

No. C08-0072-1

IN THE  
SUPREME COURT OF THE UNITED STATES

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FALL TERM 2008

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HAROLD HAN, Petitioner,

v.

MICHAEL MUKASEY, Respondent;

MICHAEL MUKASEY, Petitioner,

v.

HAROLD HAN, Respondent.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

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BRIEF FOR RESPONDENT

October 25, 2008  
Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether the Special Administrative Measures Providing for the Monitoring of Attorney-Client Communications, and implemented under strict procedural safeguards, violate Han's Sixth Amendment right to effective assistance of counsel, and Han's Fifth Amendment right to due process and right against self-incrimination.
- II. Whether the Special Administrative Measures Providing for the Dissemination and Affirmation Measures, which are implemented to prevent the disclosure of Han's communications and to provide notice of the Special Administrative Measures respectively, Violate Han's Sixth Amendment Right to Effective Assistance of Counsel.

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record at pages 4-17.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The action arises under the Fifth and Sixth Amendments to the United States Constitution. U.S. Const. amend. V, VI.

STANDARD OF REVIEW

This Court reviews questions of law de novo. Pierce v. Underwood, 487 U.S. 552, 558 (1988).

STATEMENT OF THE CASE

Statement of the Facts

The Department of Justice detained Harold Han ("Han") as a material witness in June 2007. On August 14, 2007, Han was indicted in the Eastern District of Apalsa on six counts of conspiracy to engage in terrorist activities and material support for a terrorist organization in plotting to sabotage the construction of a dam on the Apalsa River. (R. 6.)

Han attended the University of Apalsa, where he majored in environmental sciences and became heavily involved with numerous environmental organizations. (R. 5.) Since 2003, Han worked for a succession of nonprofit organizations, and allegedly became involved in supporting the Planet Liberation Front, a domestic terrorist organization. (R. 5-6.)

The government has provided evidence of Han's extensive ties to numerous environmental organizations that are known to pose a significant threat of domestic terrorism. (R. 7.) The Attorney General authorized the imposition of Special Administrative Measures ("SAMs") on Han after determining that his unrestrained communication poses a substantial risk of death, serious bodily injury, or property damage likely to result in serious bodily injury. (R. 6.) The four SAMs are: (1) Monitoring of Attorney-Client Communications ("Monitoring Measure"), which provided notice to Han and his attorney, Edwina Butayan ("Butayan"), that their communications are subject to monitoring; (2) Dissemination of Information ("Dissemination Measure"), which only permits Butayan to disseminate information to third parties for the sole purpose of preparing Han's defense; (3) Attorney Affirmation ("Affirmation Measure"), which requires Butayan's signature attesting to the fact that Butayan and her staff will abide by the SAMs; and (4) Restrictions on Inmate Communications ("Communications Measure"), which only permits Han

to receive mail from qualified legal sources and immediate family members.  
(R. 6.)

#### Procedural History

The District Court of the Eastern District of Apalsa granted Han an Emergency Hearing, to hear Han's challenges to the imposition of the SAMs.  
(R. 4.) The district court held that the SAMs were constitutional and refused to order a modification. (R. 4.)

The Fourteenth Circuit Court of Appeals granted an expedited appeal.  
(R. 4.) The Fourteenth Circuit affirmed the district court's decision on the Monitoring Measure, holding that the measure did not violate Han's Sixth Amendment right to effective assistance of counsel because the mandatory safeguards protected the attorney-client privilege, and only communications that come within the crime-fraud exception would be disseminated. (R. 4, 9.)  
The Fourteenth Circuit also held that the Monitoring Measure did not violate Han's Fifth Amendment right to due process and right against self-incrimination because the measure was not punitive in nature, nor did it compel Han to be a witness against himself. (R. 10.)

The Fourteenth Circuit, however, reversed the district court's decision on the Dissemination and Affirmation Measures, and held that these measures violated Han's Sixth Amendment right to effective assistance of counsel. (R. 4.) The court concluded that the Dissemination Measure exceeded the government's authority by restricting Butayan and her staff from communicating with third parties, and that the Affirmation Measure only served to facilitate the prosecution of attorneys like Butayan. (R. 9, 10, 13.)

On February 18, 2008, Han petitioned for writ of certiorari, which this Court granted. (R. 2.)

## SUMMARY OF THE ARGUMENT

1. The Fourteenth Circuit correctly held that the Monitoring Measure does not violate the Fifth Amendment or Sixth Amendment.

Government interference in the attorney-client relationship is not a per se violation of the Sixth Amendment. Han's assertion that the measure will undermine his ability to communicate with Butayan, and thus deprive him of his right to effective assistance of counsel fails because (1) the Sixth Amendment does not guarantee private attorney-client communications, (2) the mandatory safeguards protect, seal, and destroy Han's confidential communication thereby protecting the attorney-client privilege, and (3) Han's claim is unreasonable and purely speculative in light of the circumstances.

Additionally, the Monitoring Measure does not violate Han's due process rights because the measure is not punitive in nature, and monitoring attorney-client communications do not constitute outrageous government conduct. Finally, the measure does not violate Han's right against self-incrimination because Han is neither compelled to answer to specific questions nor is he forced to disclose involuntary testimony to be used against him in a criminal proceeding.

2. The Fourteenth Circuit erred in holding that the Dissemination and Affirmation Measures violate the Sixth Amendment.

The Dissemination Measure does not violate Han's right to effective assistance of counsel. Notwithstanding the measure, Butayan may provide "reasonable" and "competent" assistance, as required by the Sixth Amendment, because (1) the measure does not conflict with Butayan's ethical obligations, (2) Butayan's staff may work on Han's case even though she is the only person permitted to disseminate Han's communication to third parties, and (3) considering the proffered evidence that Han has extensive ties to eco-terrorist organization, such a measure is vital in preventing Han's communication to his active counterparts.

Furthermore, the Affirmation Measure cannot independently implicate the Sixth Amendment. It merely requires Butayan to acknowledge and abide by the preceding—lawful—SAMs. Courts have upheld far more restrictive policies, such as security clearances, that similarly place conditions on attorneys prior to having contact with their clients. Therefore, the Dissemination and Affirmation Measures do not violate the Sixth Amendment.

#### ARGUMENT

I. THE SPECIAL ADMINISTRATIVE MEASURE PROVIDING FOR THE MONITORING OF ATTORNEY-CLIENT COMMUNICATIONS DOES NOT VIOLATE HAN'S RIGHTS GUARANTEED BY THE FIFTH AMENDMENT AND SIXTH AMENDMENT.

A. The Monitoring Measure Does Not Violate Han's Sixth Amendment Right to Effective Assistance of Counsel Because the Presumption That the Monitoring Will Lead to a Prejudicial Outcome at Trial Fails.

The Sixth Amendment provides, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Sixth Amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984) (citing McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)).

The purpose of the right to effective assistance of counsel is to "ensure that the defendant has the assistance necessary to justify the outcome of the proceedings." Strickland, 466 U.S. at 692. Accordingly, the fundamental inquiry in cases asserting a violation of this right is whether the defendant suffered substantial prejudice at trial. Id. This Court set forth a two-prong test in Strickland for post-trial determinations of ineffective assistance of counsel. Id. at 687. The defendant must first show that his counsel's performance was deficient, and second, that this deficiency prejudiced the outcome at trial. Id.

In some cases, however, inquiry into the effects at trial is unnecessary because the likelihood of prejudice is so strong that the process itself is "presumptively unreliable." United States v. Cronin, 466 U.S. 648,

659-60 (1984). The most obvious is the complete denial of counsel. Id. Others involve situations where counsel is prohibited from defending a case in accordance with the "traditions of the adversary factfinding process." Herring v. New York, 422 U.S. 853, 857 (1975) (prohibited counsel from making a closing summation); See also Geders v. United States, 425 U.S. 80, 91 (1976) (prohibited attorney-client consultation during overnight recess); Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972) (restricted counsel's choice of when to call defendant to witness stand); Ferguson v. Georgia, 365 U.S. 570, 593-596 (1961) (barred direct examination of defendant). Aside from these state interference cases, the general inquiry is whether the "surrounding circumstances" justify a sufficiently strong presumption of prejudice for a Sixth Amendment claim without inquiry into the outcome at trial. Cronic, 466 U.S. at 662.

Here, Han asserts a denial of his right to effective assistance of counsel in a pre-trial context. Because Han cannot make the requisite showing of prejudice at trial, this case is most analogous to those where prejudice may be presumed based on the surrounding circumstances. However, under this standard, the Monitoring Measure does not violate Han's right to effective assistance of counsel because (1) the Sixth Amendment does not guarantee private attorney-client communications, (2) the mandatory safeguards prevent the dissemination of privileged communications; and (3) the presumptive chilling effect ultimately fails as a Sixth Amendment claim.

1. Monitoring Han's communication is not a per se violation of the Sixth Amendment because the right to counsel does not guarantee private attorney-client communications.

