

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

AE422D (GOV)

Government Consolidated Reply
To AE 422B (WBA) and 422C (KSM,
AAA) Defense Response to Government
Motion to Conduct Depositions of Certain
Witnesses

19 May 2016

1. Timeliness

This Reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.e.(2).

2. Relief Sought

Pursuant to R.M.C. 702, the United States respectfully moves this Commission to conduct depositions of ten potential pre-sentencing phase witnesses during the previously-scheduled October 2016 court sessions.

3. Overview

The United States has moved the Commission to conduct in-court, recorded depositions of ten potential pre-sentencing phase victim impact witnesses during the previously-scheduled October 2016 court sessions. On 12 May 2016, Counsel for Messrs. Bin ‘Attash, Mohammad, and Ali filed responses opposing the Prosecution’s motion.¹ They assert, among other things, that the motion does not satisfy the technical requirements of R.M.C. 702 and that victim impact testimony will unduly prejudice them.

As to the notice of deponent’s addresses required by R.M.C. 702, the Prosecution is prepared to cure any defect in its request for depositions by providing the addresses of the

¹ Mr. Mohammad and Mr. Ali filed a joint response.

proposed deponents under seal. As to the availability of the witnesses for trial, the Accused misinterpret the applicable standard and attempt to impose an unworkable burden. The Prosecution need not establish with certainty at this time that a potential witness will be unavailable for trial, but rather, must only show a substantial likelihood exists that the witness will be unavailable.

As to general challenges to the admissibility of victim impact evidence, these arguments are unripe and without merit. First, as a threshold matter, this Commission need not now make any decision regarding the potential admissibility at a future trial of testimony taken during the proposed depositions. The purpose of the depositions is merely to preserve the testimony in the event that any of the witnesses is, in fact, unavailable at a later date. If and when the Prosecution moves to admit any of the testimony to be recorded during the depositions, only then would the Accuseds' challenges to the admissibility of the testimony be ripe. That said, the Accused utterly miss the mark in broadly asserting that victim impact testimony will be unduly prejudicial in this case. Without question, the Supreme Court has approved the admission of victim impact testimony in capital cases. *See United States v. Payne*, 501 U.S. 808, 825-27 (1991). Such evidence is objectionable only when it violates due process. *Id.* at 825. Notably, the Accused have not, and to the Prosecution's knowledge cannot, cite a single federal case in which victim impact evidence was deemed to violate a criminal defendant's due process. Dissents and law journal articles cited by the Accused have little, if any, persuasive value.

Accordingly, this Commission should reject the Accused's arguments and grant the Prosecution's request to conduct depositions as proposed in October 2016.

4. Burden of Proof

As the moving party, the United States must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Law and Argument

This Commission has “broad discretion” to grant the Prosecution’s request to conduct pretrial depositions. *United States v. Dillman*, 15 F.3d 384, 388 (5th Cir. 1994); *see also United States v. Vo*, 53 F. Supp.3d 77, 80 (D.D.C. 2014). What is more, the mere taking of the proposed depositions does not automatically result in the admissibility of the recorded testimony at trial. *United States v. Drogoul*, 1 F.3d 1546, 1554-55 (11th Cir. 1993). Nonetheless, the Accused launch a number of unpersuasive arguments in opposition to the Prosecution’s request to take in-court depositions of ten prospective victim impact witnesses, one of whom will also provide potential merits-phase testimony, all of which would be subject to cross-examination.

I. Notice of Deponents’ Addresses May Be Provided Under Seal

Mr. Mohammad and Mr. Ali assert that this Commission should deny the request for depositions because the Prosecution failed to strictly comply with R.M.C. 702 by providing the street addresses of the proposed deponents. Notably, the Prosecution did provide the home city and state of each proposed deponent and none of the Accused have made any request for the deponents’ addresses. The Prosecution excluded this information from the publicly filed motion to protect privacy concerns of the proposed deponents. The Prosecution is prepared to provide this information to the Defense under seal, however, if this Commission orders.

II. The Government Has Sufficiently Demonstrated the Potential for Witness Unavailability at Trial

The Accused assert that the Prosecution has failed to make a sufficient showing of the witnesses’ unavailability to justify taking their depositions in October 2016. The Accused conflate the standard for establishing unavailability at this stage with the stricter standard that would ultimately apply should the Prosecution move to admit any recorded deposition testimony at trial.

The Accused submit that the Prosecution must establish witness unavailability with certainty. They assert that the Prosecution’s request to conduct depositions must fail because the Prosecution has not offered affidavits or medical reports detailing the proposed deponents’

physical conditions. There is no “bright line rule” for determining unavailability, however. *United States v. Lovely*, 73 M.J. 658, 679 (A.F.C.C.A. 2012) (holding courts must apply a “reasonableness standard”). Further, courts have held that representations by counsel are sufficient to establish unavailability. *See, e.g., United States v. Farfan-Carreon*, 935 F.2d 678, 679-80 (5th Cir. 1991).

More importantly, courts do not require a very strong showing of unavailability to justify taking a deposition. *Vo*, 53 F. Supp.3d at 81, citing *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978) (“When the question is close a court may allow a deposition in order to preserve a witnesses’ testimony, leaving until trial the question of whether the deposition will be admitted as evidence.”) As explained in its motion, the Prosecution need not prove conclusively that the prospective deponents will be unavailable to testify at trial to justify taking their proposed depositions. *See* AE 422 (GOV) at 8. Rather, the government need only show a “substantial likelihood” exists that the witness be will unavailable at trial.

The following excerpt from *Drogoul* is instructive:

The moving party may demonstrate the unavailability of a prospective deponent through affidavits or otherwise. Significantly, that showing need not be conclusive before a deposition can be taken. It would be unreasonable and undesirable to require the government to assert with certainty that a witness will be unavailable for trial months ahead of time, simply to obtain authorization to take his deposition. A more concrete showing of unavailability, of course, may be required at the time of the trial before a deposition will be admitted in evidence. A potential witness is unavailable for purposes of Rule 15(a), however, whenever a substantial likelihood exists that the proposed deponent will not testify at trial. In that situation, justice usually will be served by allowing the moving party to take the deposition, thereby preserving the party’s ability to utilize the testimony at trial, if necessary.

Drogoul, 1 F.3d at 1553 (internal citations and quotations omitted) (holding government had established “probable unavailability” where the proposed deponents were Italian citizens in Italy, who could not be compelled to appear in court in the United States).

Applying these standards, courts have repeatedly allowed depositions of government witnesses who, like the witnesses the Prosecution proposes to depose in this case, were elderly

and/or ill. *See, e.g., United States v. Campbell*, 845 F.3d 1374, 1377 (6th Cir. 1988) (affirming decisions to take and admit depositions of “several elderly witnesses whose health-related problems prevented them from traveling” to court); *United States v. Keithan*, 751 F.2d 9, 12 (1st Cir. 1984) (holding physical infirmities of two government witnesses of advanced age that prevented witnesses from traveling to courthouse, which was 60 miles away, qualified as “exceptional circumstances” to justify taking pretrial deposition); *United States v. Karoly*, 2009 WL 1872083, *2 (E.D. Pa. Jun. 29, 2009) (holding 77 year-old woman with leukemia and other medical conditions proffered by government was “sufficiently likely to be unavailable at trial . . . to warrant preserving her testimony”); *United States v. Sudeen*, 2002 WL 31427364, *1-*2 (E.D. La. Oct. 28, 2002) (granting motion to depose 72 year-old witness in poor health who was a Polish citizen and wished to return to Poland prior to commencement of trial, which was scheduled to commence two months after the motion was filed); *United States v. Dunseath*, 1999 WL 165703, *1 (S.D.N.Y. Mar. 25, 1999) (holding exceptional circumstances existed to take deposition of 86 year-old, out-of-state witness who was also caregiver for wife).

United States v. Musgrave, 2012 WL 3686496, *3 (S.D. Ohio Aug. 27, 2012), cited by Mr. Bin ‘Attash, is distinguishable from the instant case. In that case, the defendant moved to conduct a deposition of a potential witness on the mere grounds that the witness had “retired . . . , lives in South Carolina, and is of advanced age.” *Id.* The district court found the defendant did not carry the burden of demonstrating the witness’ unavailability at trial. In contrast, in this case, the Prosecution has identified specific ages and general health concerns of each prospective witness. The travel from various locations throughout the United States to Guantanamo Bay is also different than the travel from South Carolina to Ohio. Finally, the trial in *Musgrave* was scheduled to commence within less than nine months from the time the defendant filed his motion, while the trial in this case is to be held at a yet-undetermined date.

Cases cited by Mr. Mohammad and Mr. Ali are also inapposite. Most deal with determining the actual unavailability of potential witnesses at trial. None of the cases stands for

the proposition, however, that a court must require any specific form of proof before deciding to *take* a deposition.

Admittedly, for the depositions to be admissible at trial, the Prosecution recognizes that it must, *at the time of trial*, establish the unavailability of the witness. *United States v. McGowan*, 590 F.3d 446, 454 (7th Cir. 2009). The Commission should, at that time, make a final determination regarding witness availability based on up-to-date evidence about the witnesses' physical and/or mental conditions. *Id.* at 455. Such a determination would then be subject to review only for an abuse of discretion. *Id.* at 454. Requiring strict proof of unavailability at this early stage, however, is unnecessary, and protracted litigation regarding the witnesses' current conditions and availability would frustrate the purpose of taking the depositions, which is simply to preserve the witnesses' testimony in the event that they are unavailable at trial.

Here, the Prosecution has requested permission to depose ten victim family members of advanced ages who have stated health concerns to the Prosecution. Hopefully, each and every one of these witnesses will be available for trial. The Prosecution asserts that if, in fact, the witnesses are available for trial, they will be called to testify at that time and no effort will be made to introduce the depositions. The fact remains, however, that we do not know when trial will commence (a fact that alone distinguishes this case from many of the reported cases dealing with pretrial motions to depose witnesses) and these people have legitimate longevity concerns based on their respective ages alone. There is no need to require medical documentation of specific issues or life-expectancy to conclude there is a substantial likelihood the witnesses will be unavailable for trial. Further, beyond time and financial costs of two court days, prejudice to the Accused or the Commission is minimal, at best, in taking the proposed depositions. On the other hand, should any of the witnesses become unavailable by the time of trial, the Prosecution would be greatly prejudiced by the absence of the testimony of any one of the proposed deponents. Accordingly, this Commission should find that the Prosecution has made a sufficient showing of witness unavailability to justify taking the depositions.

III. Victim Impact Testimony Is Admissible Evidence

The Accused argue that this Commission should not permit the depositions because the victim impact testimony to be captured will be unduly prejudicial.² As a threshold matter, this claim is unripe. This Commission must distinguish between the propriety of taking depositions and the propriety of admitting them as evidence at trial. *See Lovely*, 73 M.J.at 680 (“The military judge’s act of ordering a deposition is a preventive measure designed to ensure evidence is preserved for use at trial). The deposition does not become admissible in evidence until trial, and only then if the military judge finds the declarant is unavailable. Mil. R. Evid. 804(b)(1). The rights of the Accused are not even implicated until the deposition (or portions thereof) is introduced into evidence without the presence of the live witness. *Drogoul*, 1 F.3d at 1554-55 (explaining that the mere taking of a deposition did not threaten defendant’s trial rights and that such rights are only implicated when deposition testimony is sought to introduced into evidence at trial). The Prosecution acknowledges that, if it moves to introduce recorded deposition testimony at trial, the recorded testimony may then be subject to challenges for, among other things, relevance and undue prejudice. Those are questions that must be determined at the time the Prosecution attempts to introduce the recorded deposition testimony at trial, but not before. They are not, however, reasons to disallow the taking of the depositions. Accordingly, this Commission should reject the defense claims that victim impact testimony is inadmissible, as that argument is not ripe.

Should this Commission nonetheless reach the merits of the Defense challenges to victim impact evidence at this time, the Commission should still reject them. Notably, the Accused have not cited a single federal capital case – military or civilian – in which victim impact evidence was disallowed outright. Despite critiques of *Payne* from dissenting opinions, post-trial

² Mr. Bin ‘Attash also argues that victim impact evidence is not material to an issue in dispute. He reaches for straws with this argument. Under R.M.C. 1001(b)(2) and 1004(b)(4)(C), victim impact is a relevant aggravating circumstance to be considered and weighed by the Members in the capital sentencing process. Surely, the sentencing decision is an issue in dispute in this case, quite probably even more so than guilt or innocence. Thus, the Accused’s argument that a deposition is unavailable for victim impact evidence because such testimony is not material to an issue in dispute simply does not make sense.

opinions, and law journal articles, *Payne* remains the law of the land. And, under *Payne*, as well as R.M.C. 1001(b)(2), the Prosecution is entitled to present evidence during the pre-sentencing phase of trial that will give the Commission and Members a view into the lives of the 2,976 people who died as a result of the actions of the Accused, as well as the impact the loss of life has had upon countless, mothers, fathers, wives, husbands, daughters, sons, close friends, and others. *See United States v. Akbar*, 74 M.J. 364, 393 (C.A.A.F. 2015) (holding “victim impact testimony is admissible in capital cases to inform the panel about the specific harm caused by the accused” and that trial counsel “may elicit evidence about (1) the victim’s personal characteristics or (2) the emotional impact of the murder on the victim’s family”).

Defense arguments that this Commission has not yet ruled on the proper scope of victim impact testimony are also unpersuasive reasons to not to permit the proposed depositions. As explained above, there is a difference between taking a deposition and offering it at trial. To the extent the Prosecution attempts to introduce at trial any recorded testimony the Accused find objectionable, they may make timely objections to such testimony allowing for the Commission to preclude the testimony or order certain portions redacted if necessary. If anything the proposed depositions give this Commission and the Accused the opportunity to preview certain victim impact testimony and set bounds for the introduction of certain types of testimony at trial. But for the need to preserve the testimony of some individuals, the Prosecution would otherwise strongly object to any request from the Accused to similarly preview victim impact testimony because, while the Accused may be entitled to notice of aggravating factors set forth in R.M.C. 1004(c), nothing in the Rules for Military Commissions requires the Prosecution to provide notice of specific evidence that it will introduce in a potential capital sentencing hearing.

Protestations that the Prosecution seeks to insert victim impact evidence into the merits phase of trial or to taint the prospective pool of Members are also without merit. As the Prosecution has stated, Mr. Lee Hanson is a potential witness at both the merits and pre-sentencing phase. The Prosecution submits it is appropriate to preserve Mr. Hanson’s testimony at this time because of Mr. Hanson’s advanced age (83) as of the date of this filing. Should

Mr. Hanson's deposition be taken, however, the Prosecution has never asserted that it would attempt to introduce Mr. Hanson's victim impact testimony during the merits phase of trial. Rather, the Prosecution would properly divide his testimony between the phases should it seek admission of the deposition during trial.

As to the potential taint of prospective Members, this claim is speculative at best, and nonetheless unmeritorious. This case has received extensive media coverage for years. Nothing is to say that any media coverage of the proposed depositions will be any more prevalent than other coverage this case has received. Regardless, the Members will be drawn from a nationwide pool of service members with varying knowledge of pretrial publicity. Any potential taint can be cured by questioning during selection of the panel and by instructions of this Commission. *See United States v. McVeigh*, 153 F.3d 1166, 1184 (10th Cir. 1998) (affirming district court decision that defendant was not denied due process because of pretrial publicity where each juror was individually questioned about his or her ability to set aside the effects of any exposure to pretrial publicity and declared he or she could remain impartial and decide the case on the merits), *disapproved on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999); *Jones v. United States*, 527 U.S. 373, 394 (1999) (holding jurors are presumed to have followed instructions).

While it may be true, as Mr. Bin 'Attash asserts, that recorded victim impact statements would be admissible at the pre-sentencing hearing even if not captured during a formal deposition,³ seeking the admissibility of such statements would likely also encounter future Defense objection, has not yet been litigated or conceded by other Defense counsel, and is not an adequate ground to deny the relief for depositions. To enhance the reliability of the pre-sentencing process, protect trial rights of the Accused, and minimize any potential litigation risks, the Prosecution has requested to go above and beyond minimum standards in preserving potential victim impact testimony in this case. Accordingly, the Prosecution has requested a

³ *See* AE 422 (GOV) at 12 n. 4 (explaining admissibility of hearsay victim impact evidence in federal capital trials).

formal, in-court setting with the Accused and counsel present and able to conduct cross-examination. *See Lovely*, 73 M.J. at 679 (holding that, in considering whether to admit deposition testimony, courts should consider factors including the trustworthiness of the recorded testimony and the nature and extent of the cross-examination permitted during the recorded testimony).

Finally, the Prosecution is compelled to briefly respond to assertions made by the Accused that the Prosecution seeks to make a spectacle of these proceedings at the expense of the victim-family members' dignity. This claim is plainly insulting not only to the Prosecution, but to the victim family members who seek to have their voices preserved on behalf of their loved ones. Counsel for the Accused represent men charged with the greatest act of mass murder in American history. Counsel's ethical and legal obligations are to those Accused and only those Accused. While the Prosecution respects and appreciates counsel's duties to their clients and any respect and compassion counsel have shown toward victim family members, whether for strategic reasons or not, the Prosecution has the sole statutory responsibility of protecting the rights of the victims and victim family members in this case. The Prosecution has made this responsibility its priority throughout the nine years this case has been pending. The Prosecution struggled with the decision to request the proposed depositions, which forces all involved to accept the mortality of the proposed deponents. Nonetheless, victim family members provided the impetus for the Prosecution to move forward with this motion, expressing their strong desires to have their testimony preserved. Each of the proposed deponents has agreed to accept the burden of traveling to Guantanamo for the proposed depositions and subject themselves to cross-examination, and stated their appreciation for the opportunity. Any suggestion that the Prosecution has requested these depositions for any other reason than to preserve the rights of those seeking to ensure their testimony about the murder of their loved ones, and the impact it had on them and their families, is dishonorable.

IV. Completion of Discovery Process Is Not Required

As foreseen by the Prosecution, *see* 422 (GOV) at 13, the Accused also assert that they will be prejudiced by the taking of depositions in advance of trial because discovery is not yet complete and, therefore, they will purportedly be unable to meaningfully cross-examine the witnesses. This argument holds no water for two reasons. First, the Prosecution has stated in open court that it expects to conclude discovery by September 30, 2016, which would be prior to the proposed depositions. Second, and more importantly, beyond disclosure of prior statements made by the deponents (and, possibly, any information potentially favorable to the defense, to the extent any such information exists, regarding the hijacking of United Airlines Flight 175, of which Lee Hanson will provide fact testimony), there is no basis for making complete discovery a condition precedent to any of the proposed depositions. *See United States v. Cooper*, 947 F. Supp.2d 108, 116 (D.D.C. 2013) (“[T]here is no sound reason for requiring pre-deposition disclosure of statements of witnesses other than the Rule 15 deponent, or exculpatory and impeachment information under *Brady* and *Giglio*, if such statements have not relation to the Rule 15 deposition testimony.”).

The depositions of potential victim impact witnesses will be taken, and potentially introduced into evidence at trial, for the limited purpose of providing the Commission with a glimpse of the many victims’ lives and the profound impact their murders have had upon their surviving family members and friends. The Prosecution has provided the Defense, or will provide by 1 July, 2016, any and all prior statements in the Prosecution’s possession made by the proposed deponents. What is more, and while the Prosecution has no obligation to bring this to the attention of the Defense, there is a wealth of information in the public domain recoverable by simple internet searches regarding public statements made by several of the Prosecution’s proposed deponents.

The Accused have made no attempt to demonstrate how further disclosures of information may possibly be relevant to proper cross-examination of the potential victim impact witnesses. As the Prosecution set forth in its motion, too, cross-examination of the proposed

deponents on topics such as their opinions of the post-arrest detention and interrogation of the Accused and appropriate sentences, among other topics, would be inappropriate and objectionable under Supreme Court precedents. *See* AE 422 (GOV) at 14; *see also* Akbar, 74 M.J. at 393 (citing examples of “impermissible victim-impact evidence”). Accordingly, this Commission should reject the Accuseds’ arguments that pre-trial depositions may not be taken prior to the completion of discovery.

6. Conclusion

For the reasons set forth above, this Commission should reject the Accused’s arguments in opposition to the Prosecution’s motion and should grant the Prosecution’s motion to conduct depositions during the October 2016 Commission hearings

7. Oral Argument

As stated in AE 422 (GOV), the Prosecution is prepared to provide the Military Judge any other information he feels he needs to rule on this motion during oral argument, but is not specifically requesting oral argument on this motion.

8. Witnesses and Evidence

None

9. Additional Information

None

10. Attachments

A. Certificate of Service, dated 19 May 2016

Respectfully submitted,

//s//

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ATTACHMENT A

