ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2010

NO. 10-5087

In the

United States Court of Appeals

for the

District of Columbia Circuit

MOHAMMEDOU OULD SALAHI, Detainee, Guantanamo Bay Naval Station; YAHDIH OULD SALAHI, as Next Friend of MOHAMMEDOU OULD SALAHI,

Petitioners-Appellees,

v.

BARACK OBAMA, President of the United States; ROBERT M. GATES, Secretary, United States Department of Defense; TOM COPEMAN, Army Brigadeer General, Commander, Joint Task Force GTMO; DONNIE THOMAS, Army Colonel, Commander, Joint Detention Operations Group, JTF-GTMO,

Respondents-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIAIN CASE NO. 05-CV-0569, JUDGE JAMES ROBERTSON

CORRECTED BRIEF OF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS-APPELLEES AND URGING AFFIRMANCE

DAVID R. BERZ
WEIL GOTSHAL & MANGES LLP
1300 Eye Street, N.W.
Suite 900
Washington, DC 20005
(202) 682-7000

GREGORY SILBERT
JENNIFER H. WU
RITU PANCHOLY
WEIL GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

MICHAEL W. PRICE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street, N.W.
12th Floor
Washington, D.C. 20036
(202) 872-8600 ext. 258

Attorneys on Behalf of Amicus Curiae

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing in this case are listed in Appellees' and Appellants' briefs, as are all rulings and related cases.

CERTIFICATE PURSUANT TO CIRCUIT RULE 29

Pursuant to Circuit Rule 29(d), counsel for *amicus curiae* the National Association of Criminal Defense Lawyers certifies that, as of the date of this certification, no other brief *amicus curiae* of which we are aware addresses the government's claim that it is proper to rely on statements obtained after torture. In this brief, we discuss exclusively why such statements are unreliable and further why such statements obtained after torture are involuntary and cannot provide a basis for detention. Counsel for *amicus curiae* submits that this is the only brief that addresses the weight given to statements obtained after torture discussed in the district court's decision. We understand that there will be a brief *amicus curiae* filed on behalf of the Brennan Center for Justice at New York University School of Law concerning the scope of the government's authority and the rule of law, and we therefore do not address those issues.

Dated: June 16, 2010

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the National Association of Criminal Defense Lawyers ("NACDL") states that NACDL is a non-partisan professional bar association that seeks to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL is a non-profit corporation, NACDL has no parent corporations, and no publicly held company has a 10% or greater ownership in NACDL.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

* Authorities on which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

OTHER AUTHORITY

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

The National Association of Criminal Defense Lawyers ("NACDL") submits this amicus brief in support of Petitioner-Appellee Mohamedou Ould Salahi, urging this Court to affirm the district court's decision granting habeas petitioner's motion for release into the United States. This brief is filed with the consent of all parties and pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29.

INTEREST OF AMICUS CURIAE

NACDL, founded in 1958, is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for people accused of crime or wrongdoing. NACDL has 10,000-plus members, including public defenders, private practitioners, law professors, and judges, as well as affiliates totaling more than 40,000 lawyers.

Among NACDL's objectives are to promote the fair and proper administration of justice and ensure due process for even the least among us who may be accused of wrongdoing. To this end, NACDL has filed numerous *amicus curiae* briefs since 2002, in this Court and others, seeking to preserve due process and proper treatment for individuals detained in the current conflict, including the right of Guantanamo detainees to challenge the lawfulness of their detention through writs of *habeas corpus*.

SUMMARY OF ARGUMENT

Since his detention in November 2001, Mr. Salahi has been subjected to repeated torture and other mistreatment as part of a sustained program of highly coercive interrogation. In particular, the government authorized a 90-day special interrogation plan for Mr. Salahi at Guantanamo, which prescribed techniques "intended to emotionally and psychologically weaken him through 'drastic changes in his environment.'"[1] The horrifying circumstances of Mr. Salahi's torture include threats against Mr. Salahi's family, unwanted sexual advances, physical beatings, sleep deprivation, and isolation in a cold room known as the "freezer." In fact, the government's own lawyer determined that Mr. Salahi's self-incriminating statements were so tainted by torture that they could not ethically be used against him.[2]

Where, as here, the statements wrung from Mr. Salahi are the product of physical and psychological abuse, they do not meet the standard of reliability and voluntariness required in a federal habeas proceeding and cannot be used to sustain

---

[1] Report of the Committee on Armed Services United States Senate ("Senate Report") at 137, *Inquiry into the Treatment of Detainees in U.S. Custody*, Nov. 20, 2008.

[2] *See* Jess Bravin, *The Conscience of the Colonel*, WALL STREET JOURNAL, Mar. 31, 2007 *available at* http://pierretristam.com/Bobst/07/wf040107.htm and http://online.wsj.com/article_email/SB117529704337355155-lMyQjAxMDE3NzM1MTIzOTE3Wj.html.

his detention. As we explain below, the positions advocated by Appellants conflict with Supreme Court and this Court's prior authority and rulings. First, the law is clear that any evidence derived from statements made by Mr. Salahi in response to torture or ill-treatment must be excluded because of their unreliability. Psychological studies confirm the correctness of the law that coerced confessions are unreliable. Second, the government cannot evade the consequences of its mistreatment of Mr. Salahi by relying only on those later statements that it contends were not tainted by earlier mistreatment. After interrogators coerced statements from Mr. Salahi, all subsequent statements were made in the shadow of the original confession, rendering them equally involuntary and unreliable, and the government cannot meet its burden of proving otherwise.

Accordingly, the decision of the district court should be affirmed.

STATEMENT OF FACTS SUPPORTING ILLEGAL COERCION AND TORTURE

As an initial matter, *amicus curiae* do not have access to the classified record in this case. We note, however, that investigations by the military, international bodies, and human rights organizations have documented abusive interrogations of detainees at Guantanamo Bay, including of Mr. Salahi.[3]

Mr. Salahi was first apprehended and detained by the United States in November 2001 on suspicion that he had been involved in the failed "Millennium Plot" to bomb the Los Angeles International Airport. District Court Order Unclassified/For Public Release ("District Court Order") at 1. Mr. Salahi was then

[3] *See, e.g.*, Unclassified Report of the Department of Justice at 122 ("DOJ Report"), *A Review of the FBI's Involvement and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq*, May 2008; Senate Report at 135-143; Dep't of Def., Army Regulation 15-6: Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 63 (Aug. 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf; United Nations, *Conclusions and Recommendations of the Committee against Torture: United States of America* ¶¶ 24, 26, 30 (July 25, 2006); *see also* Jonathan Hafetz, *Symposium: Constitutional Implications of the War on Terror: Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 N.Y.U. ANN. SURV. AM. L. 433, 449-454 (2007); Jeremy W. Newton, *False Confession: Considerations for Modern Interrogation Techniques at Home and War*, 9 J.L. & SOC. CHALLENGES 63, 81-82 (2008).

held for four years without being charged before he filed his habeas petition in 2005. *Id.*[4]

The government's treatment of Mr. Salahi during his detention was inhumane and inherently coercive, as discussed below. The Supreme Court has repeatedly condemned far less shocking conditions to be impermissible. *See, e.g.*, *Ashcraft v. State of Tennessee*, 322 U.S. 143, 152 n.8, 154 (1944) (36 hours of interrogation "inquisition[al]" and "inherently coercive"); *Darwin v. Connecticut*, 391 U.S. 346, 348 n.2 (1968) (48 hours of incommunicado questioning); *Clewis v. Texas*, 386 U.S. 707 (1967) (interrogation for nine days with little sleep); *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (confession made after two weeks in "windowless sweatbox"); *Davis v. State of North Carolina,* 384 U.S. 737, 745-46 (1966) (16 days of detention and interrogation); *see also Ammons v. Mississippi*, 80 Miss. 592, 595 (1902) (confinement in cramped sweatbox).

Indeed, the degree of coercion in these cases pales in comparison to what Mr. Salahi experienced through the period of his arrest and detention in Jordan, his transfer to Bagram, and his detention at Guantanamo Bay, Cuba. The facts, as discussed below, are not in dispute and are derived from government reports.

[4] His case, like all others, was stayed until the Supreme Court held that Guantanamo detainees have a right to habeas proceedings and this Court has jurisdiction over them. District Court Order at 1.

A. Abuse in Jordan

After his arrest, Mr. Salahi was transferred to Jordan,[5] where he was interrogated and physically and psychologically abused for eight months.[6] Mr. Salahi has stated that "what happened to me [in Jordan] is beyond description" as "they tried to squeeze information out of me."[7]

B. Abuse in Bagram

After eight months of being held in incommunicado military detention in Jordan, Mr. Salahi was turned over to U.S. custody in Afghanistan (Bagram) on July 19, 2002. DOJ Report at 122. Mr. Salahi testified:

> They took off my clothes and I said this is an American technique not an Arabic one because Arabs don't usually take all your clothes off. So they stripped me naked like my mom bore me, and they put new clothes on me. . . I did not want them to take my picture. I was in chains, a very bad suit, I had lost so much weight in Jordan I was like a ghost and I did not want my family to see me in this situation – that was my worst fear in the world. Besides that I had to keep my water for eight hours straight. Because the Americans [had me put] on a diaper but psychologically I couldn't [urinate] in the diaper.[8]

---

[5] *See* DOJ Report at 122.

[6] *See, e.g.,* William Fisher, *Ordered Release of Guantanamo Prisoner Mohamedou Ould Salahi Sets Off Firestorm (*Apr. 13, 2010), *available at* http://www.newjerseynewsroom.com/international/ordered-release-of-guantanamo-prisoner-mohamedou-ould-salahi-sets-off-firestorm.

[7] Mr. Salahi's quotes are reported in the unclassified returns of the Combatant Status Review Tribunal (CSRT) hearing held on his case in Guantanamo in late 2004 and the follow-up Administrative Review Board (ARB) hearing in December 2005.

[8] *See* note 7, *supra.*

Mr. Salahi's account is confirmed by reports that the treatment of detainees at Bagram in 2002 is widely considered to be among the worst of any Defense Department detention facility in the entire system.[9]

C. Abuse in Guantanamo

In August 2002, Mr. Salahi was transported from Bagram to Guantanamo. DOJ Report at 122. The FBI immediately sought to interview Mr. Salahi and utilized rapport-building techniques to elicit information, but the military disagreed with the FBI's approach and was "extremely critical of the friendly tenor of the FBI's interview strategy." *Id.* In late May 2003, the FBI agents who were involved with Mr. Salahi left Guantanamo and the military assumed control of his interrogation. *Id.*

On July 1, 2003, General Geoffrey Miller signed a request from the Defense Intelligence Agency (DIA) seeking "Special Projects Status" for Mr. Salahi and approval for a 90-day special interrogation plan. *Id.* The special interrogation plan called for a highly coercive interrogation regime: "interrogations would be conducted for up to 20 hours per day on Mr. Salahi"; interrogators could pour

[9] *See, e.g.*, Douglas Jehl, *Army Details Scale of Abuse of Prisoners in Afghan Jail*, N.Y TIMES, Mar. 12, 2005, *available at* http://www.nytimes.com/2005/03/12/politics/12detain.html; Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, *available at* http://www.nytimes.com/2005/05/20/international/asia/20abuse.html

water on Mr. Salahi's head to "'enforce control'" and "'keep [him] awake'"; K-9 dogs could be present during interrogation to agitate Mr. Salahi. Senate Report at 135.

The details of what the government prescribed and what in fact ensued are chilling. General Miller's memorandum described at length other techniques that could be used against Mr. Salahi to break his ego, including "ridiculing him, making him wear a mask and signs labeling him a 'liar', a 'coward', or a 'dog'." *Id.* (quoting Interrogation of ISN 760 (January 16, 2003)). Specifically, interrogators could instruct Mr. Salahi to bark and perform dog tricks "'to reduce the detainee's ego and establish control.'" *Id.* at 135-36 (quoting the same). The memorandum also authorized certain methods that would offend Mr. Salahi's religious beliefs such as: shaving his head bare, forcing him to wear a burka, and subjecting him to a strip search to attack his ego. *Id.* at 136.

In addition, the memorandum provided that interrogators could deny Mr. Salahi the opportunity to practice his religion and authorized the use of a female interrogator in close physical contact. *Id.* Interrogators could also play music to stress Mr. Salahi and light in the interrogation room could be filtered with red plastic to produce a stressful environment. *Id.* The memorandum further permitted interrogators to use a strobe light in his interrogation room to reduce outside stimuli and present an austere environment to "'disorient [Mr. Salahi] and

add to [his] stress level,' and that a hood would be placed on Mr. Salahi in the booth' 'to isolate him and increase feelings of futility.'" *Id.* (quoting the same).

Mr. Salahi's interrogation at Camp Echo was "intended to emotionally and psychologically weaken him through 'drastic changes in his environment.'" *Id.* at 137 (quoting *ISN 760 Interrogation Plan* (July 1, 2003)). Interrogators apparently intended to replicate and exploit the paradoxical "Stockholm Syndrome" between detainee and his interrogators through a cruel course of physical and psychological torture. *Id.* Specifically, Mr. Salahi would be forced to "sit in a basic chair and 'be shackled to the floor and left in the room for up to four hours while sound is playing continually.'" *Id.* (quoting the same). This "practice of shackling him to the floor and subjecting him to loud music was to be repeated over several days, interrupted by actual interrogations," and Mr. Salahi would only be permitted "four hours of sleep every sixteen hours." *Id.*

The actual abuse that was inflicted upon Mr. Salahi is detailed in the DOJ and Senate Report, which confirm that the special interrogation plan was implemented in the summer of 2003. DOJ Report at 123-24, Senate Report at 139-140. It was only after that time that Mr. Salahi began providing information that the government relied upon to support Mr. Salahi's detention. *Id*. Mr. Salahi has since recanted the statements made to government officials that he maintains were coerced.

Mr. Salahi provided details of the abuse in 2004, stating, among other things that:

- he was left alone in a cold room known as the "freezer", where guards would prevent him from sleeping by putting ice or cold water on him or by noise;
- he was subjected to sleep deprivation for a period of 70 days by means of prolonged interrogations, strobe lights, threatening music, forced intake of water, and forced standing;
- he was deprived of clothing;
- two female interrogators touched him sexually;
- he was severely beaten.

DOJ Report at 124, *see also* Senate Report at 139-140. Further, Mr. Salahi continued to experience the effects of the abuse at least until mid-October. *See* Senate Report at 140 (describing Mr. Salahi's complaint of hallucinations).

The 2005 *Schmidt-Furlow* military investigation into FBI allegations of abuse at Guantanamo confirms that Mr. Salahi had been subjected to "environmental manipulation," *i.e.*, subject to the extremes of hot and cold using the air-conditioning, during the period of July to October 2003. *Schmidt-Furlow Report* at 22.[10] The investigation also concluded that Mr. Salahi was threatened with death and "disappearance" by military interrogators, and was told that his

[10] Army Regulation 15-6: Final Report: Investigation into FBI allegations of detainee abuse at Guantanamo Bay, Cuba Detention Center (2005) (*Schmidt-Furlow Report*), unclassified version available at http://www.defense.gov/news/Jul2005/d20050714report.pdf.

family was in U.S. custody and that he should cooperate in order to help them. *Id.* at 24-25. For example, Mr. Salahi was given a letter stating that, because of his lack of cooperation, U.S. agents in conjunction with Mauritanian authorities would interrogate his mother, and that, if she was uncooperative, she would be detained and transferred for long-term detention in Guantanamo. *Id.* at 24.

Even the FBI acknowledged that the treatment of Mr. Salahi presented grave concerns. DOJ Report at 122. Specifically, "FBI agents became concerned about the potential mistreatment of Mr. Salahi in the fall of 2003." *Id.* at 125. FBI agents confirmed that threats against Mr. Salahi's family were made, and Mr. Salahi was told that the threats would be carried out unless he cooperated. *Id.* at 128, 198. FBI agents also confirmed that Mr. Salahi was subjected to unwanted sexual advances, including physical contact. *Id*. at 190.

ARGUMENT

I. Coerced Statements Cannot Provide a Basis for Detention As a Matter of Law

It has long been a cornerstone of Anglo-American jurisprudence that a confession extracted through coercion cannot stand as a basis for depriving individuals of their liberty. *Ashcraft*, 322 U.S. at 155; *A(FC) v. Secretary of State of the Home Department*, [2005] UKHL 71 (H.L Dec. 8, 2005) ("common law has regarded torture and its fruits with abhorrence for over 500 years"—an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention").[11]

The rationale for such uniform rejection of torture is "the deep-rooted feeling that . . . life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-321 (1959). In other words, using coerced confessions is as contrary to the interests of society as it is to the interests of

[11] Courts regularly hold that coerced statements are inadmissible in criminal proceedings. *See, e.g., Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006) ("We require exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable."); *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("In the case of a coerced confession …, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless."); *see also Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

justice: "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961); *see also Rochin v. California*, 342 U.S. 165, 173 (1952) (use of coerced evidence offends basic notions of "decency" and would "afford the brutality the cloak of law").

Thus, courts will only rely on a confession that is "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961); *Reck v. Pate*, 367 U.S. 433, 440 (1961) ("confession cannot be deemed 'the product of a rational intellect and a free will'") (quoting *Blackburn v. States of Alabama*, 361 U.S. 199, 208 (1960)).

The iron-clad restriction against the use of involuntary confessions applies with particular force where, as here, the evidence was obtained through torture. *See, e.g., United States v. Heller*, 625 F.2d 594, 599 (5th Cir. 1980) ("if the conduct of the foreign officers shocks the conscience of the American court, the fruits of their mischief will be excluded"). Statements obtained through physical violence are *per se* involuntary and cannot be used to support or sustain a person's imprisonment. *Brown v. Mississippi*, 297 U.S. 278, 284-86 (1936). Where, as here, coercion is present during an interrogation, "there is no need to weigh or measure its effects on the will of the individual victim," and "any confession made

concurrently with torture or threat of brutality [is] too ***untrustworthy*** to be received as evidence of guilt." *Id.* (emphasis added); *see Stein v. New York*, 346 U.S. 156, 182 (1953), *overruled on other grounds by Jackson*, 378 U.S. at 368 (emphasis added).

"[A] finding of coercion," however, "need not depend upon actual violence by a government agent; a credible threat is sufficient." *Fulminante*, 499 U.S. at 287. A statement given under a "credible threat" of violence is enough to render it involuntary. *See, e.g., id.*; *Payne v. Arkansas*, 356 U.S. 560 (1958) (confession involuntary where officials offered protection against potential mob violence). Indeed, commentators have observed: "Threats of coercion are useful because they will often be more effective than actual coercion. Because 'most people underestimate their capacity to withstand pain,' the threat of pain can produce compliance." John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L. J. 1001, 1011, 1054-55 (2009).

Even coercion that falls short of violence or the threat of violence may render a statement involuntary. Coercion comes in many guises and, as the Supreme Court noted, "the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.'" *Blackburn*, 361 U.S. at 206. Accordingly, courts must also consider "less traditional forms of coercion, including psychological torture, as well as the

conditions of confinement . . . [to] assess[] the voluntariness of the statements." *United States v. Karake*, 443 F. Supp. 2d 8, 51 (D.D.C. 2006).

Thus, in *Brooks v. Florida*, the Supreme Court deemed involuntary a confession by a defendant housed in solitary confinement for fourteen days, who "saw not one friendly face from outside the prison," and who was "completely under the control and domination of his jailers." 389 U.S. at 414-15. The Court also found that the defendant's constricted, barren cell, and his restricted diet undermined the voluntariness of his confession. *Id.*

Similarly, in *Spano v. New York*, 360 U.S. 315 (1959), the Supreme Court upheld the exclusion of statements obtained after questioning in the middle of the night by multiple interrogators. *Id.* at 322-23; *see also Ashcraft*, 322 U.S. at 153 (continuous cross-examination for thirty-six hours); *Malinski v. New York*, 324 U.S. 401 (1945) (five days of questioning in an unfamiliar and threatening setting after an all-night interrogation); *Wainright v. LaSalle*, 414 F.2d 1235, 1237-39 (5th Cir. 1969) ("continuous incommunicado custody for 12 hours"). [12]

[12] *See Stidham v. Swenson*, 506 F.2d 478 (8th Cir. 1974) (solitary confinement for 18 months in subhuman conditions); *Townsend v. Henderson*, 405 F.2d 324, 326 (6th Cir. 1968) (solitary confinement); *Arnett v. Lewis*, 870 F.Supp. 1514, 1523-25, 1540 (D. Ariz. 1994) (incarceration in "oppressive conditions," including the lack of adequate plumbing and heating, clean water, blankets and nutrition).

The degree of coercion experienced by Mr. Salahi was substantially more severe than in any of these cases, and should therefore weigh heavily against the reliability of his statements.

II. The District Court Correctly Determined That Mr. Salahi's Coerced Statements Are Not Reliable

The district court correctly held that Mr. Salahi's statements should not be given any weight because they are unreliable. It is axiomatic that coerced statements are untrustworthy. *See, e.g., Stein*, 346 U.S at 182; *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 703 (2d Cir. 1955) ("Aristotle … wrote of torture 'that people under its compulsion tell lies quite as often as they tell the truth, . . . sometimes recklessly making a false charge in order to be left off sooner . . . so that no trust can be placed in evidence under torture.'").

Moreover, it is clear from a variety of contexts that even the threat of coercion, physical or psychological, to which Mr. Salahi was subjected when he incriminated himself, renders his inculpating statements unreliable. *See*, *e.g.*, Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 532-533 (2010); David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 PAC. RIM L. & POL'Y J. 561, 581 (2003).

The unreliability of coerced confessions is of particular concern in Guantanamo Bay detainee habeas cases. *See*, *generally*, Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647 (2007). As this Court has noted, a district court's evaluation of the government's contention that a "detainee is an enemy combatant . . . requires the court to assess the reliability of the sources upon which the return is based. Hence, indications of unreliability are themselves material. For example, the court may fear, or counsel may proffer evidence, that a source is biased or that his testimony was the product of coercion." *Al Odah v. United States*, 559 F.3d 539, 545 (D.C. Cir. 2009).

Indeed, experienced FBI interrogators who witnessed the use of "enhanced interrogation techniques" used at Guantanamo Bay repeatedly objected to their use on the basis that they do not produce reliable information. "In late 2002 and continuing into mid-2003, the [FBI's] Behavioral Analysis Unit raised concerns over interrogation tactics being used by the U.S. military."[13] The FBI believed that the military's methods "were not effective or producing intel that was reliable,"

[13] *See* Detainee Interviews (Abusive Interrogation Issues) (May 6, 2004), *available at* http://www.aclu.org/files/torturefoia/released/FBI_4194.pdf; *see also* DOJ Report 125-126.

and raised these concerns in weekly meetings with senior officials at the Criminal Division of the Justice Department.[14]

The observations of the FBI are reflected in the Army Field Manual, updated in September 2006, which states that "[u]se of force is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [human intelligence] collector wants to hear."[15] David Petraeus, the Commanding General in Iraq, has similarly noted that "torture and other expedient methods to obtain information…can make someone 'talk;' however, what the individual says may be of questionable value."[16] Other military leaders have joined this chorus, agreeing that coercive interrogation techniques "generate information of dubious value" while posing "enormous risks" for American soldiers.[17]

---

[14] Human Rights First, *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects* 29 (2008) (quoting E-mail from Unknown FBI Agent to FBI Agent (May 10, 2004, 12:26 PM)), *available at* http://www.humanrightsfirst.info/pdf/08307-etn-tortured-justice-web.pdf.

[15] Army Field Manual (2-22.3) on *Human Intelligence Collector Operations* 97 (2006), *available at* http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.

[16] Open Letter from David Petraeus, U.S. General (May 10, 2007), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/petraeus_values_051007.pdf.

[17] Letter from Joseph Hoar, U.S. General (Ret.), and thirty retired military leaders to Sen. John D. Rockefeller IV and Congressman Silvestre Reyes (December 12,

The belief shared by the courts, military officers, and FBI interrogators that coerced confessions are unreliable is borne out by psychological studies. *See, e.g.*, Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 235-40, 260-73, 316-20 (1992) (analyzing British and American cases in which defendants were charged or convicted on the basis of coerced confessions later shown to be false); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989) (analyzing cases in which police interrogation techniques elicited false confessions); Saul M. Kassin & Lawrence S. Wrightsman, Confession Evidence, in *The Psychology of Evidence and Trial Procedure* 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

Psychological research confirms that victims of enhanced interrogation techniques suffer high rates of post-traumatic stress disorder that gradually erodes frontal lobe function, impairing both executive function and memory. *See, e.g.,* Shane O'Mara, et al., *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating "Enhanced and Coercive Interrogation Techniques,"* 12 TRENDS IN COGNITIVE SCIENCE 497-500 (2009).[18] Indeed, enduring coercive

---

2007), *available at* http://www.globalsecurity.org/intell/library/news/2007/071212-letter_ret-mil-ldrs.htm.