While the Sixth Amendment grants the right to communicate with one's attorney, it does not grant the right to private consultations.<sup>1</sup> See Weatherford, 429 U.S. 545, 557-58 (1979). In Weatherford, an undercover

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<sup>1</sup> But see, e.g., United States v. Levy, 577 F.2d 200 (3d Cir. 1978) (intrusion in attorney-client relationship per se violation).

agent participated in meetings held between the defendant and his attorney in preparation for trial. Id. at 548. Similarly, in Hoffa v. United States, a secret agent attended meetings between the defendant and his attorney. 385 U.S. 293, 311 (1966). In both cases, this Court held that the intrusion into the attorney-client relationship did not violate the Sixth Amendment right to counsel because the prosecution did not obtain conversations that related to defense strategies. Weatherford 429 U.S. at 558; Hoffa, 385 U.S. at 309.

Here, the Monitoring Measure is codified in the Prevention of Acts of Violence and Terrorism ("Regulation"). 28 C.F.R. § 501.3(d)(3) (2008). The Regulation prevents Han from utilizing Butayan to facilitate acts of terrorism by authorizes the disclosure of communications made in furtherance of criminal activities. Id. Moreover, any disclosed information will only be used to "stop impending terrorist attacks and to save American lives."<sup>2</sup> Therefore, like in Weatherford and Hoffa, the Monitoring Measure, without more, is not per se violation of his Sixth Amendment right to counsel.

2. The mandatory safeguards protect the attorney-client privilege because a neutral team will conduct the monitoring and may only disseminate communications that facilitate criminal activity upon approval by a federal judge.

The attorney-client privilege prevents the disclosure of confidential communication made between a client and his attorney in the course of securing legal advice. Upjohn v. United States, 449 U.S. 383, 389 (1981). However, the privilege is an evidentiary rule and not a right guaranteed by the Sixth Amendment. See Moran v. Burbine, 475 U.S. 412, 430 (1986). Once invoked, the privilege prevents forced disclosure of privileged information to the opposing party. Fisher v. United States, 425 U.S. 391, 403 (1976).

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<sup>2</sup> *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism, Before the S. Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) (testimony by Hon. John Ashcroft, Attorney General), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit_id=42) [hereinafter *DOJ Oversight*].

Because the privilege may withhold important information from the factfinding process, it only applies "where necessary to achieve its purpose." Id. Thus, the privilege does not protect communications made in furtherance of a crime or fraud. United States v. Zolin, 491 U.S. 554, 562-63 (1989) (discussing crime-fraud exception).

Here, the mere monitoring of Han's communication does not violate the privilege because mandatory safeguards prevent disclosure of all privileged communications. The Regulation provides:

To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to [ ] defense strategies, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material . . . the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

28 C.F.R. § 501(d)(3).

The privilege team may only disseminate communications that "facilitate criminal acts or a conspiracy to commit criminal acts." 28 C.F.R. § 501.3(d)(2)(ii) (2008). These communications would, nevertheless, fall within the crime-fraud exception to the attorney-client privilege. Furthermore, a federal judge must approve all communications before dissemination, and all privileged conversations must be destroyed. § 501.3(d)(3). Because the mandatory safeguards essentially function like the attorney-client privilege, communications under the Monitoring Measure should not be any different from communications under the attorney-client privilege. Thus, the safeguards do not obstruct the traditional factfinding process under the attorney-client privilege.

3. Because the extent to which the measure will inhibit Han's communication is purely speculative, the presumption that this chilling effect will preclude Butayan from providing effective assistance ultimately fails.

There is no violation of the right to counsel when the defendant's own actions cause the break down in communication. See, e.g., Thomas v. Wainwright, 767 F.2d 738, 740-43 (11th Cir. 1985) (defendant unreasonably refused to communicate with his attorney). In United States v. Sattar, the U.S. District Court of the Southern District of New York held that Stewart's claim of a chilling effect was not a valid Sixth Amendment claim. 2002 U.S. Dist. LEXIS 14798, at \*21 (S.D.N.Y. Aug. 12, 2002). The court concluded that Stewart's belief of a chilling effect was unreasonable because the screening devices ensured that her intercepted communications were not used against her. Id. at \*21-22.

Here, like in Sattar, Han's assertion that the measure will "undermine his ability to communicate with his attorney" is unfounded. (R. 8.) Presumably, Han fears that the privilege team may abuse their duties, or that accidental disclosure may occur. Such abuses, however, are minimized by first, a federal judge who must approve all communications before the team disseminates the information to the prosecution, and second, the Office of the Inspector General. The Office of the Inspector General is an independent agency that investigates allegations of fraud, misconduct and abuse by Department of Justice employees, and reports back to Congress on regulations such as the SAMs. Office of the Inspector General, <http://www.oig.hhs.gov> (last visited Oct. 9, 2008). Undoubtedly, this internal oversight ensures that privilege teams act in accordance with the law. Finally, should any accidental disclosures occur, Han may always invoke the attorney-client privilege to prevent the prosecution from getting hold of such communications. Considering the circumstances and the numerous safeguards in place, Han's claim of a substantial chilling effect is unreasonable.

Moreover, the presumption that Han's inhibited communication will prevent Butayan from providing effective assistance is purely speculative. A Sixth Amendment violation occurs when counsel's representation falls below the reasonable competency, which is predicated on prevailing professional norms. Strickland, 466 U.S. at 687-88. These include the duty to advocate and consult with the defendant, and to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id. at 691. These professional norms are a constitutional minimum. Therefore, unless Han refuses to disclose information to Butayan, it is highly unlikely that the chilling effect will be so substantial that it renders Butayan's assistance wholly ineffective.

Therefore, the Monitoring Measure does not violate Han's Sixth Amendment right to effective assistance of counsel because the surrounding circumstances prove that Han's claim of a chilling effect ultimately fails.

B. The Monitoring Measure Does Not Violate Han's Fifth Amendment Right to Due Process Because the Measure is Fundamentally Fair.

The Fifth Amendment provides that "no person . . . shall [ ] be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. While the Due Process Clause<sup>3</sup> prohibits a pre-trial detainee from being deprived of his basic rights, his rights however, are not absolute. Bell v. Wolfish, 441 U.S. 520, 554 (1979). Once a person is detained, the government may "employ devices that are calculated to effectuate this detention." Id. at 536-37.

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<sup>3</sup> The Due Process Clause also includes the right to have the effective and substantial aid of counsel. Powell v. Alabama, 287 U.S. 45, 71-73 (1932). This analysis is closely analogous to the analysis in Section I(A) regarding the Sixth Amendment Right to Counsel.

1. The Monitoring Measure is not punitive in nature under the Turner analysis because it serves national security interests with no competing alternatives.

The government may implement regulations that restrict a pre-trial detainee's constitutional rights, so long as they are not punitive in nature. Id. at 537, 554. This Court in Turner v. Safley set forth a four-factor test to determine if restrictions amounted to punishment:<sup>4</sup> (1) the regulation must have "valid rational connection" to a "legitimate government interest," (2) the implications of allowing the inmate exercise that right should not pose a huge risk, (3) and if there are alternatives to exercising the right, (4) then the alternatives indicate the unreasonableness of the measure. Turner, 482 U.S. 78, 89-90 (1987).

A valid rational connection exists when regulations are implemented for security concerns. See Bell 411 U.S. at 560 (1979) (conducting visual body strip searches is rationally related security concerns). Here, the government proffered evidence that Han has "extensive ties to environmental organizations" that pose a "significant threat of domestic terrorism." (R. 7-8.) Specifically, the information revealed Han's support for a terrorist organization to sabotage the construction of the Apalsa dam. (R. 6.) In light of inmates having used their attorneys to facilitate their terrorist agendas, Han's monitoring measure has a valid and rational connection to the legitimate government interest of preventing eco-terrorist acts. See, e.g., United States v. Sattar, 395 F. Supp. 2d 79, 85 (S.D.N.Y. 2005).

Furthermore, the alternatives, such as obtaining a warrant or holding an in camera review, fail to meet the immediate demands in this case. The cost of requiring the Attorney General to present evidence is "intolerably

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<sup>4</sup> In Turner, this Court upheld the prohibition against correspondence amongst prisons. Id. at 92-93, 99. The Court found that regulation was rationally related to security concerns of the prison, that the costs of allowing such correspondence would be exorbitantly high, and that no reasonable alternatives existed for inmates to exercise this right. Id.

high" and potentially devastating. See Zolin, 491 U.S. at 569. Moreover, allowing Han to freely communicate with Butayan may presumably encourage Han to use her as a communication channel. Therefore, while the measure may arguably restrict Han's right, it serves a legitimate purpose and is not punitive in nature.

2. Monitoring attorney-client communications does not constitute the outrageous government conduct standard for a due process violation.

The threshold finding for a due process violation is very high. The government's conduct must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice." United States v. Russell, 411 U.S. 423, 432 (1973).

The "reasonable suspicion" standard for imposing the monitoring measure does not violate due process. In Bell, this Court upheld body cavity searches of pre-trial detainees after visits from persons outside the facility as constitutional. 441 U.S. at 558-59. This Court balanced the invasion of personal rights with the government's concern for smuggling dangerous objects into the facility. Id. More significantly, this Court went on to hold that the administrators may conduct such searches on "less than probable cause." Id. at 560. The "reasonable suspicion" standard for imposing the monitoring measure is presumably comparable to the "less than probable cause" standard, which was held as constitutional in Bell. Thus, the Bell decision proves that the "reasonable suspicion" standard in the Regulation is not such a low standard that it violates due process.

Additionally, courts have held various government techniques as constitutional even when used to intrude in the attorney-client relationship. In United States v. Ofshe, the Eleventh Circuit, emphasizing the importance of undercover work, refused to find a due process violation where the government placed a "body bug" on the defendant's attorney that monitored attorney-client conversations. 817 F.2d 1508, 1511-16 (11th Cir. 1987).

Similarly, this Court has acknowledged the importance of covert investigations and has refused to find due process violation where agents infiltrate the attorney-client sphere. See Russell, 411 U.S. at 432 (infiltrating and supplying illegal substances does not violate fundamental fairness); Weatherford, 429 U.S. at 559-60 (intrusion by undercover agent who testified not outrageous).

Like the legitimate undercover work in Ofshe, Russell and Weatherford, the Attorney General authorized the monitoring measure as a technique to prevent future eco-terrorist attacks. (R. 6.) If courts have refused to find due process violations when undercover agents intrude in the attorney-client relationship for a legitimate government purpose, then the monitoring of Han's communication—to prevent terrorism—certainly does not violate due process.

Moreover, government interest must be balanced with constitutional rights. New York v. Quarles, 467 U.S. 649, 655 (1984) (recognizing a "public safety" exception to the Fifth Amendment). The Attorney General has "carefully crafted" the Regulation to "avoid infringing on constitutional rights while saving American lives." *DOJ Oversight* (Dec. 6 2001) [http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit_id=42). First, the inmates may appeal the imposition of the SAMs under the administrative appeals process. 28 C.F.R. § 501.3(e) (2008). Though not at issue here, these remedies demonstrate the judicial options afforded to pre-trial inmates. (R. 4.) Second, the Attorney General implemented mandatory safeguards to protect privileged communications and to encourage full disclosures.

Finally, the attorney-client privilege does not withstand strong countervailing policy. United States v. Goldberger, 935 F.2d 501, 504 (2d Cir. 1991). Because no government interest is more compelling than national security, the prevention of eco-terrorist attacks is undoubtedly a prevailing

concern that may restrict the privilege when necessary. See Aptheker v. Sec'y of State, 378 U.S. 500, 509 (1964).

Therefore, the Monitoring Measure does not violate Han's due process rights because the measure is not punitive nor is it fundamentally unfair.

C. The Monitoring Measure Does Not Violate Han's Fifth Amendment Right Against Self-Incrimination Because the Measure Does not Compel Han to Do Anything.

The Fifth Amendment provides, "no person shall be . . . compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege against self-incrimination prohibits the government from compelling testimonial communication from the criminal defendant himself. Clark v. United States, 289 U.S. 1, 14 (1933).

1. The Monitoring Measure does not constitute the compulsion envisioned by the Self-Incrimination Clause.

The right against self-incrimination protects the accused from being compelled to answer specific questions. See United States v. Sullivan, 274 U.S. 259, 264 (1927). In cases where compulsion implicated the Fifth Amendment, the government directly extorted information from the accused. See, e.g., Curcio v. United States, 354 U.S. 118, 128 (1957) (compelling oral testimony of non-produced records); Miranda v. Arizona, 384 U.S. 436 (1966) (officers compelling confessions in interrogation context).<sup>5</sup> Furthermore, "a party is privileged from producing evidence but not from its production." Fisher, 425 U.S. at 339 (citing Johnson v. United States, 228 U.S. 457, 458 (1918)). In Fisher, this Court held that a summons ordering the attorney to

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<sup>5</sup> The following cases provide examples of compulsion in the Fifth Amendment context. This Court, however, held that there was no Fifth Amendment violation because the evidence produced was not testimonial in nature. Schmerber v. California, 384 U.S. 757 (1966) (accused forced to submit to the extraction of blood); Holt v. United States, 218 U.S. 245 (1910) (accused forced to donate clothing to facilitate identification); United States v. Wade, 388 U.S. 218 (1967) (accused forced to participate in line-up); Gilbert v. California, 388 U.S. 263 (1967) (accused forced to produce writing exemplar); United States v. Dionisio, 410 U.S. 1 (1973) (accused forced to produce voice exemplar).

produce accounting documents given to him by his taxpayers-clients, did not violate the taxpayers' right against self-incrimination because it did not "compel the taxpayers to do anything." Id. at 397, 399.

