In The United States Supreme Court

James Everett Dutschke,
Petitioner,
v.
United States of America,
Respondent.

Case No. 18-5788
USCA5 case No. 15-60794

Supplemental Brief to Update for NEW Rule and Regulation

Filing pro se, I (James Everett Dutschke) call to the attention of the US Supreme Court a very relevant and very recent newly decided Rule which directly and dramatically affects the pending petition for writ of certiorari (as well as relevant newly implemented regulations) in accordance with Supreme Court Rule 15-8; and bring to the court the following:

1) In November of 2017, I filed with the Supreme Court of the United States a petition for writ of certiorari appealing from the 5th Circuit's denial of COA.

2) COA was sought on several jurisdictional and non-waivable grounds from the district and the circuit. Among these grounds were direct challenges to the constitutionality of the statute which "enforces" the treaty I am accused/convicted of violating - the biological weapons treaty (Biological Weapons Convention) "enforced" by 18 USC § 175(a) ['enacted' by the BWCIA].

3) These direct challenges to the constitutionality of the 'treaty enforcing statute' of 18 USC § 175(a) was based, in large part, on the exact issues that the REASONABLE JURISTS of the US Supreme Court, Justices (Alito, Scalia, and Thomas) found very DEBATABLE (Slack is therefore met) in Bond v. US, 134 S.Ct. 2077, 187 L.Ed.2d 1 (2014).

For example, (a) The 'treaty enforcing statute' (§ 175) is NOT properly and constitutionally enacted - therefore invalid (Scalia); and (b) A 'treaty enforcing statute' cannot be enforced in cases that do not "involve international intercourse" (Thomas); and (c) There is "No such (constitutional) justification for this statute", and the statute itself "lies outside Congress' reach." (Alito)

4) Despite that the REASONABLE JURISTS (Alito, Thomas and Scalia) of the US

Supreme Court in Bond specifically asked FOR (this case for deciding these issues) and thought the court must examine the argument about the constitutionality for the chemical weapons "enforcing statute"; and that these DEBATED issues were specifically and expressly opined on (at length) by the reasonable jurists of the US Supreme Court clearly ... CLEARLY ... meeting the Slack standard (as well as the recent Buck v. Davis, also reversing 5th Circuit); and that the Scalia/Thomas/Alito issues were directly and explicitly made a part of the § 2255 itself and in the request for COA - and the district court in its dismissal and the circuit in COA denial claimed they need not bother to even read those jurisdictional grounds since the claim was barred by my Alford doctrine plea, they claim.

5) They were wrong ... on many fronts (in their refusal to even look at those constitutional jurisdictional challenges to the statute itself). I expressed that to them in exhausting detail - that such a challenge to the constitutionality of the 'enforcing' statute itself (which goes directly to the jurisdictional preclusion of charges in the first place) canNOT be barred and MUST be reviewed.

Nevertheless, because the courts claimed they did not want to be bothered with a jurisdictional challenge they did not even read it; so I appealed (including) the Scalia/Thomas/Alito issues in the November 2017 petition for writ of certiorari.

6) Since then, in fact less than 3 weeks ago from the penning of this instant motion to update, specifically on February 21st, 2018, the US Supreme Court announced (majority opinion by Justice Breyer) the new RULE that "a guilty plea doesn't automatically bar a constitutional challenge." Class v. US, (US Supreme Court, 2017) US No. 16-424 (2-21-18).

7) The Class Rule, joined by Justices Ginsburg, Sotomayor, Kagan, Roberts and Gorsuch, reversed the DC Circuit's (incorrect) claim that a plea agreement blocked challenges to a statute on grounds that the statute itself is unconstitutional.

'One does NOT give up the right to challenge to the laws constitutionality "simply by pleading guilty" and (his) "Constitutional claims don't contradict the terms of his indictment or written plea agreement". In fact - they call into question the government's power to "constitutionally prosecute him"'. (in the first place).

