No. _____

Filed on 11/23/08 w/cso

Cleared 11/24/08

In the
Supreme Court of the United States

ABDUL HAMID AL-GHIZZAWI
Detainee, Guantánamo Bay Naval Station
Guantánamo Bay, Cuba;

Petitioner,

v.

GEORGE W. BUSH, et als.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's holding in *Boumediene v. Bush*, 553 U.S. __, 128 S.Ct. 2229 (2008) that §7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241(e) (Supp. 2007) "operates as an unconstitutional suspension of the writ," mean that the lower courts have jurisdiction to hear claims by Guantánamo prisoners seeking life sustaining medical care in order to meaningfully assist their counsel in advancement of their habeas proceedings?

2. Can a prisoner at Guantánamo show irreparable harm through his own affidavit and the affidavits of his counsel and medical expert when the lower court refuses to allow the prisoner to obtain his medical records or to allow independent medical review?

PARTIES TO THE PROCEEDINGS

Petitioner

Abdul Hamid Al-Ghizzawi is a Libyan national who was a resident of Afghanistan at the time he was turned over to the armed forces of the United States for a bounty shortly after the American invasion of Afghanistan. Al-Ghizzawi suffers from potentially life threatening Hepatitis B and Tuberculosis, but he has been consistently denied adequate medical treatment by his military jailers. Al-Ghizzawi's Internment Serial Number ("ISN") is 654.

Respondents

Respondents here and in the District Court, are George W. Bush, President; Robert M. Gates, Secretary of Defense; Rear Admiral Harry B. Harris, Commander, Joint Task Force-GTMO; and Colonel Wade F. Davis (United States Army), Commander, Joint Detention Operations Group, or their successors.

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The District of Columbia Circuit order/opinion is annexed as App. A. The District Court opinions are at App. B1 and B2.

JURISDICTION

The Order of the United States Court of Appeals was decided on October 3, 2008.

This Court has jurisdiction pursuant to 28 USC Section 1292(a)(1) and "the All Writs Act, "28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Suspension Clause, Art. I, §9, cl. 2, provides as follows:

Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The Military Commissions Act of 2006 (MCA) (28 U.S.C. Section 2241), in relevant part, provides as follows:

SEC. 7. HABEAS CORPUS MATTERS.

(a) In General- Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109-148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109-163 (119 Stat. 3477) and inserting the following new subsection (e):

`(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

`(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'.

(b) Effective Date- The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

STATEMENT OF THE CASE

Abdul Hamid Al-Ghizzawi is a forty-six year old male Libyan national who has been held at Guantánamo for more than six and a half years. As admitted by the Government, Al-Ghizzawi suffers from both hepatitis B and tuberculosis. Al-Ghizzawi is literally dying while incarcerated at Guantánamo where he is receiving inadequate medical care because the government claims in contradictory fashion that Al-Ghizzawi has no serious health problems and that his health problems are his own fault. The District Court Judge accepted these assessments as true despite the fact that the Court has neither reviewed nor even permitted limited disclosure of Al-Ghizzawi's medical records to ascertain his actual medical condition.

The government's assertions that Al-Ghizzawi, who has repeatedly asked for both medical care and his records, is either in good health or prefers to die the slow painful death of liver disease and cancer, rather than be treated for these conditions, are absurd. Regrettably, the result of the District Court's erroneous conclusion is that Al-Ghizzawi sits in his cell 24 hours a day, sometimes too ill to stand and other times overcome by pain. The effect of his total isolation has also affected the mental health of Al-Ghizzawi who currently spends his days talking to himself and washing and rewashing his clothes.

In one of counsel's last meetings with Al-Ghizzawi counsel did not recognize the client that she had been visiting for over two years: he looked as though he were literally about to die during their meeting. Al-Ghizzawi who was slumped in his chair

with his leg chained to the floor barely looked at counsel but instead spoke to the floor in a slow and quiet voice. Al-Ghizzawi's eyes, which have deteriorated to the point where he can barely read, were irritated and bright red from his constant rubbing and he was continually coughing and hacking as he sat in clearly visible pain. Al-Ghizzawi also had a difficult time understanding counsel and in concentrating on their discussion. Al-Ghizzawi confided that his brain is not "working right" and that he has been trying to keep his mind active by singing songs and talking to himself.

On Counsel's last trip to the base counsel was not able to see Al-Ghizzawi: Al-Ghizzawi sent a message telling her that he really wanted to see her but he was afraid to go outside of Camp 6. This was a very different man than the engaged and mentally active man whom counsel saw over the past two and a half years. The current breakdown of Al-Ghizzawi's mind and body makes it impossible for Al-Ghizzawi to meaningfully participate in his habeas litigation.

Background on Al-Ghizzawi

As set forth above, Al-Ghizzawi is a Libyan citizen who had been living in Afghanistan for approximately 10 years prior to his being abducted by Afghani tribesmen, turned over first to the Northern Alliance and then to the US forces in the late fall of 2001, in return for a cash bounty. Al-Ghizzawi is married to an Afghani woman and has a young daughter who was only a few months old when he was abducted. Al-Ghizzawi and his wife owned and ran a small shop in Jalalabad where they sold honey and spices and later expanded the shop to include a bakery. In the fall of 2001 when the United States military began bombing areas close to their city, Al-

Ghizzawi took his wife and months old baby and fled their home and shop, seeking safety in a rural area where his in-laws lived.

Not long after Al-Ghizzawi and his family arrived at his in-laws (approximately December of 2001), armed men came to the home and told the family to turn over "the Arab" (Al-Ghizzawi). Al-Ghizzawi cooperated with them to avoid any harm to his family. Al-Ghizzawi was then, in turn, sold to American forces in return for a bounty under an American sponsored program that provided large bounties in return for "terrorist and murderers." (App. C) Al-Ghizzawi is neither a terrorist nor a murderer but was instead the victim of greed in an impoverished nation. He has been held at Guantánamo since the spring of 2002 and has not seen or spoken to his wife and daughter all these years. Since his detention at Guantánamo, his health has steadily deteriorated.

In 2004, shortly after this Court's decision acknowledging that Guantánamo detainees had a right to petition the courts of the United States to challenge the legality of their detentions in *Rasul v. Bush*, 542 U.S. 466 (2004) and in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), the United States military quickly constructed a system of Combatant Status Review Tribunals, or "CSRTs" pursuant to this Court's rulings which required that the government make some kind of individualized determination regarding the status of the men it was holding, to wit, whether or not they were properly classified as "enemy combatants." The panel assigned to petitioner, "panel 23," unanimously concluded that petitioner was "not an enemy combatant."

Subsequently, a Pentagon official ordered that a second panel ("Panel 32") be

convened, and on the very same "evidence" that the first panel rendered Al-Ghizzawi "not an enemy combatant," concluded that he was, in fact, "an enemy combatant." Documents show that the reason for the second CSRT was purely political and that the military knew that it had no new evidence against Al-Ghizzawi. Among the officers assigned to the first panel was Lt. Col. Stephen Abraham of the Army Reserve, an attorney and experienced intelligence officer, who concluded in later testimony to Congress that the evidence against Al-Ghizzawi was "garbage". Further, it was, in part, based on the contentions asserted in Col. Abraham's affidavit submitted by the petitioners in *Boumediene* that this Court granted a motion for reconsideration of its earlier denial of certiorari in that case. Nonetheless, to this day, the United States military continues to insist that Al-Ghizzawi is "an enemy combatant."

