

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	D-121/D-130 Defense Motion for Appropriate Relief: Order Granting Access to View and Inspect CIA Detention Facilities/ Motion to Compel (bin al Shibh) Ruling
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1. Detailed military defense counsel for Mr. bin al Shibh move this Military Commission to enter orders requiring the government to give counsel information pertaining to and an opportunity to view and inspect facilities allegedly used to detain the accused between the date of his apprehension by Pakistani military forces on or about 11 September 2002 and his transfer to the control of Joint Task Force-Guantanamo personnel in September 2006.¹ The defense argues that the information is necessary in order to prepare for the Rule for Military Commission (RMC) 909 incompetence determination hearing.² The government opposes the

¹ The Military Commission previously denied a defense motion to compel disclosure of specific "enhanced interrogation techniques" allegedly used on the accused during this period by persons working for U.S. government agencies. See D-082 ruling - *Defense Motion for Appropriate Relief: Disclosure of Interrogation Techniques Applied by the United States During Questioning of Ramzi bin al Shibh*.

² No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. See RMC 909(e).

motions, in part,³ asserting that, under the circumstances, evidence of specific locations where the accused was actually detained prior to September 2006 and details of the environment and setting while held there is simply not relevant to determining whether the accused is currently competent to stand trial by military commission.

2. This Military Commission is tasked by the Supreme Court with balancing the government's "interest in protecting sources and methods of intelligence gathering" against a detainee's need "to find out or present evidence to challenge the Government's case against him," *Boumediene v. Bush*, 128 S.Ct. 2229, 2269, 2276 (2008). Assuming that any facilities used to detain the accused prior to September 2006 still exist, the physical plant and on-site conditions are not likely to be those which existed at the time of the accused's detention and an inspection of the scene now would serve little purpose to document the facility which existed at that time. Additionally, while the Commission finds

³ The government concedes that some information regarding the accused's detention before being turned over to the control of JTF-GTMO personnel on or about September 2006 is relevant to a current competency determination in this case.

some information about the circumstances of past detention is relevant to a determination of current competency,⁴ under the facts of this case, it not necessary for defense counsel to view the actual situs of the accused's prior detention(s).⁵ Given that the defense was previously permitted to view the location of the accused's current confinement⁶ and the prosecution's apparent concession the accused suffers from a Delusional Disorder-Persecutory Type, the Military Commission concludes that the evidentiary value in inspecting detention facilities that may have housed the accused before September 2006 and information regarding the conditions while held there is de minimus and not material to the narrow issue now before it. In other words, except for paragraph 3 below, evidence of past conditions of detention and specific locations where the accused was held

⁴ The defense cites *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007) for the proposition that conditions of confinement are relevant to a competency determination. However, *Comer* involved a remand by the Ninth Circuit to the District Court to determine whether the conditions of the defendant's incarceration rendered his decision to waive his habeas appeal right involuntary.

⁵ See generally *United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987).

⁶ The Military Commission previously granted a defense request to inspect certain aspects of the current conditions of confinement at Camp 7. See D-41 ruling *Defense Motion for Appropriate Relief - View Conditions of Confinement* ("the defense may view the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room").

before September 2006 is not material to a fair resolution of the incompetence determination hearing in this case.⁷

3. The defense motions for a Military Commission order compelling the government to allow the defense counsel access to and information about any and all facilities used to detain the accused from September 2002 to September 2006, in order to prepare for the RMC 909 hearing, is hereby GRANTED, in part. The government will provide the information set forth in paragraphs 6c(i-iv) of its classified *ex parte* 20 August 2009 response to D-130, a classified defense motion to compel dated 12 August 2009, to the defense, subject to the applicable protective orders, no later than 27 August 2009. In all other respects, the defense motions are hereby DENIED.⁸

4. The Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that

⁷ The Military Commission further finds that there is no reasonable likelihood that the requested evidence will affect the judgment of the trier of fact on the narrow issue before it, the accused's mental competency to stand trial. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).

⁸ The Military Commission may supplement its findings prior to authentication of the record of trial.

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it be provided to the Clerk of Court for review and public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused. The underlying unclassified defense motions and government responses will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So Ordered this 24th Day of August 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

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:**

Order Granting Access to View and Inspect
Central Intelligence Agency (CIA) Detention
Facilities Used to Detain High-Value Detainees

25 June 2009

1. **Timeliness:** This motion is timely filed pursuant to the procedure afforded by the Rules for Military Commissions (R.M.C.). *See* R.M.C. 703(d); 905(b)(4).¹
2. **Relief Sought:** Detailed defense counsel for Mr. Ramzi bin al Shibh respectfully request the Commission enter an Order allowing the defense, including its mental health expert, to view and inspect detention facilities used to detain Mr. bin al Shibh between the date of his capture, on or about 11 September 2002 , and the date of his actual arrival at Guantanamo, on or about 6 September 2006. Said facilities are more commonly known as “Black Sites,” and the defense seeks to inspect these sites, as well as all fixtures, instrumentalities and other equipment used in those facilities.²

¹ The Defense does not waive, and hereby continues to reserve, the right to raise further motions challenging the constitutionality of provisions of the Military Commissions Act, including provisions pertaining to the admissibility of certain evidence; jurisdiction over Defendants; and other procedural defects. The Defense does not waive and continues to reserve the right to supplement this Motion based on the government's response and receipt of discovery materials and additional information.

² This motion is filed pursuant to the Military Judge's ruling of 11 June 2009, ordering that a hearing take place in this case. The rules applicable to this proceeding are uncertain in light of pending changes to the Regulations for Trial by Military Commissions, and to the Military Commissions Act itself. In filing this motion, the defense reserves the right to supplement this motion with further arguments that may be available following any changes to said statute or regulations.

Seeking the fundamental fairness of these proceedings, as well the enforcement of any and all rights afforded Mr. bin al Shibh under the Due Process, Effective Assistance of Counsel, and Cruel and Unusual Punishments clauses of the Fifth, Sixth and Eighth Amendments to the Constitution of the United States, the defense hereby submits this Motion.

3. Overview: The defense seeks to inspect the facilities where Mr. bin al Shibh was confined prior to his arrival at Guantanamo. The defense also seeks to inspect all fixtures, instrumentalities and other equipment used in those facilities. These inspections are necessary in order for defense counsel and their expert to adequately prepare for the mental health competency hearing presently pending in this capital case.

In an earlier motion, D-108, the defense moved to compel preservation of these facilities and items. The government subsequently agreed to preserve this discovery, until resumption of commission proceedings.

The defense has previously demonstrated the relevance of Mr. bin al Shibh's current conditions of confinement when it moved to inspect Camp Platinum (also known as Camp 7), and was granted that motion. Mental status does not arise from a vacuum: present and past experiences affect one's perceptions, understandings, and general mental competency. Mr. bin al Shibh's medical history, his statements to this Commission at hearings, and defense experts consulted demonstrate that earlier confinement conditions are relevant to his case, and specifically to an adequate assessment of his competency. This information will assist not only with a diagnosis, but in assessing whether any long-term consequences to mental health exist, and whether any treatment is possible.

4. Burden and Standard of Proof: As the moving party, the defense bears the burden of establishing that it is entitled to the requested relief. *See* R.M.C. 905(c)(2)(A). "The burden of

proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.” R.M.C. 905(c)(2).

5. **Facts:**

a. [REDACTED]

c. Charges were preferred against Mr. bin al Shibh in April 2008. At his June 2008 arraignment, Mr. bin al Shibh stated, in response to a question from the Military Judge: [REDACTED] *Transcript of Hearing ICO United States v Mohammed, et al.*, 5 June 2008 (Draft), at 123. At a more recent hearing in this case, in January 2009, Mr. bin al Shibh voiced a similar complaint: [REDACTED] *Transcript of Hearing ICO United States v. Mohammed, et al.*, 19 January 2009, p. 926

³ See Attachment D to Defense Motion to Compel Transfer (concurrently filed with this motion).

⁴ Attachment D to Motion to Compel Transfer, at 11.

⁵ Attachment D to Motion to Compel Transfer, at 16 (reporting an interview with Mr. bin al Shibh)

⁶ Attachment D to Motion to Compel Transfer, at 17

d. On 1 July 2008, the Commission, *sua sponte*, ordered that an “inquiry into the mental capacity or mental responsibility of the accused” (“706 Board”) be conducted. *See* Order, 1 July 2008. In a report dated 16 October 2008, [REDACTED]

[REDACTED] *See* Report of 706 Board, ¶ 4.a, 4.b; *see also United States v. Mohammed, et al.*, Commission Ruling D-041, ¶ 2.b [Attachment A].

e. As part of the competency evaluation process, detailed counsel have obtained certain of his medical records, [REDACTED]

[REDACTED] The non-classified, DoD medical records revealed that for several years, DoD physicians at JTF-GTMO diagnosed Mr. bin al Shibh with a psychotic disorder. *See D-017*, Attachment G. The medical records from JTF-GTMO thoroughly document that the onset of illness and/or exacerbation of symptoms may have occurred as a result of his exposure to the conditions of prior and current periods of confinement. Among the medical reports, the following entry is included:

[REDACTED]

See Attachment B, Defense Motion to Compel Transfer of Mr. bin al Shibh, filed 25 Jun 09.

e. In September 2008, the defense for Mr. bin al Shibh filed a motion to examine his current conditions of confinement. *See United States v. Mohammed, et al.*, D-041. The Military Judge granted this motion. Attachment A. In ruling this motion, the Military Judge determined that:

There are numerous aspects of the pending analysis of the accused’s mental capacity. The defense position is that the conditions of the accused’s confinement have had an effect on his current mental capacity. While this may or may not be true, the evidence [REDACTED] suggest that detailed defense counsel’s pursuit of this line of investigation is appropriate. Information gleaned from such investigation may reasonably be material to the defense presentation with regard to the accused’s mental capacity.

Attachment A, at ¶ 2.f.

f. In authorizing defense counsel to view Mr. bin al Shibh’s current confinement conditions, the Commission further found that:

the discovery material associated with [the] issue of the accused mental capacity and the report of the Board conducted per RMC 706 demonstrate that the mental capacity determination in this case will involve analysis of an unusual and relatively complex set of factual circumstances and medical factors.

Attachment A at ¶ 2.i.

e. On 9 April 2009, CIA Director Leon Panetta issued a public announcement that he has directed the CIA to cease the secret detention of prisoners at overseas detention facilities (“black sites”) and planned the decommissioning of said sites.⁷ In response to this announced decommissioning plan, the defense for Mr. bin al Shibh filed a motion to preserve all black sites, and all fixtures, instrumentalities and other equipment used in those facilities. *See United States v. Mohammed, et al.*, D-108. After seeking a delay to respond, the government answered that it would “preserve the status quo that existed as of the date of the Defense filing with respect to the CIA Detention facilities.” D-108, Prosecution Response. The government agreed to preserve these sites “until a hearing can be held upon resumption of military commission proceedings.” *Id.*

f. On 11 June 2009, this Commission ordered that the parties address discovery matters relating to Mr. bin al Shibh’s competency at a hearing to be held on 16 July 2009. The Commission further ordered that a hearing regarding Mr. bin al Shibh’s competency would be held, pursuant to Rule for Military Commission (RMC) 909, on 25 September.

6. Law and Argument:

I. MR. BIN AL SHIBH’S EARLIER CONDITIONS OF CONFINEMENT ARE RELEVANT TO THE DETERMINATION OF COMPETENCY

The Military Commissions Act provides that defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence. *See* 10 U.S.C. 949j. The Rules for Military Commissions also require the Government to permit the defense counsel to examine, *inter alia*, buildings or places which are within the control of the Government which are material to the preparation of the defense. *See* R.M.C. 701(c); *see also*, Attachment A, at ¶ 2.e.

⁷ *See* “CIA Shuts Down Its Secret Prisons,” BBC News, 9 April 2009, http://news.bbc.co.uk/go/pr/fr/-/2/hi/in_depth/7993087.stm

As this Commission found already, “the discovery material associated with [the] issue of the accused mental capacity and the report of the Board conducted per RMC 706 demonstrate that the mental capacity determination in this case will involve analysis of an unusual and relatively complex set of factual circumstances and medical factors.” Attachment A at ¶ 2.i. Since the Commission found that “the provision of an opportunity to view the accused’s place of confinement at GTMO is appropriate under the MCA, section 949j and RMC 701(c),” Attachment A at ¶ 2.i, there is no valid legal or medical reason to preclude defense counsel from having the same opportunity to view and inspect CIA detention facilities and all fixtures, instrumentalities and other equipment used in facilities where Mr. bin al Shibh was imprisoned over the course of four years prior to his arrival at Guantanamo.

Since at least the 19th Century, the United States Supreme Court has recognized that the conditions of an inmate’s confinement can have severe effects on his ability to function. *See In re Medley*, 134 U.S. 160, 168 (1890)(reviewing the history of solitary confinement, and noting that it could cause prisoners to become “violently insane,” to commit suicide, and to “not recover sufficient mental capacity to be of any subsequent service to the community”). This recognition has continued in the courts to the present day. One Circuit has noted twice the opinions of psychiatric experts that the conditions of isolation in maximum security facilities on death row “can cause psychological decompensation to the point that individuals may become incompetent.” *Miller ex rel Jones v. Stewart*, 231 F.3d 1248, 1252 (9th Cir. 2000); *see also Comer v. Stewart*, 215 F.3d 910 (9th Cir. 2000); *citing Hoptowit v. Ray*, 682 F.2d 1237, 1257-58 (9th Cir. 1982)(“The deprivation of nearly all fresh air and light, particularly when coupled with the guard's control over the window and the electric light, creates an extreme hazard to the physical and mental well being of the prisoner.”); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2nd Cir.

1972)(“We cannot approve of threatening an inmate’s sanity and severing his contacts with reality by placing him in a dark cell almost continuously day and night.”); *McClary v. Kelly*, 4 F.Supp.2d 195, 205-210 (W.D.N.Y. 1998)(psychological harm can be caused by isolation); *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1397-98, *reversed in part*, 801 F.2d 1080 (9th Cir. 1986)(Noting the “unrelenting nerve-racking din that fills the segregation units” and causes a “profound impact on lockup inmates.”).

In yet another case, *Groseclose ex rel. Harries v. Dutton*, 94 F.Supp. 949 (D.C. Tenn. 1984), the court found that the defendant was not competent to waive his post conviction remedies challenging his conviction and death sentence after reviewing extrinsic evidence regarding his conditions of confinement, including that one of the examining psychiatrists saw the defendant’s cell and living conditions and found that his “waiver decision indicated a suicidal intent that renders him incompetent.” *Id.* at 961. The court held that “the conditions of confinement are so adverse that they have caused [the defendant] to waive his post-conviction remedies involuntarily.” *Id.* Most tellingly, in a series of rulings beginning with *Comer v. Stewart* and ending with an *en banc* decision, *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007),⁸ the Ninth Circuit remanded a case to the district court for an evidentiary hearing on the defendant’s competency to withdraw his habeas claim. The defendant had spent twelve years in a sensory deprivation unit. *See Comer*, 215 F.3d at 916. In completing its competency evaluation, the district court “*allowed both parties to have access to every place [the defendant] had lived while incarcerated.*” *Comer*, 463 F.3d at 942 (emphasis added). In addition, the “independent psychiatric expert appointed by the District Court toured the prison.” *Comer*, 480 F.3d at 965.

⁸ The ruling between the two cases cited, *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006), a panel decision was replaced by the *en banc* decision cited, *supra*. *See also Comer v. Stewart*, 471 F.3d 1359 (9th Cir. 2006)(order granting *en banc* hearing). The dissent in the *en banc* decision adopted the panel decision in full. *See Comer*, 480 F.3d at 966.

The ability to assess all the circumstances of Mr. bin al Shihb's confinement over the last nearly seven years, including an examination of black sites and instruments that may have been employed, is thus patently relevant to a competent assessment of his mental health condition and his prognosis. The defense must be permitted to conduct appropriate discovery that will allow it to investigate these matters and how they may have affected Mr. bin al Shihb's mental state.

II. AN EXAMINATION OF CONDITIONS OF CONFINEMENT IS LEGALLY AND CLINICALLY NECESSARY TO EFFECTUATE A DETERMINATION OF MR. BIN AL SHIBH'S COMPETENCY THAT CONFORMS WITH DUE PROCESS AND ALLOWS FOR ADEQUATE REPRESENTATION BY COUNSEL

The defense's inquiry regarding competency cannot be adequately performed without a thorough evaluation of the conditions of his confinement. In addition to the ubiquitous legal authority and psychological literature cited, *supra*, the same expert opinion that substantiated the defense's obligation to inspect current conditions supports the need for the defense to inspect prior confinement conditions. *See United States v. Mohammed, et al.*, D-017, Attachment A. Dr. Pablo Stewart, M.D., a recognized expert⁹ on this very issue, expressed that "[a]n assessment of the nature and effect of Mr. bin al Shihb's conditions of confinement, and the degree to which they may have influenced the course of his illness is essential to an informed conclusion regarding his diagnostic assessment, treatment, and prognosis." [REDACTED]

[REDACTED] "[A] thorough and accurate evaluation of the conditions of confinement is essential to rendering a valid

⁹ Dr. Stewart's *curriculum vitae* is included in **Attachment A**. Of note is that he is 1973 graduate of the United States Naval Academy and received his M.D. from the University of California, San Francisco, School of Medicine in 1982. In his distinguished career, he has served as: Director, Forensic Psychiatric Services for the City and County of San Francisco; Consultant to the Institute of Crime, Justice, and Corrections at George Washington University; Consultant to the United States Department of Justice in California, Georgia, and Michigan. He was qualified as a Psychiatric Expert in federal court in the Northern District of California, *Madrid v. Gomez*, 889 F.Supp. 1146, 1230 (N.D. Cal. 1995).

diagnosis(es) of any mental disease or defect, determining the impact of such disorder(s) on adjudicative functioning, and designing and following an effective treatment plan.” *Id.* at 9.

The defense’s ability to engage in proper discovery to investigate Mr. bin al Shibh’s competency is of paramount importance because this is a death penalty case. The Supreme Court has emphasized that “heightened reliability” is essential during death penalty proceedings due to the finality of the result. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long, [thus] ... there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”). To achieve this heightened degree of reliability, “the Supreme Court has also made clear that ... *more* evidence, not less, should be admitted on the presence or absence of aggravating and mitigating factors.” *United States v. Fell*, 360 F.3d. 135, 143 (2d Cir.2004), citing *Gregg v. Georgia*, 428 U.S. 153,203-04,96 S.Ct. 2909 (1976)(“We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision”); *see also Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733 (1983) (“What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”). In the context of this capital prosecution, therefore, for a constitutionally adequate competency proceeding to take place, the defense and its expert must be able to examine all prior detention facilities where Mr. bin al Shibh was held, and all fixtures, instrumentalities and other equipment used in those facilities. *See generally Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963) (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”) A failure to allow this discovery

will result in a violation of due process. *See generally, Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985).

7. Conclusion:

The defense simply aims to conduct the investigation that is legally and clinically necessary for a competency evaluation that conforms with due process. The defense notes both detailed counsel and the commission-approved defense mental health expert, Dr. Amador, possess the requisite security clearances to handle any evidence relevant to the issues raised in this motion. This Commission, moreover may of course exercise its authority to impose whatever protective order it deems necessary on all parties, to ensure the protection of any privileged matters or matters that may affect national security. The importance of ensuring due process in this competency proceeding should not be disregarded in favor of concerns over these latter matters.

8. Request for Oral Argument:

The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for proper consideration of the issues raised by this motion.

9. Conference with Opposing Counsel: On 25 June 2009, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

10. Attachments:

- A. Commission Ruling D-041, Motion for Appropriate Relief (Access to View and Inspect the Conditions of Confinement in GTMO), dated 26 October 2008.

Respectfully submitted,

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UNITED STATES OF AMERICA

**Commission Ruling
D-041**

**Motion to for Appropriate Relief
(Access to View and Inspect the
Conditions of Confinement in GTMO)**

v.

