MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

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 524MMM (MAH)** **Defense Motion to Reconsider AE 524LLL, Ruling on Government Motion to Reconsider and Clarify AE 524LL, Ruling** **Filed: 18 April 2019**

1. **Timeliness**: This Motion is timely filed.

2. **Relief Requested**: The Defense requests that the Commission reconsider its ruling in AE 524LLL, withdraw its deadline for filing suppression motions, and reinstate the order in AE 524LL, forbidding the Government from using the 2007 FBI statements for any purpose.

3. **Ex Parte Justification for Ex Parte Filing (Attachment B)**: Attachment B is filed *ex parte* because it reveals details of Mr. al Hawsawi's defense, including use of experts obtained through the *ex parte* process established by AE 36D.[1] It also reveals confidential details of Mr. al Hawsawi's case strategy, both in developing a case for suppression and on matters related to trial preparation.

4. **Overview**: In AE 524LLL, the Commission has ordered Defense counsel to file any motions

[1] *See* AE 36D, at 2. The parties mutually agreed on the record that this process should proceed *ex parte*, with only *de minimis* notice to opposing counsel that expert assistance was being sought through *ex parte* means. *See United States v. Khalid Shaikh Mohammad, et al.*, Tr. 1128-30 (19 October 2012).

to suppress, on the ground of involuntariness, statements the accused allegedly made to the FBI in early 2007; the Commission imposed a deadline of 10 May 2019 to file these motions. Under R.M.C. 905(b)(3), the Defense may elect to make such motions at any time before entry of a plea. Under the law the Court of Appeals for the Armed Forces has established in *United States v. Williams* and supporting cases, a Military Judge may not set an earlier deadline. The Commission's order setting an early deadline for the defense to file motions to suppress is therefore invalid as a matter of law.

Additionally, the Commission's order, for the Defense to conduct a suppression hearing now, is improper as it compels a violation of Due Process. The Commission's ruling, deferring the remedy order that suppresses the accused's statements, requires defense counsel to carry out a suppression hearing while concurrently leaving entirely intact the very same order, Protective Order #4, which the Commission found precludes the Defense from being able to develop its case for suppression.[2] Due Process and the right to counsel unequivocally extend to suppression hearings. The Commission's present ruling in AE 524LLL is improper and must be modified, as it would result in a hearing that, *ab initio,* is incapable of meeting Due Process standards and would violate the right to effective assistance of counsel.

Finally, Mr. al Hawsawi's Defense team would not be able to adequately litigate a motion to suppress by the deadline set. The details of the issues the Defense confronts may be found in Att. B (EX PARTE AND UNDER SEAL).

[2] *See* AE 524LL, Ruling, at 35 ("Specifically, Protective Order #4 will not allow the Defense to develop the particularity and nuance necessary to present a rich and vivid account of the 3-4 year period in CIA custody the Defense alleges constituted coercion.")

5. **Burden and Standard of Proof**: 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. The Defense bears the burden on this motion to reconsider by a preponderance of the evidence.[3]

6. **Facts**:

a. On 17 August 2018, the Commission issued AE 524LL, granting the Government's request for a protective order restricting Defense access to witnesses involved in the CIA's Rendition, Detention, and Interrogation Program.[4]

b. The Commission found that the resulting protective order (Protective Order #4) places an undue burden on the Defense's ability to investigate in support of a motion to suppress the accuseds' FBI statements. In an attempt to remedy that burden, the Commission ordered suppression of statements the accused allegedly made to the FBI, forbidding the Government from using those statements for any purpose in this litigation.[5] In doing so, the Commission decided: "Specifically, Protective Order #4 will not allow the Defense to develop the particularity and nuance necessary to present a rich and vivid account of the 3-4 year period in CIA custody the Defense alleges constituted coercion."[6]

c. In response to a Government motion to reconsider the Commission's suppression order in AE 524LL, the Commission has now issued a new ruling.[7] In this new ruling, AE524LLL, the Commission purports to defer the prior finding that Protective Order #4 unduly

[3] *See* R.M.C. 905(c)(1)-(2).
[4] AE 524LL, Ruling: Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview / Government Notice of Proposed Protective Order, entered 17 August 2018, at 36.
[5] AE 524LL, at 23-24 (The Commission recognizes the tension between (a) the Defense ability to conduct an independent investigation that is not unreasonably impeded by the Government and right of equal access to witnesses and evidence, and (b) the Government's need to protect classified information, disclosure of which could reasonably cause damage to the National Security […] The Commission must balance these competing interests.").
[6] *See* AE 524LL, Ruling, at 35, *citing United States v. Karake*, 443 F.Supp. 2d 8, 13 (D.D.C. 2006).
[7] AE 524LLL, Ruling: Government Motion to Reconsider and Clarify AE 524LL, Ruling, entered 3 April 2019.

burdens the Defense's ability to litigate suppression, stating that the impact on the Defense's ability to conduct a suppression hearing "is not yet fully known."[8] The Commission then suspends that part of the earlier Order in AE 524LL which forbids the Government from using the FBI statements.[9] Furthermore, the Commission instructs that it "will conduct an evidentiary to determine whether or not the accuseds' FBI Clean Team statements should be suppressed based on voluntariness;"[10] to that end, the Commission imposes a deadline of 10 May 2019, by which the Defense must file any motions to suppress those FBI statements.

7. **Argument**:

A. The Commission's Deadline for Suppression Motions is Invalid as a Matter of Law

Under Rule for Military Commissions 905(b)(3), motions to suppress evidence shall be filed "before a plea is entered." Rule for Courts-Martial 905(b)(3) sets the same deadline, in the same language for courts-martial.

In *United States v. Williams,*[11] the Court of Military Appeals considered whether a military judge has the authority to modify this deadline. It found that he does not.[12] The rule in question required motions to suppress to be submitted five days before the plea was entered, and the court analyzed it as follows:

> Certainly, there are some advantages to the establishment of such a requirement. Delays and continuances in Article 39(a) sessions and in trials can be minimized or completely avoided. However laudable these objectives may be, they do not permit overriding Rules prescribed by the President in the Manual for Courts-Martial. In [former] Mil.R.Evid. 304(d)(2), he imposed only the requirement that a motion to suppress be made "prior to submission of a plea." . . . Imposition of a duty to file the motion at an even earlier time is in conflict with the Manual.

[8] *Id*., at 10.
[9] *Id*., at 11.
[10] *Id.*
[11] *United States v. Williams,* 23 M.J. 362 (C.M.A. 1987).
[12] *Id.* at 366.

The court accordingly invalidated the local rule.[13]

Military courts since *Williams* have consistently invalidated local rules and individual judges' orders[14] changing the deadlines for motions to suppress[15] or other deadlines[16] from those set by rule or statute. The accused has a right to file a motion to suppress at any time up until the deadline set by the rule,[17] and imposing earlier deadlines can violate his Sixth Amendment right to be heard in his own defense.[18]

Accordingly, despite the Commission's desire to test the effects of Protective Order #4,[19] it cannot perform this test by setting an early deadline for suppression motions. The Commission should reconsider and cancel its order setting an early deadline for suppression motions.

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[13] *Id.*, *citing United States v. Kelson*, 3 M.J. 139, 141 (C.M.A. 1977). *Kelson* had invalidated a local rule that required motions to dismiss to be filed earlier than the Manual stated. "Although the Manual contains several provisions as to which the President has permitted supplementation by the Secretary concerned, the applicable provision as to when motions must be submitted contains no clause permitting supplementation. We are not informed of, and find no delegation of authority in a different place or forum. Accordingly, we are obliged to conclude there has been no delegation of authority to the Secretary of the Army as to the matter in question. Therefore, not only is [the local rule] inconsistent with the Manual but it has not been promulgated by proper authority." 3 M.J. at 141.

