

**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 624M (MAH)

**Defense Motion To Waive
Mr. Al Hawsawi's Appearance
At The
Military Commission Session Scheduled
To Begin 29 April 2019**

Filed: 24 April 2019

1. ~~(U)~~ **Timeliness:** This motion is timely filed.
2. ~~(U)~~ **Relief Sought:** Mr. al Hawsawi requests to be excused from attending the military commission session presently scheduled to commence on 29 April 2019.
3. ~~(U)~~ **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the Defense. R.M.C. 905(c)(2).
4. ~~(U)~~ **Facts:**
 - a. ~~(U)~~ Mr. al Hawsawi has been diagnosed with increased complications that are repercussions from torture and sodomy he endured during his detention at black sites. The rectal prolapse, rectal tears and chronic hemorrhoids he experienced as a result of this abuse has had long lasting impacts on Mr. al Hawsawi's health and well-being. Mr. al Hawsawi's most

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recent surgery to try and correct these painful health problems was on 14 October 2016.¹

b. ~~(U//FOUO)~~ The medical records most recently provided to the Defense evidence that he has been diagnosed with anal stenosis (a tightening of the rectal passage which is chronic and painful), anal verge fibrosis, and anal surgical changes. Att. B (Medical report of colonoscopy performed by a person who refers to himself in the medical records as “Dr. Poopy,”). Anal stenosis and chronic rectal pain are among the “most feared long-term complications”² of anorectal surgery, as accompanying pain with defecation, constipation and related symptoms can be debilitating and negatively impact the patient’s quality of life. *See* AE619D (MAH), Att. C. This newest medical complication is sadly unsurprising, given the history of trauma and multiple procedures conducted on Mr. al Hawsawi on that area of his body.³

c. ~~██████████~~ As a consequence of the condition recently diagnosed, Mr. al Hawsawi endures even greater physical pain from the daily struggle with having a bowel movement. Records from November-January 2019 evidence that various topical ointments which have been tried are of no assistance, and Mr. al Hawsawi shows an increased use of Tramadol, a narcotic like pain reliever.⁴ Side effects for Tramadol which Mr. al Hawsawi has experienced

¹ ~~██████████~~ *See* AE362P, Defense Motion for Appropriate Relief to Continue December 2016 Hearing (filed 10 November 2016); AE362S Reply in same motion series (filed 18 November 2016).

² ~~(U)~~ Kunitake, H., & Poylin, V. (2016). Complications Following Anorectal Surgery. *Clinics in Colon and Rectal Surgery*, 29(01), 014-021. doi:10.1055/s-0035-1568145.

³ ~~██████████~~ *See* Senate Select Committee on Intelligence, Committee Study of the CIA’s Detention and Interrogation Program, Executive Summary (December 2014), at 100, n. 584 (documenting the CIA’s use of rectal rehydration “without evidence of medical necessity, and Mr. al Hawsawi’s later suffering chronic hemorrhoids, anal fissure, and symptomatic rectal prolapse.”)

⁴ ~~██████████~~ Mr. al Hawsawi took Tramadol for his pain 15 days in December 2018, and 12 of the first 22 days in January 2019 (the Defense does not yet have records beyond that date).

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include a general feeling of discomfort, joint and muscle pain, and tiredness. Beyond the chronic anal pain, Mr. al Hawsawi has abdominal pain and sharp lower back pain; his blood pressure is also still not under control. *See* AE619D (MAH), Att. D, E, F.

d. ~~(U)~~ The Defense detailed for this Commission in earlier pleadings the surgeries performed on Mr. al Hawsawi and his on-going medical problems.⁵ Before his most recent colonoscopy on 30 November 2018, he had two surgeries in short order in April 2017: a colonoscopy to remove a polyp in his colon that was causing continued rectal bleeding, and then – just a week later – a ureteroscopy and laser lithotripsy, to extract a 1.2 cm kidney stone. At the time of the colonoscopy, the surgeon observed oozing hemorrhoids and perianal skin tags prior to the procedure. The ureteroscopy required general anesthesia.⁶ These 2017 surgeries were preceded by two earlier surgeries to the rectal area, one in October 2016 and another in 2006.⁷

⁵ ~~(U)~~ *See* AE619D (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Military Commission Session Scheduled to begin 25 March 2019, (filed 12 March 2019); AE362P (MAH); Defense Motion for Appropriate Relief to Continue December 2016 Hearing (filed 10 November 2016); AE362S Reply in same motion series (filed 18 November 2016); *see also*, AE565A (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled April-May 2018 Military Commission Session (Filed 12 April 2018); AE5400 (MAH), Defense Motion to Waive Mr. al Hawsawi's Presence at January 2018 hearings (filed 5 January 2018); AE537H (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled December 2017 Military Commission Sessions (filed 1 December 2017); AE522D (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled October 2017 Military Commission Sessions (filed 3 October 2017); AE520(MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled August 2017 Military Commission Sessions (filed 20 August 2017); AE500R (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled May 2017 Military Commission Sessions (filed 12 May 2017); AE487 (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled January-February 2017 Military Commission Sessions (filed 24 January 2017).

⁶ ~~(U)~~ *See* AE565A (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled April-May 2018 Military Commission Session (Filed 12 April 2018).

⁷ ~~(U)~~ *See* AE362P, Defense Motion for Appropriate Relief to Continue December 2016 Hearing (filed 10 November 2016).

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e. ██████████ As the Defense has informed this Commission in the past,⁸ Mr. al Hawsawi's multiple health problems stem from the conditions and treatment he experienced in black sites.⁹ In addition to the recently diagnosed anal stenosis and his chronic anal pain, he regularly suffers from debilitating migraines and persistent ringing in his ears. It bears repeating that Mr. al Hawsawi lived with a painful rectal prolapse for more than ten years, while imprisoned and while remaining in the custody of the same entities that inflicted these injuries. The whole time, even as he had to reinsert prolapsing tissue back into his anus, he had to relieve himself publicly -- that is, before guards watching over him. The public nature of such a private matter continues by virtue of his being in custody. It is exacerbated moreover, when he has to be transported to court and sit for hours because, should he need to suddenly relieve himself, he has to publicly request to be excused and temporarily halt the commission proceedings, so that guards can escort him to a holding cell outside the courtroom, where there is a toilet.

f. ██████████ A few months after Mr. al Hawsawi's October 2016 rectal surgery, the Senior Medical Officer then assigned to Camp Seven testified that it takes a prolonged period to recuperate from such a surgery. The officer could not opine precisely how long, conceding that recuperation times were averages and depended on many factors personal to the particular patient. The medical officer's assessment was based on medical averages for similar procedures; it did not consider patients recuperating while held in custody, after the kind of trauma Mr. al Hawsawi experienced while in confinement, and with next to no control over their movements,

⁸ ██████████ See AE520(MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled August 2017 Military Commission Sessions (filed 20 August 2017).

⁹ ██████████ See *supra*, note 3.

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personal treatment, or privacy.¹⁰ The Senior Medical Officer's prognosis from October 2016, if not entirely wrong, was at least wildly optimistic, and particularly so given Mr. al Hawsawi's chronic anal pain, and now the diagnosis of anal stenosis.

g. ~~██████████~~ The Commission has advised Mr. al Hawsawi of his right to be present, at the onset of over 38 pretrial hearings since the Commission began using the process of advising the accused of the right to presence.¹¹ Defense counsel has also explained to Mr. al Hawsawi his right to attend commission hearings, and the effect of his waiving his presence. Mr. al Hawsawi knowingly and voluntarily chooses to waive his right to be present at the upcoming March session of the Commission.

5. ~~██████████~~ Argument:

~~(U//FOUO)~~ It is not only legally appropriate but also humane to accept Mr. al Hawsawi's knowing and voluntary waiver to absent himself from these proceedings under the current circumstances. Given that the Rules for Military Commission explicitly allow an accused to waive appearance, and that Mr. al Hawsawi has been informed of his right to be present at least 40 times in these proceedings, there is no rational reason to decline Mr. al Hawsawi's present request here. Mr. al Hawsawi's diagnosis of anal stenosis is yet another aftermath of the long history of trauma he has had to the rectal area after being sodomized by the CIA at black sites.

¹⁰ ~~(U)~~ See *United States v. Mohammad et al.*, Transcript (5 December 2016), at 14080-81.

¹¹ ~~██████████~~ Pursuant to the Commission's order in AE37H, Order, Government Motion Regarding Accused's Presence During Commission Proceedings (dated 16 October 2012), at the beginning of every series of hearings the Military Judge has informed Mr. al Hawsawi of his right to be present, and about the process for voluntarily waiving his presence. There have been an estimated 38 sessions of the Commission since October 2012, and at each of these sessions, the military judge informed Mr. al Hawsawi of his right to be present, and the effect of waiving that right.

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Put simply, Mr. al Hawsawi asks to waive his presence at the hearing because he needs to minimize the amount of prolonged sitting he has to do, as well as the time spent away from easy access to a toilet.

██████████ JTF-GTMO's prognoses about Mr. al Hawsawi's recuperation have proven wholly unreliable. Mr. al Hawsawi's anal pain is chronic, and his anal stenosis is likely the result of the trauma, and from the multiple procedures he has had to endure to that part of his body. The pain this condition causes Mr. al Hawsawi is not under control, and he continues to try different medications to alleviate that pain; he is in general discomfort, with joint and muscle pain, and tiredness that make it difficult for him to concentrate. Furthermore, the prognoses given to-date have not taken into account the particular conditions under which Mr. al Hawsawi lives.¹² There are obvious, debilitating factors that severely impact the management of his condition: he is under a diet that he does not control; he has a schedule that he cannot control; he suffers from unalleviated, chronic head, neck, back and rectal pain; he has to relieve himself under the eyes of prison guards at all times.

██████████ The Rules for Military Commission specifically provide that an accused appearing before a military commission may voluntarily waive his right to be present at sessions of the Commission occurring after arraignment by securing the permission of the military judge on the record.¹³ Since the Commission began in 2012 to use the process of advising the accused of

¹² ~~(S)~~ See *United States v. Mohammad et al.*, Transcript (5 December 2016), at 14080-81; Mr. al Hawsawi also articulated this point fully in a previous motion, AE520 (MAH), Defense Motion to Waive Mr. al Hawsawi's Appearance at the Scheduled August 2017 Military Commission Sessions (filed 20 August 2017).

¹³ ██████████ See R.M.C. 804(c).

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their right to presence, Mr. al Hawsawi has now been advised on the record of his right at more than 37 pretrial hearings.¹⁴ Since that time, Mr. al Hawsawi has regularly waived his appearance after the first day of each session by signing a written waiver; this Commission has accepted these many signed waivers as knowing waivers from him. Mr. al Hawsawi thus understands fully his right to be present, and the meaning of his waiver of attendance. Furthermore, counsel has also advised him of his right in this regard. Accordingly, Mr. al Hawsawi's waiver of his presence at the upcoming March hearing is knowing and voluntary, and it is legally appropriate for the Commission to accept it.

~~(U)~~ There is precedent in the military commission for granting the request to waive presence at the first day of a multi-day session of the commission. In the commission case of *United States v. Abd Al Hadi Al-Iraqi*, the judge granted the same request Mr. al Hawsawi makes here – to waive his presence on the first day of the proceedings. In accepting this waiver, the judge in that case observed that:

~~(U)~~ to date the Commission has required the Accused be present at the first session of each scheduled hearing. At the first session, the Commission has advised the Accused of his right to be present under R.M.C. 804, and allowed the Accused to waive his presence at subsequent sessions of the same hearing.¹⁵

¹⁴ ~~(S)~~ See AE 37H, Order, Government Motion Regarding Accused's Presence during Commission Proceedings (dated 16 October 2012). At each of Commission hearing since this Order, the military judge has informed Mr. al Hawsawi of his right to be present, and the effect of waiving that right.

¹⁵ ~~(S)~~ See *United States v. Hadi al Iraqi*, Commission Ruling (dated 5 May 2017) (Attachment B to AE500R, Defense Motion to Waive Mr. al Hawsawi's Presence at the May 2017 Military Commissions Session (MAH) (12 May 2017).

~~(S)~~ The procedures the *al Iraqi* Commission employed are identical to the procedures this Commission uses to advise Mr. al Hawsawi of his right to be present. Just as the *al Iraqi* Commission explicitly recognized the significance of previous rights advisements given to the accused there, so should this Commission now recognize the fact that Mr. al Hawsawi has been advised at least 37 times.

Neither Mr. al Hawsawi nor the Government will suffer prejudice from Mr. al Hawsawi's voluntary absence from this session. In its Order in AE037H,¹⁶ this Commission found that "[t]he MCA 2009 specifically articulates the presence of the accused as a 'right' not a mandate." As the Commission further held:

The Commission advised each accused of their right to be present at all sessions and of their option to voluntarily waive their right to be present at certain sessions. Each accused, with advice of counsel, understands their right to be present and their option, under certain circumstances, to voluntarily waive the right.¹⁷

~~(S)~~ Mr. al Hawsawi has been advised by the Commission and by counsel. He is fully cognizant of his rights with respect to attendance, and he is aware of the meaning and effect of the waiver of the right. Mr. al Hawsawi can voluntarily waive his presence at this pretrial proceeding, and there is no requirement that such a waiver from an accused be compelled through his appearance in open court.¹⁸

¹ ~~United States v. Mohammad, et al.~~, AE037H, Order re Government Motion Regarding Accused's Presence during Commission Proceedings (16 October 2012), at 3.

¹⁷ ~~Id.~~

¹⁸ ~~See R.M.C. 804.~~

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Where counsel has been able to communicate with his client, the client has been advised of his right to be present, and there is evidence of a knowing and voluntary waiver, counsel can waive the right to presence for a client.¹⁹ Furthermore, Mr. al Hawsawi has the ability to waive his right to presence at trial, even without a written waiver, since waiver of presence can be implied by conduct.²⁰ In fact, this Commission itself has availed of its ability to imply waiver of presence, when it ordered other co-accused in this case removed due to the Commission's view that their courtroom conduct was unruly.²¹ It would lead to a nonsensical result to decide that Mr. al Hawsawi might be barred from Commission proceedings if he were unruly, yet he must be compelled to attend proceedings when he is *not* being unruly, and 1) he is using proper methods to communicate with the Commission his choice to waive his presence; 2) he has fully and repeatedly been advised of his right to be present and of the consequences of his waiving that presence; and 3) he knowingly and voluntarily offers to waive his presence.

It is therefore legally appropriate, logical, and humane to allow Mr. al Hawsawi to waive his presence at the March 2019 hearing.

¹⁹ See *United States v. Salim*, 690 F.3d 115, 122-23 (2nd Cir. 2012) (“Although it is certainly preferable that the waiver [of presence] come from the defendant directly, there is no constitutional requirement to that effect.” *Polizzi v. United States*, 926 F.2d 1311, 1322 (2d Cir. 1991). A defendant’s lawyer may waive presence on the defendant’s behalf. But a defendant’s waiver through counsel, like all waivers of constitutional rights, still must be knowing and voluntary on the part of the defendant.”); *cf. United States v. Dunlap*, 577 F.2d 867, 868 (4th Cir. 1978) (approving of trial court’s acceptance of counsel’s representation that client voluntarily waived his presence); *United States v. Wagner*, 280 F. Supp. 3d 811, 815 (W.D. Va. 2017) (court accepts of defendant’s sworn waiver of presence at a victim restitution hearing).

²⁰ See *United States v. Mackey*, 915 F.2d 69, 72 (2d Cir. 1990), *citing Illinois v. Allen*, 397 U.S. 337, 359 (1970) (a judge can imply a defendant has waived presence through defendant’s disruptive courtroom conduct).

²¹ See, e.g., *United States v. Mohammad, et al.*, Transcript (21 July 2016), at 12,594.

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6. **Request for Oral Argument:** The Defense does not request oral argument on this motion.
7. **Conference with Opposing Counsel:** To the extent the Defense request seeks a waiver of appearance for the first day of the hearing on 29 April 2019, the Prosecution opposes.
8. **Witnesses:** None.
9. **Attachments:**
 - A. Certificate of Service.

//s//
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~~(U)~~ A

CERTIFICATE OF SERVICE

(U) I certify that on the 24th day of April 2019, I electronically filed **AE 624M (MAH)**
-Defense Motion To Waive Mr. Al Hawsawi’s Appearance At The Military Commission
Session Scheduled To Begin 29 April 2019, with the Clerk of the Court and served the
attached placeholder on all the counsel of record by e-mail.

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

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