

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

**Declaration of Emily A. Keram, M.D. in
Support of Defense Motion for RMC 909
Competency Hearing**

14 May 2008

I, EMILY A. KERAM, M.D., declare pursuant to 28 U.S.C. § 1756, that the following information is true and correct:

1. I am a clinical and forensic psychiatrist retained by the defense for Salim Hamdan in the case of *United States v. Hamdan* to formulate and render opinions related to various aspects of Mr. Hamdan's mental state and its effects on his behavior. I make this declaration based on my personal knowledge, and if called to testify as to its contents, I could and would competently do so.
2. My experience as a forensic psychiatrist is as follows:
 - a. I completed a Fellowship in Forensic Psychiatry with the United States Department of Justice in June 1992.
 - b. I am Board Certified in Psychiatry and Neurology with added Board Certification in Forensic Psychiatry.
 - c. I am a co-author of the American Academy of Psychiatry and the Law's Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense.
 - d. I have served as a member of the Editorial Board of the Journal of the American Academy of Psychiatry and the Law.
 - e. Throughout my career, the majority of my professional activity has consisted of the clinical evaluation and treatment of patients.
 - f. Over the past approximately seventeen years I have conducted hundreds of civil and criminal forensic evaluations as an expert witness in the field of psychiatry. I have conducted the majority of these evaluations as a court-appointed expert. My involvement in the remainder of the evaluations arose from consultations initiated by the defense and prosecution/plaintiff in approximately equal numbers.
 - g. I have qualified as an expert witness in psychiatry in United States District Courts in North Carolina and the Northern District of California, and California Superior Courts in Sonoma and San Francisco Counties.
 - h. I have conducted hundreds of evaluations of competency to stand trial and other adjudicative competencies.
 - i. As a faculty member of the Psychiatry and the Law Program at the University of California San Francisco School of Medicine, I have taught the theory and practice of the evaluation of competency to stand trial and other adjudicative competencies to fellows in forensic psychiatry, psychiatric residents, and medical students.

3. I have spent approximately one hundred (100) hours with Mr. Hamdan in order to formulate and render opinions related to various aspects of Mr. Hamdan's mental state and its effects upon his behavior.

4. Current Medicolegal Issues. Mr. Hamdan's defense counsel have asked me to form an opinion as to (1) whether Mr. Hamdan is mentally competent to stand trial based on the standard set forth in R.M.C. 909, and (2) whether there is evidence that Mr. Hamdan was not competent to waive his presence at pre-trial hearings and to instruct his attorneys to not to speak on his behalf during court proceedings in his absence.

5. Applicable Standard. I am informed that the applicable standards are set forth in the Rules for Military Commissions (R.M.C.). Specifically, R.M.C. 909 provides that "no person may be brought to trial by military commission if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings...or to conduct or cooperate intelligently in the defense of the case." With respect to the second issue identified above, the Discussion to R.M.C. 804 (Presence of the accused at trial proceedings) provides that "where there is some evidence that an accused who is absent for a hearing or trial may lack mental capacity to stand trial, capacity to voluntarily waive the right to be present for trial must be shown." In addition, I understand that the Rule "authorizes but does not require trial to proceed in the absence of the accused upon the accused's voluntary absence. When an accused is absent from trial after arraignment, a continuance or a recess may be appropriate, depending on all the circumstances." R.M.C. 804 (b) Discussion.

Evidence of Mental Illness

6. As noted in my Declaration of 1 February 2008, I have assessed Mr. Hamdan's psychiatric symptoms at each of our meetings over the past three years, including those of February 2008. At each of our meetings Mr. Hamdan met diagnostic criteria for Posttraumatic Stress Disorder (PTSD) and Major Depression. When I first met with Mr. Hamdan in March 2005, I asked him why he did not seek mental health treatment for his psychiatric symptoms. He told me that he did not trust any providers of medical services at Guantanamo, as he felt they had colluded with guards in manipulating his conditions of confinement and access to medical care to increase the likelihood that he would cooperate with interrogators. Mr. Hamdan stated that guards would withhold access to medical care. Later during an interrogation, the interrogator would ask Mr. Hamdan if he needed medical attention. Medical personnel would then be summoned and would examine and treat Mr. Hamdan in the interrogation room. Mr. Hamdan stated that at times when he was brought to the infirmary, his interrogator would be in the exam room. Mr. Hamdan felt that access to prescribed treatment was also contingent on cooperation with interrogators. As a result of these concerns, Mr. Hamdan lost trust and faith in the system of medical care at Guantanamo and withdrew from it, except when in unmanageable pain.

7. Mr. Hamdan's concerns appear to be supported by entries in his medical record from Guantanamo and in an FBI document. A progress note in his medical record dated 3/16/03 and signed by Philip A. Miceli, LCDR MC USNR, states, "Complains of continued sciatic/leg pain. No help with meds. Upset that a month has passed and no one saw him. I explained to him that the complaints are filtered through the corpsmen and I hadn't heard anything." (See Bates 000991, attached hereto.) A progress note dated 2/19/04 and also signed by Philip A. Miceli, LCDR MC USNR, states that Mr. Hamdan was again seen for sciatic pain. Medication was prescribed, but exercise, an important component of the treatment for sciatic pain, was prohibited. The note states, "No rec time per Intel." (See Bates 000993, attached.) A progress note dated 8/28/02 and signed TSG Tracy [last name illegible] states, "Bengay to lower back-then cover with moleskin. Special request for medical attention per FBI: (Bill Corbett x 7861)" (See Bates 001013, attached) (emphasis in original). An e-mail presumably from an FBI agent to FBI Headquarters titled, "GTMO Gazette," dated 8/28/02, states, "We met with the medical staff re the detainees and interview process. They gave us insight into the outpatient clinic and the fleet hospital. They were very agreeable to working directly with the interviewers and the MP's on getting treatment to the detainees. We had a situation with a detainee that told the interviewers that he would talk and tell them whatever they needed if ONLY they would help him get some relief from his constipation. Ah, mother nature works in beautiful ways." (See Bates 4059-60, attached) (emphasis in original).

8. Thus, Mr. Hamdan's psychiatric symptoms have remained untreated throughout his confinement in Guantanamo.

9. My last meeting with Mr. Hamdan took place in February 2008. At that time Mr. Hamdan's symptoms of Posttraumatic Stress Disorder included nightmares, intrusive thoughts, memories and images, amnesia for details of traumatic events, lack of future orientation, anxiety, irritability, insomnia, poor concentration and memory, exaggerated startle response, and hypervigilance. Symptoms of Major Depression included depressed mood, sleep and cognitive disturbances as above, anergia, anhedonia, hopelessness, and helplessness. Of greatest concern was that for the first time since I met with Mr. Hamdan, he endorsed the presence of episodic suicidal ideation. He was not acutely suicidal at the time I evaluated him, but did state that it no longer mattered to him if he lived or died.

10. As a result of the conditions Mr. Hamdan has experienced and continues to experience during his interrogations at Guantanamo and his prolonged involvement in the Military Commissions, he has become extremely hopeless. In addition, he has developed other symptoms of PTSD, including a sense of detachment and estrangement from others, and a sense of a foreshortened future. Mr. Hamdan stated that his interrogators at Guantanamo initially assured him that he was just a driver, that there was no evidence against him, and that he would not be put on trial. The interrogators told him that they would write a positive report about him and that they would get him home to Yemen. Mr. Hamdan stated that because of the American reputation of upholding human rights and the reputation of the American justice system, he believed the interrogators. He

thought that the authority the interrogators reported to would make a judgment about him, that there would be justice, and that he would be sent home. The belief that the interrogators had the ability to have him sent home was broken only when Mr. Hamdan was put in isolative confinement in Camp Echo, and an officer there told him there would be no more interrogations. Mr. Hamdan fully realized that the interrogators had lied to him only when Mr. Swift (at that time, Detailed Defense Counsel) and Mr. Schmitz (the interpreter) arrived at Camp Echo to meet with Mr. Hamdan in January 2004. Mr. Hamdan still does not fully trust that the members of his defense team are really who they say they are. In February 2008, Mr. Hamdan stated that he thinks the defense team may be interrogators, and that even I am there to interrogate him. As a result of Mr. Hamdan's experience with interrogators, he feels detached and estranged from his attorneys. His hopelessness contributes to a sense that he will not have a future beyond confinement in Guantanamo.

11. As I anticipated in my declaration of 1 February 2008, Mr. Hamdan's psychiatric symptoms appear to have worsened. At my request, LCDR Mizer (the current Detailed Defense Counsel), Mr. Swift, and Mr. Schmitz recently documented their observations of Mr. Hamdan's mental state during their April 2008 contacts with him. As noted below, Mr. Hamdan's symptoms of depression, hopelessness, anger, irritability, and impaired concentration and memory appear to have worsened substantially since I last saw him in February 2008.

12. LCDR Mizer described Mr. Hamdan as indifferent to the presence of his attorney, unable to remember material that had previously been explained to and reviewed with him many times, and obsessively absorbed by concerns unrelated to his trial. Mr. Hamdan was confused and bewildered. Mr. Hamdan repeatedly stated, "You are not explaining things to me. Why am I even here? I am just a picture." Mr. Hamdan was very angry and shouted at his attorney during breaks in the hearing. His demeanor changed once he returned to court and spoke with the Judge. He became smiling and animated. LCDR Mizer did not attempt to contact Mr. Hamdan after he announced his intention to withdraw from the proceedings as Mr. Hamdan told the guards that he would attack them if his attorneys attempted to see him.

13. Mr. Swift stated that on the morning of 27 April 2008, Mr. Hamdan was withdrawn and largely incommunicative. As per LCDR Mizer's report, when Mr. Hamdan did ask questions, they were about issues that had been previously explained to him. On the afternoon of 27 April 2008, Mr. Hamdan was more animated but again asked the same questions. Mr. Schmitz, Mr. Hamdan's translator, asked Mr. Hamdan if he understood the issues. Mr. Hamdan did not, and they were repeatedly explained to him again. Mr. Hamdan believed that the Judge's findings in the December 2007 hearings were the equivalent of a guilty finding in his case. He would not be dissuaded from this belief. It became clear to Mr. Swift that Mr. Hamdan thought that his situation was hopeless.

14. On the morning of 28 April 2008, Mr. Hamdan appeared disheveled with bloodshot eyes. He complained of back pain. Mr. Swift reinitiated his attempt to

convince Mr. Hamdan that the Judge had not found him guilty. Mr. Hamdan again asked Mr. Swift what motions had been filed and decided in his case. Mr. Swift reviewed this for a third time. Prior to the hearing, Mr. Hamdan refused to change clothes because the guards had refused to let him use the toilet without direct observation. He stated he did not want to go to court. After Mr. Swift spoke with Mr. Hamdan for 75 minutes, he agreed to voluntarily enter the courtroom. He attended the afternoon session in civilian clothing. Mr. Swift described him as quiet and withdrawn throughout the afternoon. Mr. Schmitz told Mr. Swift that translation was spotty during the afternoon session.

15. On the morning of 29 April 2008, Mr. Swift felt that Mr. Hamdan was not paying attention to the proceedings. Mr. Hamdan was withdrawn and largely incommunicative during the lunch break, despite Mr. Swift's telling him that they needed to make decisions regarding how to conduct parts of his defense before they left Guantanamo. In the afternoon, Mr. Hamdan became upset when Ms. Prasow rose to argue a motion. Mr. Swift requested a recess. Mr. Hamdan was very angry and indicated that his attorneys had not told him that Ms. Prasow would be arguing a motion. His attorneys had informed Mr. Hamdan only a few days earlier that Ms. Prasow would argue motions at the upcoming hearing. Mr. Hamdan stated that Mr. Swift had misled him about Ms. Prasow's status. Mr. Hamdan changed into his prison garb for the afternoon session. After Ms. Prasow argued her motion, Mr. Hamdan asked to speak to the Judge. Mr. Swift stated that during this exchange Mr. Hamdan was a changed person. He smiled and had a friendly and respectful demeanor with the Judge. The angry, sullen and confused behavior of the previous few days was gone. After Mr. Hamdan finished, the Judge took a recess to consider what Mr. Hamdan had said. Mr. Hamdan refused to come back to the courtroom and to meet further with any of his defense team.

16. Mr. Schmitz stated that Mr. Hamdan's mental state varied in April 2008. He was not able to focus on the content of Mr. Schmitz's translations. He asked Mr. Schmitz to repeat every sentence or every couple of sentences, and he seemed to have a very hard time understanding any complex thoughts. Mr. Schmitz stated that it was as if Mr. Hamdan was very distracted internally. A day later he was fine and very lucid. It was Mr. Schmitz's opinion that the stress of isolative confinement in Camp 5 was deleterious to Mr. Hamdan's mental health and that Mr. Hamdan did not see any relief in the trial. Mr. Hamdan stated that his lawyer's efforts were useless in court and that he was useless in court. Mr. Hamdan was upset by the delay in hearing the conditions of confinement motion, as he feels his own mental deterioration.

17. Mr. Hamdan's statements to the Judge on 29 April 2008 reflect that his level of depression and hopelessness has affected his perception of the Military Commissions. He stated, "I do not want to come to this court because there is no such thing as justice here."

Cause of Mr. Hamdan's Psychiatric Symptoms and Diagnosis

18. Mr. Hamdan has experienced multiple traumatic events since he was taken into custody in Takta Pol, Afghanistan, in November 2001. Examples of these are contained

in the Defense Motion to Suppress Out-of-Court Statements of the Accused Based on Coercive Interrogation Practices (dated 4 April 2008). Among the events that were especially traumatic to Mr. Hamdan are the following:

- a. Shortly after his arrival in Takta Pol, Mr. Hamdan witnessed Afghani forces shoot and kill the Arab who arrived at the checkpoint ahead of him.
- b. Mr. Hamdan witnessed other detainees being beaten at Bagram and at Kandahar. Guards at Kandahar threatened to torture and kill Mr. Hamdan.
- c. Guards at Kandahar sexually mistreated and humiliated Mr. Hamdan.
- d. A female interrogator in Guantanamo sexually abused Mr. Hamdan.
- e. In January 2006, after ending a hunger strike, Mr. Hamdan was discharged from the hospital, where he had been force fed under medical supervision. He expected to be returned to his previous housing. However, he was taken to a different camp, Camp Oscar. He was strapped and immobilized in a safety chair and told he would be force fed. Mr. Hamdan protested that he would eat voluntarily. Despite his statement, Mr. Hamdan was force fed. Personnel administering the force feeding did not identify themselves as medical professionals by insignia or name. It is not clear that they were medical personnel. When asked, Mr. Hamdan stated he did not know if they were doctors or butchers. Mr. Hamdan was kept strapped in the safety chair for approximately four and a half hours. Personnel did not allow Mr. Hamdan to use the bathroom when he requested to do so. He was forced to soil his clothing and remain seated in his excretions for several hours.

19. Mr. Hamdan's symptoms of PTSD and Major Depression are severely exacerbated by isolative confinement such as found in his current housing conditions in Camp 5. I first documented Mr. Hamdan's psychiatric deterioration while in isolative confinement in two memos to Mr. Swift dated 16 May 2005 and 17 May 2005. Mr. Hamdan stated that when he was first placed in isolative confinement in Camp Echo in 2003, "I went crazy."

20. As noted above, Mr. Hamdan's experience with his interrogators has caused him to feel detached from and to mistrust those around him, including his defense counsel. Mr. Hamdan's prolonged involvement in the Military Commissions, in the absence of any improvement in the conditions of his pre-trial confinement or rules under which his trial will go forward, has caused him to feel depressed, anxious, irritable, and hopeless.

Neurobiology of PTSD and Major Depression

21. The disruptions in neurotransmitters such as serotonin and norepinephrine in patients with Major Depression are well known, even among non-clinicians. Less well known are changes in neuroanatomy and neurochemistry in patients with PTSD. These

patients demonstrate changes in brain structures involved in modulating response to perceived threat and fear. Reduced volume and abnormal activity of the anterior cingulate cortex (ACC), amygdala, and hippocampus have been demonstrated in patients with PTSD. Changes in neuroanatomy may be associated with symptoms of PTSD. For example, smaller hippocampal volumes in combat-related PTSD patients have been found to be associated with functional deficits in verbal memory.

22. PTSD patients evidence an increase in sensitivity of the hypothalamic-pituitary-adrenal (HPA) axis, which is consistent with the hyperreactivity (anxiety, irritability, hypervigilance) symptoms of PTSD. Patients may also have disruptions of neurotransmitters such as catecholamines. For example, patients with combat trauma-related PTSD have been found to have significantly higher cerebral spinal fluid (CSF) norepinephrine concentrations than have healthy control subjects. CSF norepinephrine levels strongly and positively correlate with the severity of some PTSD symptoms.

Evidence that Mr. Hamdan's Mental Illness May Currently Impair His Competency

23. There is evidence that Mr. Hamdan's current psychiatric symptoms impair his competency to stand trial, to waive his presence at trial, or to instruct his attorneys to not speak on his behalf. This evidence indicates that he may not currently understand the nature of the proceedings against him or be able to cooperate intelligently in his defense.

24. With respect to the issue of Mr. Hamdan's ability to understand the nature of the proceedings against him, there is evidence that his depression, hopelessness, detachment, and sense of foreshortened future have caused him to develop the belief, which he appears to report for the first time, that the Judge has already found him guilty and that he therefore cannot receive a fair hearing at trial. This evidence is recounted in the statements noted above. Thus, Mr. Hamdan appears unable to recognize the consequences of refusing to attend the trial or assist in his defense. His belief that his fate has already been determined precludes him from assisting his counsel, despite their reports to him that there is reason to believe that Mr. Hamdan may be in a position to successfully defend himself against the current charges.

25. There is abundant evidence that Mr. Hamdan's current psychiatric symptoms materially impair his ability to cooperate intelligently in the defense of his case. His attorneys and translator report that Mr. Hamdan is suffering significant impairment in concentration and memory, such that he cannot learn and retain information regarding his case. His translator described impairment in Mr. Hamdan's ability to understand complex concepts, which he must do in order to cooperate intelligently with his counsel. His level of anxiety and irritability significantly impair his ability to learn new information, and to interact with his attorneys in a cooperative manner.

26. I have some concern that Mr. Hamdan's apparent calm and rational demeanor during his discussion with the Judge on 29 April 2008 may lead to a misunderstanding of his mental state. Contrary to the portrayal of the mentally ill in movies and on television, people with significant psychiatric symptoms can be calm and rational, while at the same

time experiencing the internal logic of a belief system produced by mental illness. They can exhibit fluctuations in their ability to control their behavior, as well as fluctuations in the level of severity of their psychiatric symptoms. This is a well-recognized pattern of medical symptoms. At times variable symptom expression can cause relapsing and remitting competency, even over brief periods of time. This led earlier forensic psychiatrists to elucidate the well-established concept of “fluctuating competency,” in which a defendant’s mental state episodically impairs adjudicative competency throughout a period of hours, days, or weeks.

27. It is my opinion, to a reasonable degree of medical certainty, that there is ample evidence that Mr. Hamdan’s decision to waive his presence at pre-trial hearings and to instruct his attorneys to not to speak on his behalf in his absence was not an intelligent, rational choice, and may have been the result of symptoms of mental illness, based in changes in neuroanatomy and neurochemistry, that include depression, hopelessness, irritability, feeling detached and estranged from his attorneys, a sense of foreshortened future, and possibly his episodic suicidal ideation.

28. It is my opinion, to a reasonable degree of medical certainty, and based upon my interviews of Mr. Hamdan over the past three years, my observations of his interactions with his attorneys in the past, and upon recent communications with his counsel, that Mr. Hamdan’s decision to waive his presence in court and to instruct his attorneys not to speak in court in his absence were not attempts at manipulation on Mr. Hamdan’s part. His attorneys have observed that until recently Mr. Hamdan was always more amenable to cooperating with his attorneys when he was actively involved in working on his case and his case was going forward. This corroborates my observations of Mr. Hamdan at times when I have interviewed him proximate to activity in his legal case. It is my opinion, to a reasonable degree of medical certainty, that until recently when his psychiatric symptoms worsened to their current level, Mr. Hamdan derived a sense of structure and control as a result of participating in forward movement on his case. I have at times observed mild manipulative aspects to Mr. Hamdan’s behavior over the past three years, as is expected of a defendant with little control over their current life, and perhaps their future. However, to the extent that Mr. Hamdan exhibits manipulation, it exists independent of the psychiatric symptoms that appear to be currently causing impairment. It is my opinion, to a reasonable degree of medical certainty, that Mr. Hamdan is not malingering his psychiatric symptoms. There is a spectrum of ability among prisoners to tolerate the stress of conditions of confinement such as those Mr. Hamdan currently experiences. There are aspects of Mr. Hamdan’s history and culture that make him especially vulnerable to the development of serious psychological distress and symptoms in these conditions. Additionally, these worsening symptoms have caused him, for the first time, to believe that his legal case is hopeless, that the outcome of his trial is predetermined, and that therefore his presence and the participation of his attorneys will make no difference in its conclusion or his future. There are a large number of instruments that have been developed to detect the presence of malingered psychiatric symptoms. Additionally, neurological tests exist that can quantify deficits in attention, concentration, learning, and memory. Appropriate malingering instruments and neuropsychological tests can be administered to Mr. Hamdan as part of a competency

assessment that can determine the etiology and veracity of his reported and observed psychiatric symptoms.

29. It is also my opinion, as noted above (and in my 1 February 2008 Declaration), that Mr. Hamdan's current mental condition materially impairs his ability to cooperate intelligently in the defense of his case, and that a more complete evaluation of his competency to stand trial at this time would be advisable. It is my opinion that should Mr. Hamdan be found incompetent to proceed at the present time, he would most likely respond to treatment within a period of weeks to one or two months. Treatment modalities should include medication, exercise, and change of living conditions if possible, as Mr. Hamdan is particularly ill-suited to be exposed to the psychological stress of isolative confinement.

30. Should additional inquiry into Mr. Hamdan's mental condition be ordered, the evaluation of his adjudicative competency should be performed by clinicians with substantial experience in the conduct of competency assessments. Ordinary competency assessments include the following:

- a. Review of discovery;
- b. Eliciting the defendant's social, developmental, educational, relationship, occupational, criminal, psychiatric and medical histories;
- c. Eliciting the defendant's account of the instant offense;
- d. Administering psychological or neuropsychological testing, if indicated;
- e. Administering questions relevant to adjudicative competency;
- f. Review of assessment tools designed to aid evaluation of adjudicative competency to determine if their administration is indicated;
- g. Conducting a mental status examination;
- h. Conducting collateral interviews.

31. An evaluation of Mr. Hamdan's competency presents unique challenges to the evaluators. They should have or develop competency themselves in relevant areas such as Mr. Hamdan's Yemeni culture, with an emphasis on tribal customs, Muslim religion, the history of Arab presence in Afghanistan, and the history of Al Qaeda and the Taliban. Evaluators should take care to thoroughly review and understand the impact of Mr. Hamdan's conditions of confinement and treatment from November 2001 to the present on the development of his subsequent psychiatric symptoms; ability to cooperate with counsel; and the influence of these symptoms on his decision to waive his presence in court and instruct attorneys not to speak on his behalf in court in his absence.

32. I have completed a good deal of the aforementioned work involved in assessing Mr. Hamdan's adjudicative competency as a result of the collateral information I have reviewed, the hours I have spent evaluating him for other forensic questions, and the reading and consultation I have done since October 2004 to attain adequate cultural, religious, and political competency. In order to complete an evaluation of Mr. Hamdan's current adjudicative competency, I would need to interview him to obtain information about his current psychiatric symptoms and to evaluate their impact on the elements of competency as defined in the R.M.C. Additionally, I may choose to administer a

competency assessment instrument. I will also need to interview his attorneys to obtain a contemporaneous description of Mr. Hamdan's interactions with them. (I am capable of administering certain malingering assessment tools. Should Mr. Hamdan require neuropsychological testing, I would rely upon a board certified neuropsychologist to perform that assessment.) I anticipate that these activities would require 12-16 hours of time, assuming that Mr. Hamdan's symptoms do not significantly impair his ability to participate in the evaluation.

33. Finally, as noted in my 1 February 2008 Declaration, I continue to believe that if Mr. Hamdan remains in solitary confinement, his condition will continue to deteriorate and he will be at risk for developing even more serious psychiatric symptoms. These include the risk of suicidal thoughts and behavior.

**I declare under penalty of perjury under the laws of the United States
that the foregoing is true and correct.**

By: /s/ Emily A. Keram, M.D .

Date: 14 May 2008