MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 277A** **Government Response** To Defense Motion For Appropriate Relief: Order A Magnetic Resonance Image (MRI) of Mr. Al Nashiri's Brain 18 June 2014

1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to order magnetic resonance imaging ("MRI") of the accused's brain. The government also requests that the Commission seal the name of the Senior Medical Officer ("SMO") responsible for the primary health care of high-value detainees aboard the Joint Task Force, Guantanamo Bay, Cuba ("JTF-GTMO") detention facility. The SMO provided a Declaration (*see* Attachment B), which includes personally identifiable information belonging to the SMO, including the SMO's name.

3. Overview

The Commission should deny the defense motion for two reasons. First, the choice of diagnostic tools used in the accused's medical care is generally a matter beyond the scope of this Commission. Even if the Commission did have general cognizance over the accused's medical care, the defense fails to show that an MRI, or any other diagnostic scan, would change the accused's medical treatment. Additionally, the defense fails to show that the available diagnostic facilities are inadequate to meet the accused's medical needs.

Second, to the extent the defense request is seeking government funding for potential evidence in mitigation, the defense first must make its request to the Convening Authority with an adequate showing of necessity. Under the rules, all parties must comply with the appropriate regulations and procedures for acquiring resources at government expense. *See, e.g.*, Regulation for Trial by Military Commission ("R.T.M.C.") 2-3(a)(10) (making the Convening Authority responsible for allocating sufficient resources to the defense as necessary to ensure a fair trial). Here, the defense failed to request from the Convening Authority that an MRI be made available. Moreover, the defense failed to provide the prosecution, the Convening Authority, or the Commission with information showing that an MRI of the accused's brain is necessary for a fair and just trial. Regardless of what additional proffer the defense may make to this Commission, the defense's motion should be denied because the defense did not provide the Convening Authority with an adequate showing of necessity or give the Convening Authority an opportunity to provide a suitable substitute. *See United States v. Burnette*, 29 M.J. 473, 475 (C.M.A. 1990) (holding an accused is entitled to expert assistance only upon "a proper showing of necessity").

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 as an alien unprivileged enemy belligerent with multiple offenses under the Military Commissions Act of 2009 ("M.C.A."), 10 U.S.C. §§ 948a *et seq*., relating to his participation in the attacks on USS COLE (DDG 67) on 12 October 2000 and MV *Limburg* on 6 October 2002, and the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. These attacks resulted in the deaths of 18 people, injury to dozens of others, and significant property damage.

The accused has access to all necessary medical care onboard the detention facility at the U.S. Naval Station Guantanamo Bay, and he has not been denied any necessary medical

treatment to date. Attachment B, ¶¶ 3, 5. According to his current treating medical team, an MRI—which is not available onboard U.S. Naval Station Guantanamo Bay—is not clinically required to provide the accused with appropriate medical treatment, and the defense has not demonstrated any current medical ailment that would necessitate an MRI of the accused. *Id.* The U.S. Naval Station Guantanamo Bay has other diagnostic tools available, including contrast and non-contrast computed tomography scans ("CT Scans") that can be used if such treatment becomes necessary, which, to date, has not yet occurred. *Id*. To the knowledge of the prosecution, the defense has neither requested nor been denied a CT Scan for the accused.

Additionally, the defense motion and supporting declaration do not articulate why an MRI in particular is needed for current medical treatment, or what additional medical treatment such a test would indicate as being necessary. Similarly, except for vague references to the potential use of memory loss in mitigation, the defense does not provide any articulable factual basis for an MRI of the accused's brain as it relates to mitigation.

6. Law and Argument[1]

The accused seeks relief on two grounds: first, that an MRI is necessary for the provision of adequate medical care; and second, that an MRI is needed to produce possible evidence for use in trial and sentencing. AE 277 at 1-2. If the defense seeks medical treatment beyond what the current treating medical team believes is necessary, the defense must demonstrate, with

[1] The defense continues to assert—as it now does in nearly all of its motions—that denying the motion will violate various rights of the accused. *See* AE 277 at 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 in this request and 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.").

articulable facts, why that additional treatment is necessary for the accused. Similarly, if the defense believes government-funded resources are necessary for a fair and just trial, the defense must demonstrate the necessity of such an expenditure. To date, the defense has done neither. Moreover, the defense failed to make any request to the Convening Authority, much less a request that demonstrates with particularity why an MRI is necessary to the presentation of its case.

I. Referral of Charges to this Commission Does Not Confer General Supervision of the Accused's Medical Treatment

Because the defense claim regarding medical treatment is not supported by clinical need, is not valid under the law, and does not infringe on any right the accused has in this Commission, the defense-requested relief should be denied.

The government, as a detaining authority under the laws of war, is required to provide adequate medical care to the detainees onboard U.S. Naval Station Guantanamo Bay. 42 U.S.C. § 2000dd; U.S. DEP'T OF DEF., INSTRUCTION NO. 2310.08E, MEDICAL SUPPORT PROGRAM FOR DETAINEE OPERATIONS ¶ 1.3 (June 6, 2006); Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135. It does not follow, however, that the Commission has general supervisory authority over the appropriate medical care provided by the JTF-GTMO staff to the accused. *See generally* 10 U.S.C. § 948d. The management of daily detention operations, such as the provision of appropriate medical care, is unsuitable for judicial intervention. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1517 (2012); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). This principle, grounded in Supreme Court precedence, previously has been observed by this tribunal. *See, e.g.*, Unofficial/ Unauthenticated Transcript at 372 (Military Judge observing that "[t]he normal rule is, is that the Commission will not interfere with the running of a confinement facility unless there's some showing of exceptional or extraordinary circumstances that warrant exception in this case.") (Jan. 17, 2012); *id.* at 656-57 (Military Judge noting that decisions regarding routine detainee operations are given deference by this

Commission) (Apr. 11, 2012). This is consistent with United States Supreme Court practice. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (according "wide-ranging deference" to prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.") (citations omitted).

That the regulation of detainee medical care is outside the scope of these proceedings is underscored by the very cases cited by the defense. Each of the defense cases are civil actions brought as 42 U.S.C. § 1983 claims or as *habeas* petitions. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976) (determining the scope of liability in a 42 U.S.C. § 1983 action). The defense fails to cite a single case supporting the proposition that a military tribunal or federal civilian court in a criminal case adopts supervisory powers over every aspect of an accused's detention. The only attempt the defense makes to connect the accused's medical care to these proceedings is the conclusory statement that the MRI would result in an accused "that may be able to meaningfully participate in his defense." AE 277 at 2. There is absolutely no evidence before this Commission that this may be the case. The defense does not allege, and has not alleged, that the accused is not able to participate in his defense as the present time—were that the case, the defense would be obliged to file a motion under R.M.C. 909, which it has not. Further, the defense offers no indication of how an MRI would affect the accused's participation, or why diagnostic techniques and facilities currently available at U.S. Naval Station Guantanamo Bay are insufficient. Without connecting the proposed remedy to the conduct of the present proceedings, the defense request for relief necessarily fails.

Moreover, the claim advanced by the defense is not valid under its own cited authority. The defense motion amounts to an assertion that the accused is not receiving diagnostic tests that could confirm his current medical diagnosis, and could—potentially—indicate other causes for his alleged memory-loss symptoms. While the government contests the defense allegations concerning the accused's medical care, the Commission need not address this factual dispute. Even were the defense allegations accurate and somehow cognizable by this Commission, this is

precisely the type of claim the Supreme Court found not to constitute inadequate medical care because it does not rise to the level of "deliberate indifference to serious medical needs of prisoners [which] constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." *Gamble*, 429 U.S. at 103-105; *id.* at 106 ("a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.")

Similarly, the defense-cited Guantanamo *habeas* cases provide no support for the defense-requested relief. The defense cites three cases as providing "adequate remedies" for health-related claims. In each of these *habeas* cases, however, the district court specifically denied any relief relating to the conduct of medical treatment or other activities inside the detention facility, instead only granting the petitioners access to medical and mental-health records. *Tumani v. Obama,* 598 F. Supp. 2d 67 (D.D.C. 2009) (denying petitioner's request for independent psychiatric and medical evaluations and the cessation of further interrogations until medical records and evaluations were analyzed); *Husayn v. Gates*, 588 F. Supp. 2d 7 (D.D.C. 2008) (denying petitioner's request for permission to meet with treating physicians); *Al-Joudi v. Bush*, 406 F. Supp. 2d 13 (D.D.C. 2005) (denying petitioner's request for telephonic access, granting counsel notice of medical treatment). The defense made no showing of inadequate medical care, let alone the "deliberate indifference to serious medical needs" that would justify judicial intervention.

II. The Defense Has Not Made a Particularized Showing that an MRI Is Necessary for Trial or Mitigation

If the defense could demonstrate why a government-funded resource was necessary for a fair and just trial, that resource would be granted by the Convening Authority. R.T.M.C. 2-3(a)(10). If the Convening Authority were to deny such a request, the Commission has the authority to review the Convening Authority's denial. R.M.C. 703(d). As a condition precedent to judicial review, requests for resources must be addressed to the Convening Authority. If the Convening Authority denies the defense request, then the Commission may

consider ordering the Convening Authority to provide either the requested resources or an adequate substitute. *Id*. Until the defense makes a proper request to the Convening Authority, however, it is not ripe for review by the Commission. Casting the motion in terms of medical treatment does not satisfy this procedural requirement.

Even if the issue was properly before the Commission (it is not), the defense has not provided a sufficient basis to conclude that an MRI is a necessary resource in this case. In federal civilian courts, indigent defendants are entitled to the basic tools required to build an effective defense. *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). This does not mean the defendant is entitled to the experts of his choosing or to all the resources a wealthy defendant may employ. *Ake*, 470 U.S. at 83. Military courts have adopted a similar standard, requiring a showing of necessity for the provision of resources at government expense. *Burnette*, 29 M.J. at 475; *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986).

Resources are properly denied when the defense fails to make the required showing of necessity. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (noting the denial of resources at state expense was proper where defendant offered "little more than undeveloped assertions that the requested resources would be beneficial"); *United States v. Ndanyi*, 45 M.J. 315, 319-20 (C.A.A.F. 1996) (upholding the denial of laboratory experts because the defense failed to demonstrate necessity). Similarly, the rejection of government-provided substitutes is a proper basis for denying a defense request. *Burnette*, 29 M.J. at 476; *see also United States v. Tornowski*, 29 M.J. 578, 579 (A.F.C.M.R. 1989) (holding the defense has no right to demand a particular expert by name at government expense).

Here, the defense has not met its burden to show the necessity for an MRI of the accused's brain. While the defense has stated its intended use of evidence concerning the accused's memory, the defense has not given a valid basis to believe that an MRI procedure will show any brain abnormality, much less that an MRI will generate evidence of memory loss. Further, it has not demonstrated how an MRI would be of benefit to the trier of fact during any

presentencing phase of the trial. The defense motion for an MRI relies entirely on a suggestion that the defense expert (Dr. Crosby) put in the most speculative of terms: "For instance, this testing *may* suggest the presence of a Traumatic Brain Injury (TBI)—an injury that would separately contribute to memory loss." AE 277, Attachment A (emphasis added). At the same time, Dr. Crosby asserts the memory loss she describes is due, in her opinion, to the accused's Post-Traumatic Stress Disorder ("PTSD") and only *possibly* contributed to by other causes. *Id*. (opining the accused "suffers from memory loss because of PTSD *and, perhaps*, other physical causes") (emphasis added). The accused has been diagnosed with PTSD by an R.M.C. 706 Board and by the defense's own expert. Yet, there is no evidence that an MRI would show that any potential memory loss was caused by PTSD.

In short, the defense has identified an effect—memory loss—it wishes to argue to the members. Its own expert has alleged a cause—PTSD—that she believes to be responsible. With nothing more than this, the defense seeks to expend significant government funds exploring an allegedly separate and entirely ungrounded cause. The defense's lengthy string of case citations provides scant support to its position. AE 277 at 7 n.1. On the whole, the cases cited by the defense stand for the proposition that the defense has a duty to investigate brain damage the accused may have sustained prior to the alleged offense, when the defense is on notice of such possible damage. *See, e.g.*, *Correll v. Ryan*, 539 F. 3d 938, 952-54 (9th Cir. 2008) (noting brain impairment likely was after a brick wall collapsed on the defendant's head at age seven); *Haliym v. Mitchell*, 492 F.3d 680, 710 (6th Cir. 2007) (stating defense counsel was ineffective for failing to include mitigation evidence that the defendant had shot himself in the head prior to the offense when such evidence previously was known to defense counsel); *Douglas v. Woodford*, 316 F.3d 1079, 1086 (9th Cir. 2003) (finding defense counsel ineffective for not establishing a head injury the defendant sustained in a car crash prior to the offense). Each of these cases is easily distinguishable from one where an examining physician diagnoses a non-brain-injury cause for memory loss and suggests there are "perhaps other physical causes."

Additionally, the defense fails to show why available resources are insufficient. If the defense's purpose is to show that the accused suffers from memory loss, it might first seek further psychological testing. Attachment B, ¶ 8; *see also* AE 277, Attachment A. The Convening Authority already granted the defense its preferred psychological expert for the purpose of conducting such testing. AE 135, Attachment B. Interestingly, the defense provided this Commission with no documentation from its own expert in psychology. The Convening Authority also approved Dr. Crosby as a defense expert, and she apparently met with the accused for 30 hours and administered her own tests. AE 277, Attachment A.[2] If more resources are needed, the defense may request them from the Convening Authority, who in turn can fund an additional expert if necessary. Also, JTF-GTMO has alternate scanning facilities available to check for TBI, which the defense has not yet requested. The defense failed to show why additional psychological testing and the available scanning facilities are insufficient to address its needs. *Garries*, 22 M.J. at 290-91. Indeed, until the defense has attempted to develop its desired evidence with the available resources, it is improper to assert these resources are insufficient. *Ndanyi*, 45 M.J. at 319; *United States v. Johnson*, 47 C.M.R. 402, 405 (C.M.A. 1973).

The government has an interest in a robust defense. *Berger v. United States*, 295 U.S. 78, 88 (1935) (noting the government's interest in a prosecution "is not that it shall win the case, but that justice shall be done"). This interest is underscored by the M.C.A. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1807, 123 Stat. 2190, 2614 (2009) (describing the sense of Congress that the fairness of military commissions will depend to a significant degree on the adequacy of defense counsel and associated resources). Fairness and due process, however, depend on a dispassionate and even-handed adherence to applicable rules and procedures. Here, the defense failed to demonstrate why an MRI would be necessary to provide the accused with adequate medical care. Similarly, the defense ignored the basic

[2] The defense has not yet produced to the government or to the Commission any information concerning testing of the accused or the results of such tests. Such psychological records must be produced to fully and fairly litigate the issues raised in this motion.

procedures required under military precedent and by regulation to employ expert resources at government expense. If the defense deems an MRI necessary to the preparation of its defense, for a case in mitigation, or otherwise, it can—and should—request this resource from the Convening Authority with the proper showing. If the defense believes the accused has a valid civil claim under 42 U.S.C. § 1983 or *habeas corpus*, the accused could bring an action in a court with jurisdiction over such claims. Justice and judicial economy are best served by requiring the parties to make the appropriate requests to the appropriate fora at the appropriate time. Anything else inevitably leads to unjustifiable waste and delay. R.M.C. 102(b).

7. Conclusion

The Commission should decline to manage the accused's routine medical care. Those medical-treatment decisions are best left to the experts who are in the best position to treat the accused. The Commission similarly should defer action on any defense resources until the Convening Authority has had the opportunity to consider the request.

8. Oral Argument

The government requests oral argument.

9. Witnesses and Evidence

The government relies on the attached declaration from the SMO.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 18 June 2014.

B. Declaration from the SMO responsible, dated 17 June 2014.

C. Proposed Sealing Order.

Respectfully submitted,

//s//
CDR Andrea Lockhart, JAGC, USN
Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 18th day of June 2014, I filed **AE 277A, Government Response** To Defense Motion For Appropriate Relief: Order A Magnetic Resonance Image (MRI) of Mr. Al Nashiri's Brain, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
CDR Andrea K. Lockhart, JAGC, USN
Trial Counsel
Office of the Chief Prosecutor
Military Commissions

United States v. Abd Al-Rahim Hussayn Muhammad Al-Nashiri
ISN: 010015

APPELLATE EXHIBIT 277A

(Pages 15 – 17)

Attachment B

Under Seal

APPELLATE EXHIBIT 277A is located in the Classified annex of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

ATTACHMENT C

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 277A** **PROPOSED ORDER** __ June 2014

Upon consideration of the Government's request to maintain UNDER SEAL the name of the Senior Medical Officer ("SMO") responsible for the primary health care of high-value detainees aboard the Joint Task Force, Guantanamo Bay, Cuba ("JTF-GTMO") detention facility, and pursuant to the Commission's authority under the Military Commissions Act of 2009, 10 U.S.C. § 948a, *et. seq.*, Military Commission Rules of Evidence 104, 505-507, 611, and the general supervisory authority of the Commission; I FIND

The SMO provided a Declaration attached to the Government's Response To Defense Motion For Appropriate Relief: Order A Magnetic Resonance Image (MRI) of Mr. Al Nashiri's Brain (*see* AE 277A, Attachment B); and

The Declaration includes personally identifiable information belonging to the SMO, including the SMO's name; and

Detainees housed at JTF-GTMO have previously threatened to cause personal injury to personnel stationed aboard JTF-GTMO (though there is no evidence or allegations that the accused in this case made any such threats to any people, including the SMO).

IT IS HEREBY ORDERED that the name of the SMO contains unclassified but sensitive information that, if publicly released, could reasonably be expected to threaten the safety of individuals, and therefore shall be kept UNDER SEAL; and

IT IS FURTHER ORDERED that the name of the SMO be considered "sensitive discovery materials" as that term is used in Protective Order #2 (AE 14C), and the name shall not be disclosed to the accused or any witnesses, or potential witnesses, at any time before, during, or after trial.

SO ORDERED:

DATED: _____

_____
James L. Pohl
COL, JA, US Army
Military Judge