

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 026

**RENEWED DEFENSE MOTION TO
REQUIRE JTF GTMO TO ALLOW THE
DEFENDANT TO BE UNRESTRAINED
DURING ATTORNEY CLIENT
MEETINGS**

March 9, 2012

- 1. Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
- 2. Relief Requested:** The Defense respectfully requests that the Commission order JTF GTMO to allow the defendant to meet with his counsel without being shackled in any manner.
- 3. Overview:** Currently, when the defendant meets with his counsel he is restrained. During his incarceration with the CIA, the accused was tortured while shackled. (CIA Office of Inspector General, Special Review at ¶¶ 7, 91-94 (7 May 2004)). As a result of the torture, the use of restraints is a retraumatization of his torture and interferes with his communications with his counsel and in light of his behavior with counsel and in court is unnecessary. All counsel believe they are at no risk meeting with the defendant if he is completely unrestrained. Counsel have met with the defendant while he is unrestrained in conjunction with his appearance at arraignment. The accused has appeared unrestrained in court. And the accused has met with members of the ICRC without restraints.
- 4. Burden of Proof and Persuasion:** The defense bears the burden of persuasion as the moving party on this motion. R.M.C. 905(c). However, denial of this motion will violate the defendant's rights guaranteed by the Military Commissions Act, the Detainee Treatment Act, and the Fifth, Sixth and Eighth Amendments to the Constitution of the United States of America as well as statutes of the United States and treaties to which the United States is a signatory.

5. **Facts:** The defense provides the following unclassified facts in support of this motion. (The defense has also filed a notice pursuant to M.C.R.E. 505 requesting to supplement these facts with (1) information from the accused about his treatment while in CIA custody as well as (2) descriptions of the surrounding area and the room where legal visits take place.

Accused's Imprisonment in the CIA Rendition, Detention and Interrogation Program

a. The accused was arrested in 2002 and held by in the CIA's Rendition, Detention and Interrogation Program for four years. (CIA Office of Inspector General, Special Review at ¶7 (7 May 2004)(Attachment A)).

b. While in CIA custody the accused was tortured and subjected to cruel, inhuman and degrading treatment. For instance, the government has admitted to waterboarding him.

c. Further, the government has admitted that on one occasion an agent physically threatened the accused with a handgun, and on another occasion a government agent threatened the accused with a power drill. This government agent also threatened to harm the accused's family if he did not cooperate. (*Id.* at ¶91-94).

c. The accused was shackled when government agents physically threatened him with a handgun and a power drill, and when they verbally threatened to harm his family. (*Id.*)

d. Other improper techniques were used on the accused that involved shackles. For instance, one technique involved standing on the accused's shackles in a manner that resulted in cuts and bruises. (*Id.* at ¶ 98).

The Use of Shackles in the CIA Rendition, Detention and Interrogation Program

e. Publically released information reveals that the CIA used shackles as part of its Rendition, Detention and Interrogation Program. For instance, shackles were used in

conjunction with a variety of interrogation techniques. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005) *available at* <http://www.justice.gov/olc/olc-foia1.htm>. For instance, shackles were used with a technique called sleep deprivation. This technique would involve shackling the detainee in an upright position in order to enforce sleep deprivation. The use of such restraints for this purpose was considered “standard” techniques if only employed for up to two days. Moreover, during sleep deprivation the interrogators would place the detainee in diapers because the removal of the shackles would interfere with the effectiveness of the technique. *See* Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees at p. 13 (May 30, 2005) *available at* <http://www.justice.gov/olc/olc-foia1.htm>.

The Accused Has Been In Meetings Completely Unshackled

f. On 9 November 2011, the accused was arraigned. On 17-18 January 2012, the accused appeared in court for a total of 16 hours. During the 20 hours the accused has appeared in court, he was completely unrestrained, by order of this commission. He behaved appropriately. Prior to, and after the Commission appearances, the accused met with two of his Counsel and the linguist, while unrestrained, in a cell, much smaller than the area where they



usually meet. All were locked in this cell. The accused behaved appropriately during these meetings.

g. Presumably prior to any meetings between the accused and counsel, the accused is thoroughly searched. When counsel meets with the accused, counsel is accompanied by a linguist. Accordingly there has never been a meeting with the accused and only one other individual. The accused, in counsel's opinion would be incapable of overpowering the linguist working for the defense, LCDR Reyes, or Mr. Kammen.

h. Recently, the accused met with representatives from the ICRC. During this meeting he was unrestrained and could move around freely.

i. In the three years that counsel have been meeting with the accused he has never acted in a manner that suggested he would harm counsel.