[18] *See also* Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, 43-44 (Aug. 2007), *available at* http://physiciansforhumanrights.org/library/documents/reports/leave-no-marks.pdf.

interrogation commonly results in the "pathological production of false memories." *Id.* The extreme stress of coercive interrogation provokes a "'fight or flight' response . . . that, if overly prolonged, can result in compromised neurobiological function (and even tissue loss)" in the prefrontal cortex and hippocampus, prompting these areas of the brain to function improperly. *Id.*

Thus, it is "likely to be difficult or perhaps impossible to determine during interrogation whether the information that a suspect reveals is true: information presented by the captor to elicit responses during interrogation might inadvertently become part of the [victim's] memory, especially because [victims] are under extreme stress and are required to tell and retell the same events that might have happened over a period of years." *Id.* Ultimately, coercive interrogation techniques "are unlikely to do anything other than the opposite" of their intended purpose, resulting in unreliable information. *Id.*

Psychologists have produced a similarly illuminating—and voluminous—body of research demonstrating that people are likely to maximize their physical and psychological comfort, taking into account the constraints they face. R. J. Herrnstein, et al., *The Matching Law: Papers in Psychology and Economics* 10 (1997). In the interrogation context, people tend toward an impulsive orientation, preferring immediate outcomes, with delayed outcomes depreciating in subjective value over time. H. Rachlin, *The Science of Self-Control* 161 (2000). Specifically,

subjects of interrogation prefer delayed punishment to immediate aversive stimulation. M.Z. Deluty, *Self-Control and Impulsiveness involving Aversive Patients*, 4 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: ANIMAL BEHAVIOR PROCESSES 250-266 (1978); D. J. Navarick, *Negative Reinforcement and Choice in Humans*, 13 LEARNING AND MOTIVATION 361-377 (1982).

The Supreme Court recognized as much in *Stein v. New York*. When coercion is present during an interrogation, the Court said,

> The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

346 U.S. at 182. Precisely these psychological pressures were present—to a shocking degree—in Mr. Salahi's case. For seventy days, he was subjected to loud music, strobe lights, brief and deliberately interrupted sleep. DOJ Report at 124. He was also sexually harassed. *Id.* Both the FBI's investigation and the subsequent *Schmidt-Furlow* investigation confirmed that interrogators threatened Mr. Salahi and his family. Finally, after two years in detention, Mr. Salahi broke down when he was subjected to a combination of threats, repeated beatings, and forced sedation. In his words,

> They told him in Arabic that they were there to torture me . . . Then they gave me to the Arabic team and…took me to a place I don't know. They were hitting me all over . . . They put ice in my shirt

> until it would melt. Then I arrived at that place and . . . they brought in a doctor, who was not a regular doctor, he was part of the team. He was cursing me and telling me very bad things. He gave me a lot of medication to make me sleep and I had special guards with mask so I couldn't see anybody. For like two or three weeks I was unconscious and after that I decided that it is not worth it. Because they said to me either I am going to talk or they will continue to do this. I said I am going to tell them everything they wanted. . . I wanted to get some peace.

Summary of Administrative Review Board Proceedings for ISN 760 at 27.[19]

Moreover, where, as here, there are longer periods of interrogation, these circumstances only exacerbate the effects of coercion. In a study of 125 proven false confessions, psychologists found that where interrogation time was recorded, thirty-four percent last six to twelve hours, thirty-nine percent lasted twelve to twenty-four hours, and the mean was sixteen hours. S. A. Drizin & R. A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891-1007 (2004). Here, Mr. Salahi was subjected to interrogation during at least seventy days of detention.

Psychologists have grounded this finding in the profound lack of affiliation and social support that detainees endure. Y. Rofe, *Stress and Affiliation: A Utility Theory*, 91 PSYCHOLOGICAL REVIEW 235-250 (1984); S. Schacter, *The Psychology of Affiliation: Experimental Studies of the Sources of Gregariousness* 12-16

[19] *Available at* http://projects.nytimes.com/guantanamo/detainees/760-mohamedou-ould-slahi/documents/2/pages/3545#43.

(1959); B.N. Uchino, et al., *The Relationship between Social Support and Physiological Processes: A Review with Emphasis on Underlying Mechanisms and Implications for Health*, 119 PSYCHOLOGICAL BULLETIN 488-531 (1996). Prolonged isolation from others thus increases both a suspect's desire to escape the situation and to comply with interrogators.

Sleep deprivation becomes a similar concern in prolonged investigations—or where, as here, deprivation is practiced as policy. Controlled laboratory experiments have shown that sleep deprivation heightens susceptibility to influence and suggestibility to leading questions, while also impairing decision-making, the ability to sustain attention, and flexibility of thinking. M. Blagrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED, 48-59 (1996); Y. Harrison & J. A. Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED 236-249 (2000);[20]

In light of the foregoing, Mr. Salahi's inculpating statements cannot be deemed reliable. The vast psychological literature available, coupled with the expertise of the FBI and this nation's military leaders, shows that any *one* of the

[20] *See also* Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005), at 11, *available at* http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf.

conditions Mr. Salahi endured was sufficient to taint his statements. That he should have endured such conditions in concert, and for so long, irrevocably negates the reliability of the inculpating information he provided to his interrogators.

III. The Government Cannot Rely On Mr. Salahi's Subsequent Statements Because They Are Fruit of the Poisonous Tree

The district court correctly held that Mr. Salahi's statements were involuntary and do not provide a basis for his detention. District Court Order at 31 (government's proof was "so tainted by coercion and mistreatment" that it cannot support a successful criminal prosecution). This is an independent basis for affirming the district court's judgment.[21]

As an initial matter, the government concedes that the statements made by Mr. Salahi from June 2003 to September 2003 at Guantanamo were coerced and therefore unreliable. Appellees' Br. at 52. However, the government contends that it only relies on statements from Mr. Salahi obtained after a "clean break" from the

[21] Whether a confession was " 'made freely, voluntarily, and without compulsion or inducement of any sort,' " *Haynes v. Washington*, 373 U.S. 503, 513 (1963), is distinct from the question of whether the confession is accurate or reliable. *United States v. Raddatz*, 447 U.S. 667, 678 (1980) ("the interests underlying a voluntariness hearing do not coincide with the criminal law objective of determining guilt or innocence"); *Jackson*, 378 U.S. at 384-85 (the "reliability of a confession has nothing to do with its voluntariness").

program of torture and coercion, after the passage of enough time to supposedly "attenuate any taint." District Court Order at 11.

The government cannot meet its burden of proving that Mr. Salahi's later statements are not the product of coercion or were made after a "clean break." Once Mr. Salahi made coerced statements in June to September 2003, the future statements he made after September 2003 were also made in the shadow of that coercion because he risked more ill-treatment if he changed his story. Indeed, Mr. Salahi continued to suffer the effects from his abuse at Guantanamo at least until mid-October. Senate Report at 140. Because the government has not met its burden of proving that there was a "clean break," Mr. Salahi's subsequent statements cannot sustain his detention.

The Supreme Court has repeatedly recognized that coercive mistreatment taints subsequent statements even after the unlawful treatment has ended. In *United States v. Bayer*, 331 U.S. 532 (1947), Justice Jackson characterized the potential conflicts that may arise from excluded confessions as letting "the cat out of the bag":

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.

Id. (noting that a confession may be used if the coercive conditions are removed).

Similarly, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court analyzed a police officer's strategy of deliberately withholding Miranda warnings until after a suspect confessed, and then had the suspect repeat the confession after a Miranda warning. The Court held that prior illegally obtained statements tainted future statements notwithstanding the Miranda warning. *Id.* at 604. The issue was whether the new warnings could provide the suspect with a real choice about giving a new statement:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with Miranda, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

Id. at 612.

In order for the second statement to be given weight, the prosecution must show facts "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis*, 386 U.S. at 710. If the later confessions are part of "one continuous process" of interrogation or if it merely fills in and perfects the early confession, then the later confessions should be excluded as unreliable. *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

Justice Brennan recognized that it may be impossible to insulate the later confessions from the first: "One of the factors that can vitiate the voluntariness of a subsequent confession is the hopeless feeling of an accused that he has nothing to

lose by repeating his confession, even where the circumstances that rendered his first confession illegal have been removed." *Oregon v. Elstad*, 470 U.S. 298, 325 (1985) (dissenting opinion). Justice Harlan reasoned similarly, stating that the prosecution had "the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession." *Darwin*, 391 U.S. at 350-51 (concurring-in-part and dissenting-in-part).

When deciding whether a statement is the fruit of the poisonous tree, "[t]he question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive." *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The Supreme Court listed three factors to be considered when determining the weight that should be given to a statement subsequent to coercion, including: "[1] the temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and particularly, [3] the purpose and flagrancy of the official misconduct." *Id.* at 603-604.

Applying the factors announced in *Brown*, it becomes clear that Mr. Salahi's subsequent "clean" statements are involuntary and therefore fruit of the poisonous tree because they were made in the shadow of the previous physical and psychological torture, compelled by a legitimate fear of more abuse if he changed his statements. In particular, the government approved a 90-day special

interrogation plan in Guantanamo using techniques "intended to emotionally and psychologically weaken him through 'drastic changes in his environment.'" Senate Report at 137 (quoting *ISN 760 Interrogation Plan* (July 1, 2003)). The purpose of these techniques was to replicate and exploit the "Stockholm Syndrome" between detainee and his interrogators. *Id.*

Thus, a military interrogator told Mr. Salahi that because of his lack of cooperation, U.S. and Mauritanian authorities would apprehend his mother for interrogation, and that if she were uncooperative she too would be transferred to Guantanamo. DOJ Report at 123 (detailing *Schmidt-Furlow* investigation findings at 25-26). Military interrogators also told Mr. Salahi that he should "'use his imagination to think up the worst possible scenario he could end up in,' and that 'beatings and physical pain are not the worst thing in the world,' and that unless he began to cooperate, he would 'disappear down a dark hole.'" *Id.* (quoting *Schmidt-Furlow Report* at 26).

