

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

UNITED STATES OF AMERICA

v.

ABD AL HADI AL IRAQI

AE 070L

Defense Motion

In Limine To Permit Examination of Ahmed
al-Darbi About His Torture

17 March 2017

1. Timeliness.

This motion is filed timely pursuant to AE 070I Ruling Government Motion To Conduct an Oral Deposition Pursuant to Rule for Military Commission 702.

2. Relief Sought.

Mr. Nashwan al-Tamir, by and through counsel, respectfully requests that the Commission permit the Defense to examine Mr. al-Darbi at his deposition for purposes of showing that his trial testimony and other statements should be suppressed pursuant to the Fifth Amendment, 10 U.S.C. § 948r(a), and Military Commission Rules of Evidence (MCRE) 304(a), in addition to examining him for impeachment and other trial purposes.

3. Overview.

The defense requests that the Commission permit it to examine Mr. al-Darbi regarding all matters that may have evidentiary value bearing on the question of whether his trial testimony is derived from physical and psychological abuse he suffered at the hands of Government agents, for the purpose of establishing its inadmissibility as well as its credibility. By his own account,

Mr. al-Darbi was abused to the point of torture at Bagram Air Base and Guantanamo Bay after he was detained by the United States.

Mr. al-Tamir will be filing a motion to suppress Mr. al-Darbi's testimony as derivative of torture and/or coercion, pursuant to the Fifth Amendment, 10 U.S.C. § 948r(a), and MCRE 304(a). That motion will require a hearing and testimony from witnesses with knowledge of these events, which would ordinarily include Mr. al-Darbi himself.¹ Because it appears possible that Mr. al-Darbi will be transferred before that hearing can take place, the deposition may be Mr. al-Tamir's only opportunity to examine him with regard to these issues. The Defense thus files this motion to ensure that Mr. al-Darbi's abuse can be explored fully and completely and will be considered along with the other evidence adduced at the suppression hearing.

Independent of its admissibility, Mr. al-Tamir has the right to explore the voluntariness of Mr. al-Darbi's testimony as a matter of impeaching its credibility.² The Defense believes that the scope of examination regarding Mr. al-Darbi's abuse for credibility purposes should be co-extensive with the examination conducted for purposes of suppression. Nevertheless, in the event the Commission views the scope of cross-examination for the two purposes differently, the Defense raises the independent suppression purpose now through this motion in limine and requests authorization to pursue it in his examination at the deposition to ensure that Mr. al-Tamir has the opportunity to fully and fairly litigate the motion to suppress.

4. **Burden of Proof.**

As the moving party, the Defense must demonstrate that the requested relief is warranted by a preponderance of the evidence.³

¹ See e.g. *United States v. Karake*, 443 F.Supp.2d 8 (D.D.C. 2006) (suppressing statements as product of torture after five week hearing).

² *Crane v. Kentucky*, 476 U.S. 683, 688-89 (1986).

³ Rule for Military Commission ("RMC") 905(c)(2).

5. Facts.

Mr. al-Darbi has described the horrendous ordeal he experienced after his capture and rendition to United States custody in numerous pleadings, statements and sworn testimony. The following averments are taken from only one of these documents (a pleading he filed in 2008 prior to entering into his cooperation agreement).⁴ It is not meant to be comprehensive or complete; there is a great deal of additional information in the Government investigations of detainee abuse at Bagram and Guantanamo, as well as in court-martial transcripts and many other statements and testimony by Mr. al-Darbi (some of which has been produced to Mr. al-Tamir in discovery very recently). The below account is simply intended to provide a sample of the kind of information that an examination directed toward establishing the involuntariness of Mr. al-Darbi's statements is likely to adduce.

According to Mr. al-Darbi, the abuse began immediately after his rendition to Government custody. He was forced to remain in stress positions for long periods and kicked when he slipped out of them. Guards refused to allow him to use the restroom, forcing him to urinate on himself. He was chained and beaten. He was hung from the ceiling of his cell with his hands chained above him for days at a time, and not allowed to sleep.⁵

He was forced to perform hard labor while shackled, often gratuitously and sadistically, and beaten when he was deemed not to be working hard enough. He was forced to sweep floors with a toothbrush and, to humiliate him, was photographed while doing so by an MP. He was publicly humiliated in other ways as well.⁶

⁴ *United States v. Ahmed Mohammed Ahmed Haza Al Darbi*, AE 79, D-020 Defense Reply to Government Response to Defense Motion to Dismiss All Charges Due to Torture (24 December 2008) (Attachment B hereto).

⁵ *Id.* at 1-3.

⁶ *Id.* at 3-5.

He was repeatedly threatened with rape, including after being stripped naked, and “was threatened with rendition to Israeli, Egyptian or Afghan jails for torture and rape.”⁷ During one interrogation, “Mr. al Darbi was forced to lie between a male interrogator [REDACTED]” (apparently another interrogator), who “whispered sexual comments into Mr. Al Darbi’s ear while touching his inner thigh,” while “[t]he male interrogator lying on Mr. Al Darbi’s other side threatened to rape him.” Eventually, “the interrogator forced Mr. Al Darbi to his knees, and then the interrogator positioned himself behind Mr. Al Darbi and mimicked anally sodomizing him.”⁸ An interrogator “once showed him a condom, telling Mr. Al Darbi that ‘this is special for you. I’m going to fuck you.’”⁹ The same interrogator also “threatened to put his penis in Mr. Al Darbi’s rectum.”¹⁰

During another interrogation, “an interrogator placed a sand bag over Mr. Al Darbi’s head and tightened the bottom of the bag around his neck. The interrogator then grabbed Mr. Al Darbi’s head and began shaking it violently while swearing at him.”¹¹ In another, the interrogators “threw him against the walls, dragged him around the room, ripped hairs from his chest, and kneed him in the chest, stomach and genitals.”¹² He was “pulled to the ground and then pulled around the room by his handcuffs.”¹³ During another interrogation, “the interrogator knelt on Mr. Al Darbi’s chest and sat on Mr. Al Darbi with all his weight.”¹⁴ Mr. al-Darbi was “unable to breathe, and the interrogator stayed on top of Mr. Al Darbi for so long that he thought

⁷ *Id.* at 5.

⁸ *Id.* at 6.

⁹ *Id.* at 8.

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ *Id.* at 8.

he was going to die . . . [and] believes he would have died if the other interrogator in the room hadn't stopped the first interrogator.”¹⁵

One day Mr. al-Darbi witnessed a neighboring detainee, named Dilawar, beaten to death by his guards:

Mr. Al Darbi survived treatment identical to that which killed detainees Dilawar and Habibullah; he was chained in the same position as Mr. Dilawar, in the same detention area, and endured knee strikes similar to those which ultimately killed Mr. Dilawar. Mr. Al Darbi witnessed Mr. Dilawar's death and described the sequence of events which led to that death. Mr. Dilawar had been hanging for 48 hours when a guard told Mr. Dilawar he would release Dilawar if he would clean the floor; Mr. Al Darbi translated this for Mr. Dilawar and then cleaned the floor with him. After they were done, the guard chained Mr. Dilawar to the top of the cage once again. Mr. Al Darbi related that the next shift, annoyed with Mr. Dilawar's screaming, used a shorter chain to suspend him wholly off the floor by his wrists. When Mr. Dilawar attempted to stretch to ease his pain, the guards began beating him. At first two guards were beating Mr. Dilawar as he was suspended in the cage; they then moved him to the public area. By the time Mr. Dilawar stopped moving or crying, six guards were beating him. Mr. Al Darbi witnessed this entire scene.¹⁶

As a result, “Mr. Al Darbi feared that his own abuse might result in the same fate Mr. Dilawar met.”¹⁷

Because of the abuse, Mr. al-Darbi “began to say what he thought his interrogators wanted him to say, based in part on their leading questions, in the hopes that the torture would stop.”¹⁸ Military interrogators “fed Mr. Al Darbi the remainder of the ‘confession’ they wanted to hear” and “told Mr. Al Darbi to repeat his story to the FBI, and that if he ever changed his story, they would start the abuse again, or do worse.”¹⁹

Similarly, after his transfer to Guantanamo Bay, “Mr. Al Darbi was repeatedly told ‘if you don't stick with your Bagram confessions, don't think for a moment you can escape Bagram,

¹⁵ *Id.*

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

we can send you to X-Ray or another country for more torture.”²⁰ On one occasion, he was told to sign a confession because “we can send you to Camp X-Ray where horrible things will be done to you again or we can send you to another country where people there will make you sign.”²¹ In Guantanamo, Mr. al-Darbi “feared that he would be tortured again as he had been in Bagram,” or that he might be sent back to Bagram.²²

As of December 2008 (the date of the pleading), Mr. al-Darbi continued to report “feeling anxious, depressed and worried” because of his abuse.²³

He has recurrent nightmares of the interrogators at Bagram. Mr. Al Darbi continues to wake screaming in fear whenever he is awoken suddenly. Mr. Al Darbi says he feels emotionally unstable, and says he experiences personality changes and mood swings; such things were not typical for him before the torture. Mr. Al Darbi has experienced frequent headaches since his ordeal, and sometimes loses control of his urination.²⁴

6. Law and Argument.

Mr. al-Tamir intends to file a motion to suppress Mr. al-Darbi’s trial testimony and other statements under the Fifth Amendment, 10 U.S.C. § 948r(a), and MCRE 304(a). Even without the thousands of additional pages of statements by Mr. al-Darbi, other testimony and statements by him and other witnesses and Government reports documenting the history of detainee abuse at Bagram and Guantanamo, the above recitation is sufficient to demonstrate that a hearing to consider the suppression of Mr. al-Darbi’s testimony is warranted.

Ordinarily at such a hearing, the declarant of the statements to be suppressed testifies along with other percipient witnesses.²⁵ Because the declarant is the direct victim of the

²⁰ *Id.* at 10.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *See e.g. United States v. Karake*, 443 F.Supp.2d 8, 54-83 (D.D.C. 2006) (describing and analyzing testimony of torture victim-declarants, prison commander, experts, government officials, and other witnesses).

coercion, she is generally the critical witness. Here, however, because of the Government's transfer agreement with Saudi Arabia and the Government's intention to introduce his testimony at trial through videotaped deposition, it appears that Mr. al-Darbi may not be present for the suppression hearing. Accordingly, if the Defense is to obtain his testimony on the suppression issue, Mr. al-Darbi's deposition appears to be its only opportunity.

Mr. al-Tamir therefore requests authorization to explore at the deposition the abuse Mr. al-Darbi suffered at the hands of the Government, the voluntariness of the statements he gave as a result of that abuse, and whether the trial testimony the Government proposes to introduce is itself involuntary and/or derived from torture or coercion within the meaning of the Fifth Amendment, 10 U.S.C. § 948r(a) or MCRE 304 – whether, in other words, it is “fruit of the poisonous tree.”²⁶ With respect to the latter inquiry, where an underlying violation is shown, the test is whether “granting establishment of the primary illegality, the evidence to which instant objection is made has been come at . . . instead by means sufficiently distinguishable to be purged of the primary taint.”²⁷ Exploring whether Mr. al-Darbi's trial testimony remains tainted by his abuse will require a detailed examination of the course that took him from victim of Government torture to willing Government cooperator.

To be clear, even if Mr. al-Tamir did not intend to move to suppress Mr. al-Darbi's testimony, the same information would be within the proper scope of cross-examination in any event. Rule for Military Commission (RMC) 702(g)(1)(B) states that “[t]he scope and manner of examination and cross-examination [at depositions conducted pursuant to RMC 702] shall be such as would be allowed in the trial itself.” Under *Crane v. Kentucky*, a criminal defendant has a constitutional right to present evidence *at her trial* that a statement was involuntary in order to

²⁶ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

²⁷ *Id.* (internal quotes omitted).

impeach the declarant's credibility and/or the statement's reliability, even if the statement was ruled voluntary at a pretrial suppression motion.²⁸ As the Supreme Court explained, "the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial."²⁹ Accordingly, the fact that Mr. al-Tamir intends to question Mr. al-Darbi about his abuse for both suppression and credibility/reliability purposes should not make a difference in any evidentiary rulings regarding the scope of the Defense's cross-examination. Nevertheless, because there is a clear conceptual distinction between the two purposes, and because it is possible the Commission will view the scope of impeachment examination differently, Mr. al-Tamir notifies the Court of his intention to pursue both bases for examining Mr. al-Darbi.

7. Conclusion.

For the foregoing reasons, Mr. al-Tamir respectfully requests that the Commission permit the Defense to examine Mr. al-Darbi at his deposition for purposes of showing that his trial testimony and other statements should be suppressed pursuant to the Fifth Amendment, 10 U.S.C. § 948r(a), and MCRE 304(a), in addition to examining him for impeachment and other trial purposes.

8. Oral Argument. The Defense requests oral argument on this motion.

9. Witness and Evidence. None

10. Conference with Opposing Counsel. The Defense has conferred with the Government, which states as follows: The Government has not responded to the Defense request for its position.

11. Additional Information. The Defense does not have any additional information to present.

²⁸ *Crane*, 476 U.S. at 687.

²⁹ *Id.* at 688.

12. List of Attachments.

- A. Certificate of Service dated 17 March 2017.
- B. *United States v. Ahmed Mohammed Ahmed Haza Al Darbi*, AE 79, D-020 Defense Reply to Government Response to Defense Motion to Dismiss All Charges Due to Torture (24 December 2008)

Respectfully Submitted,

//s//

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//s//

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//s//

ADAM THURSCHELL
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 17 March 2017, I caused **AE 070L Defense Motion** in Limine To Permit Examination of Ahmed Al Darbi About His Torture to be filed with the Office of the Military Commissions Trial Judiciary and I served a copy on Government counsel of record.

//s//

Adam Thurschwell
Assistant Defense Counsel

ATTACHMENT B

MILITARY COMMISSION

United States of America

v.

Ahmed Mohammed Ahmed Haza Al Darbi

D-020

Defense Reply to Government Response to
Defense Motion to Dismiss All Charges Due to
Torture

24 December 2008

1. **Timeliness:** This Response is timely filed.
2. **Relief Sought:** Ahmed Al Darbi respectfully requests that the Military Judge dismiss all charges due to the torture of Mr. Al Darbi during his imprisonment by the United States Government, which began over six years ago in [REDACTED] 2002.

3. **Facts:**

Mr. Al Darbi was unlawfully rendered to U.S. custody in [REDACTED] of 2002. Since the time of his extraordinary rendition to U.S. agents, he has been repeatedly assaulted, humiliated and made to fear for his life. When he was captured, U.S. agents stripped him naked and photographed him. They then blindfolded him, throttled him, and began cursing at him. During this time, Mr. Al Darbi did not know why he was detained, nor did he know which country was detaining him. His terror at being seized in this manner only grew as he was transported to Bagram. As he was brought into Bagram, U.S. personnel continued to swear at Mr. Al Darbi. This, combined with a body-cavity search, where one agent probed Mr. Al Darbi rectally while telling him "fuck you," terrified Mr. Al Darbi so much that he thought he might die from the stress and shock of his capture.

Mr. Al Darbi's interrogators continued abusing him on his second day at Bagram. He was forced to kneel with his hands cuffed above his head; when his arms began to fall or he attempted to stretch to relieve the pain caused by the forced kneeling, he was kicked in the back. He was then forced to stand with his feet some distance from a wall and lean

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into the wall so that he had to support his weight on his forehead. During this time he was hooded. Interrogations that included these tactics continued for two weeks.¹ During these first two weeks, Mr. Al Darbi was kept in isolation; his cell was overheated, and he was not permitted to use the restroom, but forced to relieve himself in public. While Mr. Al Darbi was kept in isolation, Military Police took photos of him that were humiliating.² For much of his time in isolation, Mr. Al Darbi was not provided with much food.³

After two weeks of isolation, Mr. Al Darbi was moved to the general population cells, where he was placed in a cage with his hands cuffed and shackled above his head.⁴ He was kept in this position for two weeks. During those two weeks, Mr. Al Darbi was not permitted to pray properly. Mr. Al Darbi had to insist on being released to use the restroom, but the guards would not always release him, often forcing Mr. Al Darbi to urinate on himself.⁵

While he was chained in this position, U.S. personnel beat him.⁶ Mr. Al Darbi was hooded for much of this time,⁷ but when he was not, Mr. Al Darbi reported being able to see out of his cage to a blackboard where detainees' numbers were recorded,

¹ June 17 2005 Report of Investigative Activity at 1.

² June 15 2005 Report of Investigative Activity at 3.

³ June 17 2005 Report of Investigative Activity at 2.

⁴ This technique is corroborated in Sgt. Higginbotham's statement. Sgt. Higginbotham stated that the use of "standing restraint" "was a daily occurrence." Statement of SGT Jennifer N. Higginbotham, taken at Fort Bragg, NC, dated 1 August 2004 at 16 (hereinafter "Statement of Higginbotham"). The restraint would be used for an "adjusted sleep schedule" (also referred to as sleep deprivation), or for punishment. *Id.* at 17. Sgt. Higginbotham stated that when in standing restraint, detainees were placed in "either short cuffs or long cuffs. They would be standing in the small portion of the cell, which lead to the main cell area. If they refused to stand, they would be fastened with their wrists at forehead level to the door of the cell. If the detainee was located in the isolation cell, the MP's had a chain or a drop point from the center of the room which would put the detainee's arms at the same height as if they were attached to the door." *Id.*

⁵ June 17 2005 Report of Investigative Activity at 1.

⁶ Deposition of Ahmed Al Darbi at 12. Sgt. Higginbotham reported that MPs beat detainees, including the two detainees who died in custody at Bagram during the time Mr. Al Darbi was detained. "Statement of Higginbotham" at 25, 31.

⁷ June 17 2005 Report of Investigative Activity at 2.

along with symbols next to their numbers denoting what techniques were to be used on them. Next to the blackboard was another board on which were hung the implements of torture in Bagram: baseball bats, chains, cuffs, hoods, and other instruments. Mr. Al Darbi was not permitted to sleep during this time;⁸ every time he fell asleep, U.S. personnel would hit him to keep him awake.⁹ Every two to three days, U.S. personnel would release Mr. Al Darbi from his hanging position; he would collapse to the floor and immediately fall asleep, only to be suddenly awoken by the guards, who would then suspend him from the top of the cage by his wrists.

Mr. Al Darbi survived treatment identical to that which killed detainees Dilawar and Habibullah; he was chained in the same position as Mr. Dilawar, in the same detention area, and endured knee strikes similar to those which ultimately killed Mr. Dilawar. Mr. Al Darbi witnessed Mr. Dilawar's death and described the sequence of events which led to that death. Mr. Dilawar had been hanging for 48 hours when a guard told Mr. Dilawar he would release Dilawar if he would clean the floor; Mr. Al Darbi translated this for Mr. Dilawar and then cleaned the floor with him. After they were done, the guard chained Mr. Dilawar to the top of the cage once again. Mr. Al Darbi related that the next shift, annoyed with Mr. Dilawar's screaming, used a shorter chain to suspend him wholly off the floor by his wrists. When Mr. Dilawar attempted to stretch to ease his pain, the guards began beating him. At first two guards were beating Mr. Dilawar as he was suspended in the cage; they then moved him to the public area. By the

⁸ June 17 2005 Report of Investigative Activity at 2; June 15 2005 Report of Investigative Activity at 1. See also footnote 4.

⁹ Deposition of Ahmed Al Darbi at 12. Sgt. Higginbotham reported that MPs beat detainees, including the two detainees who died in custody at Bagram during the time Mr. Al Darbi was detained. "Statement of Higginbotham" at 25, 31.

time Mr. Dilawar stopped moving or crying, six guards were beating him. Mr. Al Darbi witnessed this entire scene.

