

UNITED STATES OF AMERICA

**Commission Ruling
D-041**

**Motion to for Appropriate Relief
(Access to View and Inspect the
Conditions of Confinement in GTMO)**

v.

KHALID SHEIK MOHAMMED et al
(Bin Al Shibh)

26 October 2008

1. Nature of Motion:

a. This motion seeks an order allowing the defense to “view and inspect the conditions under which Mr. Bin Al Shibh (the accused) has been and continues to be confined during his incarceration at Guantanamo Bay, Cuba (GTMO).”

b. The Commission has also considered the prosecution’s response and supplemental response to D-041, the defense reply thereto, and the oral argument presented concerning this motion.

2. Discussion:

a. Questions concerning the mental capacity of the accused were raised prior to the arraignment in this case. For this reason, counsel election by the accused was postponed until such time as the matter could be investigated by his detailed defense counsel and addressed, if necessary by a mental capacity inquiry per RMC 706 and a mental capacity determination hearing per RMC 909.

b. On 1 July 2008, the Commission ordered an inquiry into the mental capacity of the accused per RMC 706. The report of that inquiry was completed on 16 October 2008.

Significantly, [REDACTED]. Notwithstanding, [REDACTED], the Board determined, *inter alia*, that [REDACTED].

[REDACTED]. Additionally, the Board determined that the accused’s current condition [REDACTED].

c. [REDACTED] a mental capacity determination hearing per RMC 909 is warranted with regard to the accused.

d. In preparation for the RMC 909 hearing, detailed defense counsel submitted a request to JTF-GTMO to be granted access to view and inspect the accused's detention cell. The initial request regarding this matter was refused by the Government. The Government continues to oppose the request, but proffers provision of pictures of the accused's cell, two adjacent cells, the recreation room, the medical room and the media room.

e. MCA, Section 949j provides that defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence. RMC 701(c) provides that the Government shall permit the defense counsel to examine, *inter alia*, buildings or places which are within the control of the Government which are material to the preparation of the defense.

f. There are numerous aspects of the pending analysis of the accused's mental capacity. The defense position is that the conditions of the accused's confinement have had an effect on his current mental capacity. While this may or may not be true, the evidence [REDACTED] suggest that detailed defense counsel's pursuit of this line of investigation is appropriate. Information gleaned from such investigation may reasonably be material to the defense presentation with regard to the accused's mental capacity.

g. The Government's opposition to the request apparently stems from the classified nature of the location of the accused's place of incarceration at "Camp 7" and a JTF-GTMO policy "that no visitors are allowed on the detention block at Camp 7 other than required personnel."

h. It is the understanding of the Commission that both the detailed defense counsel and the assistant detailed defense counsel possess the requisite security clearances to be provided access to Camp 7. (It is also worthy of note that both the detailed defense counsel and the assistant detailed defense counsel have agreed to proceed to the facility in a blindfolded fashion or in a visually closed vehicle as necessary such that the location of the camp need not be revealed in the course of their visit.) It is the finding of the Commission that the discharge of their duties with regard to representing their client in conjunction with the pending RMC 909 hearing also establishes the "need to know" that would make their site visit to the accused's place of detention appropriate.

i. The Commission's review of the discovery material associated with issue of the accused mental capacity and the report of the Board conducted per RMC 706 demonstrate that the mental capacity determination in this case will involve analysis of an unusual and relatively complex set of factual circumstances and medical factors. The Commission finds that the provision of an opportunity to view the accused's place of confinement at GTMO is appropriate under the MCA, section 949j and RMC 701(c).

Additionally, the Commission directs that the detailed defense counsel for the accused be provided with the proffered pictures of the accused's cell, two adjacent cells, the recreation room, the medical room and the media room.

j. The Commission does not, however, find that similar access need be provided to persons other than the detailed defense counsel and the assistant detailed defense counsel.

k. This grant of relief does not extend to an order that the defense be permitted to conduct an inspection or evaluation of the accused's detention facility, its operations, or its procedures. The granted relief is limited to provision of an opportunity to visit and fully view the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room.

3. Ruling: The Defense motion is granted in part and denied in part. The Government shall provide the defense with an opportunity to visit and view the accused's place of confinement at Camp 7 consistent with the discussion above.

RALPH H. KOHLMANN
Colonel, U.S. Marine Corps
Military Judge