IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)
IDRIS AHMED ABDU QADIR IDRIS, Petitioner, v. BARACK OBAMA *et al.*, Respondents.	Civil Action No. 09-00745 (RCL)

MOTION FOR DIRECT CONTACT WITH CLIENT

Petitioner Idris Ahmed Abdu Qadir Idris has been detained at Guantanamo Bay, Cuba, for over seven years. For much of that time, Respondents refused to permit Mr. Idris or any other detainee to meet with an attorney. To counsel's knowledge, Mr. Idris has never spoken or met with any attorney.

Counsel now move this Court to order Respondents to grant undersigned counsel a face-to-face meeting with Mr. Idris, so that counsel and this Court may determine whether Mr. Idris is making a knowing, intelligent, and voluntary refusal to meet with his attorney.[1]

Other Judges of this Court have entered orders for direct contact – like the order requested here – which have promptly resulted in successful client meetings and client decisions to authorize their lawyer's representation.

[1] Counsel conferred with Respondents in compliance with Local Civil Rule 7(m), and Respondents do not agree to the requested relief.

For example, with respect to Petitioner Jamil Ahmad Saeed (ISN 728), Judge Walton recently ordered as follows:

> The Secretary of Defense and military personnel at Guantanamo Bay Naval Base are ordered to permit Petitioner's counsel to an expeditious, unobstructed, face-to-face meeting with Petitioner Saeed, ISN 728, at Guantanamo Naval Base, in advance of Petitioner's May 29, 2009 motion hearing. If the Secretary of Defense and military personnel at Guantanamo Bay deem Petitioner Saeed to have refused to visit with his attorney, his attorney shall be granted a face-to-face meeting with Petitioner for his attorney to determine whether Petitioner is making a knowing, intelligent, and voluntary refusal to meet with his attorney.

(Case No. 05-cv-2386, Docket Entry No. 1177, 5/1/09.)

As a result of Judge Walton's order for direct contact, Petitioner Saeed met with his court-appointed counsel on May 19-20, 2009. After consultation with counsel, Mr. Saeed chose to authorize his counsel to represent him and pursue his habeas corpus petition. (Notice of Authorization to Proceed, and Motion to Vacate Stay, Case No. 05-cv-2386, Docket Entry No. 1240, 5/26/09.)

In a different case, with respect to Petitioner Hamoud Abdulah Hamoud Hassan Al Wady, Magistrate Judge Alan Kay entered a similar order as follows:

> [It is hereby] ORDERED that Respondents shall promptly permit and facilitate counsel to meet with Petitioner in-person in a hearing room for the purpose of explaining their role as counsel and his rights as a *habeas* petitioner, so that the Court may ascertain whether his refusal of counsel is knowing and voluntary; and it is further
>
> ORDERED that Petitioner Al Wady shall meet with his designated counsel in a hearing room so that he may inform the Court, via his designated counsel, that his refusal of the assistance of counsel is voluntary and knowing, and whether or not he wishes to abandon his *habeas* petition.

(Case No. 08-cv-1237, Docket Entry No. 111, 5/1/09.)

As a result of Magistrate Judge Kay's order for direct contact, Petitioner Al Wady recently met with his court-appointed counsel and, after consultation with counsel, chose to

authorize counsel to proceed on his behalf in his habeas corpus proceedings. (Petitioner's Notice of Authorization, Case No. 08-cv-1237, Docket Entry No. 126, 5/22/09.)

Counsel moves this Court to enter a similar order for direct contact with Mr. Idris, to permit counsel and this Court to determine whether Mr. Idris is refusing the assistance of counsel, whether any such refusal of the assistance of counsel is voluntary and knowing, and whether or not he wishes to abandon his *habeas* petition. Counsel are planning to visit the Guantanamo Bay Detention Center on July 19-22, 2009, and would seek to visit Mr. Idris under the requested Order during that visit.

I. Factual Background

Idris Ahmed Abdu Qadir Idris was born in Yemen in 1979. According to public records, he allegedly traveled to Afghanistan in April 2001, and was then seized by Pakistani authorities in December 2001 and eventually handed over to American authorities. In his Administrative Review Board hearings, Mr. Idris repeatedly told the ARB that he had traveled to Afghanistan to teach the Koran, not to fight. He has consistently denied any membership in or ties with Al Qaeda or the Taliban. He explained that he wishes to return home to Yemen to complete his college degree and resume his position at the Ministry of Agriculture. *See* Exhibit C (Unclassified Summary of 20 July 2005 ARB); Exhibit D (Unclassified Summary of 7 April 2006 ARB); Exhibit E (Unclassified Summary of 17 April 2007 ARB).

On December 21, 2005, a petition for a Writ of Habeas Corpus was filed on behalf of Petitioner Idris Ahmed Abdu Qadir Idris, ISN 35, (and other detainees), signed by attorneys from the Center for Constitutional Rights. (Case No. 05-cv-2386, Docket Entry No. 1.) In that petition Mr. Idris is referred to as "Edress LNU."

On November 14, 2008, Judge Hogan entered an order appointing the Office of the

Federal Public Defender for the Northern District of Ohio to represent Mr. Idris. (Case No. 05-cv-2386, Minute Order, 11/14/08). Undersigned counsel entered an appearance on behalf of Mr. Idris. (Case No. 05-cv-2386, Docket Entries No. 777-783.) At that point, most of undersigned counsel had just received the security clearance necessary to schedule a visit to Guantanamo Bay. (The remaining counsel received their security clearances several months later.) Upon receipt of the necessary security clearance, counsel promptly sought to schedule a trip to Guantanamo Bay, and visited the prison for the first time in February 2009.

During counsel's visit in February 2009, guards at the prison camp informed counsel that Mr. Idris had refused the requested visit. Counsel then drafted a one-page letter asking Mr. Idris to meet with them, and counsel's interpreter translated that letter into Arabic. A guard at the prison camp then took this letter back to Mr. Idris's cell. According to the guard, Mr. Idris again refused the requested visit. Counsel then asked for permission to go to Mr. Idris's prison cell in person, with an Arabic interpreter, to speak with Mr. Idris in person. The guards refused this request.

Counsel visited Guantanamo Bay again in March, April, and May 2009. As of this filing, two of Mr. Idris's counsel are at Guantanamo Bay to attempt a visit. On each visit, counsel were informed by the guards that Mr. Idris refused the requested visit. On each occasion, counsel drafted a one-page letter – translated into Arabic – to be taken back to Mr. Idris by the prison camp guards. Each time, the guards told counsel that Mr. Idris refused the visit request.

Counsel have asked Respondents to permit counsel to meet with Mr. Idris in a meeting room in the camp where he is being housed, rather than requiring Mr. Idris to be transported to the meeting room in Camp Echo. Respondents have refused that request. *See* Exhibit F (e-mail chain regarding request). This modest accommodation had been granted by the DOJ in another

of counsel's cases, and that accommodation resulted in a successful client meeting. With regard to Mr. Idris, however, Respondents have refused this accommodation request.

Counsel have never been permitted to see or speak with Mr. Idris face-to-face.

II. Argument

The Supreme Court has held that detainees at Guantanamo Bay have a right to seek habeas corpus relief in federal court. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). The Court has also recognized that Guantanamo detainees, such as Mr. Idris, have a right to be represented by counsel – at least if counsel voluntarily make themselves available, as is the case here. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) ("[Petitioner] unquestionably has the right to access to counsel in connection with the proceedings on remand."); *cf. Boumediene*, 128 S. Ct. at 2260 (noting lack of counsel as one of deficiencies in CSRT hearing); *id.* at 2269 (same).

It follows from the right to representation by counsel that counsel must be able to meet and consult with the detainees. *See Hamdi*, 542 U.S. at 539 (noting that since grant of petition for writ of certiorari, petitioner "has met [with appointed counsel] for consultation purposes on several occasions, and . . . is now being granted unmonitored meetings"). This has been implicitly recognized by the government, through its concession that counsel must be allowed to travel to the naval base at Guantánamo Bay and meet with the clients they represent.

The problem presented in this motion lies in how counsel's availability and usefulness is to be communicated to the client. As noted above, the only communication presently being allowed – about the initial decision of whether to meet – is through the guard personnel at the Guantánamo Bay camps.

Magistrate Judge Kay confronted this problem in the *Al Wady* case, in which he ordered that counsel be provided direct access to Petitioner Al Wady. Magistrate Judge Kay explained

that a "trial court faced with a motion by Respondents to dismiss a *habeas* petition for failure to obtain client authorization to be represented cannot proceed without some direct assurance that the detainee's decision to reject the assistance of counsel and not pursue the *habeas* petition is voluntary and fully informed." *Al Wady v. Obama*, 2009 WL 1209067, at *3 (D.D.C. May 1, 2009). The Court noted that "[t]he decision to decline legal representation and potentially abandon a *habeas* petition could have an adverse impact on his status, and the Court must confirm that such decision is freely and knowingly made." *Id.*

At this point, the only basis for concluding that Mr. Idris does not want to pursue his freedom though this *habeas* action are the representations by the prison guards that he has refused to meet with counsel. There are many reasons why this is an insufficient basis, without a more direct confirmation from Mr. Idris himself, to dismiss his petition.

A. Mr. Idris is entitled to hear about his *habeas* rights, and right to counsel, from his court-appointed attorneys.

Even assuming the utmost good faith on the part of the guard personnel, they will be neither as fervent nor as knowledgeable as counsel (or even counsel's interpreter) would be. Magistrate Judge Kay recognized "the logistical difficulties of counsel attempting to meet with Guantanamo detainees, most of whom do not speak English and may have reason to distrust American visitors." *Id.* He explained that "[b]ecause of this potential distrust, it is vital that counsel **who are not affiliated with the military or Government be permitted to speak to Petitioner in person to explain their role and the procedures available to him**, so that they may ascertain whether his refusal of legal services is voluntary and well-informed." *Id.* (emphasis added).

The soundness of Magistrate Judge Kay's analysis is reinforced by the opinion of Dr.

Stuart Grassian, whose Declaration is attached as Exhibit B. As set forth in Petitioner's Opposition to Respondents' Motion to Dismiss, Dr. Grassian has extensive experience with the effects of isolation and harsh interrogation techniques of the sort used at Guantánamo. Dr. Grassian opines that the extended harsh conditions of confinement employed at Guantánamo "almost invariably result[] in what has been termed 'institutional paranoia' – a generalized fear and distrust of anyone associated with the institution." Grassian Declaration, Exhibit B, at 10, ¶ 39. This often "creates a severe obstacle against the development of an attorney-client relationship, hence severely impairing the individual's ability to access the courts." *Id.*

In Dr. Grassian's experience, a face-to-face meeting between the client and the attorney – at cellside or elsewhere – is "critically important in convincing the inmate that we were not part of the system that was responsible for his harsh confinement." *Id.* at 10, ¶ 40.

As Respondents concede, under the system of attorney-client visits at Guantánamo, all visit requests and refusals are communicated solely through the guards at the Guantánamo Bay Detention Center. Dr. Grassian opines that the use of "personnel who are clearly identified by the detainee as part of the organization responsible for his harsh and prolonged confinement and interrogation . . . is an entirely inadequate means of eliciting the detainee's cooperation." *Id.* at 10, ¶ 41. Dr. Grassian opines that "the detainee would very likely associate the request with all of the demands, suffering and hardships he has been experiencing in confinement, and have no reason to trust that these new individuals would mean him well." *Id.* at 10-11, ¶ 40.

Dr. Grassian concludes as follows: "In my opinion, to a reasonable degree of medical certainty, if the attorneys were afforded the opportunity to [speak directly with the detainee, even at cell front] – and to impress upon the detainee that they were <u>not</u> part of the organization responsible for the detainee's confinement – there is a reasonable possibility that the detainee

could be reassured sufficiently to choose to cooperate with the attorneys." *Id.* at 11, ¶ 42.

The Guantanamo prison guard personnel presumably have no legal education or experience, have little, if any, knowledge of the habeas corpus proceedings and their background, and are, at best, neutral about whether habeas corpus proceedings are a good or bad idea. Counsel, in contrast, have the legal education and experience necessary to explain habeas corpus proceedings to a client, know the history and background of the particular proceedings here, and have an affirmative, strong interest in explaining the benefit of the proceedings to the client.

The results of the direct access orders in both *Al Wady* and *Saeed* amply vindicate Magistrate Judge Kay's analysis in *Al Wady* and Dr. Grassian's expert opinion. In both *Al Wady* and *Saeed*, guards at the Guantanamo prison camp had informed counsel that the petitioner-detainee refused their visit requests, and again refused to meet when presented with a letter requesting reconsideration. In each case, however, once the Court ordered a face-to-face visit, each petitioner met with counsel (without any need for the prison guards to resort to force) and had the opportunity to discuss the representation and the *habeas* proceedings. And in each case, the petitioner, having had the opportunity to meet face to face with counsel to discuss the matter, chose to authorize the representation and proceed with the *habeas* litigation.

B. There is evidence that prison guards, whether through mis-communication or obstruction, have been mistaken when conveying supposed refusals to meet with counsel.

There is reason to question whether the guards have the utmost good faith assumed above. There is evidence of detainees seeking representation of counsel who have somehow been denied that representation, whether through mis-communication or obstructionism on the part of the prison guards. *See, e.g.,* Declaration of Jennifer R. Cowan, attached as Exhibit F;

Memorandum Opinion in *Adem v. Bush*, Case No. 05-cv-723, Docket No. 36, 3/21/06, pp. 30-31 n.34 (citing Declaration of Susan Baker Manning, *attached as* Exhibit A to Pet.'s Mem. in Opp'n to Mot. for an Order to Show Cause, *Muhammed v. Bush*, Case No. 05-cv-2087 (Dec. 2, 2005) (Dkt. No. 14)).

C. A refusal to meet with counsel under the current visitation regime cannot be equated with waiver of habeas rights.

Given the unique circumstances and history of the Guantanamo detention facility, this Court cannot assume, without some greater assurance, that Mr. Idris's reported refusal to meet with counsel represents a decision to abandon his *habeas* rights.

First, there are other reasons detainees such as Mr. Idris refuse to come out to meet with counsel. Detainees have expressed concern and fear about going through electronic scanners, some of which reveal an essentially naked view of the detainee's body. Counsel also understand that, more generally, some detainees have expressed hesitance about being moved from the camps in which they are detained to the camp where the attorneys are now required to interview clients because the process of being moved is humiliating and uncomfortable.

Second, there are concerns about Mr. Idris's competency and mental state. The basis for those concerns are set forth in detail in a number of public reports and articles, discussed in detail in Petitioner's Opposition to Respondents' Motion to Dismiss, Part II.A.1, incorporated herein by reference.[2]

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[2] *See, e.g.*:

- Report of the Senate Armed Services Committee, *Inquiry Into the Treatment of Detainees in U.S. Custody*, November 20, 2008, released April 22, 2009, available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf;
- Report, United States Department of Justice, Office of Inspector General, *A Review of the FBI's Involvement in and Observation of Detainee Interrogations at Guantánamo Bay*,

The Report of the Senate Armed Services Committee specifically concluded that the harsh interrogation techniques used at Guantanamo Bay "created a serious risk of physical and psychological harm to detainees." Senate Committee Report, at xxvi, available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

The detailed opinion of Dr. Grassian, also discussed in Petitioner's Opposition to Respondents' Motion to Dismiss, also demonstrates why a refusal to meet with counsel under the conditions currently existing cannot be deemed a voluntary waiver of habeas rights. Dr. Grassian's core opinions are as follows:

1. Prolonged solitary confinement causes serious psychiatric harm.

Afghanistan, and Iraq, May 2008, available at http://www.usdoj.gov/oig/special/s0805/final.pdf;

- Human Rights Watch,*Locked Up Alone: Detention Conditions and Mental Health at Guantánamo*, June 9, 2008, available at http://www.hrw.org/en/reports/2008/06/09/locked-alone;
- Amnesty International,*Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power*, at 83-115, Ch. 12-13, AMR 511063/2005 (13 May 2005), available at http://www.amnesty.org/ en/library/info/AMR51/063/2005;
- Amnesty International,*Guantánamo: An Icon of Lawlessness*, Jan. 6, 2005, at 3-5, available at http://www.amnesty.org/en/library/info/AMR51/002/2005/en;
- Physicians for Human Rights,*Break Them Down: Systematic Use of Psychological Torture by US Forces*, Ch. 3 (2005), available at http://physiciansforhumanrights.org/library/report-2005-may.html;
- News Articles: Carol D. Leonnig, "Guantánamo Detainee Says Beating Injured Spine; Now in Wheelchair, Egyptian-Born Teacher Objects to Plan to Send Him to Native Land," Wash. Post, Aug. 13, 2005, at A18; Neil A. Lewis, "Fresh Details Emerge on Harsh Methods at Guantánamo," N.Y. Times, Jan. 1, 2005, at A11; Carol D. Leonnig, "Further Detainee Abuse Alleged; Guantánamo Prison Cited in FBI Memos," Wash. Post, Dec. 26, 2004, at A1; Dan Eggen & R. Jeffrey Smith, "FBI Agents Allege Abuse of Detainees at Guantánamo Bay," Wash. Post, Dec. 21, 2004, at A1; Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," N.Y. Times, Nov. 30, 2004, at AI; "FBI: Workers Saw Prisoner Abuse at Guantánamo," Jan. 2, 2009, available at http://www.cnn.com/2007/WORLD/americas/01/02/Guantánamo/index.html.

2. The conditions of solitary confinement at Guantánamo are generally more severe than even those in civilian Supermax prisons.

3. Accused enemy combatants and accused Al-Qaeda supporters have undergone marked psychiatric decompensation and severe psychiatric illness as a result of being subjected to confinement and interrogation.

4. The harsh interrogation tactics employed at Guantánamo and elsewhere are likely to result in either massive dependency or else in rage and paranoid mistrust.

5. Guantánamo confinement will very often create great difficulty in establishing a relationship of trust with potential helpers – including both mental health workers and attorneys appointed to represent the detainee.

6. Face-to-face contact is critically important as a means of eliciting trust and cooperation.

Grassian Declaration, Exhibit B.

Moreover, again as noted in Petitioner's Opposition to Respondents' Motion to Dismiss, counsel have obtained a Next Friend Authorization from Mr. Idris's brother, Abdulqader Idris. Abdulqader Idris. Abdulqader is in a better position than Respondents, this Court, or undersigned counsel to assess his brother's wishes and interests. Abdulqader unequivocally states his "belief and understanding that Idris, due to his long-standing detention without proper access to lawyers, doctors, or family, lacks the necessary voluntariness to make decisions on his own behalf." Exhibit A. Abdulqader further states that in his view, "were he not so indisposed, Idris would want me to take legal action on his behalf to secure his release." Exhibit A. Accordingly, Abdulqader has expressly "authorize[d] the Office of the Federal Public Defender for the Northern District of Ohio, and any attorneys assigned by them, to take legal action on behalf of Idris, including defending him zealously in civil and criminal actions and taking any other legal action in US or international venues that is necessary and appropriate to defend his rights under law." Exhibit A.

Thus, there is ample reason for this Court to have concerns about the competence of Mr. Idris, and about his ability to knowingly and voluntarily forego his habeas rights. If counsel are allowed to see Mr. Idris at least briefly, this possibility can be at least preliminarily evaluated.

The Court should also consider that the purported "refusal" of Mr. Idris to see counsel is not consistent with his past behavior in connection with the Combatant Status Review Tribunal and Administrative Review Board proceedings. The publicly available summaries of those proceedings reveal that Mr. Idris chose to participate in his 2005 ARB proceeding. Exhibit C. At that proceeding, Mr. Idris denied any membership in or ties with Al Qaeda or the Taliban, explained that he had traveled to Afghanistan to teach the Koran, and stated that he wishes to return home to Yemen to complete his college degree and resume his position at the Ministry of Agriculture. Mr. Idris also appears to have participated in his April 2006 ARB hearing, in which he again denied any connections with Al Qaeda or the Taliban and repeated the fact that his travel was for the purpose of teaching the Koran. Exhibit D. Once again in his April 2007 ARB, Mr. Idris explained that he had traveled for the purpose of teaching the Koran, and stated he wanted to return home to complete college and return to his job at the Ministry of Agriculture. Exhibit E.

Mr. Idris's participation in his ARB proceedings – in which he consistently professed his innocence and explained why he had traveled to Afghanistan – casts doubt on his purported "refusal" to see counsel and participate in *habeas* proceedings. His participation in the ARB proceedings at the least draws into question whether his "refusal" to meet counsel is a considered decision that would not change if counsel were able to explain the present proceedings to him directly.

D. There is a substantial likelihood that a face-to-face meeting will resolve the question of Mr. Idris's participation in these proceedings.

Common sense, prior experience, and expert opinion all suggest that a conversation with someone who is not a guard or interrogator – in particular, counsel and their interpreter – could be more effective in appraising Mr. Idris of his rights.

Common sense suggests that counsel with legal education and experience who are appointed and so ethically obligated to act in a petitioner's best interest – and have an affirmative desire to do so – are likely to present the availability of attorney assistance more positively than guard personnel who have no legal experience and have interests that are adverse to the petitioner.

Counsel also brings to the Court's attention the experience of one of their interpreters, Masud Hasnain. Mr. Hasnain has been traveling to Guantánamo Bay and helping lawyers as an interpreter for several years. Prior to 2007, he was allowed – under the then existing policy at Guantánamo Bay – to go back and personally speak to detainees in their cells when they initially refused to see counsel. Mr. Hasnain indicates that he was successful in persuading the clients to meet with counsel, by his estimate, half of the time.

The examples of Mr. Al Wady and Mr. Saeed, referenced above, are the best illustration of counsel's point. In each case, the type of order requested here promptly resulted in (1) a face-to-face meeting between counsel and the detainee, without the need for any force or violence by the prison guards; and (2) a decision by the detainee to authorize counsel's representation in the *habeas* proceedings.

Dr. Grassian's expert opinion, discussed above and in Petitioner's Opposition to Respondents' Motion to Dismiss, further supports the propriety of the requested relief. Dr.

Grassian opines as follows: "In my opinion, to a reasonable degree of medical certainty, if the attorneys were afforded the opportunity to [speak directly with the detainee, even at cell front] – and to impress upon the detainee that they were not part of the organization responsible for the detainee's confinement – there is a reasonable possibility that the detainee could be reassured sufficiently to choose to cooperate with the attorneys." Grassian Declaration, Exhibit B, at 11, ¶ 42.

All of the foregoing, taken together, suggests it is appropriate for the Court to order such direct contact here. That is the only way to make sure that Mr. Idris truly is "refusing" to meet with counsel, and to assure counsel and the Court that Mr. Idris's "refusal" is fully voluntary, informed, and considered.

June 29, 2009

Respectfully submitted,

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