

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 140

Government Motion
For Inquiry Into The Mental Capacity Of
The Accused Under R.M.C. 706

15 November 2012

1. Timeliness

The government timely files this motion under Military Commissions Trial Judiciary Rule of Court 3.7.b(1).

2. Relief Sought

The government respectfully requests that the Commission order an inquiry into the capacity of the accused to stand trial. *See* R.M.C. 706.

3. Overview

Rule for Military Commissions 706 requires the parties to notify the Commission when there is reason to believe that the accused lacks the capacity to stand trial. The accused made several statements during the last motions hearing that raise the issue of the accused's ability to participate meaningfully in his trial and, therefore, call into question whether the accused lacks the capacity to stand trial. For that reason, the government is compelled to request an inquiry into the accused's mental condition. The government is not aware of any specific facts that suggest the accused lacks the capacity to stand trial, however, the government believes the accused raised the issue during the last hearing thus necessitating an inquiry under R.M.C. 706 to ensure that the accused is competent to stand trial.

4. Burden of Proof

The rules impose an obligation on the parties, including the government, to notify the Commission if there is reason to believe that the accused lacks the capacity to stand trial. The

Commission should order such an inquiry if there is a good faith basis for the request. “A motion for a sanity board should normally be granted if it is made in good faith and is not frivolous.” *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008) (citing *United States v. Nix*, 15 C.M.A. 578, 582 (1965)). Statements made by the accused during the October 2012 motions hearing provide a good faith basis for inquiring into the mental condition of the accused.

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (the “accused”) is charged with multiple offenses under the Military Commissions Act of 2009 (“M.C.A.”) relating to terrorist attacks against the United States and its allies. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.

The accused voluntarily attended his arraignment and motions hearing in November 2011, and he voluntarily attended the subsequent motions hearings in January 2012, April 2012, and 17 July 2012. The accused missed two hearings in July 2012 to protest the detention facility’s use of belly chains during internal movements not related to the accused’s military commission. AE 106A, Attachment B. Following the accused’s voluntary decision to miss two hearings in July 2012, the government filed a motion to require the presence of the accused at all pretrial hearings unless the accused’s absence was authorized by statute. AE 099. The defense opposed the government’s motion to require the presence of the accused (AE 099A), stating the accused “is likely suffering from numerous undiagnosed psychological and physical ailments resulting from his mistreatment, such as post-traumatic stress disorder (PTSD).” AE 099A at 8; AE 106 at 4-6; AE 118 at 6; AE 135 at 4,6. The Commission heard argument on the government’s motion without the accused present in October 2012. Unofficial/Unauthenticated Transcript at 1288-1347.

The Commission found that the accused need not be present for all pretrial hearings, but it decided to “make sure that [the accused] understand[s] about [his] right to be present and [his] availability to waive the right to be present.” Unofficial/Unauthenticated Transcript at 1368. The Commission further explained to the accused, “[a]nd I’m doing this, and will do this periodically, just so you understand, that you and I have talked face-to-face on this issue and that you understand your rights to be present.” Unofficial/Unauthenticated Transcript at 1368. The Commission continued, “I made a decision that every now and then when somebody does not come to the Commission session, I want to remind them, in person, of their rights to attend. That’s why I had you come today.” Unofficial/Unauthenticated Transcript at 1371.

After the Commission outlined in detail the accused’s right to be present, the accused explained why he might not attend future sessions:

But I would like to draw your attention to something very important. You have the right to know directly from the accused why he doesn’t want to attend. The accused might have threats right there back in the prison so that he doesn’t come here and talk. You need to know why I didn’t come, not just to come here and read all this stuff to me. I might be going under threats so I don’t come here and talk about things. Is that possible?

Unofficial/Unauthenticated Transcript at 1371. The accused continued with unsupported and untrue assertions about his treatment:

And back there in my prison, they create new rules by which they attack us, and they say, “We are taking security measures.” That’s impossible. I have not attended the past two sessions because of the ill-treatment of the guards on us. They say, “That’s security and we have the right to do everything.” That’s impossible.

Unofficial/Unauthenticated Transcript at 1376. The accused also stated, “my nerves are also bad.” Unofficial/Unauthenticated Transcript at 1376.

6. Law and Argument

I. There Is a Good Faith Basis To Conduct an Inquiry into the Accused's Mental Condition

The statements made by the accused at the prior motions session provide a reasonable basis to question whether the accused lacks the mental capacity to stand trial. The Commission should order an inquiry into the mental condition of the accused because the accused apparently perceives himself to be under “attack” by the guard force and he has made claims that his “nerves are also bad.” Unofficial/Unauthenticated Transcript at 1376. Those statements, coupled with previous assertions from defense counsel, support ordering the inquiry. For example, defense counsel recently made unfounded allegations about the accused's mental health, stating: “I mean, [the accused's] health and physical well being, none of us know what we're doing here.” Unauthenticated/Unofficial Transcript at 1374-1375. The defense also alleged the accused “is likely suffering from numerous undiagnosed psychological and physical ailments resulting from his mistreatment, such as post-traumatic stress disorder (PTSD).” AE 118 at 6. *See also*, AE 99A at 8; 106 at 4; AE 135 at 6.

The rules are clear: “If it appears to any . . . trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused . . . lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the authority authorized to order an inquiry into the mental condition of the accused.” R.M.C. 706(a). The Commission is the appropriate authority to order an inquiry into the mental capacity of the accused after the referral of charges. R.M.C. 706(b).

Though defense counsel previously explained that the accused may not be present at military-commission hearings because “it just may not be that interesting” to him, the accused voluntarily stated to the Commission that his bad nerves and perceived threats from the guards

may preclude him from attending all military-commission sessions. *See* Unofficial/ Unauthenticated Transcript at 663, 1371-76. The accused himself explained that his nerves are bad, he stated that he is under “attack” by the guards, and he discussed at length his inability to make statements in court because of perceived threats: “I might be going under threats so I don’t come here and talk about things. Is that possible?” Unofficial/ Unauthenticated Transcript at 1371. The government is not aware of any factual basis that supports the accused’s statements. However, since the accused apparently believes them to be true, his statements—which completely lack any evidentiary support—provide a good faith basis for conducting an inquiry into the accused’s mental condition to determine whether the perceptions of the accused are interfering with his right to participate meaningfully in his trial. The Commission should order an inquiry into the accused’s mental condition because there is a good faith basis to question the accused’s mental capacity to stand trial.

7. Conclusion

The Commission should order an inquiry into the mental condition of the accused. The voluntary statements made by the accused to the Commission at the prior motions hearing provide a good faith basis for conducting such an inquiry.

8. Oral Argument

The government does not request oral argument on this motion.

9. Witnesses and Evidence

The government does not anticipate relying on witnesses or evidence in support of this motion.

10. Certificate of Conference

The government has conferred with the defense, and the defense objects to this motion.

11. Additional Information

The government has no additional information.

12. Attachments

- A. Certificate of Service, dated 15 November 2012.
- B. Proposed Order.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Joanna Baltes
Maj Chris Ruge, USMC
LT Cherie Jolly, JAGC, USN
Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

I certify that on the 15th day of November 2012, I filed **AE 140, Government Motion** For Inquiry Into The Mental Capacity Of The Accused Under R.M.C. 706, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

Anthony W. Mattivi
Trial Counsel
Office of the Chief Prosecutor
of Military Commissions

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

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	PROPOSED ORDER _____ 2012
---	---

Pursuant to Rule for Military Commissions 706(a), the government moved this Commission to order an inquiry into the mental capacity or mental responsibility of the accused. Pursuant to R.M.C. 706(b)(2), the Commission orders such an examination. *United States v. Mackie*, 66 M.J. 198 (C.A.A.F. 2008). Voluntary statements made by the accused to the Commission at the prior motions session call into question whether he is able to participate meaningfully in his trial and, as such, whether he lacks capacity to stand trial.

IT IS HEREBY ORDERED that the Convening Authority provide a board consisting of one or more members, and each member shall be a physician or clinical psychologist. All members of the board, prior to any examination, must be eligible for and receive the necessary security clearance from the appropriate Department of Defense authorities and sign an appropriate nondisclosure agreement as verified by the Commission Security Officer, Office of Military Commissions. The board shall report on both the mental capacity and mental responsibility of the accused.

The board conducting the inquiry shall specifically answer the following questions in accordance with R.M.C. 706(c)(2):

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested by repeated criminal or otherwise antisocial conduct, or minor disorders such as non-psychotic behavior disorders and personality defects.)

(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 wrongfulness of his conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or conduct or cooperate intelligently in his defense?

Upon completion of the inquiry, a statement consisting only of the ultimate conclusions as to all of the above questions shall be submitted to the Military Judge and all counsel in the case. The board’s full report may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the Military Judge. Moreover, the board shall release a full copy of the report to the defense, and, upon request, to the confinement commanding officer of the accused. Neither the contents of the full report, nor any matter considered during the inquiry, shall be released to any person not authorized to receive the full report, except pursuant to this Commission’s order, or the order of any other military judge detailed to this case.

SO ORDERED:

DATED: _____

James L. Pohl
COL, JA, USA
Military Judge