Which means - a conviction of an unconstitutional statute can NEVER waive (by plea) a challenge to the statutes constitutionality itself. Never. With the statute itself invalid (as Scalia/Alito/Thomas opined) there can be no conviction of it (or even prosecution).

8) The majority decision of Class (Feb. 2018) establishes the exact same thing that Alito, Thomas and Scalia said in concurrence in Bond v. US, 134 S.Ct. 2077, 189 L.Ed.2d 1 (and the same thing I've said all along). In Bond (2014) those same three Justices went beyond simply looking at whether her (Bond's) behavior violated the chemical weapons 'enforcing' statute - they looked even deeper to say that the statute itself (which 'enforced' the treaty) was unconstitutional. They based their reversal (concurring in unanimity) on the unconstitutionality of the statute itself. Remember, Bond (2014) was convicted via a plea agreement.

9) This Class rule - a guilty plea does not bar a challenge to the constitutionality of a statute - is exactly what I've been saying since the very beginning to both the district and the circuit (both of whom ignored it). It is good to know that the reasonable jurists who did debate (Slack met) this very issue (in Bond, now decided in Class) have now proven me legally right all along.

However, because Class (2018) was not available to me until now (not published until a few months AFTER my 2017 filing to the Supreme Court, it is obvious that the district court (2015) and the 5th Circuit (2017) could not have known that COA MUST be granted; since everything I've been saying had not yet been affirmed by the Supreme Court. Now (with Class), it has.

10) My 2017 Certiorari brief does specifically make these claims (as all along) - which is, these jurisdictional issues cannot be waived or barred. At #11, 12, 13, 15, 15(2), 16, 17, 18, 19, 29, 30, 40, 45, 52, 49, 72, 84 & 'Conclusion-C'; but the Supreme Court's affirmation of what I've maintained all along was not available for inclusion into the 2017 Certiorari brief, obviously, because it didn't exist (Class, 2018), yet.

I admit I'd been watching Class because it directly and greatly affects the Certiorari, but including the decision/rule was, of course, impossible until now.

11) Also new - is a very relevant, very important unignorable change to the very regulation cited by the prosecutors/district judge that she (Judge Aycock) supposedly used in a bizarre stretch to qualify 'ricin' as a biological weapon instead of the chemical weapon Congress wrote it to be. This regulation was included at every level of my § 2255, including certiorari, as Exhibit 9 & 10. This is 42 CFR § 73.3 and § 73.3(d)(2) & (3).

In 2015-2017, in every filing, I point out that the very same regulation whose prosecutorial theshold prevents me from prosecution in the first place (again,

non-waivable jurisdiction) which she would have known if she had simply bothered to read the entire regulation that SHE, herself, was citing. The obvious cherry-picking of only the first part of the regulation and ignoring the rest of it was pointed out in my requests (dist. & circ.) for COA and again ignored by the district and circuit, so I did include these exhibits [9 & 10] and regulation 42 CFR § 73.3(d)(2) & (3) in the certiorari brief (in Appendix C-11); and pages 7, 18, 19, 20, & 26, and numbers 11, 33, 34, 35c, 35g, 36, 37, 38, 39, 40, 41, 58, 61, 65 and 'Conclusion-B, C & D'.

However, Exhibits 9 & 10, as provided even to this court, must now be replaced as that regulation has been updated (and very much in my favor) (by Exhibit 10d-10g).

12) 42 CFR § 73.3 is the HHS 'Select Agents & Toxins List'. It was NOT written to apply to § 175(a) [the treaty violation I'm charged with]. It was written specifically to apply to § 175b [which I was not, a 5 year maximum]. The list (a mix of biological agents and chemicals) does NOT invalidate the specifically written statutes of Congress which I mention (at length) in the certiorari brief, but it does include 'ricin' on the list. That has not been changed or been updated. However what DID change (2017) is the regulatory prosecutorial thesholds (think of the prosecutorial thesholds of a DUI breathalyzer).

13) One of the applicable prosecutorial thesholds I've used since the beginning of my 2015 original § 2255 filing was the exceptions of the HHS list which was 42 CFR § 73.3(d)(2) & (3), previous to the 2017 update:

A) "(d)(2)" EXcluded "non-toxic HHS toxins". It still does. That still applies as much now as it did prior to the update [82 FR 10864], because the developed product in my case is, in fact, "non-toxic", then any prosecution using the HHS list is prevented. The regulation's own language puts my case out of reach of the HHS list.

However, prior to the 2017 updated regulation, (d)(3) specifically and explicitly listed as an exclusion - "Less than 100 mg of Ricin". Since 0 mg is definitely "Less than 100 mg", legal prosecution using the HHS list was not just precluded, but completely impossible! I pointed this out every step of the way and it should have been unignorable to any rational thinking person who bothered to simply ... read (the entire, not just part, of the regulation). Thus the prosecution itself, was illegal!

14) Here are the changes: (And it is even MORE unignorable to a fair-minded,

reasonable or literate person) -

A) "(d)(3)" NOW states, "A .. .. toxin that has been subjected to decontamination procedure". Obviously the non-toxic product at issue in my case "has been subjected to decontamination procedure" or it wouldn't have been non-toxic! It has long been admitted (reluctantly) by the special prosecution team (but only when directly confronted with their own lab analysis) that the product was/is not the least bit toxic and is/was, in fact, entirely a harmless product. This regulatory change, as (d)(3) is NOW written (2017 update) puts my case even further out of reach of prosecution (Exhibit 10d-h).

B) (d)(7) - using the same language as the previous (d)(4), specifically RAISES (not lowers) the prosecutorial theshold of ricin (which PRIOR to now was "<100mg of Ricin" [see above]) to a new higher limit of "does not exceed ... 1,000 mg of Ricin"!!! The new threshold, being infinitely higher than the product's 0 mg, is now even further out of reach than prior to the 2017 update.

To be certain to ensure the importance of this new update is not missed here: I repeat - the 2017 updated regulation raises - RAISES - the threshold ten times over what it was before ... Before the update, the actual measured weight of active ricin (0 mg) did not even reach 1 mg, not even .5 mg, or even .001 mg. Therefore it was nowhere in sight of the 100 mg required before. This NEW update, (d)(7) puts the product beyond any possibility of reaching the new regulatory amount of 1,000 mg, that discussion is not even logical. But for the sake of any prosecutors or press who happen to read this brief - the math is simple ... 0 is "LESS than" 1,000!

What was way out of reach before is now infinite light years out of reach. (jurisdictionally beyond the statute's reach - thus COA must issue).

C) Also newly added into the (2017) updated regulation is § 73.3(e) which specifically states: "a select toxin modified to be less potent or toxic may be excluded ... based upon a determination that the ... toxin does not pose a severe threat to public health and safety."

In the instant case, this updated addition affects the submitted exhibits and the case itself because the harmless non-toxic product, no matter its original contents, which has (been proven) "modified to be less toxic" and proven, in fact, to be harmless, is NOT even a minor threat, much less a "severe" threat as required by this new § 73.3(e). This is (now) one step further than infinitely out of reach.

Because these 2017 changes (A-C) directly and dramatically affect the case,

the exhibits [9 & 10] should now be amended to include the new updated version, which I suggest to the court as Exhibits 10(d-h).

15) It must be noted that NONE of the changes to this regulation support district judge Aycock's bizarre "Asterisk Rule" or the "Aycock Rule" applying one treaty to magically cover all treaties (nullifying the chemical treaty and statute while expanding the biological treaty and statute).

Specifically:

A) The "Asterisk Rule" refers to Aycock's bizarre [Exhibit-20] claim that 'the lack of an asterisk in some regulation completely negates and nullifies specifically written congressionally mandated explicit law somewhere else; and

B) The "Aycock Rule" refers to her equally bizarre claim that the biological weapons treaty of 1989 magically negates and somehow covers the chemical weapons treaty of 1999 (a decade later).

Both of the above (a-b) are entirely made up fabrications. Aycock claimed her fabricated, made up law was based on 42 CFR § 73.3. That regulation didn't support her made up claim law before the new change. It still doesn't. She entirely made it up. Please note that there is NOTHING in the new text either to support her bizarre made up 'asterisk rule' (nullifying Congress' explicitly written laws by NOT having an asterisk in some regulation) or the 'Aycock rule' (that a later treaty is somehow nullified by a pre-existing non-applicable treaty).

16) An additional change has occurred (2017) in the substantive published law, to the CWCIA (Chemical Weapons Implementation Act) list of Schedule I Chemicals ("enforced" by 18 USC § 229(F)). The list has been updated, however, 'ricin' is STILL on that list - listed as #8. This shows that, by law, (§ 229(F)), 'ricin' is STILL a chemical weapon, NOT a biological weapon as district Judge Aycock stretched to claim (and in doing so, reversed her very own on-the-record statements; contradicting not only the written law, but herself); proving (still) that I was prosecuted under the WRONG treaty. Therefore this new Schedule I Chemical list - "Supplement No.1 to Part 745" should be entered as Exhibit-4b, which updates the submitted Exhibit-4.

I believe the US Supreme Court deserves to be up-to-date with all the relevant information on which to base any decision. Obviously, since the recent regulatory changes and rule of law (Class decision) only reinforces my already unassailable position. I believe it is more than abundantly clear that certiorari should be granted (COA granted on all grounds).

I thank the court for allowing this update.

Respectfully Submitted,

James Everett Dutschke

James Everett Dutschke

Originally submitted 3-7-2018

Exhibit 46

SUPPLEMENT NO. 1 TO PART 745 -- SCHEDULES OF CHEMICALS

Schedule 1

	C.A.S. Registry No.
A. Toxic chemicals:	
(1) O-Alkyl ([<--] C[10], incl. cycloalkyl) alkyl (Me, Et, n-Pr or i-Pr)-phosphonofluoridates	
e.g. Sarin: O-Isopropyl methylphosphonofluoridate	107-44-8
Soman: O-Pinacolyl methylphosphonofluoridate	96-64-0
(2) O-Alkyl ([<--] C[10], incl. cycloalkyl) N,N-dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidocyanidates	
e.g. Tabun: O-Ethyl N,N-dimethyl phosphoramidocyanidate	77-81-6
(3) O-Alkyl (H or [<--] C[10], incl. cycloalkyl) S-2-dialkyl (Me, Et, n-Pr or i-Pr)-aminoethyl alkyl (Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts	
e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate	50782-69-9
(4) Sulfur mustards:	
2-Chloroethylchloromethylsulfide	2625-76-5
Mustard gas: Bis(2-chloroethyl)sulfide	505-60-2
Bis(2-chloroethylthio)methane	63869-13-6
Sesquimustard: 1,2-Bis(2-chloroethylthio)ethane	3563-36-8
1,3-Bis(2-chloroethylthio)-n-propane	63905-10-2
1,4-Bis(2-chloroethylthio)-n-butane	142868-93-7
1,5-Bis(2-chloroethylthio)-n-pentane	142868-94-8
Bis(2-chloroethylthiomethyl)ether	63918-90-1
O-Mustard: Bis(2-chloroethylthioethyl)ether	63918-89-8
(5) Lewisites:	
Lewisite 1: 2-Chlorovinyldichloroarsine	541-25-3
Lewisite 2: Bis(2-chlorovinyl)chloroarsine	40334-69-8
Lewisite 3: Tris(2-chlorovinyl)arsine	40334-70-1
(6) Nitrogen mustards:	
HN1: Bis(2-chloroethyl)ethylamine	538-07-8
HN2: Bis(2-chloroethyl)methylamine	51-75-2
HN3: Tris(2-chloroethyl)amine	555-77-1
(7) Saxitoxin	35523-89-8
(8) **Ricin**	

This is the same as Supplement No 1 to 15 CFR 712

Exhibit 46

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NEW
42 CFR 73.3

§ 73.3 HHS select agents and toxins.

[PUBLISHER'S NOTE: 82 FR 10864, Feb. 16, 2017, provides: "The effective date for the final rule published January 19, 2017, at 82 FR 6278, is delayed until March 21, 2017."]

(a) Except for exclusions under paragraphs (d) and (e) of this section, the HHS Secretary has determined that the biological agents and toxins listed in this section have the potential to pose a severe threat to public health and safety. The select agents and toxins marked with an asterisk (*) are designated as Tier 1 select agents and toxins and are subject to additional requirements as listed in this part.

(b) HHS select agents and toxins:

Abrin

Bacillus cereus Biovar anthracis *

Botulinum neurotoxins*

Botulinum neurotoxin producing species of Clostridium *

Conotoxins (Short, paralytic alpha conotoxins containing the following amino acid sequence X[1] CCX[2] PACGX[3] X[4] X[5] X[6] CX[7]) n1

n1 C = Cysteine residues are all present as disulfides, with the 1st and 3rd Cysteine, and the 2nd and 4th Cysteine forming specific disulfide bridges; The consensus sequence includes known toxins alpha -MI and alpha -GI (shown above) as well as alpha -GIA, Ac1.1a, alpha -CnIA, alpha -CnIB; X1 = any amino acid(s) or Des-X; X2 = Asparagine or Histidine; P = Proline; A = Alanine; G = Glycine; X3 = Arginine or Lysine; X4 = Asparagine, Histidine, Lysine, Arginine, Tyrosine, Phenylalanine or Tryptophan; X5 = Tyrosine, Phenylalanine, or Tryptophan; X6 = Serine, Threonine, Glutamate, Aspartate, Glutamine, or Asparagine; X7 = Any amino acid(s) or Des X and; "Des X" = "an amino acid does not have to be present at this position." For example if a peptide sequence were XCCHPA then the related peptide CCHPA would be designated as Des-X.

Coxiella burnetii

Please Note—
There is STILL no such thing as a "Tier 2 toxin"

Judge Aycock just made it up.

Exhibit
10 J

Crimean-Congo hemorrhagic fever virus

Diacetoxyscirpenol

Eastern equine encephalitis virus

Ebola virus*

Francisella tularensis *

Lassa fever virus

Lujo virus

Marburg virus*

Monkeypox virus

Reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments (Reconstructed 1918 influenza virus)

Ricin

Rickettsia prowazekii

SARS coronavirus (SARS-CoV)

Saxitoxin

South American hemorrhagic fever viruses:

Chapare

Guanarito

Junin

Machupo

CFR

Exhibit 10e

99443280

Sabia

Staphylococcal enterotoxins (subtypes A-E)

T-2 toxin

Tetrodotoxin

Tick-borne encephalitis virus

Far Eastern subtype

Siberian subtype

Kyasanur Forest disease virus

Omsk haemorrhagic fever virus

Variola major virus (Smallpox virus)*

Variola minor virus (Alastrim)*

Yersinia pestis *

(c) Genetic Elements, Recombinant and/or Synthetic Nucleic Acids, and Recombinant and/or Synthetic Organisms:

(1) Nucleic acids that can produce infectious forms of any of the select agent viruses listed in paragraph (b) of this section.

(2) Recombinant and/or synthetic nucleic acids that encode for the toxic form(s) of any of the toxins listed in paragraph (b) of this section if the nucleic acids:

(i) Can be expressed in vivo or in vitro, or

(ii) Are in a vector or recombinant host genome and can be expressed in vivo or in vitro.

(3) HHS select agents and toxins listed in paragraph (b) of this section that have been genetically

Exhibit
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modified.

(d) HHS select agents or toxins that meet any of the following criteria are excluded from the requirements of this part:

(1) Any HHS select agent or toxin that is in its naturally occurring environment provided the select agent or toxin has not been intentionally introduced, cultivated, collected, or otherwise extracted from its natural source.

(2) Non-viable HHS select agents or nontoxic HHS toxins.

(3) A select agent or toxin that has been subjected to decontamination or a destruction procedure when intended for waste disposal.

(4) A select agent or regulated nucleic acids that can produce infectious forms of any select agent virus that has been subjected to a validated inactivation procedure that is confirmed through a viability testing protocol. Surrogate strains that are known to possess equivalent properties with respect to inactivation can be used to validate an inactivation procedure; however, if there are known strain-to-strain variations in the resistance of a select agent to an inactivation procedure, then an inactivation procedure validated on a lesser resistant strain must also be validated on the more resistant strains.

(5) Material containing a select agent that is subjected to a procedure that removes all viable select agent cells, spores, or virus particles if the material is subjected to a viability testing protocol to ensure that the removal method has rendered the material free of all viable select agent.

(6) A select agent or regulated nucleic acids that can produce infectious forms of any select agent virus not subjected to a validated inactivation procedure or material containing a select agent not subjected to a procedure that removes all viable select agent cells, spores, or virus particles if the material is determined by the HHS Secretary to be effectively inactivated or effectively removed. To apply for a determination an individual or entity must submit a written request and supporting scientific information to CDC. A written decision granting or denying the request will be issued.

(7) Except as required in § 73.16(l), the aggregate amount of the toxin under the control of a principal investigator, treating physician or veterinarian, or commercial manufacturer or distributor does not, at any time, exceed the following amounts: 1000 mg of Abrin; 1 mg of Botulinum neurotoxins; 100 mg of Conotoxins (Short, paralytic alpha conotoxins containing the following amino acid sequence X[1] CCX[2] PACGX[3] X[4] X[5] X[6] CX[7]); 10,000 mg of

Exhibit
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99443280

Diacetoxyscirpenol; 1000 mg of **Ricin**; 500 mg of Saxitoxin; 100 mg of Staphylococcal enterotoxins (subtypes A-E); 10,000 mg of T-2 toxin; or 500 mg of Tetrodotoxin. Provided that,

(i) The toxin is transferred only after the transferor uses due diligence and documents the identification of the recipient and the legitimate need (e.g., prophylactic, protective, bona fide research, or other peaceful purpose) claimed by the recipient to use such toxin. Information to be documented includes, but is not limited to, the recipient identity information, including the recipient's name, institution name, address, telephone number and email address; name of the toxin and the total amount transferred; and the legitimate need claimed by the recipient. Notwithstanding the provisions of paragraph (d) of this section, the HHS Secretary retains the authority to, without prior notification, inspect and copy or request the submission of the due diligence documentation to the CDC.

(8) An animal inoculated with or exposed to an HHS select toxin.

(9) An HHS select toxin identified in an original food sample or clinical sample.

(10) For those laboratories that are not exempt under § 73.5(a) and § 73.6(a), Botulinum neurotoxin that is produced as a byproduct in the study of Botulinum neurotoxin producing species of Clostridium so long as the toxin has not been intentionally cultivated, collected, purified, or otherwise extracted, and the material containing the toxin is rendered non-toxic and disposed of within 30 days of the initiation of the culture.

(11) Waste generated during the delivery of patient care by health care professionals from a patient diagnosed with an illness or condition associated with a select agent, where that waste is decontaminated or transferred for destruction by complying with state and Federal regulations within seven calendar days of the conclusion of patient care.

(12) Any South American genotypes of Eastern Equine Encephalitis Virus and any West African Clade of Monkeypox virus provided that the individual or entity can identify that the agent is within the exclusion category.

(e) An attenuated strain of a select agent or a select toxin modified to be less potent or toxic may be excluded from the requirements of this part based upon a determination by the HHS Secretary that the attenuated strain or modified toxin does not pose a severe threat to public health and safety.

(1) To apply for exclusion, an individual or entity must submit a written request and supporting scientific information. A written decision granting or denying the request will be issued. An

Exhibit 10h

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