

UNITED STATES OF AMERICA

v.

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

D-041

**Prosecution Response
to the
Defense Motion for an Order Granting
Access to View and Inspect Conditions of
Confinement in GTMO**

19 September 2008

1. **Timeliness:** This response is filed within the time allowable by the Military Commissions Trial Judiciary Rules of Court.
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 bear the burden of persuasion. *See* Rule for Military Commissions (RMC) 905(c).
4. **Facts:**
 - A. The location of Camp 7 is a fact classified at the SECRET compartmentalized level. (*See* Attachment 1)
 - B. JTF-GTMO has a policy that no visitors are allowed on the detention block at CAMP 7 other than required personnel. To date no prosecutor or defense counsel has been given access to Camp 7. (*See* Attachment 1)
 - C. Consistent with force protection and security concerns at JTF-GTMO and other federal penitentiaries, visitors are not allowed access to detention blocks at Camp 7 and usually meet with the detainees in designated meeting rooms. Camp 7 has no such designated meeting room. (*See* Attachment 1)
 - D. Two physicians that have been designated as the 706 Board for Ramzi bin al Shibh, acting pursuant to the military judge's order, are in the course of determining:

- i. Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?
- ii. Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him. If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?

5. **Discussion:**

- A. The Defense states that Mr. Bin al Shibh suffers from a mental disease or defect which may be severely affected by his conditions of confinement in GTMO. The Defense claims its request to investigate the accused's conditions of confinement is rooted in the Due Process Clause and the 6th and 8th Amendments of the United States Constitution. *See* Def. Motion at 1. The Prosecution notes, however, that the accused has been determined to be an alien unlawful enemy combatant, who has no voluntary connections to the United States, and is being detained as such in Guantanamo Bay, Cuba. Under settled Supreme Court doctrine, the accused lacks any claim to the protections of the Bill of Rights. *See generally, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The accused is entitled to only that which the Military Commission Act, and the Manual for Military Commissions, directs.
- B. While the 706 Board has not yet reached its finding on the question as to whether Ramzi bin al Shibh suffers from a mental disease or defect, even if the accused was suffering from such a mental disease, the potential *causation* of such

a mental disease, which is the only logical basis for the Defense desire to investigate his conditions of confinement, has no relevance to the RMC 909 hearing.

C. Under Rule for Military Commissions 909, the accused's pending competency hearing will focus on whether 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 his case. *See* RMC 909(e)(2). The relevant inquiry will therefore focus on the accused's present mental condition, and not the reason or causation of that condition (if there is one). Whether the accused is suffering from a mental disease caused by his conditions of confinement, or from the stress of having to stand trial for the 2,973 people he is alleged to have murdered, or for any other reason at all, the causation of such a mental disease is not relevant to the determination of whether he 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 his case.

D. The Defense recklessly states that "undoubtedly" Mr. Bin al Shibh and other high value detainees in GTMO are subject to prolonged isolation, as "isolation was built into the system in Guantanamo." In making its allegation the Defense cites to a 2005 article titled "Break Them Down: Systematic use of Psychological Torture by US Forces." Despite the Defense's "undoubted" reliance on an article alleging war crimes against fellow U.S. forces, the accused is not being held in prolonged isolation; he has available to him outdoor recreation, socialization with a recreation partner, the ability to exercise, access to

library books twice a week, the privilege of watching movies, and may meet with his attorneys upon request should he so choose. If the accused takes advantage of all the privileges offered to him, he would have a minimum of two hours a day outside his cell. The circumstances of the accused's detention render all of the cited cases by the Defense inapposite, as all of these cases had facts where a defendant was in solitary confinement, extreme isolation, or had some other type of sensory deprivation, which is not the case for detainees at Camp 7. (*See* Attachment 1).