6. **Argument:**

This motion is made in the interests of justice, to insure that defense counsel meet their obligations under the M.C.A. and the Sixth Amendment to the Constitution of the United States, and have appropriate access to their client.

The Act of Shackling is a Retraumatization of Past Torture

The accused was tortured in CIA custody. He was waterboarded by the government. This by itself constitutes torture. But in addition to this horrendous act, the government physically threatened the accused with a power drill on one occasion, and with a handgun on another. On these two occasions, the accused was shackled. *See* CIA Office of Inspector General, Special Review at ¶91-94 (7 May 2004)(Attachment A).

(Pursuant to the M.C.R.E. 505 notice provided, the accused desires to supplement this argument with classified information).

As a victim of torture, it is likely that the accused suffers from Posttraumatic Stress Disorder. One of the hallmarks of PTSD is the presence of “intrusive memories” or flashbacks of the traumatic event. See John P. Wilson & Terence M. Keane, *Assessing Psychological Trauma and PTSD* (2004). Thus, any present condition that mirrors the past trauma can cause retraumatization. If this were to occur, the victim may behave in a way to avoid situations that are a reminder of the past trauma. Further, this retraumatization is likely to cause further psychological damage and exacerbate any symptoms that exist. Here, the accused underwent horrendous treatment by the government while he was shackled. And the use of shackles during legal visits acts as a reminder of these past horrors and amounts to the retraumatization of the torture. Furthermore, this retraumatization significantly interferes with the accused’s ability to assist in his defense.

Common Article III of the Geneva Conventions, the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) prohibit the cruel, inhuman and degrading treatment of the detainees held in Guantanamo Bay. Of note, these authorities pertain to the general day-to-day treatment of a detainee and not just during interrogations. In both the DTA and the MCA the term *cruel, inhuman, or degrading treatment* means “cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

Using the above definition as it applies to the Constitution, courts have looked to the individual physical or mental condition of the prisoner in determining whether there is constitutional violation: Namely, a condition or procedure that may seem harmless to some may

be extremely debilitating to others. For instance, in *Madrid v. Gomez*, the court found that conditions in a Special Housing Unit (SHU) caused serious mental harm to those inmates with mental health problems, and not to others. 889 F. Supp. 1146, 1265 (N.D.C.A. 1995).¹ The court held that for those inmates, “placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly ‘unreasonable.’” *Id.* (citing *Helling v. McKinney*, 509 U.S. 25 (1993)). In the present case, Mr. Al-Nashiri is one of only three detainees that the government has admitted to waterboarded. Further, he was physically threatened with a power drill and handgun, and verbally abused and threatened by government agents while he was chained. As a consequence, he is an atypical detainee, and this factor should be considered by the Commission in determining whether the use of shackles interfere with the accused’s rights and ability to assist in his defense.

Use of Restraints is Harmful to the Accused’s Preparation for Trial

Additionally, counsel anticipate that it will be necessary and appropriate for the accused to show counsel how events occurred. This approach, more interactive than might be anticipated, is a more efficient way of learning facts about a case. This interactive approach is especially important when counsel begins discussion certain aspects of the accused’s treatment while in CIA custody.

This interactive approach to preparation has become known as the psychodramatic approach. Proponents of this method contend that it is a tool that permits us to access the experience of others – to see things as they saw them and to feel it as they felt it – in other words,

¹ Although an Eighth Amendment case, courts have held that Eighth Amendment protection applies to detainees in pre-trial status. See *Graham v. Connor*, 490 U.S. 386 (1989); *Bell v. Wolfish*, 441 U.S. 520 (1979). But an integral distinction that must be kept in mind is that the pre-trial detainee has not been judged by a tribunal and therefore society’s need to punish the offender through the deprivation of certain liberties is not relevant.

to truly empathize. Psychodrama also allows us to access our own experiences and to better understand our experiences. "Psychodrama expands our understanding of experiences, hence our understanding of ourselves. This is particularly important here, where counsel have the obligation to reconstruct events that occurred under difficult circumstances when the client was under extraordinary stress. See Dana Cole, *Psychodrama and the Training of Trial Lawyers*, American Association of Law Schools(2005); see also, Joane Garcia-Colson, *Trial in Action: The Persuasive Power of Psychodrama* (2010).

