

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 619Q (MAH)

Mr. al Hawsawi's Reply
to Government Answer to Mr. al
Hawsawi's Motion to Waive Appearance
at the Military Commission Session
Scheduled to Begin on March 25, 2019

Filed: 21 March 2019

1. **Timeliness:** This Reply is timely filed in accordance with the Commission's Expedited Briefing Order, AE 619F (14 March 2019).
2. **Relief Sought:** Mr. al Hawsawi continues to seek waiver of his appearance at the upcoming hearings and, given the Prosecution's reliance on a written statement about Mr. al Hawsawi's medical conditions from an unidentified medical official at Joint Task Force-Guantanamo, Mr. al Hawsawi now seeks an order for the testimony of that individual, as the Confrontation Clause requires and an order to the prosecution to provide all of Mr. al Hawsawi's medical records up to the present.

The Commission should be aware that the Government classified its Answer as "For Official Use Only" and that, as a result (pursuant to the Communications Order, AE 18U) the Defense is not permitted to show that Answer to Mr. al Hawsawi, unless and until the Government authorizes it as "Releasable to Mr. al Hawsawi." The Defense has asked the Government multiple times to so mark its Answer; however, the Government has not responded

to the Defense's request, and the Defense has therefore been unable to discuss the Answer with Mr. al Hawsawi.

Mr. al Hawsawi's medical care and medical condition continue to be a matter of great concern. While thus far Mr. al Hawsawi has continued to comply with the Military Commission's orders to appear in court on the first day of hearings, the inability to review and properly discuss even the most basic legal pleadings bearing directly on the issue at hand can only unnecessarily heighten the understandable frustration and tension Mr. al Hawsawi feels due to his un-remedied medical condition. This additional tension can potentially lead to disruptions in the Commission's hearings schedule for next week. Accordingly, the defense requests that the Commission withhold ruling and permit oral argument on this motion first thing Monday morning and that Mr. al Hawsawi not be brought to court until counsel has had the opportunity to address the issues raised herein.

3. **Argument:**

Per the Government's own dictate, the Defense is not permitted to speak with the medical personnel who oversee Mr. al Hawsawi's treatment. Despite counsel having security clearances, somehow the Government bars defense counsel from speaking with or discussing Mr. al Hawsawi's medical treatment with Joint Task Force-Guantanamo (JTF-GTMO) medical personnel. And, notwithstanding the bar it places on the Defense, the Government here presents to the Commission a declaration from an unnamed medical staffer from JTF-GTMO. Additionally, the defense is once again put in a position to rebut an unidentified government witness without adequate access to Mr. al Hawsawi's medical records since the production of medical records consistently lags 2-3 months behind. Presently, Mr. al Hawsawi's defense team

only possesses medical records up until the end of January 2019.¹

Mr. al Hawsawi has the right to confront witnesses. *Pointer v. Texas*, 380 U.S. 400, 403-404 (1965) (“The fact that this right [to confrontation] appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.”); *United States v. Wade*, 388 U.S. 218, 224 (1967) (“[The] most basic right [of] a criminal defendant [is] his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.”); *see also*, *United States v. Thompson*, 31 M.J. 168, 171 (CMA 1990) (“Confrontation ... forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth.’”) (quoting *California v. Green*, 399 U.S. 149, 158 (1970)). Flouting this fundamental right entirely, the Government offers its declaration, while Mr. al Hawsawi’s Defense is confined to making his case with the Government-redacted medical documents that the Government deigns to turn over. The Government is obstructing access to JTF-GTMO medical personnel, and using that personnel for its own advocacy purposes. Once more in this case, we are faced with the Government’s leveraging of its power in order to give itself an unconstitutional litigation advantage that precludes Mr. al Hawsawi’s ability to be properly represented and to defend himself.

“There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.” *Pointer*, 380 U.S. at 405. In light of his medical condition, and

¹ Mr. al Hawsawi’s team possesses general medication notes that run through the period ending in 29 January 19. However the last doctor’s notes from any physician including the senior medical officer is 10 January 19.

also in light of the Government's disregard for the Confrontation Clause, this Commission should grant Mr. al Hawsawi's motion to waive his presence at the upcoming hearings.

Furthermore, the Commission must order the testimony of the unknown medical officer whose declaration the Government relies on in support of its position and the production of medical records to date.

4. **Oral Argument:** In view of the Government's reliance on a written declaration from an anonymous individual whom the Government precludes the Defense from speaking with, the Defense seeks oral argument on this motion.

5. **Attachments:**

A. Certificate of Service.

//s//
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CERTIFICATE OF SERVICE

I certify that on the 21st day of March 2019, I electronically filed **AE 619Q (MAH) - Mr. al Hawsawi's Reply to Government Answer to Mr. al Hawsawi's Motion to Waive Appearance at the Military Commission Session Scheduled to Begin on March 25, 2019** with the Clerk of the Court and all the counsel of record by e-mail.

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