

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

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

AE 906O / AE 914EE

RULING AND ORDER

Rule for Military Commissions 909  
Competency Determination and Severance

21 September 2023

1. PROCEDURAL HISTORY.

a. On 14 April 2023, the Commission ordered<sup>1</sup> an inquiry into the mental capacity of Mr. bin al Shibh under Rule for Military Commissions (R.M.C.) 706 (“the Board”). The impetus for this order was an extensive series of pleadings regarding Mr. bin al Shibh’s ongoing mental health concerns.<sup>2</sup>

b. On 24 August 2023, the Board issued its Ultimate Conclusions (“Short Form Report”).<sup>3</sup> The Board answered the R.M.C. 706 specified questions as follows:

*[Question 1] Is Mr. bin al Shibh presently suffering from a mental disease or defect?*

**The Board Replies: Yes.**

*[Question 2] What is the clinical psychiatric diagnosis?*

**The Board Replies:**

**The clinical psychiatric diagnosis most accurately reflecting the accused’s presentation:**

<sup>1</sup> See AE 152QQQQQ / AE 906. Order. Inquiry Into the Mental Capacity of the Accused Under R.M.C 706, dated 14 April 2023.

<sup>2</sup> See AE 152 series.

<sup>3</sup> See AE 906D (GOV). Government Notice of Results of Inquiry Into the Mental Capacity of the Accused Under R.M.C. 706. Attachment B, filed 25 August 2023.

**Posttraumatic Stress Disorder (PTSD), with Secondary Psychotic Features**

**The clinical psychiatric diagnosis strictly conforming to the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, Text Revision (DSM-5-TR) accounting for the accused's symptoms:**

**Posttraumatic Stress Disorder (PTSD)  
Delusional Disorder, Persecutory Type**

*[Question 3] Is Mr. bin al Shibh presently suffering from a mental disease or defect rendering him unable to understand the nature of the proceedings against him or cooperate intelligently in his defense?*

**The Board Replies: Yes.**

c. On 29 August 2023, Counsel for Mr. bin al Shibh filed AE 906G (RBS),<sup>4</sup> which contained the Board's long form Narrative Summary ("Long Form Report") of their findings regarding the mental capacity of Mr. bin al Shibh.

d. On 31 August 2023, based on the Board's ultimate conclusions, the Commission ordered<sup>5</sup> a hearing pursuant to R.M.C. 909 to determine the mental capacity of Mr. bin al Shibh to stand trial.

e. On 6 September 2023, Mr. bin al Shibh provided notice that the defense did not require the testimony of any witnesses and would rely on the Long Form Report for the R.M.C. 909 hearing.<sup>6</sup> On the same day, the Prosecution gave notice that they did not intend to call any witnesses or present any additional documentary evidence at the R.M.C. 909 hearing.<sup>7</sup>

<sup>4</sup> See AE 906G (RBS), Mr. Bin al Shibh's Notice of R.M.C. 706 Long Form Report, filed 29 August 2023.

<sup>5</sup> See AE 906I / AE 914B Order, Rule for Military Commissions 909 Hearing, dated 31 August 2023.

<sup>6</sup> See AE 906J (RBS) / AE 914G (RBS), Mr. Bin al Shibh's Notice in Accordance with AE 906I / AE 914B (ORD), filed 6 September 2023.

<sup>7</sup> See AE 906K (GOV) / AE 914K (GOV), Government Notice In Accordance With AE 906I / AE 914B, Rule for Military Commissions 909 Hearing, filed 6 September 2023.

f. On 19 September 2023, the Commission conducted the R.M.C. 909 hearing.

## 2. LAW.

a. R.M.C. 909(a) provides that:

No person may be brought to trial by military commission if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against him or her or to conduct or cooperate intelligently in the defense of the case.

b. A person is presumed to have the capacity to stand trial unless the contrary is established.<sup>8</sup>

c. If an inquiry pursuant to R.M.C. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge *shall* conduct a hearing to determine the mental capacity of the accused.<sup>9</sup>

d. The mental capacity of the accused is an interlocutory question of fact.<sup>10</sup> The standard set out in R.M.C. 909(e)(2) is whether a preponderance of the evidence establishes that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case.

e. "The phrase... 'understand the nature of the proceedings...or to conduct or cooperate intelligently in the defense of the case' means that the accused 'has sufficient present ability to

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<sup>8</sup> R.M.C. 909(b).

