

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 205

**DEFENSE MOTION TO ABATE THE
PROCEEDINGS UNTIL THE ACCUSED
RECEIVES ADEQUATE MEDICAL CARE**

17 January 2014

1. Timeliness: This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).

2. Relief Requested: The defense moves this Commission to abate these proceedings until such time that he receives adequate medical care for his diagnosed PTSD and depression.

3. Overview:

The failure to provide adequate medical care violates both US and international law. It impacts the attorney client-relationship and promises to render the trial fundamentally unfair. It has also limited the ability of the defense to communicate with Mr. Al-Nashiri, to develop coherent legal strategies, and discover evidence that will further those strategies at trial. Moreover, it is inhumane to know of a medical condition and to provide sub-standard treatment for that condition. The Commission should therefore abate the proceedings until these problems are remedied and until Mr. Al-Nashiri can meaningfully assist in his defense.

4. Burden of Proof and Persuasion: This motion, at its essence, is a request for a continuance until the Government of the United States fulfills its ethical and legal obligations to provide adequate medical care to the defendant, who the Government knows suffers from serious conditions that it caused. The burdens of proof and persuasion are on the defense as the moving party. R.M.C. 905(c). Denial of this motion will violate the defendant's rights as guaranteed by

the Fifth, Sixth, and Eighth Amendments to the Constitution of the United States of America, the Military Commission Act of 2009, the Detainee Treatment Act of 2005, treaty obligations of the United States and fundamental fairness.

5. Statement of Facts:

Since 2002 until the present, Mr. Al-Nashiri, the accused, has been in the custody of the United States. From 2002 to 2006, the accused was in CIA custody. During that custody agents of the United States tortured the accused. Even though the President of the United States, who is also the Commander in Chief, acknowledges that the United States tortured the accused and other prisoners, the defense has learned that counsel for the prosecution inexplicably, refuses to acknowledge such torture occurred. Two of the documented *sequale* of torture are Post-Traumatic Stress Disorder ("PTSD") and Depression.

Since his incarceration in Guantanamo, Mr. Al-Nashiri has received no meaningful treatment for the mental health conditions that were the foreseeable, if not intended, result of the torture inflicted upon him. Based upon information provided to the defense, it is the defense position that Mr. Al-Nashiri suffers from PTSD and other conditions associated with PTSD that are the result of the torture inflicted upon him. For various reasons the Commission has thus far refused to address allegations made about Mr. Al-Nashiri's conditions.

In 2013, at the insistence of the prosecution, Mr. Al-Nashiri was subjected to a Rule 706 mental competence evaluation. While the defense has never asserted that the defendant was incompetent to stand trial, given the rather low bar for trial competency, the prosecution insisted upon this evaluation. Physicians and psychologists appointed by the government subsequently found, as the defense has consistently alleged, Mr. Al-Nashiri suffers from PTSD and depression

associated with PTSD. These conditions are the result of the torture the agents of the United States inflicted upon Mr. Al-Nashiri.

Dr. Sondra Crosby is a defense expert who has been approved by the Convening Authority. She examined Mr. Al-Nashiri subsequent to the diagnosis of PTSD and depression. Dr. Crosby found that Mr. Al-Nashiri's conditions continue to impact his communications with counsel. This impedes the defense's ability to prepare for trial and effectively deprives the accused of effective assistance of counsel

The medical care provided to the accused since his incarceration in Guantanamo to present constitutes malpractice. The medical authorities at Guantanamo have taken no meaningful steps to address these severe medical issues identified by the 706 evaluation board in the ten months that have elapsed since his diagnoses. Indeed, when requested, the medical authorities have *refused* to consult with a physician, Dr. Sondra Crosby, an internationally recognized expert on dealing with the effects of torture, who has evaluated the accused for the defense. (Attachments A, B) In light of the fact that as custodian for the accused the medical authorities at Guantanamo have a legal and ethical obligation to provide adequate medical care, this failure violates both domestic and international law. This failure has limited the ability of the defense to communicate with the accused, to develop strategies, and discover evidence that will further those strategies at trial.

The indifference of the medical staff is likely the result of the command climate in JTF-GTMO. COL. Bogdan's reputation for disregarding the medical needs of the detainees and the medical ethics of his healthcare staff is now well documented. Further, COL. Bogdan's disregard for the detainees' rights to having meaningful attorney-client relationships with counsel has already been the subject of multiple motions before this Commission.

Of specific relevance to the present issue, COL. Bogdan falsely asserted on the national news *60 Minutes* that the rate of PTSD among his guard staff is twice the rate of U.S. forces returning from combat. The Department of Defense promptly retracted this claim. The *Miami Herald* reported that the Defense Department spokesmen admitted that “‘There are no statistics that support the claim of twice the number of troops diagnosed with PTSD[.]’” Carol Rosenberg, *Military retracts Guantánamo PTSD Claim*, The Miami Herald (8 December 2013). The spokesman attempted to explain away COL. Bogdan’s comments on the grounds that he had a basic “misunderstanding of the distinction between a PTSD diagnosis and the stress troops experience at Guantánamo[.]” *Id.*

On 28 September 2011, the Convening Authority referred this case to a military commission under the Military Commissions Act of 2009 and authorized it to sentence the accused to death.

6. Argument:

The Supreme Court long ago settled that the government is required to provide adequate medical care to those it keeps in its custody.

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ ..., the evils of most immediate concern to the drafters of the [Eighth] Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. ... We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ ... proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

Estelle v. Gamble, 429 U.S. 97, 103-05 (1976) (internal citations omitted).

As the Supreme Court noted in *Estelle*, constitutionally adequate medical care is not

satisfied by the perfunctory supervision of a health care worker. The medical care provided must actually address the detainee's needs. "[G]overnment officials who ignore indications that a prisoner's or pretrial detainee's initial medical treatment was inadequate can be liable for deliberate indifference to medical needs[.]" *Cooper v. Dyke*, 814 F.2d 941 (4th Cir. 1987); *Miranda v. Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (upholding denial of judgment n.o.v. where "[i]t could be found that defendants ignored a clear warning that the medical treatment they provided for [plaintiff, a pretrial detainee] was inadequate").

The federal courts settled thirty years ago that an inmate's serious psychiatric or psychological condition presents a "serious medical need," whose neglect is forbidden by the Constitution and requires a judicial remedy. *See, e.g., White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1187 (5th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 273 (7th Cir. 1983); *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (holding that there is "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.").

When comparable health-related issues have gone before the district courts in the Guantanamo *habeas* cases, the district courts have not hesitated to provide adequate remedies. *See, e.g., Tumani v. Obama*, 598 F.Supp.2d 67 (D.D.C. 2009) (ordering appropriate remedies where it was alleged that the conditions of petitioner's detention had caused such severe mental illness that the detainee was no longer able to participate in his *habeas* action); *Husayn v. Gates*, 588 F.Supp.2d 7, 9 (D.D.C. 2008) (petitioner alleged that medications prescribed for him by doctors at Guantanamo cause him to become incoherent, psychotic, and interfered with his

ability to write and speak); *Al-Joudi v. Bush*, 406 F.Supp.2d 13 (D.D.C. 2005) (granting remedies where inexperienced medical staff were alleged to be improperly placing intravenous lines to force feed detainees and providing other sub-standard medical care).

The defense proffers that the testimony from Dr. Sandra Crosby and Dr. “John Doe,” the attending physician for JTF-GTMO, will demonstrate that the nature of the health care Mr. Al-Nashiri has received during the time of his detention until present is constitutionally and medically inadequate. The treatment received by the accused was not “medical care” as an ordinary person would understand it – a patient who is given the confidential help of a doctor to address a medical need. It was, instead, the type of tending that one imagines is given to poorly kept circus animals – symptoms identified with no effort to address to their causes and occasionally medicated with powerful, yet inappropriate, pharmaceuticals to render the animal docile and willing to perform. This is not medical care. It is not the medical care the Guantanamo authorities are obligated to provide. It is not medical care that the Constitution and human decency require.

The defense further proffers that the testimony of Dr. “John Doe” and COL John Bodgan will show that JTF-GTMO operates under a command climate that is deliberately indifferent to the medical and mental health needs of the detainee population, including the accused. The health care provided to Mr. Al-Nashiri, particularly as it respects his mental health, is wantonly inadequate, fails to abide by the most basic canons of medical ethics, and violates federal law guarantees for the health of prisoners. COL. Bogdan has demonstrated on diverse occasions that he is indifferent, if not hostile, to the legal and healthcare rights of the men in his custody. He has consistently devised new methods of frustrating the accused’s access to counsel. *See, e.g., In re Guantanamo Bay Detainee Litigation*, 2013 WL 3467134 (D.D.C. 2013); *In re Guantanamo Bay*

Detainee Continued Access to Counsel, 892 F. Supp. 2d 8 (D.D.C. 2012). And as evidenced by his willingness to lie on national television, he either does not understand or is deliberately indifferent to the seriousness and severity of mental health diseases like PTSD.

A delay in these proceedings until the accused receives medically appropriate health care is essential to the fair administration of justice. Until JTF-GTMO provides the accused with adequate medical care, the accused cannot meaningfully assist defense counsel with the preparation of this capital case.

If, as the defense suspects, JTF-GTMO's personnel lacks the knowledge and experience necessary to treat individuals who have been the victims of torture, the defense has already offered Dr. Crosby as a consultant. Dr. Crosby is happy to meet with them and provide guidance. She will of course continue to meet with the accused and evaluate him for the preparation of his defense. Granting this motion will, therefore, allow for better pre-trial preparation and, ultimately, a more efficient trial.

The defense requests a delay until the accused has received adequate medical treatment to address his medical conditions, specifically PTSD and depression related to PTSD. The medical care that the Guantanamo authorities have been providing is woefully inadequate. Indeed, the failure to make even minimal efforts to address the effect of the torture the United States inflicted upon Mr. Al-Nashiri or to provide medical care after those conditions were diagnosed violates domestic and international law, denies Mr. Al-Nashiri due process and is an affront to basic human decency. Because the only remedy available to the Commission is abatement, we ask that these proceedings be abated until Mr. Al-Nashiri receives constitutionally adequate medical care.

7. Oral Argument: The defense requests oral argument on this motion.

8. Witnesses:

- a. Dr. Sandra Crosby
- b. COL. John Bodgan
- c. "John Doe," Attending Physician, JTF-GTMO

9. Conference with Opposing Counsel: The defense has conferred with the government and it objects to this motion.

10. List of Attachments:

- A. ~~(U//FOUO)~~ Request for Defense Appointed Medical Doctor to Meet with Mr. Al-Nashiri's Treating Physician(s), dated 25 November 2013 (1 page)
- B. ~~(U//FOUO)~~ Government Response to Defense Request for Defense Appointed Medical Doctor to Meet with Mr. Al-Nashiri's Treating Physician(s), dated 5 December 2013 (1 page)

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

CERTIFICATE OF SERVICE

I certify that I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail on 17 January 2014

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

ATTACHMENT

A



UNCLASSIFIED//FOR PUBLIC RELEASE
DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

25 November 2013

From: Major Allison C. Danels, USAF, Assistant Detailed Defense Counsel
To: Commander, Joint Medical Group
Via: Trial Counsel

SUBJ: ~~(U//FOUO)~~ REQUEST FOR DEFENSE APPOINTED MEDICAL DOCTOR TO MEET
WITH MR. AL-NASHIRI'S TREATING PHYSICIAN(S)

1. ~~(U//FOUO)~~ The defense respectfully requests permission for Dr. Sondra Crosby, a defense appointed medical doctor, to meet with Mr. Al-Nashiri's treating physicians.
2. ~~(U//FOUO)~~ Dr. Crosby is a medical doctor with expertise in examining and treating individuals who, like Mr. Al-Nashiri, are victims of torture. In her role as a defense appointed expert, Dr. Crosby has conducted an extensive medical examination of Mr. Al-Nashiri. During the course of her examination, she learned that Mr. Al-Nashiri suffers from numerous maladies, many of which have gone untreated or undertreated during his period of confinement. She believes it is important to immediately address one specific concern: the severe sleep disturbance (manifestation of PTSD), from which Mr. Al-Nashiri suffers. Lack of sleep interferes with Mr. Al-Nashiri's overall psychological well-being. Dr. Crosby is of the opinion that the regulation of Mr. Al-Nashiri's sleep pattern is critical in improving his overall physical and mental health.
3. ~~(U//FOUO)~~ Dr. Crosby appreciates the difficulty of caring for a complex patient like Mr. Al-Nashiri under the challenging circumstances at GTMO, including the difficulty of creating a trusting doctor patient relationship. Because the care of torture survivors, like Mr. Al-Nashiri, is such a specialized field of expertise, it is unlikely that any of his providers (medical or mental health) have expertise in diagnosing and treating torture related sequelae. Therefore, Dr. Crosby would like to meet with Mr. Al-Nashiri's current medical team to discuss possible course(s) of treatments to improve Mr. Al-Nashiri's sleep pattern and treat his PTSD.
4. ~~(U)~~ The defense respectfully requests a response by 6 December 2013. Thank you for your time and consideration. If you need further information or have any questions, please do not hesitate to reach Maj Allison Danels at [REDACTED] or at [REDACTED].

//s//

Allison C. Danels, Maj, USAF

ATTACHMENT

B

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

**Government Response To Defense
Request For Defense Appointed Medical
Doctor To Meet With Mr. Al-Nashiri's
Treating Physician(s)**

05 December 2013

The government is in receipt of the 25 November 2013 defense request to have its appointed medical doctor, Dr. Crosby, meet with the accused's current JTF-GTMO medical team to discuss courses of treatment to improve the accused's sleep patterns and treat his PTSD. Current JTF-GTMO practice prohibits its medical staff from discussing information related to a detainee's medical condition with a detainee's legal team. Further, the government is not aware of any legal obligations that require access by the defense medical expert to nontestifying medical professionals. As such, the defense request is respectfully declined. Please note that JTF-GTMO's procedure is consistent with that employed by the Federal Bureau of Prisons. There is nothing that prohibits counsel or appointed experts from meeting with the accused or having access to his medical information, which has been provided to the defense.

Respectfully submitted,

//s//

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

Mark Martins
Chief Prosecutor

Military Commissions