

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>IBRAHIM AHMED MAHMOUD AL QOSI</b>	<b>AE 018</b>  <b>RULING</b>  <i>DuBay Hearing</i> Findings of Fact and Conclusions of Law  <b>19 July 2017</b>
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**1. Procedural History.**

a. On 7 July 2010, Mr. al Qosi pled guilty to conspiracy to commit terrorism and provide material support for terrorism, and also the substantive charge of providing material support to al Qaeda.<sup>1</sup> Mr. al Qosi was sentenced by a military commission to fourteen years confinement. Pursuant to his pretrial agreement, all of his confinement in excess of two years was suspended.<sup>2</sup> On 10 July 2012, Mr. al Qosi was released from confinement and transferred to his native Sudan.<sup>3</sup> Commander Suzanne Lachelier represented Mr. al Qosi before the Commission.<sup>4</sup>

b. On 12 September 2012, the Chief Defense Counsel appointed Captain (CAPT) Mary R. McCormick to be Mr. al Qosi's appellate defense counsel.<sup>5</sup> CAPT McCormick filed a petition for extraordinary relief in the nature of a writ of mandamus to the United States Court of Military Commission Review (U.S.C.M.C.R.) asking, among other things, for funding and an interpreter to travel to Sudan to meet and consult with Mr. al Qosi so he could make an informed decision

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<sup>1</sup> *United States v. al Qosi*, 28 F. Supp. 3d 1198 (U.S.C.M.C.R. 2017).

<sup>2</sup> *Id.* at 1200.

<sup>3</sup> *Id.*

<sup>4</sup> Order, *Al Qosi v. United States*, C.M.C.R. Case No. 17-002, 11 March 2017 at 2.

<sup>5</sup> 28 F. Supp. 1201.

whether he wished to file an appeal.<sup>6</sup> CAPT McCormick also filed a writ asking the U.S.C.M.C.R. to extend the two-year period to file a petition for a new trial.<sup>7</sup>

c. On 12 February 2014, the U.S.C.M.C.R. ordered CAPT McCormick to show cause why she was authorized by Mr. al Qosi, either explicitly or implicitly, to represent Mr. al Qosi before that court.<sup>8</sup> On 24 April 2014, the U.S.C.M.C.R. denied all the petitions, finding “that the record contains no evidence that an attorney-client relationship exists between CAPT McCormick and al Qosi,” and without such a relationship CAPT McCormick was not authorized to file the writ petitions.<sup>9</sup>

d. On 13 February 2017, Ms. McCormick (no longer in her military capacity), filed a “Brief” before the U.S.C.M.C.R., claiming Mr. al Qosi’s case was “properly before the Court for plenary review under 10 U.S.C. § 950f.”<sup>10</sup> This filing was also signed by Mr. al Qosi’s trial attorney before the Commission, Ms. Suzanne Lachelier (no longer in her military capacity).<sup>11</sup> On 11 March 2017, the U.S.C.M.C.R. ordered Ms. McCormick and Ms. Lachelier file a signed statement that they had personally communicated with Mr. al Qosi since his return to Sudan, and if so, whether Mr. al Qosi had given informed consent, either expressly or impliedly, for Ms. McCormick or Ms. Lachelier to file the “appeal” before the Court.<sup>12</sup> On 23 March 2017, Ms. McCormick and Ms. Lachelier responded to the U.S.C.M.C.R. order, asserting that Mr. al Qosi had given his consent to Ms. Lachelier when she was designated to handle all post-

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Order, *Al Qosi v. United States*, U.S.C.M.C.R. Case No. 17-002, 12 February 2014 at 4.

<sup>9</sup> *Id.* at 1201.

<sup>10</sup> Brief on Behalf of Mr. al Qosi (“Brief”), filed 13 February 2017 at 1.

<sup>11</sup> Brief at 14.

