

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

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**UNITED STATES OF AMERICA**

v.

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

**AE 422I**

**RULING**

**Government Motion**  
To Reconsider In Part AE 422 Ruling,  
Government Motion to Conduct  
Depositions of Certain Witnesses

**2 September 2016**

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**1. Background.**

a. The Government requests reconsideration<sup>1</sup> of the Commission's Ruling<sup>2</sup> regarding the Government's motion for the Commission to order depositions of ten witnesses during Commission hearings scheduled on 3-14 October 2016 at U.S. Naval Station, Guantanamo Bay, Cuba (GTMO), in a public proceeding with the Accused present.<sup>3</sup> As justification for the depositions, the Government cited specific health concerns regarding two of the witnesses and "advanced age" and "general health concerns" for the remaining eight. Of the ten named witnesses, nine were to offer testimony on sentencing and the tenth was a witness as to the merits and sentencing.

b. In relevant part, the Commission's Ruling in AE 422E granted the Government's motion to depose two witnesses for whom the Government provided specific health concerns and denied the request to depose the remaining eight witnesses. The Ruling also denied the request to hold the depositions during the 3-14 October 2016 Commission hearings in a public proceeding with the Accused present. The Commission ruled the depositions would take place in the

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<sup>1</sup> AE 422F (GOV), Government Motion to Reconsider in Part AE 422E, Ruling, Government Motion To Conduct Deposition of Certain Witnesses, filed 22 July 2016.

<sup>2</sup> AE 422E, Ruling: Government Motion to Conduct Deposition of Certain Witnesses, dated 17 July 2016.

<sup>3</sup> AE 422 (GOV), Government Motion To Conduct Depositions of Certain Witnesses, filed 21 April 2016.

National Capital Region (NCR),<sup>4</sup> in a closed proceeding without the presence of the Accused, in lieu of the Commission hearings scheduled for 5-9 December 2016.

c. The Government requests reconsideration of the denial of seven of the eight witnesses requested for deposition. The basis for the request for reconsideration is “new and additional information” regarding specific health concerns of these witnesses that were unknown to the Government when the original motion was filed. The Government also requests reconsideration of the Ruling to conduct the depositions away from GTMO in the absence of the Accused. The Government asserts reconsideration is warranted to prevent litigation over the admissibility of depositions taken outside the presence of the Accused, and to avoid the practical difficulty of identifying suitable courtroom facilities in the NCR.<sup>5</sup> The Government does not request reconsideration of the Ruling that the depositions will not be conducted in a public proceeding, nor the determination that they be held during the 3-14 October 2016 Commission hearings.

d. Counsel for Messrs. Mohammad, Ali, and bin al Shibh filed a joint response,<sup>6</sup> arguing reconsideration should be denied because it is based on facts previously available to the Government when they filed their original motion. The response also disputes the Government’s contention that it will be difficult to identify a location in the NCR that can accommodate the depositions.

e. Counsel for Mr. bin ‘Attash filed a response,<sup>7</sup> urging reconsideration be denied because (1) the motion to reconsider is not based on new information or a change in controlling law; (2) the new information regarding specific medical concerns of the seven witnesses the

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<sup>4</sup> The NCR consists of Washington D.C. and the surrounding area.

<sup>5</sup> The Commission is not aware of any requirement that the depositions be conducted in a courtroom.

<sup>6</sup> AE 422G (KSM, RBS, AAA), Joint Defense Response to AE 422F (GOV), Government Motion To Reconsider In Part AE 422E, Ruling, Government Motion To Conduct Depositions of Certain Witnesses, filed 5 August 2016.

<sup>7</sup> AE 422H (WBA), Mr. bin ‘Attash’s Response to AE 422F (GOV), Government Motion to Reconsider AE 422E (Ruling), Denying Motion to Conduct Depositions, filed 5 August 2016.

Government wishes to depose was available to the Government when the original motion was filed; and (3) the Government has presented no affidavit or medical evidence to substantiate its proffer.<sup>8</sup>

2. **Oral Argument.** The Government did not request oral argument. Counsel for Messrs. Mohammad, Ali, and bin al Shibh requested oral argument unless the Commission denies the Government motion without oral argument. Counsel for Mr. bin ‘Attash requested oral argument. The request for oral argument is **DENIED**.

3. **Law.**

a. The Commission may order a deposition whenever, due to exceptional circumstances, it is in the interest of justice to preserve a witness’s testimony. As the moving party, the Government bears the burden of establishing the “exceptional circumstances.”<sup>9</sup> A party seeking a deposition must provide the Commission with the following information: (1) the name and address of the person whose deposition is requested . . . ; (2) a statement of the matters on which the person is to be examined; (3) a statement of the reasons for taking the deposition; and (4) whether an oral or written deposition is requested.<sup>10</sup> A request for deposition may be denied for good cause. The fact that a witness will be available for trial is good cause in the absence of unusual circumstances.<sup>11</sup> When an oral deposition is requested an Accused does not have a right to be present for the deposition, but has the right to be represented by counsel.<sup>12</sup> A deposition is not part of the “trial” triggering the requirement for a public trial under R.M.C. 806 and the public may be excluded from an oral deposition.<sup>13</sup>

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<sup>8</sup> Based upon the Rules of Court applicable at the time the various Defense responses were filed, Mr. Hawsawi is considered a party to both; *see* Rule 3.5i, Military Commissions Trial Judiciary Rules of Court (5 May 2014).

<sup>9</sup> Rule for Military Commissions (R.M.C.) 905(c)(2).

<sup>10</sup> R.M.C. 702(c)(2).

<sup>11</sup> R.M.C. 702(c)(3)(A) and Discussion.

<sup>12</sup> R.M.C. 702(g)(1)(A) and Discussion.

<sup>13</sup> *See Seattle Times v. Rhinehart*, 467 U.S. 20, 33 (1984).

b. Rule for Military Commissions (R.M.C.) 905(f) permits the Commission to reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial. Either party may move for reconsideration, but granting of the request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law. Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice.<sup>14</sup> Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and arguments the Commission has previously rejected.<sup>15</sup> Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.<sup>16</sup>

#### 4. Findings

a. The Government motion states the Commission was provided “with specific health concerns of the identified individuals based on its knowledge at the time of filing its Motion” and “seven (7) of the eight (8) witnesses previously denied by this Commission...have provided the Prosecution with additional/new information regarding serious health issues that they suffer from.”<sup>17</sup> The Government does not assert the additional information now proffered regarding these health issues was unavailable when it filed the original motion for depositions. Instead, at that time, the Government chose to rely on broad assertions of “advanced age and general health concerns.” As such, the Commission ruled the Government failed to establish exceptional circumstances showing it was in the interest of justice to preserve the testimony of the witnesses.

b. There is no evidence before the Commission that the “new evidence” proffered by the Government with respect to five of the seven witnesses (Mr. Hemenway, Mr. Haberman, [REDACTED]

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<sup>14</sup> See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

<sup>15</sup> See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

<sup>16</sup> See *Bloch*, 794 F. Supp. 2d at 19-20.

<sup>17</sup> AE 422F (GOV) at 5.

[REDACTED] was unavailable to the Government when it filed its original motion. Reconsideration “to prevent a manifest injustice” is not appropriate when the evidence the Government relies upon now was available at the time the original motion was filed.

c. The Government proffered information regarding the medical conditions of Mr. Hanson and [REDACTED] indicating recent adverse changes regarding serious medical conditions occurring after the original motion was filed. Such information qualifies as “new evidence,” and is sufficient to justify a reconsideration with respect to these witnesses.

d. The Government offers no new evidence or new intervening case law with respect to its motion for the Commission to reconsider its Ruling in AE 422E and order the depositions be taken at GTMO in the presence of the Accused. The Government’s argument regarding potential future litigation over admissibility of the depositions is an extension of argument made in the original motion and the practical difficulty of identifying a suitable deposition site in a location away from GTMO could have been raised in the original motion, but was not. They are inappropriate justification for reconsideration.

e. Unlike the other witnesses, the Government offers Mr. Hanson as a witness both on the merits and for sentencing. The Commission makes no finding as to whether Sixth Amendment confrontation rights apply to the Accused standing trial by military commission in a trial outside the United States. However, the Commission finds it appropriate to conduct depositions of witnesses on the merits in the presence of the Accused unless such presence is affirmatively waived by the Accused.<sup>18</sup>

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<sup>18</sup> “An accused does not have the right to be present at an oral deposition except as provided by the Military Judge.” See Discussion, R.M.C 702(g).

5. **Ruling:** The Government motion for reconsideration of the Commission's Ruling (AE 442E) is **GRANTED IN PART** and **DENIED IN PART**:

a. the Government motion to reconsider ordering deposition of Mr. Hemenway, Mr. Haberman, [REDACTED] is **DENIED**;

b. the Government motion to reconsider ordering depositions of Mr. Hanson and [REDACTED] as witnesses on sentencing is **GRANTED**;

c. the Government motion to reconsider ordering deposition of Mr. Hanson as a witness on the merits is **GRANTED**, subject to the special conditions set out below;

d. the Government motion to reconsider the Commission's Ruling denying the Government request to hold the depositions at GTMO, in the presence of the Accused, is **DENIED**, except as it applies to Mr. Hanson as a witnesses on the merits; and

e. the Government motion for the Commission to order deposition of Mr. Hanson and [REDACTED] is **GRANTED**. Any deposition of Mr. Hanson as a witness on the merits will be conducted at GTMO, on a specific date to be determined, and will be in the presence of the Accused unless presence is affirmatively waived by the Accused.

6. **Order:**

a. The Government will provide the Commission with the addresses of the witnesses to be deposed **no later than 16 September 2016**.

b. The Government will provide the Commission and the Defense notice of an appropriate location within the NCR for the Commission to conduct the depositions of Mrs. Dillard, Mr. Vigiano, Sr., and [REDACTED] (and Mr. Hanson if appropriate) with Counsel for all of the parties present. The notice of location will be filed *ex parte* and under seal. The notice will be filed **no later than 16 September 2016**.

c. The Accused will not be present at depositions of witnesses for sentencing only.

d. The depositions of Mrs. Dillard, Mr. Vigiano, Sr., and [REDACTED] are scheduled for **7 December 2016** in lieu of the Commission hearings scheduled 5-9 December 2016. The Government may also schedule the portion of the deposition of Mr. Hanson addressing sentencing matters on 7 December 2016 or conduct the entire deposition of Mr. Hanson during a scheduled hearing session at GTMO. The depositions will continue 8-9 December 2016 if necessary to complete them.

e. The Government will advise the Commission **no later than 16 September 2016** whether the sentencing portion of the deposition of Mr. Hanson will take place on 7 December 2016 and identify a scheduled hearing session to depose Mr. Hanson at GTMO regarding his testimony on the merits.

f. All depositions will be videotaped and transcribed.

g. The videotaped and transcribed depositions will be closed to the public and remain under seal until further order of the Commission or other court of competent jurisdiction.

7. The parties are on notice that *should the depositions not take place* between 5-9 December 2016, the Commission session scheduled for 5-9 December 2016 will take place at GTMO.

So **ORDERED** this 2nd day of September, 2016.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge