

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

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 131 (S) ORDER 29 November 2018
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1. (S) Procedural History

a. ~~(U//FOUO)~~ *Historical background.* Since September 2017, the Accused has undergone five surgeries stemming from degenerative disc disease and other conditions. (See AE 125G, Att. B). The Accused is currently diagnosed with degenerative disc disease, peripheral neuropathy, and chronic pain. (AE 125G, Att. B ¶ 4). During this timeframe, the Commission cancelled or continued four sessions for reasons related to the Accused's medical condition.¹ During those sessions which have occurred, progress was limited due to the Accused's medical condition.² When the Accused has attended sessions, the Commission has made certain accommodations, including shortened sessions, rest days between session, longer breaks, and more frequent breaks. The motions docketed for oral argument during the August 2018 session have yet to be heard. (See AEs 119, 124, and 126, Docketing Orders).

b. (S) *Current procedural posture and medical status.* During the first day of the 6–9 November 2018 hearing, the Accused was present. However, shortly after the hearing began, the session was recessed due to the Accused experiencing muscle spasms. During a Rule for Military Commission (R.M.C.) 802 conference held immediately after the incident, the Commission was

¹ (S) See AEs 082D, 099G, 099V, and 119E.

² (S) During the September 2018 session, the Accused refused to attend the first day of the hearing. Subsequently, the Senior Medical Officer (SMO) recommended the Accused not be moved. Accordingly, no hearings were held during the September session which the accused participated in.

informed that the Accused's treating neurosurgeon would be arriving to Naval Station Guantanamo Bay on 6 November 2018 to conduct a previously scheduled medical assessment of the Accused.³ The Defense filed a declaration providing additional information on the medical incident. (*See* AE 125I, Att. B)

~~(U//FOUO)~~ On 6 November 2018, the neurosurgeon met with the Accused and conducted a one-year post-surgical follow-up evaluation for the November 2017 surgery, and a six-month follow-up for a May 2018 surgery. (AE 125G, Att. B ¶ 1). Pursuant to the Commission's order in AE 125F, the Government provided a declaration from the Accused's neurosurgeon in AE 125G, Attachment B.

~~(U//FOUO)~~ The neurosurgeon stated that the Accused's degenerative disc disease and chronic pain may improve with time, however, it is also possible these conditions will remain static or become worse. (AE 125G, Att. B ¶ 4.a & c). As to the Accused's neuropathy, the neurosurgeon determined it is "unlikely to improve with time and may get progressively worse." (AE 125G, Att. B ¶ 4.b). The neurosurgeon concluded

~~(U//FOUO)~~ The patient's health has improved, his strength has returned, and he has recovered. The patient is currently in pain and may continue to suffer from chronic pain. The process of transporting the patient from his cell to the commission may exacerbate his pain as would be expected with any other patient undergoing similar surgeries. The movement process may also trigger muscle spasms. It was reported to me that yesterday's event "muscle spasms" occurred approximately 1.5 hours after transportation and thus it is my opinion that the transport was not directly linked to the event. However, if the patient can be transported while laying down, versus sitting in his wheelchair, he may be more comfortable and less prone to pain and muscle spasms. Movement is unlikely to cause any new injury to the patient, but I have recommended that action be taken to limit pain caused by transportation.

~~(U//FOUO)~~ There is an increased potential for acute exacerbations if the patient is required to maintain a static physical position for any extended period of time. This

³ ~~(U)~~ *See* Unofficial/Unauthenticated Transcript of the Abd al Hadi al-Iraqi Motions Hearing (Transcript) dated 9 November 2018 from 8:56 A.M. to 1:17 P.M. at pp. 2232–34.

could affect his ability to attend any meeting or proceeding that requires him to remain in one position for extended amount of time. This is a consequence of previous spinal compression, nerve damage, and surgical intervention. The discomfort is not unique to sitting down, it will be present when the patient cannot independently change his position for periods of time (i.e., if he is required to stand, lie down, or sit for long periods of time, he may be in pain). Attending commission proceeding is unlikely to cause new injury or exacerbate the existing conditions as long as the patient is allowed to change position from sitting/standing/reclining. However, acute exacerbations are unpredictable despite any preventative measures.

~~(U//FOUO)~~ It is my opinion that the patient can presently and safely be transported to and attend commissions' proceedings.

(AE 125G, Att. B ¶ 5.a–c).

~~(U)~~ In addition to requiring the Government to provide a declaration from the neurosurgeon, AE 125F directed the Government to “provide an updated course of action that it is currently capable of putting in place to ensure the Accused can safely be transported to, and remain present for, all future sessions of the Commission.” (AE 125F at 2). In response, the Government filed AE 125H. In AE 125H, the Government indicated the following additional accommodations were to be made available: “First, the Government has placed a hospital bed in the ELC courtroom that is functionally identical to the hospital bed that the Accused has used in his living quarters throughout his post-surgical recovery. . . . With the hospital bed in place, during the Commission session, the Accused will have the option to lie down on the bed, recline in the bed, sit in his hospital chair, or stand with the assistance of his walker.”; “Second, the Government, in consultation with the neurosurgeon, will make available to the Accused additional medical treatments to alleviate his back pain and help prevent muscle spasms, including Lidocaine patches and a TENS unit.”; “Third, the Government will post a Corpsman at the ELC during hearings to monitor the Accused’s medical condition and offer on-scene treatment when necessary”; and finally, the Government indicated it “is also exploring the feasibility of

transporting the Accused while laying down to and from the ELC.” (AE 125H at 1–4).

(S) The Commission subsequently held a session on 9 November 2018. The Accused was present. At the session, the Government indicated it had made the accommodations indicated in AE 125H, and that the Accused had been transported to the session in an ambulance. (Transcript at 2235-36). Approximately 19 minutes into the session, the Accused indicated through counsel that he felt a back spasm coming on and the Commission was placed into recess. (Transcript at 2243-44). During a subsequent R.M.C. 802 conference, the Commission was informed that the Accused had been administered Valium. (*See* Transcript at 2245). At that point, the Commission decided that the Accused would be afforded the opportunity to rest in his bed in the courtroom with the lights dimmed. The Commission was called back to order approximately two and a half hours later. (*See* Transcript at 2244). The subsequent session lasted an hour and twenty seven minutes, and the parties were able to address voir dire, challenges to the Military Judge, and several outstanding counsel excusal issues. (Transcript at 2244–2303). During this session, the accused was attentive, engaged, and able to understand the questions being asked of him and respond accordingly. There were no additional medical incidents that caused disruption or delay before the Commission recessed.

2. (S) Discussion

(S) The Commission has previously found the Accused physically competent to stand trial. In AE 099TT,⁴ the Commission found that the Defense “failed to establish that the Accused’s presence and participation in his trial substantially increases the risk to his life or health. Likewise, the Defense has not established that the Accused’s physical condition

⁴ (S) AE 099TT was a written ruling pursuant to an oral ruling conducted on the record. *See* Transcript dated 31 January 2018 from 1:06 P.M. to 5:30 P.M. at pp. 1638–1733.

substantially impairs his ability to present a proper defense.” (AE 099TT at 3–4). Following the November 2018 session, the Defense moved the Commission to reconsider its ruling in AE 099TT.⁵

(U) As an initial matter, the Commission does not find reasonable grounds to reconsider its ruling in AE 099TT or to question the physical competence of the Accused. The declaration provided by the Accused’s neurosurgeon in AE 125G, Att. B, is consistent with the testimony of the previous neurosurgeon, upon which the findings in AE 099TT were made. In particular, movements to, and participation in, commissions’ hearings is not likely to cause injury to the Accused or further exacerbate his underlying medical condition. Furthermore, based on the observations of the Accused’s neurosurgeon as noted in AE 125G, Att. B., the bi-weekly declarations provided by SMOs treating the Accused,⁶ and the Accused’s ability to communicate, comprehend, and articulate his understanding of his rights and provide relevant factual and legal information during the most recent commission session, the Commission continues to find that there are no reasonable grounds to question the Accused’s mental or physical competence.

(U) However, as evidenced by lack of progress during the September 2018 session and limited progress during the November 2018 session,⁷ the ability for this Commission to proceed in an orderly and timely manner remains in question. While the additional accommodations made by the Government, including the bed in the courtroom and transportation to commissions’ sessions in an ambulance, may facilitate incremental progress in the short-term, their long-term

⁵ (U) The Defense also requested the Commission reconsider rulings in the AE 103 series related to expert assistance in the field of neurosurgery (AE 103D), and 102 series, related to access to the Accused at in his recovery cell to facilitate attorney client meetings (102K).

⁶ (U) See AE 099 series declarations.

⁷ (U) As further confirmed by the neurosurgeon and SMO declarations.

viability remains to be seen.

(U) In a trial that will likely require hundreds of additional hours on the record, including sessions that are necessarily extended in duration, the Commission finds that additional information is required to ensure that the Accused's medical condition will not impede his ability to participate in his Defense and that this Commission can proceed and progress in a timely manner. Accordingly, the Commission will receive additional testimony on: "the medical evidence; the evidence of defendant's activities outside the courtroom; the availability of measures to minimize the risks to defendant's health in subjecting him to trial; [and] the temporary or permanent character of the physical problem" See *United States v. Passman*, 455 F. Supp. 794, 797 (D.D.C. 1978).

(U) Beginning in the 7–14 January 2019 session, the Commission will hear testimony and receive evidence from the Accused's various medical treatment providers and other government stakeholders that oversee and facilitate the Accused's detention and transportation, as they relate to access to counsel and attendance at commissions proceedings.

(U) This hearing will be conducted contemporaneously with the ongoing litigation in this case. This hearing is to determine the viability of the current accommodations provided for the Accused, and whether additional accommodations may be required, to facilitate the conduct of this commission in the long-term while ensuring the Accused's maximum participation.

3. (U) Order

a. (U) The Government will have the following witnesses available to testify, either in person or via VTC, at the beginning of the January 2019 hearing:⁸

⁸ (U) The date and time of the first session will be published via the pending docketing order for the January 2019 hearing.

1. (S) The Accused's neurosurgeon.

2. (S) The Senior Medical Officer treating the Accused.

3. (S) The Camp 7 Officer-In-Charge, and other knowledgeable officials, as appropriate, to discuss the feasibility of potential accommodations related to the Accused's access to counsel and participation in commission hearings.

b. (S) If the Defense reasonably expects to disclose, or cause the disclosure of, classified information in any manner related to this testimony, they must file the requisite notices no later than **14 December 2018**. If the Government intends to use any classified information, any notice required pursuant to Military Commission Rule of Evidence 505(h) is due no later than **14 December 2018**. Any requests for a hearing pursuant to Military Commission Rule of Evidence 505(h) shall be made no later than **2 January 2019**.

So **ORDERED** this 29th day of November, 2018.

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M. D. LIBRETTO
LtCol, USMC
Military Judge