifically, the prosecution notes that following the events of September, 11, 2001, "[t]he FBI, in conjunction with civil and state authorities, other federal agencies, and foreign governmental agencies, immediately initiated *the largest criminal investigation in the history of the United States*. During the course of that investigation, the investigative team collected evidence from private, commercial and governmental individuals and agencies around the world." (Emphasis added.)

13. Various public sources indicate that Mr. Mohammed was captured in Rawalpindi, Pakistan on March 1, 2003 and held in the custody of the Central Intelligence Agency at various undisclosed locations until his transfer to the custody of the United States Military at GTMO in September 2006. Recent public sources including former CIA Director George Tenet indicate that immediately after his capture, Mr. Mohammed advised his CIA captors "that he would talk only when he got to New York and was assigned a lawyer...." *(See* Inside the Interrogation of a 9/11 Mastermind, by Scott Shane, New York Times, June 22, 2008, submitted as Exhibit to Joint Defense Motion to Modify Protective Order #3 (D-013); *see, also* CBS News, 60 Minutes: George Tenet: At the Center of the Storm, April 29, 2007, www.cbsnews.com/stories/2007/04/25/60minutes/main2728375.shtml) .

14. Mr. Mohammed was indeed assigned a lawyer (CAPT Prince) – but not until over 5

years had elapsed since the foregoing request. (*See* AE 009.)

15. Various public sources, including acknowledgments by officials of the United States Government such as the CIA director, Michael Hayden to the United States Congress, as well as news sources, indicate that certain detainees in CIA custody were subjected to so-called "enhanced interrogation techniques" by agents of the U.S. government. These "techniques" are reported to have included physical abuse, including physical striking and battering, sleep deprivation, use of prolonged stress positions, extremes of temperature, and other humiliating or degrading treatment. On February 5, 2008, Mr. Hayden testified before the Senate Select Committee on Intelligence and acknowledged the use of "waterboarding" on Mr. Mohammed. I am advised by experts that I have consulted in this case that "waterboarding" is a form of mock execution that involves restraining and immobilizing a subject while forcing them to breathe in water, resulting in gagging, choking, or vomiting, and acute physical and psychological pain and fear of death.

16. According to these experts, the above described practices, individually or collectively, amount to cruel, abusive and degrading treatment at a minimum and equate to torture under most internationally recognized norms.

17. For a more complete description of the reported treatment of detainees in CIA custody including Mr. Mohammed and the public source reporting of this treatment, I rely on and refer the Commission to the contemporaneously filed declaration of Katherine Newell.

18. It also has been publicly reported that other coercive techniques were used against Mr. Mohammed that involved the apprehension and mistreatment of his young children. According to public reports, including the unclassified Transcript of the CSRT hearing for

Majid Khan on March 28, 2007, Ali Khan, described as a citizen of Pakistan and a permanent resident of the United States, provided a statement based on information provided to him by one of his sons indicating that he and another of Mr. Khan's sons were detained in the same place where two of Khalid Sheik Mohammed's young children, ages about 6 and 8, were held and according to Mr. Khan: "The Pakistani guards told my son that the boys were kept in a separate area upstairs, and were denied food and water by other guards. They were also mentally tortured by having ants or other creatures put on their legs to scare them and get them to say where their father was hiding." (*See* www.globalsecurity.org/security/library/report/2007/khan_csrt-hearing070415.htm). The unclassified transcript from the CSRT hearing for Mr. Mohammed on March 10, 2007, also references Mr. Mohammed's description of the treatment of his children: "They arrested my kids intentionally. They are kids. They been arrested for four months they had been abused." (Unclassified Transcript, page 24 of 26, www.defenselink.mil/news/transcript_ISN10024.pdf.)

19. I believe and I am advised by death penalty qualified defense counsel that I have consulted with in connection with this case that the information reported above imposes on defense counsel and any court significant responsibilities concerning the rights of an accused at both the guilt and penalty phase of trial as well as in connection with various pretrial matters. It also necessitates the involvement of various consultants or experts and requires a thorough investigation of these matters.

20. Based on my experience in other national security litigation and my knowledge of the scope and complexity of the allegations in this case, I anticipate that the volume of discovery in this case will be staggering. This is especially true given the representation by the

prosecution that this case arises out of the largest criminal investigation in the history of the United States. The charging document in this case contains allegations of international terrorism and an alleged criminal conspiracy involving the events of September 11, 2001, al Qaeda, various charged and uncharged co-conspirators and acts taking place over a number of years.

21. By way of comparison, I have reviewed pleadings and consulted with a former member of the defense team for Zacarias Moussaoui who was similarly charged with a criminal conspiracy involving the events of September 11, 2001 and al Qaeda in *United States v. Zacarias Moussaoui*, Criminal NO. 01-455-A (U.S. District Court for the Eastern District of Virginia). I am informed and believe that this discovery consisted of approximately 1300 cd's of non-classified discovery, 1.2 million pages of website material deemed pertinent, 180,000 FBI Reports (302's), 1262 audio tapes - 45 min each (requiring 157 days at 6 hours a day to review), 526 video tapes (equaling approximately 789 hours, requiring 131 days at 6 hours a day to review), 200 computer hard drives and numerous other classified evidence. I am informed and believe that the defense in the *Moussaoui* case retained two litigation support services who dedicated 70 reviewers to complete the initial review of the large mass of discovery and that this generated some 4,600 leads for follow up. Public source materials indicate the litigation in that case, from indictment to sentencing, took over 4 years to complete. Presumably, the foregoing discovery volume involving the many of the very same matters at issue in these Commission proceedings will be produced to the defense for the Accused.

22. On July 2, 2008, Mr. Mohammed, through detailed defense counsel, submitted to the government various specific requests for discovery. Notwithstanding the large mass of

discovery which is required to be produced to the defense, nothing approximating the foregoing volume of discovery produced in the Moussaoui case has been produced to the defense to date. The government has advised that it anticipates producing further discovery, both classified and unclassified. However, the government has not responded to the specific discovery requests submitted by Mr. Mohammed and thus it is unknown at present whether the government will produce all required discovery pursuant to these requests or whether it will be necessary for the defense to seek the assistance of the Court to compel discovery. For example, it appears that the government has omitted from its production large categories of material including critical materials dealing with the capture, renditions, interrogations and conditions of confinement of Mr. Mohammed – all of which have been requested.

23. The defense has received three deliveries of discovery to this point. The first delivery of unclassified discovery included over 7000 images. A delivery of classified discovery material followed. The defense recently received an unclassified delivery which I am informed and believe consists of over 25,000 images along with dozens of hours of videotape. We are informed and believe that a larger mass of classified discovery will follow. The material that has been received to date was delivered by CD. However, the documents are recorded on the CD in an electronic file format that makes it impossible to perform electronic document searches until such documents are electronically converted to a searchable format using an optical character recognition (OCR) process. The conversion of the documents to a searchable OCR format is a labor intensive process for paralegal staff and thus causes substantial delay. The processing and management of discovery in the format provided by the prosecution has created and will likely continue to create substantial challenges for the defense.

24. Additionally, *all discovery* produced to date have been subject to blanket protective orders entered by the military judge without opportunity for objection by the defense. These protective orders were unduly restrictive and significantly impaired the defense function. As a result, the defense has been required to file joint defense motions to rescind or modify these protective orders. While the protective orders have just recently been modified to address some of the concerns identified by the defense, the presence of these protective orders have contributed to delays in the processing and analysis of discovery. Moreover, although the protective orders have now been modified to some extent, the presence of these protective orders covering all discovery produced to date will continue to impair the defense and create various logistical challenges and delays.

25. As set forth above, this case also involves classified discovery much of which has not yet been produced. The presence of classified discovery is a significant complicating factor in handling this case. I am aware from other litigation that the presence of classified discovery often results in significant litigation concerning the use of such evidence. I anticipate that it will be necessary to litigate a variety of issues concerning classified evidence in this case.

26. In order for Mr. Mohammed to represent himself, it will be necessary for him to review the discovery in this case. I am advised that efforts are being made to provide Mr. Mohammed and the other accused with access to a computer for the review of discovery. To my knowledge, this has not yet occurred. After this occurs, I anticipate it will take Mr. Mohammed a significant period of time to review the discovery in this case. As Mr. Mohammed does not speak English as a first language and often requires the assistance of a translator, I anticipate that Mr. Mohammed's review of this discovery will be especially

challenging and time consuming and will require the assistance of a translator. Additionally, it is my opinion that Mr. Mohammed's lack of legal training, proficiency in English, cultural background, forced isolation and treatment following his capture has and will further complicate his efforts to represent himself including his review and preparation of legal pleadings as well as his interactions with his American lawyers.

27. This case requires that the defense be given ample opportunity to prepare for trial and complete necessary pretrial tasks. This is an enormous undertaking for counsel as well as any Accused undertaking to represent himself, including Mr. Mohammed. The five Accused are exposed to conviction and a capital sentence – either as principals, accomplices or co-conspirators – for the commission of, *inter alia*, several thousand homicides and life-threatening assaults that occurred at three separate locations and participation in a complex, international conspiracy that resulted in the events of September 11, 2001. The scope of the government's investigation, and consequent generation of discovery materials, extends to the period before September 11, 2001, and includes advance intelligence regarding the likelihood of the attacks, and relevant statements and other communications attributed to the five Accused or other potential suspects.

28. There are innumerable additional complicating factors associated with this case which require the need for a reasonable period of additional time.

29. As evidenced in the June 5 courtroom proceedings, none of the Accused are native English speakers and many require the services of a translator. Many of the Accused complained about the quality of the defense translators, nearly all of whom are non-native speakers, during the court proceedings. Mr. Mohammed is presently working with a young,

American translator who I am informed and believe learned Arabic while in the U.S. Marines and whose prior experience consisted of mainly document translation and not verbal translation.

30. Mr. Mohammed is from a different country and a different culture than counsel. In my opinion, a significant amount of additional time will need to be spent with him in order to advise him of matters related to the defense of his case and in order to deal with all the cultural, logistical and other issues in this case.

31. This matter is further complicated by the presence of classified evidence. Prior to the recent modification of the corresponding protective order, everything Mr. Mohammed said to us, his attorneys, is presumed classified. (Protective Order #3, AE 032.) While this protective order has been modified to some extent, it still creates significant obstacles.

32. For example, only the attorneys who are granted the appropriate security clearances are permitted to meet with the detainees and have access to Classified Information that relates to this case. Thus, although we are presently consulting with death penalty qualified counsel, under the present ABA standards for such counsel, these counsel have not yet obtained the requisite security clearance that would permit them to meet with Mr. Mohammed.

33. Nor can experts or consultants meet with Mr. Mohammed without the requisite security clearance. It is anticipated that it will be necessary for certain experts and/or consultants to meet with Mr. Mohammed during the course of this litigation. However, many of these experts or consultants have not yet been formally retained pending a ruling from the Court on the pending defense motion to allow the defense to retain such experts on an ex parte basis, *i.e.* without disclosing to the prosecution the identities of consultants and experts and a description of their anticipated work. Upon retention, it will be necessary for some of these

consultants/experts to obtain a security clearance in order to meet with Mr. Mohammed and to review relevant discovery.

34. The rules concerning classified evidence create significant complications to the defense function in other respects. Attorneys for the defense who have the proper security clearance are not permitted to keep possession of any notes they make during attorney-client interviews outside of a secure facility. To date, the only secure facilities for reviewing such notes are at GTMO and at a defense office in Virginia, the latter of which has been unusable at times and when functioning, must be shared by the defense teams. For its part, the secure facility at GTMO is only open for limited hours during the day. The inability to access such client notes except in this very restrictive environment make it very difficult if not impossible to perform the functions of defense counsel and at a minimum, creates innumerable challenges and complications.

35. Mr Mohammed's location at GTMO presents unique and complicated access problems. There is no confidential communication between attorney and client in any form other than in-person interviews with security-cleared counsel at GTMO. I am advised that to visit Mr. Mohammed, or for other defense counsel to visit another detainee, the custodial authority (JTF) generally requires a fourteen-day advance notice of intent to visit the accused. Further, in my experience, transportation to GTMO is limited, frequently changes and requires the cooperation of agents of the U.S. government and sometimes consumes nearly a full day in travel both to and from GTMO. Because Mr. Nevin and I both reside in Idaho, the travel is especially onerous in that it is necessary for us to travel a full day between our office in Boise and the Washington, DC area. Thus, for example, if we wish to visit Mr. Mohammed through a

regularly scheduled military flight to GTMO (depart Tuesday and return Thursday), it is necessary for us to spend all day traveling on Monday and Friday between Boise and one of the Washington, DC airports. This further limits the amount of time that we are able to spend with Mr. Mohammed at GTMO.

36. Once at the detention facility in GTMO, we have been advised that only two teams may meet with their respective clients at the same time. These meetings are scheduled for the morning or afternoon and with five detainees, there is a very limited number of hours available to meet with a detainee.

37. In my opinion, there are insufficient physical resources for attorneys who are required to discuss client's statements, review their own notes or prepare a classified filing at the secured facility GTMO. The room provided for counsel is small, with limited desk space. It is also extremely uncomfortable, kept very cold, and has no adjustable temperature control. Most significantly, it closes at 6:00 pm, thereby unnecessarily limiting its availability.

38. All filing with the Military Commissions Court must be done electronically. Thus, Counsel who wish to have the advantage of notes taken in an attorney-client interview must file from GTMO in a classified setting. Internet access is available at the defense offices to military counsel but is sporadic at best. When seeking to file our relatively simple notices of appearance, as described above, we did not have access to the internet from our laptop computers, could not locate an available scanner, and the court refused to accept paper copies. I am informed that court personnel suggested to defense counsel's paralegal that the defense team should avail themselves of internet access at a local coffee shop which was approximately 10 minutes away by car.

39. It is my opinion that available resources to the detailed military counsel are similarly inadequate. I have learned that some military counsel at times have not had voicemail, are required to answer their own phone and that their offices lack adequate support staff. Further, I am advised that some detailed military counsel have been required to change offices and locations during the pendency of this case which has created further complications and delays. When I visited the defense offices in [redacted] on August 8, 2008, where CAPT Prince maintains his office, a significant construction project was underway inside the office. I was advised that this project had been ongoing for several weeks, was for purposes of permitting the offices to be used as a secure facility and in the meantime, created a significant obstacle to completing legal work given the ongoing disruption of the workplace. I am informed that this project is still ongoing on a daily basis at this office.

40. I am aware of other factors that have created delays specific to certain of the other Accused. This includes the unavailability of LCDR Brian Mizer, detailed military counsel for Mr. Ammar Al Baluchi (Ali Abdul Aziz Ali), who just completed a trial before the Commissions involving Salim Hamdan. I am also aware of various complicating factors associated with the defense of Mr. Ramzi bin al-Shibh and his still undetermined mental status. The foregoing have created difficulties among the defense teams in coordinating resources and efforts.

41. There remain further pending matters with the Commission which require resolution in order to move forward with the litigation. This includes in particular the joint defense request to obtain expert services ex parte. Without this, the defense is unable to confidentially retain experts necessary to the defense of this case. In addition, the Military Judge has not yet

answered the voir dire submitted on behalf of Mr. Mohammed on June 27, 2008. This also requires consideration and resolution of whether the Military Judge should proceed in this capacity. Finally, still unresolved is the joint defense motion to dismiss for unlawful command influence, filed May 15, 2008 (D-001), in connection with the actions of Brigadier General Thomas Hartmann, the legal advisor to the Convening Authority. The foregoing motion is particularly significant in light of the disqualification of General Thomas Hartmann in another Commission case.

42. All the foregoing necessitates that defense counsel and the Accused be afforded additional time to file pretrial motions including law motions and discovery motions. Notwithstanding the exercise of due diligence, the defense is simply unable to file all required motions within the time frames presently established by the Commission. Further, the Commission should continue to defer setting a trial date in this matter. In my opinion, it simply cannot be predicted with any measure of certainty when this matter will be ready for trial given the various complicating factors and other matters described above.

I have read the foregoing declaration, know the contents thereof, and declare under penalty of perjury of the laws of the United States that it is true and correct.

DATED this 20th day of August, 2008.

/s/
Scott McKay

EXHIBIT F

DECLARATION OF ADAM THURSCHWELL

I, Adam Thurschwell, declare under penalty of perjury that the following is true to the best of my knowledge, information and belief, pursuant to 28 U.S.C. § 1746:

1. I make this declaration in connection with the case of *United States v. Khalid Sheikh Mohammed, et al*.

2. I am a Civilian Defense Counsel in the Office of the Chief Defense Counsel, Office of Military Commissions, United States Department of Defense. I am not detailed to any case currently before the Military Commissions.

3. Until May 2008, I was an Associate Professor of Law at Cleveland-Marshall College of Law, Cleveland State University, for ten years. From August 2006 - May 2008, I was also Visiting Professor of Law at Washington College of Law, American University. During this period I taught Criminal Law, Criminal Procedure, Criminal Trial Process, a seminar on Capital Punishment, International Criminal Law, and Evidence. I have practiced criminal defense and civil rights litigation for 20 years.

4. I have been continuously involved in capital litigation since June 1995. I was an associate defense counsel for Terry Lynn Nichols in *United States v. Timothy James McVeigh and Terry Lynn Nichols*, the federal Oklahoma City bombing case, at trial and throughout his direct appeals. One of my roles was to direct the preparation of Mr. Nichols' mitigation case. Most recently, I served as co-counsel "learned in the law applicable to capital cases," 18 U.S.C. § 3005, for Francois Karake in *United States v. Karake, et al.*, a federal capital case charging extraterritorial murder of Americans under the federal terrorism long-arm statute. I have consulted and written briefs, from the trial level through the United States Supreme Court, in many other state and federal capital cases as well.

5. I am the author of several articles on capital punishment, and was the guest editor for a special issue of the *Federal Sentencing Reporter* devoted to the federal death penalty. I have lectured on capital punishment at Continuing Legal Education programs and other venues.

6. I am familiar with the allegations and unclassified evidence in *United States v. Khalid Sheikh Mohammed, et al*. I am also familiar with the current motion schedule set by the Commission. I make this declaration in support of the Defense Motion for Appropriate Relief: Enlargement of Time in Which to File Law Motions.

A Comparable Case: *United States v. Karake*

7. In many respects, this case resembles *United States v. Karake* in the types of challenges it presents to defense counsel, although the challenges are far greater in *Mohammed*.

8. *Karake* was a capital terrorism prosecution that charged three Rwandan citizens with murdering two Americans in Uganda. At the request of the American government, the Rwandan authorities captured the defendants and thereafter held them in a Rwandan military camp. Over a period of months, Rwandan military authorities intermittently transported the defendants to a police station for interrogations by American FBI agents, after which they were returned to the military camp. The defendants made statements to the FBI agents, confessing, *inter alia*, to the murders. Subsequently, the federal government indicted the defendants capitally and attempted to bring them to trial in the Federal District Court for the District of Columbia. All charges were eventually dismissed, however, after the District Court suppressed all of the defendants' statement to the FBI as the products of torture they had endured at the hands of their Rwandan captors. *See United States v. Karake*, 443 F.Supp.2d 8 (D.D.C. 2006).

9. The indictment in *Karake* was handed up in February 2003. All charges were dismissed in February 2007.

10. Numerous factors made *Karake* an extraordinarily difficult case to investigate and defend. Chief among these factors – all of which are shared by the cases in *United States v. Mohammed, et al*. – were the following:

a. The client's lingering trauma from the torture. As a result of his experiences at the hands of the Rwanda government, Mr. Karake required numerous evaluations from various psychiatric and medical specialists (including a Rwandan psychiatrist who spoke the client's native language of Kinyarwandan) and, eventually, treatment for depression and other symptoms of post-traumatic stress disorder. Trauma-related stress also resulted in predictable but unavoidable lapses in his trust in and ability to tolerate communication with the defense team, a continuing problem which required frequent consultation with culturally competent trauma experts and frequent meetings with the client and members of the defense team to address the client's perceptions and concerns.

b. The difficulty of conducting a mitigation investigation in a foreign country under a repressive government. As related further below, this was a huge impediment to the defense investigation, not only because of the unfamiliarity of Rwandan culture and language, but because defense counsel were confronted on a regular basis with the ethical dilemma of having to choose between providing our client with an adequate defense and putting witnesses' lives at risk.

c. The client's unfamiliar cultural and linguistic background. In order to prepare the defense, counsel had to investigate and learn the complex history of ethnic and religious conflict that set the course for the client's life history and involvement in a rebel army classified as terrorist by the United States State Department. Mr. Karake was born and reared in an isolated, small mountain village based on kinship ties and farming with only sporadic contact with the larger world. When ethnic conflict divided his province, he and his family fled to refugee camps in Congo where they barely survived. He had a fourth-grade education, and his

native language was Kinyarwandan (he also spoke some Swahili). Finding competent and unbiased interpreters was time consuming, as was locating experts who could (and were willing) to help the defense team understand the defendant's perceptions and experiences in light of the social, political, and cultural history of Rwanda and its ethnic conflict that ultimately resulted in genocide. Placing Mr. Karake's life in a larger context was relevant to several legal issues in his case, including the voluntariness of his statements, the reliability of his statements after torture, his competency to aid and assist counsel, his culpability for the offenses charged, and sentencing issues.

11. The mitigation investigation was more complex, more time-consuming, and more expensive than in otherwise comparable capital cases simply because it had to be conducted on remote foreign territory in a completely unfamiliar culture and language (Kinyarwandan). United States-based defense counsel, mitigation specialists and investigators made multiple trips to Rwanda, totaling more than 1,500 hours on the ground locating and interviewing witnesses. In addition, Rwanda-based investigators and academicians devoted weeks to identifying, locating, and interviewing witnesses and obtaining documentary evidence about the defendant's social history, and circumstances surrounding his capture, detention, and interrogation.

12. Apart from the difficulties inherent in any foreign location, the repressive character of the Rwandan government and its alignment with the United States government in the prosecution created an almost insurmountable obstacle to investigating the case.

13. Prior to and during the period of the investigation and prosecution of the *Karake* case, the Rwandan government had been regularly cited as a human rights violator in United States Department of State Human Rights Country Reports. Human rights violations by the Rwandan government were alleged to include "disappearances" and presumed murders of political dissidents and others. One of the prominent individuals who "disappeared" – a former judge – was alleged to have been held for a period at the same camp at which the defendants were held and tortured.

14. The United States received extensive cooperation from the Rwandan government in the investigation and prosecution. Rwanda itself had no interest in prosecuting the crime, since the victims were American and the crime was committed in Uganda, where Rwanda lacked criminal jurisdiction. Nevertheless, it captured and held the defendants at the request of the United States while the crimes were investigated; made the defendants and other witnesses available for FBI interrogation on multiple occasions (after extracting confessions by torture and ensuring that these confessions would be repeated to the FBI); and finally rendered the defendants to the United States for trial, in direct violation of Rwandan law (which forbade such renditions).

15. The defense, by contrast, received no assistance from the Rwandan government, despite repeated requests made through United States diplomatic channels and direct approaches to Rwandan government officials. In order to conduct its own investigation, defense counsel were forced to rely on private Rwandan citizens for assistance. Counsel were advised by experts

on Rwanda not to trust anyone who was offering to help unless they came with firm recommendations from trusted sources, because of the likelihood that they would be working for the Rwandan government.

16. The defense team eventually found several trustworthy individuals on the ground in Rwanda to serve as guides and investigators. These individuals agreed to help only if counsel agreed to their terms, which were aimed at keeping their activities secret from the government. Defense team members were able to meet with potential witnesses only at safe houses arranged by the Rwandan contacts.

17. The defense contacts and potential witnesses' fears for their safety were well-taken. One of the defense team's Rwandan contacts was a law professor who assisted with Rwandan legal issues and also helped with the investigation. One particularly dangerous assignment that he undertook was a visit across the border into Congo for an interview with a potential witness. Shortly after he returned from that trip, he was in his office and about to return home when he looked out his window and saw a police official standing next to his car, clearly waiting for him to appear. He left his office through a rear door and did not return to his home for several days. Subsequently, he began receiving anonymous, threatening phone calls at home telling him that "they" were aware of his activities – which he took to mean his involvement in the case – and warning him that for his and family's safety, he should cease those activities.

18. As a result of these threats, he had to withdraw from his involvement with the defense team, go into hiding, and flee to the United States. He is now a United States resident, having been granted political asylum as a direct consequence of these events.

19. At the time that the case was dismissed, neither the attorneys nor the court had found a complete solution to the potential dangers that defense witnesses faced. My recollection (which may be faulty on this point) is that one defense witness at the suppression hearing was allowed to testify anonymously, but it is far from clear that that solution would have worked at trial, where the Federal Rules of Evidence applied. In any event, because the case was dismissed, that issue did not have to be resolved.

20. In my opinion, the attorneys and mitigation specialists defending the accused in *United States v. Mohammed, et al.* face even greater difficulties than counsel did in defending Mr. Karake. Mr. Karake was not a prominent figure in Rwanda, and Rwanda had no special interest in him, beyond its interest in cooperating with the United States. By contrast, the accused in these cases are by now internationally known, and their own home countries – all of which have imperfect records when it comes to protecting human rights – have a much more significant political interest in these cases. Indeed, international interest generally in these cases is intense. That places even greater pressure on potential witnesses and local contacts who might otherwise consider helping the defense. Some mitigation witnesses will reasonably fear that they will be identified by their governments and targeted for unfair treatment and will be reluctant to cooperate with defense investigators. Many are terrified of the name Guantanamo as it has come to be a symbol of disappearances and torture in communities in the Middle East. The process of

overcoming those very understandable reactions requires a great deal of additional time dealing with the witnesses and addressing their fears on a face-to-face basis, by both the mitigation specialist and the attorney who will present the witness's testimony.

Recent Cases in Which Mitigation Resulted in Life Verdicts Despite Terrible Crimes

21. It is a commonly-held belief – even among some experienced criminal defense attorneys who have never tried a capital case – that presenting mitigating evidence is a futile endeavor if the crime of conviction is sufficiently gruesome. Both from personal experience in capital litigation and through familiarity with other capital cases, I know that belief to be false. A constitutionally adequate mitigation case holds out the possibility of saving the life of *any* defendant, no matter how terrible the crime for which he was convicted. Four recent cases are evidence for that conclusion:

22. Terry Nichols was twice tried for aiding and abetting Timothy McVeigh in the Oklahoma City bombing that killed 168 people on April 19, 1995, seventeen of them children in a daycare center. Nichols's role was alleged to have been helping McVeigh gather materials for the truck bomb early in the conspiracy, and then, at the very end, helping him build the bomb and then picking McVeigh up in Oklahoma City where he had stashed his getaway car.

23. In the first, federal trial, Nichols's defense at both the guilt/innocence phase and the sentencing phase was directed toward showing that he was not the kind of person who would deliberately or knowingly attempt to kill anyone, especially children. The evidence for these personal traits was generated by the life history mitigation investigation. The defense was able to introduce much of this evidence into the guilt/innocence phase after the prosecution put his character in issue. The jury acquitted Nichols of eight counts of 1st degree murder and of the substantive bombing charges, and convicted him of eight lesser included offenses of involuntary manslaughter and a terrorist conspiracy charge, the latter of which exposed him to the death penalty. In the penalty phase, the jury deadlocked on the question of his intent to kill and he was sentenced to life in prison without the possibility of release.

24. The federal Oklahoma City bombing trials had been transferred to federal court in Denver, Colorado, because of overwhelming pretrial publicity that prejudicially tilted the jury pool toward death. *See United States v. McVeigh*, 918 F.Supp. 1467 (W.D.Okla. 1997). Nevertheless, after Nichols received a life verdict in the federal case, the State of Oklahoma charged him with 162 counts of murder, solely in order to obtain the death penalty. (The state did not similarly charge McVeigh, who had been sentenced to death in his separate federal trial.) The state trial was held, and the jury returned guilty verdicts on 161 murder counts (one had been dismissed by the judge on purely legal grounds). In the penalty phase, however, following the mitigation presentation, the same jury deadlocked on the sentence and Nichols was sentenced to life imprisonment rather than death.

25. The trial of Zacarias Moussaoui provides another example of the potency of a competent mitigation strategy. Moussaoui was charged with a terrorism conspiracy that caused

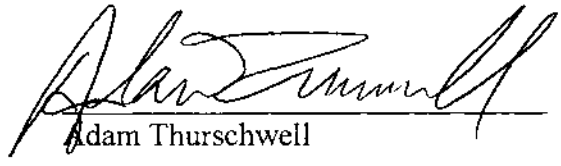
the same 9/11-related deaths as those charged in these cases (he was alleged at one time to have been the "20th hijacker"). He pleaded guilty, sought to represent himself, and fought his court-appointed attorneys' attempts to save his life. Nevertheless, after an extraordinary sentencing trial, in which numerous relatives of victims testified for the defense, the jury deadlocked and Mr. Moussaoui was sentenced to life imprisonment.

26. The federal Embassy Bombing trial involved four defendants who were alleged to be associated with al Qaeda, and who were charged with the coordinated bombings of the American Embassies in Kenya and Tanzania in 1998. All four defendants were charged with capital crimes, all four were convicted of those crimes, and all four received sentences of life imprisonment after the jury deadlocked in the sentencing deliberations.

27. Most recently, in a less high-profile but telling case, Rudy Sablan was sentenced to life imprisonment in federal court in Colorado after the jury convicted him of 1st degree murder. The circumstances of the crime were exceptionally gruesome and the defendant should have been a poster-child for the death sentence. At the time of the crime, Sablan was already serving a life sentence. He had an atrocious disciplinary record in prison, having been charged in prison disciplinary proceedings with stabbing a previous cellmate and several assaults and aggravated assaults, and having been tried and convicted for attempted murder of another cell mate in a separate proceeding. The crime itself was horrendous. Sablan and his cousin were sharing a cell with a third cell mate at the time. Both cousins were charged with strangling and then disemboweling the third cell mate, and "decorating" their cell with his organs. Sablan himself was observed handling the organs. Sablan was convicted of 1st degree murder for the crime. Nevertheless, he was ultimately sentenced to another life sentence after the jury deadlocked 7 to 5 for life. The mitigation case focused on his rehabilitation during the period that he was held in solitary confinement in maximum security conditions following the commission of the crime.

28. These cases are examples; they are not unique. Based on my personal experience and my familiarity with capital litigation generally, it is my opinion that an effectively investigated and presented mitigation case can potentially save the life of any capital defendant, regardless of how terrible the crime of conviction. A jury that can be made to understand the humanity of a defendant – which does not necessarily mean recognizing some "goodness" in him, or even his remorse, but how it is possible for another human being to have come to a point in his life where he voluntarily performed a terrible act – is a jury that will hesitate to bring that human life to an end. That does not mean that every constitutionally adequate mitigating case will be successful, but it does mean that it is never futile.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 22 August 2008.



Adam Thurschwell

EXHIBIT G

UNITED STATES OF AMERICA,)
)
vs.)
) **Declaration of Timothy K. Ford**
KHALID SHEIKH MOHAMMED, *et. al*)
)
)
)

I, Timothy K. Ford, declare under penalty of perjury as follows:

1. I am an attorney and a member of the Bar of the State of Washington and several federal courts. I was admitted to the Bar of the State of Washington in 1975 and have practiced criminal and civil litigation ever since.

2. Since my admission to the Bar, a substantial portion of my caseload has involved capital defense work. I have represented capital defendants in appeals and postconviction proceedings before the Supreme Court of the United States; the United States Courts of Appeals for the Eighth, Ninth, Tenth and Eleventh Circuits; the United States District Court for the District of Arizona, Montana, Nebraska and Utah; the Northern District of Georgia and the Southern District of Texas; and the Supreme Courts of Arizona, Montana, Nebraska, Utah and Washington. I have argued four cases before the United States Supreme Court.

3. I have handled fifteen capital cases at the trial level: two each in Nebraska and Montana, one each in Arizona, Idaho and Utah, and the rest in Washington. Five of these cases went to contested penalty phase hearings; in the rest, the death penalty was taken out of the case by agreement, pretrial ruling or guilt phase verdict. Eight of these fifteen cases were retrials after reversals of the conviction or death sentence.

4. I have been consulted by hundreds of lawyers handling capital trials, appeals,

postconviction and habeas proceedings, and clemency hearings, over the last thirty years. Many of these consultations have involved only a few phone calls or letters, but in many others I have prepared significant portions of the case or drafted major pleadings and briefs for submission by counsel of record. I believe I have been consulted in capital cases in every state which has capital punishment, but the largest number of such consultations have involved cases in Washington, Utah, Arizona, Idaho, and Montana.

5. I have lectured and taught seminars on capital defense in continuing legal education programs in a number of states, including Arizona, California, Colorado, Florida, Idaho, Illinois, Georgia, Kentucky, Louisiana, Missouri, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington and Wyoming.

6. I am a member of the Washington Supreme Court panel that certifies lawyers to handle capital cases under Washington's court rules at trial and appeal (Washington Superior Court Special Proceedings Criminal Rule 2) and in postconviction proceedings (Washington Rule of Appellate Procedure 16.25). I have been a member of this panel since its creation. I am certified under these Washington's qualification rules to handle capital trials, appeals and postconviction proceedings as lead counsel.

7. I have testified in federal court as an expert witness regarding claims of ineffective assistance of counsel in five capital cases: two in Washington and one each in Arizona, Nevada and Wyoming.

8. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long," and as a result, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v.*

North Carolina, 428 U.S. 280, 305 (1976). As a result, the United States Supreme Court has repeatedly stated that in capital cases, "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). This "need for heightened reliability," *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring), affects every procedure at a capital trial, including the procedures used to determine guilt and innocence as well as those that apply solely at the sentencing hearing. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("[W]e 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.").

9. This begins with evidence supporting the charge itself. I am told that the government in this case has alleged that its criminal investigation is the largest ever undertaken in the history of the United States. I understand that in the case of *United States v. Zacarias Moussaoui*, E.D. Va. No. 01-455-A, the defendant, like Mr. Mohammed, was charged with a criminal conspiracy involving al Qaeda and the events of September 11. I understand that in *Moussaoui*, the discovery consisted of approximately 1300 compact disks of non-classified discovery, 1.2 million pages of website material, 180,000 FBI investigative reports (302s) of various length, 1262 audio tapes, each some 45 minutes in length (thus requiring some 157 days at 6 hours a day to review), 526 video tapes (a total of approximately 789 hours, requiring 131 days at 6 hours a day to review), 200 computer hard drives, and extensive classified evidence. I understand that the *Moussaoui* defense team required some 70 reviewers just to complete just the initial review of the large mass of discovery.

I know that carefully analyzing voluminous and complex factual evidence takes time. I gather that the government has been investigating the present case for almost seven years. Counsel for Mr. Mohammed must be given a meaningful opportunity to review and analyze this evidence. I would expect a team of four dedicated lawyers working full time with the assistance of litigation support personnel to require at least one to two years to acquire a meaningful understanding of this quantity of evidence.

10. The death penalty decision always requires not only consideration of the offense itself, but also of the characteristics of the individual offender. "Sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. ___ , 127 S.Ct. 1654, 1657 (2007). This process is always difficult, requiring a painstaking inquiry. Counsel are required to "fulfill their obligation to conduct a thorough investigation of the defendant's background" to prepare effectively for a capital sentencing hearing. *Williams v. Taylor*, 529 U.S. at 396. This requires, among other matters, carefully considering the offender's individual circumstances, including his or her childhood development, upbringing, education, medical history, employment history, family circumstances, and other aspects of the offender's life. This reflects the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), cited with approval by *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). *See also*

Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (consideration of the offender's life history is a "'part of the process of inflicting the penalty of death.'"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background); *Abdul-Kabir v. Quarterman, supra*, (a statute or judicial interpretation of a statute is unconstitutional if it prevents the jury from considering mitigating evidence).

11. In addition, the United States Supreme Court has repeatedly made clear that no offense, no matter how grave, may be regarded as requiring in itself the imposition of a death sentence. *E.g., Williams v. Taylor*, 529 U.S. 362, 368 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Williams* the defendant murdered an elderly man in cold blood because he refused to loan Williams "a couple of dollars." 529 U.S. at 368. This murder was "just one act in a crime spree that lasted most of Williams's life. Indeed, the jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." Id., 529 U.S. at 418 (Rhenquist, C.J., dissenting). Nonetheless, the Court found that the failure of defense counsel to present available mitigation evidence undermined confidence in the result, and required a new sentencing hearing. Referring to *Williams*, the Ninth Circuit has stated that "[t]he Supreme Court ... has made clear that counsel's failure to present mitigating evidence can be prejudicial even when the defendant's actions are egregious." *Stankewitz v. Woodford*, 365 F.3d 706, 723-4 (9th Cir. 2004). *See also Rompilla v. Beard*, 545 U.S. 374 (2005) (deficient development of mitigation despite fact that defendant was convicted of stabbing a man repeatedly and then setting his body on fire).

