

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SHARQAWI AL HAJJ (ISN 1457),

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Case No. 09-cv-745 (RCL)

**PETITIONER’S EMERGENCY MOTION FOR AN INDEPENDENT
MEDICAL EVALUATION AND MEDICAL RECORDS**

Petitioner Sharqawi Al Hajj, by and through his undersigned counsel, respectfully submits this emergency motion for an independent medical evaluation and production of his medical records.¹

INTRODUCTION

Petitioner, a detainee at the U.S. Naval Base at Guantanamo Bay, suffers from chronic, debilitating symptoms that suggest the possibility of a serious underlying illness. His condition worsened precipitously in July, when after several weeks of a hunger strike because of growing despair over his ill health and indefinite detention, he fell unconscious and required emergency hospitalization. At meetings with counsel last month, Petitioner appeared frail, gaunt, and strained to maintain energy and focus. The medical experts with whom counsel subsequently conferred have made grave preliminary assessments, including that Petitioner’s symptoms appear consistent with potentially

¹ Petitioner’s counsel conferred with Respondents about the relief requested in this motion. Respondents indicated that they would oppose.

threatening liver disease, and that the impact of his hunger strike on his already fragile state puts Petitioner at risk of “total body collapse.”

Petitioner’s potential health crisis looms at a critical juncture, when, 16 years into his detention, with no prospects for transfer, he had been preparing to reopen his habeas case in the coming months. His precarious health condition and elevated risks of permanent harm threaten his ability to bring and meaningfully participate in his anticipated proceedings, and thus jeopardize the jurisdiction of the court and the viability of the writ. His counsel and the court must be able to apprehend the true nature of his health condition and risks to understand and preserve his capacity to proceed before this court, under its recognized habeas jurisdiction. As such, Petitioner seeks an order permitting (1) at a minimum, access to Petitioner’s readily available medical records, and (2) access to Petitioner by a trusted outside physician to conduct an independent medical evaluation of Petitioner.

BACKGROUND

Petitioner is a 43 year-old citizen of Yemen who has been detained without charge at Guantanamo since 2004, and in government custody since 2002. In February 2017, the government’s Periodic Review Board conducted a review of his status and subsequently recommended him for continued detention. U.S. Dep’t Defense, Periodic Review Secretariat, Unclassified Summary of Final Determination for Sharqawi Abdu Ali Al Hajj, ISN 1457, Mar. 30, 2017. Petitioner’s next full review by the Board will be in 2020. Exec. Order No. 13567 of Mar. 7, 2011, §3(b) (providing for full reviews on a triennial basis).

Prior to his transfer to Guantanamo, Petitioner was held for over two years in secret detention sites, where his brutal treatment was the subject of litigation during his prior habeas proceedings. Mem. Op. of May 23, 2011 (Dkt. No. 1529). Petitioner was subjected to, *inter alia*, intimidation, regular beatings, and threats of electrocution and physical violence, and forced to endure complete darkness and continuous loud music. *Id.* at 5. In striking statements relied upon by the government as tainted by Petitioner’s abuse during that period, the court found that Petitioner had been subjected to “patent . . . physical and psychological coercion.” *Id.*

Prior Proceedings

Petitioner filed a petition for a writ of habeas corpus on December 21, 2005, shortly after his transfer to Guantanamo. (Dkt. No. 1). After the Supreme Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), he moved to lift the stay in his case and proceeded through requests for discovery. In October 2011, discouraged in part by the fate of other detainee cases, he moved to dismiss his petition without prejudice. (Dkt. No. 1593). On October 27, 2011, this court dismissed Petitioner’s petition without prejudice. (Dkt. No. 1595).²

Medical Condition

Petitioner’s current state of health is precarious – the result of chronic pain and frailty that are themselves debilitating and suggest the possibility of a grave underlying

² Petitioner has a continuing right to seek habeas relief and to the assistance of counsel, beyond the dismissal of his habeas petition without prejudice. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 18 (D.D.C. 2012). As noted in counsel’s declaration, Petitioner intends to move to reopen his habeas case in the near future. *See id.* at 18-19 (petitioners “have made plain their desire to continue challenging the legality of their detention” and are entitled to access to counsel). His motion bears directly on his right to access the court and counsel, which the court is charged with ensuring, and is well within the court’s jurisdiction to decide.

cause, and a recent hunger strike that is exacerbating his condition and elevating his risks of irreparable harm. At meetings with counsel last month, Petitioner reported that he had fallen unconscious and required emergency hospitalization in the preceding weeks, and his physical and mental degradation, and the need for intervention, appeared obvious and urgent. Indeed, outside physicians with whom counsel subsequently consulted believe Petitioner may be on the verge of total body collapse, among other concerns.

Petitioner's hunger strike was precipitated in part by growing despair over his ill health owing to various issues, including acute weakness and fatigue, recurring jaundice, severe abdominal pain, and painful urination. Ex. A, Declaration of Pardiss Kebriaei, dated Sept. 5, 2017, at ¶ 5 ("Kebriaei Decl."). Prior to his detention, he was also diagnosed with Hepatitis B, an infection that can lead to liver failure and liver cancer. Ex. B, Declaration of Dr. Robert Cohen, dated Aug. 30, 2017, at ¶ 9 ("Cohen Decl."). Petitioner's symptoms raise concerns about the possibility of a serious underlying condition, including significant liver disease. *Id.* at ¶ 11. His ailments may also be symptomatic of injuries caused by his torture prior to his transfer to Guantanamo, regarding which Petitioner has never been evaluated by a doctor he trusts. Ex. C, Declaration of Dr. Jess Ghannam, dated Aug. 29, 2017, at ¶ 12 ("Ghannam Decl."). Even without a malignant source, Petitioner's symptoms can lead to severe physical and neurophysiological damage if they continue unabated. *Id.*

Despite the persistence of his symptoms even with prescribed medication, Petitioner is generally told after his medical visits that "there is nothing wrong with me" and "everything is fine." Kebriaei Decl. at ¶ 6. As a result he has stopped requesting care even when he needs it "because they'll just say I'm fine and give me vitamins." *Id.*

The concerns about Petitioner’s health have been compounded by his recent hunger strike. During meetings with counsel from July 31 to August 2, 2017, Petitioner reported that he had recently escalated his hunger strike by refusing to be “tube-fed” or “drink Ensure.” *Id.* at ¶ 3. As a result his health “went down after 20 days,” to the point where he was lying in his cell immobile and uncommunicative. *Id.* He ultimately fell unconscious and required emergency hospitalization. *Id.* He was told by his “medical team” that his glucose level had dropped to “43” – which is considered a medically emergent level, Ghannam Decl. at ¶ 13 – and had “reached a point of danger.” Kebriaei Decl. at ¶ 3.

To counsel, the deterioration of Petitioner’s physical and mental state was palpable. During the course of the meetings, counsel was forced to ask Petitioner repeatedly if he had the energy to continue because he appeared so weak and unwell. *Id.* at ¶ 4. After departing Guantanamo, counsel consulted with multiple independent physicians – including Dr. Robert Cohen and Dr. Jess Ghannam, physicians with decades of experience, including in prison settings – who confirmed that there are grave concerns about Petitioner’s condition. Petitioner’s symptoms are “consistent with significant liver disease, including the possibility of chronic active Hepatitis B infection,” which is a “serious, and sometimes life-threatening, illness.” Cohen Decl. at ¶ 6. On their own, Petitioner’s symptoms “can cause severe physical and neuropsychological damage.” Ghannam Decl. at ¶ 12. “In the midst of a hunger strike, [they] can lead to total bodily collapse and medically irreparable harm.” *Id.*

As of a telephone call with counsel on August 16, 2017, Petitioner remains on a hunger strike – a desperate act that he does not view as voluntary, but as the result of the

pressure of his constant feeling of illness and pain amidst ongoing, indefinite detention. Kebriaei Decl. at ¶¶ 8, 10. He is again refusing to be tube-fed or drink Ensure. *Id.* at ¶ 8. He is drinking only water and honey, and eating small solids once a day for the purpose of taking medication that he needs in order to be able to urinate. *Id.* He is not able to take the rest of his prescribed medications. *Id.* At a weight check a few days prior to the call, he weighed 104 pounds. *Id.*

Petitioner also reported during the call that he had suffered a bout of jaundice the week prior and that he was feeling “acute” abdominal pain “on a daily basis.” *Id.* at ¶ 9. He expects that he will rapidly decline as before, that the government will intervene to revive him, and that the cycle will repeat over and over again. *Id.*

Interference with Judicial Access

Petitioner wishes to reopen his habeas case and reinitiate proceedings addressing the legality of his continuing detention. *Id.* at ¶ 10. He had been preparing to bring new claims in the coming months. *Id.* During recent meetings with counsel, he expressed concern that “my condition will prohibit me from participating” in his anticipated proceedings. *Id.* He expressed “difficulties paying attention and focusing,” and with comprehension of case-related discussions. *Id.* He canceled a scheduled meeting because of pain and exhaustion. *Id.* He has previously expressed that he finds it exhausting to be moved from his cell for legal appointments, and declined habeas and Periodic Review Board meetings for this reason in the past. *Id.* His health issues have also necessarily taken priority over, and detracted time and energy from, his work with counsel to prepare his habeas claims for release. *Id.* at ¶ 11.

ARGUMENT

Detainees at Guantanamo may seek the writ of habeas corpus, *Boumediene*, 553 U.S. 723, and have the right to be represented by counsel in presenting their claims. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004). Under the All Writs Act, the court has broad discretionary power to preserve its habeas jurisdiction over detainee claims by issuing all necessary or appropriate relief, including injunctive relief. 28 U.S.C. § 1651(a) (federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions”); *SEC v. Vision Communs.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (All Writs Act “empowers a district court to issue injunctions to protect its jurisdiction”); *see also Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942) (a court may grant a writ under the Act whenever it is “calculated in its sound judgment to achieve the ends of justice entrusted to it” and not only when it is “‘necessary’ in the sense that the court could not otherwise physically discharge its ... duties”). Orders designed to better enable a party to effectuate his rights and duties are “in aid of” the court’s jurisdiction. The court is empowered to safeguard not only ongoing proceedings, but also potential future proceedings. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004).

Petitioner’s current condition presents multiple concerns about potential life-threatening illness and harm that jeopardize his ability to bring and participate in, and the court’s jurisdiction over, his anticipated proceedings. *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) (“where the health of a ... vulnerable person is at stake, irreparable harm can be established”). His chronic symptoms, which pre-date his hunger strike and are debilitating in themselves, suggest among other concerns the possibility of significant

liver disease, which can lead to liver failure and death. Cohen Decl. at ¶ 6. His symptoms may also be associated with his torture prior to his transfer to Guantanamo, for which he has never been evaluated by a doctor he trusts, and which, standing alone, can lead to severe physical and neurophysiological damage if they continue unabated. Ghannam Decl. at ¶ 12.

The concerns about Petitioner’s pre-existing issues “will not be addressed even if he voluntarily stops his hunger strike, or if he is forcibly fed.” Cohen Decl. at ¶ 8. Yet, as a result of the cumulative pressures on his body, including the stresses of a hunger strike, Petitioner “may very well be on the precipice of total body collapse.” Ghannam Decl. at ¶ 12.

Given these grave assessments, it is essential as Petitioner prepares to embark on perhaps his last chance for full habeas relief before this court that his counsel understand the full and true nature of his health condition and risks, and the implications for his ability to participate meaningfully in future legal proceedings. *See Al-Joudi*, 406 F. Supp. 2d at 22 (“Unless petitioners’ counsel can have access to their clients, and know their true medical conditions ... it is obvious that their ability to present their claims to the Court will be irreparably compromised.”); *id.* at 21-22 (“[I]n order to properly represent [habeas] Petitioners, their counsel ... must be made aware if their clients are in such fragile physical condition that their future ability to communicate is in imminent danger.”); *see also In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 20 (detainees’ access to the courts must be “adequate, effective and meaningful”) (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). His present condition has in fact already interfered with litigation planning discussions with his

counsel. Kebriaei Decl. at ¶ 10. *See In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 23 (in the context of Guantanamo litigation “access to the courts means nothing without access to counsel”) (quoting *Al-Joudi*, 406 F. Supp. 2d at 22)).

Petitioner cannot rely on assurances from his jailers alone about his wellbeing. “Proper diagnosis and treatment requires a trust-based doctor-patient relationship.” Cohen Decl. at ¶ 10; Ghannam Decl. at ¶ 16 (“[O]ne of the foundational elements of effective medical care [is] trust in one’s treating doctor.”). Despite positive interactions with some of his providers, Petitioner’s overall confidence in his medical care has eroded to the point where he refrains from requesting care because he does not believe it will help him. Kebriaei Decl. at ¶¶ 6-7.

Petitioner requires careful evaluation by a physician he trusts. Cohen Decl. at ¶ 4. This has two components. First, at a minimum, counsel should be provided access to Petitioner’s medical records and permitted to obtain independent medical assessments of the data. *Husayn v. Gates*, 588 F. Supp. 2d 7 (D.D.C. 2008) (“[r]equesting copies of [] medical records ... and being able to secure independent expert assessments of the data in the records is a legitimate and important effort to provide effective representation”). Production of Petitioner’s existing records would present a nominal burden for the government while providing elucidating information for Petitioner and counsel, including about the testing and evaluations that have been performed on Petitioner, without which it will be impossible to confirm or rule out concerns, i.e., about his liver function. *See Al-Joudi*, 406 F. Supp. 2d at 22 (finding that the logistical burden of producing medical

records was “simply not substantial when weighed against the irreparable injury” faced by hunger-striking petitioners).

Second, in order to allow for an informed and accurate assessment, the court should permit an independent physician retained by Petitioner’s counsel to conduct a physical and psychological examination of Petitioner. Some of Petitioner’s symptoms – his weakness, fatigue, jaundice, cognitive difficulties – depend on self-reporting and direct observation. Effective diagnosis of Petitioner’s condition depends on personal evaluation by a trusted provider. *See* Cohen Decl. at ¶¶ 4, 10; Ghannam Decl. at ¶ 16. The “seriousness of his condition, and the signs of deterioration ... elevates his need for a trusting doctor-patient relationship to a clinical significant level.” Cohen Decl. ¶ 10.

The resulting information from an independent assessment of Petitioner’s medical records and Petitioner himself would allow counsel a full, reliable understanding of his condition and prognosis on the basis of which to evaluate his ability to participate in his anticipated proceedings. Both requests are well within the court’s authority to order, and necessary given the serious concerns about Petitioner’s health at this critical juncture, as he attempts to renew his challenge to his ongoing detention. *See, e.g., Al-Oshan v. Obama*, 753 F. Supp. 2d 1, 2 (D.D.C. 2010) (permitting independent physicians to evaluate hunger-striking petitioner’s medical and psychiatric status and determine a treatment plan); *Zuhair v. Bush*, 592 F. Supp. 2d 16, 17 (D.D.C. 2008) (ordering all medical and mental health records and an independent medical/mental health examination of hunger-striking petitioner). Petitioner’s condition is “tenuous, fragile, and imminent irreparable harm is likely ... without immediate intervention.” Ghannam Decl. ¶ 15.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that the court order the government to provide Petitioner with his medical records and permit Petitioner to be examined by an independent physician retained by his counsel.

Dated: New York, New York
September 6, 2017

/s/ Pardiss Kebriaei
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[PROPOSED] ORDER

The Court, having considered Petitioner's Emergency Motion for an Independent Medical Evaluation and Medical Records, hereby ORDERS that the Motion is GRANTED.

Respondents shall produce all medical records pertaining to Petitioner to his counsel. Counsel is permitted to obtain independent medical assessments of the records. Respondents shall also permit an independent medical expert(s) retained by Petitioner's counsel to conduct a physical and psychological evaluation of Petitioner.

SO ORDERED, this _____ day of _____, 2017.

Royce C. Lamberth
Senior United States District Judge