

Transition Plan of Assigned Learned Counsel for Mr. Ramzi Bin al Shibh

1. Introduction

On March 17, 2020, the Commission excused Mr. James Harrington as learned counsel for Mr. bin al Shibh, conditioned in part upon the filing of a “written transition plan” that would “include estimates of how long the new learned counsel will need to familiarize him or herself with the case, develop a trial strategy, and prepare for trial.”¹ The Commission’s order further provided:

The plan shall also provide an explanation (which may be filed *ex parte*), of any anticipated significant strategy deviations, an estimate of how long it will take to implement those strategies, and a listing of any additional motion practice (if any) that may be necessary to address those strategies. Finally, the transition plan shall include information on how, if at all, the new learned counsel will continue to use Mr. Harrington’s expertise, and an estimate as to how long this assistance will be required to ensure a proper and thorough transition.²

On 14 April 2020, the Convening Authority approved the Chief Defense Counsel’s funded request for me to serve as Learned Counsel with an understanding that I would begin full-time work on 1 July 2020 after the end of my then-current employment.³ On 15 April 2020, the Chief Defense Counsel assigned me to the Bin al Shibh defense team. In light of this 1 July start-date, the Commission established 22 July 2020, as the deadline for the filing of the transition plan.⁴

What follows is the transition plan that I understand the Commission to have ordered, and nothing more. It is not:

- a motion to continue,⁵
- a motion to sever,⁶
- a legal brief explicating learned counsel’s constitutional,⁷ statutory,⁸ and ethical⁹ responsibilities to provide effective representation, or

¹ AE 761F (Interim Ruling) at 5-6.

² *Id.*

³ AE 761I (RBS) (Attachment C).

⁴ AE 761F (Sup) at 2, n.4 (June 4, 2020).

⁵ See generally, *United States v. Miller*, 47 M.J. 352, 358 (1998)

⁶ See generally, *Zafiro v. United States*, 506 U.S. 534 (1993); *United States v. Perez*, 299 F. Supp. 2d 38 (D. Conn. 2004) *United States v. Green*, 324 F. Supp. 2d 311 (D. Mass. 2004).

⁷ See, e.g., *Andrus v. Texas*, 590 U.S. ____ (15 June 2020) (reversing state prisoner’s death sentence due to constitutionally ineffective assistance of counsel); *Buck v. Davis*, 137 S.Ct. 759 (2017) (same); *Sears v. Upton*, 561 U.S. 945 (2010) (same); *Porter v. McCollum*, 558 U.S. 30 (2009) (same); *Rompilla v. Beard*, 545 U.S. 374 (2005) (same); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000) (same).

⁸ 20 U.S.C. § 949a(b)(2)(C)(ii) (providing for appointment, where capital charges are preferred, of “at least one additional counsel who is learned in applicable law relating to capital cases”

⁹ Rule 1.1, Virginia Rules of Professional Conduct (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); Rule 1.1, South Carolina Rules of Professional Conduct (same).

- a description and qualitative assessment of the client’s representation since 2011.

I will turn my attention (and devote my time) to any or all of these subjects should the Commission so direct. But, in drafting this transition plan, I have been mindful of both the Commission’s actual directive and the inefficiency of devoting many hours of investigation, research, and drafting to answering questions that have not been asked. Suffice to say that the following estimate of the work before me reflects, “prevailing professional norms at the time of [this] trial,”¹⁰ as required by well-established Supreme Court precedent construing the Sixth Amendment right to effective representation in capital cases.

2. Summary

My best estimate, based on the approximately 375 hours that I have devoted to this case both before and after 1 July, is that I will need 30 months after resumption of normal working and travel conditions to

- develop an attorney-client relationship,
- become familiar with the evidence, the issues, and the pretrial litigation,
- evaluate and if necessary revise the trial and sentencing strategy, and
- be ready for trial.

This 30-month estimate embodies three assumptions.

First, it excludes time during which critical work and travel are disrupted by the COVID-19 pandemic. I am therefore assuming that the time would not begin to run until, at a minimum, it becomes practicable for me to conduct face-to-face meetings with the client.¹¹

Second, it assumes that the time will actually be *available* for the tasks I have just listed. This in turn will require that, apart from motions to compel discovery and matters involving scheduling, pretrial filing deadlines and motions practice will be abated for Mr. Bin al Shibh for a period of 12 working months.

Third, the estimate assumes that I will be both expected and permitted to conduct an independent assessment of the client’s case, and to make such changes and course corrections as may be indicated. The Commission clearly contemplated that successor counsel would be expected to exercise independent judgment when it relieved Mr. Harrington and directed successor learned counsel to estimate the time he or she would need to effectuate any changes in strategy. Such independent judgment presupposes a reasonable opportunity to investigate the

¹⁰ *Andrus v. Texas*, *infra* at n.5, slip op. at 8 (June 15, 2020) (internal citations omitted).

¹¹ While there may be cases in which an attorney-client relationship can be initiated and sustained entirely through remote 60-minute videoconferences such as the government has recently offered, this case is not one of them. The Commission can surely appreciate that if a working relationship with a court-appointed lead attorney can be established after everything that Mr. Bin al Shibh has endured in U.S. government custody since 2002, it will have to be established through sustained personal interaction, and not over a video monitor.

facts, the law, and the existing pretrial record. No qualified lawyer would have accepted this appointment under any other conditions.

There remains the Commission's directive to provide, in an *ex parte* filing, a description of any contemplated changes in trial strategy, together with an estimate of how much time I will need to implement such changes, including additional motions practice. Based on everything I have learned so far, I have concluded that I cannot provide such a description until I have both familiarized myself with the evidence and issues in the case, and developed an attorney-client relationship with Mr. Bin al Shibh. I have nevertheless provided a good-faith estimate of the total amount of time required to prepare for trial, assuming normal working conditions.

Finally, I would request that Mr. Harrington remain available in a resource capacity for a period of six months. Mr. Harrington is the only attorney on Mr. Bin al Shibh's defense team who has worked on this case for longer than three years. I will require his assistance in explicating past strategic decisions, reviewing his personal case file and notes, and other important tasks. COVID-19 travel restrictions have prevented us from meeting in person since my appointment, but we have been in frequent contact by telephone, email, and videoconference, and I will need him to be available to assist me, albeit remotely, for at least the remainder of 2020.

3. Factual basis for the time requested

The Commission's order to provide a transition plan identifies at least two sequential tasks of successor counsel – “familiarization” and “strategic adjustment” -- and asks for an estimate of the time required to accomplish each. As noted above it would be hard to predict how much time I will need to make as-yet-unknown changes in Mr. Bin al Shibh's defense when I am just three weeks into his representation, have yet to meet him, and am not yet detailed or fully cleared. This leaves me with the alternatives of

1. making a very rough estimate of the time that *all* stages of the representation before trial may require, or else
2. estimating only the time required for the initial “familiarization” stage, and requesting leave to submit a subsequent estimate of the time needed to adjust and implement a trial strategy once I have learned the case and have established an attorney-client relationship with Mr. Bin al Shibh.

In estimating that I will require 30 working months, I have taken the first of these approaches. I have done so in recognition of the importance of this question to the Commission's duty to manage this very significant case. That said, precise answers to the questions posed in AE 761F are difficult to provide. In the next section of this Transition Plan, I offer whatever insight can be derived (a) from comparing this case with other capital cases, and (b) from attempting to quantify the work involved by converting pages and terabytes into estimates of hours and weeks.

A. There are no modern precedents for how long defense counsel would need to prepare for this trial.

The obvious problem with comparing this case to other similar cases is that there aren't any. The median time between indictment and trial in the last 25 federal capital cases to have actually reached trial is 31.1 months.¹² However, there are enormous differences between all of those cases and Mr. Bin al Shibh's.

