

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 278C

*AMENDMENT¹ TO AE278

**DEFENSE MOTION TO COMPEL THE
GOVERNMENT TO DISCLOSE ITS
PLANS AND PROTOCOLS FOR
CARRYING OUT THE EXECUTION OF
THE ACCUSED**

17 June 2014

1. Timeliness: This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).

2. Relief Requested: The defense respectfully requests this Commission compel the government to provide the required execution protocols for how it intends to carry out the execution of the accused if he is convicted and sentenced to death.

3. Overview:

Cruel or unusual punishments are prohibited in this case by statute and the Constitution. 10 U.S.C. 949s; U.S. CONST. AMEND. VIII. Significant deviations from an execution protocol intended to protect inmates from cruel and unusual punishment can violate the Eighth Amendment. *Arthur v. Thomas*, 674 F. 3d 1257, 1263 (11th Cir. 2012). Although the Manual for Military Commissions states death sentences “shall be carried out in the manner prescribed by the Secretary,” the Secretary of Defense has yet to publish the execution protocols for alien enemy unprivileged belligerents. This motion asks the simple question of the government: What are the protocols and procedures it intends to follow in order to carry out their plan to kill the

¹ The only change from the original filing of AE 278 and this amended version is the addition of paragraph “7. Oral argument: The defense requests oral argument on this motion,” to page 8 and the subsequent paragraphs have been renumbered sequentially.

accused? What will the method of execution be? How will his executioners be trained? Where will he die? These questions are naturally of great significance to him. But they are also significant to the members in deciding whether death is appropriate. They may also be subject to litigation before this Commission. *See e.g., In re Ohio Execution Protocol Litigation*, 671 F. 3d 601 (6th Cir. 2012)(Staying execution because four core deviations from Ohio's lethal injection protocol, including foregoing mandated vein assessments, burdened the Equal Protection rights of inmates in Ohio).

In a capital case, the members are entitled to vote against death for any reason compelled by the law or their conscience. If the members know or rationally believe that the government will be as ill-prepared to execute the accused as the government of Oklahoma was in the execution of Clayton Lockett this past April, then the members may consider that as a relevant fact in mitigation of punishment. *See generally Campbell v. Livingston*, 2014 U.S. Dist. LEXIS 64579 (S.D. Tex. 2014)(“The horrific narrative of Oklahoma’s botched execution of Clayton Lockett on April 29, 2014, requires sober reflection on the manner in which this nation administers the ultimate punishment.”). Certainly, if the government’s plans for executing the accused entail a high probability that his death may involve the chemical flaying of his skin over the course of thirty minutes, the members may find that a life sentence is more humane, fitting for his alleged crimes, and consistent with American values. The government should therefore be required to provide a detailed outline of their plans for carrying out the accused’s execution should it achieve its punitive objective in this case.

4. Burden of Proof and Persuasion: The burdens of proof and persuasion are on the defense as the moving party. R.M.C. 905(c). Denial of this motion will violate the defendant’s rights as guaranteed by the Fifth, Sixth, and Eighth Amendments to the Constitution of the

United States of America, the Military Commission Act of 2009, the Detainee Treatment Act of 2005, treaty obligations of the United States, and fundamental fairness.

5. Statement of Facts:

On 28 September 2011, the Convening Authority referred this case to a military commission under the Military Commissions Act of 2009, and authorized it to sentence the accused to the death.

6. Argument:

The Military Commissions Act (“MCA”) states a military commission “may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter.” 10 U.S.C. § 948d. The MCA, in turn, grants military commissions subject-matter jurisdiction over thirty offenses, twelve of which carry a death sentence. The accused here is charged with six death-eligible offenses under the MCA.

Before the members can sentence him to death, however, the accused has a statutory and Eighth Amendment right to present them any evidence that may persuade the members to spare his life. Under the rules, the “accused shall be given broad latitude to present evidence in extenuation and mitigation.” R.M.C. 1004(b)(3). This is consistent with the Eighth Amendment requirement that the sentence must be offered an opportunity to consider any “evidence ... the sentencer could reasonably find that it warrants a sentence less than death.” *McKoy v. North Carolina*, 494 U.S. 443, 441 (1990). The Supreme Court has “firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual,

notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

The threshold for relevance in mitigation is especially low. As the Supreme Court held at the start of its post-*Furman* jurisprudence, “the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor.” *Eddings v. Oklahoma*, 455 U.S. 104, 112-114 (1982) (emphasis added). Consequently, “virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.” *Eddings*, 455 U.S. at 114. “[T]he jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a low threshold for relevance, which is satisfied by evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.” *Smith v. Texas*, 543 U.S. 37, 44 (2004) (internal quotations omitted).

The members cannot be misled into believing that a sentence of death will be a “clean” determination that the accused’s life will simply end. The human body cannot simply be turned off at will. To carry out the members’ sentence, the government must inflict enough damage on the accused’s body to render his brain, heart, and lungs incapable of independently functioning. How the government will go about achieving this end, and the degree of suffering it may cause the accused before he ultimately dies, is squarely relevant to the members consideration of whether he “warrants a sentence less than death.”

First introduced by Oklahoma in 1977, 36 states and the federal government have adopted lethal injection as the exclusive or primary means of implementing the death penalty. *Baze v. Rees*, 553 U.S. 35, 42 (2008). It is “undisputed that, in moving to lethal injection, the States were motivated by a desire to find a more humane alternative to then-existing methods.”

Id. at n. 1. Thirty of these thirty-six states use a three-drug protocol. *Baze*, at 44. The protocol itself requires the condemned man to be injected first with sodium thiopental or pentobarbital, which are anesthetics, intended to induce unconsciousness. He is then injected with pancuronium bromide, which is a paralytic and prevents him from moving, before he is injected with potassium chloride, which induces a heart attack.

Medical professionals, including both doctors and nurses, have long refused for ethical reasons to participate in lethal injections as a violation of Hippocratic Oath. The result is that this pseudo-medical procedure, including the introduction of IVs into the condemned man's veins, is performed by non-medical personnel. Furthermore, procuring the necessary components for the three-drug protocol has become more difficult as the countries in which these chemicals are made have barred their sale in the United States due to their opposition to the death penalty. The result has been execution procedures, even in states that frequently execute people, which have are *ad hoc* and prone to catastrophic failure. A recent study by a scholar at Amherst College estimated that at least 7% of all lethal injections have been "visibly botched," the highest error rate for any other form of execution used in the past 125 years, including electrocution, hanging, or firing squad. Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* (Stanford Univ. Press 2014).

For example, two men from Georgia and one from Arizona were executed in 2011 using a grey-market supply of sodium thiopental. The eyes of all three men reportedly remained open after the sodium thiopental was administered. This means that all three likely remained conscious, terrified, and in excruciating pain, as they lay unable to move and dying of a chemically induced heart attack. In other recent executions, the inadequately trained executioners failed to inject the chemicals into the condemned man's veins, and instead flooded the

surrounding muscle tissue. This causes the chemicals to be slowly released into the body, resulting in a prolonged and agonizing death. Earlier this year, Oklahoma executed Clayton Lockett and the executioners struggled for 51 minutes to find a vein for IV access. They eventually aimed for the femoral vein deep in Lockett's groin. Piercing this vein is exceptionally painful and risky, typically requires an ultrasound, and can only be done properly by experienced medical professionals. Indeed, most nursing professionals are not authorized to perform this procedure. Consequently, the chemicals infused into the surrounding soft tissue of Lockett's groin. Witnesses to the execution say Lockett writhed, clenched his teeth, and mumbled throughout the procedure, which lasted an hour and forty minutes. Also this year, Ohio botched the execution of Dennis McGuire, who gasped for air for 25 minutes after being injected. Witnesses reported that McGuire's stomach heaved and made "horrible" snorting and choking sounds over the course of "repeated cycles of snorting, gurgling and arching his back, appearing to writhe in pain." In Florida's execution of Angle Diaz in 2006, the executioners also missed the vein and injected the chemicals into the flesh of his arms, twice. This resulted in massive chemical burns over his forearms with numerous bullae, or blisters, filled with "watery pink-tinged fluid" and decomposition of the skin. Diaz was conscious, but chemically paralyzed, for thirty minutes until he died of a heart attack.

Unlike Oklahoma, which has the highest execution rate *per capita* in the country, the military has not executed anyone since 1961, when the Army hanged Private First Class John A. Bennett for the crime of rape. While Rule for Courts-Martial 1113 requires each service secretary to prescribe the manner of execution, only the Secretaries of the Army and Navy have complied with the Rule and established lethal injection as the means of execution for their service members. Army Regulation 190-55 dated 17 January 2006; SECNAVINST 5815.4 dated

24 August 1993. The Air Force has not even bothered to draft the required protocol much less train an executioner to implement it. The most likely candidate to be tasked with executing the accused, the U.S. Navy, has not carried out an execution since it hanged two sailors for throwing an officer into the sea in order to desert and join the California gold rush of 1849.

This complete lack of experience in administering the death penalty may have motivated the Secretary of the Army to designate the federal death chamber at Federal Correctional Institution, Terre Haute as the site of Specialist Ronald Gray's execution in 2008, before his execution was stayed by a federal court. But this Commission, in denying a motion for change of venue, has held the accused cannot be transferred to the United States without violating federal law. *See* 187C at 3. If the United States Army lacks confidence in its ability to execute a military prisoner on its long-established death row at the United States Disciplinary Barracks, what constitutionally acceptable procedures will be put in place to execute a military prisoner in an *ad hoc* death chamber at Naval Station Guantanamo Bay?

If the government wishes the members to conclude that the accused deserves to die, it is highly relevant for them to consider how he is likely to die. Sentencing a man to die is not a binary choice. Sentencing a man to die by firing squad is an altogether different proposition than sentencing a man to be hanged or to a chemically induced heart attack after thirty minutes of agonizing, paralyzed consciousness. Far more trivial consequences of a sentence, such as a sentence's financial costs to an accused and his family, have been held to be specifically relevant in mitigation. *United States v. Luster*, 55 M.J. 67 (C.A.A.F. 2001).

It is incumbent upon the government, therefore, to disclose in detail what protocols and procedures will be followed to end Mr. Al-Nashiri's life. Will his family have an opportunity to meet with him and witness his execution? Will he have the opportunity to meet with religious

counsellors of his own choosing? Will his execution be carried out in Guantanamo or elsewhere in the United States? What will be the method of execution? If lethal injection, what chemicals will be used and from where will they be procured? Who will be his executioners? What training will they have received? The accused and the members have a right to know if the death the government is seeking to impose will be an agonizing spectacle of the government's *ad hoc* incompetence.

7. **Oral Argument:** The defense requests oral argument.
8. **Conference with Opposing Counsel:** The defense has conferred with the government and it opposes the requested relief.
9. **List of Attachments:** None.
10. **List of Witnesses:** None.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail on 16 June 2014.

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