

UNITED STATES OF AMERICA

v.

IBRAHIM AL QOSI

**Defense Motion
to Compel Access to Client**

12 May 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's order of 10 April 2008.
2. **Relief Sought:** The defense respectfully requests that this Commission order that Detailed Defense Counsel be permitted to meet with the accused at his cell, thereby avoiding the need for the accused to be transported anywhere for an attorney-client conference.
3. **Overview:** The defense seeks access to the accused, who is imprisoned at Guantanamo Bay, in a facility which is managed by the Joint Task Force Guantanamo (JTF-GTMO). To-date, JTF-GTMO has not permitted detailed defense counsel to see her client. JTF-GTMO takes to the accused a non-confidential letter from detailed defense counsel. JTF-GTMO staff then communicates to detailed counsel regarding their interpreter's understanding of the accused's response to any such letter.

This request seeks to assure that Mr. Al Qosi receives due process and the right to counsel promised him in the Military Commissions Act (M.C.A.). A failure to allow detailed defense counsel to meet in person with her client precludes Mr. Al Qosi's right to counsel and does not afford him any of the procedural guarantees afforded under the M.C.A., and precludes detailed counsel from abiding by applicable service and bar regulations governing communications and representation of clients.

4. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion on this motion; the burden of proof necessary to decide this motion is a preponderance of the evidence. R.M.C. 905(c).

5. **Facts:**

The accused, Mr. Al Qosi, was originally imprisoned at Guantanamo Bay Naval Station on or about January 2002. He was charged before a military tribunal, in February 2004, and was detailed a military defense counsel, Col. Sharon Shaffer (USAF). Mr. Al Qosi worked with Col. Shaffer, and civilian counsel, Mr. Paul Reichler, during the more than two years when his case languished in the system. The charges were dismissed with the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which halted the military tribunal system in June 2006. Then, on 8 February 2008, new charges were referred against Mr. Al Qosi before this military commission; these charges were referred on 5 March 2008. His military counsel having changed duty assignments, Mr. Al Qosi was detailed the undersigned defense counsel.

Defense counsel travelled to Guantanamo, having arranged ahead, with the Staff Judge Advocate's (SJA) office for JTF-GTMO, to meet Mr. Al Qosi on 27 and 28 March 2008 at the detention facility aboard Naval Station Guantanamo, Cuba.

On the morning of 27 March 2007, detailed counsel went to the SJA's office to be escorted to see Mr. Al Qosi. Representatives of the Staff Judge Advocate's (SJA) office for JTF-GTMO claimed that Mr. Al Qosi refused to see detailed counsel. The SJA's office informed detailed counsel that she could write a note to Mr. Al Qosi and submit the same, translated into Arabic (Mr. Al Qosi's native tongue); the SJA's office would take it to the accused. The prison facility's procedures do not provide for any confidentiality in the delivery of such letters to clients. After counsel prepared and had the defense interpreter translate the letter, the SJA's

office staff read the note to Mr. Al Qosi, while he remained in his cell; during this time, defense counsel was instructed to wait outside the detention facility. The SJA staff returned, saying that Mr. Al Qosi refused to speak with defense counsel.

Defense counsel had an appointment to see Mr. Al Qosi that afternoon of 27 March. The SJA staff informed counsel that she could not return in the afternoon to try and see Mr. Al Qosi; the prison's "Summary of Access Procedures to Assist Commissions Counsel with Detainee Visitation" (SAPACCDV) prohibited afternoon visits when a prisoner had refused to see his attorney in the morning, even when an afternoon appointment had been arranged in advance. App. Exh. ____.

Defense counsel returned in the morning of 28 March 2008. Again, she was informed Mr. Al Qosi was refusing to see her. Again, defense counsel wrote, and had translated, a letter to Mr. Al Qosi, then waited outside the detention facility for the letter to be read to him. The SJA staff indicated Mr. Al Qosi refused to see counsel. Defense counsel asked to return that afternoon, since she had made an appointment for that time and was leaving the next morning. The SJA staff stated she could return that afternoon, but when defense counsel did return, the staff refused entry, citing the SAPACCDV.

Defense counsel requested to be able to go on the cell block, and speak with Mr. Al Qosi through his cell door. App. Exh. ____ The SJA's office demanded that such a request be made in writing, and counsel submitted that request the same day. The SJA denied access to counsel, citing unspecified "secured facilities" which purportedly conducted the same practice. App. Exh. ____ Verbally, the SJA staff told defense counsel that if detailed counsel were allowed on the cell block, then habeas counsel would also make such requests, and the SJA staff could not

accommodate everyone; hence, the reasoning went, they had to refuse detailed counsel access to the cell block.

Defense counsel returned to Guantanamo two weeks later, to see Mr. Al Qosi and attend his arraignment, which was scheduled for 10 April 2008. On 9 April, defense counsel went to the SJA's office at the appointed time; again, she was informed Mr. Al Qosi refused to see her. Again, relying on its Summary of Access Procedures, the SJA's office refused to honor an afternoon appointment the defense had made to see Mr. Al Qosi, and refused to allow defense counsel on the cell block to meet with him. Only after this commission ordered the SJA's office to permit defense counsel to attempt a visit that afternoon, did the SJA's office allow the defense to try again. That afternoon, after reading another letter from defense counsel to Mr. Al Qosi, the SJA staff returned to state that he refused to see defense counsel.

The morning of arraignment, Mr. Al Qosi was taken to the Commissions building where the arraignment would take place. This commission permitted defense counsel to attempt to speak with him in the cell where he was being held outside the commission hearing room. This cell was heavily guarded, both outside and inside. Mr. Al Qosi, who was seated in the middle of the cell, had both feet chained to the floor. When counsel entered, the approximately four guards in the cell with Mr. Al Qosi left; the meeting was observed by guards through a one-way glass window giving onto the cell. When Mr. Al Qosi saw counsel enter with the interpreter and paralegal, he gesticulated to the window, at which point a guard entered indicating that, per the SJA's instructions, if Mr. Al Qosi gave a sign, defense counsel was to be removed from the cell, allegedly to avoid upsetting him. Defense counsel asked whether Mr. Al Qosi understood that his gesticulating signified counsel would be removed; the guard stated that yes, Mr. Al Qosi had been told to signal the guards.

Respecting this supposed understanding with Mr. Al Qosi, counsel left the cell. Although the SJA's staff indicated the SJA had instructed against it, counsel returned about five minutes later, to try again to speak with Mr. Al Qosi. At this point, the commotion of guards and counsel moving in and out of the cell was such that Mr. Al Qosi shut down, refusing to listen to anything counsel tried to say; counsel was in the cell with him for no more than one minute. The arraignment proceeded with counsel never having spoken to Mr. Al Qosi in any substantive manner.

At the time of arraignment and during an R.M.C. 802 pretrial conference, defense counsel asked the judge to issue an order permitting her to enter the cell block, so she could meet directly with Mr. Al Qosi. *See* transcript of proceeding, 10 Apr 08. Defense counsel noted that the attempted meetings with Mr. Al Qosi to-date entailed his being hooded, goggled, ear-muffled, chained and transported around Guantanamo Naval Station before he would be deposited at a facility where defense counsel might meet with him. *See* transcript of proceeding, 10 Apr 08 Meeting with Mr. Al Qosi on the cell block would avoid putting him through this onerous transportation stratagem. This commission denied defense counsel's oral requests to enter the cell block.

Since the arraignment, on 24 April, 2008, defense counsel again tried to meet with Mr. Al Qosi. Upon returning from delivering another letter to him, the SJA representatives said that Mr. Al Qosi had indicated he would attend his commission hearing, but he did not want to meet with his attorney. This statement was different from that Mr. Al Qosi had made in court during his 10 April 2008 arraignment, where he had said he would not attend any further proceedings. Citing specifically the need to clarify Mr. Al Qosi's intentions with respect to self-representation, via electronic mail, defense counsel renewed her request to meet directly with Mr. Al Qosi. App.

Exh. ____ The SJA responded, also via electronic mail, stating defense counsel's access was denied. This time, the reason for the denial was unspecified "security reasons." App. Exh. ____

There is an important backdrop to all these attempted contacts with Mr. Al Qosi: government attorneys have met and communicated with him, even during the time he has been represented by counsel. *See* decl. of Detailed Counsel.

6. Discussion:

A. Under International and U.S. Law, Mr. Al Qosi Retains the Right to Representation by and Communication with Counsel

The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The Military Commissions Act reflects Congress' specific intent to honor an accused's right to counsel by providing that: "The accused shall be represented in his defense before a military commission." 10 U.S.C. § 949c. The preamble to the Rules for Military Commissions specifies that "Implementing rules must be consistent with the M.C.A. and provide for the accused's rights to ...assistance by counsel or self-representation." R.M.C., Part I (*preamble*). The Regulations for the Commissions also state: "Every Accused shall have a qualified military defense counsel detailed at government expense during every stage of the proceeding." *See* Regulation for Trial by Military Commissions § 9-1 (*Detailed of Defense Counsel*)

Under the U.S. Constitution, an accused in a criminal proceeding has the right to establish an attorney-client relationship. U.S. Const. Amend VI; *see, e.g., Argersinger v. Hamlin*, 407 U.S. 25, 31, 92 S. Ct. 2006 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.