<sup>9</sup> R.M.C. 909(d) (Emphasis added).

<sup>10</sup> R.M.C. 909(e)(1).

consult with his lawyer with a reasonable degree of rational understanding—and...a rational as well as factual understanding of the proceeding against him.”<sup>11</sup>

f. “In determining whether a defendant possesses competence, a court must consider a number of factors, including: (1) evidence of a defendant’s irrational behavior; (2) any prior medical opinion on the defendant’s competence to stand trial and (3) the defendant’s demeanor at trial and/or hearings.”<sup>12</sup>

g. “The ability to assist in one’s own defense does not refer to matters involving legal questions, but to such phases of the defense as an accused would normally assist in, such as accounts of facts, identities of witnesses, and similar matters...The question is whether the accused is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental facilities and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense.”<sup>13</sup>

h. The Supreme Court has stated “[t]he Sixth Amendment ‘contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense.’”<sup>14</sup> The Court went on to state “[s]ome decisions...are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”<sup>15</sup>

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<sup>11</sup> *United States v. Proctor*, 37 M.J. 330, 336 (C.M.A. 1993) (quoting *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). See also *United States v. Battle*, 05-0234 (RMU), 2007 U.S. Dist. LEXIS 102766, at \*12 (D.D.C. Sept. 20, 2007) (quoting *United States v. Caldwell*, 543 F.2d 1333, 1348 (D.C. Cir. 1974)), *aff’d* 613 F.3d 258 (2009).

<sup>12</sup> *Battle*, 2007 U.S. Dist. LEXIS 102766, at \*12-13 (citing *Drope v. Missouri*, 420 U.S. 162, 181 (1975)).

<sup>13</sup> *United States v. Lee*, 22 M.J. 767 (A.F.C.M.R. 1986) (citing *United States v. Martinez*, 12 M.J. 801 (N.M.C.M.R. 1981) and *United States v. Williams*, 17 C.M.R. 197, 206 (1954)).

<sup>14</sup> *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 382, n. 10 (1979)).

<sup>15</sup> *McCoy*, 138 S. Ct. at 1508.

i. The Supreme Court has also stated “[w]ith the assistance of counsel, the defendant is also called upon to make myriad smaller decisions concerning the course of his defense. The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a ‘fundamental component of our criminal justice system’—the basic fairness of the trial itself.”<sup>16</sup>

### 3. Findings of Fact.

a. On 6 September 2023, Mr. bin al Shibh provided notice that the Defense did not require the testimony of any witnesses and would rely on the Long Form Report for the R.M.C. 909 hearing.<sup>17</sup> On the same day, the Prosecution gave notice that they did not intend to call any witnesses or present any additional documentary evidence at the R.M.C. 909 hearing.<sup>18</sup>

b. On 19 September 2023, the Commission conducted the R.M.C. 909 hearing. The parties did not dispute the facts set out in the Long Form Report, nor present any contradictory evidence at the hearing. Accordingly, the Commission has adopted the facts set out in the Long Form Report and relied on them in making a competency determination.

c. The parties did not dispute the Board’s finding that Mr. bin al Shibh is presently suffering from a mental disease or defect.

d. The parties did not dispute the Board’s finding that diagnosed Mr. bin al Shibh with Delusional Disorder, Persecutory Type. The Prosecution asserted that it was questionable whether Mr. bin al Shibh fits the PTSD criteria. The Prosecution also argued that PTSD with

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<sup>16</sup> *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996).

<sup>17</sup> See AE 906J (RBS) / AE 914J (RBS) at 1.