As set forth above, Al-Ghizzawi has suffered from a number of adverse medical conditions. Although the government claims that Al-Ghizzawi had Hepatitis B when he entered Guantánamo, Al-Ghizzawi had no symptoms from that disease and was in good health. The government admits that Al-Ghizzawi contracted tuberculosis while in American custody. Both conditions have been exacerbated from the extremely harsh solitary confinement conditions in which he has been placed. Further, on at least one prior occasion, medical personnel at the Guantánamo Bay detention facility told Al-Ghizzawi that he was HIV positive and suffering from Acquired Immune-Deficiency Syndrome, or AIDS, although the government has later denied this. Al-Ghizzawi still does not know why he was told that he had AIDS, if in fact it is not true.

Al-Ghizzawi moved before the District Court seeking to compel the respondents

to provide him with adequate medical care, and, to provide petitioner's counsel with access to his medical records pursuant to the release signed by her client. That motion was denied by the District Court by Order dated November 2, 2006. (See App B1) Al-Ghizzawi appealed to the Circuit Court on November 29, 2006. The Circuit Court never ruled on that appeal until after Al-Ghizzawi filed a second appeal more than eighteen months later, at which time the two appeals were consolidated and the Circuit Court affirmed both Orders by decision dated October 3, 2008. (See App A).

While the first appeal remained sub judice for eighteen months without the Circuit Court seeking further briefing or ruling on the government's motion for summary affirmance, Al-Ghizzawi's medical condition further deteriorated. He filed a second Motion before the District Court in 2008. Again counsel conferred with the world-renowned liver specialist Dr. Juerg Reichen and who, though still not permitted to either examine Al-Ghizzawi or to examine his medical records, relied upon the affidavits signed by military medical personnel and counsel's relaying of Al-Ghizzawi's complaints of symptoms and counsel's observations of his condition. Dr. Reichen concluded that Al-Ghizzawi's condition was seriously worsening that he possibly suffers from liver cancer, and that the military's course of treatment, if any, was entirely inadequate. On this basis, Al-Ghizzawi's second motion included a request to transfer him to a civilian facility pursuant to the provisions of the Geneva Conventions in addition to similar relief to what had been previously sought. Again, the District Court denied that motion, by Order dated April 8, 2008 (see App. B2). The Circuit Court affirmed that Order by decision dated October 3, 2008. (App. A).

REASONS FOR GRANTING THE PETITION

The Military Commissions Act of 2006 ("MCA") purported to statutorily reverse this Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which implicitly recognized the right of Guantánamo Bay detainees to petition the federal courts to challenge the legality of their detentions and which recognized the applicability of the Geneva Conventions to their confinement. In *Boumediene v. Bush*, 553 U.S. __, 128 S.Ct. 2229 (2008), this Court specifically found Sec. 7 of the Military Commissions Act to be an unconstitutional suspension of the writ of habeas corpus and hence, that Guantánamo detainees had a Constitutional right to pursue their habeas corpus petitions in the federal courts.

Notwithstanding this Court's holding that Section (7) of the MCA is an unconstitutional suspension of habeas corpus, the government has taken the position that Section (7) still precludes the federal courts from exercising jurisdiction over claims for necessary medical care which would allow Al-Ghizzawi to literally live to assist and pursue his habeas claim. The Circuit Court held that because of this "open" question of jurisdiction Al-Ghizzawi could not show the likelihood of success required for obtaining the injunctive relief of life sustaining medical care and further held that even if it did have jurisdiction that the District Court was correct in that Al-Ghizzawi had not shown the irreparable injury necessary to allow him to receive the medical care and records he so desperately seeks. This Court must determine whether the very ability of the petitioner to prosecute his case may be precluded by Section (7) of the MCA as the

government argues.

The consequences of the government's position with respect to the provision of adequate medical treatment pending determination of Al-Ghizzawi's petition will likely be the irreversible deterioration of his health, if not his death, and has already impacted his ability to assist counsel in prosecuting his petition, a situation certain to worsen. What Al-Ghizzawi seeks is to keep the "health status quo" because he approached the court with a given quality of health and he has been under the sole dominion and control of the respondents as his health has deteriorated. For the government to allow his failing health to interfere with the *"health status quo"* potentially to its litigation advantage should not be countenanced.

For the foregoing reasons, certiorari should be granted.

I. BECAUSE THIS COURT HAS ALREADY FOUND SECTION 7 OF THE MILITARY COMMISSIONS ACT TO BE AN UNCONSTITUTIONAL SUSPENSION OF HABEAS CORPUS, THE CIRCUIT COURT ERRED IN FINDING THAT THE VERY SAME SECTION RAISES A JURISDICTIONAL QUESTION PRECLUDING AL-GHIZZAWI'S ABILITY TO SHOW PROBABLE SUCCESS ON THE MERITS

In *Boumediene*, this Court held that: §7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ [of habeas corpus]. Therefore the contention of the government, that Section 7(e) (2) of the MCA somehow survived *Boumediene* and that the Courts continue to lack jurisdiction to even consider a claim by Al-Ghizzawi for life sustaining medical treatment necessary to keep him alive long enough to effectively assist counsel in his

habeas proceedings and, if successful, be freed, must be an unconstitutional reading of that statute, either facially or as applied. The Circuit Court acted in error when it breathed life into the government's theory by finding that the jurisdictional question raised by the government effectively rendered Al-Ghizzawi unable to prove that he could win on the merits of his motion, a condition the Courts held necessary before Al-Ghizzawi could be granted the "extraordinary relief" of medical care. However, any reading of the statute depriving the federal courts of jurisdiction[1] to provide Al-Ghizzawi the opportunity to litigate this issue must itself be unconstitutional.

Here, petitioner seeks nothing more than to ensure that his most fundamental right – to bodily integrity, health and safety – is protected. Without his physical and mental health, petitioner will likewise lose his right of access to the courts to prosecute his instant habeas petition. *See Bounds v. Smith*, 430 U.S. 817, 824 (1977). At a minimum, petitioner requests a simple and narrowly tailored remedy – access to his own medical records and an order that he be provided appropriate medical care so that he can assist his counsel in prosecuting his habeas petition.

Courts are empowered to "requir[e] additional measures to assure meaningful access" by habeas petitioners "to present their own cases." *Bounds*, 430 U.S. at 824. Such measures include setting forth affirmative obligations to assure all prisoners meaningful access to the courts. *Id.* Without intervention by this Court, counsel will have no effective means of conferring intelligently with Al-Ghizzawi and therefore no means to

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[1] Judge Hogan who is the coordinating judge in the Guantanamo litigation at the District Court also found Sec. 7 strips the District Court of Jurisdiction to hear similar claims (See, *Abdah vs.*

address substantial issues related to his petition - leaving him "only the right to a meaningless ritual." *Douglas v. State of California*, 373 U.S. 353, 358 (1963).

Without a doubt, the situation presented by Al-Ghizzawi is extraordinary. Al-Ghizzawi, who has never been charged with a crime, must be given the tools to literally stay alive and in adequate health long enough to meaningfully assist in his habeas petition. Al-Ghizzawi cannot present an analogous situation where a prisoner and his attorney would be denied basic information about the client's health nevertheless in a situation as dire as this where the client is literally dying before counsel's eyes.

II. ACCEPTING THE GOVERNMENT'S SIMULTANEOUS DEPRIVATION TO AL-GHIZZAWI OF THE ABILITY TO DEMONSTRATE THAT HE IS SUFFERING FROM MEDICAL NEGLECT AND THEN ARGUING THAT HE THEREFORE CANNOT DEMONSTRATE IRREPARABLE HARM IS ANATHEMA TO OUR CONSTITUTIONAL FRAMEWORK

Petitioner Al-Ghizzawi filed his underlying emergency applications first with the District court and then with the Circuit Court to compel the government to afford him adequate medical treatment, immediate disclosure of his medical records (relief available to any convicted prisoner in America let alone a man not even accused of a crime) and relief from the cruel isolation of Guantánamo Camp 6, so that Al-Ghizzawi can effectively assist his counsel in his own habeas proceedings. Although not apparent in reading the District Court opinion, Al-Ghizzawi submitted affidavits from himself, his attorney and a medical expert. Despite that evidence submitted, the courts below have accepted the government's bald assertions of adequate medical treatment, without

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Bush et al 04-1254, order dated 9/22/08..

any review of the actual medical records, and without an independent examination and without consideration of the affidavits from Al-Ghizzawi, his counsel, and liver specialist Dr. Juerg Reichen, all of which contradicted the military doctors' assertions that Al-Ghizzawi would be in perfect health but for his own recalcitrance. Notwithstanding the government's assertion that Al-Ghizzawi's medical condition is "uncontroverted" the courts did not conduct a contested hearing with respect to, the actual controversy before them and completely ignored Al-Ghizzawi's evidence. Al-Ghizzawi respectfully submits that this was in error.

Al-Ghizzawi is suffering irreparable harm by his ongoing detention and will suffer yet more harm if he is not provided with medical care and his counsel is not permitted to have immediate and meaningful access to his medical records. No subsequent action by the Court or Respondents can repair the physical and psychological damage resulting from the ongoing inadequate medical treatment. Of course, without the actual medical records before a court or available to Al-Ghizzawi, the government will argue, as it has continuously to date, that Al-Ghizzawi can never show irreparable harm, because it holds all of the information itself and refuses to disclose them. This situation would be unacceptable as a matter of law in any other circumstances as it undermines any notion of due process under law. The governments conduct in this is anathema in our system of adversarial litigation and discovery. As noted in Al-Ghizzawi's original motion to the District Court, even the International Committee for the Red Cross inadvertently raised concerns about Al-Ghizzawi's health to counsel in late 2006, and yet, the United States government insists that it need

disclose nothing.

The Federal Courts have broad power to fashion equitable relief as may be necessary in aid of its equity jurisdiction in habeas cases. See *SEC v. Vision Commc'ns, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (holding that the All Writs Act "empowers court to issue injunctions to protect its jurisdiction"); see also *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (holding that centuries of tradition confirm that federal judges have "broad discretion in conditioning a judgment granting habeas relief"); see 28 U.S.C. § 2243 (directing courts to "dispose of [a habeas case] as law and justice require"); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) ("mandate is broad with respect to the relief that may be granted"); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas "never has been a static, narrow, formalistic remedy").

The Federal Courts also have broad and specific authority to order appropriate relief under habeas corpus, including, inter alia, relief in the nature of bail or parole, addressed to the condition or maintenance of the prisoner prior to final resolution of the habeas petition. *Baker v. Sard*, 420 F.2d 1342, 1343 (D.C. Cir. 1969); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (citing to *Baker*, 420 F.2d at 1343); *Ostrer v. United States*, 584 F.2d 594, 596 n.1 (2d Cir. 1978); *Boyer v. City of Orlando*, 402 F.2d 966, 968 (5th Cir. 1968) (ordering the release of a habeas petitioner on bail pending exhaustion of state and federal remedies). In addition, the writ of habeas corpus has long dealt with movement of prisoners. See, e.g., *United States v. Mauro*, 436 U.S. 340, 357 (1978) (power to issue writs of habeas corpus includes authority to issue such a writ when it is necessary to bring a prisoner into court to testify or for trial or to remove a prisoner in order to

prosecute him in the proper jurisdiction where offense was committed).

In addition, the Geneva Conventions and this Court's decision in *Boumediene* are in accord that Al-Ghizzawi must be treated humanely and that he must be afforded proper medical care until such time as his petition is heard and he is released. This Court has twice held that Al-Ghizzawi and others held at Guantánamo are entitled to the protections of the Geneva Conventions (an argument raised by Al-Ghizzawi's motions in the courts below but ignored by the Government and rejected by those courts). The Geneva Conventions protection mandates not only humane treatment but also that Al-Ghizzawi be afforded appropriate treatment in a civilian facility if the military facility cannot provide it. The military has clearly shown over these many years that it is completely unwilling and/or unable to provide proper care for Al-Ghizzawi thus necessitating the relief of a civilian facility.

Al-Ghizzawi has more than shown the necessary factors for awarding injunctive relief. (1) Al-Ghizzawi is suffering and will continue to suffer irreparable harm if the injunction is denied; (2) no harm will be suffered by Respondents if the injunction is granted; (3) based on the record of Al-Ghizzawi's two CSRT's and in light of the decision in *Parhat*, Al-Ghizzawi is likely to succeed on the merits of his claim, and (4) there is a clear public interest in preventing the Government from refusing to competently treat its prisoner, in refusing to provide him medical records, and in holding a prisoner like Al-Ghizzawi in the astonishingly harsh, and potentially deadly isolation of Camp 6, particularly where the Government has no lawful basis to continue to detain him at all. See *Al-Fayed v. CIA*, 254 F.3d 300, 304 (D.C. Cir. 2001); *Serono Labs.*,

Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998).

This Court may issue preliminary injunctive relief to ensure that Petitioner has access to the Court. This Court also has inherent power, under the All Writs Act, 28 U.S.C. § 1651(a), to issue "all writs necessary or appropriate to aid of [its] jurisdiction[] and agreeable to the usages and principles of law." The Act "empowers a court to issue injunctions to protect its jurisdiction," *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996); *Env'tl. Def. Fund. v. EPA*, 485 F.2d 780, 784 n. 2 (D.C. Cir. 1973), and "to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 273 (1942). Where "alternative remedies are unavailable," *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999), a court may use the Act to order appropriate relief.

The failure of the District Court to hold (or the Circuit Court to direct) a contested hearing, or to ask the Government for medical records for disclosure or at a minimum for in camera review or any kind of independent examination at all, warrants the injunctive relief Al-Ghizzawi seeks in order to ensure that the habeas corpus remedy to which this Court held that he and other Guantánamo prisoners are entitled in *Boumediene* are not rendered nugatory as a result of the combination of government dilatory tactics and the illness of the prisoner.

CONCLUSION

As set forth above, at issue here is whether the Government may frustrate the right to pursue habeas petitions recognized by this court in *Boumediene* by denying Al-Ghizzawi adequate medical treatment and holding him in conditions designed to destroy his mind. For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Al-Ghizzawi asks this Court to grant his petition for a Writ of Certiorari, reverse the lower courts' decisions on his motions to compel production of his own medical records, adequate and reasonable medical treatment, and, for such other and further relief as this Court deems just.

Respectfully Submitted,

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Counsel apologizes to this Court for the unprofessional look of this document as it was prepared at the "secure facility" which lacks proper resources for filing documents such at this.

A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5394 **September Term 2008**

05cv02378

Filed On: October 3, 2008

Abdul Hamid Abdul Salam Al-Ghizzawi,
Detainee, Guantanamo Bay Naval Station,

Appellant

v.

George W. Bush, President of the United States, et al.,

Appellees

No. 08-5136

05-cv-02378

Abdul Hamid Abdul Salam Al-Ghizzawi,
Detainee, Guantanamo Bay Naval Station,

Appellant

v.

Robert M. Gates, Secretary, United States Department of Defense, et al.,

Appellees

BEFORE: Ginsburg, Tatel, and Griffith, Circuit Judges

ORDER

Upon consideration of the unopposed motion to consolidate Nos. 06-5394 and 08-5136; the motion to hold the appeals in abeyance or in the alternative to set a briefing schedule, the response thereto, and the reply; the motion for injunction to maintain status quo, which contains a request for summary reversal of the district court's decisions, the response thereto, and the reply, which opposes further briefing on the merits; and appellees' motion for summary affirmance filed January 16, 2007, in No. 06-5394, the response thereto, and the reply, consideration of which was deferred by order entered March 14, 2007, it is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5394 **September Term 2008**

ORDERED that the district court's orders filed October 2, 2006, November 2, 2006, and April 8, 2008, be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly denied appellant's successive motions for preliminary injunctive relief on the grounds that appellant had not demonstrated a likelihood of success on the merits, particularly in view of the unresolved jurisdictional questions posed by his claims; or that he would suffer irreparable harm if his motions were denied. No. 05-2378, 2006 WL 2844781 (D.D.C. Oct. 2, 2006); 2008 WL 948337 (D.D.C. Apr. 8, 2008). Nor did the district court abuse its discretion in denying reconsideration of the October 2006 order. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996). It is

FURTHER ORDERED that the motion for injunction pending appeal and the motion to consolidate the above-captioned appeals be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate in Nos. 06-5394 and 08-5136 until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Lynda M. Flippin
Deputy Clerk

B1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDUL HAMID ABDUL SALAM AL-GHIZZAWI,

Petitioner,

v.

GEORGE W. BUSH, et al.,

Respondents.

Civil Action No. 05-2378 (JDB)

MEMORANDUM OPINION & ORDER

Petitioner Abdul Hamid Abdul Salam Al-Ghizzawi has moved for reconsideration of the Court's October 2, 2006, Memorandum Opinion & Order denying his emergency motion to compel access to medical records and to require emergency medical treatment. See Al-Ghizzawi v. Bush, No. 05-cv-2378 (D.D.C. Oct. 2, 2006) ("Al-Ghizzawi Mem. Op. & Order"). The facts underlying petitioner's original emergency motion are set forth fully in the Memorandum Opinion & Order. See id. at 2-6. The Court will only briefly review those facts here.

Petitioner is a Libyan citizen currently detained at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). Id. at 1. He alleges that he is in ill health and that respondents have provided him with inadequate medical care. Id. at 2. In support of his emergency motion, petitioner submitted affidavits from two medical doctors who suggested additional medical tests they believe should be performed on petitioner. Id. at 5-6. Respondents submitted declarations in opposition to the emergency motion describing the medical care provided to detainees at Guantanamo generally and to petitioner specifically. Id. at 3-5. The

Court construed petitioner's emergency motion as a motion for a preliminary injunction. Id. at 6. As explained in the Memorandum Opinion, the Court concluded that petitioner has not demonstrated a likelihood of success on the merits of his claim because he has failed to show that his medical care at Guantanamo is deficient to the point of violating his rights, id. at 8-9, and that petitioner has not shown that he would suffer irreparable harm absent the requested relief, id. at 9-10. The Court accordingly denied the motion, and petitioner then immediately filed this motion for reconsideration on October 4, 2006.

There is no Federal Rule of Civil Procedure that expressly addresses motions for reconsideration. E.g., Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d 1292, 1296 n.3 (10th Cir. 2002); Lance v. United Mine Workers for Am. Pension Trust, 400 F. Supp. 2d 29, 31 (D.D.C. 2005). Courts typically treat motions to reconsider as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). E.g., Emory v. Sec'y of Navy, 819 F.2d 291, 293 (D.C. Cir. 1987); Lance, 400 F. Supp. 2d at 31. "'A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Ciralsky v. Cent. Intelligence Agency, 355 F.3d 551, 671 (D.C. Cir. 2004) (quoting Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). A Rule 59(e) motion "is not simply an opportunity to reargue facts and theories upon which a court has already ruled." New York v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995). Nor is it "a vehicle for presenting theories or arguments that could have been advanced earlier." Burlington Ins. Co. v. Okie Dokie Inc., 439 F. Supp. 2d 124, 128 (D.D.C. 2006); see also Kattan v. District of Columbia, 995 F.2d 274, 276 (D.C. Cir. 1993).

Petitioner's arguments do not fall neatly into the Rule 59(e) framework. It is clear, however, that petitioner has not shown an intervening change in controlling law--indeed, petitioner's motion does even not make any arguments with respect to controlling law--and the Court sees no reason to reconsider its decision on that basis.[1] It is also clear that the supplemental affidavits of Dr. Jensen and Dr. Reichen, which petitioner has submitted to challenge the accuracy of the medical tests conducted on petitioner, present evidence that could have been advanced earlier. See Petr.'s Mem. Supp. Mot. Recons. ("Petr.'s Mem.") Ex. G (Suppl. Aff. of Dr. Juerg Reichen) ¶ 19; Petr.'s Mem. Ex. H. (Suppl. Aff. of Dr. Donald Jensen) ¶ 22. For example, the journal articles submitted in support of both affidavits were published in 2004 and 2005. See Suppl. Aff. of Dr. Juerg Reichen ¶¶ 20, 21; Suppl. Aff. of Dr. Donald Jensen ¶ 24.

Petitioner challenges the Court's irreparable-harm analysis on the basis of evidence that is arguably newly available. As noted in the Memorandum Opinion & Order, the "D.C. Circuit 'has set a high standard for irreparable injury. . . . The moving party must show [t]he injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" Mem. Op. & Order at 9 (quoting Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2004)) (alteration in original). Petitioner asserts that the Court "overlooked the fact that the government concedes that Mr. Al-Ghizzawi has Hepatitis

[1]Petitioner argues that the Court incorrectly characterized his request for relief as being made for the purpose of obtaining a second medical opinion; instead, petitioner states that he requested the medical records and additional testing in order to demonstrate that he is not receiving adequate medical care. Petr.'s Mem. Supp. Mot. Recons. at 4-5. The Court is not persuaded that the difference in these characterizations of petitioner's purpose has any real significance. Moreover, under petitioner's reasoning, any person in custody would automatically be entitled to relief upon pleading allegations of inadequate medical care, a result inconsistent with the longstanding reluctance of courts to second-guess the medical care provided to prisoners by government officials. See Mem. Op. & Order at 3.

B and that Mr. Al-Ghizzawi has tuberculosis, but is not being treated for either condition." Petr.'s Mem. at 2. But the impact of petitioner's Hepatitis B status on his medical treatment was fully considered in the Memorandum Opinion & Order. See Mem. Op. & Order at 4, 5-6, 9. The Court also noted in its opinion that petitioner was diagnosed with *latent* tuberculosis but, according to respondents, had refused treatment. Mem. Op. & Order at 6 n.6 (citing Resp'ts' Opp'n Ex. 1 (Decl. of Captain Ronald L. Sollock, M.D., Ph.D. ("Sollock Decl.")) ¶ 13).

Petitioner now asserts that the Court "ignores the fact that [] Petitioner's counsel was not able to consult with Petitioner regarding the accuracy of these claims until after Petitioner's reply memorandum was due." Petr.'s Mem. at 2. Petitioner's counsel apparently did not review Captain Sollock's declaration with petitioner until September 19, 2006, six days after filing the reply memorandum in support of the emergency motion.[2] See Petr.'s Mem. Ex. F (Aff. of H. Candace Gorman) ¶¶ 2-3. Petitioner's counsel states that petitioner told her in the September 19th meeting that he had never been informed of his latent tuberculosis diagnosis and that he had never refused treatment for that diagnosis. Id. ¶ 4. Respondents, on the other hand, reassert that petitioner was specifically informed of both his latent tuberculosis diagnosis and his treatment options but has refused any form of treatment. Resp'ts' Opp'n to Petr.'s Mot. to Recons. Ex.4 (Second Decl. of Capt. Ronald L. Sollock, M.D., Ph.D. ("2d Sollock Decl.")) ¶ 3.

The Court need not specifically resolve this issue because respondents also present

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[2]The Court notes that prior to counsel's September 19, 2006, trip to Guantanamo, petitioner requested an extension of time to file a different reply with this Court in order to allow counsel to consult with Mr. Al-Ghizzawi regarding respondents' claims relevant to that other reply. See [43] Petr.'s Mot. for Extension of Time to Reply to Resp'ts' Opp'n to Petr.'s Mot. to Compel Compliance (filed Sept. 18, 2006). The Court granted the motion for an extension of time. See Al-Ghizzawi v. Bush, No. 05-cv-2378 (D.D.C. Sept. 22, 2006) (Minute Order).

uncontroverted evidence leading the Court to reaffirm its earlier conclusion that petitioner has not sufficiently demonstrated irreparable harm. Respondents present medical evidence that a diagnosis of latent tuberculosis indicates that the individual has been exposed to tuberculosis mycobacterium but has no symptoms or findings of active disease.[3] 2d Sollock Decl. ¶ 3(a). Furthermore, respondents assert that petitioner did not have any symptoms of active tuberculosis at the time of his diagnosis. Id. ¶ 3(b). According to Captain Sollock, these symptoms include night sweats, cough, hemoptysis (coughing up blood), and weight loss. Id. Only one of these symptoms--weight loss--has been alleged by respondent, see Mem. Op. & Order at 2-3 (listing symptoms), and that allegation was rebutted by evidence stating that petitioner has gained over ten pounds during his detention, see id. at 3 (citing Sollock Decl. ¶ 11). Respondent has not otherwise alleged that he currently has an active case of tuberculosis. In other words, even assuming that petitioner is not being treated for his latent tuberculosis, the Court still cannot conclude that petitioner's health is in *immediate* danger from deficient medical treatment given the absence of any evidence of active tuberculosis.

Therefore, upon consideration of petitioner's motion and the entire record herein, and for the reasons stated above, it is this 2nd day of November, 2006, hereby

ORDERED that [49] petitioner's motion to reconsider is **DENIED**.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

[3]Captain Sollock also explains that, "[a]lthough many people with latent Tuberculosis never develop active Tuberculosis," Guantanamo medical personnel recommend to detainees that they undergo nine months of treatment consisting of oral medication and Vitamin B6 supplements in order to destroy the tuberculosis mycobacterium. 2d Sollock Decl. ¶ 3(a).

B2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDUL HAMID ABDUL SALAM AL-GHIZZAWI,

Petitioner,

v.

GEORGE W. BUSH, et al.,

Respondents.

Civil Action No. 05-2378 (JDB)

MEMORANDUM OPINION & ORDER

Petitioner Abdul Hamid Abdul Salam Al-Ghizzawi, a citizen of Libya, is currently detained at the United States Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), and he has challenged the legality of his confinement in a petition for a writ of habeas corpus. This Court previously ordered a stay in this case pending resolution of related appeals in the D.C. Circuit, see July 19, 2006 Order, and the Court is now awaiting the Supreme Court's decision in Boumediene v. Bush, 476 F.3d 981 (2007), cert. granted, 127 S. Ct. 3078 (June 29, 2007), which was argued on December 5, 2007.

Currently before the Court is Al-Ghizzawi's New Emergency Motion for Medical Treatment and Medical Records. As the title implies, this is not the first time Al-Ghizzawi has requested preliminary injunctive relief seeking this Court's direct intervention into the medical treatment provided to individuals in United States custody at Guantanamo. After careful consideration, the Court previously denied Al-Ghizzawi's similar motion filed in August 2006, finding that he had "not provided evidence of misconduct on the part of respondents with respect

to his medical care." Al-Ghizzawi v. Bush, 2006 WL 2844781, at *4 (D.D.C. Oct. 2, 2006). And the Court previously denied his October 2006 motion for reconsideration, stating that "the Court still cannot conclude that petitioner's health is in immediate danger from deficient medical treatment." Nov. 2, 2006 Mem. Op. & Order at 5 (Dkt. No. 56). Now, once again, Al-Ghizzawi has failed to demonstrate on this most recent occasion that he is not receiving thorough, appropriate, professional medical care. The Court will therefore deny his new emergency motion.[1]

BACKGROUND

Al-Ghizzawi, a man in his mid-forties who has been in the custody of the United States since late 2001, arrived at Guantanamo in June 2002. Pet'r's Mot. Ex. C (Aff. of Attorney H. Candace Gorman) ¶¶ 1, 5. In his opening brief to this Court, Al-Ghizzawi made grave accusations about the U.S. government's failure to provide any medication or treatment for his alleged "life threatening illnesses." Pet'r's Mot. at 3. As the briefing progressed, however, his accusations regarding the lack of medical care weakened, and he was forced to concede that his most serious allegation was, in fact, inaccurate. Because he still maintains that the government is providing inadequate medical care, however, it is necessary to detail the parties' accounts of his

[1]The Court takes seriously its obligation to review carefully and resolve every matter based upon the parties' memoranda and exhibits, the applicable law, and the entire record. In this case, Al-Ghizzawi's counsel has attempted to add another factor into the mix by encouraging interested parties to submit a litany of letters to this Court expressing their opinions on Al-Ghizzawi's behalf. Although the Court has read the letters that were submitted and understands the emotions and sentiments expressed, the Court is not confident that counsel's attempt to influence the resolution of this matter by marshalling a letter-writing campaign was appropriate. The Court hopes that all interested persons can set aside the emotions and sympathies understandably triggered by Guantanamo detainee cases and remember that the Court must resolve this matter based on the law and the medical declarations that detail the care available to Al-Ghizzawi.

physical condition, the medical treatment he has been offered and is (or is not) receiving, and the relief he now requests.

Al-Ghizzawi first makes the serious allegation that Guantanamo medical personnel diagnosed him with acquired immune deficiency syndrome ("AIDS") and offered him no medication or treatment for this condition. Id. at 2, 9. Contrary to Al-Ghizzawi's unsubstantiated assertions, however, the sworn declaration of Dr. Bruce C. Meneley, the Commanding Officer, Naval Hospital, Commander, Joint Medical Group, Guantanamo Bay, Cuba, states that "Mr. Al-Ghizzawi is not correct." Resp'ts' Opp. Ex. B (Declaration of Captain Bruce C. Meneley, M.D. ("Meneley Decl.")) ¶ 5. As is the typical processing procedure, Al-Ghizzawi was tested for human immunodeficiency virus ("HIV") upon his arrival at Guantanamo, and the result was negative. Resp'ts' Response Ex. C (Declaration of Captain Bruce C. Meneley, M.D. ("Second Meneley Decl.")) ¶ 7. In case a detainee contracted HIV just before his arrival at Guantanamo, which would be too recent to show up on the first round of testing, each detainee is tested again several weeks later. Id. Al-Ghizzawi's test result was again negative. Id. According to Dr. Meneley, "[s]ubsequent HIV tests were performed in an attempt to reassure Mr. Al-Ghizzawi that he is not HIV positive." Id.

Each and every test result has been negative, and Al-Ghizzawi has been informed of these results. Meneley Decl. ¶ 5. Although Al-Ghizzawi contends that the medical staff told him he was HIV positive, there is no evidence of this, other than Al-Ghizzawi's unsubstantiated assertions, and his medical file contains multiple notations "stating that he does not believe the physicians who have told him he is HIV negative." Id. As Dr. Meneley points out, to tell Al-Ghizzawi anything other than a truthful diagnosis would violate the rules and protocols under

which the Guantanamo medical staff operate. Id. Respondents therefore argue that Al-Ghizzawi "is simply not telling the truth or has somehow deceived himself into believing something that is not true." Resp'ts' Opp. at 16. The Court need not determine the source of confusion over this serious issue, however, because Al-Ghizzawi seeks relief for his medical conditions -- and AIDS is not one of his medical conditions. Al-Ghizzawi's counsel now accepts Dr. Meneley's representations and concedes "that Al-Ghizzawi does not, in fact, suffer from AIDS." Pet'r's Supp. Mem. at 1. Hence, this issue, which sounded so alarming at first, does not warrant this Court's further attention.

Al-Ghizzawi next asserts that he has been diagnosed with a severe liver infection, has not been given any medication or treatment for this ailment, and was "scared out of having a liver biopsy provided by camp medical staff at Guantanamo." Pet'r's Mot. at 9 (citing Ex. A, Affidavit of Abdul Hamid Al-Ghizzawi). Al-Ghizzawi's status as a Hepatitis B carrier was confirmed shortly after his arrival at Guantanamo. At that time, he was advised of the screening and treatment options that were available to him. As the Court noted in its Memorandum Opinion & Order on October 2, 2006, "[b]ecause of his history of Hepatitis B, which was confirmed shortly after the initial physical exam, petitioner has been given routine evaluations that include ultrasound evaluations and serum laboratory testing in accordance with guidelines issued by Guantanamo's gastroenterology department." Al-Ghizzawi, 2006 WL 2844781, at *2 (noting that those tests included "liver function tests, complete blood counts, electrolytes, tumor marker, alpha-fetoprotein, serum liver transaminases, and bilirubin levels").

Laboratory results from November 2006 and August 2007 "revealed that Mr. Al-Ghizzawi's viral markers were slightly elevated above what would normally be seen with a

typical Hepatitis B carrier." Meneley Decl. ¶ 6.[2] Because these results suggested the possibility of active Hepatitis B and/or cirrhosis of the liver, but were not diagnostic of either, medical personnel recommended that a liver biopsy be performed. Id. After Al-Ghizzawi was informed of the nature, risks, and benefits of the proposed procedure, he refused to consent to the biopsy. Id. ¶ 7. The medical staff thereafter conducted an ultrasound of Al-Ghizzawi's liver and found no evidence of cirrhosis or carcinoma. Id. ¶ 6. Al-Ghizzawi then subsequently "refused to have blood tests for monitoring his liver enzymes and viral load," despite the warning that the refusal of these tests could be detrimental to his health. Id. ¶ 7.

With his reply brief, Al-Ghizzawi submitted an affidavit from Dr. Juerg Reichen, who is the Chief of Hepatology at the University Hospital of Bern, Switzerland. Pet'r's Reply Ex. E (Affidavit of Dr. Juerg Reichen ("Reichen Aff.")). Relying on the information presented in respondents' briefs and declarations, Dr. Reichen takes issue with the need for a liver biopsy and points out that an active Hepatitis B determination can often be made from blood test results. Id. ¶ 5.4. Dr. Meneley acknowledges this possibility in his response but reiterates that here "Mr. Al-Ghizzawi's blood test results are not diagnostic of precore mutant Hepatitis B; the tests do not indicate either anti-HBe positive or an HBV DNA viral load of $>10^5$." Second Meneley Decl. ¶ 3. Hence, relying on standards that include the American Association for the Study of Liver Diseases practice guidelines, Guantanamo medical personnel recommended a liver biopsy as the

[2]Al-Ghizzawi makes much ado about nothing regarding alleged contradictions between Dr. Ronald Sollock's affidavits, filed in September and October 2006, and Dr. Meneley's affidavit, filed in February 2008. See Pet'r's Reply at 7-9. Although Al-Ghizzawi speculates with harsh language, there are no obvious contradictions regarding Al-Ghizzawi's Hepatitis B test results. Indeed, Dr. Meneley's affidavit discusses tests that were performed and treatment that was offered after Dr. Sollock's affidavits had been submitted to this Court.

"gold standard and most medically appropriate test that would allow [them] to make definitive treatment decisions." Id.[3] Because Al-Ghizzawi has failed to consent to follow-up procedures, the medical staff has been unable to make an appropriate determination of his condition.[4]

Following counsel's visit with Al-Ghizzawi on February 26 and 27, 2008, a supplemental memorandum was submitted containing additional symptoms that Al-Ghizzawi complained of and additional symptoms that counsel observed. According to counsel, Al-Ghizzawi found it difficult to talk, appeared jaundiced, complained of diarrhea, had difficulty urinating, complained about the eyeglasses he was prescribed, felt constant body aches and pains, and experienced itchy skin. Pet'r's Supp. Mem. at 6-9. Al-Ghizzawi told his counsel that a Guantanamo doctor had prescribed him an antibiotic along with other medication, but because the guards gave him very cold water to swallow the pills, he would not take the medication. Id. at 6-7. He apparently asked the doctor to include a note with the medication instructing the guards to bring him warm water, but the doctor allegedly declined this request. Id. Al-Ghizzawi also told his counsel that

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[3]Dr. Reichen also picks up on Al-Ghizzawi's alleged symptom of skin itching and states in the abstract that this "could be an indicator that something serious is happening in the liver of Mr. Al-Ghizzawi." Reichen Aff. ¶ 9. Dr. Meneley clearly states, however, that "Mr. Al-Ghizzawi's blood test results do not suggest liver disease as a cause of the itching" and that an appropriate topical treatment was provided for the itching. Second Meneley Decl. ¶ 5.

[4]Al-Ghizzawi also attempts to resurrect a claim that was resolved in his first emergency motion for medical treatment and the subsequent motion for reconsideration. He again argues that he has "Tuberculosis and has not been treated for [this] condition." Pet'r's Mot. at 8. As the Court previously noted, however, "petitioner was diagnosed with latent tuberculosis," with "no symptoms or findings of active disease." Nov. 2, 2006 Mem. Op. & Order at 4, 5 (Dkt. No. 56). "'Although many people with latent Tuberculosis never develop active Tuberculosis,' Guantanamo medical personnel recommend to detainees that they undergo nine months of treatment consisting of oral medication and Vitamin B6 supplements in order to destroy the tuberculosis mycobacterium." Id. at 5. In Dr. Meneley's updated declaration, he states that "[t]here has been no change to Mr. Al-Ghizzawi's diagnosis of latent Tuberculosis," and "Mr. Al-Ghizzawi continues to refuse treatment." Meneley Decl. ¶ 8.

he had refused to allow any blood tests or a liver biopsy. Counsel noted that two of the tests the Guantanamo doctors wanted to perform were tests that Dr. Reichen had also recommended. Id. at 8-9.

Responding to the allegations in Al-Ghizzawi's supplemental memorandum, the government briefly describes the treatment he has received in the last year alone: "blood testing, ultrasound, the offer of a liver biopsy, medical counseling, prescription eyeglasses, ten medical visits related to gastrointestinal complaints, and treatment for H.Pylori." Resp'ts' Response at 5. After Al-Ghizzawi returned the eyeglasses that were prescribed for him, he was scheduled for another optometry visit even though he has indicated that he does not want to see an optometrist. Second Meneley Decl. ¶ 8. The medical staff at Guantanamo is also prepared to conduct an "ultrasound of the liver, routine follow up blood work, tissue transglutaminase IgA, anti-gliadin antibody tests, . . . a percutaneous liver biopsy," and tests for gluten sensitive enteropathy as soon as Al-Ghizzawi gives his consent. Id. ¶¶ 2, 5.[5]

On March 2, 2008, just days after counsel's visit, a Guantanamo physician met with Al-Ghizzawi for forty-five minutes, counseling him about the need for follow-up testing. Id. ¶ 2. Despite the encouragement of Al-Ghizzawi's counsel and the Guantanamo medical staff, Al-Ghizzawi persisted in his refusal to allow any additional testing. Id. During the meeting with the physician, Al-Ghizzawi did not complain of any significant body pains, did not exhibit difficulty speaking, and did not appear to suffer from jaundice. Id. ¶ 4.

Upset at the care he has received, Al-Ghizzawi, through his counsel, now seeks an order

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[5]It is important to note that Al-Ghizzawi and all Guantanamo detainees may seek medical care at any time by making a request to a guard or to one of the medical personnel who make several rounds on the cellblock each day. Meneley Decl. ¶ 4.

from this Court requiring the government to provide him with emergency medical treatment and requiring the government to tender his complete medical records to counsel.[6] In his reply and supplemental memorandum, counsel for Al-Ghizzawi focuses on how distrustful Al-Ghizzawi is of the Guantanamo medical staff, and also seeks his transfer to a civilian medical facility.[7]

STANDARD OF REVIEW

To prevail on his motion for a preliminary injunction, Al-Ghizzawi must demonstrate (i) a substantial likelihood of success on the merits; (ii) that he will suffer irreparable harm absent the relief requested; (iii) that other interested parties will not be harmed if the requested relief is granted; and (iv) that the public interest supports granting the requested relief. E.g., Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). In assessing a motion for a preliminary injunction, the district court should "balance the strengths of the requesting party's arguments in each of the four required areas." Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (internal quotation marks omitted). Because a showing of irreparable harm is the basis of injunctive relief, however, a "movant's failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction." Id. Furthermore, "a preliminary injunction is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the

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[6]On January 28, 2008, Al-Ghizzawi filed an emergency application in the Supreme Court in his original habeas action seeking similar relief. The next day, the Chief Justice denied the application without comment. Resp'ts' Opp. Ex. A.

[7]As the Court noted in connection with Al-Ghizzawi's first request for a transfer to Dr. Reichen's clinic in Switzerland, a transfer request strains the bounds of preliminary injunctive relief. See Al-Ghizzawi, 2006 WL 2844781, at *3 n.7 (citing Cobell v. Kempthorne, 455 F.3d 301, 314 (D.C. Cir. 2006) ("The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation.") (internal quotation marks omitted)).

burden of persuasion." Cobell v. Norton, 391 F.3d at 258.

ANALYSIS

I. Jurisdiction

As a preliminary matter, respondents argue that this Court is deprived of jurisdiction to entertain Al-Ghizzawi's motion by the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, and the law of this Circuit following Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (June 29, 2007). The Military Commissions Act specifically states that no court shall have jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination," 28 U.S.C. § 2241(e)(1), and that no court shall have jurisdiction "to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of such an alien, except as provided by the Detainee Treatment Act of 2005, id. § 2241(e)(2). In Boumediene, the D.C. Circuit held that the Military Commissions Act's removal of federal court jurisdiction over detainees' habeas petitions is constitutional and does not violate the Suspension Clause. 476 F.3d at 993-94. Under this authority, then, there was serious doubt that this Court had jurisdiction to grant the relief that Al-Ghizzawi seeks.

But another aspect of the analysis is now the D.C. Circuit's recent opinion in Belbacha v. Bush, 2008 WL 680637 (D.C. Cir. Mar. 14, 2008). Belbacha, a Guantanamo detainee, had previously petitioned the district court for a writ of habeas corpus. Id. at *1. While his petition was pending, he sought preliminary injunctive relief barring his transfer to Algeria. The district

court denied the motion on the ground that it had no power to grant the requested relief under the Military Commissions Act and Boumediene. Id. On appeal, the D.C. Circuit held "that when the Supreme Court grants certiorari to review [the Court of Appeals'] determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act, 28 U.S.C. § 1651, and during the pendency of the Supreme Court's review, act to preserve the status quo in other cases raising the same jurisdictional issue if a party satisfies the criteria for issuing a preliminary injunction." Id. at *3.

Respondents raise a colorable argument that because Al-Ghizzawi's motion involves issues of his ongoing medical care, it "therefore cannot be characterized, within the bounds of the record in this case, as seeking jurisdiction-preserving relief, which is the feature of the relief sought in Belbacha." Resp'ts' Response at 2 n.1. Al-Ghizzawi, on the other hand, responds that adequate medical care is surely an essential ingredient for preserving his life and hence the status quo. This context is arguably different from that raised in Belbacha by a motion to enjoin a transfer, and hence the answer to the jurisdictional issue is uncertain. But in any event, for the reasons that follow, Al-Ghizzawi clearly is not entitled to the relief he seeks.

II. Preliminary Injunction Requirements

Al-Ghizzawi has failed to demonstrate that he will suffer irreparable injury if his motion is denied. The D.C. Circuit "has set a high standard for irreparable injury. First, the injury must be both certain and great; it must be actual and not theoretical. The moving party must show [t]he injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Chaplaincy of Full Gospel Churches, 454 F.3d at 297 (citations and internal quotation marks omitted) (alteration in original); see also Wisc. Gas

Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

Here, Al-Ghizzawi argues that "the irreparable harm that this Court found lacking at the time this Court denied his prior motion [is] now clearly established" in the form of "imminent death." Pet'r's Mot. at 5-6. According to counsel: "If Al-Ghizzawi goes much longer without treatment he will, in all likelihood, die of the many diseases he has acquired at Guantanamo despite his incredible will to survive." Id. at 11. Despite this emotionally-charged language to which Al-Ghizzawi consistently resorts throughout his briefing, the Court does not find that irreparable harm will result from declination of the emergency relief requested.

Keeping in mind the "consistent body of law reflecting the reluctance of courts to second-guess the medical treatment provided to prisoners by government officials," Al-Ghizzawi has not demonstrated that his ongoing care is deficient in any way. See O.K. v. Bush, 344 F. Supp. 2d 44, 60-61 (D.D.C. 2004). A prisoner must usually demonstrate that government officials have exhibited "deliberate indifference" to his "serious medical needs." Neitzke v. Williams, 490 U.S. 319, 321 (1989); Estelle v. Gamble, 429 U.S. 97, 104 (1976).[8] Deliberate indifference is found where officials were "'knowingly and unreasonably disregarding an objectively intolerable risk of harm to the prisoners' health or safety.'" Scott v. District of Columbia, 139 F.3d 940, 943 (D.C. Cir. 1998) (quoting Farmer v. Brennan, 511 U.S. 825, 846 (1994)). The "deliberate indifference" standard is not satisfied by allegations of "mere negligence, mistake or difference of opinion."

[8]The "deliberate indifference" standard was developed in the context of Eighth Amendment challenges to prison-provided medical care, see Estelle, 429 U.S. at 104, and has been applied in cases involving the rights of pretrial detainees under the Due Process Clause of the Fourteenth Amendment, see Hill v. Nicodemus, 979 F.2d 987, 991-92 (4th Cir. 1992) (collecting cases). Without deciding that the "deliberate indifference" standard applies to petitioner, this Court will again refer to this body of law to frame its analysis of this emergency motion. See Al-Ghizzawi, 2006 WL 2844781, at *4 n.8; O.K., 344 F. Supp. 2d at 61 n.23.

Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977). This standard has been applied to Al-Ghizzawi's previous motions relating to his medical care. See Al-Ghizzawi, 2006 WL 2844781, at *4 n.8.

Here, at most, the parties have a difference of opinion as to which particular diagnostic tests and treatments should be administered, but respondents have amply documented and supported their efforts to provide Al-Ghizzawi with care that conforms to their own internal standards and to the standards of the American Association for the Study of Liver Diseases. Based upon respondents' declarations, it is apparent that Al-Ghizzawi is already being offered adequate medical care. Hence, the Court cannot conclude that his health is in imminent danger due to the actions of the Guantanamo medical staff.

First and foremost, all parties agree that Al-Ghizzawi does not, in fact, suffer from AIDS. Upon an objective review of the record, Al-Ghizzawi received an extensive medical examination upon his arrival at Guantanamo, wherein his history of Hepatitis B was revealed. When it was determined that he was a Hepatitis B carrier, the medical staff continuously monitored Al-Ghizzawi with multiple blood tests and ultrasounds. Upon their determination that his viral markers were slightly elevated, Al-Ghizzawi was offered but refused any additional tests or treatment. "Since 08 February 2008 Mr. Al-Ghizzawi has declined consent to have his blood tested on four occasions," and "[h]e has also declined to have an ultrasound of his liver performed." Second Meneley Decl. ¶ 2. Following his diagnosis with latent tuberculosis, Al-Ghizzawi also refused a nine-month treatment regime of oral antibiotics and a vitamin. See Nov. 2, 2006 Mem. Op. & Order at 5 (Dkt. No. 56); Meneley Decl. ¶ 8.

When the medical staff prescribed an antibiotic and other medicine for the treatment of

H. Pylori, Al-Ghizzawi went so far as to complain about the temperature of the water he was given to take the medication. Because the water was allegedly too cold, he refused the treatment. When he was prescribed eyeglasses, he returned them, and although he continues to complain about his eyesight, he does not want to visit an optometrist. He has not given his consent to routine follow up blood work, to a liver biopsy, or to tests for gluten intolerance (suggested to address his digestive complaints). To be candid, then, if Al-Ghizzawi is currently suffering any harm from his medical condition, it is largely self-inflicted. Of course the cause of any medical harm is not the ultimate focus of this Court's inquiry, but it certainly sheds light on "the degree and imminence of harm that will result if the Court does not issue emergency relief." Al-Joudi v. Bush, 406 F. Supp. 2d 13, 20 (D.D.C. 2005). Here, it appears that granting the relief Al-Ghizzawi requests -- ordering treatment and the production of his medical records -- will not redress any imminent danger to his health because medical personnel have already made numerous testing and treatment recommendations, but Al-Ghizzawi has simply refused his consent. The record is clear -- adequate medical care is available and has either been provided or offered, and any present harm or future risk relating to the adequacy of care received is the result of Al-Ghizzawi's own refusals to cooperate in his treatment. Hence, respondents are not causing him irreparable harm.

Because Al-Ghizzawi has not demonstrated that he will suffer irreparable harm if the Court denies the relief he seeks, the Court will only briefly address the remaining preliminary injunction factors. As the D.C. Circuit noted in Belbacha, "the probability of [a detainee] prevailing on the merits of his habeas petition is far from clear." 2008 WL 680637, at *5. Moreover, Al-Ghizzawi comes up far short of the deliberate indifference standard for his medical

treatment claims on their merits. And with respect to the effect of a preliminary injunction on the interests of respondents and the public, the Court notes that Al-Ghizzawi has requested relief that would require direct judicial intervention into the operations of the medical facility at Guantanamo. Al-Ghizzawi's requested relief thus goes against the well-established case law cited above, which expresses the judicial reluctance to second-guess the medical treatment provided to prisoners or other detainees by government officials.

Although Al-Ghizzawi's request for medical records is arguably less intrusive to the operations at Guantanamo, he requests these records to "be sure that any 'treatment' he receives is applicable to his actual medical conditions." Pet'r's Mot. at 6. Again, then, this boils down to nothing more than another attempt to second-guess the medical treatment provided by the government. See Al Odah v. United States, 406 F. Supp. 2d 37, 44 (D.D.C. 2005) (denying detainee's request for medical records while explaining that "logically the provision of medical records and/or medical reports will not result in any further protection of the life of a detainee without intermediate scrutiny of the records by medical professionals and challenges to the Court based on that scrutiny").

The Court is cognizant of Al-Ghizzawi's distrust for the authorities at Guantanamo, but that alone is insufficient to justify his failure to cooperate with the medical staff or to warrant the relief he seeks. The Court agrees with respondents that "[i]t would not be in the public interest to permit a wartime detainee such as petitioner to leverage that lack of cooperation into a claim for Court intervention into the medical care provided detainees at Guantanamo." Resp'ts' Response at 9. Hence, and for the third time, Al-Ghizzawi's request for extraordinary emergency relief relating to his medical treatment at Guantanamo must be rejected.

Accordingly, and for the reasons stated above, it is this 8th day of April, 2008, hereby

ORDERED that [78] Al-Ghizzawi's New Emergency Motion for Medical Treatment and Medical Records is **DENIED**.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

C

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2008 I caused the foregoing Petition For A Writ Of Certiorari to be filed with the CSO, for delivery to the below-listed counsel of record in the above-captioned matters:

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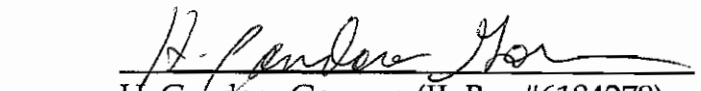
Respectfully submitted,



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