Mr. Dilawar was then removed to an isolation cell out of sight; days later, Mr. Al Darbi heard Mr. Dilawar had died. Mr. Al Darbi feared that his own abuse might result in the same fate Mr. Dilawar met.

Mr. Al Darbi was also forced to perform hard labor in the public square,¹⁰ carrying heavy boxes of water while shackled; often, when Mr. Al Darbi was carrying two boxes with his hands cuffed, the MPs would stack a third box on top of his load for him to carry.¹¹ If he didn't take all the boxes, the MPs would beat him. Mr. Al Darbi experienced sciatic back pain for years after this forced labor. Although the Prosecution claims that conditions in Bagram were rustic, such conditions do not explain why MPs forced Mr. Al Darbi to sweep the entire floor using only a toothbrush. To add to this humiliation, one MP took pictures of Mr. Al Darbi while he was completing this degrading task.¹² Once, when Mr. Al Darbi complained that he could not change the port-a-potty with short cuffs on, an MP punched him in the side. Mr. Al Darbi crumpled to the floor in a fetal position after the first blow, but the MP continued to hit him.¹³

Mr. Al Darbi was also hung by his wrists in the public square, with his face to the fence. The guards would release Mr. Al Darbi and tell him he could sleep; after Mr. Al Darbi dropped to the ground and immediately fell asleep, the guards would wake him

¹⁰ Deposition of Al Darbi at 12.

¹¹ June 15 2005 Report of Investigative Activity at 3; June 17 2005 Report of Investigative Activity at 2; Report of Investigative Activity, Activity No. 11515052691324, taken September 22, 2005, at Guantanamo Bay, Cuba, at 1. (Hereinafter September 22 2005 Report of Investigative Activity.)

¹² June 17 2005 Report of Investigative Activity at 1-2; June 15 2005 Report of Investigative Activity at 3; September 22 2005 Report of Investigative Activity at 1.

¹³ June 17 2005 Report of Investigative Activity at 2.

violently and hang him back up. Mr. Al Darbi was allowed no more than 10 to 15 minutes of sleep at a time.

The MPs also sprayed water on Mr. Al Darbi's face and then blew pepper onto him, burning his skin and making his nose run.¹⁴ Another time, an MP placed a diaper on Mr. Al Darbi's head in the middle of the public square and began taking pictures. One MP posed in this picture while the other took the pictures.¹⁵

About a month after Mr. Al Darbi's transfer to Bagram, he was in an interrogation room when the interrogator called him "sex boy"; the interrogator then pressed his finger hard into the soft flesh under Mr. Al Darbi's jaw. Mr. Al Darbi started to choke; afterwards, the area swelled badly.¹⁶ In another interrogation around this time, an interrogator placed a sand bag over Mr. Al Darbi's head and tightened the bottom of the bag around his neck. The interrogator then grabbed Mr. Al Darbi's head and began shaking it violently while swearing at him.¹⁷

Also about one month after Mr. Al Darbi arrived at Bagram, the threats of rape began. Mr. Al Darbi was repeatedly stripped naked during interrogation in the interrogation room by [REDACTED] interrogators; he was shown condoms and threatened with rape multiple times; he was threatened with rendition to Israeli, Egyptian or Afghan jails for torture and rape; and, he was subjected to attempts, threats, and simulations of rape.

¹⁴ June 15 2005 Report of Investigative Activity at 1; June 17 2005 Report of Investigative Activity at 2; September 22 2005 Report of Investigative Activity at 1.

¹⁵ June 17 2005 Report of Investigative Activity at 4; June 15 2005 Report of Investigative Activity at 3; September 22 2005 Report of Investigative Activity at 1; conversation with defense counsel 11/13/08.

¹⁶ June 17 2005 Report of Investigative Activity at 2; June 15 2005 Report of Investigative Activity at 1; September 22 2005 Report of Investigative Activity at 1; deposition of Al Darbi at 13.

¹⁷ June 17 2005 Report of Investigative Activity at 2.

In one interrogation Mr. Al Darbi was hooded and interrogated by two male interrogators³ [REDACTED]. During this interrogation, the interrogators jerked Mr. Al Darbi around the cell, forcing him to run around myself.¹⁸ Mr. Al Darbi was forced to lie between a male interrogator³ [REDACTED]. The³ [REDACTED] interrogator whispered sexual comments into Mr. Al Darbi's ear while touching his inner thigh. The male interrogator lying on Mr. Al Darbi's other side threatened to rape him. This continued all night.¹⁹ At one point, after one of the times the male interrogator threatened him with rape, the interrogator forced Mr. Al Darbi to his knees, and then the interrogator positioned himself behind Mr. Al Darbi and mimicked anally sodomizing him.²⁰

Following this interrogation, another two interrogators entered the interrogation room, playing blaring music; they began physically assaulting Mr. Al Darbi. They threw him against the walls, dragged him around the room, ripped hairs from his chest, and kned him in the chest, stomach and genitals.²¹ Mr. Al Darbi was pulled to the ground and then pulled around the room by his handcuffs.²² The interrogators stepped on Mr. Al

¹⁸ Sgt. Higginbotham stated that "another technique we used was to have the detainees do physical training. . . . We would also have them jog in place." Statement of Higginbotham at 9.

¹⁹ Deposition of Al Darbi at 12-13; September 22 2005 Report of Investigative Activity at 1.

²⁰ June 17 2005 Report of Investigative Activity at 3; June 15 2005 Report of Investigative Activity at 2; September 22 2005 Report of Investigative Activity at 1; deposition of Al Darbi at 12.

²¹ June 17 2005 Report of Investigative Activity at 3; June 15 2005 Report of Investigative Activity at 1; Deposition of Al Darbi at 12. Sgt. Higginbotham described an incident in which she re-entered a room to observe Joshua Claus "holding onto the shirt of the detainee and dragged him against the wall. He held him against the wall until I began asking the detainee a question. I told the detainee to answer my one question and he would be let go." Statement of Higginbotham at 22.

²² Deposition of Al Darbi at 17-18. Sgt. Higginbotham confirmed in her statement that this practice was common among the interrogators, especially to move detainees from a stress or "safety" position to a standing position or into other stress positions. Statement of Higginbotham at 19-20, 27.

Darbi's handcuffs to cause him pain and push him to the ground. Mr. Al Darbi reported being on an "adjusted sleep schedule" at the time this interrogation took place.²³

Mr. Al Darbi began to say what he thought his interrogators wanted him to say, based in part on their leading questions, in the hopes that the torture would stop, but the abuse continued.²⁴ Military interrogators then fed Mr. Al Darbi the remainder of the "confession" they wanted to hear. The interrogators told Mr. Al Darbi to repeat his story to the FBI, and that if he ever changed his story, they would start the abuse again, or do worse.