KHALID SHEIK MOHAMMED et al
(Bin Al Shibh)

**26 October 2008
(As modified on 31 October 2008)**

1. Nature of Motion:

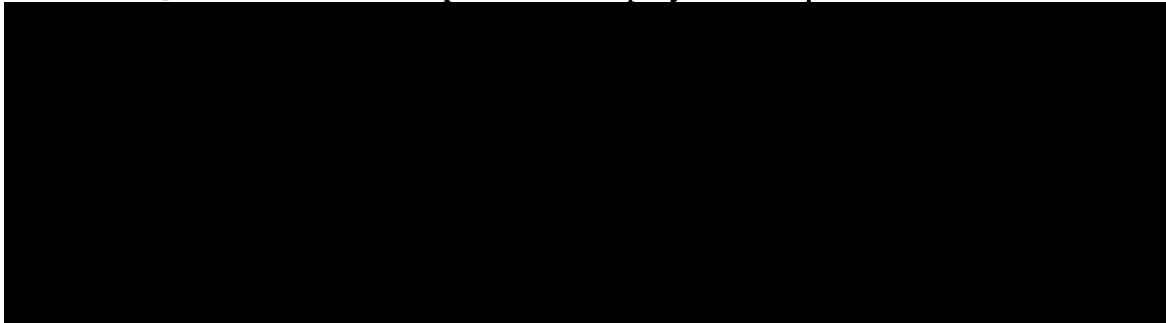
a. This motion seeks an order allowing the defense to “view and inspect the conditions under which Mr. Bin Al Shibh (the accused) has been and continues to be confined during his incarceration at Guantanamo Bay, Cuba (GTMO).”

b. The Commission has also considered the prosecution’s response and supplemental response to D-041, the defense reply thereto, and the oral argument presented concerning this motion.

2. Discussion:

a. Questions concerning the mental capacity of the accused were raised prior to the arraignment in this case. For this reason, counsel election by the accused was postponed until such time as the matter could be investigated by his detailed defense counsel and addressed, if necessary by a mental capacity inquiry per RMC 706 and a mental capacity determination hearing per RMC 909.

b. On 1 July 2008, the Commission ordered an inquiry into the mental capacity of the accused per RMC 706. The report of that inquiry was completed on 16 October 2008.



c. [REDACTED] a mental capacity determination hearing per RMC 909 is warranted with regard to the accused.

d. In preparation for the RMC 909 hearing, detailed defense counsel submitted a request to JTF-GTMO to be granted access to view and inspect the accused's detention cell. The initial request regarding this matter was refused by the Government. The Government continues to oppose the request, but proffers provision of pictures of the accused's cell, two adjacent cells, the recreation room, the medical room and the media room.

e. MCA, Section 949j provides that defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence. RMC 701(c) provides that the Government shall permit the defense counsel to examine, *inter alia*, buildings or places which are within the control of the Government which are material to the preparation of the defense.

f. There are numerous aspects of the pending analysis of the accused's mental capacity. The defense position is that the conditions of the accused's confinement have had an effect on his current mental capacity. While this may or may not be true, the evidence [REDACTED] suggest that detailed defense counsel's pursuit of this line of investigation is appropriate. Information gleaned from such investigation may reasonably be material to the defense presentation with regard to the accused's mental capacity.

g. The Government's opposition to the request apparently stems from the classified nature of the location of the accused's place of incarceration at "Camp 7" and a JTF-GTMO policy "that no visitors are allowed on the detention block at Camp 7 other than required personnel."

h. It is the understanding of the Commission that both the detailed defense counsel and the assistant detailed defense counsel possess the requisite security clearances to be provided access to Camp 7. (It is also worthy of note that both the detailed defense counsel and the assistant detailed defense counsel have agreed to proceed to the facility in a blindfolded fashion or in a visually closed vehicle as necessary such that the location of the camp need not be revealed in the course of their visit.) It is the finding of the Commission that the requested site visit to the accused's place of detention by the detailed defense counsel is material to the preparation of the defense in conjunction with the pending RMC 909 hearing in accordance with RMC 701(c)(1).

i. The Commission's review of the discovery material associated with issue of the accused mental capacity and the report of the Board conducted per RMC 706 demonstrate that the mental capacity determination in this case will involve analysis of an unusual and relatively complex set of factual circumstances and medical factors. The Commission finds that the provision of an opportunity to view the accused's place of confinement at GTMO is appropriate under the MCA, section 949j and RMC 701(c).

Additionally, the Commission directs that the detailed defense counsel for the accused be provided with the proffered pictures of the accused's cell, two adjacent cells, the recreation room, the medical room and the media room.

j. The Commission does not, however, find that similar access need be provided to persons other than the detailed defense counsel and the assistant detailed defense counsel.

k. This grant of relief does not extend to an order that the defense be permitted to conduct an inspection or evaluation of the accused's detention facility, its operations, or its procedures. The granted relief is limited to provision of an opportunity to visit and fully view the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room.

3. **Ruling:** The Defense motion is granted in part and denied in part. The Government shall provide the defense with an opportunity to visit and view the accused's place of confinement at Camp 7 consistent with the discussion above.

A handwritten signature in black ink, consisting of a horizontal line with a stylized 'R' and 'K' followed by two circles, all connected by a continuous stroke.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge

UNITED STATES OF AMERICA

D-121

v.

**KHALID SHEIKH MOHAMMED;
WALID MUHAMMAD SALIH MUBARAK
BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

Prosecution Response
to the Defense Motion requesting an
Order Granting Access to View and Inspect
Central Intelligence Agency (CIA) Detention
Facilities Used to Detain High-Value Detainees

2 July 2009

1. **Timeliness:** This response is filed within the time allowable by the Military Judge’s Order of 11 June 2009.
2. **Relief Sought:** The Prosecution respectfully requests the Military Judge deny the Defense Motion.
3. **Burden of Proof:** As the requesting/moving party, the accused bears the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).
4. **Discussion:**

a. In its motion the Defense requests this Commission enter an order allowing defense counsel and its government-funded mental health expert to view and inspect overseas detention facilities used to detain Mr. Bin al Shibh between on or about 11 September 2002 up to his arrival at Guantanamo Bay on or about 6 September 2006; as well as all fixtures, instrumentalities and other equipment used in those facilities. See Def motion at 2. A request to view facilities where the accused was held over three years ago¹, and as far back as seven years ago, has no relevancy to the accused’s present mental competency to stand trial, and could seriously impact the national security of the United States. The Defense posits that having this information will assist with a diagnosis, and also in assessing whether any long-term consequences to mental health exist, and whether any treatment is possible. In framing its reasoning for the request in the above manner, the Defense not only ignores the fact that all of the military doctors who have treated the accused on Guantanamo Bay, Cuba since September 2006, to include the RMC 706 Board, share in the diagnoses of the accused as having Delusional Disorder; Persecutory Type, but also entirely misapprehends the proper role of this commission in assessing the accused’s mental competency.

b. On 16 October 2008, the RMC 706 Board submitted its *Conclusions of Inquiry into the Mental Capacity of Ramzi Bin Al Shibh* to the parties. [REDACTED]

¹ Three years ago takes into account the Defense claimed capture date and the current date scheduled for the RMC 909 hearing of 21 September 2009.

[REDACTED]

[REDACTED]. Evidence at the RMC 909 hearing will establish that all of the active duty military doctors who cared for the accused share in this same diagnosis; a diagnosis which the Prosecution will not contest.³

c. Contrary to the Defense claim, it is not this commissions proper role to determine or hear evidence on the causation of the accused's mental defect, or the long-term consequences his confinement may have on his mental health, or even if any treatment is possible. The Military Judge's only role in this regard is to determine if a preponderance of the evidence establishes that the accused is *presently* suffering from a mental disease or defect rendering him incompetent to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case, such that it would overcome the presumption that the accused is competent to stand trial. See Ruling, D-042, para f. The potential *causation* of such a mental disease, which can be the only other logical basis for the Defense desire to investigate his past conditions of confinement, simply has no relevance to the RMC 909 hearing. Simply stated, the Military Judge will evaluate the accused's present competency to stand trial as he sits before him on the week of 21 September 2009; nothing more and nothing less. The Military Judge should seek neither to find the cause of his disorder, the long-term consequences his confinement may have on his mental health, or how to treat his disease; and any evidence sought that may establish such is not relevant to the pending inquiry.

d. While it is true that the Military Judge granted the defense request to inspect Camp 7, where the accused is *currently* being confined, the reason for him doing so was far narrower than the Defense claims in its motion, and is a far cry from setting forth the proposition that the Defense is entitled to a thorough inspection of an (a) overseas facility (facilities) where the accused was confined, at the most recent, over three years ago.

[REDACTED]

[REDACTED]

e. As made clear in his ruling, the Military Judge granted access to the detailed defense counsel to Camp 7 specifically because of comments the accused made on the record regarding his current confinement (and as specifically set forth by the Defense counsel in its fact section of D-041)⁴ and not because the Military Judge accepted the defense counsel claim that past conditions of the accused's confinement were *per se* relevant to the accused's mental competency determination.

f. During his arraignment on 5 June 2008, the accused made the following statement:

[REDACTED]

Transcript of Hearing ICO United States v. Mohammed, et.al., 5 June 2008 (Draft), pg. 123; See also Defense Motion, D-041, Fact D.

g. In his ruling on D-041, the Military Judge cited specifically to the comments made on the record by the accused in finding that investigation of his current confinement was warranted:

There are numerous aspects of the pending analysis of the accused's mental capacity. The defense position is that the conditions of the accused's confinement have had an effect on his current mental capacity. *While this may or may not be true, the evidence* [REDACTED] suggest that detailed defense counsel's pursuit of this line of investigation is appropriate.

See Ruling, D-041, para f (emphasis added). However, contrary to what defense counsel seeks in the instant motion, this access was limited only to detailed defense counsel and was far more limited than what the defense now seeks:

The Commission does not, however, find that similar access need be provided to persons other than the detailed defense counsel and the assistant detailed defense counsel....

This grant of relief does not extend to an order that the defense be permitted to conduct an inspection or evaluation of the accused's detention facility, its operations, or its procedures. The granted relief is limited to provision of an opportunity to visit and fully view the accused's cell, the two

adjacent cells, the recreation room, the medical room and the media room.

See Ruling, D-041, paras i, j and k. Clearly, the Military Judge did not make a determination that the accused's past, or even current conditions of confinement, were relevant, as a matter of course, to evaluate the accused's current mental health or he would have allowed the defense mental health expert to join the defense in a more thorough inspection of Camp 7 than he ordered.

h. The Defense cites to seven different cases it believes supports its position that it is entitled to inspect past confinement facilities⁵. See Defense motion at 6, 7. However, the first six of those cases, all of which were civil matters, dealt only with convicted defendants' *current* conditions of confinement, not past places of confinement. And in Comer v. Schriro, 463 F.3d 960, 942, (9th cir 2007), also cited by the Defense, while the district court allowed both sides to view every place the defendant had lived while incarcerated, the citation by the Defense offers no legal reasoning behind why the court so ruled, whether the court felt it was legally required to do so, or even if it did so over the prosecution's objection or with its consent. A non-binding factual inquiry by a federal district court in the 9th Circuit, that supplies no legal reasoning behind its determination, and allowed access to a correctional facility whose location is in the United States and a matter of public record, should be given no weight by this military commission in determining whether it is necessary to grant access to a classified overseas detention facility on foreign land that the accused will not have been detained in for over three years.

i. Although the Prosecution opposed the relief the Military Judge granted in D-041, it was not unreasonable, based on the specific statements that the accused made, for the Military Judge to allow the Defense to investigate certain aspects of its client's *current* confinement on Naval Station Guantanamo Bay. It would be patently unreasonable, however, to allow the Defense and a mental health expert to travel overseas to a foreign country to investigate the accused's conditions of confinement from over three years ago, when all it could possibly establish is evidence of the causation of a mental disorder the Prosecution will acknowledge the accused has had. This is especially true in light of the potential impact such a ruling could have on the National Security of the United States.

5. Conclusion: As the accused's past conditions of confinement are not relevant to the pending RMC 909 hearing, the Defense motion should be denied.

6. Request for Oral Argument: The Prosecution does not request oral argument but reserves the right to respond to any oral argument the defense may make.

⁵ The Defense also cites to death penalty cases it posits stand for a heightened reliability standard. See Defense Brief at 9. However, in the Manual for Military Commissions, the standard for competency in a death penalty case does not change from the standard of competency for a non-capital case, and the determination of relevant evidence should not differ between the two either.

7. **Attachments:**

- a. Selected Excerpts from the Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition, Text Revision (DSM –IV TR).

8. **Respectfully submitted,**

By:

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Prosecutor

Office of Military Commissions