Ct. 792 (1963). Communications between client and counsel are integral to the constitutionally required right to representation. *See generally, United States v. Padilla*, 203 F.3d 156, 160 (2d Cir. 2000) Indeed, under the rules governing Judge Advocates of the Department of the Navy, a detailed attorney is required to keep a client informed of the progress of his case. Dept. of the Navy, JAGINST 5803.1C, Rule 1.4(a) (“A covered attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”) The undersigned counsel’s bar rules provide similarly. *See* Rules of Professional Conduct of the State Bar of California, Rule 3-500 (“A member shall keep a client reasonably informed about significant developments relating to the employment or representation.”)

A Sixth Amendment violation arises when a court precludes defense counsel from discussing matters with his client. *Geders v. United States*, 425 U.S. 80, 91, 96 S.Ct. 1330 (1976)(finding Sixth Amendment violation where trial judge precluded attorney-client communications during an overnight recess in the trial, while client was on the stand). The defense need not show prejudice to establish this violation of the Sixth Amendment. *Id.* Courts have repeatedly noted that even the permissible restrictions imposed on access to counsel must be “carefully tailored and limited.” *Serrano v. Fischer*, 412 F.3d 292, 299 (2d Cir. 2005), quoting *Morgan v. Bennett*, 204 F.3d 360, 367 (2d Cir. 2000). The Supreme Court has recognized only very limited circumstances when a trial court may restrict attorney-client communications. In *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594 (1989). The Court sanctioned a trial court’s limitation on attorney-client consultations during a short trial break, while the defendant was testifying. *Id.* Even in that context, the *Perry* Court emphasized that

the controlling presumption of a defendant's "right to unrestricted access to his lawyer for advice on a variety of trial related matters." *Id.* at 284.

Along with the above-outlined obligations and rights created at common law, service regulations and applicable bar rules, the R.M.C. specify that detailed defense counsel has the duties to "guard the interests of the accused zealously within the bounds of the law" and to "represent the accused with undivided fidelity." *See* R.M.C. 502(d)(6)(discussion).

B. The Guidelines for Prisoner Visitations at Guantanamo Bar the Development of an Attorney-Client Relationship and thus Preclude Adequate Representation

Defense counsel cannot properly proceed and exercise professional judgment where barriers are set up to minimize, if not entirely preclude, counsel from communicating effectively with the accused. Defense counsel cannot assist the accused and keep him informed of the progress of his case, as mandated under service regulations and bar rules, when guidelines prevent direct and confidential communications with the accused.

The Military Commissions Act, as well as the Rules for Military Commissions, protect defense counsel in the performance of duties as follows:

Unlawfully influencing action of military commission.

No person may attempt to coerce or, by any unauthorized means, influence—

. . . (C) the exercise of professional judgment by trial counsel or defense counsel.

10 U.S.C. 949b; *see also*, R.M.C. 104(a)(2)(stating same prohibition)

The ad hoc guidelines the SJA's office has established for counsel's visits with Mr. Al Qosi obstruct counsel from developing an attorney-client relationship. These

guidelines effectively operate to vitiate the right to counsel that Congress guaranteed every accused appearing before a commission. These obstructions constitute a violation of the prohibition on influencing the actions of defense counsel. *See* 10 U.S.C. § 949b, R.M.C. 502(d)(6).

C. The History of Mr. Al Qosi's Case Demands the Court's Assistance in Facilitating the Development of an Attorney-Client Relationship

Mr. Al Qosi has endured the untold rigors of repeated government interrogations, has been charged in three different military systems, and lost one military counsel who had gained his trust, only to be detailed a new one in a new system with new charges. He has lived through these demanding experiences over the course of more than six years of imprisonment, during which the allegations levied against him have yet to be vetted before a trier of fact. The twisted legal history of his case demands that this commission intercede to facilitate the development of an attorney-client relationship, so that Mr. Al Qosi can finally have "his day in court." If the commission is unwilling to confront the guidelines the detention facility has set for client visitations, then the proceedings should be abated until such time as the detention facility can properly accommodate detailed counsel's visits.

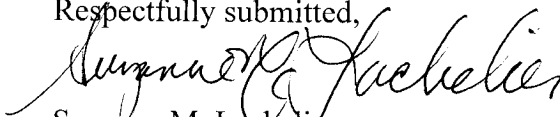
7. **Oral Argument:** The Defense respectfully requests oral argument on this motion to compel access.

8. **Witnesses/Evidence:** The Defense attaches hereto Appellate Exhibits ___ through ___ (four in total), in support of this motion.

9. **Conference:** Not applicable.

10. Additional Information: None.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Suzanne M. Lachetier". The signature is written in a cursive style with a large initial 'S'.

Suzanne M. Lachetier
CDR, JAGC, USN
Detailed Defense Counsel