

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT of TENNESSEE
at CHATTANOOGA**

UNITED STATES OF AMERICA

v.

**SEAD MILJKOVIĆ
also known as Sead Dukic**

1:23-cr-55

**Judge Atchley
Magistrate Judge Steger**

**UNITED STATES' MOTION TO PRECLUDE REFERENCES DURING CLOSING
ARGUMENT TO ABU GHRAIB, GUANTANAMO, WATER BOARDING, OR
SIMILARLY INFLAMMATORY AND IRRELEVANT TORTURE COMPARISONS**

The United States of America, by and through the undersigned attorneys, files this motion to preclude the defendant from referring during closing arguments to Abu Ghraib, Guantanamo, water boarding, or making similarly inflammatory and irrelevant torture references.

During his opening statement, defendant's counsel essentially said that the conduct his client is accused of is not the type of torture with which everyone is familiar, and then specifically mentioned Abu Ghraib, Guantanamo, and water boarding. Any waiver resulting from the Government's strategic decision not to object during the defendant's opening statement is limited to arguments regarding the opening statement. The Government respectfully requests the Court to preclude defense counsel from repeating such references and from making any similar references during closing argument.

Torture is not defined by what was done to prisoners at Abu Ghraib or Guantanamo. Torture is not limited to water boarding. Rather, the United States Code defines torture. "[T]orture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). The statute goes on to state:

“severe mental pain or suffering” means the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]

18 U.S.C. § 2340(2).

No other definition of torture is relevant. The jury must decide whether defendant’s conduct falls within the statute’s definition of torture, not whether the defendant’s conduct is comparable to Abu Ghraib, Guantanamo, and water boarding—which have nothing to do with this case and about which no evidence will be introduced during this trial.

Irrelevant, distracting, and inflammatory references to unrelated situations that some jurors might consider the epitome of torture and other jurors might know little about are essentially an attempt at jury nullification. Defendant should not implicitly or explicitly be permitted to argue that he should not be convicted because his conduct was not as bad as whatever happened at Abu Ghraib and Guantanamo. Based on well-established Sixth Circuit precedent, the Court already has prohibited defendant “from presenting arguments overtly designed to elicit jury nullification.” (Doc. 120 at 1-2). *See also Wofford v. Woods*, 969 F.3d 685, 709 (courts should not allow lawyers to argue overtly for jury nullification); *United States v. Young*, 470 U.S. 1, 8-9 (1985) (“[C]ounsel on both sides of the table share a duty to confine arguments to the jury within proper bounds. Just as the conduct of prosecutors is circumscribed, the interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.”) (citation omitted).

For the reasons stated above, the Government respectfully requests that the Court not permit defendant to refer during closing argument to Abu Ghraib, Guantanamo, or water boarding or to make similar references to torture that are outside the bounds of the evidence in this case.

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