There is no need to belabor the obvious fact that this case is the result of the largest criminal investigation in the history of the United States. Just the unclassified discovery produced to date encompasses about half a million pages. The Government's trial exhibit list includes approximately 40,000 pages of material, including thousands of items of physical evidence that must be viewed in person rather than remotely, and that have already been moved to Naval Station Guantanamo Bay (NSGB).

It is also surely the longest-running criminal trial in American legal history. Mr. Bin al Shibh was arrested nearly 18 years ago. After "disappearing" him for four years, the Government chose to prosecute him first by Presidential edict and then by two successive sets of procedures that Congress enacted specially for this case and a handful of others. Predictably, this procedural creativity has given rise to complex legal challenges for which there are few if any precedents, and which I will have to study and understand if I am to function as Mr. Bin al Shibh's learned defense counsel.

The complexity of these legal issues is matched by the massiveness of the existing pretrial record. Since the current iteration of the proceedings began in 2011, nearly nine years after Mr. Bin al Shibh's arrest, the parties have filed roughly 500 substantive pretrial motions that have generated some 8,500 separate pleadings and orders, and more than 33,000 pages of hearing transcripts. Simply reading the pretrial record through one time is a task that will consume many uninterrupted weeks of work. But there may be no such thing as "uninterrupted" work, since I must also find the time in the months ahead to spend sufficient time with the client, navigate the time-consuming complexities of working with large amounts of classified material, master all of the work done so far by the former and current defense team, and familiarize myself with case law governing military commissions, among many other tasks.

In addition, there are other facets of this case that will make my task as successor learned counsel even more complex and demanding. One is the presence of four capital co-defendants. Large multi-defendant conspiracy prosecutions are commonplace. But large multi-defendant *capital* prosecutions are not. In fact, this case appears to be the first in the modern era of American capital punishment in which more than four co-accused will face the death penalty in a

¹² See Declaration of Kevin M. McNally, Federal Death Penalty Resource Counsel, July 13, 2020, https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/time/declaration_on_preparation_time_from_indictment_to_noi_to_trial_under_obama_and_trump_administrations_mcnally_july_2020.pdf. The underlying data summarized in Mr. McNally's affidavit is available at https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/project_declarations/time/time_span_between_indictment_notice_of_intent_trial_for_obama_and_trump_admins_may_2020.pdf

single trial. There are practical reasons why even three- and four-defendant capital trials are rare exceptions rather than the norm. The presence of four other co-defendants (and their defense counsel) requires an understanding not only of the Government's evidence, strategy and tactics, but also of the potentially conflicting strategies and tactics of four additional parties. The multi-dimensionality of each accused's case for life—involving such issues as his lesser role in the offense, his post-arrest behavior (including willingness to incriminate himself), and a myriad of other relevant factors—can tend, in a five-way capital sentencing, to spuriously *aggravate* the blameworthiness of co-accused for whom these mitigating factors are absent. At the same time, the presentation of similar mitigating factors by numerous co-defendants can unfairly suggest that such factors are mere “cookie-cutter” contrivances. In these ways and others, multi-defendant presentencing hearings risk overwhelming the fundamental constitutional principle of individualized consideration for each accused¹³ by inviting the sentencer to resort to a “one-size-fits-all” decision-making rubric. A related danger is that the sentencer will employ a “sliding scale” approach that implicitly assumes the appropriateness of death for one or more accused, and considers mitigating factors only in deciding which if any of the accused to spare. Leaving aside the difficult legal complexities raised by these issues, their relevance here is that the presence of numerous capital co-accused unquestionably requires each defense team to predict and prepare for every aspect of their co-defendants' cases as well as the Government's. This is so because everything each defense attorney presents or does in court may affect the judgment of the members who will determine the fates of all five accused. For this reason, the unprecedented size of this capital case is another circumstance that will substantially increase the work required of me to prepare for trial.

