U.S. Department of Justice

National Security Division

Washington, D.C. 20530

July 6, 2022

Mr. Mark Langer, Clerk
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, No. 21-1208
Letter under Fed. R. App. P. 28(j)

Dear Mr. Langer:

We write pursuant to Fed. R. App. P. 28(j) to inform the Court of the military commission's recent order suppressing certain statements that a third-party witness, Ahmed al-Darbi, made to FBI agents in 2002. *See* Ruling, AE 335N (June 30, 2022). The military commission's opinion is attached.

Sincerely,

/s/ Joseph F. Palmer
Joseph F. Palmer
Danielle S. Tarin
Counsel for the United States

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 335N** **RULING** **AE 335 Defense Motion** to Suppress Custodial Statements made by Mr. Ahmed Mohammed Ahmed Haze (Al-Darbi) to Federal Law Enforcement Agents between 24 August – 3 September 2002 and Derivative Evidence, as Required by 10 U.S.C. § 948r and the Fifth Amendment **30 June 2022**

1. Procedural Background.

a. On 16 January 2015 in AE 335, the Defense moved the Commission to suppress custodial statements made by Ahmed Mohammed Ahmed Al Darbi to federal agents between 24 August and 3 September 2002 and derivative evidence obtained as a result of the statements. The defense request for suppression of derivative evidence extended to any future testimony Al Darbi might provide[1] and the Accused's 2007 statements to federal agents, which the Defense argues were obtained as a result of statements made by Al Darbi while he was being tortured. The Government opposed the motion in AE 335A on 27 January 2015, initially representing that it did not intend to use Al Darbi's 2002 custodial statements in its case in chief,[2] but reserving the right to use the statements in rebuttal. The Defense replied in AE 335B on 2 February 2015.

[1] The defense motion to suppress was filed in 2015. Therefore, reference to future testimony by Al Darbi would include any testimony provided by Al Darbi since 2015, including his deposition testimony in 2017.
[2] "The government will not affirmatively offer—during any stage of the accused's case—the contents or any statements that Al-Darbi made to law-enforcement agents in 2002." AE 335A at 4.

b. Al Darbi was deposed in 2017 at U.S. Naval Station Guantanamo Bay, Cuba (NSGB), due to his pending release from United States custody. The Accused's Detailed Defense Counsel did not actively participate in the deposition and conducted no cross-examination of Al Darbi. Since the deposition, Al Darbi was transferred out of the custody of the United States.

c. In an interim order, AE 335H, on 2 October 2020, the Commission ordered the Government to submit an updated notice pleading specifically addressing whether the Government intended to introduce into evidence at trial, for any purpose—including rebuttal—Al Darbi's 2002 statements forming the basis of the defense motion to suppress. In AE 335I on 30 October 2020, the Government stated the intent to admit the 2017 deposition, assuming Al Darbi is unavailable to testify at trial. However, the Government represented that if Al Darbi is unavailable for live testimony at trial and if the Commission does not admit Al Darbi's deposition testimony the Government will, in spite of prior representations to the contrary, seek to admit Al Darbi's 2002 statements.

d. The Commission conducted an evidentiary hearing[3] and heard oral argument[4] on the motion during the April–May 2022 session of the Commission.

2. **Burden of Proof**. "When an appropriate motion or objection has been made by the defense under [Military Commission Rule of Evidence (M.C.R.E.) 304], the prosecution has the burden of establishing the admissibility of the evidence." M.C.R.E. 304(d).

[3] Unofficial/Unauthenticated Transcript of the Motions Hearings dated 28 April 2022 at pp. 16137–16324.
[4] Tr. dated 29 April 2022 at pp. 16340–16385.

3. **Findings of Fact**.

a. Al Darbi is a named co-conspirator in this case. He was captured in June 2002. Following his capture, he was transferred to United States custody and moved to Bagram Air Base in Afghanistan in early August 2002, where he was detained for approximately eight months.

b. Upon his arrival at Bagram, Al Darbi, hooded and shackled, was subjected to the menacing sound of barking dogs. It was there at Bagram during his in-processing that Al Darbi met Damien Corsetti, a United States Army soldier who served as a counterintelligence agent. During the in-processing, Al Darbi was stripped naked, subjected to a body cavity search, given a brief medical examination, and instructed on the rules of the facility. He was then shackled and hooded again and taken to a screening room where he was questioned to determine his level of knowledge and his level of cooperation. Upon his arrival, Al Darbi was assessed by the screener to be highly knowledgeable but uncooperative.

c. The normal protocol for any new detainee at Bagram was for the detainee to be held in isolation and subjected to 48 hours of sleep deprivation. Detainees would be kept awake by guards who would yell at the detainees, play loud music, force the detainees to stand up in the isolation cell, or shackle the hands of the detainees over their heads through "hog wire" on the ceiling, such that the detainee was forced to stand with his hands shackled above his head.

d. Some detainees, such as Al Darbi, were subjected to an initial 72-hour "more intense" process referred to as "monstering" or "fear up harsh." Mr. Corsetti was assigned to conduct the monstering of Al Darbi. "Monstering" was a choreographed process by which interrogators would constantly engage with detainees, providing only 15-minute intervals where detainees

might try to rest. Monstering included forcing detainees such as Al Darbi into "extremely painful" stress positions, depriving the detainees of sleep, subjecting the detainees to a constant stream of interrogation, the use of bright halogen lights to cause discomfort, as well as the use of yelling and the throwing and breaking of furniture to scare detainees. The purpose of monstering was to break a detainee's will to resist interrogation and to "remove all hope from the prisoner."[5]

e. Mr. Corsetti used a variety of stress positions on Al Darbi in August 2002. One of those stress positions included forcing Al Darbi to kneel on the concrete floor with his hands shackled above his head. Another stress position involved forcing Al Darbi to lean against a wall at a 45-degree angle with his hands behind his head and only his forehead touching the wall, thereby causing his body weight to be held up by his forehead. Other times, Al Darbi was forced to hold a chair above his head for a long period of time. Al Darbi would be forced to remain in stress positions for hours at a time. Occasionally, when Al Darbi was unable to maintain a stress position, Mr. Corsetti or another person would kick him to force him back to the proper position. Mr. Corsetti and his colleagues practiced some of the stress positions on each other out of curiosity and found the positions to be "extremely painful," even after spending only a few minutes in a given stress position.

f. Mr. Corsetti also used a practice that he and his colleagues termed "casual cruelty," which involved further demeaning and dehumanizing detainees. "Casual cruelty" generally involved putting detainees, such as Al Darbi, in stress positions while Mr. Corsetti would casually read a book. At times, Mr. Corsetti would treat Al Darbi as an inanimate object, using him as a foot rest while Mr. Corsetti read a book, or using Al Darbi's shirt pocket as an ash tray.

[5] Tr. at 16178.

At other times, Mr. Corsetti required Al Darbi to engage in vigorous physical exercises to cause him discomfort and distress.

g. The monstering process also included substantial sleep deprivation. Although detainees were technically required to be permitted four hours of sleep per 24-hour period, the interpretation of that requirement when Al Darbi arrived at Bagram was that detainees were not entitled to four consecutive hours of sleep. The practice in place was to periodically leave a detainee alone for approximately 15 to 30 minutes before resuming interrogation or other monstering processes, so long as the detainee was provided a cumulative, non-consecutive total of four hours alone during a 24-hour period. This process ensured that detainees such as Al Darbi spent days at a time without any meaningful sleep. The guards would shackle detainees in standing positions and play loud music at other times to prevent detainees from sleeping. Mr. Corsetti estimates that Al Darbi may have gone through one week of sleep deprivation after his arrival at Bagram in early August 2002. At a minimum, Al Darbi experienced at least a 72-hour period with little or no sleep, combined with the other monstering processes.

h. Another technique the guards and interrogators used to break the will of detainees like Al Darbi included the use of hot halogen lamps placed in close proximity to a detainee. Other times, Mr. Corsetti would pour water over Al Darbi's head, while he was hooded and positioned near the hot halogen lights. The combination of those factors made it difficult for Al Darbi to breath under the hood.

i. While the monstering period was ongoing and for several weeks afterward, Al Darbi was subjected to extensive interrogation by military interrogators. Mr. Corsetti was not one of Al Darbi's assigned interrogators. Instead, Mr. Corsetti's role was to break Al Darbi's ability or

willingness to resist providing his assigned interrogators with information. Mr. Corsetti conducted approximately 20–30 "sessions" with Al Darbi over the course of approximately six weeks. After the more intense monstering period was over for Al Darbi, Mr. Corsetti would routinely pay visits to Al Darbi, sometimes at the request of Al Darbi's interrogators, in order to remind Al Darbi that Al Darbi was better off talking to his assigned interrogators rather than having to undergo further monstering at the hands of Mr. Corsetti.

j. After the initial period of isolation, Al Darbi was moved to a chain-link holding pen with dozens of other detainees. The detainees in the pens were not permitted to move from a 3' x 5' blanket that was laid on the floor which defined each detainee's personal space, other than to use the toilet. Although dozens of detainees lived in each pen, the detainees were not permitted to speak to each other. The toilet facility for the detainees in the pens was a "mess bucket," which consisted of half of a 55-gallon drum filled with diesel fuel in which detainees would urinate and defecate. A curtain hung around the drum to conceal only the lower half of a person using the mess bucket. Mr. Corsetti equated the smell in the pen area to be similar to the elephant house at the National Zoo.

k. On one occasion, one of the mess buckets was spilled in the detention area as it was being removed to have the contents burned. The guards tasked detainees to clean up the mess with mops and dust pans. When Mr. Corsetti saw what was going on, he told the guards that he wanted Al Darbi to clean up the approximately 30 gallons of spilled fuel, urine, and feces. Mr. Corsetti forced Al Darbi alone to clean up the mess using only two pieces of cardboard, which quickly became saturated, leaving Al Darbi to clean up the mixture of diesel, urine, and

feces with his hands. While he was doing so, Mr. Corsetti laughed at him. According to Mr. Corsetti, "that was the straw that broke his back right there."[6]

l. Although Al Darbi was initially classified upon his arrival at Bagram as highly knowledgeable but not cooperative, during the approximately six weeks Al Darbi interacted with Mr. Corsetti Al Darbi transitioned to a cooperative state and was willing to speak to interrogators.

m. Beginning on 24 August 2002, Federal Bureau of Investigation (FBI) Special Agents (SAs) Roberts and Fuller began conducting custodial interviews of Al Darbi at Bagram. Before beginning the interviews of Al Darbi, SA Fuller spoke to the military interrogators at Bagram to learn more about Al Darbi. The FBI interviews were conducted in the same building in which Al Darbi was detained, monstered, and interrogated for the prior three weeks since his arrival at Bagram. Al Darbi cooperated fully with the FBI agents from the very beginning of their interviews. During one such interview, Al Darbi informed the agents that he was tired because he had been interviewed the previous night by military interrogators.

n. The FBI agents conducted "a couple dozen" interviews lasting from six to ten hours each between 24 August 2002 and 17 October 2002. Between 24 August 2002 and 3 September 2002, the FBI agents interviewed Al Darbi on an almost daily basis. Al Darbi was never advised that he had a right to remain silent. Beginning on 26 August 2002, Al Darbi made statements to the FBI agents that incriminated the Accused in offenses charged in this case. Al Darbi also provided information related to the Accused's location in the United Arab Emirates, where the Accused was ultimately apprehended.

[6] Tr. at 16176.

o. Mr. Corsetti is now a former service member of the U.S. Army. He was charged in 2006 with a number of offenses related to the alleged abuse of Al Darbi, including allegations of maltreatment, assault consummated by battery, and indecent acts. He was tried by a court-martial, but was ultimately acquitted on all charges.

4. Law & Analysis.

a. Of those violations of human dignity that exist, torture is enumerated as an "evil[] of most immediate concern." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *Filartiga v. Pena*, 630 F.2d 876, 890 (2d Cir. 1980)). "Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed . . . the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." *Filartiga*, 630 F.2d at 890. "Torture, and evidence obtained thereby, have no place in the American system of justice (or of any nation for that matter)." *United States v. Abu Ali*, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005). "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because the declarations produced by torture are not premises from which a civilized forum will infer guilt." *Lyons v. State of Okl.*, 322 U.S. 596, 605 (1944). "[A] confession obtained by means of torture may be excluded on due process grounds as '[in]consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *United States v. Karake*, 443 F. Supp. 2d 8, 50 (D.D.C. 2006) (quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936)); *see also Linkletter v. Walker*, 381 U.S. 618, 638 (1965); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)).

Admissibility of Al Darbi's 2002 Statements

b. The Defense moved the Commission to suppress statements Al Darbi made to FBI SAs Roberts and Fuller between 24 August 2002 and 3 September 2002 on the grounds that those statements were obtained as a result of torture or cruel, inhuman, or degrading treatment, citing the prohibitions contained in 10 U.S.C. § 948r and M.C.R.E. 304(a)(1). The Defense does not allege that SAs Roberts or Fuller mistreated Al Darbi while they were interviewing him. Instead, the Defense alleges that the statements made to the FBI agents by Al Darbi were a direct result of the treatment he endured at the hands of Damien Corsetti and other military guards and interrogators prior to and potentially contemporaneously with the FBI interviews conducted in August and September 2002.

c. The Government originally represented that Al Darbi's 2002 statements to the FBI would not be offered by the Prosecution at trial, except possibly in rebuttal. The Government has since modified its position and now wishes to reserve the ability to offer those statements at trial, if necessary. In argument on the motion, Trial Counsel argued that Al Darbi's statements were not obtained through torture or cruel, inhuman, or degrading treatment.

d. M.C.R.E. 304(a)(1) provides, "[n]o statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a trial by military commission, except against a person accused of torture or such treatment as evidence that the statement was made." *See also* 10 U.S.C. § 948r(a).

e. M.C.R.E. 304(b)(3) defines torture as:

> [A]n act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person

> within the actor's custody or physical control. "Severe mental pain or suffering" is defined as 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.

The Detainee Treatment Act of 2005, as cited in M.C.R.E. 304(a)(1), states, "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." 42 U.S.C. § 2000dd(a).

f. M.C.R.E. 304(b)(4) mostly mirrors the definition of "cruel, inhuman, or degrading treatment or punishment" set forth in 42 U.S.C. § 2000dd(d), defining the terms as follows:

> The term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984, without geographical limitation.

The language of this section, known as the McCain Amendment, prohibits cruel, inhuman, or degrading treatment or punishment regardless of geographic location or nationality. "Accordingly, it appears that the McCain Amendment is intended to ensure that persons in U.S. custody or control abroad cannot be subjected to treatment that would be deemed unconstitutional if it occurred in the United States." AE 335B at 17, Attach. A.

g. In 1992, the United States Army published Field Manual (FM) 34-52, related to "Intelligence Interrogation." That version of FM 34-52 was in effect in 2002 when Al Darbi was detained at Bagram. FM 34-52 applied to the interrogation of "captured, detained, or retained persons," to include suspected terrorists, "until their precise status has been determined by competent authority." FM 34-52 at 1-7. The FM prohibited "acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid to interrogation." *Id*. at 1-8. The FM defined "torture" as "the infliction of intense pain to body or mind to extract a confession or information, or for sadistic pleasure." *Id*.

h. FM 34-52 also provided specific examples of "physical torture," which included: infliction of pain through chemicals or bondage (other than legitimate use of restraints to prevent escape); "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time"; "any form of beating"; and "abnormal sleep deprivation." *Id*. One of the interrogation methods approved in FM 34-52 was the "Fear-Up (Harsh)" method, which included the use of a loud and threatening voice by the interrogator, punctuated if necessary by the throwing of objects across the room to "heighten the source's implanted feelings of fear." *Id*. at 3-15 to 3-16. FM 34-52 does not include the use of "extremely painful" stress positions, prolonged sleep deprivation, or forcing detainees to clean up mixtures of urine, feces, and diesel fuel with their hands as approved interrogation methods.