Here, the Attorney General has not coerced Han to produce incriminating evidence, nor has the prosecution forced Han to answer to specific questions. Like the accounting documents in Fisher, Han's communications are recorded information eventually submitted to a neutral party to guard against disclosure. While the monitoring provision may record incriminating statements and presumably forces Han to submit to a measure against his will, none of this constitutes the compulsion envisioned by the Fifth Amendment.

2. The Monitoring Measure does not compel Han to be a witness against himself.

Compelling incriminating statements, however, are permissible so long as those statements are not used in a criminal proceeding. See Chavez v. Martinez, 538 U.S. 760, 768 (2003). A defendant must have been placed under oath and exposed to "'the cruel trilemma of self-accusation, perjury or contempt.'" Id. at 767 (citing Michigan v. Tucker, 417 U.S. 433, 445 (1974)). In Chavez, this Court refused to find a violation, even though police officers were engaged in coercive interrogation tactics because the defendant was never charged and never made to be a witness against himself. Id. at 767. Here, there is no proof that the Attorney General will use such statements against Han in a subsequent criminal proceeding. (R. 10.) In fact, the statements are only used to prevent criminal activities. *DOJ Oversight* (Dec. 6 2001) [http:// judiciary. senate.gov/hearings/testimony. cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit_id=42). Additionally, like in Chavez, Han has not been placed under oath to submit to the "cruel trilemma." The mere recording of Han's communications does not put him in a position where he must choose between disclosing potentially incriminating statements, or be subject to perjury or contempt in a court of law.

Therefore, the Monitoring Measure does not violate Han's right against self-incrimination because it does not compel involuntary statements from Han himself, nor does it force Han to be a witness against himself.

II. THE SPECIAL ADMINISTRATIVE MEASURES PROVIDING FOR DISSEMINATION AND AFFIRMATION REQUIREMENTS DO NOT VIOLATE HAN'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A. The Dissemination Measure Does Not Violate Han's Sixth Amendment Right to Effective Assistance of Counsel Because Butayan may Still Provide Reasonable and Competent Representation.

The Sixth Amendment requires an attorney to perform reasonably and competently. Strickland, 466 U.S. at 686; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (no guarantee to perfect advocacy). This Court considers the totality of circumstances in evaluating attorney effectiveness. Strickland, 466 U.S. at 688 (performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances). Here, the Dissemination Measure does not implicate Han's right to effective assistance of counsel because (1) the measure does not abridge Butayan's ethical obligations, (2) Han may receive competent assistance from Butayan notwithstanding the measure, and (3) the context of eco-terrorism prevention must be considered.

1. The Dissemination Measure comports with Butayan's professional ethical obligations.

The prevailing professional norms, as provided by the American Bar Association<sup>6</sup> Model Rules of Professional Conduct ("ABA Rules"), are relevant in measuring effective assistance. Strickland, 466 U.S. at 688. The ABA Rules state "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," or if an exception applies. Model Rules of Prof'l Conduct R. 1.6, (2008).

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<sup>6</sup> The State of Apalsa's professional rules are equivalent to ABA Rules. (R. 13.)

The ABA Rules also state "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Model Rules of Prof'l Conduct R. 1.2, (2008).

The Fourteenth Circuit erred in concluding that the Dissemination Measure requirement conflicted with the ABA Rules. Here, the measure only allows Butayan to disseminate Han's communications to third parties for the purpose of preparing his defense. (R. 6.) Similarly, under the ABA Rules, Butayan cannot reveal information unless it is implicitly authorized in order to carry out Han's representation. Model Rules of Prof'l Conduct R. 1.6. Both obligations require that Butayan only disseminate information to third parties for the purpose of Han's representation. Accordingly, by complying with the Dissemination Measure, Butayan is automatically complying with the ABA Rules. As such, the Dissemination Measure does not contradict Butayan's existing ABA ethical obligations.

2. Butayan's staff may provide reasonable and competent support without disseminating Han's communications to third parties.

The Sixth Amendment requires a level of reasonable competency so that the accused may receive a fair trial. Strickland, 466 U.S. at 688. Nowhere in the text of the Sixth Amendment, nor in case law construing the Sixth Amendment's guarantee, has the right to effective counseling been interpreted to guarantee a team of support staff. Even without this constitutional guarantee, the Dissemination Measure still permits the support staff to work on Han's case. The measure only prohibits the staff from disseminating the contents of Han's communication to third parties. (R. 6.) Thus, staff may perform research, interview witnesses, or even conduct depositions, as long as staff members do not disseminate any communications received from Han. Even assuming that staff members are an indispensable part in building a legal defense, the Dissemination Measure still allows Butayan to provide

reasonable and competent assistance because the measure does not prohibit staff from working on Han's case.

3. The destructive reality of eco-terrorism must be considered.

Pretrial detainees are no less dangerous than convicted criminals. Bell, 441 U.S. at 546. In fact, detainees frequently facilitate criminal activities while in prison. See generally United States v. Regan, 281 F. Supp. 2d 795 (E.D. Va. 2002); United States v. Sattar, 395 F. Supp. 2d 79 (S.D.N.Y. 2005). The Dissemination Measure addresses the risk "posed by the possible exchange of information" with persons outside the detention center. United States v. Abu Ali, 396 F. Supp. 2d 703, 710 (E.D. Va. 2005).

It is well known that terrorist training manuals instruct operatives to take advantage of free press to further their crimes. *DOJ Oversight* (Dec. 6, 2001) [http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit\\_id=42](http://judiciary.senate.gov/hearings/testimony.cfm?id=121&wit_id=42). For instance, captured Al-Qaeda terrorists are taught to use any means to "communicate with brothers outside prison and exchange information that may be helpful to them in their work." Id. The manual emphasizes the "importance of mastering the art of hiding messages." Id.

The persistence to use any means necessary has filtered into the prisons system. In Sattar, the defendant used his attorney to communicate to an Islamic Group, urging his support to terminate a cease-fire with Egypt. 395 F. Supp. 2d at 85. Similarly, in Regan, an espionage defendant mailed letters written in secret codes that instructed his spouse to find and destroy hidden classified documents containing information that "affected national security." 281 F. Supp. 2d at 805-06.

Here, the Attorney General has proffered evidence of Han's extensive ties to environmental organizations that pose a "significant threat of domestic terrorism." (R. 7-8.) By representing Han, Butayan and her staff will have numerous contacts with him. Thus, the Dissemination Measure

prevents the risk of Han perpetrating criminal activities by utilizing Butayan and her staff to communicate with other eco-terrorists.

Considering the totality of the circumstances—the Dissemination Measure’s compliance with the ABA Rules and the legitimate interest in preventing future terrorist attacks—the Measure allows Butayan to provide reasonable counseling and therefore does not deprive Han’s right to effective assistance of counsel.

4. The Dissemination Measure satisfies the Turner analysis, and is not punitive in nature.

In cases involving terrorism, lower courts have upheld restrictions that regulated attorneys’ ability to communicate with third parties. Public harm is a legitimate government interest that justifies the SAMs imposed on Han. See generally United States v. El-Hage, 213 F.3d 74 (2nd Cir. 2000).

In Sattar, the district court upheld a similar dissemination measure that prohibited defendant’s counsel from passing information to third parties and the media. 272 F.Supp.2d 384, 354 (S.D.N.Y. 2003). There, the measure “[protected] persons against the risk of death or serious bodily injury” that may have resulted from the defendant’s continued communication with Islamic terrorists. Id. at 354. In particular, the measure ensured that individuals working with the defendant did not circumvent other efforts to limit his communication with the Islamic Group. Id.

Similarly, in United States v. Hashmi, the district court upheld another measure that prevented the attorney’s staff from communicating with the defendant without the attorney’s participation, and barred defendant from communicating with the media. 2008 U.S. Dist. LEXIS 3801, at \*24 (S.D.N.Y. 2008). There, the Court concluded that Hashmi’s history of supporting terrorists posed a substantial risk that his communications would result in serious bodily injury, and death. Id. at \*25-26.

Furthermore, in United States v. Kassir, a dissemination measure, identical to Han's, was imposed on the defendant's lawyer. The district court explained that the measure did not preclude the attorney from "discussing the nature of the charges with third parties or reporting what happened in Court." 2008 U.S. Dist. LEXIS 52713, at \*14 (S.D.N.Y. 2008). Thus, the measure ultimately "permitted his lawyers to prepare adequately for the trial." Id. These decisions demonstrate that even when inmates rights are restricted by the SAMs, including dissemination measures similar to the one at issue here, courts have upheld their constitutionality because of the government's interest in ensuring public safety.

Here, Han's poses similar risks found in Hashmi. Han has extensive ties with environmental organizations that pose a "significant threat of domestic terrorism." (R. 7-8.) Additionally, as in Kassir, the Dissemination Measure does not prevent Butayan from speaking with third parties to adequately prepare Han's defense. (R. 6.) Furthermore, the Dissemination Measure ensures that individuals working with Han do not circumvent the other SAMs, specifically the Monitoring and the Communication Measures, by preventing Han from using them as another communication channel. Therefore, while the Dissemination Measure burdens Han's rights, in light of Turner, it is nonetheless constitutional.

B. The Affirmation Measure Does Not Independently Violate Han's Sixth Amendment Right to Effective Assistance of Counsel Because the Measure Effectuates the Other Lawful Special Administrative Measures Imposed on Han.

1. The Affirmation Measure merely requires compliance with the other lawful measures imposed on Han.

Because the other SAMs are constitutional, the Affirmation Measure, which only requires Butayan to acknowledge and abide by those measures, cannot independently implicate the Sixth Amendment.

In Dennis v. United States, this Court held that the underlying crime, not the constitutionality of the statute that prompted the defendants'

conduct, was relevant in deciding the defendants' offense. 384 U.S. 855, 859 (1966). There, the defendants filed false affidavits to meet a section of the Taft-Hartley Act in order to obtain government services. Id. at 858. The defendants' raised a defense predicated on the unconstitutionality of the statute. Id. at 859. However, this Court concluded that the constitutionality of that particular section was irrelevant, because at issue was the underlying "effort to circumvent the law." Id. at 861.

This Court's decision in Dennis, demonstrates that it is the underlying crime and not the constitutionality of a measure that ultimately controls. In Dennis, the underlying crime was making false statements. Here, the Affirmation Measure requires compliance with the other SAMs imposed on Han. Any underlying crime, and any further inquiry of Butayan's behavior, would stem from violation of the other SAMs, and not the Affirmation Measure itself. Therefore, the Affirmation Measure cannot independently implicate the Sixth Amendment.

2. The Affirmation Measure, like security clearances, is a constitutional prerequisite to attorney representation.

This Court has long recognized the need to protect "the secrecy of information important to our national security." Snepp v. United States, 444 U.S. 507, 509 n.3 (1980). Security clearances are often required from attorneys representing high-risk inmates, and courts have been consistently upheld these devices as constitutional. See United States v. Smith, 899 F.2d 564, 567-68 (6th Cir. 1990).

In Smith, the Sixth Circuit concluded that the Executive Branch may conduct background investigations of judicial personnel before they are cleared to participate in the trial. Id. at 570. Additionally, in United States v. Usama Bin Laden, the U.S. District Court of the Southern District of New York upheld security clearance requirements in order to protect classified information, "the unauthorized disclosure of which could cause

irreparable harm to our national security.” 58 F. Supp. 2d 113, 123 (S.D.N.Y. 1999).

These cases demonstrate that the right to effective assistance of counsel does not prevent the use of reasonable measures to maintain national security. The Affirmation Measure, like security clearances, requires that Han’s visitors are aware of the sensitive issues involved, and confirms that they will uphold the measure for national security purposes. However, unlike security clearances that place heavy burdens on defense attorneys and are intrusive in nature, the Affirmation Measure only requires Butayan’s signature. If devices such as security clearances are constitutional prerequisites to attorney representation, then the Affirmation Measure must likewise be constitutional.

#### CONCLUSION

This Court should uphold the Fourteenth Circuit’s decision with respect to the Monitoring Measure, and reverse the Fourteenth Circuit’s decision with respect to the Dissemination and Affirmation Measures.

First, the Monitoring Measure does not violate Han’s Sixth Amendment right to counsel because mandatory safeguards are in place to protect, seal, and destroy Han’s confidential communication. The Measure strictly requires that, upon approval by a federal judge, the neutral privilege team may disseminate only communications made to facilitate criminal activities. The extent to which Han will be impaired from building a viable defense is purely speculative and unreasonable.

Furthermore, the Monitoring Measure does not violate Han’s due process rights because it is not punitive in nature, and more importantly, does not constitute outrageous government conduct in light of real governmental interest in preventing eco-terrorist attacks. The Measure also does not violate Han’s rights to be free from compelled self-incrimination, because

Han is neither compelled to answer specific questions nor is he forced to disclose involuntary testimony.

Second, the Dissemination and Affirmation Measures do not violate Han's Sixth Amendment right to counsel. The Sixth Amendment does not guarantee Han's access to an attorney's staff, nor does the Dissemination Measure restrict it. Thus, the Dissemination Measure does not prevent Butayan from representing Han reasonably competently.

By analogy, the Affirmation Measure, like security clearances, is merely a device to ensure that attorneys realize the sensitivity of the case, and that they abide by the other lawful Measures imposed on Han. The Dissemination and Affirmation Measures do not abridge Butayan's ABA duties, nor her ability to represent, and thus are constitutional.

Therefore, this Court should affirm the Fourteenth Circuit's decision with respect to the Monitoring Measure, and reverse the Fourteenth Circuit's decision with respect to the Dissemination and Affirmation Measures.

Dated: October 25, 2008

Respectfully Submitted,

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