The two interrogators smoked during the same interrogation, and they would blow smoke in Mr. Al Darbi's face.²⁵ The interrogators would throw trash and cigarette butts on him.²⁶ Mr. Al Darbi was forced to hold a chair over his head for a prolonged period of time. One of the interrogators²⁷ exposed his genitals to Mr. Al Darbi, putting his penis near Mr. Al Darbi's face. He told Mr. Al Darbi, "This is your God."²⁸

The interrogator called Mr. Al Darbi a "pussy," and smeared some medicinal-smelling liquid on his nose and mouth. The other interrogator pulled down his pants and showed Mr. Al Darbi his buttocks. That interrogator wiped the area between his buttocks with toilet paper and threw this paper on Mr. Al Darbi.²⁹

²³ Deposition of Al Darbi at 12.

²⁴ June 17 2005 Report of Investigative Activity at 3.

²⁵ June 17 2005 Report of Investigative Activity at 3.

²⁶ Deposition of Al Darbi at 19.

²⁷ The interrogator charged with this conduct was Damien Corsetti. Sgt. Higginbotham said that she observed incidents which lead her "to think that [Corsetti] was doing things to detainees that he was not supposed to be doing. SSG [REDACTED] knew about it and even referred to Corsetti as the 'King of Torture.'" Statement of Higginbotham at 24. Corsetti also bragged about exposing himself to detainees. Statement of Higginbotham at 24.

²⁸ June 15 2005 Report of Investigative Activity at 1; deposition of Al Darbi at 13, 16.

²⁹ June 17 2005 Report of Investigative Activity at 3; June 15 2005 Report of Investigative Activity at 2; September 22 2005 Report of Investigative Activity at 1; deposition of Al Darbi at 19.

The week after this interrogation, Mr. Al Darbi was again kept from sleeping.³⁰ These two interrogators interrogated him between ten and fifteen times; each time the interrogation techniques were different. Most of the time, they played blaring music and kicked Mr. Al Darbi in the groin. At other times they would force him to lie down, and then they would step on the chain linking his handcuffs. They threw trash on Mr. Al Darbi, and they throw him against the walls.³¹ These were normal things that happened every day.³²

During one interrogation, the interrogator knelt on Mr. Al Darbi's chest and sat on Mr. Al Darbi with all his weight. Mr. Al Darbi was unable to breathe, and the interrogator stayed on top of Mr. Al Darbi for so long that he thought he was going to die. Mr. Al Darbi believes he would have died if the other interrogator in the room hadn't stopped the first interrogator.³³

This team of interrogators would punch Mr. Al Darbi in the chest and stomach. One of the interrogators once showed him a condom, telling Mr. Al Darbi that "this is special for you. I'm going to fuck you."³⁴ The interrogator also threatened to put his penis in Mr. Al Darbi's rectum.³⁵

³⁰ September 22 2005 Report of Investigative Activity at 1.

³¹ June 17 2005 Report of Investigative Activity at 3.

³² June 15 2005 Report of Investigative Activity at 1.

³³ Deposition of Al Darbi at 18.

³⁴ June 17 2005 Report of Investigative Activity at 3; June 15 2005 Report of Investigative Activity at 1.

³⁵ Deposition of Al Darbi at 17. Sgt. Higginbotham described Corsetti as "obnoxious" and "sexually immature. He will make many sexual comments where most people, at least myself, are very uncomfortable." Statement of Higginbotham at 23-24. Corsetti's partner on the interrogation of Omar al-Faruq, Sgt. Selena Salcedo, described a series of disturbing incidents. In one, Corsetti and ██████████ pulled down the pants of a detainee so that Sgt. Salcedo "could see his genitalia. [She] was sitting in a chair, so al-Faruq didn't know [she] was there when they pulled his pants down originally, but when they pulled his blindfold, he was [her] and was like in shock and immediately tried to cover himself. . . . I left the room for about 5-10 minutes and when I came back, Al-Faruq was bent over a table, like with his feet on the floor and his chest bent over the table. I don't remember if he had his pants up or down, but I recall Corsetti had a plastic, like one liter drinking water bottles, in his hand and was waving it around. I don't know if he was

Another time, the interrogator threatened to perform sexual actions on Mr. Al Darbi. He told Mr. Al Darbi he would be sent to countries where he would be raped and tortured.³⁶

During many interrogations, Mr. Al Darbi was stripped naked by ³ [REDACTED] ³ [REDACTED] interrogators. Many of the interrogations involved loud music; many involved bright lights. Unidentified agents were sometimes standing behind the bright lights during interrogations.

On five separate occasions at Bagram, Mr. Al Darbi's interrogators would threaten to rape him and then send him to the doctor without medical cause, where the doctor would perform a rectal exam. Mr. Al Darbi believed the interrogators were beginning to make good on their threats of rape.³⁷

Mr. Al Darbi was frightened, and often afraid he would not survive the torture. The torture was so severe that there were times where he wished he would die.³⁸

Mr. Al Darbi was transported to Guantanamo in early 2002. Once he was transported to Guantanamo, Mr. Al Darbi was again kept in solitary confinement for two months in Camp Delta ² [REDACTED]. Mr. Al Darbi was interrogated daily, for five to six hours every day, and sometimes at night, from the middle of the night until dawn. Mr. Al Darbi was subjected to ² [REDACTED] ² [REDACTED] loud music and extreme cold temperatures.

smacking him on the butt or touching him, but it was like he was waving it." Statement of Sgt. Selena Salcedo, taken at Fort Bragg, NC, dated September 15, 2005.

³⁶ Deposition of Al Darbi at 17. June 17 2005 Report of Investigative Activity at 3; June 15 2005 Report of Investigative Activity at 2; September 22 2005 Report of Investigative Activity at 1.

³⁷ June 15 2005 Report of Investigative Activity at 2.

³⁸ Deposition of Al Darbi at 40. Extensive corroboration of these incidents may be difficult to find, as misconduct within the unit that abused Mr. Al Darbi was typically "brushed under the rug." Statement of Higginbotham at p. 46.

The interrogators at Guantanamo would sometimes throw Mr. Al Darbi's Koran to the ground, and the interrogators would throw around gruesome photos of bloodied and mutilated bodies on the ground.

