

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

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

AE 140

Government Response

To Defense Motion To Unseal The
R.M.C. 706 Board Evaluation:

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

08 May 2013

1. Timeliness

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court (RC) 3.7.c(1).

2. Relief Sought

The government does not oppose the defense request to unseal the R.M.C. 706 Board's evaluation of the accused.

3. Overview

The government does not oppose the defense request to unseal the R.M.C. 706 Board's report diagnosing the accused. The defense, however, made several attempts through its motion to imply that the report says more than it does about the cause of the accused's diagnosed mental conditions. The "short form" at issue here lists only the diagnosis, and it does not discuss the cause for any such diagnosis. There is currently no evidence before this Commission indicating the cause of any diagnosed mental condition.¹

¹ The government has not reviewed, nor does it have possession of, the Board's full report and analysis. In accordance with the Commission's Order, the Board only provided the government with (i) the accused's diagnosis and (ii) the Board's finding that the accused is competent to stand trial.

4. Burden of proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) is charged with multiple offenses under the 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 Commission ordered an R.M.C. 706 inquiry to determine whether the accused is competent to stand trial. AE 140F. The Board evaluated the accused and provided the government with the results of its evaluation. AE 140J. The government filed the Board’s results with the Commission and asked that the information be sealed because it appeared to contain personal, private information belonging to the accused. *Id.* The Commission sealed the Board’s results. AE 140K. The defense now asks the Commission to unseal that information. AE 140L.

6. Law and Argument²

The Commission ordered that an R.M.C. 706 Board determine whether the accused is competent to stand trial. The Board evaluated the accused and found the accused to be competent. The Board provided the defense with its full report and analysis, and it provided the government with its conclusions diagnosing the accused, which is commonly referred to as the “short form.” The government filed the short form with the Board’s conclusions and asked that the information be sealed as it appeared to contain personal, private information belonging to the accused.

The defense moves to unseal that information, which the government does not oppose. In doing so, however, the defense made several inflammatory assertions suggesting that the Board identified a cause for the accused’s diagnosed mental conditions. Significantly, there is no evidence before the Commission identifying a cause for the accused’s diagnosed mental conditions. If the defense wishes to make allegations to this Commission about the cause of the accused’s mental conditions, it must introduce evidence to support its assertions and allow the government the opportunity to examine and potentially rebut that evidence.

7. Conclusion

The government does not oppose the defense request to unseal the R.M.C. 706 Board’s report diagnosing the accused. In its motion, however, the defense implies certain findings the

² The defense continues to assert—as it now does in nearly all of its motions—that denying the defense motion will violate various rights of the accused, including rights that have not been extended to any detainee by any United States court. *See* AE 140 at 1-2. The defense, however, persists in omitting any explanation of how those rights are implicated in this case. Absent any explanation as to how those rights are implicated under these facts, the Commission should reject the defense’s boilerplate language. *See Harding v. Illinois*, 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question was properly raised in the state court where the Illinois Supreme Court concluded that “no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional” and thus the “point, if it could otherwise be considered, was deemed to be waived”); *United States v. Heijnen*, 215 F. App’x 725, 726 (10th Cir. 2007) (“We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings . . . [A]ppellant’s issues are not supported by any developed legal argument or authority, and we need not consider them.”).

Board may have determined concerning the cause for the accused's diagnosed mental conditions. These specific findings are not detailed in the short form presently at issue, however, and the defense has offered no evidence establishing the cause of the accused's mental conditions. Before the defense makes any similar assertions in the future, it first should present evidence supporting these assertions.

8. Oral Argument

The defense does not request oral argument, nor is oral argument necessary for resolution of this motion. *See* 3.9(a) ("the Military Judge may make final rulings on all motions based upon the written filings of the parties.").

9. Witnesses and Evidence

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

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 08 May 2013.

Respectfully submitted,

//s//

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 8th day of May 2013, I filed **AE 140, Government Response To Defense Motion To Unseal The R.M.C. 706 Board Evaluation: 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.

//s//

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Office of the Chief Prosecutor
Office of Military Commissions