12. Conducting a proper mitigation inquiry will be especially difficult in the present case. I understand that the accused in these cases are not United States citizens, but rather are citizens of various foreign countries. Traveling to these countries to make an adequate study of the offender's particular circumstances of life will be particularly difficult. I understand that Mr. Mohammed's country of origin is culturally very different from the United States. I understand that his native language, and that of his family, is not English, and that persons who are capable of adequately translating this language are relatively rare. I understand that travel to these countries where he has lived, and where his family now lives, is expensive, time consuming, and that government permission for such travel may be limited or even withheld altogether. In short, a meaningful opportunity to fairly develop and present Mr. Mohammed's individual circumstances, as required by the United States Supreme Court, will require a considerable effort and an extended period of time - in my experience, at least one year.

This ends my declaration.

DATED this 21 day of August, 2008.

Timothy K. Ford

EXHIBIT H

UNITED STATES OF AMERICA,)
)
vs.)
) **Declaration of Gerry L. Spence**
KHALID SHEIKH MOHAMMED, *et. al*)
)
)
_____)

I, Gerry L. Spence, declare under penalty of perjury as follows:

1. I am a trial lawyer, duly licensed to practice law in the state of Wyoming. I am 79 years of age, and have been a lawyer for some 55 years. Over the years I have handled countless cases in state and federal courts across the United States. My practice is limited to representation of the injured and the accused.

2. I have defended a wide variety of criminal cases, from capital murder to fraud, and everything in between. These range from the 1979 acquittal of Ed Cantrell, a Rock Springs, Wyoming policeman charged with murder, to the 1990 acquittal of Imelda Marcos, former first lady of The Philippines, on fraud and racketeering charges in a three-and-a-half month trial in federal court in New York City. In 1993 I successfully defended white separatist Randy Weaver in the Ruby Ridge case, in which Mr. Weaver and a family friend were charged with the murder of a Deputy United States Marshal. In 2008 I successfully defended Geoffrey Fieger, a prominent trial lawyer and former Michigan gubernatorial candidate, on charges of violating the Federal Election Campaign Act.

I have also successfully tried many personal injury cases of national significance, from a suit on behalf of Karen Silkwood's estate against Kerr McGee in 1979 to a $52 million verdict against McDonald's Corporation on behalf of a small, family-owned ice cream

company.

3. I have lectured at law schools and have taught at continuing legal education seminars throughout the United States. In 1994 I founded the Trial Lawyers College, a non-profit organization dedicated to sharing my trial methods with lawyers who pursue justice for the poor, the injured, the forgotten, the defenseless, and the damned. For many years I have conducted a week-long seminar for the defense of capital cases as a part of the program of Trial Lawyers' College. This program has been widely attended and acclaimed by public defenders, mitigation experts and others interested in defending capital cases. I am also the founder of Lawyers and Advocates for Wyoming (L.A.W.), a nonprofit public interest law firm.

4. I have frequently appeared as a legal commentator on various television programs, and hosted my own program on MSNBC in 1995 and 1996. I have published 16 books on a variety of subjects, from trial techniques to detailed descriptions of my cases to social commentary.

5. I have handled a number of capital cases, both as a prosecutor and as a defender. Capital cases present the ultimate challenge to lawyers -- and to the legal system itself -- because of the grave consequences of such cases. If the prosecution is successful in its pursuit of a death sentence, the result is that the offender is deliberately killed at the hands of the government. In calmly and dispassionately taking a person's life, government collectively operates at the very limit of its sovereign power - indeed, many scholars and ethicists believe it does not legitimately possess this power at all. Of course, the execution of offenders is permitted in rare cases by the laws of the United States and of some states. But all agree that the decision to carry out capital punishment may occur only after the most careful analysis of

the facts of the case, and a searching inquiry in which every other possible result is considered and rejected. Only in this way may the ultimate value of life be even approached, and may citizens be faintly assured that the questionable power exercised by the government has not been abused.

6. The net result is that a capital case must proceed with the utmost caution and deliberation. This begins with a careful consideration of the circumstances of the alleged offense itself to determine whether the accused is guilty as charged. I am told that the government in this case has alleged that its investigation is the largest ever undertaken in the history of the United States. I understand that in the case of *United States v. Zacarias Moussaoui*, E.D. Va. No. 01-455-A, the defendant, like Mr. Mohammed, was charged with a criminal conspiracy involving al Qaeda and the events of September 11. I understand that in *Moussaoui*, the discovery consisted of approximately 1300 compact disks of non-classified discovery, 1.2 million pages of website material, 180,000 FBI investigative reports (302s) of various length, 1262 audio tapes, each some 45 minutes in length (thus requiring some 157 days at 6 hours a day to review), 526 video tapes (a total of approximately 789 hours, requiring 131 days at 6 hours a day to review), 200 computer hard drives, and extensive classified evidence. I understand that the *Moussaoui* defense team required some 70 reviewers just to complete the initial review of the large mass of discovery.

I know from personal experience that carefully analyzing such voluminous and complex factual evidence takes inordinate time. I gather that the government has been investigating the present case for almost seven years. Counsel for Mr. Mohammed must be given a meaningful opportunity to review and analyze this evidence. I would expect a team of

four dedicated lawyers working full time to require more than two years to acquire a meaningful understanding of this quantity of evidence.

7. The death penalty decision always requires not only consideration of the offense itself, but also facts that support the mitigation of the death penalty. It includes, in part, the characteristics of the individual offender, his life's history, his emotional composition, his life's experiences that have been formative - under our law, the death penalty is never automatically imposed, no matter how terrible the case is. Instead it is necessary for the sentencer to know the offender in a very detailed way, and consider his individual circumstances and all facts that can and should be considered in mitigation of the death penalty. It isn't easy to reconstruct and understand a person's life - it takes careful study and considerable time by persons with particular expertise.

The task will be particularly difficult in this case because Mr. Mohammed is a foreigner, the product of an unfamiliar culture. His family members live far away and speak a foreign language. Their culture and religion will make a careful analysis of their background - for that matter, even meeting them - very difficult. Traveling to their home countries will be expensive and time consuming if it can be done at all. Gathering records, even those which would be commonly available in the United States, may be next to impossible. Any kind of a meaningful study of Mr. Mohammed and his family will be extremely time consuming.

8. If this case is placed on a rushed schedule, whether for political or other reasons, its result will never satisfy either the fact or the appearance of justice. I have read enough about this case to know that the entire world will be watching the outcome. It is critical to the future of our nation and of the world that the case both be, and be seen to be, deliberate and fair. I

therefore urge the Court to afford the accused a fair opportunity, consistent with the time frames referred to above, to develop their defenses. Only in this way may all of us, whether citizens of the United States or of the rest of the world, be confident that the correct outcome has been reached.

This ends my declaration.

DATED this 18 day of August, 2008.

Gerry L. Spence

EXHIBIT I

UNITED STATES OF AMERICA,	)	
	)	**DECLARATION OF**
vs.	)	
	)	**KATHERINE STONE**
KHALID SHEIKH MOHAMMED, *et. al*	)	
	)	**NEWELL**
	)	
_____	)	

I, KATHERINE STONE NEWELL, being first duly sworn upon oath, hereby say:

1. I am an attorney, employed in the Office of the Chief Defense Counsel, Office of Military Commissions since November, 2007. In this capacity, I serve as a subject matter resource on the subject of torture and other forms of cruel, inhuman, and degrading treatment. From October 2005 to March 2007, I was the Counterterrorism Counsel for the U.S. Program of Human Rights Watch. In both capacities, I have reviewed numerous open source documents relating to U.S. detention and interrogation operations.

2. I was graduated *cum laude* from the Washington College of Law at American University in 2000 and am licensed to practice in the State of New York. I obtained my undergraduate degree from Virginia Tech in 1990. From 1991 to 1996, I served as an officer in the U.S. Air Force (final rank, Captain).

3. I am not detailed to any case currently before the Military Commissions and do not have an attorney-client relationship with any detainee charged in the case of *U.S. v. Mohammed*. I affirmatively assert that nothing in this affidavit is based on classified information or any information obtained directly from an accused or from counsel for any accused.

4. Based on the above, on information and belief I acquired through current and previous employment, the narrative below applies to the detainees charged in the case of *U.S. v. Mohammed*.

A SPECIAL CIA PROGAM FOR SENIOR AL QAEDA SUSPECTS

5. Reports that suspected al Qaeda operatives were being held by the CIA in undisclosed locations abroad began circulating in 2002.[1] By 2004, a number of suspected al Qaeda

[1] See, for example, "Getting al Qaeda to talk," CNN.com, September 17, 2002 (discussing the detention of Ramzi bin al-Shibh and Omar al-Faruq) available at http://archives.cnn.com/2002/US/09/17/bergen.otsc/index.html; "'Appropriate pressure' being put on al Qaeda leader," CNN.com, March 3, 2003 (stating that CIA had brought

operatives were declared by human rights advocates to have been "disappeared" by the U.S. government.[2],[3] In September of 2006, the President announced the transfer of the detainees charged in the case of *U.S. v. Mohammed* and others to Guantanamo after they had been held in great secrecy and subjected to "an alternative set of [interrogation] procedures" outside the United States in a separate program operated by the CIA.[4]

6. The covert CIA program referred to by the President was authorized under a classified Presidential finding signed on September 17, 2001, which reportedly gave the CIA broad powers to kill, capture, detain and interrogate suspected al Qaeda leaders and their associates. President Bush reportedly signed a new executive order in 2007 after the Supreme Court ruled in 2006 that the Geneva Conventions applied to prisoners who belonged to al Qaeda.[5]

Khalid Shaikh Mohammed, who was arrested in Pakistan, to an undisclosed location outside of the United States) available at http://www.cnn.com/2003/WORLD/asiapcf/south/03/02/pakistan.arrests/index.html.

[2] With the exception of Mr. al Baluchi, all the accused were among those listed as "disappeared" by Human Rights Watch by October 2004. See http://www.hrw.org/backgrounder/usa/us1004/7.htm#_Toc84652978. Mr. Baluchi was later added to this list. *See also* Human Rights Watch, *The United States' "Disappeared": The CIA's Long-Term "Ghost Detainees"* (October 2004); Amnesty International et. al., *Off the Record, U.S. Responsibility for Enforced Disappearances in the "War on Terror"* (2007).

[3] A "disappearance" is an unlawful detention in which the detaining authorities deny holding the person or refuse to disclose his or her whereabouts. Under international law, "forced disappearances" are considered one of the most serious violations of the fundamental rights of human beings, as well as an "offence to human dignity" and "a grave and abominable offense against the inherent dignity of the human being." *See,* respectively, United Nations General Assembly, "Declaration on the Protection of All Persons from Enforced Disappearances" (Geneva: United Nations, 1992), A/RES/47/133, art. 1; Organization of American States, "Inter-American Convention on Forced Disappearance of Persons," 2003, Preamble, para. 3. 13. Louise Arbour, United Nations High Commissioner for Human Rights, said in an article in Le Monde published on 7 December 2005 that secret detention was a form of torture in itself, for the person detained, who was at the mercy of the detaining authorities, and, worse still, for the families, who were faced with a situation that amounted to that of a missing person. Quoted in Eur. Parl. Ass., *Comm. on Legal Aff. and Hum. Rts., Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, para. 13., 17th Sitting, Doc. No. 10957 (2006) at 9-19, *available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

[4] *See* President Discusses Creation of Military Commissions to Try Suspected Terrorists, Office of the Press Secretary, The White House, September 6, 2006, available at http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html (President Bush stating that "In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency.".) See also Announcement, Office of the Director of National Intelligence, *Summary of the High Value Terrorist Detainee Program*, undated (ODNI discussing the capture of Abu Zubaydah in March 2002 and stating that "Over the ensuing months, the CIA designed a new interrogation program..."), available at http://www.fas.org/irp/news/2006/09/hivaluedetainees.pdf.

[5] *See* Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, *available at* http://www.nytimes.com/2007/10/04/washington/04interrogate.html.

7. Practices associated with the CIA's expanded powers include the use of extra-judicial renditions; secret capture and detention of suspects, high-value and otherwise; [6] 'proxy' detention and interrogation of suspects by foreign governments; and detention conditions and interrogation techniques[7] traditionally considered unlawful and possibly torture.[8] Detainees charged in the case of *U.S. v. Mohammed* were held in a separate "high-value detainee" program which was a specific part of the CIA's broader detention and interrogation operations, and was not discontinued when they were transferred to military custody in September 2006.

8. Given the secrecy surrounding the program, open source information from current and former detainees about their treatment in any tier of CIA custody remains limited. However, while details remain classified, the information about CIA detention and interrogation practices that is publically available depicts a regime in which extremely coercive treatment was considered legal, necessary, and proper, as described below.

9. The "high-value detainee" program was authorized to use extreme measures to control and interrogate detainees. Detainees in this program were reportedly subjected to prolonged periods of isolation, multiple sophisticated psychological manipulations, and mental or physical pain or suffering through techniques chosen to minimize physical evidence of abuse. The purported purpose of this regimen was to overcome a subject's resistance to interrogation by dismantling his identity and personality.[9] According to a source reportedly familiar with the methods, "the basic approach was to "break down [the detainees] through isolation, white noise, completely take away their ability to predict the future, create dependence on interrogators."[10]

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[6] It appears the CIA operated at least two tiers of detention. The first was for major terrorism suspects "held under the highest level of secrecy at black sites financed by the CIA and managed by agency personnel, including those in Eastern Europe and elsewhere…" Dana Priest, CIA Holds Terror Suspects in Secret Prisons, Wash. Post, Nov. 2, 2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html. Another was for detainees who were considered less important, and who may have been taken to CIA-run "black sites", rendered to foreign countries for detention in jails operated by the host nations, or held in US military facilities with CIA support or direction. *Id.*

[7] Forms of treatment that may be considered part of an interrogation or a component of detainee management or discipline include but are not limited to: isolation; dietary or environmental manipulation; forced grooming; removal of clothing or comfort items; sleep deprivation; hooding and shackling; frequent body cavity searches and the use of suppositories. Regardless of whether a form of treatment is considered part of interrogation, punishment, or detainee management or discipline, it may singly or in combination constitute prohibited mistreatment.

[8] For the purposes of this affidavit, this author will not categorically state whether a form of treatment or a specific course of treatment constituted torture or not.

[9] See, e.g., Jane Mayer, *The Black Sites: A rare look inside the C.I.A.'s secret interrogation program*, The New Yorker, Aug. 13, 2007.

[10] Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007. *See also* Jane Mayer, *The Black Sites*, The New Yorker, August 13, 2007, ("They were very arrogant, and pro-torture," a European official knowledgeable about the program said. "They sought to render the detainees vulnerable—to break down all of their senses. It takes a psychologist trained in this to understand these rupturing experiences.").

10. As subjects of "high-value detainee" program, the detainees charged in the case of *U.S. v. Mohammed* were held in long-term incommunicado detention in secret locations (or "black sites") for some *three and half to four years* before their transfer to Guantanamo,[11] during which the United States refused to disclose their whereabouts and refused to allow them access to their families, lawyers or the International Committee of the Red Cross.

A MODEL FOR CIA INTERROGATION

11. Numerous allegations of mistreatment generally comport with the reported genesis of the CIA's interrogation program. The CIA allegedly turned to psychologists involved in training U.S. personnel how to resist coercive interrogation for advice on what might "break" captives resistant to questioning.[12] Sources report the program's coercive procedures were "reverse-engineered" for the purposes of eliciting information from procedures designed to train US personnel how to withstand interrogation, specifically, techniques utilized by U.S. government instructors in survival training meant to help U.S. personnel prepare for possible detention by captors who would not adhere to the Geneva Conventions. The program was commonly referred to SERE training, from the acronym for "survival, evasion, resistance, and escape", and was based in part on studies of North Korean and Chinese practices designed to compel confessions from American prisoners.[13]

12. The CIA program's supporters reportedly believed these origins gave coercive techniques scientific credibility, making it more likely they would be employed.

13. SERE training is designed to expose a student to a form of "controlled realism" that will prepare him or her for captivity through "stress inoculation" and "stress resolution".[14] SERE

[11] Open sources report that Mr. bin al Shibh was arrested in September of 2002, and that the other detainees charged in the case of *U.S. v. Mohammed* were arrested in March or April of 2003.
[12] See., e.g., Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, ("Psychologists, working in secrecy, had actually designed the tactics and trained interrogators in them while on contract to the C.I.A."); JANE MAYER, THE DARK SIDE (2008). Advocates who work with victims of torture note that a victim's mental suffering can be compounded by the belief that medical personnel know about and condone his or her treatment.
[13] A recent Congressional investigation revealed that SERE instructors sent to Guantanamo in December 2002 to train military interrogators on "interrogation fundamental and resistance to interrogation" provided them with a chart of "Coercive Management Techniques" that was, in fact, copied verbatim from a 1957 Air Force study of Chinese Communist techniques used during the Korean War to obtain confessions from American prisoners, many of them false. Scott Shane, China Inspired Interrogations at Guantánamo, N.Y. Times, July 2, 2008.
[14] *See generally* July 25, 2002 document entitled "Physical Pressures used in Resistance Training and Against American Prisoners and Detainees" attached to July 25, 2002 Memorandum from Joint Personnel Recovery Agency Chief of Staff to Office of the Secretary of Defense General Counsel, Subject: Exploitation, released at Tab 3 of documents accompanying The Origins of Aggressive Interrogation Techniques: Part I of the Committee's inquiry into the treatment of detainees into U.S. custody, United States Senate Committee on Armed

experts note that "too much" pressure on students can induce "learned helplessness", the point at which stress and duress is no longer a beneficial inoculant to interrogation, but will create vulnerabilities that interrogators can exploit to overcome resistance.[15] News reports describe former SERE instructors working with the CIA as contractors to develop its interrogation program as strong proponents of the "learned helplessness" model to break detainees.[16]

14. Techniques used by the Department of Defense and/or military service SERE programs include but are not limited to:[17] waterboarding;[18] shaking and manhandling, to include "walling"[19] or "grounding"[20]; slapping; forced stress positions, possibly with threat of punishment for failure; close confinement; isolation; induced physical weakness and exhaustion; "degradation" and "conditioning"; sensory deprivation;[21] sensory overload;[22] disruption of sleep and biorhythms; and manipulation of diet, nutrients, and vitamins as a way to impact general health and emotional state.

15. This list echoes practices reportedly authorized for and used by the CIA, as described below.

Services (June 17, 2008), available at http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf.

[15] "If too much physical pressure is applied, the student is made vulnerable to the effects of learned helplessness, which will render him/her less prepared for captivity ...". *Id.*

[16] Jane Mayer, *The Black Sites: A rare look inside the C.I.A.'s secret interrogation program*, The New Yorker, Aug. 13, 2007.

[17] In addition to noted sources, this list and the descriptions are from July 25, 2002 document entitled "Physical Pressures used in Resistance Training and Against American Prisoners and Detainees" attached to July 25, 2002 Memorandum from Joint Personnel Recovery Agency Chief of Staff to Office of the Secretary of Defense General Counsel, Subject: Exploitation, released at Tab 3 of documents accompanying The Origins of Aggressive Interrogation Techniques: Part I of the Committee's inquiry into the treatment of detainees into U.S. custody, United States Senate Committee on Armed Services (June 17, 2008), available at http://levin.senate.gov/newsroom/supporting/2008/Documents.SASC.061708.pdf.

[18] The CIA's use of the waterboarding procedure was reportedly adapted directly from SERE training. *See* Opening Statement of Senator Carl Levin before the Senate Armed Services Committee's inquiry into the treatment of detainees in U.S. custody, citing earlier testimony of Steven Bradbury, the current Assistant Attorney General of the OLC, before the House Judiciary Committee. *The Origins of Aggressive Interrogation Techniques: Part I of the Committee's Inquiry into the Treatment of Detainees in U.S. Custody*, 110 Cong. 8 (2008) (June 17, 2008 Opening Statement of Senator Carl Levin).

[19] Quickly and firmly pushing the student numerous times into the wall with a towel or other lead around the neck.

[20] Quickly and firmly pushing the student numerous times into the ground.

[21] "When a subject is deprived of sensory input for an interrupted period, for approximately 6-8 hours, it is not uncommon for them to experience visual, auditory and/or tactile hallucinations. If deprived of input, the brain will make it up. This tactic is used in conjunction with other methods to promote dislocation of expectations and induce emotions."

[22] "This includes being constantly exposed to bright, flashing lights, loud music, annoying / irritating sounds, etc. This tactic elevates the agitation level of a person and increases their emotionality, as well as enhances the effects of isolation."

ASSURANCES THAT EXTREME TREATMENT WAS LAWFUL

16. At various times the CIA sought legal opinions from the Office of Legal Counsel (OLC) of the Department of Justice concerning the legality of detention and interrogation practices used by its officers. Not all these legal opinions have yet been released, or even publically acknowledged.[23] It appears that, as Congress and the courts took steps reasserting or expanding legal limits on detainee abuse, the Administration took steps to maintain the CIA's detention and interrogation powers, including the development of additional secret legal guidance.

17. The OLC legal opinions that are publically available indicate that at various times the CIA operated under assurances that some or all domestic and international legal limits on torture and other forms of cruel, inhuman or degrading treatment did not apply to the treatment of alien detainees held overseas by the CIA. In effect, CIA officials were given permission to subject detainees to treatment and conditions considered torture under traditional interpretations of U.S. and international law, and, literally, treatment and conditions considered torture under its own interpretation if so ordered by the President.[24]

18. For example, one 2002 OLC legal opinion redefined "torture" to include only the most extreme forms of pain and suffering. The opinion stated that for an act to constitute torture, it must inflict pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[25] "Torture" did not include treatment that resulted in "mental suffering" without "pain", and did not include mental

[23] For an example of some OLC opinions known to exist but yet to be made available to the public or to Congress, see Letter for Fred Fielding, Counsel to the President, from Senators Patrick Leahy and Arlen Specter, Re: Outstanding Requests for Information and Documents Concerning Legal Analysis and Advice from the Department of Justice's Office of Legal Counsel Related to the Administration's Detention and Interrogation Policies, August 19, 2008, available at http://www.fas.org/irp/congress/2008_cr/leahy081908.pdf.

[24] For a period between 2002 and 2004, known OLC guidance posited that US interrogators were permitted to use even torture with Presidential authorization. Memorandum for Alberto R. Gonzales, Counsel to the President. From Office of Legal Counsel, US Department of Justice. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A. August 1, 2002 ("Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional powers to conduct a military campaign … Any effort to apply Section 2340A in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."). This opinion was withdrawn in June 2004 and replaced with another known OLC opinion on December 30, 2004, which did not reach this point. Memorandum for James B. Comey, Deputy Attorney General. From Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice. December 30, 2004. It is not known if any other OLC guidance has been issued on this point.

[25] Memorandum for Alberto R. Gonzales, Counsel to the President. From Office of Legal Counsel, US Department of Justice. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A. August 1, 2002.

pain and suffering that did not result in significant psychological harm lasting for months or even years.[26] In 2004, when OLC repudiated this particular memorandum, the new opinion reasserted a more traditional definition of *physical* torture, but possibly narrowed the definition of *psychological* torture even further. Commentators have expressed particular concern that the 2004 memorandum said Congress did not intend to specifically prohibit four practices listed in the federal anti-torture statute as examples of severe mental pain or suffering, and these practices therefore did not necessarily constitute torture unless they actually resulted in prolonged mental harm to the specific victim in question – an analysis that can only occur after the harm has been done.[27] These four practices are:

> (A) The intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) The administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) The threat of imminent death; or
>
> (D) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.[28]

EXTREME TREATMENT IN PRACTICE

19. Open source information suggests how the CIA put OLC legal guidance, known and unknown, into practice. CIA sources have reportedly described "enhanced interrogation techniques" instituted in mid-March 2002 and used on CIA detainees singly and in combination that include but are not limited to shaking, body and face slaps, forced standing, sleep deprivation, exposure to cold, waterboarding, isolation and nudity. [29] In January 2003,

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[26] A companion memorandum to this 2002 opinion reportedly outlined specific methods the CIA could use. See Memorandum for [redacted] From Office of Legal Counsel, US Department of Justice. Re: Interrogation of [redacted] , August 1, 2002, available at http://www.aclu.org/pdfs/safefree/cia_3686_001.pdf. An unredacted version of this memorandum is not publically available.

[27] Physicians for Human Rights, *Break them Down: Systematic Use of Psychological Torture by U.S. Forces* (2005), pp 76 et seq, available at http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf.

[28] 18 U.S.C. §§ 2340-2340(A).

[29] One source described six techniques:

> 1. The Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him.

then-CIA Director George Tenet issued a policy directive that shows the CIA planned for the use of forms of interrogation more extreme than "enhanced interrogation techniques."[30]

20. CIA officers reportedly combined multiple forms of treatment. CIA officers reportedly sought the Agency's legal advice about the application of specific combinations, concerned about the effect of combining techniques.[31] Sources told ABC News that senior Bush

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2. Attention Slap: An open-handed slap aimed at causing pain and triggering fear.
3. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage.
4. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions.
5. The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water.
6. Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.

CIA's Harsh Interrogation Techniques Described, ABC News, Nov. 18, 2005 available at http://abcnews.go.com/WNT/Investigation/story?id=1322866. *See also* Jan Crawford Greenburg, Howard L. Rosenberg and Ariane de Vogue, *Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'* ABC News, Apr. 9, 2008, available at http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1. In 2003-2004, the CIA Inspector General investigated the use of ten extreme techniques. Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, The New York Times, Nov. 9, 2005. CIA Director Michael Hayden has specifically stated Mr. Mohammad and two other CIA high-value detainees were subjected to waterboarding. *Hearing of the Senate Select Committee on Intelligence* (Feb. 5, 2008) (testimony of General Michal Hayden) at 24. See also Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, N.Y. Times, June 22, 2008. A 2007 investigative report into alleged secret detention in COE member states from a rapporteur for the Council of Europe combined descriptive testimonies from former or current detainees, human rights advocates, or people who have worked in the establishment or operations of CIA secret prisons to describe conditions in CIA detention that include: confinement, isolation, and insufficient provision; careful physical conditioning of detainee and cell; permanent surveillance; mundane routines as unforgettable memories; and exertion of physical and psychological stress. Eur. Parl. Ass., *Comm. on Legal Aff. and Hum. Rts., Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, 17th Sitting, Doc. No. 10957 (2006) at pp. 51-53, *available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf (describing "months of *solitary confinement and extreme sensory deprivation* … A common feature for many detainees was the *four-month isolation regime*. During this period of over 120 days, absolutely no human contact was granted with anyone but masked, silent guards." (emphasis in original)). Jane Mayer relates that a former CIA officer who favored the program said the agency frequently "photographed the prisoners naked 'because it's demoralizing.'" JANE MAYER, THE DARK SIDE (2008), p. 273.

[30] The Tenet memorandum directs certain CIA officers to use only "Permissible Interrogation Techniques" "*unless otherwise approved by CIA headquarters*" (emphasis added). "Permissible Interrogation Techniques" were defined as (a) Standard Techniques and (b) Enhanced Techniques. See January 28, 2003 Memorandum from CIA Director George Tenet (redacted) *available* at http://www.aclu.org/pdfs/safefree/cia_3684_001.pdf.

[31] *See* Scott Shane, David Johnston, & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. Times, Oct. 4, 2007, *available at* http://www.nytimes.com/2007/10/04/washington/04interrogate.html ("We were

administration officials met to discuss and approve CIA interrogations, including those that combined different methods and thereby "push[ed] the limits of international law and even the Justice Department's own legal approval […]."[32] In 2005, OLC issued another secret memorandum reportedly authorizing the combination of forms of treatment, including but not limited to waterboarding, head and belly slapping, sleep deprivation, temperature extremes, and stress positions.[33]

21. In 2004, CIA Inspector General (IG) John Helgerson completed a months-long special review of the Agency's interrogation practices.[34] The special review investigated at least three deaths of CIA-held detainees in Afghanistan and Iraq; the treatment of three dozen more, including Mr. Mohammad; and seven or eight cases in which the CIA appeared to have abducted and jailed misidentified people. [35] The CIA's special review concluded the CIA's techniques constituted cruel, inhuman, and degrading treatment, in violation of the Convention Against Torture.[36] The heavily redacted version of the report that is publically available suggests the IG may have used the OLC legal opinions as a basis for its analysis; it is possible that had the IG used a traditional view of US and international law, he might have concluded CIA techniques constituted torture.

22. Detainees held in the CIA high-value program who were transferred to military custody at Guantanamo in 2006, including detainees charged in the case of *U.S. v. Mohammed*, reported forms of abuse consistent with the forgoing descriptions to the International Committee of the Red Cross (ICRC) after their transfer. The ICRC report itself has not been made public. According to people familiar with its contents, the detainees told the ICRC they were kept

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getting asked about combinations — 'Can we do this and this at the same time?'" recalled Paul C. Kelbaugh, a veteran intelligence lawyer who was deputy legal counsel at the C.I.A.'s Counterterrorist Center from September to December of 2003. Interrogators were worried that even approved techniques had such a painful, multiplying effect when combined that they might cross the legal line, Mr. Kelbaugh said. He recalled agency officers asking: "These approved techniques, say, withholding food, and 50-degree temperature — can they be combined?" Or "Do I have to do the less extreme before the more extreme?").

[32] Jan Crawford Greenburg, Howard L. Rosenberg and Ariane de Vogue, Sources: Top Bush Advisors Approved 'Enhanced Interrogation,' ABC News, Apr. 9, 2008, available at http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1 ("At one meeting in the summer of 2003 -- attended by Vice President Cheney, among others -- Tenet made an elaborate presentation for approval to combine several different techniques during interrogations, instead of using one method at a time, according to a highly placed administration source.").

[33] JANE MAYER, THE DARK SIDE (2008), p. 309. This memorandum, which is not publically available, is one of at least three secret legal opinions relating to the interrogation of detainees in CIA custody believed to have been drafted by the OLC in May 2005 alone. *See generally* ACLU Press Release, ACLU Learns of Third Secret Torture Memo by Gonzales Justice Department (November 6, 2007) available at http://www.aclu.org/safefree/torture/32597prs20071106.html.

[34] Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, The New York Times, Nov. 9, 2005.

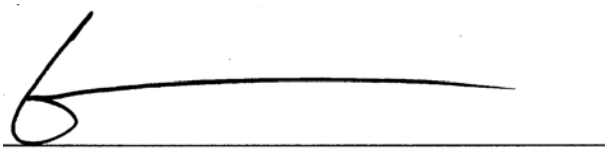
[35] *Id.*

[36] *Id.*

completely naked for extended periods; doused with cold water and subjected to frigid temperatures; sexually humiliated; forced to stand or shackled in stress positions for prolonged periods; beaten; held in close confinement for extended periods; yanked into walls by their necks with a towel or other lead; deprived of sleep for extended periods; subjected to extreme noise stress; and waterboarded. The ICRC reportedly described the CIA's detention and interrogation methods as tantamount to torture.[37]

I have read the foregoing declaration, know the contents thereof, and declare under penalty of perjury of the laws of the United States that it is true and correct.

DATED this 21st day of August, 2008.



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[37] See JANE MAYER, THE DARK SIDE (2008), p. 165 – 169.

EXHIBIT J

UNITED STATES OF AMERICA

VERSUS

KHALID SHEIKH MOHAMMED

Declaration of Katherine Porterfield, Ph.D.

I, Katherine Porterfield, Ph.D., under penalty of perjury declare as follows:

Qualifications

I am a clinical psychologist licensed to practice in the State of New York (License number 014105-1). I am a Senior Psychologist at the Bellevue/NYU Program for Survivors, where I serve as the primary mental health clinician for numerous patients in the program. I am a Clinical Instructor in the Department of Psychiatry at the NYU School of Medicine and, in addition to my clinical duties, I supervise and train psychology interns and externs and psychiatric residents in the diagnosis and treatment of torture survivors. I am the Chair of the American Psychological Association Task Force on the Impact of War on Children Residing in the United States.

I received my Bachelor of Arts from Georgetown University where I graduated cum laude and I received my Doctor of Philosophy from the University of Michigan in 1998. I was the recipient of a Power Fellowship at the University of Michigan, where I specialized in clinical treatment and research implications of bereavement and loss. I received training in psychological assessment of adults and children at the University of Michigan. After completing my doctorate, I received a Post-Doctoral Fellowship at the New York University Child Study Center and trained in clinical and assessment methods with children and adolescents.

I am a co-author on several publications, pertaining to the assessment and treatment of torture and trauma survivors, including: Traumatic experiences and psychological distress among an urban refugee population. *Journal of Nervous and Mental Disease, 194 (3), 188-194.* (2006), Traumatic Stress in Adolescents Anticipating Parental Death. *The Prevention Researcher, 12 (4), 17-20.(2004),* Facilitating attachment between school-aged children and a dying parent. *Death Studies, 915-938. (2004),* Meeting the needs of parentally-bereaved children: A framework for child-centered parenting. *Psychiatry: Interpersonal and Biological Processes, 67(4)*, 331-352 *(2004)*; Managing traumatic stress in children anticipating parental death. *Psychiatry: Interpersonal and Biological Processes,* 66 (2), 168-181 (2004); The impact of early loss history on parenting of bereaved children: A qualitative study. *Omega: Journal of Death and Dying,* 47(3):203-220 (2002-2003); Comparison of preventive interventions for families with parental affective disorder. *J. Am. Acad. Child Adolesc. Psychiatry,* 32(2), 254-263 (1993).

Advisory counsel for Khalid Sheikh Mohammed have requested that I render an opinion on whether the described conditions under which they are currently assisting Mr. Mohammed are clinically consistent with the minimal prerequisites for development of the professional relationship necessary to enable an individual meaningfully to comprehend and weigh legal advice and assert his legal rights.

In addition they have asked that I comment on the time and conditions necessary for building appropriate rapport with individuals in order to competently assess ill treatment and torture, the need for sufficient time to develop that rapport, and the barriers to communication that may exist in the prisoners' current situation that will require additional time in which to build a professional relationship.

It is my understanding that advisory counsel for Mr. Mohammad wish to proceed with

a clinical evaluation of their client, which is necessary for a competent assessment of the possible infliction and resulting effects of torture and maltreatment.

I have spoke to counsel familiar with these cases, and I have reviewed the following documents:

1. Declaration of Attorney Katherine Newell
2. Affidavit of Attorney Nasrina Bargzie and List of Sources, filed in *ACLU v Department of Defense & CIA,* No. 08-00437 (D.C. Cir. 2008)
3. Excerpts from ABA Guidelines
4. Declaration of Scott McKay, Consulting Attorney for Khalid Sheikh Mohammed

I am informed that the defendants in the referenced proceedings are all prisoners, sometimes referred to as "High Value Detainees," charged with various acts of responsibility for planning, funding, and carrying out the attacks of 9/11. Official government statements characterize this case as the biggest criminal investigation ever conducted in the history of the United States. These are all capital cases, before the Military Commission in Guantanamo.

Assessment of Treatment of the Prisoners Known As "High Value Detainees"

Istanbul Protocol requirements

The *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (known as the "Istanbul Protocol") is the first set of international guidelines for documentation of torture and its consequences. It became a United Nations official document in 1999 and is available on the United Nations web site. The *Istanbul Protocol* provides a set of guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting

such findings to the judiciary and any other investigative body. The assessment teams with which I have worked comply with the Protocol's guidelines.

Speaking broadly, the Istanbul Protocol mandates that, in order to assess and report competently on allegations of torture, a qualified psychologist must perform a thorough evaluation, and consult with other members of the inter-disciplinary team for coordination of the assessment of the psychological evidence of torture. As the Istanbul Protocol states: "The psychological consequences of torture, however, occur in the context of personal attribution of meaning, personality development and social, political and cultural factors." Para 234. A competent psychological evaluation must address the context of the evaluation.

At a minimum, this requires sufficient time to gain the cooperation and understanding of the person to be assessed. In many instances, persons have been brought to me by their lawyers, with whom they have had a number of months or even years in which to become comfortable sharing their painful and often shaming experiences. Often the services of a competent and sensitive translator are involved. The evaluation must be culturally competent, and factor for relevant cultural, ethnic, and linguistic variables.

Comments on the materials reviewed

I have read the declaration by Katherine Newell, summarizing conditions of capture and detention of "high value detainees," including prisoners now charged with capital offenses under the Military Commissions Act in the case of U.S. v. Mohammed. These conditions include the use of extra-judicial renditions; secret capture and detention of suspects; 'proxy' detention and interrogation of suspects by foreign governments; and detention conditions and interrogation techniques traditionally considered as unlawful and

torture. In addition I have read the Draft Declaration of Scott McKay, the consulting counsel for Khalid Sheikh Mohammad, and additional information from open sources provided by counsel assisting Mr. Mohammed. These sources indicate that Mr. Mohammad in particular was subjected to techniques, including waterboarding, that would be regarded as torture and ill treatment

My opinions about the protocol for determining the nature and consequences of mistreatment on the defendants in U.S. v. Mohammed are offered within the context of the treatment summarized in these documents I have reviewed.

These data indicate that prisoners and other detainees were subjected to prolonged periods of isolation, multiple sophisticated psychological manipulations, and mental or physical pain for the purpose of overcoming the defendants' resistance to interrogation by dismantling their identity and personality. The defendants in U.S. v. Mohammed reportedly were held in long-term incommunicado detention in secret locations (or "black sites") for some three and half to four years before their transfer to Guantanamo, during which the United States refused to disclose their whereabouts and refused to allow them access to their families, lawyers or the International Committee for the Red Cross (ICRC). Interrogation techniques included but were not limited to: waterboarding; shaking and manhandling, to include "walling" or "grounding"; slapping; forced stress positions, possibly with threat of punishment for failure; close confinement; isolation; induced physical weakness and exhaustion; degradation and conditioning; sensory deprivation; sensory overload; disruption of sleep and biorhythms; forced nudity; sexual humiliation; frequent body cavity searches and the use of suppositories.

Individuals reported to the ICRC that they were kept completely naked for extended

periods; doused with cold water and subjected to frigid temperatures; sexually humiliated; shackled or forced to stand in stress positions for prolonged periods; beaten; held in close confinement for extended periods; yanked into walls by their necks with a towel or other lead; deprived of sleep for extended periods; subjected to extreme noise stress; and waterboarded. Other detainees have reported they were threatened with perpetual detention or death; forced to stand or shackled in stress positions for prolonged periods; beaten; and isolated.

In my professional opinion, the treatment to which these prisoners, including the defendants, have been subjected falls within the universally accepted definition of torture according to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which states: "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person, has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason, based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

This opinion is necessarily based only on the documents and information cited above: I have no other source of information. In order to competently assess any of these individual defendants in these capital cases, I would have to participate in an interdisciplinary team, have the appropriate background information, and have the opportunity to evaluate the individual in person.

Requisite Time Frame for the Indicated Evaluations

The prerequisites for a competent assessment of torture in compliance with the Istanbul Protocol and standards of psychological assessment and testing practices require an inter-disciplinary team to evaluate clinically reliable data obtained from clinical interviews, medical evaluations, indicated laboratory testing, social and medical history records and other materials, including normed, standardized psychological tests and interviews, necessary to assess the individual's pre- and post-morbid level of functioning.

Torture is an extraordinary life experience capable of causing a wide range of physical, psychiatric and cognitive impairments and suffering. The extreme nature of torture can disrupt every sphere of an individual's functioning and have a devastating impact on the ability to trust others. By its very nature torture affects every aspect of prisoners' relationships with their counsel and requires counsel to make every effort to overcome its impact on perceptions of trustworthiness and rapport building. The consequences of torture can be ameliorated by treatment, intervention, and appropriate support services, but unattended to it can continue to cause profound suffering. The functional impacts of torture present a significant risk of creating barriers to communication between lawyers and their affected clients.

Torture has been documented to have numerous psychological consequences, many of which have a direct bearing on the tasks and interactions that are necessarily part of a client's relationship with his/her lawyer. One of these conditions, Post-traumatic Stress Disorder, is characterized by hyperarousal, anxiety, and agitation, reexperiencing symptoms (flashbacks and nightmares) and avoidance of reminders of the traumatic events and emotional numbing. Each of these symptoms can make it very difficult for an individual to recount the events of

the trauma that they experienced, thereby directly affecting the individual's ability to talk in detail with an attorney about these events. Another well-documented side effect of torture is depression, a condition characterized by low mood, poor concentration, difficulty sleeping, low energy, hopelessness, and, in some cases, suicidal feelings. Depression can also impair an individual's ability to mobilize himself for the collaboration required in a legal relationship and can profoundly affect the individual's ability to focus and concentrate on the legal process. In addition to these psychological difficulties, survivors of torture often report pronounced difficulties in trusting others and building relationships. This could directly affect a client's experience of trusting his attorney.

Competent clinicians and legal practitioners familiar with the standard of care required by the Istanbul Protocol are aware that several considerations must be taken into account by lawyers undertaking the representation of clients who are reported to have been subjected to past mistreatment or torture. First, the acute and long term consequences typically associated with ill treatment and torture of individuals must be taken into account at every step of the legal process, including a consideration of the manner in which compromised functioning may impair an individual's stamina; capacity to consider legal advice; and ability to attend, follow and comprehend courtroom proceedings. Second, prisoners should be guaranteed adequate procedural safeguards protected by international law at all stages of the proceedings, including a humane, safe and healthy living environment free of reprisals, violence, threats of violence, and any form of intimidation or coercion . Third, counsel must be afforded a reasonable opportunity to form the bonds of trust with their client necessary to promote disclosure of sensitive information regarding the fact and impact of prior maltreatment. Fourth, because of the nature of torture and the trauma individuals suffer as a result, it is particularly critical for

counsel to adhere to professional principles that demand respect, understanding and knowledge of the social, cultural, and political background of clients and the consequences of torture on their functioning and well being.

It is possible for torture survivors to build and maintain a trusting and professional relationship with counsel, but several factors influence the amount of time necessary for such a relationship to develop. These factors include the nature of the torture, the consequences and effects of the torture in light of the prisoners' social, political, medical, and historical context, cessation of interrogation and torture, and conditions of confinement. Multiple interviews over time, conducted in a safe, comfortable and confidential environment, are necessary for Guantanamo prisoners to begin to trust counsel to the degree necessary to reveal information relevant to their defense, including the nature of the torture they survived.

Counsel must give cautious and rigorous attention to rapport building in light of the torture their clients have experienced. Interviews and communications with prisoners must be conducted with an awareness of cultural context and an appreciation that the interview process itself may cause the individual to re-experience interrogation and specific acts of torture, inducing fear and terror, revulsion, helplessness, confusion, panic and loss of contact with reality. Counsel must conduct interviews with care, patience, and knowledge of characteristic reactions to torture that can disrupt rapport building and professional relationships.

Furthermore, linguistic differences between counsel and Mr. Mohammed require the use of interpreters, which presents the additional challenges of time, the inherently intrusive nature of a third party on rapport-building, and the risk of misinterpreting and losing important information. At a minimum, counsel must be allowed sufficient time, access to the client, and relevant expert assistance to learn, recognize, and overcome the substantial barriers

and obstacles that exist to building and maintaining a professional relationship.

It is my professional opinion, to a reasonable degree of professional certainty, that the competent assessment of Mr. Mohammad or the other detainees in order to determine whether and to what degree they were subjected to maltreatment, including torture, while in the custody of United States authorities; and to assess the medical, psychiatric and cognitive consequences of such experiences, will require the time reasonably necessary to build and maintain that professional relationship; obtain and evaluate any reasonably available, relevant data including documentation of the dates, location, nature and other circumstances of any such mistreatment; a medically adequate social history; a complete medical and psychological history, including all available records; and opportunities for personal clinical interviews, appropriate psychological testing, and assessments of the individual defendants.

Signed this 21st day of August, 2008

Katherine Porterfield PhD

Katherine Porterfield, Ph.D.

EXHIBIT K

UNITED STATES OF AMERICA

VERSUS

KHALID SHEIKH MOHAMMED*, et al*

Declaration of Allen S. Keller, M.D.

I, Allen S. Keller, M.D., declare under penalty of perjury as follows:

Qualifications

I am an American physician licensed to practice medicine in the State of New York. I am a graduate of New York University School of Medicine and completed my residency in Primary Care Internal Medicine at NYU/Bellevue Medical Center. The residency program provided me intensive training on the psychosocial aspects of care including effective doctor-patient communications and the evaluation and treatment of common psychiatric problems including depression, anxiety and somatization. I am an Associate Professor of Medicine at NYU School of Medicine, and an Attending Physician at Bellevue Hospital in New York City.

I am the founder and director of the Bellevue/New York University Program for Survivors of Torture (PSOT). PSOT provides medical, mental health, social and legal services to refugees, asylum seekers and other immigrants who were victims of torture, refugee trauma and other human rights abuses. Since PSOT began in 1995, we have evaluated and cared for approximately 3,000 individuals from over 80 countries.

I have received specialized post-graduate training from Physicians for Human Rights in the use of medical skills for the documentation and treatment of torture victims. I have been conducting medical/forensic evaluations of survivors of torture since 1990. In 1993, I worked in

Cambodia where I helped to develop a program to train Cambodian health professionals in addressing human rights abuses including the evaluation, documentation and treatment of survivors of torture. I have participated in several international investigations into allegations of torture and abuse, including a 1996 investigation in India of Tibetan refugees reporting they had been tortured. In 1999, I was part of a team that conducted an epidemiological survey of Kosovar refugees who fled to Albania and Macedonia reporting human rights abuses by Serbian authorities. In 2007, I conducted an evaluation in South Africa and Zimbabwe of Zimbabweans reporting that they were victims of torture and political violence. I am the author or coauthor of more than 30 publications on the evaluation, documentation and treatment of individuals reporting a history of torture or other human rights abuses. This includes articles published in peer reviewed medical journals, chapters and books.

I am co-chair of the Bellevue Hospital Bioethics Committee and am responsible for medical ethics education at New York University School of Medicine. I have previously served on the American College of Physicians Ethics and Human Rights Committee. I am currently participating in a project to train individuals working at public hospitals throughout New York City in providing bioethics consultations.

I have trained numerous health professionals both domestically and internationally in the forensic evaluation, documentation and treatment of individuals reporting a history of torture. I have participated on many occasions in training staff of the Department of Homeland Security, in particular Asylum Officers, concerning the physical, psychological, and social consequences of torture. In June of 2001, at the invitation of the Office of Chief Immigration Judge, I was invited

to make a presentation concerning the evaluation of torture survivors at the Annual Conference of Immigration judges.

I served as a member of the U.S. Department of State Delegation to the 1998 meeting of the Organization for Security and Cooperation in Europe, held in Warsaw Poland. In 2004-2005 I served as an expert in a national study, mandated by Congress, of individuals seeking political asylum conducted by the United States Commission on International Religious Freedom. I am on the International Advisory Board of Physicians for Human Rights.

I have been invited to testify at several Congressional hearings and briefings concerning torture, including the U.S. Senate Select Committee on Intelligence, the Helsinki Commission and the Congressional Human Rights Caucus. I am frequently invited to speak both nationally and internationally at conferences, medical schools and universities.

I have been previously qualified in U.S. Federal Immigration Court and U.S. Federal Court as an expert witness in evaluating and treating individuals reporting a history of torture and trauma.

I have won several awards for my work with torture victims including the Barbara Chester Award from the Hopi Foundation, the Roger E. Joseph Prize from Hebrew Union College, and the Jim Wright Vulnerable Populations Award from the National Association of Public Hospitals. This past year I received the Distinguished Alumnus of the Year Award from New York University.

Advisory counsel for Khalid Sheikh Mohammed have requested that I render an opinion on whether the described conditions under which they are currently assisting Mr. Mohammed are

clinically consistent with the prerequisites for developing a trusting professional relationship necessary to enable an individual, particularly one alleging a history of torture or other abuse, to meaningfully comprehend and weigh legal advice and assert his legal rights.

In addition they have asked that I comment on the time and conditions necessary for building appropriate rapport with individuals in order to competently assess reports of ill treatment and torture, the need for sufficient time to develop that rapport, and the barriers to communication that may exist in the prisoners' current situation that will require additional time in which to build a professional relationship.

It is my understanding that advisory counsel for Mr. Mohammed wish to proceed with a medical/forensic evaluation of their client, which is necessary for an adequate assessment of the possible infliction and resulting effects of torture and maltreatment.

In preparation for this declaration, I have consulted with counsel familiar with these cases, and I have reviewed the following documents:

1. Declaration of Attorney Katherine Newell
2. Affidavit of Attorney Nasrina Bargzie and List of Sources
3. Excerpts from ABA Guidelines
4. Declaration of Scott McKay, Consulting Attorney for Khalid Sheikh Mohammed
5. "Break Them Down. Systematic Use of Psychological Torture by US Forces." Physicians For Human Rights, 2005
6. "Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality." Physicians for Human Rights, 2007

I am informed that the defendants in the referenced proceedings are all prisoners, sometimes referred to as "High Value Detainees," charged with various acts of responsibility for planning, funding, and carrying out the attacks of 9/11. Official government statements

characterize this case as the “biggest criminal investigation ever conducted in the history of the United States.” These are all capital cases, before the Military Commission in Guantanamo.

Assessment of Treatment of the Prisoners Known as “High Value Detainees”

Istanbul Protocol Requirements

The *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (known as the "*Istanbul Protocol*") is the first set of international guidelines for documentation of torture and its consequences. The manual and principles are the result of three years of analysis, research and drafting, undertaken by more than 75 experts in law, health and human rights from 15 countries. The *Istanbul Protocol* became a United Nations official document in 1999 and is available on the United Nations web site. The *Istanbul Protocol* provides guidelines for the assessment of persons who allege torture and ill treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body. It is considered by many as the international “gold standard” for medical legal documentation of torture and ill treatment. Many of the assessment teams with which I have worked, most recently as part of a study conducted by physicians for human rights in the forensic evaluation of 11 former detainees from Abu Ghraib Prison in Iraq and Guantanamo Prison alleging torture and mistreatment, utilized the Protocol’s guidelines.

Speaking broadly, *the Istanbul Protocol* mandates that in order to assess and report competently on allegations of torture this requires a thorough medical and psychological history and evaluation, a thorough physical examination, ancillary tests including blood tests and

radiographic exams when indicated and available, and the acquisition of appropriate background information.

At a minimum, this requires sufficient time for rapport-building in order to gain the cooperation, trust and understanding of the person to be evaluated. In many instances, persons have been brought to me by their lawyers, with whom they have had a number of months or even years in which to become comfortable sharing their painful and often shaming experiences. Often the services of a qualified and sensitive translator are involved. The evaluation must be culturally appropriate and respectful including the consideration of relevant cultural, ethnic, and linguistic variables.

Comments on the Materials Reviewed

I have reviewed several documents in preparing this declaration including the declaration by Katherine Newell, summarizing conditions of capture and detention of "high value detainees," including prisoners now charged with capital offenses under the Military Commissions Act in the case of U.S. v. Mohammed. These conditions include the use of extra-judicial renditions; secret capture and detention of suspects; 'proxy' detention and interrogation of suspects by foreign governments; and detention conditions and interrogation techniques traditionally considered as unlawful and torture. In addition I have read the Declaration of Scott McKay, the consulting counsel for Khalid Sheikh Mohammed, and additional information from open sources provided by counsel assisting Mr. Mohammed. These sources indicate that Mr. Mohammed in particular was subjected to techniques, including frequent waterboarding, which invokes a strong fear and sense of drowning and asphyxiation, and the apprehension and mistreatment of his young children that

would be regarded as torture and ill treatment. I have also reviewed two publications by Physicians for Human Rights: “Break Them Down. Systematic Use of Psychological Torture by US Forces” (2005), and “Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality” (2007).

My opinions about the protocol for determining the nature and consequences of mistreatment on the defendants in U.S. v. Mohammed are offered within the context of the forms of mistreatment summarized in the documents I have reviewed.

These data and other reports of mistreatment of detainees indicate that prisoners and other detainees were subjected to multiple forms of abuse, often simultaneously including prolonged periods of isolation, multiple sophisticated psychological manipulations, and mental or physical pain for the purpose of overcoming the defendants’ resistance to interrogation by attempting to dismantle their identity and personality, and to make individuals feel helpless without any sense of control. The defendants in U.S. v. Mohammed reportedly were held in long-term incommunicado detention in secret locations (or “black sites”) for approximately three and half to four years before their transfer to Guantanamo, during which time the United States refused to disclose their whereabouts and refused to allow them access to their families, lawyers or the International Committee for the Red Cross (ICRC). Interrogation techniques reportedly included but were not limited to: waterboarding; shaking and manhandling, to include “walling” or “grounding”; slapping; forced stress positions, possibly with threat of punishment for failure; close confinement; isolation; induced physical weakness and exhaustion; degradation and conditioning; sensory deprivation; sensory overload; disruption of sleep and biorhythms; forced nudity; sexual

humiliation; frequent body cavity searches and the use of suppositories. It is often the case that when such abusive methods are used, they are often used in combination and simultaneously thus compounding their traumatic impact.

Defendants reported to the ICRC that they were kept completely naked for extended periods; doused with cold water and subjected to frigid temperatures; sexually humiliated; shackled or forced to stand in stress positions for prolonged periods; beaten; held in close confinement for extended periods; yanked into walls by their necks with a towel or other lead; deprived of sleep for extended periods; subjected to extreme noise stress; and waterboarded. Other detainees have reported they were threatened with perpetual detention or death; forced to stand or shackled in stress positions for prolonged periods; beaten; and isolated.

In my professional opinion, many of the mistreatments to which these prisoners, including the defendants, have reportedly been subjected to fall within the universally accepted definition of torture according to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, which states: "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason, based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

This opinion is necessarily based only on the documents and information cited above: I have no other source of information. In order to adequately assess any of these individual defendants in these capital cases, and to help determine the veracity of their allegations of mistreatment, it is essential to conduct a comprehensive evaluation. This includes a detailed medical, psychological and social history of the individual before the alleged torture/mistreatment; a detailed history of the events leading up to arrest, the arrest itself and the history of imprisonment, including alleged traumatic events such as torture and mistreatment; a detailed review of physical, psychological and social reactions/symptoms prior to imprisonment, during imprisonment and reported at the time of the interview; a detailed psychological evaluation, physical examination and when available and necessary appropriate diagnostic tests. Efforts should be made to locate available medical records and other relevant documents and if so to adequately review them.

Such evaluations can be conducted by one individual with appropriate knowledge, training and experience, or by more than one health professional, individually or together, who have expertise in different areas, such as one or more mental health professionals and one or more medical doctors. Based upon my clinical experience, conducting such evaluations utilizing an interdisciplinary team either conducting interviews separately or together is a very effective and time efficient method, and produces reliable and detailed results. In any event it is essential to have appropriate background information, and have the opportunity to evaluate the individual in person, with appropriate privacy, and with sufficient access and time.

Requisite Time Frame for the Indicated Evaluations

The prerequisites for an appropriate assessment of torture, as described above include utilizing the guidelines from *the Istanbul Protocol*. In my experience, such evaluations are highly effective: utilizing an inter-disciplinary team to collect and evaluate clinical data obtained from clinical evaluations, perform indicated ancillary testing such as laboratory and radiographic studies, and review social and medical history records and other materials necessary to assess the individual's pre- and post-morbid level of functioning.

Torture is a profound and potentially devastating traumatic event(s) capable of causing a wide range of physical, psychiatric, cognitive, and social impairments and suffering. The extreme nature of torture can disrupt an individual's physical, psychological and social well being and every sphere of an individual's functioning such as a devastating impact on the ability to trust others. By its very nature torture can negatively impact on every aspect of a prisoner's relationships with their counsel and requires counsel to make substantial effort to overcome its impact including perceptions of trustworthiness and rapport building. The consequences of torture can be ameliorated by treatment, intervention, and appropriate support services, but unattended to it can continue to cause profound suffering. Even when services are provided, this can be much more complicated when such care is provided in the context of ongoing imprisonment-in the environment where the individual allegedly was mistreated. The impact of torture, physically, psychologically and socially, presents a substantial risk of creating barriers to communication between lawyers and their affected clients.

Torture can have devastating health consequences on the victim's physical, mental and social well being. Physical manifestations include bruises, broken bones, joint and muscle pain, headaches, dizziness, scars, neurological damage such as hearing loss or loss of sensation. Psychological and emotional sequelae of torture include profound feelings of sadness and hopelessness, suicidal thoughts, sleep difficulties, cognitive difficulties, such as memory and concentration disturbance, lack of energy, sexual dysfunction, emotional irritability, flashbacks and nightmares, phobias and difficulty feeling or expressing emotions. Specific mental health disorders from which torture victims commonly suffer include depression, anxiety and post-traumatic stress disorder (PTSD). Social consequences of torture and mistreatment include social withdrawal and loss of trust in others, inability to work or interact with others, decreased participation in previously pleasurable activities, avoidance of any activities or places that remind an individual of their torture/trauma.

These different dimensions of health (i.e. physical, psychological and social) are interdependent. For example, an individual who was severely beaten may frequently experience musculoskeletal pain (a physical symptom). The recurring pain can trigger significant psychological symptoms, such as intrusive thoughts of the trauma. Because of these symptoms, the individual may be socially isolated, mistrustful and withdrawn.

Qualified clinicians and legal practitioners familiar with the standards and methods for effective investigation, documentation of torture and other cruel, inhuman or degrading treatment or punishment as described in *the Istanbul Protocol* are aware that several considerations must be taken into account by lawyers undertaking the representation of clients who are reported to have

been subjected to past mistreatment or torture. First, the acute and long term consequences typically associated with ill treatment and torture of individuals must be taken into account at throughout the legal process, including a consideration of the manner in which compromised functioning may impair an individual's stamina; capacity for trust and to consider legal advice; and ability to attend, follow and comprehend courtroom proceedings. Second, prisoners should be guaranteed adequate procedural safeguards protected by international law at all stages of the proceedings, including a humane, safe and healthy living environment free of reprisals, violence, threats of violence, and any form of intimidation or coercion . Third, counsel must be afforded a reasonable opportunity to form the bonds of trust with their client necessary to promote disclosure of sensitive information regarding the fact and impact of prior maltreatment. Fourth, because of the nature of torture and the trauma individuals suffer as a result, it is particularly critical for counsel to adhere to professional principles that demand respect, understanding and knowledge of the social, cultural, and political background of clients and the consequences of torture on their functioning and well being.

It is possible for torture survivors to build and maintain a trusting and professional relationship with counsel, but several factors influence the amount of time necessary for such a relationship to develop. These factors include the nature of the torture, the consequences and effects of the torture in light of the prisoners' social, political, medical, and historical context, cessation of interrogation and torture, and conditions of confinement. Multiple interviews over time, conducted in a safe, comfortable and confidential environment, are necessary for Guantanamo prisoners to begin to trust counsel to the degree necessary to reveal information

relevant to their defense, including the nature of the torture they survived. It is possible that an individual may initially demonstrate appropriate interpersonal and/or coping skills, but this apparent ability to communicate successfully may mask profound medical and psychological consequences of torture. Such underlying dysfunction often is not discernible to the untrained observer. The waxing and waning course of conditions induced or exacerbated by torture and other maltreatment can also confound the detection of symptoms even by trained clinicians.

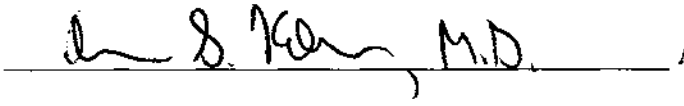
Counsel must give cautious and rigorous attention to rapport building in light of the torture their clients have allegedly experienced. Interviews and communications with prisoners must be conducted with an awareness of cultural context and an appreciation that the interview process itself can be re-traumatizing and may cause the individual to re-experience interrogation and specific acts of torture, inducing fear and terror, revulsion, helplessness, confusion, panic and loss of contact with reality. Counsel must conduct interviews with care, patience, and knowledge of characteristic reactions to torture that can disrupt rapport building and professional relationships.

Furthermore, linguistic differences between counsel and Mr. Mohammed require the use of interpreters with whom rapport and trust must be established, and which presents the additional challenges of time, the inherently intrusive nature of a third party on rapport-building, and the risk of misinterpreting and losing important information. At a minimum, counsel must be allowed sufficient time, access to the client, and relevant expert assistance to learn, recognize, and overcome the substantial barriers and obstacles that exist to building and maintaining a professional relationship.

It is my professional opinion, to a reasonable degree of medical certainty that in order to evaluate whether or not Mr. Mohammed or the other detainees were subjected to maltreatment, including torture, while in the custody of United States authorities requires the time reasonably necessary to build and maintain a professional relationship.

Similarly, in order to assess the physical, mental health, cognitive and social consequences of such traumatic experiences, requires the time reasonably necessary to build and maintain a professional relationship; obtain and evaluate relevant data including documentation of the dates, location, nature and other circumstances of any such mistreatment; conduct an adequate medical/forensic evaluation including a complete history, physical and psychological evaluation, and appropriate ancillary tests; the opportunity to review all relevant and available records; and opportunities for clinical interviews with appropriate access and time.

Signed this 21st day of August, 2008.



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