Yet another feature of this case that will increase the time needed to prepare is the necessity of researching, understanding, and proving in court the pervasive effects of the Government's acknowledged campaign of physical and psychological coercion against Mr. Bin al Shibh. These effects are relevant to many aspects of the case and of the defense function, including admissibility of evidence, mitigation of sentence, the current health and functioning of the client, and the attorney-client relationship. The time demanded by this extraordinary feature of the case is likely to be further increased by the difficulties of investigating and presenting a reasonably full narrative of Mr. Bin al Shibh's prolonged maltreatment in the face of the Government's continuing restrictions on the production and use of documents, evidence, and witnesses. Additionally, competent representation with respect to this aspect of Mr. Bin al Shibh's case will require me to familiarize myself with both U.S. and international law against torture and cruel, inhuman, and degrading treatment, and with the scientific understanding of the long-term effects of such extreme forms of prisoner maltreatment. To be sure, part of the qualifications of experienced capital defense counsel is a familiarity with the myriad effects of trauma. But before this case, neither I nor any other American capital defense attorneys had ever encountered anything like this. This case appears unlike any other in

¹³ See *Tennard v. Dretke*, 542 U.S. 274 (2004); *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Skipper v. South Carolina*, 476 U. S. 1 (1986); *Eddings v. Oklahoma*, 455 U. S. 104 (1982); *Lockett v. Ohio*, 438 U. S. 586 (1978).

- the severity, variety, and duration of the physical and psychological abuse inflicted,
- the nearly 20-year effort by the United States government to foster confusion and categorical misunderstanding regarding what was, in fact, an official policy of torture, and
- the continuing refusal (endemic among regimes that torture) to preserve and disclose evidence and testimony in a form that can adequately convey torture's effects.

I do not cite this unique aspect of the case here in order to argue the merits of the many issues that flow from torture (which I am far from ready to do in any event). Rather, its relevance to this transition plan is simply this. The Government's acknowledged campaign to alter Mr. Bin al Shibh's thinking and behavior by inflicting intolerable physical and mental pain while reducing him to a condition of utter helplessness is likely to increase the amount of time that I as his attorney will need to prepare for many aspects of the case. These obviously include the establishment of a relationship of trust with the client. Given what little I have been able to review of Mr. Bin al Shibh's tormented history as a prisoner at Guantanamo,¹⁴ the task of establishing an attorney-client relationship will be daunting and time-consuming, and the Government is in a poor position to claim otherwise.

B. Quantifying the time required

I have listed a few of the reasons why prior capital cases provide misleadingly short benchmarks for estimating the time required to prepare for this one. Another approach would be to simply identify some of the specific tasks involved, and attempt to calculate the attorney-hours (and weeks and months) they are likely to require. For example:

1. Reading the 33,206 pages of hearing transcripts, optimistically assuming a rate of 60 pages per hour, will require 553 hours, or just under 14 40-hour weeks – not counting the time required to make notes.
2. The Commission docket numbering system has reached AE 803, which implies over 800 motions series constituting more than 8,500 filings, including motions, responses, replies, orders, supplements, and rulings. I am advised that roughly 300 of the motions series are not substantive, were filed ex parte by another party, or involve unused AE numbers. This leaves an estimated 500 substantive motions series that vary widely in duration and volume. Assuming an average pace of five substantive motions series a day, reading all of the pretrial pleadings and orders filed so far will require 20 weeks, plus additional time to review the cases and evidence that the pleadings cite.

¹⁴ See AE 152 (3 April 2013) Emergency Defense Motion To Order the Cessation of External Use of Sounds and Vibrations etc; AE 152HH (2 November 2015) Order, Do Not Subject Mr. bin al Shibh to Disruptive and Harassing Noises and Vibrations; AE 152FFFF (31 December 2019) (ordering full psychiatric evaluation and MRI scan, while amending AE 152HH to prohibit Camp 7 staff from "subjecting Mr. bin al Shibh to physical sensations such as burning skin, pricking of needles, and the biting of insects.") As I have begun to learn about the efforts of Mr. Bin al Shibh's defense team efforts to date, I have been struck by how much of his attorneys' time and energy that has been unavoidably consumed by efforts to obtain relief for their client's chronic physical suffering and sleep deprivation.

3. Reviewing the 39,689 pages of the Government's case in chief and sentencing evidence, minus a small quantity of documents depicting physical evidence that must be viewed at NSGB, can be expected to take up to 16 weeks.
4. At least two weeks – and probably considerably more, if the experiences documented in AE 604 are any guide – will be required for even a cursory examination of noticed physical trial evidence that has been relocated from FBI Headquarters in Washington, DC to NSGB (and that is effectively inaccessible at present due to COVID-19 travel restrictions).
5. Personally reviewing the half-million pages of unclassified discovery will obviously be impossible. But I have reason to believe that I will need to read large segments of the discovery covering several different aspects of the case in order to prepare for trial, identify avenues for further investigation, and evaluate strategy for trial and sentencing. No one can estimate with precision the time required for this discovery review, but I am confident that it will require at least 12 weeks.

The foregoing totals well over a year's work. The Government may argue that I will not have to review the entire legal and evidentiary record myself, and can rely on the work of co-counsel in deciding what to skip or skim. However, even if this point were taken into account, it would not undermine the overall reasonableness of the amount of time I am requesting, because the above list does not include many other essential tasks, such as:

- meeting with the client at NSGB, Cuba;
- identifying and working with experts, an especially time-consuming task that may require substantial travel;
- reviewing client interview memos and client mail;
- consulting with prior learned counsel as necessary;
- managing a large defense team and implementing any necessary administrative changes;
- conducting regular defense team meetings;
- communicating with learned counsel for the co-defendants in this case, and with trial counsel;
- familiarizing myself with court-martial and military commissions case law;
- reading background material on key issues in this case, including Law of War issues, and legal and medical research literature concerning the short- and long-term effects of severe prisoner maltreatment;
- making the weekly 6-hour roundtrip between my home in southwest Virginia and the defense SCIF in Arlington;
- traveling to and from NSGB for client meetings, evidence review, and Commission hearings; and
- taking care of numerous administrative tasks involving security, document management, and IT issues, among others.

These lists also do not include time that must be spent researching, drafting, revising, and filing pleadings, and keeping abreast of ongoing pretrial litigation in the case. Simply monitoring motions practice and the orders of the Commission will require several additional hours each week.

It should be apparent by now that being required to represent the client in pretrial filings, replies and Commission hearings would make most of my other essential work impossible. That is why this transition plan assumes a one-year hiatus in Mr. Bin al Shibh's obligations to participate in pretrial motions practice and hearings, and a longer period before he is required to provide a defense witness list and reciprocal discovery such as expert witness summaries and CVs, and notice of intent to offer evidence under MCM Rule 803(b)'s residual hearsay exception.¹⁵ Without such a pause, my participation in this case would be that of an overwhelmed bystander rather than as an actual lead counsel for a man on trial for his life.

To summarize, the list of tasks required to "familiarize [my]self with the case," AE 761F (Sup), represents well over a year of 40-hour weeks, and more than justifies the year proposed for that stage of the representation. Under the transition plan I am submitting, this would leave an additional 18 months to "develop a trial strategy, and prepare for trial," *id.*, including any strategic revisions and new discovery requests and pretrial motions that might be indicated.

I should note parenthetically that earlier this year, in *United States v. Nashiri*, another Military Commission considered¹⁶ and provisionally denied¹⁷ a request by successor learned counsel for a two-year abatement of almost all pretrial activity. Despite finding that Mr. Nashiri's defense had not shown justification for a "full-stop" of nearly two years, Judge Acosta recognized "[t]hat the Accused's newly appointed Learned Counsel will need significant time to acquaint himself with the voluminous and complex record in this case and to take all of the further preparatory and investigatory steps necessary to provide a competent capital defense of the Accused cannot reasonably be disputed."¹⁸ The remainder of the *Nashiri* order shows that that case differs from Mr. Bin al Shibh's situation here in virtually every relevant respect:

- There was no trial date and few impending deadlines at the time of the abatement request in *Nashiri*.
- No evidentiary hearings were already underway or scheduled.
- Almost every prior ruling in the case since November 2015 had recently been vacated by the D.C. Circuit¹⁹ and would have to be redetermined in due course.

¹⁵ It is my understanding that the current filing deadline for defense residual hearsay notices is July 27, 2020, and that the deadlines for defense reciprocal discovery, witness lists, expert notices, expert CVs, and expert reports is July 30, 2020 (AE 788 (5th Sup)/AE 639HH (4th Sup)).

¹⁶ Unofficial/Unauthenticated Transcript (hereafter "Tr.") of Al Nashiri II (10 Jan 2020 AM1) (Hearing on motion to abate).

¹⁷ Al Nashiri II, AE 403(I) (31 January 2020).

¹⁸ *Id.* at 6.

¹⁹ *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019).

- A second “highly experienced” counsel who had represented Mr. Nashiri for many years was expected to rejoin the defense team within weeks.²⁰
- Newly appointed learned counsel effectively withdrew the abatement request in open court.²¹

Nashiri, moreover, involves a single accused and a much smaller record. This case, by contrast, involves five accused and proceedings of unprecedented size and complexity that were already midway through critical pretrial evidentiary hearings, and advancing toward a 2021 trial, at the time of Mr. Harrington’s excusal. If recent scheduling decisions in *Nashiri* hold any lesson for this case, it is simply that each case should be decided on its own facts.

C. The presence of co-counsel does not obviate the need for enough time to familiarize myself with the case and prepare for trial.

The Government will point out—as it did in opposing appointment of a new learned counsel to replace Mr. Harrington²²—that seven other lawyers were already helping to represent Mr. Bin al Shibh when I joined the case. But despite the Government’s self-serving reference to what it described as Mr. Bin al Shibh’s “staggering array of civilian and military legal talent,”²³ there is less here than meets the eye. Mr. Harrington has represented Mr. Bin al Shibh for the last nine years; no other attorney now on the team has been involved for more than three. The average tenure of the lawyers whom I will be joining is less than 19 months. This contrasts with every other capital defense team in this case, each of which is anchored by a learned counsel—and in some instances by several counsel—who have been engaged in these proceedings for the last eight or nine years. It takes nothing away from the dedication and zeal of the young lawyers now working on Mr. Bin al Shibh’s case to point out that most of them are both new to the case and lack relevant trial experience. Indeed, only one has ever participated in even a single capital trial, and that was as third chair with limited responsibilities.

There is another factor to consider in evaluating how much co-counsel’s presence and prior work will actually reduce the time I will need to get ready for trial. Anyone reviewing the pretrial history of this case will be struck by the extent to which Mr. Bin al Shibh’s attorneys have been forced to prioritize matters that are unrelated or tangential to the charges against him, including

²⁰ Al Nashiri II, AE 403(I) at 6 (“This ruling is premised on CAPT Mizer’s continued participation as a part of the Defense team. His unavailability would no doubt alter the balance of equities significantly.”).

²¹ *Id.* at 5 (“At oral argument, Defense Counsel tacked significantly from the Defense’s original request, stating that what the Defense currently seeks, ‘would be more correctly characterized as a reasonable and viable ... trial schedule, and that there be no deadlines or hearings on substantive motions ... unless and until the government has fulfilled all of their Brady discovery responsibilities, we have had the chance to complete all of our factual investigation.’”).

²² AE 761A, Government Response to Defense Request for Excusal of Learned Defense Counsel (15 February 2020) at 4-5.

²³ *Id.* at 6.

- alleviating his physical suffering at Camp 7,²⁴
- uncovering and defending against FBI infiltration and law enforcement investigation of members of his defense team,²⁵ and
- responding to Government and Commission initiatives to probe his mental condition and competency to stand trial.²⁶

At an earlier stage of the proceedings, these issues proved so disruptive and time-consuming that they actually prompted the Commission to sever Mr. Bin al Shibh's case from those of the other four accused.²⁷ While this *sua sponte* severance order was later rescinded,²⁸ the problems that prompted it still claim a disproportionate share of defense counsel's time, attention, and motions practice.²⁹

A balanced picture of the challenges facing Mr. Bin al Shibh's defense team as a whole would require an *ex parte* filing to allow discussion of privileged matters. My point here is simply that the relatively inexperienced lawyers now involved in Mr. Bin al Shibh's defense cannot substitute for learned capital defense counsel. Their work and that of their predecessors make it possible to plan a transition within the 30 months proposed here. They do not justify depriving me of the minimum amount of time required to do the job for which I have been appointed.

D. This plan is as particularized as the situation permits.

²⁴ See n. 12, *supra*.

²⁵ For a brief summary of the complex history of this and related issues – some of which remain unresolved – see AE 292JJJJ, (Order re Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused) (23 December 2015).

²⁶ AE 152G (GOV) Government Motion For Inquiry Into Ramzi Binalshibh's Mental Capacity To Stand Trial Pursuant to R.M.C. 706, 19 December 2013; AE 152J (GOV) Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. Binalshibh Regarding His Capacity to Stand Trial By Military Commission, 4 February 2014; AE 152M TRIAL CONDUCT ORDER Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. Bin al Shibh Regarding His Capacity to Stand Trial By Military Commission, 25 February 2014; AE 152S(GOV) Government Bench Memorandum for the R.M.C. 909 Hearing, 27 March 2014.

²⁷ AE 312 SEVERANCE ORDER, 24 July 2014.

²⁸ AE 312D ORDER (CORRECTED COPY) Government Emergency Motion To Reconsider AE 312 Severance Order, 27 November 2015.

²⁹ The AE 152 series spans from 3 Apr 13 to the current time, and includes 88 substantive pleadings (not counting motions for leave). Additional requirements regarding this series are still pending, such as the Commission's order for an MRI and full psychiatric evaluation, found in AE 152FFFF (ORD) Defense Emergency Motion to Reconsider AE 152ZZZZ (RUL), 31 December 2019. The AE 292 series involves 125 substantive pleadings (not counting the motions for leave), beginning 14 Apr 14, and continuing to the present with the need for my independent review of this litigation, as expressed in AE 708 (RBS) Mr. Bin al Shibh's Motion to Compel the Appointment of Independent Counsel, 30 January 2019. Additionally, Mr. Bin al Shibh's recognition of his interpreter as a former CIA employee spawned the AE 350 series, encompassing 87 pleadings beginning 9 Feb 15, also leading to the AE 616 series, which most recently includes AE 616XXX (GOV), filed 9 Jun 20.

The Government may fault this transition plan for failing to specify how I propose to use each week and month of the 30 months I am requesting—and thus, presumably, why fewer months won't serve just as well. I hope the foregoing discussion has shown the circularity of such a complaint. Simply put, if I already knew precisely which specific tasks need to be completed before trial—what defenses and mitigating factors I must consider and discuss with my client, what additional discovery should be sought, how many additional motions should be researched, drafted and filed, how many witnesses should be located and interviewed, how many experts should be identified, retained, and prepared, and how much trial and presentencing evidence should be gathered and noticed—and how long each such task will take, I would not need much more time at all. But how—other than by dereliction of my duties to my client—could I (or anyone else) have arrived at this case forearmed with such a detailed plan of action? The fact is that the Commission's decision to replace learned counsel in this case necessitates a substantial period of time to allow Mr. Bin al Shibh the defense representation to which he is constitutionally and statutorily entitled. The plan submitted here is a conservative, good-faith estimate of how much time this situation demands, and is as particularized as it could be under the circumstances.

Should the Commission require further detail in evaluating the reasonableness of this transition plan, I will do my best to provide it. Likewise, if the Commission thinks it appropriate to receive *ex parte* interim reports on the progress of the transition outlined here, I will submit such reports as the Commission may direct.

Respectfully submitted,

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David I. Bruck

22 July 2020