Mr. Al Darbi was repeatedly told "if you don't stick with your Bagram confessions, don't think for a moment you can escape Bagram, we can send you to X-Ray or another country for more torture." In April and May of 2003, while Mr. Al Darbi was still isolated and had yet to encounter other Guantanamo detainees, military interrogators and FBI agents told him to sign a confession. They told Mr. Al Darbi that "we can send you to Camp X-Ray where horrible things will be done to you again or we can send you to another country where people there will make you sign." Mr. Al Darbi feared that he would be tortured again as he had been in Bagram. Mr. Al Darbi expressed fear that this torture would be renewed in Cuba or elsewhere, or that he might be sent back to Bagram.

To this day, Mr. Al Darbi reports frequently feeling anxious, depressed and worried.³⁹ He says that he feels not quite right. He has recurrent nightmares of the interrogators at Bagram.⁴⁰ Mr. Al Darbi continues to wake screaming in fear whenever he is awoken suddenly. Mr. Al Darbi says he feels emotionally unstable, and says he experiences personality changes and mood swings; such things were not typical for him before the torture. Mr. Al Darbi has experienced frequent headaches since his ordeal,⁴¹ and sometimes loses control of his urination.

4. Law and Argument: This Military Commission has the authority to dismiss charges against Mr. Al Darbi due to the torture inflicted upon him by agents of the United

³⁹ Deposition of Al Darbi at 31.

⁴⁰ June 17 2005 Report of Investigative Activity at 4.

⁴¹ Deposition of Al Darbi at 26.

States Government while in U.S. custody. The torture of Mr. Al Darbi was outrageous and shocking. He was beaten, deprived of sleep for long periods of time, suspended by chains from the ceiling of an isolation cage, subjected to sensory overload and sensory deprivation, sexually assaulted, subjected to various forms of degrading treatment and threatened with even worse. Having subjected Mr. Al Darbi to this brutal treatment for years, the Government now wishes to prosecute Mr. Al Darbi for non-capital offenses connected to an alleged plot that never came near to fruition. Federal law and military law suggest that dismissal of charges is an appropriate remedy for the type of shocking and outrageous conduct by the Government in this case. This Commission should not condone the prolonged and repeated torture of Mr. Al Darbi while in United States custody and should dismiss all charges against him.

A. This Commission may look to military law or federal law for guidance when construing its procedures and the scope of its authority

The Government argues that 10 U.S.C. § 948b(c) bars reference to *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001), to construe the powers of this Commission. This interpretation is unsupported by the plain text of the statute. 10 U.S.C. § 948b(c) states that:

(c) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general court-martial under chapter 47 of this title (Uniform Code of Military Justice). Chapter 47 by this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are *not binding* on military commissions established under this chapter.

10 U.S.C. § 948b(c) (emphasis added). This provision merely indicates that holdings in cases brought under the UCMJ are not *binding* on this Commission. It does not, however, bar this Commission from looking to such rulings as persuasive authority. It is

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entirely permissible and indeed logical for this Commission to look to rulings by the Court of Appeals for the Armed Forces or by U.S. federal courts in order to construe its authority in matters not covered by the MCA or the MMC. Indeed, where civilian appellate review is available, studying appellate jurisprudence cannot be superfluous. See 10 U.S.C. § 950g (providing for review by United States Court of Appeals for the District of Columbia Circuit and by Supreme Court).

Mr. Al Darbi does not ask this Commission to treat *Fulton* or any other case arising under the UCMJ as binding. Rather, the Defense merely suggests that this Commission look to military law for guidance when it construes the scope of its authority. *Fulton* suggests an authority to dismiss charges as a remedy for illegal Government treatment of a defendant at least in some circumstances. It also suggests that provisions listing some grounds for dismissing charges do not imply that these are the only such grounds. *United States v. Fulton*, 55 M.J. at 89 (“Although illegal pretrial punishment is not listed under RCM 907(b) (‘Grounds for dismissal include the following...’), that list is illustrative, not exclusive.”). Government’s citation of legislative history suggesting that Congress wished to create a system of military commissions distinct from the UCMJ has little bearing on this point. Gov’t Resp. at 3-5. Mr. Al Darbi’s motion to dismiss does not invoke Article 13 of the UCMJ but rather rests on the illegality of torture under U.S. and international law, which one hopes the prosecution does not dispute.⁴² Legislative intent to create a system of justice separate

⁴² Detainee Treatment Act of 2005, 42 U.S.C.A. § 2000dd (2006); Geneva Convention Relative to the Treatment of Prisoners of War, art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027.

from the UCMJ is irrelevant to this matter unless the Government means to argue that Congress intended to condone torture of detainees.

B. Dismissal of charges is within the scope of the Military Judge's authority

Military law suggests that a judge has substantial discretion to craft remedies appropriate to a case including, in particularly egregious cases, dismissal of charges. R.M.C. 907 does not purport to provide an exhaustive list of the grounds upon which a motion to dismiss may be granted. Military law suggests that this list is best interpreted as illustrative, not excluding all other possible grounds for dismissal. *United States v. Fulton*, 52 M.J. 767, 769 (A.F. Ct. Crim. 2000), *aff'd United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001) (“Although R.C.M. 907 sets forth ‘grounds for dismissal,’ there is nothing in the rule itself or in existing case law that indicates that this is an exhaustive or all-inclusive list.”). In general, judges must have some flexibility to tailor remedies to the facts of a particular case so as to achieve a reasonable and equitable outcome. *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983) (holding that a military judge may order two-for-one credit for illegal pretrial confinement even though Manual provided no such remedy). Under appropriate circumstances, this can lead to relatively harsh remedies. For example, the United States Court of Appeals for the Armed Forces has dismissed charges with prejudice due to unlawful command influence. *United States v. Lewis*, 63 M.J. 405, 416 (C.A.A.F. 2006) (“Dismissal of charges with prejudice, however, is an appropriate remedy where the error cannot be rendered harmless.”).

Just as the court in *Fulton* dismissed charges on account of pre-trial punishment, charges should be dismissed here on account of the shocking and outrageous torture of Mr. Al Darbi. The Government's contention that the absence from the MCA of a provision parallel to Article 13 of the UCMJ precludes this Commission from dismissing

charges is unfounded.⁴³ Gov't Resp. at 2. Torture of Mr. Al Darbi is not made lawful because of the inapplicability of Article 13. The Government's conduct in this case was far more egregious than most of the excessively harsh conditions of pre-trial confinement proscribed by Article 13. It involved multiple methods of torture including beatings, sexual assault and sleep deprivation compounded by threats of further bodily harm if Mr. Al Darbi did not continue to cooperate with interrogators by repeating his confessions. That some forms of lesser abuse might be eligible for redress under the UCMJ but not the MCA is no cause to deny redress for victims of prolonged and grotesque torture that was not and could not have been legalized by the MCA.

C. This Military Commission may exercise its supervisory powers to dismiss charges due to the shocking treatment of Mr. Al Darbi while in United States custody in Bagram and Guantanamo Bay

Dismissal of charges for Government conduct that shocks the conscience is within the supervisory power of U.S. courts under federal law. "Guided by considerations of justice, and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted). Such supervisory powers have three purposes: "to implement a remedy for violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct." *Id.*; see also *McNabb v. United States*, 318 U.S. 332 (1943). All three rationales apply to this case.

⁴³ Article 13, UCMJ, states that no person facing trial by court martial "may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him." It does not explicitly authorize dismissal of charges as a result of pre-trial punishment.

First, dismissal of charges is an appropriate remedy for a defendant subjected under the guise of interrogation to grotesque torture over a period of years in complete violation of inalienable rights recognized under both domestic and international law. Second, the integrity of any court is threatened when a case is brought before it that rests largely on evidence gained directly or indirectly through interrogation by torture.⁴⁴ Third, dismissal of charges is the only remedy available to this Commission with any prospect of deterring further illegal conduct by the Government. Dismissal of an indictment may be proper “to deter a pattern of demonstrated and longstanding or continuous official misconduct.” *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941 (1979). A pattern of systematic and organized abuse of detainees in Bagram and Guantanamo has been clearly and publicly documented.⁴⁵

As the Government points out in its response, use of supervisory powers to overturn a conviction or dismiss charges requires the objectionable conduct to meet a high threshold. The Supreme Court has found convictions reversible when treatment of a defendant “shocks the conscience.” *Rochin v. California*, 342 U.S. 165 (1952). “A violation of general due process can be the basis to overturn a conviction, however it should be applied only in those rare instances where the law enforcement involvement reaches a demonstrable level of outrageousness.” *United States v. Patterson*, 25 M.J. 650 (A.F.C.M.R. 1987). Physical violence and violations of a defendant’s bodily integrity are

⁴⁴ Mr. Al Darbi also moves to suppress all statements made while in U.S. custody. However, given his long detention and the possible use of information obtained from Mr. Al Darbi to locate other evidence to be used against him, the entire case presented by the Government is compromised by its treatment of Mr. Al Darbi during his six years of detention.

⁴⁵ See *Taxi to the Darkside and Torturing Democracy* (Jigsaw Productions 2007); *Torturing Democracy* (The National Security Archive & Washington Media Associates 2008). The Defense has moved to preadmit these documentaries as evidence of the systematic use of torture on detainees generally and on Mr. Al Darbi specifically at Bagram and Guantanamo Bay.

the leading examples of such outrageous conduct. “[T]he existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it ‘shocks the conscience,’ Extreme physical coercion . . . would certainly fall within this category.” *United States v. Chin*, 934 F.2d 393, 398-99 (2d Cir. 1991).

In *Rochin*, the defendant was subjected to an illegal search and had his stomach pumped involuntarily to obtain two morphine tablets to be used as evidence against him. *Rochin*, 342 U.S. at 172. While appalling, this abuse pales in comparison to the torture experienced by Mr. Al Darbi over a period of years. Mr. Al Darbi was systematically beaten, sexually assaulted, subjected to repeated and unnecessary body cavity searches, sensory deprivation and sensory overload, sexually humiliated, chained to the ceiling of his cell, and threatened with rape and other forms of extreme violence. Even where courts decline to exercise their supervisory power to dismiss charges, they recognize that such a remedy may be appropriate in extreme cases. *United States v. Chin*, 934 F.2d 393, 399 (2d Cir. 1991) (“The use of physical coercion such as that involved in *Rochin* and *Huguez* is unconstitutional because it causes injuries that are ‘brutal and . . . offensive to human dignity.’”); *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 n.3 (7th Cir. 1995) (“The only way we could exercise our supervisory powers in this particular case is if the defendant could demonstrate governmental misconduct ‘of the most shocking and outrageous kind,’ so as to warrant dismissal.”); *United States v. Mitchell*, 957 F.2d 465, 470 n.6 (7th Cir. 1992) (“[T]he conduct of the government . . . clearly . . . not comparable to official acts of torture, brutality or similar outrageous conduct present in cases where conduct was found to shock the conscience.”). Despite “the lack of a clear holding on outrageous conduct by the Supreme Court, most of the circuits . . . have recognized the

viability of the outrageous conduct defense.” *United States v. Mosley*, 965 F.2d 906, 909 (10th Cir. 1992) (citations omitted).⁴⁶

In *United States v. Russell*, the Supreme Court noted that it “may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” 411 U.S. 423, 431-32 (1973). The Second Circuit has found dismissal of charges an appropriate remedy in at least one case of particularly shocking government conduct. In *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), the court remanded a case for an evidentiary hearing on whether charges should be dismissed against an Italian national who was kidnapped in Uruguay, taken to Brazil where he was allegedly drugged and tortured and then flown to New York where he was wanted on narcotics charges and there arrested by two agents of the Drug Enforcement Agency. Toscanino’s motion to overturn his conviction, dismiss the indictment against him and permit him to return to Uruguay was denied by the District Court. The Second Circuit held that Toscanino was entitled to an evidentiary hearing to determine whether agents of the U.S. Government “kidnapped [him abroad], used illegal electronic surveillance, tortured him and abducted him to the United States for the

⁴⁶ The Government misleadingly cites *United States v. Boyd* 55 F.3d 239, 241 (7th Cir. 1995) for the claim that the outrageous conduct doctrine is defunct. Gov’t Resp. 7-8. “Contrary to the holding in Boyd, the fact remains that most jurisdictions at least acknowledge that such a defense exists.” *People v. Ming*, 316 Ill. App. 3d 1274, 1280 (Ill. App. Ct. 2000). The outrageous conduct doctrine is still recognized in ten circuits. See *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008); *United States v. Williams*, 372 F.3d 96, 111 (2d Cir. 2004) (citing *United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir.1991)); *United States v. Guzman*, 282 F.3d 56, 59 (1st Cir. 2002); *United States v. Finley*, 175 F.3d 645, 647 (8th Cir. 1999); *United States v. Chastain*, 198 F.3d 1338, 1352 (11th Cir. 1999); *United States v. Nolan- Cooper*, 155 F.3d 221, 230 (3d Cir. 1998); *United States v. Walls*, 70 F.3d 1323, 1330 (D.C. Cir. 1995); *United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993); *United States v. Mosley*, 965 F.2d 906, 909 (10th Cir. 1992); *United States v. Arteaga*, 807 F.2d 424, 426 (5th Cir. 1986). Other than the Seventh Circuit, only the Sixth Circuit has rejected the outrageous conduct doctrine entirely. See *United States v. Tucker*, 28 F.3d 1420 (6th Cir.1994), *cert. denied*, 514 U.S. 1049 (1995).

purpose of prosecuting him here.” *Toscanino*, 500 F.2d at 268.⁴⁷ “The cruel, inhuman and outrageous treatment allegedly suffered by Toscanino brought his case within the *Rochin* principle and demanded that we provide him a remedy.” *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1975), *cert. denied* 421 U.S. 1001 (1975).

Toscanino has been read narrowly by subsequent cases. The proposition that a foreign abduction may be sufficient grounds for dismissal of charges has not survived. “[I]n the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in [*Toscanino*], have been cut short.” *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995). Indeed, a year after *Toscanino* was decided, “the Supreme Court generally reaffirmed the validity of the Ker-Frisbie doctrine, refusing to ‘retreat from the established rule that illegal arrest or detention does not void a subsequent conviction.’” *United States v. Best*, 304 F.3d 308, 312 (3d Cir. 2002) (citing *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)).

Despite *Toscanino*’s misreading of the Ker-Frisbie doctrine, courts have repeatedly recognized that facts as outrageous as those alleged in *Toscanino*, such as torture, might still be sufficient for dismissal of charges. *United States v. Valot*, 625 F.2d 308, 310 (1980) (“[O]nly where the defendant alleges governmental conduct ‘of the most shocking and outrageous kind’ will due process be violated and the court required to divest itself of jurisdiction.”); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975), *cert. denied* 421 U.S. 1001 (1975). (“[T]he government conduct of which [defendant] complains pales by comparison with that alleged by *Toscanino*.”); *United*

⁴⁷ On remand the motion to dismiss was denied. *United States v. Toscanino*, 398 F. Supp. 916 (E.D.N.Y. 1975). The District Judge held that the defendant had “not submitted any credible evidence which would indicate any participation on the part of United States officials prior to the time the defendant arrived in this country.” *Id.* at 917. This finding combined with the standard on remand suggests that had U.S. agents participated in torturing Toscanino, charges would have been dismissed.

States v. Best, 304 F.3d 308, 313 (3d Cir. 2002) (“[S]eizure of the defendant in this case do not come close to resembling the ‘shocking governmental conduct’ that the Second Circuit equated with a violation of due process in *Toscanino*.”); *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 (9th Cir. 1995) (“The acts alleged were not nearly as egregious as those committed in *Toscanino*.”).

Contrary to the Government’s contention that *Toscanino* has been entirely superseded, Gov’t Resp. 7, these cases all suggest that outrageous conduct such as torture could be grounds for dismissal of charges if adequately proven in court. Mr. Al Darbi does not here petition for dismissal of charges on account of illegal arrest or detention. Rather, this motion seeks dismissal of charges due to horrific torture that took place while Mr. Al Darbi was already indisputably within U.S. custody. *Toscanino* alleged that he was tortured for a few days. The torture Mr. Al Darbi has survived is of another order of magnitude.

The Government suggests that dismissing charges in this case would be without precedent under federal law.⁴⁸ Gov’t Resp. 6. As shown above, this conclusion is highly misleading since charges in *Toscanino* certainly would have been dismissed if the defendant could have proven torture by agents of the U.S. Government. *See supra*. Even if the Government’s contention is taken as true for the sake of argument, however, it is of no moment for the simple reason that no federal court has ever been presented with facts even roughly comparable to this case. Indeed, what is entirely without precedent in

⁴⁸ The Government also suggests that charges may only be dismissed when the misconduct is attributable to the prosecutor. Gov’t Resp. 10 (citing *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991)). This argument hangs on dicta in one opinion in one circuit unsupported by any citation. It is not supported by the bulk of federal law on this point. *Rochin*, for example, would have been decided differently under this principle. Furthermore, many of the cases exploring the *Toscanino* defense would have been decided on these grounds if prosecutorial misconduct were truly a requirement of the outrageous conduct doctrine. *See supra*.

federal law is a defendant being brought to trial in federal court after being held without charges for over five years and tortured horribly during much of this time. A host of courts have suggested that this degree of torture would be sufficient for dismissal of charges. *See supra*. That the federal courts have not had the misfortune to face such a shameful set of facts is no grounds for this Commission to turn a blind eye to the Government's appealing treatment of Mr. Al Darbi.

D. Dismissal of charges is warranted in light of the outrageous and illegal conduct of the Government in this case

Dismissal of charges is not a remedy to be applied lightly. *Fulton* suggests that dismissal of charges is an "extraordinary" remedy. 55 M.J. at 90 n.2. That being so, only an extraordinary remedy can be commensurate with the extraordinary treatment survived by Mr. Al Darbi during his detention of over six years. Mr. Al Darbi has been repeatedly beaten, deprived of sleep for long periods of time, chained in "stress positions" for protracted periods of time, kept in isolation for long periods of time, hooded, subjected to sensory overload and sensory deprivation, sexually assaulted, threatened and humiliated, and forced to perform hard labor. This treatment is "shocking and outrageous." *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1975), *cert. denied* 421 U.S. 1001 (1975). The Government's treatment of Mr. Al Darbi was more egregious than that found in any case cited in this brief or the Government's Response. It is certainly enough to warrant an extraordinary remedy.

Dismissal is the sole remedy adequate to the egregious facts of this case. Suppression of all evidence would provide only a partial remedy. Mr. Al Darbi has been detained for over six years by the United States Government. During this time, he has been tortured, made false confessions and divulged information to his interrogators,

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including false and possibly incriminating information regarding himself and others. Even suppressing all statements made by Mr. Al Darbi will not remove the cloud cast over these proceedings by the prolonged and extensive torture to which he was subjected. Dismissal of charges is the only adequate remedy.

Conclusion

Mr. Al Darbi has been in U.S. custody for over six years. He has been repeatedly subjected to unspeakable torture and acts of systematic cruelty and depravity for much of this time. Having held Mr. Al Darbi for more than half a decade and abused him brutally under the guise of “interrogation,” the Government asserts that and it may now try him so long as it finds prosecutors who have not been involved in torturing him. The Military Judge, it argues, may not dismiss charges no matter how outrageous the Government’s conduct and no matter what the detainee has endured. Such a theory would be an insult to the integrity of any legitimate tribunal and should be rejected. The torture of Mr. Al Darbi while in U.S. custody is not only shocking and outrageous; it is a disgrace to our country’s democratic tradition and an affront to its longstanding ideals. This Commission should not prolong this shameful episode by holding a trial irrevocably tainted by this pattern of wanton abuse.

4. **Conference with Opposing Counsel:** Not applicable.
5. **Request for public release:** The Defense requests permission to publicly release this submission, along with the original Motion, the Government response thereto, and the Court’s ruling as soon as possible.

Respectfully Submitted,

//s//

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