MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 056F RULING Right to Additional Civilian Defense Counsel 12 August 2016

1. **Procedural History**.

During the May 2016 hearing, the Defense stated four additional attorneys were in the process of being added to the Accused's team and argued this was justification for a continuance.[1] The Commission offered the Defense an opportunity to fully brief this issue and set a 15 June 2016 filing deadline. (AE 056). The Defense filed AE 056A and requested "the proceedings in the above titled trial be continued until the Government completes it's processing of the security clearance applications of Mr. Al-Tamir's[2] counsel of choice, and said counsel are given an opportunity to meet with their client and review the discovery which the Government has been ordered by this commission to turnover to the Defense." (AE 056A at 1). The Government response argued

> the Accused is already represented by more counsel than he has a right to under Rule for Military Commissions ("R.M.C.") 506(a). The Accused chose Pro Bono Civilian Defense Counsel, Mr. Brent Rushforth, as his counsel of choice and is represented by an additional three detailed military attorneys. The Defense position, that the Accused is entitled to expand the number, beyond "one" attorney is a strained reading of the facially clear and unambiguous language of R.C.M. [R.M.C.] 506(a).

(AE 056C at 3). The Defense did not file a reply. The Commission heard argument on this motion on 12 July 2016 at U.S. Naval Station, Guantanamo Bay, Cuba.[3]

[1] *See* Unofficial/Unauthenticated Transcript of the *US v. Abd al Hadi al-Iraqi* Motions Hearing (Transcript) Dated 17 May 2016 from 10:42 A.M. to 11:43 A.M. at pp. 723–28.
[2] The Military Judge will continue to refer to the Accused as Mr. Hadi al Iraqi. *See* Transcript at 679.
[3] *See* Unofficial/Unauthenticated Transcripts of the Abd al Hadi al-Iraqi Motions Hearings Dated 12 July 2016 at pp. 788–832.

2. **Facts**.

a. The Accused has three detailed Military Defense Counsel, MAJ Kincaid, MAJ Hall, and LCDR Lofland. (AEs 007B, 007C, and 007D).

b. The Accused has one qualified and detailed pro bono Civilian Defense Counsel, Mr. Brent Rushforth. (*See* AE 007E and Transcript at 676–77).

c. Mr. Rushforth is lead counsel for the Accused. (Transcript at 720–21).

d. At the 17 May 2016 session, the Accused stated he wished to be represented by four additional pro bono Civilian Defense Counsel, Mr. James G. Szymanski, Mr. Robert L. Palmer, Ms. Catherine Moore, and Mr. Erwin Chemerinsky. (Transcript at 684).

3. **Analysis**.

The issue before the Commission is whether (1) the Military Commissions Act of 2009 (M.C.A.), 10 U.S.C. § 948a *et seq*. or (2) Sixth Amendment principles guarantee the Accused a right to be represented by multiple civilian counsel.

(1) M.C.A. Under the M.C.A., "The accused may be represented by civilian counsel if retained by the accused . . ." 10 U.S.C. § 949c(3); *see also* R.M.C. 502(d)(3) and 506(a). The Defense argues,[4] because the word "counsel" may be singular or plural,[5] the M.C.A. should be interpreted to create a right to multiple civilian counsel.[6] The M.C.A. states

[4] *See* Transcript at 820.

[5] The Defense also argues the use of the ambiguous term "counsel" in Sixth Amendment cases leaves open an interpretation of a right to multiple counsel of choice. In *United States v. Gonzales-Lopez*, the Supreme Court stated, "the right to counsel of choice--which is the right to a particular lawyer . . . ." *United States v. Gonzalez Lopez*, 548 U.S. 140, 148 (2006). The Court in *Wheat v. United States* noted, "The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified . . . ." *Wheat v. United States*, 486 U.S. 153, 159 (1988). These statements are not definitive on the Court's position, but illustrate the term "counsel" is not always used when describing the right to counsel of choice. When the Court has used unambiguous terms to define counsel of choice in Sixth Amendment cases, it has not described a right to multiple attorneys or lawyers.

[6] The Defense argues the Rule of Lenity should be applied to interpret the word "counsel" to mean multiple counsel. The Rule of Lenity is generally applied to resolve "ambiguity concerning the ambit of criminal statutes . . ." *Cleveland v. United States*, 531 U.S. 12, 25 (*citing Rewis v. United States*, 401 U.S. 808, 812). That is, when there is ambiguity concerning what conduct is criminalized by a statute or what the penalty is.

> The accused may be represented by civilian counsel if retained by the accused, provided that such civilian counsel-
>
> (A) *is a* United States citizen;
> (B) *is* admitted to the practice of law in a State, district, or possession of the United States, or before a Federal court;
> (C) *has* not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;
> (D) *has* been determined to be eligible for access to information classified at the level Secret or higher; and
> (E) *has* signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

10 U.S.C. § 949c(3) (emphasis added). The plain reading of the statute indicates the word "counsel" is singular due to the use of the third person singular verb form in 10 U.S.C. § 949c(3)(A)–(E).

(2) Sixth Amendment principles. The Commission will assume without deciding, for the purpose of resolving this motion, the Accused is entitled to rights under the Sixth Amendment.

The Supreme Court in *Powell v. Alabama* determined the Sixth Amendment requires "a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). The Accused was arraigned over two years ago on 18 June 2014. At the arraignment and on two occasions thereafter the Commission advised the Accused on his right to be represented by civilian counsel. Subsequently, through the Military Commissions Defense Organization and the Chief Defense Counsel, the Accused retained and designated Mr. Brent Rushforth as his lead counsel. The Accused has been afforded a fair opportunity and has in fact been successful in securing his counsel of choice.

The Defense did not cite any case law to support the proposition the Sixth Amendment includes a right to multiple counsel of choice. The Defense argues the lack of case law on the matter supports their position.[7] Several federal circuits have heard cases involving an accused with multiple counsel, one of whom was not present at trial over the objection of the defense. *See United States v. Riccobene*, 709 F.2d 214, 231 (3d Cir. 1983); *United States v. McManaman*, 653 F.2d 458, 459–61

[7] Transcript at 820–21.

(10th Cir. 1981); *Giacalone v. Lucas*, 445 F.2d 1238, 1240–43 (Sixth Cir. 1971); and *Rolon Marxuach v. United States*, 398 F.2d 548 (1st Cir. 1968). In each of these cases, the federal circuit courts applied an abuse of discretion standard to determine whether the trial judge should have granted a continuance to allow the additional attorney to be present at trial. None of these federal circuit courts determined the defendant was denied choice of counsel under the Sixth Amendment when at least one of his attorneys was present at trial.

In *United States v. Burton*, the D.C. Circuit stated

> Once a fair and reasonable initial opportunity to retain counsel has been provided, and adequate counsel obtained, the court, mindful of the accused's interest in having counsel in whom he has confidence, is free to deny a continuance to obtain additional counsel if, upon evaluation of the totality of the circumstances, it reasonably concludes that the delay would be unreasonable in the context of the particular case.

United States v. Burton, 584 F.2d 485, 490 (D.C. Cir. 1978). The Accused made his pro bono counsel selection on 30 October 2015.[8] The Commission was first made aware the Accused was retaining a civilian counsel on 13 November 2015. (AE 053C). At the 18 November 2015 R.M.C. 802 conference, the Commission was informed the Accused was retaining Mr. Brent Rushforth as lead counsel, and possibly a second pro bono civilian attorney as an advisory counsel. (*See* AE 053D). The Commission gave a 1 January 2016 deadline for civilian counsel to submit all required documentation. (AE 053D). On 17 December 2015, Mr. Brent Rushforth submitted the required documentation and provided initial notice to the Commission in accordance with this requirement. (AE 007E). Subsequently, the Defense filed three continuance requests, none of which requested time for additional civilian counsel. (*See* AEs 015K, 054A, and 055B). The Commission was not informed additional civilian counsel were desired until the 17 May 2016 hearing. The proceedings are currently in the pretrial litigation stage and are expected to be for some time. The Accused has had opportunity to retain civilian counsel, has retained his lead counsel, and has three additional

[8] *See* AE 053C, Attachment B.

competent military defense counsel. Given the circumstances, further delay of the proceedings is unreasonable.

An accused's right to counsel of choice is not absolute—he may not elect counsel not qualified to represent him. In *Wheat*, the Court held, "The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court." *Wheat*, 486 U.S. at 159. Under the M.C.A., R.M.C., and R.T.M.C., a civilian attorney must be found eligible to access information at the level of Secret or higher, as required, before he or she is qualified to represent an accused before a military commission. *See* 10 U.S.C. § 949c(3)(D), R.M.C. 502(d)(3)(D), and R.T.M.C. 9-5.c.1.B.iv.

Once civilian counsel is qualified, "the retention of qualified civilian defense counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel." R.T.M.C. 9-5.c.1.C.2. The Commission has not received written entry of appearance pursuant to R.T.M.C. 9-5.c.1.C.2 or notice of appearance required by RC 4.2.b from any of the four requested additional civilian counsel. The Accused stated he wished to be represented by these four additional civilian counsel; however, an attorney must first be fully qualified, properly detailed, and have formed an attorney-client relationship before he or she can represent the Accused before the Commission. Until these requirements are met, analysis under R.M.C. 805(c)[9] is not required when an attorney is absent from a military commission proceeding.

4. **Findings**.

a. The M.C.A. creates a statutory right to one civilian counsel of choice.

b. The Sixth Amendment does not create a right to multiple counsel of choice.

[9] "Ordinarily, no military commission proceeding should take place if any defense or assistant defense counsel is absent . . . unless the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired." *See* R.M.C. 805(c) discussion.

c. The Accused is currently represented by his counsel of choice, Mr. Brent Rushforth, and three detailed military defense counsel.

d. The Accused may retain additional civilian counsel at no cost to the government, but further delay to do so is unreasonable under the circumstances.

e. R.M.C. 805(c) analysis is only required when a fully qualified and properly detailed attorney, who has formed an attorney-client relationship with the Accused, is absent from a military commission proceeding.

5. **Ruling**.

The Defense's motion to continue proceedings pending the qualification and appearance of additional civilian counsel (AE 056A) is **DENIED**.

So **ORDERED** this 12th day of August, 2016.

//s//
J. K. WAITS
CAPT, JAGC, USN
Military Judge