<sup>18</sup> See AE 906K (GOV) / AE 914K (GOV) at 1.

psychotic features is not a valid diagnosis as it is not recognized in the DSM-5-TR. However, the Prosecution did not call any expert witness to support these positions.

e. The parties did not dispute the Board's finding in the Long Form Report that Mr. bin al Shibh is able to understand the nature or object of the proceedings.

f. The Prosecution challenged the Board's finding that Mr. bin al Shibh is unable to cooperate intelligently in his defense, but they did not present any additional evidence in support of this position.

#### 4. Analysis.

a. The parties do not dispute that Mr. bin al Shibh is presently suffering from a mental disease or defect. The Prosecution, without evidence, disputes some of the Board's diagnoses, but they do not dispute that Mr. bin al Shibh has Delusional Disorder, Persecutory Type.

b. As mentioned above, while arguing against some of the Board's conclusions, the Prosecution did not dispute any of the underlying facts the Board provided in the Long Form Report. The Long Form Report outlines that Mr. bin al Shibh has exhibited symptoms of possible mental impairment, starting in approximately 2004.<sup>19</sup> A psychological report, dated 14 April 2005, stated that his mental status had "deteriorated significantly"<sup>20</sup> and he was likely "delusional."<sup>21</sup> These mental health issues have continued to be documented during Mr. bin al Shibh's 21 years in detention.<sup>22</sup>

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<sup>19</sup> See AE 906G (RBS) at 25 (Long Form Report, page 20).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See generally *id.* at 6-85 (Long Form Report).

c. The record demonstrates that Mr. bin al Shibh's mental health has continued to deteriorate. He reports "stabbing pains, vibrations, and burning."<sup>23</sup> When he experiences what he believes to be attacks by the Government, he often responds by damaging items in his cell.<sup>24</sup> He is then typically placed into a disciplinary status, which entails isolation and loss of privileges. He reports difficulty sleeping and has engaged in multiple hunger strikes.<sup>25</sup>

d. Although Mr. bin al Shibh's mental health problems have been documented since 2004, the Commission has not been able to complete an R.M.C. 706 Sanity Board until 2023, because Mr. bin al Shibh refused to cooperate with the experts conducting the previously attempted boards.<sup>26</sup> It is notable that an attempted R.M.C. 706 Board in 2008, which reviewed Mr. bin al Shibh's records but was unable to interview him, found that, "[t]he accused is suffering from a mental disease that has the potential to impair his ability to conduct or cooperate intelligently in his defense, and which also may have led him to refuse an interview by the Board. Without an interview of the accused, the Board cannot give a definitive opinion with regard to this part of section 3b of ref (b)."<sup>27</sup>

e. Because Mr. bin al Shibh believes that the Government is actually attacking him, he becomes agitated if his defense counsel make the argument that the "attacks" stem from mental health problems. The record shows that this focus on his delusions being real has caused a significant negative impact on his ability to work with his prior counsel.<sup>28</sup>

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<sup>23</sup> See *id.* at 28 (Long Form Report, page 23).

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 27, 30, and 61 (Long Form Report, pages 22, 25, and 56).

<sup>26</sup> See AE 152S (GOV), Government Bench Memorandum for the R.M.C. 909 Hearing, at 39-46 (Attachments C and D), filed 27 March 2014.

<sup>27</sup> *Id.* at 43 (Attachment C, page 4).

<sup>28</sup> See AE 906G (RBS) at 37 (Long Form Report, page 32); AE 761 (RBS), Defense Request for Excusal of Learned Defense Counsel, at 45-49 (Attachment F), filed 13 February 2020.

f. With his current defense team, Mr. bin al Shibh has still insisted that the primary focus of their efforts be directed at stopping the “attacks,” rather than allowing them to work on developing a defense for his case. The AE 152 series highlights this lengthy process, whereby his defense team documents his complaints, attempts to raise his complaints to the Guard Force leadership, and then brings the issue to the Commission in an attempt to stop the alleged Government harassment. This has resulted in the Commission issuing multiple orders to the Guard Force to not engage in any of the alleged harassing behaviors. Nevertheless, the delusions continue, which then causes the whole process to repeat.

g. The Prosecution points out that Counsel for Mr. bin al Shibh only reports Mr. bin al Shibh being too tired to assist with his defense around one third of the time and that working to stop the attacks is just a predominant focus. The Prosecution asserts this demonstrates some distraction and difficulty but does not rise to the level of rendering Mr. bin al Shibh incapable of cooperating intelligently in the defense of his case. Rather than pulling select quotes, the totality of the facts demonstrates an accused who is wholly focused on his delusions. They disrupt his sleep and lead to outbursts that result in disciplinary confinement measures. The result is a sleep-deprived accused whose primary focus is on stopping the attacks, not defending himself against the charged offenses. That this mental impairment is the primary focus is demonstrated by the fact that the bulk of his defense team’s filings are related to these “attacks.” Additionally, the Commission has personally observed Mr. bin al Shibh insisting on speaking in open court to bring this issue to the Commission’s attention.<sup>29</sup>

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<sup>29</sup> See Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad, et al.*, dated 9 November 2021, at pp. 35291-35296; Transcript, dated 10 November 2021, at pp. 35305-35308.

h. The Prosecution asserts the Board's conclusion that Mr. bin al Shibh is unable to cooperate intelligently in the defense of his case is actually contradicted by the evidence set out in the Long Form Report. The Prosecution focuses on the evidence the Board relied on to determine that Mr. bin al Shibh is able to understand the nature of the proceedings against him. The Board found that Mr. bin al Shibh did not demonstrate any significant impairment in terms of his factual understanding of the proceedings. They found that he was able to correctly identify the charges against him and he described them as "very serious" and "major offenses." The Board found that Mr. bin al Shibh was able to correctly identify the roles and responsibilities of defense counsel, government counsel, the judge, jury, and his role as the accused. The Defense did not dispute any of these facts at the R.M.C. 909 hearing and, in fact, conceded that Mr. bin al Shibh is able to appreciate the legal proceeding and understand the legal concepts.

i. The facts referenced by the Prosecution are useful in analyzing whether Mr. bin al Shibh is able to cooperate intelligently in the defense of his case, but they actually cut against the Prosecution's argument. It is true that the facts demonstrate a certain level of competence and understanding by Mr. bin al Shibh. However, the fact that Mr. bin al Shibh understands the serious nature of the charges and the capital nature of his case, and yet he still cannot focus his attention on those issues, demonstrates the significant effect of his mental defect on him. The fact that Mr. bin al Shibh understands the vital role that his defense counsel plays and yet, again and again, he focuses his counsel's work on stopping his delusional harassment, demonstrates the impairment of his ability to assist in his defense.

j. Mr. bin al Shibh understands that he is charged in a capital case and that the death penalty is the "ultimate worst punishment." However, of the five accused in this case, he is the

only one who is unwilling to entertain plea negotiations because the Government has not yet stopped “the attacks.” Mr. bin al Shibh has the right to refuse to negotiate a plea agreement, but basing his refusal on the Government stopping attacks which stem from delusions is not rational and demonstrates significant impairment.

k. As the Supreme Court explained in *McCoy*, two of the most essential trial decisions reserved for the accused are whether to plead guilty and choice of counsel. The evidence shows that both of these decisions have been severely impacted by Mr. bin al Shibh’s mental impairment. As such, Mr. bin al Shibh’s mental impairment prevents him from cooperating intelligently in the defense of his case.

5. **Ruling:** Examining the totality of the information available, including the Commission’s observations and interactions with Mr. bin al Shibh, the statements of current and prior counsel, and the R.M.C. 706 Long Form Report, the Commission finds that a preponderance of the evidence establishes that Mr. bin al Shibh is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to cooperate intelligently in the defense of his case. Accordingly, Mr. bin al Shibh lacks capacity to stand trial.

6. **Order:**

a. As Mr. bin al Shibh lacks capacity to stand trial, the Commission **SEVERES** Mr. bin al Shibh’s case from those of his co-accused. The undersigned will remain the presiding judge over Mr. bin al Shibh’s case.

b. The Office of the Trial Judiciary will serve this Ruling on the Convening Authority  
IAW R.M.C. 909(e)(3).

So **ORDERED** this 21st day of September, 2023.

*//s//*  
MATTHEW N. MCCALL, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary