

|  |  |
|--|--|
| <p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHEIKH MOHAMMED, WALID<br/> MUHAMMAD SALIH MUBARAK BIN<br/> 'ATTASH, RAMZI BIN AL SHIBH,<br/> ALI ABDUL-AZIZ ALI, MUSTAFA<br/> AHMED ADAM AL HAWSAWI</p> | <p><b>D-078</b></p> <p>Defense Motion to Reconsider<br/> Ruling on Motion to Compel<br/> Discovery-Names of Psychiatric<br/> Technicians and Corpsmen<br/> Mentioned in JTF-GTMO Medical<br/> Records</p> <p><b>Ruling</b></p> |
|--|--|

1. Ramzi Bin Al Shihb was captured by Pakistani Forces in Karachi, Pakistan, on or about 11 September 2002, and transferred to Guantanamo Bay, Cuba on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo personnel. Charges were sworn on 15 April 2008, and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commission (RMC) 706<sup>1</sup> to inquire into the present mental capacity

---

<sup>1</sup> If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. See RMC 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B) What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or

*United States v. Mohammed, et al., D-078 Ruling  
(Reconsideration)*

of the accused and scheduled an incompetence determination hearing<sup>2</sup> for 21 January 2009.<sup>3</sup>

2. On 22 December 2008, the defense moved this Commission to compel the government to disclose contact information for all psychiatric technicians and medical corpsmen that assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The government opposed the motion.

3. In its 24 July 2009 order, this Commission observed that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow up interview would be helpful to the defense in preparing for the incompetence determination hearing, including exploring a particular

---

wrongfulness of his or her conduct? (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? RMC 706(c)(2).

<sup>2</sup> 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. RMC 909(e).

<sup>3</sup> Two government delays have continued the hearing to begin no earlier than 21 September 2009.

*United States v. Mohammed, et al., D-078 Ruling  
(Reconsideration)*

technician or corpsman's recollection of behavior, demeanor and actions of the accused not reflected in the written reports and expanding on representations attributed to them by the physician. However, the Commission also recognized it must strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the military commission - the *current* mental competency of the accused. The Military Commission ultimately ordered the prosecution to facilitate access by defense counsel to those psychiatric technicians and medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled RMC 909 hearing.

4. On 18 August 2009, the defense moved this Commission to reconsider that part of the order limiting access to those psychiatric technicians and medical corpsmen who treated the accused since 21 September 2008, and requested the Commission now require the government to facilitate access to any technician or corpsman who observed and provided treatment to the accused since September 2006, the date the accused was transferred to

*United States v. Mohammed, et al., D-078 Ruling  
(Reconsideration)*

Guantanamo Bay, Cuba. The government opposes the motion to reconsider.

5. The defense's additional legal precedent and argument submitted in support of its request for reconsideration is unpersuasive and does not rise to the extraordinary circumstances, manifest injustice or clear error required to warrant modifying or changing the Military Commission's original ruling.<sup>4</sup> The defense has not yet established the materiality of past observations and impressions of the accused by psychiatric technicians and medical corpsmen, beyond those contained in the documentary record since 21 September 2008, to an assessment of the accused's present mental competency.<sup>5</sup> Therefore, the defense motion for reconsideration is hereby DENIED.

---

<sup>4</sup> A motion for reconsideration is appropriate where "the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Trans, Inc*, 70 F3d 255, 257 (2d Cir. 1995). A motion for reconsideration may also be granted to 'correct a clear error or prevent manifest injustice'" *In Re Terrorist Attacks on September 11, 2001*, 2006 U.S. Dist Lexis 11741 (S.D.N.Y. Mar. 20 2006) (quoting *Doe v. New York City Dept of Soc. Svcs*, 709 F.2d 782, 789 (2d Cir. 1983).

<sup>5</sup> If defense counsel can identify a particular technician or corpsman who treated or observed the accused between September 2006 and 20 September 2008, and provide a reason why that person could reasonably assist counsel in clarifying or adding to the information already provided to the defense by a

*United States v. Mohammed, et al., D-078 Ruling  
(Reconsideration)*

6. The Military Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military 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 defense motion and government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So Ordered this 20th Day of August 2009:

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

---

treating physician, or otherwise contained in the medical and mental health records, they may make that request.

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

**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-078**

**Defense Motion to Reconsider**

Commission Ruling Regarding  
Discovery of Medical Personnel

Dated: 18 August 2009

1. **Timeliness:** This motion for reconsideration is timely filed.
2. **Relief Sought:** Mr. bin al Shibh, by and through detailed defense counsel, respectfully requests the Commission reconsider and modify its previous ruling on the Defense Motion, D-078, that limited defense access only to psychiatric technicians and/or medical corpsman who treated the accused since 21 September 2008 and, instead, provide the defense access to such persons who observed and provided treatment beginning in September 2006, the date Mr. bin al Shibh was transferred to Guantanamo Bay, Cuba.
3. **Discussion:**
  - a. On 22 December 2008, the defense filed a motion seeking an order to compel the government to “produce contact information for each psychiatric technician and corpsman who worked with the 10 physicians whom the defense has been permitted to interview.” Defense Motion, D-078, ¶ 2. This Motion was opposed by the government and oral argument was held during a hearing on 16 July 2009. The Military Judge issued a ruling on 24 July wherein he ordered the government to facilitate access to the requested persons, psychiatric technicians and hospital corpsman, who assisted JTF-GTMO physicians since 21 September 2008. *See* Commission Ruling, D-078, ¶ 5, 24 July 2009.
  - b. On request of any party, a Military Judge may, prior to authentication of the record of trial, reconsider any ruling. *See* R.M.C. 905(f). The defense comes now to the Commission and respectfully requests that it reconsider its ruling that limited the defense access to prospective witnesses only to those who observed and treated Mr. bin al Shibh since 21 September 2008.
  - c. The defense access to prospective witnesses was previously the subject of written and oral argument in September 2008 when the defense sought an order to identify the names of medical and detention personnel so that these persons could be subject to interview. In a ruling

dated 16 September 2008, the Commission found that, “past experiences of the accused and past observations of the accused may reasonably play a part in an analysis of his current mental capacity.” Commission Ruling, D-023, ¶ 2.f. The Commission ordered the defense to provide to the prosecution a specific list of persons (identified by reference to specific records) it sought to interview. Of particular note, no limitation was included in the Commission’s previous ruling as to the date of when these persons observed and treated Mr. bin al Shibh. In response to the Commission’s Ruling, the government facilitated access to ten physicians only – no corpsman or psychiatric technicians were produced. The denial of access to these persons became the basis of the present motion, D-078.

d. In its ruling on D-078, the Commission stated that “it must also strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the military commission – the mental capacity of the accused.” Ruling, at ¶ 4. The defense respectfully suggests that denying access to prospective witnesses with an arbitrary 1-year time limitation does not strike the appropriate balance in a capital case. Indeed, “[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994); quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part).

e. On the issue of competency, the Commission should consider any medical and psychiatric evaluations available. See *Comer v. Stewart*, 215 F.3d 910, 917 (9<sup>th</sup> Cir. 2000); citing *Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505 (1965). As previously briefed, every JTF-GTMO physician informed the defense that he/she heavily relied upon the psychiatric technicians and hospital corpsman for evaluation and treatment of Mr. bin al Shibh. In addition, “evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial” is relevant to a competency analysis. See *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 908 (1975) (emphasis added). At present, the defense cannot be sure as to the amount of evidence the requested technicians and corpsman may possess because it has not been permitted to interview them.

f. Finally, the Commission also correctly noted that it is not necessary at present to “consider whether such testimony would be admissible at trial.” Ruling, ¶ 4. Rather, the defense merely seeks the opportunity to interview these persons to determine whether they should be called as witnesses. The concept of judicial economy is thus not yet ripe to be considered as a factor in determining the issue. Rather, at present, the defense has been denied a “reasonable opportunity to obtain witnesses.” 10 U.S.C. § 949j; R.M.C. 701

**4. Request for Oral Argument:** In order to ensure a prompt resolution of this matter, the defense waives its right to oral argument. Also, in order to ensure the parties may have adequate time to prepare for the next session, should the requested relief be granted, the defense respectfully requests the Commission issue a ruling on this matter at the earliest possible date.

**5. Request for Witnesses:** None.

**6. Conference with Opposing Counsel:** Pursuant to Military Commissions Rules of

Court, Rule 3.3, the defense conferred with the prosecution on 18 August 2009. The prosecution opposes the requested relief.

Respectfully submitted,

By: 

CDR SUZANNE LACHELIER, JAGC, USNR  
LCDR RICHARD FEDERICO, JAGC, USN  
*Detailed Defense Counsel for*  
*Mr. Ramzi bin al Shibh*