[14] *United States v. Walker*, 25 M.J. 713, 715-16 (A.C.M.R. 1987) (invalidating judge's order setting early deadline for notice of mental responsibility defense).

[15] *United States v. Norman*, 42 M.J. 501, 503 (A. Ct. Crim. App. 1995) (invalidating local rule setting early deadline for filing of suppression motions).

[16] *United States v. Webster*, 24 M.J. 96, 99 (C.M.A. 1987) (invalidating local rule setting early deadline for request for trial by judge alone); *United States v. Summerset*, 37 M.J. 695, 697-99 (A.C.M.R. 1993) (same holding for request for enlisted panel members); *United States v. Wiggers*, 25 M.J. 587, 594 (A.C.M.R. 1987) (invalidating local rule requiring advance written notice for motions to produce witnesses, and reprimanding judge for threatening counsel with contempt if they violated it).

[17] *Wiggers*, 25 M.J. at 594 (recognizing accused's right to rely on the deadlines set by the rules, and opposing judicial interference with counsel's "rightful exercise of motion practice").

[18] *See United States v. Coffin*, 25 M.J. 32, 33-34 (C.M.A. 1987), *citing, inter alia, Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (ruling that enforcing a deadline on motion to suppress violated accused's right to be heard—in that case, because the evidence on which suppression was based was late discovered).

[19] *See United States v. Williams*, 23 M.J. 362, 366 (C.M.A. 1987); *United States v. Webster*, 24 M.J. 96, 99 (C.M.A. 1987) (both recognizing that early deadlines were set in support of seemingly "laudable" goals, but still invalid when they contradicted rules set down in the *Manual for Courts-Martial*);

B. The Commission's Ruling Ordering a Suppression Hearing while Leaving Protective Order #4 in Place Creates an Irreconcilable Conflict that Violates Due Process and the Right to Counsel.

The U.S. Supreme Court holds that "the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'"[20] "[T]he right to present a defense ... is a fundamental element of due process of law."[21] And in turn, "[t]he fundamental requirement of Due Process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[22] In the present instance, neither the timing nor the manner in which the ordered suppression hearing would take place complies with the requirements of Due Process, much less the heightened standards required of a death penalty prosecution.[23] The capital nature of this case demands a greater level of accuracy and certainty in adjudicating questions surrounding Due Process and the right to counsel.[24]

Thus, it is central to Due Process for the criminal trial to provide a fair and reliable determination of guilt.[25] The right to the assistance of counsel is, in turn, vital to the fairness of proceedings, and thus critical to achieving Due Process.[26] That right to the assistance of counsel extends to all critical stages of his criminal trial,[27] which includes suppression hearings.[28] The

[20] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*citing California v. Trombetta*, 467 U.S. 479, 485 (1984)).
[21] *Washington v. Texas*, 388 U.S. 14, 19 (1967).
[22] *Matthews v. Eldridge*, 424 U.S. 319 333 (1972), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).
[23] *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding that "the penalty of death is qualitatively different from a sentence of imprisonment.").
[24] *See id*. The Supreme Court's decisions in capital cases subsequent to *Woodson* recognize the heightened standard in adjudicating questions about Sixth Amendment rights, and Due Process. *See Estelle v. Smith*, 451 U.S. 430 (1981); *Caldwell v. Mississippi*, 471 U.S. 320 (1985).
[25] *Smith v. Phillips*, 455, U.S. 209, 225 (1982).
[26] *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.")
[27] *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (holding that the right to counsel does not merely attach at trial, but at earlier stages of the criminal justice process, and that the government has "an *affirmative obligation* not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." (emphasis added))
[28] *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994), *citing United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) ("the suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person.")

right to the assistance of counsel however, "has been accorded […] 'not for its own sake, but *because of the effect it has on the ability of the accused to receive a fair trial*.'"[29] To be effective, counsel must conduct a thorough and wide-ranging investigation that will assist the Defense in shaping the case against death; as "informed legal choices can be made only after investigation of all available options."[30] If counsel is unable to fulfill this duty, counsel is "ineffective in preserving fairness" and thus the assistance of counsel is constitutionally deficient.[31] Protective Order #4, which the Commission's present ruling leaves intact, renders counsel unable to fulfill their duties. The Commission's present ruling recognizes this very problem for the Defense, as the Commission found:

> The decision as to whether PO #4 allows the Defense to develop "the particularity and nuance necessary to present a rich and vivid account of the 3-4 year period" the Accused were in CIA custody is best made after the Defense has the ability to use all tools at their disposal. Although the Defense has received extensive discovery and interviewed some RDI witnesses, the extent of the Government's willingness to further ease restrictions upon further Defense investigation, to enter into meaningful stipulations, or to produce RDI witnesses during upcoming evidentiary *suppression hearings is not yet fully known.*

Notwithstanding this finding however, the Commission directs a suppression hearing. On its face, the Commission's ruling results in an irreconcilable conflict regarding the constitutional obligations of the Defense.

Judge Pohl's order came following his more than six years overseeing this case and reviewing Government *ex parte* requests for substitutions, analyzing evidence against what the

[29] *Mickens v. Taylor*, 535 U.S. 162, 167 (2002); *quoting United States v. Cronic*, 466 U.S. 648 (1984) (emphasis added).
[30] *Strickland v. Washington*, 466 U.S. 668, 680 (1984).
[31] *Mickens*, 535 U.S. at 166 ("assistance which is ineffective in preserving fairness does not meet the constitutional mandate," *citing Strickland v. Washington*, 466 U.S. at 685-86).

Government offered to the Defense, the Defense's case theories, and the Defense's legal obligations in this capital case. Judge Pohl recognized in his suppression order the cumulative effect of the investigation restrictions, discovery limitations, and witness access preclusions which the Government is imposing on the defense in this case. Faced with the Government's repeated invocation of national security claims, Judge Pohl signed Protective Order #4; but, in recognition of the cumulative burdens he witnessed the Government put on the Defense, he struck a balance with the accuseds' rights by suppressing the FBI statements. That suppression order is an attempt to remedy the fatal imbalance which the Government invocations of national security present in this case, and particularly the impact of Protective Order #4 on the right to a fair trial.

In AE 524 LLL, the Commission leaves Protective Order #4 in place. However, the Commission *defers* Judge Pohl's decision that this protective order unconstitutionally burdens the Defense, and suspends the suppression remedy Judge Pohl found necessary. Even as it finds the effects of the protective order are "not yet known, the Commission instructs the Defense may file a motion to suppress based on voluntariness, and orders a suppression hearing. Meanwhile, nothing has changed about the restrictions in Protective Order #4, the order which the Commission explicitly found was *the cause* of the Defense's inability to "develop the particularity and nuance necessary to present a rich and vivid account of the 3-4 year period in CIA custody the Defense alleges constituted coercion."[32] The Commission is thus now directing Mr. al Hawsawi and his co-accused to prepare and present an essential part of Mr. al Hawsawi's defense case while operating under the debilitating restrictions of a protective order that the Commission ruled do not allow due process in this capital trial. The Commission's ruling in AE

[32] AE 524LL, Ruling, at 35.

524LLL leaves these legal proceedings in a constitutionally untenable state; it invites a defective process that places the defense's obligations in conflict and violates the heightened due process mandated in capital proceedings.

The ruling in AE 524LLL puts this trial and this Commission at the crossroad that was foreseen some time ago in this case:

> [T]he Government has to decide which path it chooses to take in the prosecution of these cases. While there are limitations on the permissible use of classified information, as in any trial involving such, the Government must be mindful that unwarranted or improper interference with the trial procedures of this or any court cannot be tolerated. If the Government believes the needs of national security trump the need for a just criminal proceeding, the means are available to accomplish this. Rule for Military Commission (R.M.C.) 604 permits the withdrawal of charges "for any reason;" and, when taken in consideration of R.M.C. 407(b), a proper reason is a determination of harm to national security. [33]

There can be no "just criminal proceeding" under these conditions, and the ruling ordering a suppression hearing must be reversed.

C. Because of the Government's Rendition, Detention and Interrogation Program, the Government's Faltering Discovery Production, a Hearing to Suppress Will Take Enormous Effort and Time Before the Defense Can Litigate the Subject Adequately.

As the Government itself stated at the most recent hearing:

> [T]he alleged mental damage done by infliction of enhanced interrogation techniques is a new and novel area that I suggest is not just something where a run-of-the-mill psychiatrist on the street can be put in place and allowed to answer all kinds of questions about it. This is going to take a hard amount of effort and a lot of time to get to the point that the parties, both parties on both sides, are properly prepared to litigate this issue in a fulsome manner.[34]

[33] Ruling AE 292QQ(Amended), filed 16 December 2014, at 32-33.
[34] *See United States v. Mohammad, et al*., Transcript, at 22317-18 (25 March 2019).

The Defense fully agrees with the Prosecution regarding the novelty and complexity of the issues involved in a suppression hearing in this case, and regarding the effort and time till will require from both sides to properly prepare to litigate this issue. This is not a run-of-the-mill suppression motion, but one which involves years of torture, unprecedented medical and psychological issues, and a derivative evidence concern which the Government is only just now starting to reveal in discovery.

Due to no fault of its own, but rather because of the Government's delays and obstructions, the Defense is not in a position at this time to litigate the exceptionally challenging questions surrounding suppression of statements. Requiring the Defense to prematurely litigate the suppression of Mr. al Hawsawi's statements, before Defense Counsel has been provided access to relevant discovery, witness, and expert assistance to prepare their case for suppression, will violate Mr. al Hawsawi's rights under the Military Commissions Act, the Manual for Military Commissions, and the 5th, 6th, and 8th Amendments, which provide for due process and effective assistance of counsel in such a hearing, particularly in a death penalty case.

8. **Conference**: The Prosecution opposes this motion.

9. **Attachments**:

A. Certificate of Service;
B. **Ex Parte and Under Seal**;
C. **Ex Parte and Under Seal**;
D. **Ex Parte and Under Seal**;
E. **Ex Parte and Under Seal**;
F. **Ex Parte and Under Seal**.

//s//
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A

CERTIFICATE OF SERVICE

I certify that on 18th day of April 2019, I caused to be electronically filed **AE 524MMM (MAH) - Defense Motion to Reconsider AE 524LLL, Ruling on Government Motion to Reconsider and Clarify AE 524LL, Ruling,** with the Clerk of the Court and all the counsel of record by e-mail.

//s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi

B

APPELLATE EXHIBIT 524MMM (MAH)

(Pages 15 - 24)

Ex Parte/Under Seal

Attachment B

APPELLATE EXHIBIT 524 MMM (MAH) is located in the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

C

APPELLATE EXHIBIT 524MMM (MAH)

(Pages 26 - 33)

Ex Parte/Under Seal

Attachment C

APPELLATE EXHIBIT 524 MMM (MAH) is located in the original record of trial.

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D

APPELLATE EXHIBIT 524MMM (MAH)

(Pages 35 - 44)

Ex Parte/Under Seal

Attachment D

APPELLATE EXHIBIT 524 MMM (MAH) is located in the original record of trial.

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Office of Military Commissions

E

APPELLATE EXHIBIT 524MMM (MAH)

(Pages 46 - 48)

Ex Parte/Under Seal

Attachment E

APPELLATE EXHIBIT 524 MMM (MAH) is located in the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions

F

APPELLATE EXHIBIT 524MMM (MAH)

(Pages 50 - 51)

Ex Parte/Under Seal

Attachment F

APPELLATE EXHIBIT 524 MMM (MAH) is located in the original record of trial.

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Office of Military Commissions