
UNITED STATES)	
)	
v.)	ANSWERS TO THE PRESIDING
)	OFFICER'S QUESTIONS ON THE ISSUE
ALI HAMZA SULEIMAN AL BAHLUL)	OF SELF-REPRESENTATION
)	
)	
)	October 25, 2004

The following is the Prosecution's responses to the Presiding Officer's questions concerning self-representation.

a. A candid consideration of the evidence and a statement by counsel concerning whether they believe any closed sessions or presentation of protected information will be necessary. Part of the answer to this issue will be an explicit statement that a closed session or presentation of protected information is, is not, or may be required.

In our proposed Protective Order, the Accused is entitled to see FOUO and Law Enforcement Sensitive information that is considered protected information. We intend to introduce a lot of this form of protected information, but it should not create any issues with respect to the Accused's access and preparation.

Depending on the Accused's theory of the case, the Prosecution may introduce a limited amount of classified (and thereby protected information) in either the case in chief or in rebuttal. The Accused would not be entitled to see unsanitized versions of this information.

b. The procedural problem involved in having the Commission determine the issue of self-representation when the Commission has not been subject to voir dire on behalf of Mr. Al Bahlul. (That is, for the Commission to decide a question of fact or law, the Commission has to be established. Assume that for the Commission to be established it should be subject to voir dire and a decision on challenges. Who will represent Mr. Al Bahlul in this process when the question presented to the Commission is who is representing him?)

LCDR Sundel and Major Bridges are the counsel detailed to this Commission. Until relieved by competent authority, they are to continue to represent the Accused to include during any voir dire. They have previously asked to be relieved by competent authority (Chief Defense Counsel), and that request was denied.

To ensure that ethics issues are not problematic, the Presiding Officer and or Commission as a whole should order that LCDR Sundel and Major Bridges represent the Accused through voir dire and other preliminary matters. This is consistent with Navy JAGINST 5803.1B Rule 1.16(c) which states that "when ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation." This is consistent with the ABA Model Rules.

Our situation is unique as the Commission as a whole is the finder of fact and law. In a traditional situation, the Accused is represented by detailed counsel during the colloquy used to determine if the accused qualifies for self-representation. This colloquy is normally only conducted in the presence of the judge.

The Prosecution believes that Detailed Defense Counsel should represent the Accused during voir dire and through the colloquy. At that point, the Commission can decide if they desire to certify this issue as an interlocutory question. If they decide not to, then current Commission Law prevails and the Accused is not entitled to represent himself. If the question is certified as an interlocutory question, and if rules are amended to permit self-representation, the Accused should be provided the opportunity to conduct additional voir dire in his capacity as a pro se defendant.

It is noteworthy that “the right to self-representation complements the right to counsel and is not meant as a substitute thereof.” M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int’l L. 235, 283 (1993).

c. Should the Appointing Authority consider the challenges made in US v. Hamdan and US v. Hicks as reflecting the challenges of any competent counsel and use them for US v. Al Bahlul? Additionally, assuming that members originally appointed to sit on the defendant's trial were challenged and removed in the cases of Hamdan and Hicks, are those members required to be available for voir dire in US v. al Bahlul?

This issues appears either moot or at a minimum not yet ripe for discussion. The Appointing Authority has already stated his position that “official orders appointing replacement commission members for the cases of . . . United States v. al Bahlul will be issued at a future date.” We desire to reserve comment until these official orders are issued.

d. Is self-representation required in order to provide Mr. Al Bahlul a full and fair trial, and the authority that requires allowing the defendant to represent himself notwithstanding the current state of Commission Law?

The Prosecution’s position is that current Commission Law does not permit self-representation. The sole basis for certifying this as an interlocutory issue is the requirement that a full and fair trial be provided. Based upon the case law identified in the submissions of both the Prosecution and the Defense, there appears to be no precedent for denying the opportunity to represent oneself (where standby counsel are also appointed), and therefore we believe self-representation is necessary for a full and fair trial unless and until the Accused forfeits this opportunity.

e. Are current detailed defense counsel permitted or required to argue the issue of self-representation to the Commission, given Mr. Al Bahlul's expressed desire that he does not wish detailed counsel to represent him?

Yes. As previously discussed, these detailed counsel are to represent the Accused until relieved by an appropriate authority. Even in cases where pro se representation is permitted, the detailed counsel remain on the case until the colloquy is conducted where the accused demonstrates that he is capable of self representation.

As it is the Prosecution's position that a colloquy should also be conducted, the Accused will be provided an opportunity to put on the record his position as to whether he desires to engage in self-representation and this will be part of what is forwarded to the Appointing Authority should it be certified.