i. There is not necessarily a specific standard for determining what constitutes "cruel, inhumane, or degrading treatment," but it "encompasses acts falling short of torture." *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1321 (N.D. Cal. 2004) (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (cruel, inhuman or degrading treatment defined as including "acts

which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture.'")); *see also Jama v. U.S. I.N.S.*, 22 F. Supp. 2d 353 (D.N.J. 1998) (finding cruel, inhuman, or degrading treatment that "would clearly violate" the Eighth Amendment where detainees "were not permitted to sleep—bright lights shone on them 24 hours a day, and guards woke them up just to taunt them"; where detainees "could observe and smell other detainees using the toilets"; where detainees were "forced [] to stand facing a wall, with their legs spread, for up to an hour at a time"; and where detainees lived in unsanitary conditions, among other abuses).[7]

j. "The Supreme Court has stated that punishments violate the Eighth Amendment[8] when they 'are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain.'" *United States v. Lovett*, 63 M.J. 211, 214 (C.A.A.F. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–103 (1976)). In *Hope v. Pelzer*, the Supreme Court found an "obvious" violation of the Eighth Amendment where prison guards handcuffed an inmate to a hitching post, with his arms above shoulder height, for seven hours in the sun with no bathroom breaks and only a minimal amount of water provided. The Court found that "the use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment[, which] is nothing

[7] *See also Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002) ("Despite the absence of a distinct definition for what constitutes cruel, inhuman or degrading treatment, various authorities and international instruments make clear that this prohibition is conceptually linked to torture by shades of misconduct discernible as a continuum. The gradations of the latter are marked only by the degrees of mistreatment the victim suffers, by the level of malice the offender exhibits and by evidence of any aggravating or mitigating considerations that may inform a reasonable application of a distinction. Several courts and other authorities have recognized that: '[g]enerally, cruel, inhuman or degrading treatment includes acts which inflict mental or physical suffering, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture'").

[8] The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishments.

less than the dignity of man.'" 536 U.S. 730, 738 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).[9]

k. Trial Counsel argues that "torment is not torture,"[10] suggesting that although Al Darbi may have been tormented by Mr. Corsetti he was not subjected to the type of torture or cruel, inhuman, or degrading treatment that would render any of his statements inadmissible at a military commission.[11] Trial Counsel further argued that Mr. Corsetti's monstering techniques were in line with the Army FM because FM 34-52 authorized the use of the fear-up technique.[12] It is true that the Army FM did define and permit the Fear-Up (Harsh) method, which included yelling and throwing objects to instill fear in a detainee. However, FM 34-52 specifically addressed and prohibited techniques that it defined as a form of torture, to include abnormal sleep deprivation, infliction of pain through bondage, and forcing a detainee to sit, stand, or kneel in abnormal positions for prolonged periods of time. It is difficult then to accept Trial Counsel's suggestion that some of those prohibited techniques, which were clearly applied to Al Darbi, do not constitute torture or cruel, inhuman, or degrading treatment here.

l. The Commission has little difficulty reaching the conclusion that the treatment of Al Darbi in August 2002, as detailed in the testimony of Mr. Corsetti and in Al Darbi's written

[9] "The government cannot, however, meet its burden where defendants' statements were extracted only after countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinement, positional torture, and repeated physical abuse. It is a 'fundamental . . . concept' of our constitutional system of criminal law that 'neither the body nor the mind of an accused may be twisted until he breaks.'" *United States v. Karake*, 443 F. Supp. 2d 8, 94 (D.D.C. 2006) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 582 (1961)).
[10] Tr. at 16363.
[11] The Merriam-Webster dictionary doesn't necessarily align with Trial Counsel's distinction between torment and torture, defining "torment" alternatively as "extreme pain or anguish of body or mind" or "the infliction of torture (as by rack or wheel)." *Torment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/torment, last visited 29 June 2022.
[12] Tr. at 16362.

declaration, can best be described as either torture or cruel, inhuman, or degrading treatment.[13] Al Darbi was detained for several months in mid to late 2002 under terrible conditions at Bagram. He was humiliated and abused in ways that the Commission finds clearly meet the definition of cruel, inhuman, and degrading. Some of the treatment in question clearly falls in categories that the Army FM described as torture. During the aptly described "monstering" phase, he was shackled in extremely painful stress positions for hours on end, sometimes while forced to kneel on hard concrete floors with his hands shackled above his head or while leaning on a wall with his head supporting most of his body weight. He was subjected to up to a week of sleep deprivation, where he was scarcely allowed 15 minutes of respite from his torment. He was subjected to the use of hot, bright halogen lamps, sometimes while hooded and doused with water, to increase his level of discomfort. He was humiliated by being stripped naked, sometimes in front of female guards, being forcibly cavity searched, being used as an ottoman and an ash tray by Mr. Corsetti, and forced to live in a 15-square-foot space atop a small blanket in a pen full of 20 to 40 people. Finally, in what Mr. Corsetti deemed the straw that broke Al Darbi's back, he was forced to clean up half of a 55-gallon drum's worth of urine, feces, and diesel fuel which had spilled on the floor, using only two pieces of cardboard while Mr. Corsetti "laughed at him." The Commission is confident that almost any U.S. court would assess the type of treatment Al Darbi endured as a clear violation of the Eighth Amendment if a prisoner were treated in such a manner in a U.S. prison.

[13] The Commission need not definitively resolve the question of which of the specific abuses Al Darbi was subjected to rise to the level of torture as defined in M.C.R.E. 304(b)(3) as the Commission finds that, at a minimum, much of Al Darbi's treatment at the hands of soldiers at Bagram Air Base as described by Mr. Corsetti clearly meets the criteria of being cruel, inhuman, or degrading.

m. The Government's alternative argument is that, even if the treatment of Al Darbi constituted torture or cruel, inhuman, or degrading treatment, that treatment only lasted for approximately two weeks and the FBI interview started over three weeks into Al Darbi's detention. The Government's alternative position is that Al Darbi's statements to the FBI are divorced in some way from the abusive treatment that occurred a week or more before the interview began, such that Al Darbi's statements to the FBI were not "obtained by the use of torture, or by cruel, inhuman, or degrading treatment." This argument is unpersuasive.

n. Mr. Corsetti described a "monstering" process that was designed to "remove all hope from the prisoner," a process he described as "extremely effective."[14] The dehumanizing treatment was so effective that it transformed Al Darbi from a knowledgeable but uncooperative detainee when he arrived at Bagram into a fully cooperative and compliant witness for the FBI only a little more than three weeks later. To ensure that Al Darbi didn't return to his uncooperative ways, Mr. Corsetti recalled being "brought back in with al Darbi, over the course of the first month he was there, probably a half a dozen times past the monstering, of having to reinforce you don't want to talk to me, you want to talk to these people."[15] Additionally, the evidence suggests that while Al Darbi was being interviewed by the FBI he was also still being subjected to interrogations at night by military interrogators. So even if the worst of Al Darbi's treatment had passed by the time the FBI agents sat down with him on 24 August 2002, the effects of that treatment would have still been fresh in his mind, punctuated by routine appearances by Mr. Corsetti and other military interrogators to reinforce the harsh lessons regarding compliance learned by Al Darbi during his first few weeks in U.S. custody.

[14] Tr. at 16178.
[15] Tr. at 16168.

o. The Commission finds that there was no clear break between Al Darbi's experiences with the military interrogators and Mr. Corsetti and his interviews with the FBI. Therefore, there is no reasonable basis to conclude that the FBI interviews conducted in August and September 2002 were in any way separate or distinct from the mistreatment experienced by Al Darbi. While the FBI agents may not have directly engaged in any mistreatment of Al Darbi or may not have known the extent of the mistreatment, their interviews undoubtedly immeasurably benefitted from it. Ultimately, it is the Government's burden to establish the admissibility of Al Darbi's August to September 2002 statements to the FBI. The Government has not met their burden. On the facts presented, the Commission concludes that Al Darbi's statements to the FBI between 24 August 2002 and 3 September 2002 were directly obtained through the use of torture or by cruel, inhuman, or degrading treatment. Therefore, Al Darbi's statements to the FBI between 24 August and 3 September 2002 must be suppressed pursuant to M.C.R.E. 304(a)(1).

Derivative Evidence

p. In addition to seeking the suppression of Al Darbi's 2002 statements, the Defense also moves the Commission to suppress evidence or potential evidence that the Defense contends is improperly derived from the 2002 coerced statements. Specifically, the Defense seeks to suppress any future testimony by Al Darbi,[16] as well as statements made by the Accused in 2007.[17] The defense argument hinges on a strained reading of 10 U.S.C. § 948r, which commands that "[n]o statement obtained by the use of torture, or by cruel, inhuman, or degrading

[16] The Defense argues that "any live testimony from Mr. Al-Darbi would be derivative evidence that was obtained through the use of torture and should not be permitted." AE 335 at 5.
[17] The Defense asserts that the Accused's 2007 statements are derived from Al Darbi's 2002 statements because Al Darbi's statements to the FBI may have played some part in the capture of the Accused in 2002. The Defense argues the Accused's capture in 2002 then ultimately led to the Accused's 2007 statements to the FBI.

treatment . . . shall be admissible in a trial by military commission . . . .” The Defense interprets the statute to preclude the admission not only of statements directly obtained by the use of torture or cruel, inhuman, or degrading treatment such as Al Darbi’s 2002 statements, but also any other evidence derived therefrom.

q. The Defense[18] broadly asserts that “M.C.R.E. 304(a)(5) prohibits derivative evidence from statements obtained by torture or cruel, inhuman, or degrading treatment.” AE 335 at 5. However, M.C.R.E. 304(a)(5)(A) actually states:

> Evidence derived from a statement that would be excluded under section (a)(1) of this rule may not be received in evidence *against an accused who made the statement* if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that— (i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice.” (emphasis added).

In other words, the rule limiting the admissibility of evidence derived from statements obtained by torture or other abuse applies, by its own clear and unambiguous terms, to evidence derived from statements made *by the Accused*, not to evidence derived from statements made by a third party such as Al Darbi. There is no comparable rule that bars the admissibility of evidence derived from the coerced statements of third parties.

r. In the motion, the Defense relies extensively on *United States v. Ghailani*, 743 F. Supp. 2d 261 (S.D.N.Y. 2010), for the proposition that evidence derived from torture is inadmissible at trial. In *Ghailani*, the court ruled that the testimony of a witness was inadmissible because the witness was only identified and located because Ghailani mentioned the witness while being abused in Central Intelligence Agency custody. The court ruled the testimony of the

[18] The Commission recognizes that only one of the original signatories to AE 335 remains on the defense team.

third-party witness was inadmissible because the witness was identified and located (i.e., derived) as a direct result of Ghailani's coerced statement. Ultimately, the result in *Ghailani* is unhelpful to the Defense because the result in that case is entirely consistent with the plain language of M.C.R.E. 304(a)(5)(A), which precludes the admissibility of evidence derived from an accused's coerced statements.[19] The instant motion, however, differs in an important respect from *Ghailani* in that, here, it relates to evidence allegedly derived from coerced statements made by a third party, *not the Accused*. Because of that critical distinction, *Ghailani* does not assist in resolving the specific issue presented here.

s. Aside from the reliance upon *Ghailani*, the main thrust of the defense argument is that the language of M.C.R.E. 304(a)(5)(A) is inconsistent with the language of 10 U.S.C. § 948r and the legislative intent behind the statute. Specifically, the Defense argues that "[w]hen Congress banned the use of any evidence obtained from torture, or cruel, inhuman, or degrading treatment, it necessarily banned the use of any derivative evidence from such treatment as well." AE 335B at 3. The Defense's liberal reading of the actual statutory language aside, the Commission is unpersuaded by the Defense's broad interpretation of the legislative intent pertaining to the admissibility of derivative evidence.

t. Review of the legislative history surrounding 10 U.S.C. § 948r suggests that Congress was clearly concerned with prohibiting the use of statements obtained through torture or cruel, inhuman, or degrading treatment.[20] For example, Senator Carl Levin of Michigan stated in the

[19] Notably, derivative evidence obtained from coerced statements by an accused are not automatically subject to suppression. M.C.R.E. 304(a)(5)(A)(i–ii) provides exceptions to the general exclusionary rule where (1) the evidence would have been obtained even if the statement had not been made or (2) where the use of such evidence would otherwise be consistent with the interests of justice.

[20] The previous version of § 948r contained in the 2006 MCA also barred the admissibility of statements obtained by torture, but it permitted the admission, in some circumstances, of coerced statements. In the 2009 MCA, Congress deleted the provision permitting the admission of coerced statements and added "cruel, inhuman, or degrading

Congressional Record regarding the 2010 NDAA that they worked to "dramatically improve" the 2006 Military Commissions Act (MCA) by "precluding the use of coerced testimony" and that in doing so they intended to follow *Hamdan*.[21] Representative Louise Slaughter of New York stated, "the bill reforms the [MCA] to clarify rules and improve trial procedures to make military commissions fair and effective, and puts new revisions into place that would forbid the use of statements alleged to have been secured through cruel, inhuman, or degrading treatment."[22] However, the Commission finds no evidence from the legislative history to support the defense suggestion that Congress intended by 10 U.S.C. § 948r to bar the admissibility of all derivative evidence that might possibly be obtained as a result of coerced statements made by third parties.

u. Congressional silence in both the legislative history and in the resulting statute on the admissibility of evidence derived from coerced statements made by third parties may be due to the well-established concept in American jurisprudence that a criminal defendant typically does not have standing to assert the constitutional rights of third parties. For example, in *United States v. Payner*, 447 U.S. 727 (1980), the Supreme Court held that the defendant did not have standing under the Fourth Amendment to suppress evidence illegally obtained from a third party.[23] After

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treatment" to the list of statements that are inadmissible in a military commission. The requirement that detainee statements be made voluntarily and not while subject to cruel, inhuman, or degrading treatment was a significant change between the two versions of the statute.

[21] 155 Cong. Rec. S10663-02, 155 Cong. Rec. S10663-02, S10666. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

[22] 155 Cong. Rec. H11115-04, 155 Cong. Rec. H11115-04, H11117.

[23] *See also Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Anderson*, 772 F.3d 969 (2d Cir. 2014) (holding that it is "well settled" that the accused could not suppress, on substantive due process grounds, evidence obtained as a consequence of an illegal search of his wife rather than himself, but not deciding the question of whether evidence obtained by outrageous government conduct such as torture inflicted on a third party may never be excluded on due process grounds); *United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984) (holding that evidence derived as a result of the violation of a co-conspirator's rights was admissible, noting "[g]enerally, individuals not personally the victims of illegal government activity cannot assert the constitutional rights of others," but also noting that there are circumstances where the due process rights of an accused may be implicated when "the government seeks a conviction through the use of evidence obtained by extreme coercion or torture.")

all, "the court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *Id*. at 734.

v. Similarly, in *United States v. Bruton*, 416 F.2d 310 (8th Cir. 1969), the Eighth Circuit Court of Appeals addressed the defendant's standing to object to the testimony of a co-conspirator who had been coerced into a confession by the police. The court applied the same principle as that set forth in *Payner* and other Fourth Amendment standing cases, holding that the defendant lacked standing to object to the co-conspirator's testimony even though the witness's prior confessions implicating the defendant in the crimes were coerced by the police. The court noted, "[i]t has long been held that the Fifth Amendment right to be free from self-incrimination is a personal right of the witness." *Id*. at 312 (listing cases). If Congress had intended to establish a rule whereby an accused could suppress evidence derived not from a violation of the Accused's rights, but from the violation of the rights of a third party, Congress would presumably have indicated in the statute some intent to do so, especially in light of the ample judicial precedent to the contrary.

w. The consideration of proper standing to object to the violation of a third party's rights emphasizes the difference in the way derivative evidence is treated by the Military Commission Rules of Evidence. Evidence derived (found) as a result of coercion of an accused is evidence that is a direct result of a violation of the accused's right not to be a witness against himself (*see* 10 U.S.C. § 948r(b)) and is therefore precluded in most instances by M.C.R.E. 304(a)(5)(A). Arguably, however, reliable evidence that is derived from the violation of a third party's rights poses no inherent danger to the rights of an accused, which may explain why such evidence is not barred by the rule.

x. Ultimately, neither the legislative history, nor the plain language of the statute supports the Defense's expansive interpretation of 10 U.S.C. § 948r. Returning to the language used by the Defense in AE 335B, the Defense suggests that the intent of Congress in 10 U.S.C. § 948r was to ban "the use of *any evidence*" obtained from torture, or cruel, inhuman, or degrading treatment. AE 335B at 3 (emphasis added). But that is not what the statute says. The plain language of 10 U.S.C. § 948r is that "[n]o *statement* obtained by the use of torture . . . shall be admissible in a military commission . . . ." (emphasis added). If Congress did intend to bar the use of "any evidence" derived from statements obtained by the torture of third parties, as the Defense contends, it would have been easy for legislators to say so. In the absence of evidence to the contrary, Congress can be presumed to have intentionally chosen the language of the statute for a particular reason. The words that were ultimately chosen do not support the defense argument here regarding the admissibility of independent evidence that was derived (located) based on the coerced statements of third parties.

y. Further, if Congress intended, as the Defense suggests, to preclude the admissibility of *any evidence* derived as a result of the torture or abuse of third parties because torture or abuse is *malum in se*, it would make little sense for Congress to limit the prohibition on derivative evidence only to "statements," as opposed to all other potential forms of evidence that might conceivably be derived from statements obtained by torture. If Congress intended in 10 U.S.C. § 948r to bar the admissibility of all derivative evidence, Congress could have easily made such an intent clear by specifically including some reference to "derivative evidence." Derivative evidence obtained as a result of coerced statements made by third parties is clearly not *per se* barred by M.C.R.E. 304(a)(5).

z. One might reasonably conclude that Congress should have barred the admissibility of evidence that was in any way derived from torture or other forms of coercion, whether of an accused or of some third party. Such an exclusionary rule might serve to deter any future deplorable and inhumane treatment of individuals by representatives of our government. However, there are countervailing considerations associated with preventing the abuse of witnesses on the one hand and considering the costs to society and the search for truth of excluding reliable evidence in a criminal case on the other. The exclusionary "rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). As such, the rule does not "proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.*; *see also United States v. Janis*, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted."). Moreover, because the rule is prudential rather than constitutionally mandated, the Supreme Court has held it to be applicable only where its deterrence benefits outweigh its "substantial social costs." *United States v. Leon*, 468 U.S. 897, 909 (1984); *see also Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362–63 (1998); *Stone v. Powell*, 428 U.S. 465, 482, 486 (1976). Ultimately, in drafting the MCA, Congress was clearly concerned with the admissibility of statements directly arising from torture or cruel treatment, but did not see fit to establish an exclusionary rule when it comes to evidence derived from the coerced statements of a third party.

aa. The Government's position and the plain reading of M.C.R.E. 304(a)(5)(A) suggests that evidence derived from torture is admissible as long as the person tortured is not the accused. This position suggests that the U.S. Government could torture any number of people until the victims of the torture produce evidence that incriminates an accused as long as the Government does not offer into evidence the actual statements made under torture. "It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . . . Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness." *LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974). However, a military judge is not powerless to prevent injustice that might occur in such an egregious scenario.

bb. The fact that M.C.R.E. 304(a)(5) does not expressly bar the admissibility of evidence derived from the coerced statements of third parties does not end the inquiry when it comes to a judicial determination of whether to admit such derivative evidence at trial. "Judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding." *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (*citing United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998); *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988)). Military judges have the "*sua sponte* duty to insure [] that an accused receives a fair trial." *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018)[24] (citing *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) (internal citations omitted)).

cc. Although courts generally have determined that an accused lacks standing to assert the constitutional rights of third parties to bar the admission of evidence, some courts have held

[24] *Reconsideration denied*, 78 M.J. 34 (C.A.A.F. 2018), *and cert. denied*, 139 S. Ct. 434 (2018).

that placing in evidence a coerced statement of a witness in a criminal case who is *not* a defendant may violate a constitutional right of the defendant. *Samuel v. Frank*, 525 F.3d 566, 569 (7th Cir. 2008); *see Williams v. Woodford*, 384 F.3d 567, 593–94 (9th Cir. 2002); *United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999); *Wilcox v. Ford*, 813 F.2d 1140, 1147–49 (11th Cir. 1987); *LaFrance*, 499 F.2d at 35–36. Under the appropriate circumstances, an accused may challenge the government's use against them of a coerced confession given by another person. "Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause." *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994).[25] The relevant inquiry is whether the admission of the challenged evidence would "so infect[ ] the trial with unfairness as to make [any] resulting conviction a denial of due process." *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (internal citation omitted).

dd. The predominant reasoning in cases where courts have found that the admission into evidence of the coerced statements of witnesses violates an accused's due process rights is the inherent unreliability of the coerced statements. Statements made under torture or other cruel treatment should rightly be considered presumptively unreliable. To admit patently unreliable coerced statements into evidence against an accused may violate that accused's right to a fundamentally fair trial. However, other forms of evidence that may be derived (or located) as a result of coerced statements of a third party may yet be reliable and, therefore, potentially admissible at trial. Consider, for example, a hypothetical witness who has been physically

[25] *See also Clanton v. Cooper*, 129 F.3d 1147, 1157–58 (10th Cir. 1997), *overruled on other grounds by Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007) ("Clanton may contest the voluntariness of Eaves's confession not based on any violation of his constitutional rights, but rather as a violation of her own Fourteenth Amendment right to due process.").

coerced by an investigator into naming the defendant as the murderer and also revealing the location of the murder weapon, which contains the defendant's fingerprints. While the statement accusing the defendant of murder might be deemed unreliable due to the coercion and therefore inadmissible at trial, the murder weapon and the defendant's fingerprints may constitute reliable evidence that the defendant committed the murder. Suppressing the murder weapon in this scenario would arguably be a windfall to the defendant when the rights violated were those of the witness rather than the defendant. In addition, suppressing the physical evidence would potentially deprive the court of reliable evidence in the search for the truth.[26]

ee. In addition to considering concerns related to the impact of unreliable evidence on the fair trial rights of an accused, a military commission judge is compelled to analyze any evidence offered into evidence through the lens of M.C.R.E. 403, which provides that evidence shall be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the commission or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. "Even if it is concededly relevant, unduly prejudicial evidence may be excluded to prevent jurors from impermissibly relying on biases, dislikes, or the emotional impact of the evidence . . . ." *United States v. Straker*, 800 F.3d 570, 589 (D.C. Cir. 2015) (citing *United States v. Douglas*, 482 F.3d 591, 600 (D.C. Cir. 2007); *United States v. Manner*, 887 F.2d 317, 322 (D.C. Cir. 1989)). A primary purpose of M.C.R.E. 403 is to prevent findings of guilt based on impermissible grounds. The admission

[26] *See Alderman v. United States*, 394 U.S. 165, 174–175 (1969) ("The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed . . . . But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.").

against an accused of evidence derived from a statement made under torture, even of a third party, may in some circumstances constitute such impermissible grounds. Such evidence may be substantially more unfairly prejudicial or misleading than it is probative.

ff. Exclusion of evidence derived from statements obtained through torture would not be without societal costs; however, permitting the admission of evidence derived from the torture of a named third-party co-conspirator, by the same government that seeks to prosecute an accused using such evidence, may have greater societal costs. Permitting admission of such evidence might greatly undermine the actual and apparent fairness of the criminal proceeding against an accused by infecting a trial with unfairness sufficient to make any resulting conviction a denial of due process. *See Romano*, 512 U.S. at 12.

gg. After careful consideration of the arguments presented, the Commission disagrees with the defense interpretation of 10 U.S.C. § 948r. Neither the statute, nor the implementing Rule of Evidence bar the admissibility of evidence derived from the coerced statements of third parties. Nevertheless, the Commission finds that the admission of statements derived from the torture of a third-party co-conspirator may be determined to be inadmissible, as discussed herein, if such evidence lacks reliability, deprives the Accused of a fair trial, results in unfair prejudice that outweighs any probative value, or where the deterrence value of excluding such tainted evidence would substantially outweigh the costs to society of excluding the evidence.

hh. Although Al Darbi's 2002 statements to the FBI agents must be suppressed because they constitute statements that were directly obtained through the use of torture or cruel, inhuman, and degrading treatment, evidence derived from those statements is not barred by the plain language of 10 U.S.C. § 948r or M.C.R.E. 304(a)(5). Therefore, the defense motion to

suppress any evidence that may have derived from Al Darbi's 2002 statements must be denied on the theory presented by the Defense.

ii. Even if the Commission were to agree with the defense contention that the MCA or the rules of evidence barred the admissibility of evidence derived from the coerced statements of third parties, the Commission would not necessarily be convinced that Al Darbi's deposition testimony, any other potential future testimony by Al Darbi, or the 2007 statements made by the Accused constitute evidence derived from Al Darbi's 2002 statements. Al Darbi's deposition took place 15 years after his statements to the FBI and after he pleaded guilty to charges against him. Such an extended period of time between the coerced statements and the testimony at issue greatly undermines any assertion that the 2017 testimony is necessarily derived from the 2002 statements. With respect to the Accused's 2007 statements, the Defense has offered only speculation to suggest that the Accused was captured as a direct result of Al Darbi's 2002 statements, implying that the Accused otherwise would not have been captured.

jj. To be clear, the Commission's denial of the defense motion to suppress "future" testimony of Al Darbi (including his 2017 deposition testimony) should not be read to suggest that Al Darbi's deposition testimony or any other testimony he may be invited to provide in the future will necessarily be admissible at trial. As discussed herein, the Commission must still consider the reliability of Al Darbi's 2017 testimony or any other potential future testimony and the question of whether or not the admission of such evidence would violate the Accused's right to a fair trial. The Commission must also apply M.C.R.E. 403 to evaluate whether any probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the commission. That is a separate question from the one presented

here, and the Commission will evaluate the admissibility of any testimony from Al Darbi when or if it is offered into evidence at trial. Similarly, although the Commission will not suppress the Accused's 2007 statements on the grounds asserted here by the Defense, the Commission makes no final ruling on the admissibility of those statements, which are the subject of another motion to suppress pending before the Commission. *See* AE 467.

5. **Ruling**. The defense motion in AE 335 is **GRANTED IN PART** and **DENIED IN PART** as follows:

a. The defense motion to suppress Al Darbi's statements to FBI agents made between 24 August 2002 and 3 September 2002 is **GRANTED** pursuant to M.C.R.E. 304(a)(1).

b. The defense motion to suppress evidence purportedly derived from those statements is **DENIED** at this time.

So **ORDERED** this 30th day of June 2022.

//s//
LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge