MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **IBRAHIM AHMED MAHMOUD AL QOSI**	**AE 015A** **Government Response** to Defense Motion to Abate *DuBay* Hearing as an Unauthorized Post-Trial Proceeding 10 July 2017

1. Timeliness

This Response is timely in accordance with the Commission's Order AE 006, Pretrial Order *DuBay* Hearing of 29 June 2017 and AE 006A, *Amended* Pretrial Order *DuBay* Hearing of 3 July 2017, by which all responses to motions are due no later than 10 July 2017.

2. Relief Sought

The Government requests that the Military Commission promptly deny the Defense Motion of 5 July 2017, *see* AE 015, because Military Commission Defense Office (MCDO) - detailed counsel, CAPT Brent G. Filbert, CDR Patrick J. Flor, and Michael A. Schwartz (hereinafter "putative defense counsel") do not have an attorney-client relationship with al Qosi; on knowledge and belief the Government avers that any attempt by the putative defense counsel to establish such a relationship by traveling to Sudan will be futile, *see* AE 014A and Attachments; and the Military Commission lacks the authority to disregard the orders of the U.S.C.M.C.R. *See* AE 009A.

3. Overview

The U.S.C.M.C.R. ordered a *DuBay* hearing for the limited purpose of determining whether al Qosi is "an unprivileged enemy belligerent engaged in hostilities against the United States or its coalition partners" and "under present circumstances whether al Qosi can be made to respond to any judgment that the Court may render in response to his appeal." Order at 2-3,

United States v. Al Qosi, No. 17-001 (U.S.C.M.C.R. June 19, 2017) ("June 19 Order"). The U.S.C.M.C.R. stated, "[b]ased on statements made by Suzanne Lachelier, Esq., in her declaration, we conclude she has made a sufficient showing that she has an attorney-client relationship with al Qosi." *Id*. at 1. Ms. Lachelier has not filed any motions with this *DuBay* Military Commission. However, the putative defense counsel have filed numerous motions in this proceeding without al Qosi's authority. The putative defense counsel base their purported authority to act on al Qosi's behalf on a detailing memorandum signed by the Chief Defense Counsel. *See* AE 008; AE 010B at 1 n.1; AE 015 at 1 n.1. Although the Chief Defense Counsel has authority to detail defense counsel, he has neither the authority nor the power to create an attorney-client relationship between putative defense counsel and al Qosi. Therefore, putative defense counsel lacked the authority to file this motion on behalf of al Qosi.

Putative defense counsel request this Commission to abate this post-trial proceeding because it is not authorized by any statute, rule, or regulation, and because it is an "illegitimate use of this type of proceeding." AE 015 at 5. However, as this Commission has already recognized, it "lacks authority to disregard C.M.C.R.'s order." AE 009A. Further, counsel associated with Ms. Lachelier requested the U.S.C.M.C.R. rescind its order for a *DuBay* hearing for many of the same reasons putative defense counsel now seek to have the proceedings abated. The U.S.C.M.C.R. denied this request noting that any issues regarding the propriety of the *DuBay* hearing will be considered in the event the Court orders briefing on his appeal.

For these reasons, the Commission should deny the Defense Motion.

4. <u>Burden of Proof</u>

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). However, here it is apparent that putative defense counsel do not represent al Qosi and have no authority to act on his behalf,

having never met, or even spoken with him.[1] Moreover, putative defense counsel claim no association with Suzanne Lachelier, Esq.—the one attorney who may have some limited authority to represent al Qosi based on an attorney-client relationship dating to the original proceedings before this Military Commission. Ms. Lachelier likewise claims no affiliation with putative defense counsel. Therefore, putative defense counsel must evince first that they are authorized by Mr. al Qosi to seek any relief whatsoever before this Military Commission, prior to attempting to show that Mr. al Qosi is entitled to relief under R.M.C. 906(a).

5. Facts

Ibrahim Ahmed Mahmoud al Qosi stands convicted of (1) conspiring to commit terrorism and to provide material support for terrorism in violation of 10 U.S.C. § 950t(20), and (2) providing material support for terrorism in violation of 10 U.S.C. § 950t(25). Transcript of Proceedings ("Tr.") at 428–97 (July 7, 2010, Aug. 9, 2010, & Aug. 11, 2010). Al Qosi pled guilty to these offenses and admitted that, from about 1996 until December 2001, he entered into an agreement with al Qaeda members to commit these offenses and then personally—and with knowledge of its unlawful purpose—committed six overt acts in furtherance of the agreement:

a. From on or about 1996, through in or about 2001, on divers occasions, in Afghanistan, al Qosi, armed with an AK-47, served as a driver for Usama bin Laden, and other al Qaeda members.

b. From in or about 1996, through in or about 1998, in Afghanistan, al Qosi lived at an al Qaeda compound known as the "Star of Jihad," with other al Qaeda members, including Usama bin Laden, where he provided transportation and supply services.

c. From in or about 1998, through in or about 2001, in Afghanistan, al Qosi lived at an al Qaeda compound near Kandahar ("Kandahar compound"), with other al Qaeda members, including Usama bin Laden, where he provided transportation and supply services.

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[1] In almost every unauthorized motion filed with this Military Commission since the *DuBay* hearing was ordered, putative defense counsel have acknowledged that they have no attorney-client relationship with Mr. al Qosi, that they have never met or spoken with him, and that ethical considerations may require them to withdraw all pending motions and take whatever other actions are required consistent with the ethical practice of law. *See, e.g.*, AE 015 at 1 n.1. The putative defense counsel have provided no evidence that they have even attempted to contact al Qosi.

d. From in or about 1998, through in or about 2001, in Afghanistan, at various times, al Qosi traveled from Kandahar compound to the front near Kabul, where he fought in support of al Qaeda near Kabul as part of a mortar crew.

e. From in or about October 2001, through in or about December 2001, in Afghanistan, al Qosi, armed with an AK-47, traveled to Tora Bora with other al Qaeda members.

f. From in or about December 2001, through on or about 15 December 2001, in Afghanistan, at or near Tora Bora, al Qosi, armed with an AK-47, along with al Qaeda members traveled away from Tora Bora where they came under fire from U.S. forces.

See Amended Charge Sheet (reflected also in AE 088–Flyer). In the Stipulation of Fact that he signed on 9 June 2010 and that was considered as evidence by his military commission, al Qosi admitted that he was an "unprivileged belligerent," PE 1 at ¶ 3,[2] and stated, "I knew that al Qaeda has been connected, or admitted, to the attacks on the U.S. embassies in Kenya and Tanzania, the U.S.S. Cole, and the attacks in the United States on 11 September 2001, all with the intent of influencing the conduct of the United States Government." *Id.* ¶ 19. He also admitted, "I was not involved in and had no foreknowledge of these attacks, but continued to materially support al Qaeda." *Id.*

On 10 July 2012, having spent 10 years and 6 months in detention with the final two years of that period in confinement pursuant to his military commission conviction and sentence, the U.S. government released the then fifty-two year old al Qosi from confinement and transported him to Khartoum, Sudan aboard a U.S. military aircraft. Having entered into a Pre-Trial Agreement, and signed a detailed Stipulation of Fact, al Qosi had to that point complied with the terms of that Agreement. Tr. 834. His purported intention, as summarized by his defense counsel at the pre-sentencing proceeding in 2010, had been to "fit back into his family

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[2] He also admitted that he was an alien, an established fact not subject to dispute and thus not requiring any attention at the *DuBay* hearing, as neither subject matter jurisdiction nor personal jurisdiction per se are at issue here, even as present unprivileged enemy belligerency must be established to the satisfaction of the U.S.C.M.C.R. According to the Stipulation of Fact,

> I was born in Atbara, Sudan circa 1960. I graduated high school in the 1980s and studied accounting at Khartoum Polytechnic for four years. *I am not a United States citizen.*

PE 1 at ¶ 2 (emphasis added).

and community as a peaceable, law-abiding member." Tr. 832. According to matters presented by al Qosi's family and by the defense, "[h]e would be running the family grocery store in Atbarah, Sudan," Tr. 833, a town northeast of Khartoum where his father had operated the business throughout his and his father's lifetimes.

On 11 March 2017, in an Order from the U.S.C.M.C.R., case No. 17-001, the court more fully summarized the procedural history of the case. That document, appended as Attachment B to AE 010, is incorporated here by reference. On 19 June 2017, the U.S.C.M.C.R. ordered a *DuBay* hearing "to make findings of fact and conclusions of law regarding whether (a) al Qosi is currently an unprivileged enemy belligerent, and (b) under present circumstances whether al Qosi can be made to respond to any judgment that the Court may render in response to his appeal." June 19 Order at 3. On 26 June 2017, the Convening Authority requested that the Chief Trial Judge detail a judge to conduct the hearing. AE 004. On 29 June 2017, the newly detailed Military Judge, *see* AE 005, issued a pre-trial order for the hearing. AE 006.

On 30 June 2017, attorneys with an apparent existing attorney-client relationship with al Qosi applied for permission from the U.S.C.M.C.R. to request that the U.S.C.M.C.R. rescind its order for a *DuBay* hearing. Letter from Mary R. McCormick, Esq., to The Honorable Presiding Judge Pollard and The Honorable Judges Herring and Celtnieks, U.S.C.M.C.R. (Jun. 30, 2017). On 7 July 2017, two days after putative defense counsel filed the present motion, the U.S.C.M.C.R. denied permission. Order at 1, *United States v. Al Qosi*, No. 17-001 (U.S.C.M.C.R. July 7, 2017) ("July 7 Order").

On 5 July 2017, putative defense counsel filed AE 015, Defense Motion to Abate *DuBay* Hearing as an Unauthorized Post-Trial Proceeding. The Government now responds.

6. Law and Argument

The statutory provision mandating automatic review of military commission convictions and sentences does not create an attorney-client relationship between a military commission appellant and counsel detailed by the Chief Defense Counsel for the purpose of appeal. *See* 10

U.S.C. § 950c(a). Neither does the language in the statute that reads, "[t]he accused shall be represented by appellate counsel . . . ." 10 U.S.C. § 950h(c).[3] As the Court of Appeals for the Armed Forces acknowledged in *United States v. Moss*, the decision to appeal is a personal decision of an accused. 73 M.J. 64, 67 (C.A.A.F. 2014) (citing *United States v. Larneard*, 3 M.J. 76, 82 (C.M.A. 1977). The putative defense counsel have not presented any evidence that al Qosi has authorized them to act on his behalf. The appellant in *Moss* exercised her right to representation on automatic appeal by indicating so on a Post-Trial and Appellate Rights Form. *Id.* at 68. There is no analogous election in this case. Putative defense counsel argue that rules mandating appellate representation and action of the Chief Defense Counsel detailing them to represent al Qosi establish the only authorization they need to act on behalf of al Qosi. However, putative defense counsel are not detailed appellate counsel—Ms. Lachelier is. *See* June 19 Order at 1; *see also* AE 10B, Attach. B ¶¶ 2, 10.

Regardless of whether or not putative defense counsel have been properly detailed to represent al Qosi, they have acknowledged they have not established an attorney-client relationship with him. *See supra* note 2. An "attorney-client relationship must exist for anyone to function as 'counsel for the accused.'" *United States v. Iverson*, 5 M.J. 440, 441 (C.M.A. 1978). The attorney-client relationship is one of agency, and "one cannot act as an agent without the knowledge and consent of the principal." *Id.* at 443 (internal citations omitted). The Court of Military Appeals has stated very clearly that detailing alone is insufficient authority for an attorney to act on behalf of an accused. *United States v. Miller*, 21 C.M.R. 149, 154 (C.M.A. 1956).

> There is more to creating the relationship of attorney and client than the mere publication of an order of appointment, and we have so suggested in an earlier opinion. An accused's right to a counsel of his own choice, and the necessity of a finding that he has consented to representation by appointed counsel, was recognized by this Court in *United States v Goodson*, [3 C.M.R. 32 (C.M.A. 1952)], where we said: "He [the accused] is entitled to select counsel of his own

[3] Putative defense counsel admit that they do not have an attorney-client relationship with al Qosi. AE 013 at 2.

> choice, and may object to being defended by the person appointed if he desires to do so." The relationship between an attorney and client is personal and privileged. It involves confidence, trust and cooperation. Where counsel is appointed to represent one charged with an offense, the offender is entitled to protest, if the lawyer selected is objectionable to him. In the military system, if an accused has just cause for complaint against his defender, such as hostility or incompetency, he is entitled to request the appointment of other counsel. Furthermore, he is entitled to reject the services of appointed officers and employ, at his own expense, the services of civilian counsel. It may be that where an accused does not retain the services of civilian counsel, or prevail upon individual counsel to undertake his defense, or object with good cause to the representation by counsel appointed for him, he is deemed to have concurred in the appointment. However, that notion of implied consent or acquiescence is not peculiar to the military system, but is operative in every system which relies, in whole or in part, on public defenders or court-appointed counsel.

Id. As it stands, putative defense counsel have provided no evidence that al Qosi has any knowledge whatsoever that putative defense counsel are acting on his behalf as his agents. Any notion of implied consent or acquiescence is inapplicable to the present situation because there is no evidence that al Qosi has any knowledge of the fact that putative defense counsel have been detailed to represent him and are purportedly acting on his behalf.

Despite their lack of authority to act on al Qosi's behalf, putative defense counsel are seeking to have this Commission abate the *DuBay* hearing because they claim it is not authorized by statute, rule, or regulation and that "[c]onducting a *DuBay* hearing under the circumstances of this case and for the purpose articulated by the [U.S.C.M.C.R.] is an illegitimate use of this type of proceeding." AE 015 at 5.[4] However, as the Military Commission has itself acknowledged, the Military Commission is not free to "disregard C.M.C.R.'s order." AE 009A ¶ 2. In a letter to the judges of the panel of the U.S.C.M.C.R. that ordered the pending *DuBay* hearing, counsel with apparent authority to act on behalf of al Qosi[5] applied for permission to request that the

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[4] The Government does not concede in any way that the arguments of putative defense counsel are availing. However, given the present posture of this case, arguing the merits of putative defense counsel's claims will serve no purpose. The Government reserves the right to brief and argue the merits of putative defense counsel's arguments at the appropriate time.

[5] The Government acknowledges that the U.S.C.M.C.R. has recognized that Ms. Lachelier has an attorney-client relationship with al Qosi and specifically authorized Ms. Lachelier to

U.S.C.M.C.R. rescind its order for substantially the same reasons putative defense counsel argue in the present motion. Letter from Mary R. McCormick, Esq., to The Honorable Presiding Judge Pollard and The Honorable Judges Herring and Celtnieks, U.S.C.M.C.R. (Jun. 30, 2017). In response, the U.S.C.M.C.R. denied permission to seek rescission and stated, "[a]l Qosi may make the arguments he seeks to assert in the event the Court orders briefing regarding whether it has the discretion to dismiss his appeal." July 7 Order at 1. In light of the U.S.C.M.C.R.'s decision not to reconsidered its order for a *DuBay* hearing at this time and the Military Commissions recognition that it does not have authority to disregard the orders of the U.S.C.M.C.R., the Military Commission should deny this motion.

7. Conclusion

For the forgoing reasons, the Military Commission should deny the Defense Motion to Abate *DuBay* Hearing as an Unauthorized Post-Trial Proceeding.

8. Oral Argument

The Government does not request oral argument; however, should the Commission grant oral argument, the Government requests an opportunity to be heard. The Commission should not grant oral argument for any counsel who has not demonstrated an attorney-client relationship with al Qosi.

9. Witnesses and Evidence

The Government does not anticipate presenting evidence on this motion.

10. Additional Information

None.

11. Attachments

A. Certificate of Service, dated 10 July 2017.

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associate Ms. McCormick for the purposes of representing al Qosi on appeal. June 19 Order at 1.

Respectfully submitted,

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 10th day of July 2017, I filed AE 015A, Government Response to Defense Motion to Abate *DuBay* Hearing as an Unauthorized Post-Trial Proceeding, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel, Ms. Suzanne Lachelier.

//s//
MICHAEL J. O'SULLIVAN
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Office of the Chief Prosecutor
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