Through psychodrama, the lawyer is able to "experience" the event. The lawyer can reverse roles with the witness and experience the event from the vantage point of the witness. The lawyer will have access to the emotional content involved in the story that is not otherwise fully available. The lawyer will have a deeper understanding of the "truth" involved – an understanding grounded in empathy, not sympathy.¹⁰⁶ The lawyer's deeper understanding of the witness' story will suggest different questions – better questions. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

Conclusion

The shackles to which the accused is subjected, while seemingly minimal are in fact quite restrictive. They are uncomfortable and intrusive. They re-traumatize the accused. They distract the accused and interfere with the attorney client meetings. If the court sees the accused, as it must as an individual still suffering the effects of trauma, the court will understand the intrusive and lasting effect of the shackles. If these were necessary to protect counsel there would be no objections, however, with this accused, in this setting, with this defense team such shackles are unnecessary.

For all the forgoing reasons this request should be granted.

7. **Oral Argument:** The Defense requests oral argument in connection with this motion.
8. **Witnesses:**
 - (a) The Accused
 - (b) Dr. Barry Rosenfeld
9. **Conference with Opposing Counsel:** The Defense has conferred with the Prosecution.
10. **List of Attachments:**
 - (A) Excerpts from CIA Office of Inspector General, Special Review (7 May 2004).

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RICHARD KAMMEN
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CERTIFICATE OF SERVICE

I certify that on 9th day of March I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record by e-mail.

/s/ Stephen Reyes
STEPHEN C. REYES
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Detailed Defense Counsel

ATTACHMENT A

~~TOP SECRET~~ [REDACTED]

CIA LOAN COPY
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*Central Intelligence Agency
Inspector General*

SPECIAL REVIEW



(S) [REDACTED] COUNTERTERRORISM DETENTION AND
INTERROGATION ACTIVITIES
(SEPTEMBER 2001 – OCTOBER 2003)
(2003-7123-IG)

7 May 2004

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~~TOP SECRET~~ [REDACTED]

address the use of props to imply a physical threat to a detainee, nor did it specifically address the issue of whether or not Agency officers could improvise with any other techniques. No formal mechanisms were in place to ensure that personnel going to the field were briefed on the existing legal and policy guidance.

Specific Unauthorized or Undocumented Techniques

90. (TS [REDACTED]) This Review heard allegations of the use of unauthorized techniques [REDACTED]. The most significant, the handgun and power drill incident, discussed below, is the subject of a separate OIG investigation. In addition, individuals interviewed during the Review identified other techniques that caused concern because DoJ had not specifically approved them. These included the making of threats, blowing cigar smoke, employing certain stress positions, the use of a stiff brush on a detainee, and stepping on a detainee's ankle shackles. For all of the instances, the allegations were disputed or too ambiguous to reach any authoritative determination regarding the facts. Thus, although these allegations are illustrative of the nature of the concerns held by individuals associated with the CTC Program and the need for clear guidance, they did not warrant separate investigations or administrative action.

Handgun and Power Drill

91. (TS [REDACTED]) interrogation team members, whose purpose it was to interrogate Al-Nashiri and debrief Abu Zubaydah, initially staffed [REDACTED]. The interrogation team continued EITs on Al-Nashiri for two weeks in December 2002 [REDACTED] they assessed him to be "compliant." Subsequently, CTC officers at Headquarters [REDACTED] sent a [REDACTED] [REDACTED] senior operations officer (the debriefer) [REDACTED] to debrief and assess Al-Nashiri.

92. (TS [REDACTED]) The debriefer assessed Al-Nashiri as withholding information, at which point [REDACTED] reinstated [REDACTED] hooding, and handcuffing. Sometime between [REDACTED]

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]

28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information.⁴⁴ After discussing this plan with [REDACTED] the debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head.⁴⁵ On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. With [REDACTED] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill.

