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v.

ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI

Defense Motion To Discontinue

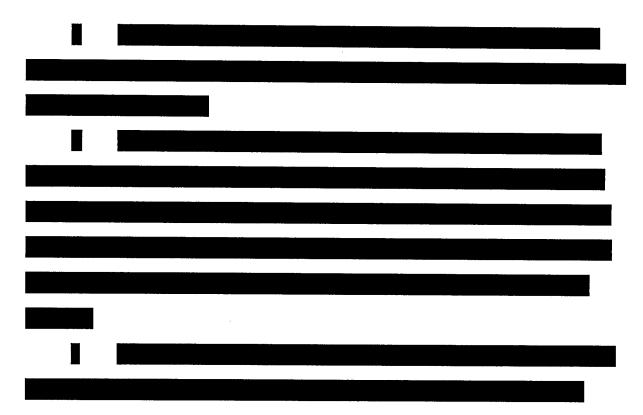
9 January 2009

1.	Timeliness: This request is filed within the timeframe established by Rule for Military
Comm	ission (R.M.C.) 905.
2.	Relief Requested: The Defense respectfully requests that the Commission order that JTF
GTMC	O discontinue the
3.	Overview: The
detrim	ental to the health of Mr. Al-Nashiri and unduly burdens the attorney-client relationship.
4.	Burden of Proof: The defense bears the burden of proof as the moving party on this
motion	and the standard is proof by a preponderance of evidence. R.M.C. 905(c).
5.	Facts:
	Initial Detention and Transfer to Guantanamo Bay, Cuba (GTMO)
	a.
	b.
	c. On or about September 2006, Mr. Al-Nashiri was transferred to Guanatanamo
Bay, C	Cuba.
	d.
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Transport of Mr. Al-Nashiri

	e.	Mr. Al-Nashiri's
	•	
	Initial	Request to Commander JTF GTMO by the Defense and Request by the International Committee of the Red Cross (ICRC)
	f.	On or about August to September 2008, the ICRC made a request to have Mr. Al-
Nashi	iri excep	ted from having his (Attachment A.)
	g.	On 22 September 2008, the defense made a formal request to the JTF Commander
to not	have M	r. Al-Nashiri's (Attachment A, B.)
	h.	On 7 October 2008, the Staff Judge Advocate's (SJA) office informed the defense
that th	ne JTF C	Commander had denied the defense's request. (Attachment C.)
	Sec	ond Request to Commander JTF and Affidavit of Dr.
	i.	On 14 October 2008, the defense made a second request to the JTF Commander.
(Attac	chment I	D.) In support of the request, the defense attached an affidavit from
	MD.	(Attachment E.)
	j.	is an Associate Professor of Medicine at the Boston University School
of Me	edicine a	nd Co-Director of the Boston Center for Refugee Health and Human Rights. Her
clinic	al practi	ce focuses on the care of asylum seekers, asylees and refugees, most of whom have
exper	ienced to	orture. She taught extensively on the medical care and evaluation of refugees and
survi	vors of to	orture and published considerable work in this area in many professional journals.
	ha	as been qualified as an expert witness for evaluation of the medical effects of torture
in the	Boston	Immigration Court and in the United States Federal District Court. (Id.)

