

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL IRAQI	AE 099TT RULING Emergency Defense Motion to Abate the Proceedings Until Mr. al-Tamir is Physically Competent to Stand Trial 30 March 2018
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1. Procedural History.

In AE 099, supplemented on 13 September 2017 by AE 099 (Sup), the Defense requested abatement of all proceedings until the Accused “is physically competent to stand trial.” The Government response (AE 099E) requested the Commission deny the requested relief. The Defense replied in AE 099H. The Commission subsequently ordered the Government provide bi-weekly updates as to the Accused’s medical condition commencing the week of 2–6 October 2017. (AE 099I). During the pendency of the instant motion, the Commission continued the scheduled October session (AE 099G) and cancelled the December session (AE 099V) due to the Accused’s medical condition. Oral argument occurred on 30 January 2018 and 31 January 2018.¹ During argument on 30 January 2018, the Defense modified its abatement request, stating:

So for the record, we are modifying our request for relief in AE 099 to -- not to abate the proceedings entirely, but to proceed on the basis that neither impairs Mr. Al-Tamir's physical health in any further way and so long as and on a basis that he is able to meaningfully participate in his defense.

However, the following day, the Defense “renewed” its motion to abate the proceedings entirely based on the failure to provide certain accommodations for the Accused. On 31 January 2018,

¹ See Unofficial/Unauthenticated Transcript of the Abd al Hadi al-Iraqi Motions Hearing (Transcript) dated 31 January 2018 from 1:06 P.M. to 5:30 P.M. at pp. 1638–1733.

the Commission denied the motion to abate on the record.² The following findings of fact and conclusions of law supplement that oral ruling.

2. **Facts.**

Over the course of his detention, the Accused has suffered from spinal conditions including degenerative disc disease and spinal stenosis. These conditions caused various symptoms to include pain, extremity weakness/numbness, and loss of bladder control. During the fall of 2017, the Accused's condition required a series of four surgical procedures.

Subsequent to his surgeries and a recovery period, the Senior Medical Officer cleared the Accused to travel to attorney-client meetings. The Accused was able to participate in proceedings occurring on 30 January 2018 and 31 January 2018. When the Accused attended these sessions, he was alert and responsive to questions. He asserted that he understood his rights and in fact voluntarily waived rights, including the presence of certain counsel. The Accused has written letters that have been entered into the record in support of his own defense. These letters have been reasoned and articulate.

The Commission has been and will remain sensitive to the need to accommodate the Accused to ensure his ability to participate meaningfully in his defense is not impaired. During the hearings attended by the Accused, the Commission allowed for more frequent and longer breaks, and shortened the length of the sessions to accommodate the Accused's level of comfort and pain threshold.

Subsequent to the Commission's oral ruling denying the request to abate, the Accused's neurosurgeon testified on the on the Accused's medical condition.³ From that testimony, it is

² See Transcript dated 31 January 2018 from 1:06 P.M. to 5:30 P.M. at pp. 1638–1733.

³ See Transcript dated 4 February 2018 from 9:17 A.M. to 12:04 P.M. at pp. 1734–1820.

apparent that while the Accused continues to experience pain, his condition has improved to the point that he is able to participate meaningfully in his defense.

3. Analysis.

While Rule for Military Commission (R.M.C.) 706 describes procedures applicable when there is a question as to an accused's mental capacity to stand trial, there is no corresponding rule relative to a claim that an accused lacks the physical capacity to stand trial. Likewise, the Rules for Courts-Martial provide no such provision. A review of reported military cases reveals no decisions providing an appropriate procedural or analytical framework.

The Defense cited *United States v. Landsman*, 366 F. Supp 1027 (S. D. N. Y. 1973), in which the district court employed a two-part test to balance the defendant's physical and emotional condition against, "a substantial public interest in the resolution by trial of a criminal indictment." *Id* at 1028. The questions are: (1) would the defendant's presence at trial substantially increase the risk to his health or life; and (2) would his physical condition substantially impair his ability to present a proper defense? *Id*. The government counters that abatement is not an appropriate remedy and instead urges the Commission to apply the standard for continuances found in R.M.C. 707(b)(4)(E).

Abatement of proceedings is only specifically enumerated as a remedy in R.M.C. 703 with regard to the availability of witnesses and evidence, and R.M.C. 704 regarding immunity. Looking at these authorities, abatement is clearly a remedy of last resort to be employed only where lesser remedies have proven insufficient to serve the ends of assuring a fair trial.

Applying the *Landsman* factors, the Defense failed to establish that the Accused's presence and participation in his trial substantially increases the risk to his life or health. Likewise, the Defense has not established that the Accused's physical condition substantially

impairs his ability to present a proper defense. Finally, the Defense has failed to show why the accommodations of the sort employed to this point are inadequate to assure the Accused's presence at trial does not substantially increase the risk to his health or ability to meaningfully participate in his defense.

4. Accordingly, the Defense motion to abate the proceedings is **DENIED**.

So **ORDERED** this 30th day of March, 2018.

//s//
P. S. RUBIN
Col, USMC
Military Judge