93. ~~(S//NF)~~ The [REDACTED] and debriefer did not request authorization or report the use of these unauthorized techniques to Headquarters. However, in January 2003, newly arrived TDY officers [REDACTED] who had learned of these incidents reported them to Headquarters. OIG investigated and referred its findings to the Criminal Division of DoJ. On 11 September 2003, DoJ declined to prosecute and turned these matters over to CIA for disposition. These incidents are the subject of a separate OIG Report of Investigation.⁴⁶

Threats

94. ~~(TS)~~ [REDACTED] During another incident [REDACTED] the same Headquarters debriefer, according to a [REDACTED] who was present, threatened Al-Nashiri by saying that if he did not talk, "We could get your mother in here," and, "We can bring your family in here." The [REDACTED] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [REDACTED] intelligence officer based on his Arabic dialect, and that Al-Nashiri was in [REDACTED] custody because it was widely believed in Middle East circles that [REDACTED] interrogation technique involves

⁴⁴ ~~(S//NF)~~ This individual was not a trained interrogator and was not authorized to use EITs.

⁴⁵ (U//FOUO) Racking is a mechanical procedure used with firearms to chamber a bullet or simulate a bullet being chambered.

⁴⁶ ~~(S//NF)~~ Unauthorized Interrogation Techniques [REDACTED] 29 October 2003.

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~~TOP SECRET~~ [REDACTED]

sexually abusing female relatives in front of the detainee. The debriefer denied threatening Al-Nashiri through his family. The debriefer also said he did not explain who he was or where he was from when talking with Al-Nashiri. The debriefer said he never said he was [REDACTED] intelligence officer but let Al-Nashiri draw his own conclusions.

95. (TS) [REDACTED] An experienced Agency interrogator reported that the [REDACTED] interrogators threatened Khalid Shaykh Muhammad [REDACTED]. According to this interrogator, the [REDACTED] interrogators said to Khalid Shaykh Muhammad that if anything else happens in the United States, "We're going to kill your children." According to the interrogator, one of the [REDACTED] interrogators said [REDACTED]

[REDACTED] With respect to the report provided to him of the threats [REDACTED] that report did not indicate that the law had been violated.

Smoke

96. (TS) [REDACTED] An Agency [REDACTED] interrogator admitted that, in December 2002, he and another [REDACTED] smoked cigars and blew smoke in Al-Nashiri's face during an interrogation. The interrogator claimed they did this to "cover the stench" in the room and to help keep the interrogators alert late at night. This interrogator said he would not do this again based on "perceived criticism." Another Agency interrogator admitted that he also smoked cigars during two sessions with Al-Nashiri to mask the stench in the room. He claimed he did not deliberately force smoke into Al-Nashiri's face.

~~TOP SECRET~~ [REDACTED]

~~TOP SECRET~~ [REDACTED]**Stress Positions**

97. (TS) [REDACTED] OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed Al-Nashiri backward while he was in this stress position. On another occasion, [REDACTED] said he had to intercede after [REDACTED] [REDACTED] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [REDACTED] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

Stiff Brush and Shackles

98. (TS) [REDACTED] interrogator reported that he witnessed other techniques used on Al-Nashiri that the interrogator knew were not specifically approved by DoJ. These included the use of a stiff brush that was intended to induce pain on Al-Nashiri and standing on Al-Nashiri's shackles, which resulted in cuts and bruises. When questioned, an interrogator who was at [REDACTED] acknowledged that they used a stiff brush to bathe Al-Nashiri. He described the brush as the kind of brush one uses in a bath to remove stubborn dirt. A CTC manager who had heard of the incident attributed the abrasions on Al-Nashiri's ankles to an Agency officer accidentally stepping on Al-Nashiri's shackles while repositioning him into a stress position.

Waterboard Technique

99. (TS) [REDACTED] The Review determined that the interrogators used the waterboard on Khalid Shaykh Muhammad in a manner inconsistent with the SERE application of the waterboard and the description of the waterboard in the DoJ OLC opinion, in that the technique was used on Khalid Shaykh Muhammad a large number of times. According to the General Counsel, the Attorney

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