<sup>12</sup> Order, *Al Qosi v. United States*, U.S.C.M.C.R. Case No. 17-002, 11 March 2017 at 2.

trial matters on Mr. al Qosi's behalf, and that Ms. Lachelier's *ex parte* affidavit establishes that Ms. McCormick has authority from Mr. al Qosi to represent him.<sup>13</sup>

e. On 17 June 2017, the U.S.C.M.C.R. issued an Order<sup>14</sup> directing a hearing, conducted pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), 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."<sup>15</sup>

f. In that Order, the U.S.C.M.C.R. stated that, "based on statements made by [Ms.] Lachelier in her declaration, we conclude she has made a sufficient showing that she has an attorney-client relationship with al Qosi."<sup>16</sup> The Court also found that Ms. Lachelier had authority to associate Ms. McCormick as her co-counsel.<sup>17</sup>

## 2. Findings of Fact.

a. On 12 July 2017, the Commission convened the *DuBay* hearing.

b. Mr. al Qosi was not present.

c. The Chief Defense Counsel, Brig Gen J.G. Baker, detailed CAPT Brent G. Filbert, CDR Patrick J. Flor, and Mr. Michael A. Schwartz to represent Mr. al Qosi. None of the detailed defense counsel have ever spoken with or met Mr. al Qosi.

d. Ms. Suzanne M. Lachelier represented Mr. al Qosi at his trial. Subsequently, Ms. Lachelier was detailed to represent Mr. al Qosi for his appeal. Ms. Lachelier was not detailed to represent Mr. al Qosi at the *DuBay* hearing.

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<sup>13</sup> Appellant's Response to Specified Questions, dated 23 March 2017.

<sup>14</sup> Order CMCR Case NO. 17-001, dated June 19, 2017.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.*

e. Ms. Mary R. McCormick was recognized as associate co-counsel to assist

Ms. Lachelier on Mr. al Qosi's appeal. Ms. McCormick made no appearance at the *DuBay* hearing.

f. Ms. Lachelier made an appearance at the *DuBay* hearing as a witness, not as defense counsel representing Mr. al Qosi. She testified she is not detailed counsel for Mr. al Qosi for the *DuBay* hearing but remains his detailed appellate counsel. She also testified that the three (3) defense counsel detailed for the *DuBay* hearing were not associate counsel with her.

Ms. Lachelier stated she had a conflict of interest which prevented her representing Mr. al Qosi at the *DuBay* hearing, but the conflict would not prevent her from continuing to represent him on appeal.<sup>18</sup>

g. Trial counsel objected to anyone, other than Ms. Lachelier and associate counsel, representing Mr. al Qosi at the *DuBay* hearing.<sup>19</sup> Trial counsel also refused to serve classified pleadings (including specific notices under Military Commission Rule of Evidence (M.C.R.E) 505(g)) on detailed defense counsel, claiming they had "no need to know."<sup>20</sup>

h. In addition to the 17 June 2017 Order, the U.S.C.M.C.R. also issued an Order on 11 March 2017.<sup>21</sup> Concerning the issue of Mr. al Qosi's representation, this Order stated:

Joining Ms. McCormick as counsel on the instant case is Suzanne Lachelier, Esq. She was assigned by the OMC Chief Defense Counsel as assistant appellate counsel.... Counsel have not provided the Court with any evidence that al Qosi ***has consented to be represented by either of them in appellate matters***, or that he has authorized them to proceed with the appeal.<sup>22</sup> (Emphasis added)

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<sup>18</sup> Transcript of U.S. v. Ibrahim Ahmed Mahmoud al Qosi, 12 July 2017, at 8.

The Commission did not address how Ms. Lachelier's conflict of interest would prevent her from representing Mr. al Qosi at the *DuBay* hearing but still permit her to represent Mr. al Qosi on appeal. The Commission believes these issues are within the purview of the U.S.C.M.C.R.

<sup>19</sup> Transcript at 3-4, 51.

<sup>20</sup> Transcript at 51.

<sup>21</sup> Order, C.M.C.R. Dkt. No. 17-001, dated 11 March 2017.

<sup>22</sup> *Id.* at 2.

i. In its 17 June 2017 Order, the U.S.C.M.C.R. found:

Based 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. As such, Ms. Lachelier also has the authority to associate Ms. Mary R. McCormick as her co-counsel. To be clear, Ms. McCormick's authority to act as counsel is derivative of Ms. Lachelier's.<sup>23</sup>

### 3. Conclusions of Law.

a. Fundamental to the adversarial process is the right to representation by counsel at important stages of the military commission process. A *DuBay* hearing is an "important stage" of the military commission process. *See United States v. Rodriguez*, 60 M.J. 239, 260 (C.A.A.F. 2004) (stating that denial of counsel at a *DuBay* hearing can violate right to counsel at an "important stage" of a proceeding.) As such, Mr. al Qosi should be represented at the *DuBay* hearing.

b. Before the Commission can address the specified questions, it must determine who represents Mr. al Qosi. Normally, this is not an issue because an accused is present, or at least available, to indicate his choice of counsel. In this case, Mr. al Qosi was not present and the only evidence of his selection of appellate counsel is the finding by the U.S.C.M.C.R. 19 June 2017 Order referenced in paragraph 2.1 above. But Ms. Lachelier claims a conflict of interest, and the Government objects to anyone but Ms. Lachelier representing Mr. al Qosi.

c. The Commission must respect and follow the direction of its superior Court. The Commission believes both the 11 March 2017 and 19 June 2017 Orders must be read together. It agrees with the Government that U.S.C.M.C.R. has authorized only Ms. Lachelier and associate counsel to represent Mr. al Qosi at the *DuBay* hearing, and that the three detailed defense counsel who appeared at the *DuBay* do not have authority to represent Mr al Qosi at the hearing.

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<sup>23</sup> Order, CMCR Dkt. No. 17-001, dated June 19, 2017 at 1.

d. The Commissions also notes it is unclear whether this is a mandatory appeal or an extraordinary writ. If this is a mandatory appeal, as Mr. al Qosi' brief states (“[t]his case is properly before the Court for plenary review under 10 U.S.C. § 950f”), at least for appellate purposes, an appellate defense counsel does not necessarily have to personally consult with a client to file a mandatory appeal on a client's behalf. *United States v. Moss*, 73 M.J. 64 (C.A.A.F. 2014). The same would appear to be true for a *DuBay* hearing. *Rodriguez*, 60 M.J. at 260 (counsel never consulted with his *DuBay* client). But if this is a discretionary appeal, *Moss* would dictate that consultation with Mr. Qosi and an affirmative decision by him to appeal would be necessary. 73 M.J. at 67. While Mr. al Qosi's brief and the way the U.S.C.M.C.R. is handling this case gives the initial appearance this is a mandatory appeal, the question regarding counsel to be addressed by the *DuBay* hearing signals otherwise.

e. The Commission takes Ms. Lachelier, as an officer of the Court, at her word that she has a conflict of interest preventing her from representing Mr. al Qosi at the *DuBay* hearing.<sup>24</sup> The end result is that no conflict free defense counsel appear to have authority to represent Mr. al Qosi at the *DuBay* hearing. Despite a suggestion by the Government that counsel for Mr. al Qosi was unnecessary,<sup>25</sup> the Commission, unless directed otherwise, will not conduct the *DuBay* hearing in the absence of any defense counsel to represent Mr. al Qosi.

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<sup>24</sup> The Commission did not elicit the specifics of the alleged conflict to determine whether Ms. Lachelier has a conflict of interest or not for the *DuBay* hearing, believing this beyond the scope of the Commission's mandate in the U.S.C.M.C.R. June 19, 2017 Order. The Commission also did not address how or whether Ms. Lachelier's conflict of interest would prevent her from representing Mr. al Qosi at the *DuBay* hearing but still permit her to represent Mr. al Qosi on appeal. The Commission believes these issues are within the purview of the U.S.C.M.C.R.

<sup>25</sup> Transcript at 29.

**4. Order.**

The case is to be returned to the U.S.C.M.C.R. for further direction how to proceed in light of the apparent lack of authorized defense counsel.

*//s//*  
JAMES L. POHL  
COL, JA, USA  
Military Judge