k.	In her affidavit, stated that sensory deprivation of Mr. Al-Nashiri will
likely cause	profound psychological symptoms and, most significantly, could serve as a
continuation	of torture. (Id.)
1.	has neither personally examined Mr. Al-Nashiri nor has knowledge of
any specific	allegations of the prior mistreatment of Mr. Al-Nashiri that occurred before his
arrival in Gu	antanamo Bay. (Id.)
m.	medical opinion is based on
n.	strongly recommends against any practice that involves
	(Id.)
o.	On 14 October 2008, JTF Guantanamo SJA's office informed the defense that its
request was	denied and that force protection issues continue to require that JTF-GTMO adhere to
the current d	etainee movement procedures. (Attachment F.)
	Defense Request to be Transported to Mr. Al-Nashiri
p.	On 6 January 2009, in order to find a compromise with the
the defense r	equested that they be brought to Mr. Al-Nashiri's camp for attorney visits. The
defense agre	ed to On 7 January 2009, JTF-
GTMO denie	ed the request. (Attachment G.)
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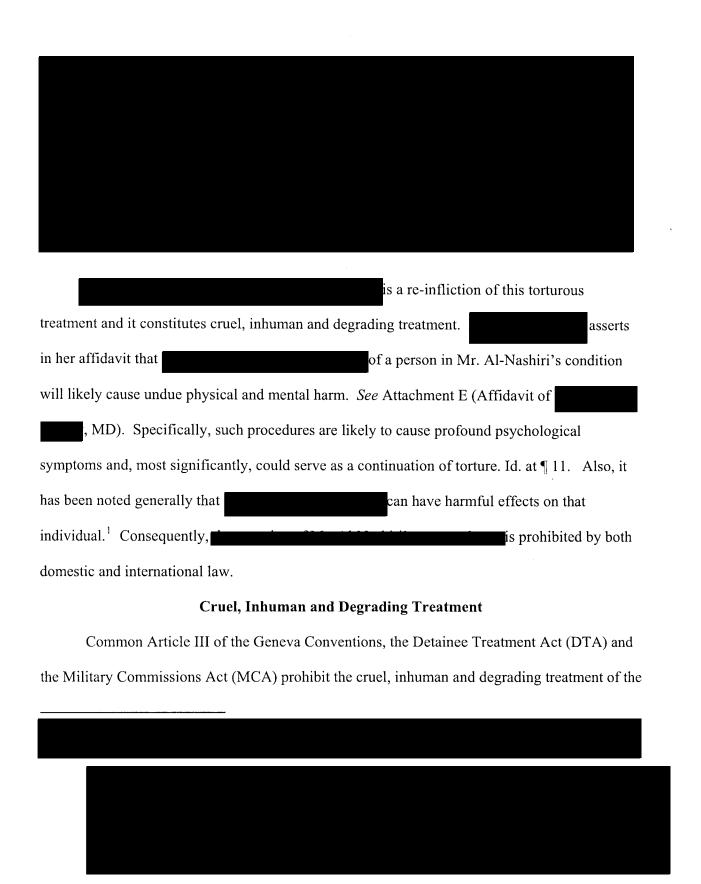


Forced Cell Extraction.

u. Current Department of Defense Instruction require that if an accused refuses to attend a Commission proceeding that he be forcefully extracted from his cell, unless a military judge rules otherwise.

6. Argument:





detainees held in Guantanamo Bay. Of note, these authorities pertain to the general day-to-day treatment of a detainee and not just during interrogations.

In both the DTA and the MCA the term *cruel, inhuman, or degrading treatment* means "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

Using the above definition as it applies to the Constitution, courts have looked to the individual physical or mental condition of the prisoner in determining whether there is constitutional violation: Namely, a condition or procedure that may seem harmless to some may be extremely debilitating to others. For instance, in *Madrid v. Gomez*, the court found that conditions in a Special Housing Unit (SHU) caused serious mental harm to those inmates with mental health problems, and not to others. 889 F. Supp. 1146, 1265 (N.D.C.A. 1995). ² The court held that for those inmates, "placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly 'unreasonable.'" *Id.* (citing *Helling v. McKinney*, 509 U.S. 25 (1993)).

As a consequence, he is

an atypical detainee, and this factor should weigh heavily in the Commission's judgment.

² Although an Eighth Amendment case, courts have held that Eighth Amendment protection applies to detainees in pre-trial status. See *Graham v. Connor*, 490 U.S. 386 (1989); *Bell v. Wolfish*, 441 U.S. 520 (1979). But an integral distinction that must be kept in mind is that the pre-trial detainee has not been judged by a tribunal and therefore society's need to punish the offender through the deprivation of certain liberties is not relevant.

Proceeding further, courts have found a Constitutional violation when the detainee is subjected to serious mental or physical harm. See *Id.*; but see Hudson v. McMillian, 503 U.S. 1, 7 (1992)(noting that in excessive force cases a prisoner can still prove an Eighth Amendment violation absent an injury). Such harm can stem from non-physical conduct such as verbal threats and sexual advances, as noted in *United States v. Brennan*, 58 M.J 351 (C.A.A.F. 2003), to the potential harm resulting from second hand smoke, as noted by the Supreme Court in *Helling*, 509 U.S. 25. In this case,

International Law

throughout international law. For instance, the Supreme Court of Israel in commenting on the techniques used by the General Security Service (GSS) held that the hooding of a prisoner constitutes both cruel and degrading treatment insofar as it is demeaning to his humanity, inflicts physical harm and causes the prisoner to lose sight of time and place. *See* The Judgment Concerning the Interrogation Methods Implied by the GSS, the Supreme Court of Israel, sitting as the High Court of Justice, adjudicating H.C. 5100/94, et.al., *available at* [http:www.court.gov.il]. The Supreme Court of Israel required the GSS to impose less harmful means of fulfilling its stated goal of preventing eye contact with other prisoners. Another example is found in the case of *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) para. 94 (1978). In this case, the court held that the use of sensory deprivation techniques know as the "five techniques" amounted to cruel and inhuman treatment. One of these techniques was the hooding of a prisoner.

No Legitimate Purpose in

Lastly, the Commission should look to whether there is a legitimate purpose behind the

The defense argues that this procedure is
unnecessary in light of the physical isolation of Guantanamo Bay and the other security
precautions placed upon Mr. Al-Nashiri. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002)(finding a violation of the Eighth Amendment when a prisoner was handcuffed to a post significantly beyond what was necessary to quell the harm).

In stark contrast is how similarly charged defendants in Federal and State Courts were transported. For instance, according to the counsel for one of the Embassy Bombers, Josh Dratel, tl Notably, these defendants were alleged members of al-Qaeda and were accused of similar crimes as Mr. Al-Nashiri. Mr. Dratel also notes that he has been involved in several terrorist related cases; and in those cases, Another example is that of Terry Nichols, the Oklahoma City Bomber. According to his state defense counsel, Terry Nichols (Attachment J.) These two cases of similarly charged defendants belies the government's argument that force protection measures necessitate the If the above defendants can be transported throughout the open streets in the United States with their then it is unnecessary for Mr. Al-Nashiri's in the isolated and secured facility of U.S. Naval Base, Guantanamo.

7. **Oral Argument**: The defense requests a hearing to present evidence and oral argument. In light of the specific nature of this motion, the defense requests that this hearing occur prior to the arraignment and without Mr. Al-Nashiri's presence.

8. Witnesses:

- a. Major
 b.
 c. Brigadier General (Ret.)
- 9. Conference with Opposing Counsel: The defense has conferred with trial counsel about this motion. Trial counsel expressed that they will take the motion under consideration and respond accordingly.

10. List of Attachments:

- A. Email to Deputy SJA JTF-GTMO, dtd 25 Sep 08
- B. Request for an Exception to Detainee Transport, dtd 22 Sep 08
- C. Email from Deputy SJA JTF-GTMO, dtd 7 Oct 08
- D. Renewed Request for and Exception to Detainee Transport, dtd 14 Oct 08
- E. Declaration of 1 MD, dtd 6 Oct 08
- F. Email from Deputy SJA JTF-GTMO, dtd 14 Oct 08
- G. Denial of Request to Travel, dtd 7 Jan 09
- H. Affidavit of Josh Dratel
- I. Affidavit of

//s//
LCDR STEPHEN C. REYES, USN
Detailed Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions