

FILED WITH THE
COURT SECURITY OFFICER
CS0 _____
DATE: _____

No-07 M 5

IN THE SUPREME COURT OF THE UNITED STATES

In re Abdul Hamid Al-Ghizzawi,

Petitioner.

EMERGENCY MOTION TO EXPEDITE PETITION
FOR ORIGINAL HABEAS CORPUS OR,
IN THE ALTERNATIVE FOR EMERGENCY INJUNCTION TO
MAINTAIN STATUS QUO BY COMPELLING PROVISION
OF LIFE-SAVING MEDICAL TREATMENT

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I. INTRODUCTION

Petitioner, Abdul Hamid Al-Ghizzawi respectfully moves this Court for an Order expediting his petition for habeas corpus within the original jurisdiction of this Court, or in the alternative granting him an emergency affirmative injunction to compel the United States Government to provide him adequate medical care and to provide his complete medical file to his counsel in order to enable his counsel to provide adequate representation in these proceedings, such relief necessary to preserve the status quo, to wit, that he not suffer death as a result of inadequate medical care during the pendency of this proceeding. In support of this motion Petitioner states:

Petitioner Abdul Hamid Al-Ghizzawi ("Mr. Al-Ghizzawi") has been held prisoner at the United States military's Guantánamo Bay detention facility since approximately March 2002. After this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the government organized Combatant Status Review Tribunals (CSRT's), ostensibly for the purpose of establishing a meaningful legal process for determining whether those men imprisoned at Guantánamo Bay were properly held as "enemy combatants." Despite the fact that his *original* CSRT panel found him not to be an enemy combatant, Petitioner is still held, without charge, and without due process of law. The CSRT process has been exposed as

a mockery and an affront to this nation's tradition of adherence to law.

Lieutenant Colonel Stephen Abraham of the United States Army Reserve, one of the panel members from Al-Ghizzawi's original CSRT, testified before the House Armed Services Committee of Congress on July 26th 2007, and described the evidence that has kept Mr. Al-Ghizzawi in prison all these years as "garbage." (*Upholding the Principles of Habeas Corpus for Detainees, 2007: Hearing before the House Armed Services Committee, 110th Cong., 1st Sess. (2007)* (statement of Lieutenant Colonel Stephen Abraham, U.S. Army Reserve)) This "evidence" which Lt. Col Abraham deemed garbage has not only kept Mr. Al-Ghizzawi imprisoned under conditions not fit for living creatures, let alone human beings, but has also been used as an excuse by the government to deny Mr. Al-Ghizzawi medical treatment for his life threatening conditions. Although Lt. Col. Abraham and his fellow panel members found no basis to classify Mr. Al-Ghizzawi as an "enemy combatant," the government refused to accept this finding and convened another CSRT, which, assessing the same "garbage" evidence as Lt. Col. Abraham's CSRT panel, came to the opposite conclusion.

A. PROCEDURAL HISTORY OF THIS CASE

The relevant procedural events in this case may be summarized as follows:

1. Petitioner filed a Petition for Habeas Corpus in the United States District Court for the District of Columbia on December 9, 2005. No action has been taken on that petition and Petitioner's prior request for medical records and medical treatment were denied by the District Court first on October 2, 2006 and again after Petitioner's Motion to reconsider, on November 2, 2006.

2. Petitioner filed an appeal in the United States Court of Appeals for the District of Columbia Circuit seeking his medical records and medical treatment (06-5394). The government filed a motion to dismiss the appeal which has been fully briefed since February 5, 2007. No action has been taken on that motion nor has a further briefing schedule been set for the merits of the appeal.

3. Petitioner filed a Petition under the Detainee Treatment Act or in the alternative a Petition for habeas corpus in the United States Court of Appeals for the District of Columbia Circuit on April 10, 2007 (07-1089). No further action has been taken on that petition.

4. Petitioner filed a Petition for habeas corpus within this Court's original jurisdiction with the United States Supreme Court on July 26, 2007.

II. BACKGROUND

Mr. Al-Ghizzawi was diagnosed with hepatitis B shortly after entering Guantánamo. Mr. Al-Ghizzawi was never told of the diagnosis by the military (it

fell to his counsel to inform him of the diagnosis after the government admitted in an affidavit in the fall of 2006 that Mr. Al-Ghizzawi suffers from both hepatitis B and tuberculosis). In that same self-serving affidavit, the military described the medical facility at Guantánamo in misleadingly positive terms, but amazingly, also admitted that Mr. Al-Ghizzawi has never been treated for his life threatening medical conditions. To justify their cruel and inhuman neglect, the military falsely claimed that Mr. Al-Ghizzawi did not want to be treated. To this day Mr. Al-Ghizzawi has not received any treatment for his life-threatening hepatitis B and tuberculosis, and his counsel, as set forth in detail in her affidavit attached to the Original Petition for Habeas Corpus, describes the rapid and serious deterioration of Mr. Al-Ghizzawi's health over the past year and a half. (Appendix to Petition for Original Habeas, at A286).

Mr. Al-Ghizzawi described to his counsel that prior to getting married he had a blood test that showed positive for hepatitis B. However, he underwent a second blood test and the result was negative for hepatitis B. Mr. Al-Ghizzawi stated that he never had any symptoms of hepatitis B prior to being detained at Guantánamo and that he was in good health at the time of his initial capture. However, as Mr. Al-Ghizzawi languished at Guantánamo his health deteriorated and he began to suspect that he did in fact have hepatitis B. Mr. Al-Ghizzawi's suspicions were confirmed when the government admitted in court documents that it has known since the time that Mr. Al-Ghizzawi arrived at Guantánamo

that he suffers from hepatitis B. (A286)

Mr. Al-Ghizzawi's counsel has attempted to visit him approximately every other month to monitor his deteriorating health in a thus far futile effort to convince his military jailers to provide adequate medical treatment for Mr. Al-Ghizzawi and to move him out of the notorious Camp 6 where the cruel and inhuman isolation conditions of that camp are clearly aggravating Mr. Al-Ghizzawi's already frail state. During counsel's last visit to see Mr. Al-Ghizzawi during the second week of July 2007, Mr. Al-Ghizzawi was in such pain and discomfort that he could barely walk. Mr. Al-Ghizzawi's mental health is also at risk because of the complete isolation he is subjected to in the notorious Camp 6. Mr. Al-Ghizzawi confided to counsel that, in addition to his other maladies, he is now also suffering from mental health issues after more than eight months in total isolation. (Those conditions are also described in counsel's affidavit A 286)

For the first time in the seven visits by counsel since July 2006, Mr. Al-Ghizzawi was unable to meet counsel for a second day of meetings, as planned, because of his ill health. Counsel had intended to finalize the affidavit of Mr. Al-Ghizzawi that she and he had been preparing to advance in his DTA proceeding, but Mr. Al-Ghizzawi was too ill to continue. (Counsel did not learn that Lt. Col. Abraham's declaration implicated her client's CSRT until subsequent to that last visit.)

A. THE LOWER COURTS HAVE IGNORED AL-GHIZZAWI'S PLIGHT

At the district court level, on August 28, 2006 Mr. Al-Ghizzawi petitioned the court for access to his own medical records and records of his medical treatment after counsel returned from her first visit with a signed release for the records from him. Counsel witnessed his medical condition first hand and conferred with two world renowned medical doctors in the area of liver disease (one from the University of Chicago and the other from the University of Berne, Switzerland). The two doctors prepared affidavits which were attached to the Petition and which described in detail the effects of untreated hepatitis B and the state of the art treatments that are available for this disease. Both doctors volunteered to go to Guantánamo and treat Mr. Al-Ghizzawi themselves, and one of the physicians also volunteered to treat Mr. Al-Ghizzawi in his world-famous clinic in Berne, Switzerland. (Exs. A -D) The district court ignored Mr. Al-Ghizzawi's plea and the compelling evidence of his condition, and denied the motion in its entirety finding, incredibly, that counsel had not shown sufficient evidence of "irreparable injury." (2006 WL 2844781)

Mr. Al-Ghizzawi appealed the District Court's decision on November 28, 2006, and the government moved to dismiss the appeal. Although that motion has been fully briefed, no action has been taken on that appeal.

Guantánamo military officials falsely claim that Mr. Al-Ghizzawi does not want to be treated for his life threatening conditions and they therefore have left

him to die in solitary confinement. Ironically, in the case of detainees who do not wish the intervention of medical personnel, the military nonetheless continues to force feed those prisoners who have entered into hunger strikes to protest their unjust detention, in order to keep those men from dying.

Mr. Al-Ghizzawi demands that he receive adequate medical treatment. Mr. Al-Ghizzawi was never informed of the true nature of his medical conditions until his counsel told him in September 2006. Once Mr. Al-Ghizzawi learned of his condition he and counsel have repeatedly asked that he receive adequate medical treatment. Instead of receiving such adequate medical treatment, Mr. Al-Ghizzawi was moved to the total isolation of “super max” camp 6, severely exacerbating his medical condition. Hence, the military's deliberate and calculated actions (and inactions) have dramatically increased the possibility that Mr. Ghizzawi will quite literally die during the pendency of these proceedings if the government is not compelled, immediately, to provide him life-saving treatment.

III. SUMMARY OF ARGUMENT

If Mr. Al-Ghizzawi is to provide meaningful assistance to his counsel and, quite literally, to survive to have his petition heard by this Court, he must be immediately provided with adequate medical treatment.

IV. ARGUMENT

The government's admission that Mr. Al-Ghizzawi has both hepatitis B

and tuberculosis and that he has not been treated for either condition establishes as a *per se* matter that Petitioner is not receiving adequate treatment for his life-threatening illnesses. Hence, Petitioner is compelled to seek immediate judicial redress from this Court to ensure that the government meets his immediate and compelling medical needs while awaiting his petition to be heard by this Court. Because Petitioner has not even been charged with, much less convicted of, a crime, he should be protected by the Due Process Clause. “While the convicted prisoner is entitled to protection only against punishment that is ‘cruel and unusual,’ the pretrial detainee, who has yet to be adjudicated guilty of any crime (or as in this case even charged with any crime) may not be subjected to *any* form of ‘punishment.’” *Slade v. Hampton Rds. Terg’l Jail*, 307 F.3d 243, 250 (4th Cir. 2005) (emphasis in the original). *See also Youngberg v. Romeo*, 457 U.S. 307, 312-22 (1982); *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979). Unfortunately, these holdings will not serve Mr. Al-Ghizzawi if he is permitted to die at the hands of a vindictively neglectful jailer before he even has an opportunity to be heard.

Assuming *arguendo* that Mr. Al-Ghizzawi must compare the grave risk of irreparable injury and likelihood of success on the merits with the potential injury to the government and public interest concerns (*See Katz v. Georgetown Univ.*, 246 F.3d 685, 687-688 (D.C. Cir. 2001)) the equities and circumstances still balance in favor of Mr. Al-Ghizzawi; “[t]hese factors interrelate on a sliding scale and must be balanced against each other.” *Serono Labs, Inc. v. Shalala*, 158 F.3d

1313 (D.C. Cir. 1998). “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in the other areas are rather weak.” *City Fed. Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

Even if this Court believes that Mr. Al-Ghizzawi has somehow made an inadequate showing of irreparable harm, Petitioner respectfully requests that this Court grant his request for access to his complete medical records that would provide a basis for Mr. Al-Ghizzawi to establish his irreparable injury upon their presentation. Petitioner respectfully submits that comparing the grave risk of irreparable injury to Mr. Al-Ghizzawi if he does not have access to his medical records, to his likelihood for success on the merits and the fact that there has been no representation that the national interest will be threatened or even burdened by granting this minimal relief militates in favor of Mr. Al-Ghizzawi's instant motion. Further, given the compelling circumstances of this case, Mr. Al-Ghizzawi respectfully also requests an expedited hearing on his Petition.

i. **Irreparable Injury**

Mr. Al-Ghizzawi's counsel has submitted an affidavit with the Original habeas petition filed in this court on July 27, 2007 (A 286) regarding her observations of Mr. Al-Ghizzawi's physical condition over the past year. At the district court level counsel submitted affidavits from two leading experts in the area of diseases of the liver. Each of these doctors concluded that due to the “severity of the symptoms” Mr. Al-Ghizzawi could well be suffering from liver

cancer. This is a disease that is easily treatable if caught early, but deadly if left untreated. Dr. Donald Jensen from the University of Chicago Medical School concluded that even if Mr. Al-Ghizzawi does not have liver cancer, “it is clear from the symptoms that Mr. Al-Ghizzawi is suffering that he is very ill and needs appropriate medical care immediately.” That affidavit was prepared almost a year ago and yet Mr. Al-Ghizzawi has still not been treated. (Ex. B¶ 14)

The government’s medical witness, Dr. Ronald Sollock admitted in his affidavit that Mr. Al-Ghizzawi has a history of hepatitis B and that he suffers from abdominal pain. Although Dr. Sollock states that there is access to medical care beyond the capacity of the five medical doctors at the base, there is no evidence that Mr. Al-Ghizzawi has ever even been seen by a doctor with an expertise in liver disease. Coupling this with the glaring admission from Dr. Sollock that Mr. Al-Ghizzawi has never been treated for either hepatitis B or tuberculosis, it is imperative at a minimum that counsel for Mr. Al-Ghizzawi receive his medical records to get an accurate assessment of his medical condition in order to ensure that the medical care Petitioner actually does receive, if any, is adequate. Absent such immediate relief, it is becoming increasingly likely that Mr. Al-Ghizzawi will ultimately die as a result of his medical conditions while still at Guantánamo, without treatment.

It is axiomatic that irreparable harm may be shown where the movant’s health is in imminent danger. *See, e.g., Blackman v. District of Columbia*, 185 F.R.D.

4, 6-7 (D.D.C. 1999); *Wilson v. Group Hosp. & Med. Servs., Inc.*, 791 F.Supp. 309, 314 (D.D.C. 1992). As asserted by Judge Gladys Kessler in her decision in *Al-Joudi, et. Al. v. Bush, et. Al*, 406 F. Supp.2d 13, 20 (DDC 2005), “where the health of a . . . vulnerable person is at stake, irreparable harm can be established.” In addressing the request for medical records made on behalf of other detainees at Guantánamo Bay, Judge Kessler goes on to write, “[w]hile Petitioners do not lack legal competence as children do, they are indeed vulnerable to further physical deterioration, and possibly death, by virtue of their custodial status at Guantánamo and weakened physical condition.” *Id.* Judge Kessler was ruling on the implications of the actions of prisoners who were then engaged in a hunger strike. In making her decision, Judge Kessler relied primarily on affidavits submitted by attorneys of their observations of their clients and by statements of the detainees themselves, even though, as here, Guantánamo Bay officials denied those accusations.

Mr. Al-Ghizzawi’s case is even more pernicious and compelling than the detainees on a hunger strike. Mr. Al-Ghizzawi has been made vulnerable to further physical deterioration, and possible death, as a result of his continued detention and lack of proper medical care at Guantánamo. Mr. Al-Ghizzawi is prevented from seeking further medical treatment or advice as a direct result of his on-going detention and the deliberate actions of the United States military and government. The symptoms observed by his counsel and admitted by the

government have led two of the world's leading experts on liver disease to conclude that he is likely suffering from liver cancer or at the very least, and under any circumstances, he is extremely ill and in need of immediate medical treatment. If Mr. Al-Ghizzawi is suffering from liver disease and it is caught early enough, it is treatable (though literally less so with each passing day). If it goes undiagnosed and untreated, Mr. Al-Ghizzawi will in all likelihood die of his liver disease. If this happens, the harm will clearly be irreparable.

ii. Likelihood of Success on the Merits

This Court held in *Rasul v. Bush*, 542 U.S. 466,485, 124 S. Ct. 2686, 2699 (2004) that “federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.” This Court further stated that none of its prior decisions “categorically exclude aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts.” *Id.* (internal quotations and citations omitted).

Surely there is no detainee with a more compelling likelihood of success on his ultimate habeas petition than Mr. Al-Ghizzawi. Not only was he found to *not* be an enemy combatant by his original CSRT but one of the panel members from that unanimous panel has referred to the evidence against Mr. Al-Ghizzawi as “garbage” in sworn testimony before a Congressional committee.

In order to provide Mr. Al-Ghizzawi the ability to legally challenge his

detention, a right this Court recognized in *Rasul*, it is imperative to develop proper procedures to facilitate access between counsel and Mr. Al-Ghizzawi and to ensure that Mr. Al-Ghizzawi has the necessary resources to present his case. This very issue was previously presented before the District Court by other detainees to Judge Kollar-Kotelly in *Al Odah v. United States*, 02-828 (October 20, 2004 Mem. Op. at 8-9) and to Judge Kessler in *Al-Joudi v. Bush*, 406 F. Supp.2d 13, 20, both of whom found that the Guantánamo detainee was entitled to such appropriate and proper procedures and to present facts regarding their detention to the Court. *Al Odah*, 02-828 (October 20, 2004 Mem. Op. at 10); *Al-Joudi*, 406 F. Supp.2d 13, 20. Judge Kessler further held that for the detainees to properly be represented by their counsel, it was necessary for the attorneys to be made aware if their clients are “in such a fragile physical condition that their future ability to communicate is in imminent danger.” *Al-Joudi*, 406 F. Supp.2d 13, 20

At a minimum, Mr. Al-Ghizzawi asks this court for relief no different from that asked of Judge Kessler and Judge Kollar-Kotelly: for access to his own medical records and for adequate medical treatment. Access to his medical records will afford his counsel the information necessary to properly and adequately represent Mr. Al-Ghizzawi, and to better assess Mr. Al-Ghizzawi’s fragile physical condition and determine his ongoing ability to communicate with his counsel and to be an active participant in his case. As stated by Judge Kessler, “Unless Petitioners’ counsel can have access to their clients, and know

their true medical conditions, including whether they are in imminent danger of death, . . . , it is obvious that their ability to present their claims to the Court will be irreparably compromised.” *Al-Joudi*, 406 F. Supp.2d 13, 20.

iii. Injury to the Government

The government can make no legitimate argument that there would be any injury to the government were it required to provide Mr. Al-Ghizzawi’s medical records or provide him with medical treatment. As to moving *post haste* on Mr. Al-Ghizzawi’s habeas petition, the only conceivable injury to the government is possible embarrassment that it has been holding an innocent man under dreadful conditions, hardly a compelling interest.

iv. Public Interest Concerns

Finally, it is in the utmost public interest for detainee Petitioners from Guantánamo Bay to have meaningful and adequate access to their counsel so that they might properly challenge their detention and so that the courts can properly adjudicate their claims. These principles are so critical, that this Court has granted review on at least three different occasions on behalf of Guantánamo detainees. These are the principles on which this country was founded and go back as far as John Adams’ representation of nine British soldiers after the Boston Massacre in 1770.

Mr. Al-Ghizzawi also submits that it is in the public interest to treat prisoners of the United States in a lawful and humane manner.

Mr. Al-Ghizzawi's request for access to his own medical records and medical treatment is nothing less than a request to allow himself and his attorney to have the full knowledge of his medical condition they need in order to adequately and effectively prepare his case and to quite literally allow him to live long enough to pursue his case to conclusion.

V. CONCLUSION

Petitioner's right to his medical records and to medical treatment is even greater than those of typical pretrial detainees. Unlike those charged with crimes, Mr. Al-Ghizzawi has been detained with no charge whatsoever, but instead remains incarcerated solely on the whim and caprice of the Executive. Mr. Al-Ghizzawi's current designation as an enemy combatant is hardly a foregone conclusion given that his *first* CSRT unanimously found him not to be an enemy combatant and that the evidence against him has been described, by at least one panel member, as "garbage"; the fact that the government falsely claimed that they had "new evidence" and set up a second tribunal six weeks later undermines any legitimacy of the government's determination that Mr. Al-Ghizzawi has engaged in hostilities against the United States, or aided those who have. This is the very core of Petitioners' underlying habeas claims. Even under the most deferential standard, published reports, many from the government's own admissions in this case, illustrate that the government has shown that it cannot be trusted to provide even basic minimal medical care for Guantánamo

detainees, and thus far, its actions have spoken for themselves in the case of Mr. Al-Ghizzawi.

For all the reasons set forth above, this Court should proceed in the most expeditious manner to hear Mr. Al-Ghizzawi's Original Habeas Corpus petition, or in the alternative, should enter an emergency injunction to maintain the status quo by ordering the government to release Mr. Al-Ghizzawi's complete medical file and to provide meaningful and adequate medical treatment immediately. Petitioner respectfully suggests that the most efficient way to deal with the matters related to Mr. Al-Ghizzawi's medical treatment and medical records would be to name a special master. As Petitioner's pro-bono counsel is a sole practitioner located in Chicago, Illinois, Petitioner suggests that the court name either the presiding magistrate for the Northern District of Illinois, Magistrate Judge Morton Denlow or the second most senior magistrate, Magistrate Judge Arlander Keys.

Respectfully Submitted,

H. Candace Gorman
Counsel of record

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2007, I filed and served the foregoing Emergency Motion to those listed below by causing it to be delivered to the Court Security Office via hand delivery.

Hon. Paul Clement
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