

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 619R</p> <p>RULING</p> <p>— Defense Motion to Waive Mr. al Hawsawi’s Appearance at the Military Commission Session Scheduled to begin March 25, 2019</p> <p>22 March 2019</p>
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1. ~~(S)~~ **Background.**

~~(S)~~ On 12 March 2019, Counsel for Mr. Hawsawi filed a motion requesting the Commission excuse Mr. Hawsawi from attending the Commission hearings scheduled for 25-29 March 2019 in order to minimize the amount of prolonged sitting he has to do, as well as the time spent away from easy access to a toilet.¹ Counsel for Mr. Hawsawi assert that Mr. Hawsawi suffers pain from various medical conditions, and medical records of Mr. Hawsawi from November 2018 – January 2019 indicate he has been diagnosed with anal stenosis and has physical pain with bowel movements.² Notwithstanding these assertions, Counsel for Mr. Hawsawi also claim that Mr. Hawsawi’s request to waive his presence is made voluntarily. The motion did not request oral argument.³

~~(S//FOUO)~~ On 19 March 2019, the Government responded,⁴ opposing the motion and requesting the Commission follow its well-established practice of requiring Mr. Hawsawi to be

¹ ~~(S)~~ AE 619D (MAH), Defense Motion to Waive Mr. al Hawsawi’s Appearance at the Military Commission Session Scheduled to begin March 25, 2019, filed 12 March 2019.

² ~~(S)~~ *Id.* at 1-2.

³ ~~(S)~~ *Id.* at para. 6.

⁴ ~~(S)~~ AE 619N (GOV), (U) Government Response To Defense Motion to Waive Mr. Hawsawi’s Appearance at the Military Commission Session Scheduled to Begin on 25 March 2019, filed 19 March 2019.

present on 25 March 2019 to receive his right to be present advisement in person and on the record.⁵ The response included a declaration dated 18 March 2019⁶ from the Senior Medical Officer (SMO) at Camp VII who is currently responsible for Mr. Hawsawi's medical care. The declaration described Mr. Hawsawi's medical condition, his current medications, and the level and type of pain Mr. Hawsawi experiences. The SMO concluded that "as long as [Mr. Hawsawi] has restroom breaks and is allowed to stand as needed, there would be no medical reason why he cannot attend and be present at commission hearings."⁷ The Government response, including the SMO declaration, was banner marked "UNCLASSIFIED//FOR OFFICIAL USE ONLY" and portion marked within. The substantive paragraphs of the SMO declaration were marked "(U//FOUO)."

~~(U)~~ On 21 March 2019, Counsel for Mr. Hawsawi replied,⁸ reaffirming Mr. Hawsawi's request to waive his appearance and asserting that because the Government filing, to include the SMO declaration, are marked "For Official Use Only" the Commission's Order in AE 018U⁹ prohibits Counsel for Mr. Hawsawi from showing the filing and the SMO declaration to Mr. Hawsawi unless the Government authorizes and marks the filing as "Releasable to Mr. al Hawsawi." In light of the Government response, Counsel for Mr. Hawsawi also now request the Commission to (1) produce the SMO to testify; (2) require the Government to produce all Mr. Hawsawi's medical records to date; and (3) withhold ruling, permit oral

⁵ ~~██████~~ See AE 037H *Corrected* Order, Government Motion Regarding Accused's Presence During Commission Proceedings, dated 17 October 2012.

⁶ ~~(U)~~ AE 619N (GOV), at Attach. B.

⁷ ~~██████~~ The SMO also opined that standard operation in transporting Mr. Hawsawi did not require special accommodation or change. See AE 442I Order, Mr. al Hawsawi's Second Supplement to AE 442 (MAH) Defense Motion for Appropriate Relief from Interference with Right to Participate in Own Defense Due to Torture Injuries, dated 3 January 2018.

⁸ ~~██████~~ 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.

⁹ ~~(U)~~ See AE 018U (2nd Amend) Second Amended Order, Privileged Written Communication, dated 1 August 2018.

argument as the first order of business on 25 March 2019, and not require Mr. Hawsawi to appear until after Counsel have had an opportunity to address this issue.

2. ~~██████████~~ Analysis.

~~██████████~~ In its Order in AE 442F,¹⁰ the Commission addressed a similar motion made by Counsel for Mr. Hawsawi to waive Mr. Hawsawi's appearance due to pain resulting from his medical condition. In that ruling, the Commission advised Counsel for Mr. Hawsawi that if they believe the Accused's waiver of his presence is not voluntary, Counsel have a responsibility to raise the issue to the Commission. The Commission also stated that unless reason is given to the contrary, the Commission will continue to assume that when an Accused waives his right to be present for these proceedings, he does so voluntarily.

~~(U)~~ In this case, although Counsel for Mr. Hawsawi assert his waiver of appearance would be voluntary, like the motion to waive Mr. Hawsawi's appearance in the AE 442 series, the current justification for the Commission to allow Mr. Hawsawi to waive his presence is because of pain and discomfort resulting from his medical condition. Based on the SMO declaration, the Commission finds no medical basis preventing Mr. Hawsawi from appearing at the Commission hearings and assisting in his Defense.¹¹ The Commission also finds no good reason to deviate from its previous practice of requiring all Accused to be present for the first day of Commission hearings and to be advised of their right to be present in person and on the record.

¹⁰ ~~(U)~~ AE 442F Order, Mr. al Hawsawi's Supplement to Defense Motion for Appropriate Relief from Interference with Right to Participate in Own Defense Due to Torture Injuries, dated 30 June 2017.

¹¹ ~~(U)~~ This is particularly true given that the Commission's current practice is to allow the Accused to waive their appearance starting at the first break of the first session. This means the Accused can generally depart within the first two hours.

~~(U)~~ Counsel for Mr. Hawsawi assert the Sixth Amendment right to confront and cross examine the SMO requires that the Commission produce him to testify. Assuming *arguendo*, this Sixth Amendment right applies to trials by military commission, the right is a trial right not applicable to pretrial motions such as this one.¹²

█ The Government has not explained why it marked its response and the SMO declaration in a manner that prohibits Counsel for Mr. Hawsawi from showing the documents to Mr. Hawsawi. The Commission cannot discern any cogent reason for this decision.

3. ~~(U)~~ **Ruling.** The motion for Mr. Hawsawi to waive his presence at the start of the 25 March 2019 hearing and the additional relief requested in the reply are **DENIED**.

4. ~~(U)~~ **Order.** Not later than **23 May 2019**, the Government will mark its response (AE 619N (GOV)) to include the SMO declaration, and this ruling in a manner by which Counsel for Mr. Hawsawi can show the documents to Mr. Hawsawi; or the Government will produce the SMO to testify at 0930 on 25 March 2019.

So **ORDERED** this 22nd day of March, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge

¹²~~(U)~~ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (“The opinions of this Court show that the right to confrontation is a *trial* right . . .”).