The discussion of McKaskle v. Wiggins below demonstrates the active role that a standby counsel can engage in even against the wishes of the accused. More on point is the case of Prosecutor v. Seselj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Order Appointing Counsel, (ICTY Order of May 9, 2003). In this case, the Trial Chamber held that things are examined on a case by case basis and that even in the case of an accused desiring no assistance and wanting to proceed pro se (accused was a qualified lawyer), it was appropriate to assign counsel in the interest of justice. Id. at para 20. Permitting counsel to represent such an accused in some capacity may be necessary for a "fair trial which is not only a fundamental right of the accused, but also a fundamental interest of the Tribunal related to its own legitimacy." Id. at para 21. Similarly, Detailed Defense Counsel in this case should zealously represent this Accused unless the Accused is permitted to engage in some form of self-representation. Absent this requirement, the Prosecution contends that a full and fair trial for the Accused may be jeopardized.

f. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation is not in the defendant's best interests, can or should detailed defense counsel argue in favor of self-representation?

Until this issue is formally resolved either through a Commission decision, or the certification of an interlocutory question, the Detailed Defense counsel should argue for self-representation on the Accused's behalf. Examining ABA Defense Counsel Standard 4-5.2, while not specifically mentioned, the desire to engage in self-representation appears to be the type of decision that belongs to the Accused and is not a strategic or tactical decision that belongs to counsel. Furthermore Rule 1.2(c) of the Rules of Professional Responsibility states that a "covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, **choice of counsel**, forum, pleas, whether to testify, and settlements.

g. If detailed defense counsel are permitted or required to represent the defendant on the limited issue of whether self-representation shall be allowed, and detailed defense counsel believe that self-representation would deprive the defendant of a full and fair trial, can or should detailed defense counsel argue in favor of self-representation?

The hypothetical is not the situation at hand. Detailed Defense Counsel have been filing correspondence for months stating that they believe the Accused is entitled to represent himself.

It is recommended that the Commission should not exceed the scope of the question with regard to these particular facts in resolving this issue.

h. Assuming that Mr. Al Bahlul is allowed to represent himself, what procedures might be used if there is a closed session from which the defendant is excluded and at which evidence is presented to the Commission that the Commission might consider? The answer to this issue will not be limited to only an assertion there should be no closed sessions.

At the outset, the Accused must be told that there may be closed sessions involving classified information and that he will not be able to be present at these sessions. Absent an affirmative understanding and acknowledgement of this condition, the Accused should not be permitted to represent himself. Furthermore, he should be reminded of his decision to engage in self-representation and its impact each time we go into a protected session where the Accused cannot be present.

While not directly applicable, under the Classified Information Procedures Act (CIPA), court sessions involving classified information are routinely held outside the presence of the accused. 18 U.S.C. app. 3 (1980); United States v. bin Laden, 2001 U.S. Dist Lexis 719 (S.D.N.Y. 2001). In the bin Laden case the defendants were not given security clearances and were denied access to the relevant classified information in the case.

Standby counsel in this case should be required to represent the Accused's interests at any closed session where the Accused is not present. Part of this representation should include advocating for redacted or sanitized versions of the classified documents that can then be provided to the Accused. To the extent not requiring the disclosure of classified information, the Accused should also be involved in this process. In bin Laden, a defendant argued that his Sixth Amendment right was violated because his attorneys could not effectively confront the evidence against him without his input. Id. The court held that mere speculation on this issue would not override the compelling interest to protect classified information. Id. The Prosecution can state in good faith that it does not intend to introduce more than a few pages of classified information against the Accused, and depending on the Accused's strategy, there may be no need to introduce any classified information.

The Moussaoui case demonstrates that such closed sessions can be held with the absence of a pro se defendant who is not being cooperative with his standby counsel. In the context of an al Qaida member charged with a conspiracy to commit acts of terrorism transcending national boundaries, it was held that the interest of the United States in protecting national security information outweighed the pro se accused's desire to review the information. United States v. Moussaoui, 2002 U.S. Dist. Lexis 16530 (E.D. Va. August 23, 2002)

i. Assuming that Mr. Al Bahlul is allowed to represent himself, how would stand-by counsel be appointed and how would they communicate with Mr. Al Bahlul?

The Commission could rule that standby counsel are required and could order the Chief Defense Counsel to appoint standby counsel. The Commission is permitted great discretion in defining the role of standby counsel. A starting point would be to ask the Accused how he

prefers to communicate with standby counsel. Regardless, standby counsel would need to be present at all stages in the proceedings and available to perform any and all functions the Commission deems appropriate for a full and fair trial mindful of the fact that the Accused be permitted to represent himself both in fact and in appearance.

The Military Commission is unique in having the entire panel as finders of fact and law. Throughout any commission trial, they will be exposed to a variety of evidence they would not ordinarily see and arguments they would not ordinarily hear if solely finders of fact. While it is true that the greater role of standby counsel is at times justified because they perform actions outside the presence of the jury, the Commission system is built around experienced, proven officers who must be entrusted to maintain the perspective that the Accused is making his own trial decisions. Furthermore, the Supreme Court has ruled that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary. McKaskle v. Wiggins, 465 U.S. 168, 181 (1984)

In McKaskle, standby counsel were quite active as they frequently expressed their views to the judge, made motions, dictated proposed strategies into the record, and registered objections to the prosecution's evidence. Id at 180. There were even open disagreements between the accused and his standby counsel. Id. at 181. However, the trial judge cautiously and correctly was quick to opine that any conflicts between the tactical calls of the accused and standby counsel would be resolved in favor of the accused. Id.

In McKaskle, the Supreme Court saw a more active role for standby counsel as needed for a just trial. The Court specifically reversed the judgment of a lower court that had held that "standby counsel is to be seen and not heard" and that his "presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Id. at 173.

The Supreme Court specifically said that there is no infringement of pro se rights when standby counsel assists in: (1) helping to overcome routine procedural or evidentiary obstacles; (2) assisting in the introduction of evidence; (3) helping to object to evidence the accused clearly does not want admitted; and (4) ensuring the accused complies with basic courtroom protocol and procedure. Id. at 183. What is clear is that the accused's lack of desire for standby counsel is not a "free pass" for standby counsel to abandon playing an important and significant role in the trial.

The Seselj Trial Chamber has provided excellent guidance on the role of standby counsel that should be the Commission's starting point in defining this role. It includes requiring standby counsel to:

- (1) assist the accused in pretrial preparation when requested by the accused;
- (2) assist the accused in presentation of the trial case when the accused requests;
- (3) receive copies of all court filings and discovery;
- (4) be present in the courtroom for all proceedings;

- (5) be actively engaged in substantive preparation of the case;
- (6) address the Court when requested by the accused or Trial Chamber;
- (7) offer advice or suggestions to the accused when they see fit;
- (8) question protected or sensitive witnesses when so ordered; and
- (9) take over representation if accused forfeits ability to proceed pro se.

j. Assuming that Mr. Al Bahlul is allowed to represent himself, how would the issues of access to evidence be handled?

The majority of the evidence is FOUO or Law Enforcement sensitive and the Accused is entitled to see this evidence. If it is classified, the Standby counsel would have to view it on the Accused's behalf, and consistent with the Accused's interests, they could represent the Accused in a quest to obtain declassified sanitized versions of the evidence.

k. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that those matters to which the defense is entitled under Commission Law - less classified or protected information - must be translated into the defendant's language?

The Accused should maintain the relationship he has with his current translator and this translator should be available to either read or translate documents for the Accused as the Accused deems necessary for him to adequately represent himself. There is no independent burden on the Prosecution to translate every document.

l. Assuming that Mr. Al Bahlul is allowed to represent himself, is there any requirement that the accused be allowed access to that information or those sessions that he would not have access to were he being represented by detailed defense counsel under the current state of Commission Law?

No. Consistent with Moussaoui and other cases, one does not get access to classified evidence or evidence he is otherwise not entitled to see simply because he engages in self-representation. As the case law holds, so long as the Accused is informed up front of the limitations he will experience should he desire to pursue self-representation, it is completely permissible to have standby counsel represent his interests with respect to this evidence.

m. Assuming that Mr. Al Bahlul is allowed to represent himself, what are the consequences of, possible uses of, and ability of the Commission to consider any and all statements made by Mr. Al Bahlul, while representing himself at times when Mr. al Bahlul is not a witness?

The standard for admissibility is does the evidence have probative value to a reasonable person. If in the course of engaging in self-representation the Accused says something that has probative value to a reasonable person in relation to this case, it qualifies as admissible evidence. Just as the Accused has previously made admissible incriminating statements on the record, his self-representation does alter his status and provide him greater protection.

n. Assuming that Mr. Al Bahlul is allowed to represent himself, the methods by which Mr. Al Bahlul would be able to control his notes and other working documents given his current status and security precautions taken with detainees?

At the time of this filing, I have not resolved this issue with JTF GTMO personnel. We will continue to pursue an answer.

o. Any other problems or issues which might arise from allowing Mr. Al Bahlul to represent himself.

Not aware of any at this time.

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Commander, JAGC, U.S. Navy
Prosecutor