

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID  
MUHAMMAD SALIH MUBARAK BIN  
'ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

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Defense Motion to Compel Production of  
Medical Records

**Ali Abdul Aziz Ali**

29 August 2008

1. **Timeliness:** This Motion is submitted timely and pursuant to the Military Judge's Order of 1 July 2008.
2. **Relief Sought:** At the direction of, and with the consent of, the *pro se* accused Ali Abdul Aziz Ali, standby counsel respectfully request that the Commission:
  - a. Order that Mr. Ali be provided a complete and un-redacted copy of all of his medical, dental, and mental health records prepared as a result of or during his detention since the time of his arrest on or about 29 April 2003 until the present, regardless of the place of his detention or the agency exercising control over his person.
  - b. Order the transfer to Mr. Ali of all of his medical, dental, and mental health records, including any copies in any form, currently in the possession of the prosecution.
  - c. Order that the Staff Judge Advocate, Joint Task Force-Guantanamo provide Mr. Ali with copies of any written requests made by any Office of Military Commissions Prosecutor for his medical records, notice of information contained in the records identified by any prosecutor as relevant and necessary to comply with discovery or other prosecutorial obligations, and copies of any certified records requested by the prosecution.
3. **Overview:** Mr. Ali has requested from the government a complete and un-redacted copy of all of his medical and mental health records prepared as a result of or during his detention at any site, including Guantanamo Bay Naval Base, dating from the time of his capture by the United States military to the present. However, to date, Mr. Ali has neither received nor been permitted to examine his own medical records. Meanwhile,

the prosecution has been given full access to his records for the purposes of preparing its case for trial and redacting discoverable information.

The continued denial of Mr. Ali's right of access to his own records and their possession and use by the prosecution violates Mr. Ali's constitutional, statutory and common law rights. First, Mr. Ali has rights to a complete copy of his medical records under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, under R.M.C. 701 and *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), and under the Health Insurance Portability and Accountability Act of 1996, P.L., 104-191 ("HIPAA"), and accompanying regulations. Second, the prosecution has no legitimate interest in Mr. Ali's medical records. The government's continued possession and use of his personal and private records violates Mr. Ali's constitutional right of privacy as described in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001), as well as his statutory right under HIPAA's Privacy Rule, which limits disclosure of his protected health information.

Most importantly, given that this is a capital prosecution, Mr. Ali must be permitted to develop and present evidence in mitigation. The Supreme Court has defined mitigating evidence in the most expansive terms as "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586 (1978). The Commentary to Guideline 10.7 of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases emphasizes the importance of gathering records including those documenting medical and mental health treatment in order to develop and present evidence in mitigation. The government's

decision to deny Mr. Ali access to these records violates the Eighth and Fourteenth Amendments thereby threatening the legitimacy of these proceedings.

**4. Burden and Standard of Proof:** As the moving party, the burden of persuasion lies with the defense. In addition, the defense bears the burden of proof on any question of fact. This burden is met by a showing of a preponderance of the evidence. R.M.C. 905(c).

**5. Facts:**

- a. Mr. Ali was apprehended in Karachi, Pakistan on 29 April 2003. Since that time he has been held in the custody of or at the direction of the United States. He has been detained at the Guantanamo Bay Naval Base since September, 2006. Prior to his transfer to Guantanamo Bay, Mr. Ali was held by the CIA in various “black sites.”
- b. During his time in the custody of both the CIA and Department of Defense, Mr. Ali has been examined, observed, treated and medicated on many occasions by medical doctors, dentists, psychiatrists, psychologists, and possibly other medical professionals.
- c. At no time has Mr. Ali been permitted to review or examine any of his medical records prepared as a result of these examinations.
- d. On 2 May 2008, Joseph Benkert, the Deputy Assistant Secretary of Defense for Global Security Affairs, issued a “Memorandum for Commander, U.S. Southern Command Convening Authority, Office of Military Commissions” (“Benkert Memo”) that set rules for accessing the medical records of the detainees, including those of Mr. Ali. (**Attachment A.**)
- e. The Benkert Memo cites *Medical Program Support for Detainee Operations*, DoD Instruction 2310.08E § 4.4 (June 6, 2006), for the proposition that “Health care personnel charged with the medical care of a detainee shall safeguard patient confidences and privacy within the constraints of the law. Under U.S. and international law and medical practice standards, no person enjoys absolute confidentiality of his or her medical information. Detainee medical records may be released for any lawful law enforcement, intelligence, or national security-related purpose.” Benkert Memo 1(a) (paraphrasing DoD Directive 2310.08E section 4.4).
- f. The Benkert Memo further asserts that “Prosecutors with the Office of Military Commissions (OMC) have a need or duty to review certain records in the

- possession, custody, or control of the government, including detainee medical records, in order to review cases prior to potential prosecution, make recommendations to the Convening Authority, prepare cases for trial, and provide discoverable information to the defense under the Rules for Military Commissions and other authorities.” Benkert Memo 1(b).
- g. Based on these assertions, the Benkert Memo directs that the first step in the procedure for obtaining and reviewing the medical records of the detainees, including those of Mr. Ali, is that “The OMC-Prosecutor (OMC-P) counsel (“prosecutor”) will make a written request (electronically or by mail) to the Joint Task Force-Guantanamo (JTF-GTMO) medical unit commander through the JTF-GTMO Office of the Staff Judge Advocate to screen a particular detainee’s medical records in order to prepare for trial and/or comply with discovery obligations.” Benkert Memo 2(a).
  - h. After the medical unit commander transmits the detainee’s medical records to the prosecution, according to the Benkert Memo, the “prosecutor conducting the screening will identify any information within the medical records that the prosecutor deems relevant and necessary to comply with the government’s discovery or other prosecutorial obligations.” Benkert Memo 2(b).
  - i. Once the prosecutor identifies parts of the detainee’s medical records “that the prosecutor deems relevant and necessary to comply with the government’s discovery or other prosecutorial obligations,” the prosecutor requests certified copies of those sections from the medical unit commander. Benkert Memo 2(c).
  - j. After receiving copies of the purportedly relevant parts of the detainee’s medical records, “the prosecutor will be permitted to use and/or distribute the medical records as authorized by law, subject to applicable classification and release rules.” Benkert Memo 2(e).
  - k. If the medical unit commander objects to any part of a prosecutor’s request for the detainee’s medical records, the detainee’s records may be submitted to the Military Judge for an *in camera* inspection. Benkert Memo 2(d)(2); R.M.C. 703(f)(4)(C).
  - l. The procedure laid out by the Benkert Memo “does not address medical or mental health records covered by Military Commission Rule 706 (Inquiry into the mental capacity or mental responsibility of the accused) or Military Commission Rule of Evidence 513 (Psychotherapist-patient privilege).” Benkert Memo 1(c).
  - m. In a 15 May 2008 Memorandum to the JTF-GTMO Commander, Captain Bruce C. Meneley, Commander of the JTF-GTMO Joint Medical Group (JMG), expressed concern that the Benkert Memo “might only provide the JMG authorization to enable prosecutors to screen medical records, and not mental health records.” *See* Cpt. Meneley, Memorandum for Commander, JTF-

- n. Based on his articulated concerns regarding the scope of the Benkert Memo and the protections granted under M.C.R.E. 513 to confidential communications between a detainee and a psychotherapist, Captain Meneley declined to release the detainees' mental health records for screening by the prosecution. *See id.*, at ¶ 5.
- o. In a 29 May 2008 Memorandum to the Convening Authority, Brigadier General Gregory J. Zanetti confirmed that the JMG would not release the detainees' mental health records to the prosecution for screening. Brig. Gen. Zanetti, Memorandum for Office of Military Commissions, Office of Convening Authority Re: Disclosure of Potentially Privileged Mental Health Records (May 29, 2008) (**Attachment C**).
- p. On 5 June, the co-accused were arraigned. During the arraignment, counsel for Mr. Bin al Shibh and the Military Judge discussed whether Mr. Bin al Shibh's medications affected his competency. This discussion was censored by the Security Officer. Members of the press were informed by military spokespersons that the redactions were necessary under HIPAA's privacy protections. *See*, PBS NewsHour Interview of Carol Rosenberg, (June 5, 2008), (tr. avail. at [www.pbs.org/newshour/bb/terrorism/jan-june08/gitmo\\_06-05.html](http://www.pbs.org/newshour/bb/terrorism/jan-june08/gitmo_06-05.html)).
- q. On 19 June 2008, Mr. Ali, through counsel, requested a copy of his medical records through the Staff Judge Advocate, Joint Task Force Guantanamo. In support of his request, he executed a signed HIPAA waiver. A representative from the SJA responded by sending Mr. Ali's counsel a copy of the Benkert Memo as well as General Zanetti letter confirming that mental health records would not be released to the prosecution. (**Attachment D**).
- r. On 3 July 2008, Mr. Ali, through counsel submitted a discovery request to the prosecution which included a request for release of his medical and mental health records. The prosecution has not produced any medical, dental, or mental health records in response to this request.
- s. On 22 July 2008, the Military Judge conducted an in camera review of Mr. Bin al Shibh's medical records.
- t. On 24 July 2008, the Military Judge notified prosecution and defense counsel by e-mail that the prosecution's "proposed summaries and redacted material were not a sufficient alternative to the ordered discovery of the material in question." The Military Judge then "directed that the material be returned to the prosecution with instructions on how the summaries could be augmented in order to become a sufficient alternative to full disclosure of the material in question." E-mail from Lt. Col. Sowder to All Counsel (July 24, 2008).

- u. To date, neither Mr. Ali nor any of his standby counsel or legal advisors has been provided with or permitted to review any of his medical records.
- v. Mr. Ali requires a complete copy of his medical, dental, and mental health records to adequately prepare for his trial. This includes records of all examinations, observations, treatment, and medications of any kind, at any place of detention, since the time of his arrest on 29 April 2008.
- w. Mr. Ali's standby counsel and civilian legal advisors also require complete copies of the above-described records to be able to adequately advise and assist Mr. Ali.

## **6. Law and Argument**

### **Mr. Ali is entitled to his own medical records**

Mr. Ali's right to a complete copy of his medical records arises from several distinct sources. First, Mr. Ali is entitled to a complete copy of his medical records under *Brady v. Maryland*, 373 U.S. 83 (1963). There, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87 (1963). The duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and it covers information "known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). Where, as here, the accused faces the death penalty, the Supreme Court has spoken of relevant mitigating evidence "in the most expansive terms." *Tennard v. Dretke*, 542 U.S. 274 (2004). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (internal quotations omitted). Information contained within Mr. Ali's medical and mental health records fall squarely within the definition of mitigating evidence.

Second, Mr. Ali is entitled to a complete copy of his medical records under R.M.C. 701 and *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which together require production of records that are relevant and helpful to the defense.

Finally, Mr. Ali is entitled to a complete copy of his medical records under HIPAA and its regulations, which provide individuals a right of access to their own health information.

**Capital cases required heightened procedural protections to ensure a reliable sentencing determination.**

Capital prosecutions require the most exacting standards to ensure fairness to the accused. “[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because “death is different,” the United States Constitution requires that “extraordinary measures [be taken] to insure that” Mr. Ali “is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring)). Indeed, “[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part)).

The Supreme Court has applied this heightened level of procedural protections to protect the reliability of the proceedings. “To insure that the death penalty is indeed

imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that *tended* to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.” *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's “duty to search for constitutional error with painstaking care is never more exacting than in a capital case.”) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

To achieve reliability in sentencing, the fact finder must be permitted to consider both aggravating and mitigating factors in exercising their individual moral judgment regarding whether the death penalty should be imposed. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (sentencer must be able to consider and give effect to mitigation evidence), *overruled on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2002). “Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.” *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

The development and presentation of mitigation evidence is fundamental to reaching this constitutionally required individualized determination. Consequently, “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

There is no requirement that Mr. Ali demonstrate a nexus between the requested records and the charged offenses. *See Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004). Mr. Ali is constitutionally entitled to his records because they reflect aspects of his character and record that he may argue warrant imposing a sentence less than death. *See Lockett*, 438 U.S. at 604. The records will be helpful to Mr. Ali and his counsel and defense team in investigating, evaluating, and presenting evidence regarding the impact of his prolonged detention in isolation as well as the impact of his treatment and interrogation. Further, the records may open up avenues of investigation providing leads to additional mitigation evidence.

**Mr. Ali is constitutionally entitled to his medical records as exculpatory evidence.**

In *Brady*, the U.S. Supreme Court held that the suppression of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment. *See also Youngblood v. West Virginia*, 547 U.S. 867, 869–870 (2006) (holding that “[a] *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused,” and that “the *Brady* duty extends to impeachment evidence as well as exculpatory evidence”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (“It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.”). In the capital context, evidence is material to punishment when it is mitigating. Mitigation encompasses any information about Mr. Ali that could be presented to support the argument that a death sentence is inappropriate. *See, Lockett*, 438 U.S. at 604.

Specific Rules for Courts-Martial and the Rules for Military Commissions are premised on *Brady*. Both sets of Rules also require the fact finder to consider mitigation

evidence in the broadest possible terms. Rule for Courts Martial 701, pertaining to "evidence favorable to the defense," specifically incorporates the protections of *Brady*:

The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

- (A) Negate the guilt of the accused of an offense charged;
- (B) Reduce the degree of guilt of the accused of an offense charged; or
- (C) Reduce the punishment.

R.C.M. 701(a)(6). This provision implements *Brady's* holding that an individual's constitutionally guaranteed due process right is violated where the prosecution withholds information requested by the defense that is material to the issue of guilt or of sentence. *United States v. Williams*, 50 M.J. 436, 440 (C.A.A.F. 1999). The parallel Military Commissions Rule, R.M.C. 701, is a nearly verbatim replication of R.C.M. 701, and by extension, incorporates the adoption of the *Brady* rule.

In addition to the constitutional due process rights recognized in *Brady*, the Uniform Code of Military Justice (U.C.M.J.) provides the accused with even broader discovery rights than those available under the federal rules. *United States v. Reece*, 25 M.J. 93, 94-95 (C.M.A. 1987) ("Military law provides a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts."). For instance, Congress specifically provided in Article 46 of the U.C.M.J. that "trial counsel, defense counsel and court-martial shall have equal opportunity to obtain witnesses and other evidence." Art. 46, U.C.M.J., 10 U.S.C. § 846. These expanded discovery rights were incorporated into R.C.M. 701 and 703 *see Reece*, 25 M.J. at 94-95 and are equally preserved in the Military Commission Rules at R.M.C. 701 and 703.

Section 949j(d) of the Military Commissions Act also provides broad discovery rights to exculpatory evidence by requiring that:

(1) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Where exculpatory evidence is classified, the accused shall be provided with an adequate substitute in accordance with the procedures under subsection (c).

(2) In this subsection, the term “evidence known to trial counsel,” in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

10 U.S.C. § 949j(d).

Consistent with Supreme Court death penalty jurisprudence, the structure of a capital sentencing proceeding both under the Rules for Courts-Martial and Military Commission Rules contemplates the presentation of mitigation evidence and requires the panel to consider such evidence in reaching its sentencing determination. Rule for Courts Martial 1004 sets out the procedure for the trial of capital cases. Rule for Military Commissions 1004 provides the corresponding Commissions’ procedures. Both Rules provide “the accused shall be given broad latitude to present evidence in extenuation and mitigation.” Further, both Rules require the Military Judge to instruct the members “that they must consider all evidence in extenuation and mitigation before they may adjudge death.”

Mr. Ali’s medical records may shed light on the conditions of his confinement and treatment, the effects of any of these conditions on his physical and mental states during his detention, and the circumstances under which he made any statements to government investigators. Each of these factors is likely to be material at a guilt or sentencing phase of Mr. Ali’s trial. Further, any evidence relating to these factors is likely to constitute evidence mitigating against a death sentence. As a result, “the government has the obligation to turn over” Mr. Ali’s medical records, as “evidence in its

possession that is both favorable to the accused and material to guilt or punishment.”

*Ritchie*, 480 U.S. at 57. This obligation is amplified by the expanded discovery obligations of Article 46 of the U.C.M.J., as incorporated in the R.M.C., and by the broad discovery rights granted in section 949j(d) of the Military Commissions Act.

**Mr. Ali is entitled to his own medical records as evidence material to his defense.**

Mr. Ali’s medical records can be anticipated to document his past and present physical and mental conditions during his detention, as well as any medical or health care treatment or service, and are material to his defense at both the trial and any sentencing phases of this proceeding. The Rules for Military Commissions compel production of a complete and un-redacted copy of Mr. Ali’s medical records.

R.M.C. 701 requires that:

[a]fter service of charges, upon a request of the defense, the Government shall permit the defense counsel to examine . . . (2) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

R.M.C. 701(c)(2).

R.M.C. 701(c)(3) compels production of:

The contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.

As provided in the discussion notes to these sections, the definition of the phrase “material to the preparation of the defense” is governed by *United States v. Yunis*, 867

F.2d 617 (D.C. Cir. 1989). In *Yunis*, the District Court used a three-step procedure to evaluate materiality:

[F]irst, inquiring as to whether the evidence was relevant, second, if relevant, determining if it was material, and finally, balancing the defendant's need for access to the information in the preparation of his defense against the government's need to keep the information from disclosure by reason of its potential harm to our country's national security interests.

*Yunis*, 867 F.2d at 620. The Court of Appeals, noting the confusion over the difference between relevancy and materiality, held that evidence is material when it “is relevant *and* helpful to the defense of the accused.” *Id.* at 622 (emphasis in original).

The materiality threshold is often a low one. The *Yunis* Court noted that “[t]he requirement that statements made by the defendant be relevant has not generally been held to create a very high threshold. Generally speaking, the production of a defendant's statements has become practically a matter of right even without a showing of materiality.” *Id.* at 621–622. Similarly, “a defendant's access to his own statements in the possession of the government has generally been granted upon a minimal showing of relevance.” *Id.* at 622; *see also United States v. Haldeman*, 559 F.2d 31, 74 n.80 (D.C. Cir. 1976) (holding that production of written or recorded statements made by the defendant and recorded testimony of the defendant before a grand jury was practically a matter of right even without a showing of materiality); *United States v. Percevault*, 490 F.2d 126, 129–130 (2d Cir. 1974) (holding that a statement of the defendant in the hands of the prosecution “is obviously of such vital importance to the defense that fairness compels its disclosure,” and that “[c]ommon sense and judicial experience teach that a defendant's prior statement in the possession of the government may be the single most crucial factor in the defendant's preparation for trial”); *Xydas v. United States*, 445 F.2d

660, 664 n.9 (D.C. Cir. 1971) (holding that discovery under Rule 16(a), the federal rule analogous to R.M.C. 701, was “as a rule, almost automatically available to the defendant”); *United States v. Bryant*, 439 F.2d 642, 649 n.14 (D.C. Cir. 1971) (noting that “Professor Wright has surveyed the cases and concluded that ‘while the subdivision is cast in discretionary terms it gives the defendant virtually an absolute right to discovery of the materials there listed.’”) (citations omitted); *United States v. Crisona*, 416 F.2d 107, 115 (2d Cir. 1969) (holding that “weighty scholarly authority supports the proposition that withholding a defendant's statement should be the exception, not the rule”).

Under a straightforward analysis of the Military Commissions rules and *Yunis*, Mr. Ali is entitled to his medical and mental health records. First, Mr. Ali’s medical records may shed light on the conditions of his detention, on his physical and mental states during his detention, and consequently, on the circumstances in which he made any statements to government investigators. Because the circumstances surrounding any statements Mr. Ali made to government investigators may be a key issue in this case, Mr. Ali’s medical records are relevant, helpful to his defense, and therefore material. Second, any statements Mr. Ali made to medical personnel during his detention, for the purposes of medical treatment or otherwise, must be produced “practically a matter of right even without a showing of materiality.” *Yunis*, 867 F.2d at 621-22. Moreover, Mr. Ali’s medical records are his, not the prosecution’s, much in the same way a defendant’s own statements are his. Thus, only a minimal showing of relevance is necessary to support compulsion of their production.

**Mr. Ali is entitled to his medical records under the terms of HIPAA and the Privacy Rule.**

The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. § 1320d-1, was enacted to protect individuals’ privacy rights in their medical records. *South Carolina Med. Ass’n v. Thompson*, 327 F.3d 346, 348 (4th Cir. 2003) (explaining that HIPAA was enacted in recognition of “the importance of protecting the privacy of health information”). Regulations promulgated to carry out HIPAA’s privacy goals, collectively known as the “Privacy Rule,” apply to all “protected health information” held or transmitted by a “covered entity.” 45 C.F.R. § 164.502(a) (2007). “Protected health information” is information that relates to the individual’s past, present or future physical or mental health or condition, or to the provision of health care to the individual, and that identifies the individual. 45 C.F.R. § 164.501 (2007). Any provider of medical or health services who transmits any health information in electronic form is a “covered entity.” 45 C.F.R. § 160.103 (2007).

Access to one’s own medical records is an essential element of the privacy rights protected by HIPAA. *See, e.g., Webb v. Smart Document Solutions*, 499 F.3d 1078, 1080-84 (9th Cir. 2007) (noting that the broad right of access provided in the Privacy Rule implemented the Congressional directives in HIPAA). The Privacy Rule provides that “an individual has a right of access to inspect and obtain a copy of protected health information about the individual.” 45 C.F.R. § 164.524(a)(1) (2007). In addition to a person’s right of access to their own medical records, the Privacy Rule requires that access be either granted or denied (for one of a limited set of reasons) no more than thirty days after the request is made. 45 C.F.R. § 164.524(b) (2007).

Mr. Ali’s medical records, as information relating to his “past, present or future

physical or mental health or condition” and to the government’s provision of health care to him, clearly constitute “protected health information” under HIPAA and the Privacy Rule. 45 C.F.R. § 164.501 (2007). Any government medical or health providers who transmitted any of Mr. Ali’s health information in electronic form meet the Privacy Rule’s definition of “covered entity.” 45 C.F.R. § 160.103 (2007). As a result, under HIPAA and the Privacy Rule, Mr. Ali has “a right of access to inspect and obtain a copy” of his medical records. 45 C.F.R. § 164.524(a)(1) (2007). Through counsel, Mr. Ali has requested that the JMG provide him an opportunity to view and copy his records. He has signed the appropriate waivers giving his standby counsel the right to receive his records. Yet, Mr. Ali has been denied all access to his personal medical and health care records, in violation of both HIPAA and the Privacy Rule.

**The prosecution is not entitled to use Mr. Ali’s medical records for redaction, discovery screening, or trial preparation.**

While Mr. Ali has been unable to see years’ worth of medical records, apparently the prosecution has had virtually unfettered access to them. The prosecution has no legitimate interest in Mr. Ali’s medical records that would justify their current procedures. In fact, the prosecution’s current use of Mr. Ali’s medical records for their own trial preparation and for redaction violates Mr. Ali’s constitutional and statutory rights. The prosecution’s possession and review of Mr. Ali’s medical records violates Mr. Ali’s constitutional right of privacy as described in *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). The prosecution’s use of Mr. Ali’s records also violates Mr. Ali’s statutory right under HIPAA and the Privacy Rule to limit disclosure of his protected health information.

**Mr. Ali has a constitutional privacy interest in his medical records that prevents their screening and use by the prosecution.**

The Constitution protects the privacy of personal health information. In *Whalen*, the Court recognized that an individual's interest in avoiding disclosure of personal information falls within the constitutionally protected "zone of privacy." 429 U.S. at 599. *See also Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 529 (1990) (Blackmun, J., dissenting) (quoting *Whalen* and noting that "[t]he zone of privacy long has been held to encompass an individual interest in avoiding disclosure of personal matters."); *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 457 (1977) (citing *Whalen* for the proposition that "[o]ne element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters").

The Supreme Court, recognizing the intensely private nature of personal health information, has further held that the zone of privacy described in *Whalen* encompasses an individual's medical records. *Ferguson*, 532 U.S. at 78. Specifically, the Court held both that an individual has a reasonable expectation of privacy in personal medical records and that those records "will not be shared with nonmedical personnel without [the patient's] consent." *Id.* As one court framed the issue:

There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection. Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life. It has been recognized in various contexts that medical records and information stand on a different plane than other relevant material. For example, the Federal Rules of Civil Procedure impose a higher burden for discovery of reports of the physical and mental condition of a party or other person than for discovery generally. Medical files are the subject of a specific exemption under the Freedom of Information Act. This difference in treatment reflects a recognition that information concerning one's body has a special character.

*United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (internal quotations omitted); *see also United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1137-38 (9th Cir. 2008) (holding that individuals have a constitutionally protected interest in avoiding disclosure of personal matters, including medical information); *Citizens for Health v. Leavitt*, 428 F.3d 167, 177 (3d Cir. 2005) (affirming that the right to medical privacy “is legally cognizable under the Due Process Clause of the Fifth Amendment”); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (observing that “there are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over,” and concluding as a result that “the right to confidentiality includes the right to protection regarding information about the state of one’s health”); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (noting that “[o]ne can think of few subject areas more personal and more likely to implicate privacy interests” than medical records); *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (noting that “individuals have a right protected under the Due Process Clause of the Fifth or Fourteenth Amendments in the privacy of personal medical information and records”); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (agreeing that “the right to confidentiality includes the right to protection regarding information about the state of one’s health”).

Under the well-established federal precedent of *Whalen* and *Ferguson*, Mr. Ali has a constitutional privacy interest in his medical records. Recognition of that right requires that medical personnel not share his personal medical records with non-medical personnel without his consent. Mr. Ali has never consented to the release of his medical records to the prosecutors, whether for the purpose of reviewing them, redacting them, or

using them to prepare for putting him on trial. Quite the contrary; Mr. Ali vigorously objects to any such use of his records by the prosecution. The prosecution's continued possession and use of Mr. Ali's medical records violate Mr. Ali's well-recognized constitutional rights, as described in *Whalen* and *Ferguson*.

**Mr. Ali has a statutory privacy interest in his medical records that prevents their screening and use by the prosecution.**

The use of Mr. Ali's medical records also violates HIPAA. As described above, the Privacy Rule issued under HIPAA applies to all "protected health information" held or transmitted by a "covered entity." 45 C.F.R. § 164.502(a) (2007). A primary purpose of the Privacy Rule is to define and limit the circumstances in which an individual's protected health information may be used or disclosed by covered entities. As one commentator phrased it, the Privacy Rule was designed to "establish a detailed, minimal threshold or floor designed to avoid improper dissemination" of medical records.

Charlotte A. Hoffman & Tamela J. White, *The Privacy Standards under the Health Insurance Portability and Accountability Act: A Practical Guide to Promote Order and Avoid Potential Chaos*, 106 W. Va. L. Rev. 709, 712 (2004).

The Privacy Rule specifically forbids a covered entity from disclosing protected health information except to the individual or to others in certain limited circumstances. 45 C.F.R. § 164.502(a) (2007) ("A covered entity may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter."). In the limited set of permitted disclosures, the Rule permits but does not require disclosure of protected health information in response to a statute, court order, or subpoena; for certain limited law-enforcement and national security purposes; and to protect the health and safety of inmates and prison officials. 45 C.F.R. §

164.502(a)(vi) (2007); 45 C.F.R. § 164.512 (2007).

The Privacy Rule does not permit disclosure “to screen a particular detainee’s medical records in order to prepare for trial and/or comply with discovery obligations,” as contemplated by the Benkert Memo. In the absence of a specific exemption, the general rule that the “covered entity may not use or disclose protected health information” controls. 45 C.F.R. § 164.502(a) (2007). Neither the law enforcement nor the national security exemptions apply here: Mr. Ali is not a fugitive hiding in a hospital, nor are the prosecutors engaged in clandestine intelligence activities of national security interest. Mr. Ali has a statutory privacy interest in his own medical records, granted by HIPAA and the Privacy Rule. Permitting the prosecution to use Mr. Ali’s records for their own trial preparation, without any established regulatory exception, constitutes an “improper dissemination” of exactly the sort the Privacy Rule was enacted to prevent.

**The prosecution has no legitimate interest in Mr. Ali’s medical records.**

The prosecution has no legitimate interest in Mr. Ali’s medical records. No legal foundation is provided for the bare assertion in the Benkert Memo that the prosecution has a “need or duty” to use Mr. Ali’s medical records to “review cases prior to potential prosecution, make recommendations to the Convening Authority, prepare cases for trial, and provide discoverable evidence to the defense.” Benkert Memo 1(b). In fact, none of the supporting references cited in the Benkert Memo, nor the general legal principles to which it refers, give rise to a prosecutorial entitlement to use Mr. Ali’s records for trial preparation or redaction. *See, e.g., DoD Law of War Program, DoD Directive 2311.01E § 5.2 (May 9, 2006), reissuing DoD Law of War Program, DoD Directive 5100.77 (December 9, 1988) (authorizing the Undersecretary of Defense for Policy to provide*

development and coordination for major Department of Defense policies and plans); *The Department of Defense Detainee Program*, DoD Directive 2310.01E § 5.1, September 5, 2006 (authorizing the Undersecretary of Defense for Policy to review, coordinate and approve policies related to the detainee program); *Medical Program Support for Detainee Operations*, DoD Instruction 2310.08E § 4.4 (June 6, 2006) (directing health care personnel to safeguard medical information, record disclosures for purposes other than treatment, and seek command authorization on disclosure when there is a dispute). The Benkert Memo itself only asserts the legal principle that “[d]etainee medical records may be released for any lawful law enforcement, intelligence, or national security-related purpose.” Benkert Memo 1(a). Prosecution trial preparation is notably absent from this list, and falls into none of the enumerated categories. As a result, the prosecution, even under the analysis provided by the Benkert Memo, lacks any recognizable legitimate interest in Mr. Ali’s medical records.

7. **Request for Oral Argument:** The Defense requests oral argument to allow for thorough consideration of the issues raised by this motion. R.M.C. 905(h) provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.”

8. **Request for Witnesses:** None.

9. **Conference with Opposing Counsel:** The Defense conferred with the Prosecution regarding the relief requested in this motion. The Prosecution objects to the motion.

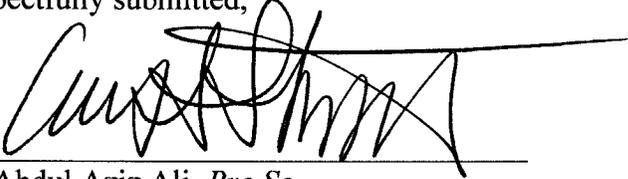
10. **Additional Information:** None.

11. **Attachments:**

- a. Joseph Benkert, Memorandum for Commander, U.S. Southern Command Convening Authority, Office of Military Commissions Re: Access to Medical Detainee Records by the Office of Military Commissions (May 2, 2008).
- b. CAPT Bruce Meneley, Memorandum for Commander, JTF-Guantanamo Re: Disclosure of Potentially Privileged Mental Health Records, at ¶ 2 (May 15, 2008).
- c. Brig. Gen. Gregory Zanetti, Memorandum for Office of Military Commissions, Office of Convening Authority Re: Disclosure of Potentially Privileged Mental Health Records (May 29, 2008).
- d. Email from SJA representative in response to Mr. Ali's request for medical records and submission of a HIPAA waiver.

Respectfully submitted,

BY:

  
Ali Abdul Aziz Ali, *Pro Se*

LCDR Brian Mizer, JAGC, USN  
MAJ Amy Fitzgibbons, JA, USAR

***Standby Counsel for Mr. Ali***  
Office of the Chief Defense Counsel  
Office of Military Commissions  


Jeffery Robinson  
Amanda Lee  
Schroeter Goldmark & Bender  
***Advisory Civilian Counsel***  


# **Attachment A**



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE  
2900 DEFENSE PENTAGON  
WASHINGTON, D.C. 20301-2900

GLOBAL SECURITY  
AFFAIRS

MAY - 2 2008

MEMORANDUM FOR COMMANDER, U.S. SOUTHERN COMMAND  
CONVENING AUTHORITY, OFFICE OF MILITARY  
COMMISSIONS

SUBJECT: Access to Detainee Medical Records by the Office of Military  
Commissions

References:

- DoD Directive 5100.77, "DoD Law of War Program," December 9, 1988
- DoD Directive 2310.01E, "The DoD Detainee Program," September 6, 2007
- DoD Instruction 2101.08E "Medical Program Support for Detainee  
Operations," June 6, 2006
- Manual for Military Commissions (MMC), October 16, 2006

1. Background.

- a. Health care personnel charged with the medical care of a detainee shall safeguard patient confidences and privacy within the constraints of the law. Under U.S. and international law and medical practice standards, no person enjoys absolute confidentiality of his or her medical information. Detainee medical records may be released for any lawful law enforcement, intelligence, or national security-related purpose. Whenever health care personnel disclose patient-specific medical information concerning detainees for purposes other than treatment, DoD policy requires health care personnel to record the details of the disclosure, including the specific information disclosed, the person to whom it was disclosed, the purpose of the disclosure, and the name of the medical unit commander approving the disclosure.
- b. Prosecutors with the Office of the Military Commissions (OMC) have a need or duty to review certain records in the possession, custody, or control of the government, including detainee medical records, in order to review cases prior to potential prosecution, make recommendations to the Convening Authority, prepare cases for trial, and provide discoverable information to the defense under the Rules for Military Commission and other authorities. In order to comply with these obligations, the



prosecutors must have access to the relevant and necessary medical records upon request.

- c. This policy does not address medical or mental health records covered by Military Commission Rule 706 (Inquiry into the mental capacity or mental responsibility of the accused) or Military Commission Rule of Evidence 513 (Psychotherapist-patient privilege).
- d. Recognizing the importance of the above interests and obligations, DoD implements the following procedure.

## 2. Procedure.

- a. The OMC-Prosecutor (OMC-P) counsel ("prosecutor") will make a written request (electronically or by mail) to the Joint Task Force-Guantanamo (JTF-GTMO) medical unit commander through the JTF-GTMO Office of the Staff Judge Advocate to screen a particular detainee's medical records in order to prepare for trial and/or comply with discovery obligations. Such request will include the prosecutor's official duties, and affirm that the screening is required for official business related to investigative, trial, or post-trial responsibilities. The prosecutor may only request records of specific detainees relevant to a case to which the prosecutor is assigned for investigative, trial, or post-trial duties. The prosecutor may request to screen all or any part of the medical records.
- b. The medical unit commander will promptly act on the prosecutor's request, but will make the requested records available for screening no later than 10 calendar days after the date the request is received, unless he objects to the request. If requested by the prosecutor, this screening may also take place at the Navy Bureau of Medicine and Surgery in Washington, D.C., or another medical facility selected by the JTF-GTMO medical unit commander. The prosecutor conducting the screening will identify any information within the medical records that the prosecutor deems relevant and necessary to comply with the government's discovery or other prosecutorial obligations.
- c. The prosecutor will submit to the medical unit commander a written request for the production of certified true copies of records containing information identified as relevant and necessary during the screening. Consistent with Rule 703(f) of the Rules for Military Commissions, the request shall set forth factual justification sufficient for the medical unit commander to assess the purpose and propriety of the disclosure. The

medical unit commander shall produce the requested documents within 10 days, unless he objects to the production.

- d. Should a medical unit commander wish to raise any issue with regard to the prosecution's screening request or request for copies, he will do so in writing within 5 days of the prosecution's request.
  - (1) Prior to the referral of charges in the pertinent case, this submission will be made directly to the Convening Authority for Military Commissions who will take such action as she deems appropriate. The medical unit commander will act immediately upon any direction received from the Convening Authority.
  - (2) After the referral of charges, any objection by the medical unit commander will be processed pursuant to Rule 703(f)(4)(C) of the Rules for Military Commissions. The medical unit commander will act immediately upon any direction received from a military judge.
- e. Upon receipt of the records described in paragraph c above, the prosecutor will be permitted to use and/or distribute the medical records as authorized by law, subject to applicable classification and release rules. Before such records are provided to the defense or released publicly (if at all), the prosecutor shall redact the names of all health care providers or other JTF-GTMO personnel within the records.
- f. To the extent required by DoD policy, the custodian of records for the requested medical records will record the details of the disclosure, including the specific information disclosed, the person to whom it was disclosed, the purpose of the disclosure, and the name of the medical unit commander approving the disclosure.

  
Joseph Benkert

# **Attachment B**



DEPARTMENT OF DEFENSE  
HEADQUARTERS, JOINT TASK FORCE GUANTANAMO  
U.S. NAVAL BASE, GUANTANAMO BAY, CUBA  
APO AE 09360

JTF-GTMO-JMG

15 May 2008

MEMORANDUM FOR Commander, JTF-Guantanamo

SUBJECT: Disclosure of Potentially Privileged Mental Health Records

References: (a) USD-P Policy 2 May 2008  
(b) M.C.R.E. 513

1. On 2 May 2008, USD-P, Joe Benkert, signed into effect a policy for access to detainee medical records by the Office of Military Commissions, reference (a).
2. On 6 May 2008, after carefully reviewing the policy, as Commander, Joint Medical Group (JMG), I expressed concern to the Staff Judge Advocate regarding reference (a), i.e., which states, "This policy does not address medical or mental health records covered by...Military Commission Rule of Evidence 513 (Psychotherapist-patient privilege)." It seemed that reference (a), might only provide the JMG authorization to enable prosecutors to screen medical records, and not mental health records.
3. On 8 May 2008, prosecutors in the cases of ISNs 37, 39, 753, 766, and 1453 were provided medical records, excluding mental health records, pending more specific guidance on the access and releaseability of mental health records, as directed by reference (a).
4. Reference (b), indicates that a detainee patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the detainee patient and a psychotherapist or an assistant to the psychotherapist if the communication was made for the purpose of facilitating diagnosis or treatment of the patient detainee's mental or emotional condition. Reference (b), para (b)(4) defines a confidential communication as one "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication." Reference (b), para (c), states, "The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient."
5. I cannot definitively determine that JMG mental health records are not based on confidential communications by the detainee patient to the mental health care providers, as defined in reference (b), para (b)(4). As such, consistent with references (a) and (b), the mental health records concerning the above detainees will be withheld from disclosure to the Office of Military Commissions.

SUBJECT: Disclosure of Potentially Privileged Mental Health Records

6. Should you have any questions, I can be reached at 72002.

A handwritten signature in black ink that reads "BC Meneley". The letters are cursive and fluid.

BRUCE C. MENELEY  
Captain, U.S. Navy  
Commander, Joint Medical Group

# **Attachment C**



DEPARTMENT OF DEFENSE  
HEADQUARTERS, JOINT TASK FORCE GUANTANAMO  
U.S. NAVAL BASE, GUANTANAMO BAY, CUBA  
APO AE 09360

JTF-GTMO-DCDR

29 May 2008

MEMORANDUM FOR Office of Military Commissions, Office of the Convening Authority

SUBJECT: Disclosure of Potentially Privileged Mental Health Records

References: (a) ASD Memo 2 May 2008  
(b) M.C.R.E. 513

1. Consistent with the reasons articulated in the attached and pursuant to references (a) and (b), JTF-Guantanamo will withhold mental health records of detainees identified in the Joint Medical Group Commander's memorandum.
2. Should your staff have any questions, they may contact Captain Patrick M. McCarthy, JTF-Guantanamo, Staff Judge Advocate at DSN 660-9911.



GREGORY J. ZANETTI  
Brigadier General, US Army  
Deputer Commander

Encl: JTF-GTMO-JMG Memorandum 15 May 2008

# **Attachment D**

**From:** [Fitzgibbons, Amy, MAJ, DoD OGC](#)  
**To:** [REDACTED]  
**Subject:** FW: Medical Records Request Process  
**Date:** Friday, August 29, 2008 11:28:43 AM  
**Attachments:** [Access to Detainee Medical Records by OMC 2 May 08.pdf](#)  
[Withholding of Detainee Mental Health Records.pdf](#)

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**From:** [REDACTED]  
**Sent:** Thursday, June 19, 2008 1:30 PM  
**To:** Mizer, Brian, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD, OGC  
**Cc:** Fitzgibbons, Amy, MAJ, DoD OGC; Fitzgibbons, Amy, MAJ  
**Subject:** Medical Records Request Process

LCDR Mizer,  
Here are the access to medical records documents.

v/r  
Michelle A. Hansen  
MAJ, JA  
Assistant Staff Judge Advocate  
JTF-GTMO

[REDACTED]

UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;  
WALID MUHAMMAD SALIH MUBARAK  
BIN 'ATTASH;  
RAMZI BINALSHIBH;  
ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED AL HAWSAWI**

ORDER

15 SEPTEMBER 2008

1. This Order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC).

2. Accordingly, IT IS HEREBY ORDERED:

That the Commander, Joint Task Force – Guantanamo Bay, Cuba (JTF-GTMO) shall provide to the Prosecution, for release to the standby counsel for Ali Abdul Aziz Ali, any and all medical records in the possession of JTF-GTMO related to Ali Abdul Aziz Ali, including any mental health records.



Ralph H. Kohlmann  
Colonel, U.S. Marine Corps  
Military Judge