E. The Defense fails to make a sufficient proffer under the rules as why it is relevant and necessary for defense counsel to view where the accused is confined. Such a request is not akin to a crime scene viewing, as the accused's conditions of confinement are not *per se* relevant in the proceedings against him or for a RMC 909 hearing. Also, the Defense's reliance on the fact that the 706 Board personnel were able to visit the facility, to buttress its argument for why defense counsel also need access to the facility, is misplaced.

F. Whereas the 706 Board personnel were acting under order from the Military Judge to perform a competency hearing, which necessitated the medical personnel at least attempt to speak with the accused (who had refused to go to his appointment with them at another facility), the Defense counsel seeks to perform its own extensive investigation of the conditions of confinement at a facility whose location is classified as Secret, and which houses more than a dozen of the most dangerous terrorists the United States government has in its custody (*See* Attachment 1). The circumstances between the two are strikingly different in that one was mandated by judicial order and governed by RMC 706, and lasted a short

time, and the Defense request to investigate¹ the accused's conditions of confinement is neither required under RMC 701 or RMC 703, nor is it necessary for the RMC 909 hearing, and could significantly impact the daily operations of Camp 7.

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

7. **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.

8. **Attachments:**

1. Declaration from the Staff Judge Advocates Office, JTF-GTMO (under separate cover)

9. **Respectfully submitted,**

/S/

Clay Trivett
Prosecutor
Office of Military Commissions

¹ The Prosecution further notes that there are other ways to develop such evidence without having to grant access to the Defense to investigate Camp 7 should the military judge determine that the accused's conditions of confinement are relevant to the pending inquiry.

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**Prosecution Supplemental Response
to the
Defense Motion for an Order Granting
Access to View and Inspect Conditions of
Confinement in GTMO**

30 September 2008

1. **Timeliness**: This supplemental response is filed within the time frame established by the Military Judge upon his oral request for a supplemental filing.
2. **Relief Sought**: The Prosecution respectfully requests the Military Judge deny the Defense Motion, or, in the alternative, approve pictures of the relevant areas of the confinement facility in lieu of ordering the defense inspection of the confinement facility.
3. **Burden of Proof**: As the requesting/moving party, the accused bears the burden of persuasion on the original motion. *See* Rule for Military Commissions (RMC) 905(c).
4. **Facts**¹:
 - A. JTF-GTMO has fewer security concerns with photographing the accused's conditions of confinement than allowing Defense access to the facility, and have agreed to provide such photographs if necessary for resolution of this motion.
 - B. The accused's bed and cell are not now, nor have they ever been, intentionally made to vibrate or shake (and the Prosecution is willing to stipulate to this fact if necessary).

¹ These facts, as well as the facts stated in the Prosecution's initial response to D-041, will all be contained within one declaration from JTF-GTMO as opposed to two separate declarations. This declaration will be filed at a later date.

- C. JTF-GTMO maintains the temperature of Ramzi bin al Shibh's cell within normal standards at a comfortable level. JTF-GTMO does not intentionally manipulate the temperature to aggravate the accused (and the Prosecution is willing to stipulate to this fact if necessary).
- D. JTF-GTMO does not intentionally pump any odors, to include unpleasant odors, into Ramzi bin al Shibh's cell (and the Prosecution is willing to stipulate to this fact if necessary).
- E. JTF-GTMO does not intentionally cause loud noises in an effort to aggravate the accused (and the Prosecution is willing to stipulate to this fact if necessary).

5. **Discussion:**

A. JTF-GTMO has indicated that there are less security concerns associated with its personnel photographing all of the areas to which the accused has access or is able to view (to include the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room) than allowing a defense counsel (and possibly a defense expert) access to the facility. However, the Prosecution reiterates its prior position that, even if the accused was suffering from a mental disease, the potential *causation* of such a mental disease, which is the only logical basis for the Defense desire to investigate his conditions of confinement, still has no relevance to the RMC 909 hearing. As such, it requests that D-041 be denied without having to make such photographs available.

B. In the alternative, photographs of the facility, especially in light of the willingness of the Prosecution to stipulate to the above-stated facts, provides more than adequate evidence of the accused's conditions of confinement in the event

the Military Judge determines that such conditions are relevant to the pending RMC 909 hearing.

C. The Defense asserts that the accused is suffering from a delusional disorder as shown by fixed, firm, false beliefs that JTF-GTMO guards are producing noxious odors, sounds, and temperature manipulation. *See* Defense Motion at 5. The Prosecution is willing to stipulate that the JTF-GTMO guards are not producing noxious odors, sounds, or manipulating the temperature of the accused's cell. These facts, when coupled with the photographs of all relevant portions of the confinement facility, makes Defense access to the facility unnecessary. This alternative is the best way to balance the interests of the Defense with that of JTF-GTMO and its legitimate security concerns with limiting access to Camp 7 to the fewest number of people possible.

6. **Conclusion:** As the accused's conditions of confinement are not relevant to the pending RMC 909 hearing, the Defense motion should be denied without requiring Defense access to the accused's confinement facility or any photographs of the facility being turned over to the Defense. In the alternative, the proposed photographs, and willingness to stipulate to the above-stated facts, is more than adequate to detail the accused's conditions of confinement should it be determined to be relevant to the pending RMC 909 hearing.

7. **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.

8. **Attachments:**

1. Declaration from the Staff Judge Advocates Office, JTF-GTMO (to be filed at a later date)

9. **Respectfully submitted,**

/S/

Clay Trivett
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA

V.

KHALID SHEIKH MOHAMMED,
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH, RAMZI BIN
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HAWSAWI

D-041

**Defense Reply to Prosecution
Supplemental Response
to the
Defense Motion for an Order Granting
Access to View and Inspect Conditions
of Confinement in GTMO**

(RAMZI BIN AL SHIBH)

2 October 2008

1. **Timeliness:** On 29 September 2008, the government filed a supplemental response in its opposition to the Defense Motion for an Order to View Conditions of Confinement. That supplemental response contained new facts and government assertions. This brief is timely submitted within the rules prescribed for this Commission, to reply to this new information.

2. **Facts:**

A. On 12 September 2008, the defense filed a motion seeking an order from this Commission, allowing the defense and a defense mental health expert to examine the conditions of confinement under which Mr. bin al Shibh is being held.

B. The defense motion is filed in conjunction with a pending competency evaluation of Mr. bin al Shibh, conducted under Rule for Military Commission (RMC) 706, and a hearing to be held pursuant to RMC 909.

C. The government opposes the defense motion to examine conditions of confinement, and this commission heard argument on the motion on 22 September 2008.

D. Following argument, on 29 September 2008, the government filed a supplemental response to its opposition, asserting new facts and arguments.

E. In its supplemental response, the government asserts that "JTF-GTMO does not

intentionally” pump any odors or cause loud noise at Mr. bin al Shibh’s place of confinement. *See* Govt. Supp’l Resp., p.2.

F. The government’s supplemental response also contends that the temperature of Mr. bin al Shibh’s cell is kept “within normal standards at a comfortable level. JTF-GMTO does not intentionally manipulate the temperature.” *See* Govt. Supp’l Resp., p.2

G. Additionally, the government offers to produce photographs of Mr. bin al Shibh’s confinement location, should the commission agree that an examination of the conditions of confinement is warranted. These photographs, the government argues, would be generated in lieu of permitting defense counsel and a defense expert to observe directly the conditions of confinement.

H. The defense’s previously filed pleadings on this motion, as well as the government’s own supplemental response, document Mr. bin al Shibh’s assertion that smells are being inserted in his cell, that noises are made that disrupt his sleep, and that his bed is being shaken.

3. Discussion:

A. Delusional Behaviour Was Characterized by JTF Military Medical Personnel, Not by the Defense

The government argues that it is the defense that has identified delusional behaviour in Mr. bin al Shibh. In fact, the characterization of Mr. bin al Shibh’s behaviour as delusional originates in the medical records generated from Joint Task Force-Guantanamo. The very purpose of the present motion is to determine whether, in fact, Mr. bin al Shibh is delusional. Through an examination of the conditions of confinement, and with the assistance of a requested defense mental health expert, the defense aims to identify if delusional behaviour is present, and if so, what are the delusions or what may be accounted for in reality.

B. Photographs Are not an Appropriate Substitute for the Defense's Direct Observation of the Conditions of Confinement

An examination of the conditions of confinement will permit the defense to ascertain whether any of Mr. bin al Shibh's assertions regarding his cell are real. Photographs cannot replace a direct defense viewing of the conditions of confinement. Photographs are inadequate because they would be taken by persons who would not have Mr. bin al Shibh's interests and the defense's concerns in mind. They are also inadequate because of the specific nature of Mr. bin al Shibh's complaints regarding his conditions of confinement. Mere visual observation of the conditions is not the sole purpose of the requested examination: Mr. bin al Shibh complains of smells and sounds as well, and so an examination of the conditions requires use of olfactory and auditory senses. Photographs there cannot replace direct observation of the conditions of confinement.

C. JTF's Actions and Intent as to Camp 7 Are Irrelevant

The government's emphasis on the intentional actions of the Joint Task Force Guantanamo evinces the prosecution's misunderstanding of the questions presented here. The intent of the JTF is irrelevant. It is the presence or absence of the environmental factors Mr. bin al Shibh describes that are the focus of this motion. JTF is itself irrelevant, for that matter, since it is not responsible for the detention of so-called 'high value' detainees (HVD) such as Mr. bin al Shibh. Though the government has not been forthcoming in identifying the precise command structure for Camp 7, where HVDs are confined, the procedures that have been applicable to that Camp show that JTF itself is not in control there. For example, when the government sought to forcibly extract Mr. bin al Shibh from his cell to ensure his presence before the commission last week, JTF did not order his extraction; rather, the government had to seek authorization elsewhere, above JTF's command level. As another example, when the military medical officers

conducting the RMC 706 proceeding wanted to speak with Mr. bin al Shibh, JTF could not authorize their entrance into Camp 7; authorization had to be obtained at the Pentagon, in the civilian chain of command overseeing that Camp. Accordingly, the government's statements regarding what actions JTF may or may be taking within Camp 7 are irrelevant: JTF is not operating Camp 7.

4. Conclusion:

The government is fixated on causation issues. The defense is not focused on causation, and seeking the cause of any possible medical condition is not the aim of this motion. Rather, the questions the defense seeks to answer go to the heart of the issues relevant to the RMC 909 hearing, and include the question: do the present conditions of confinement result in a possible impediment to Mr. bin al Shibh's ability to assist in his defense? The government's parochial concern for concealing any issues of causation is not pertinent, and should not distract this Commission from the genuine and meritorious purpose of the defense's motion. Seeking an opportunity to independently examine evidence is hardly a foreign concept to criminal justice, or military justice. *See generally*, R.M.C. 701(c)(1) (requiring the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense.*") (emphasis added) The defense seeks merely to accomplish such an examination, free from any government influence.

The prosecution has not articulated a coherent argument, if there is one, that would preclude the defense from carrying out such a fundamental aspect of the defense function.

Respectfully submitted,

By: _____ //s// _____

CDR SUZANNE LACHELIER, JAGC, USN

Detailed Defense Counsel for

Ramzi bin al Shibh

Office of the Chief Defense Counsel

Office of Military Commissions

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By: _____

LT RICHARD E.N. FEDERICO, JAGC, USN

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Ramzi bin al Shibh

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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

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.

Significantly, [REDACTED]. Notwithstanding, [REDACTED], the Board determined, *inter alia*, that [REDACTED].

[REDACTED]. Additionally, the Board determined that the accused’s current condition [REDACTED].

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 discharge of their duties with regard to representing their client in conjunction with the pending RMC 909 hearing also establishes the "need to know" that would make their site visit to the accused's place of detention appropriate.

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.

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

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