Mr. Salahi was also subjected to physical abuse during his detention. First, he was "environmentally manipulated" by being isolated in a cold room known as the "freezer", where guards would prevent him from sleeping by putting ice or cold water on him or by noise. *Id.* at 123-24. Second, he was deprived for a period of 70 days by means of prolonged interrogations, strobe lights, threatening music, forced intake of water, and forced standing. *Id.* Third, he was deprived of clothing

by a female interrogator, and two female interrogators touched him sexually and made sexual statements to him. *Id.* Finally, he was severely beaten. *Id.*

Tellingly, it was only after Mr. Salahi was physically and psychologically abused that he began providing information that the government now attempts to rely upon to keep him imprisoned. *Id.* at 123-24. In these circumstances, Mr. Salahi's subsequent statements are tainted by his earlier mistreatment, and cannot be used to support his detention because nothing "breaks the causal chain" between his initial torture and his subsequent statements such that the latter are "sufficiently an act of free will to purge the primary taint." *Elstad*, 470 U.S. at 306 (quoting *Taylor v. Alabama*, 457 U.S. 687, 690 (1982)); *Clewis*, 386 U.S. at 709-10 (petitioner's third statement was involuntary because it could not "on these facts, be separated from the circumstances surrounding the two earlier 'confessions'").

Because of the horrifying abuse endured by Mr. Salahi, Marine Corps Lt. Col. Stuart Couch, the military lawyer originally assigned to prosecute the case against Mr. Salahi in the military commissions, determined that Mr. Salahi's self-incriminating statements were so tainted by torture that they could not ethically be used against him.[22] Lt. Col. Couch refused to participate in the prosecution. *Id.*

[22] *See* Jess Bravin, *The Conscience of the Colonel*, WALL STREET JOURNAL, Mar. 31, 2007, *available at* http://pierretristam.com/Bobst/07/wf040107.htm and http://online.wsj.com/article_email/SB117529704337355155-lMyQjAxMDE3NzM1MTIzOTE3Wj.html.

Application of the three *Brown* factors confirms that Mr. Salahi's subsequent statements cannot be used because they are tainted by the earlier ill-treatment. First, the temporal proximity of the arrest and confessions is inevitably very close, since Mr. Salahi is still detained. Mr. Salahi's interrogations began immediately after he was captured, and they continued thereafter in a constant, coordinated system of interrogation and detention. Because of this continuous system of interrogation, no confession can be separated from the arrest and interrogation that began his detention.

Second, intervening circumstances between Mr. Salahi's arrest and statements all support excluding the statements as unreliable. Mr. Salahi was ill-treated from the time of his capture and was never freed from the effects of the coercion he suffered after his capture, thereby rendering all future statements involuntary. As described above, the physical and psychological abuse inflicted on him during his detention was horrifying, even to FBI agents and government military lawyers. Third, there was official misconduct sufficient to destroy voluntariness because of its flagrancy and impermissible purpose, as discussed above. *See Brooks,* 389 U.S. at 415 (confining a prisoner naked, for two weeks, with only twelve ounces of soup and eight ounces of water for daily sustenance, a hole in the corner for sanitation, and no friendly human contact was a "shocking display of barbarism").

Indeed, all of Mr. Salahi's ill-treatment was inflicted for an impermissible purpose—eliciting incriminating statements from Mr. Salahi. *Blackburn*, 361 U.S. at 205; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, entered into force June 26, 1987 (expressly identifying "obtaining from [a torture victim] or a third person information or a confession" as an impermissible purpose for ill-treatment). Extracting confessions by these means must be considered an impermissible purpose "because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. State of Oklahoma*, 322 U.S. 596, 605 (1944).

In these circumstances, Mr. Salahi's confessions were not voluntarily given, and once the "cat was out of the bag," Mr. Salahi could not have made a truly voluntary confession in the shadow of the original torture, coercion, and other egregious legal deprivations discussed above. Therefore, none of the statements and evidence derived from Mr. Salahi's original coerced statements can be used to sustain his detention.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

June 16, 2010

Respectfully submitted,

/s/

David R. Berz
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW, Suite 900
Washington, DC 20005
(202) 682-7000

Gregory Silbert
Jennifer H. Wu
Ritu Pancholy
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Michael W. Price
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L St. NW 12th Floor
Washington, D.C. 20036
(202) 872-8600 ext. 258

Attorneys for *National Association of Criminal Defense Lawyers*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

/s/
David R. Berz
WEIL, GOTSHAL & MANGES LLP

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(1)(B) and Circuit R. 25, I hereby certify that on June 16, 2010, I caused the foregoing brief to be filed with the Court in hard copy and electronically, and served through the Court's ECF system on:

Nancy Hollander (nh@fbdlaw.com)
Theresa M. Duncan (tmd@fbdlaw.com)
Freedman Boyd Hollander Goldberg, Ives, & Duncan
20 First Plaza, Suite 700
Albuquerque, NM 87102-0000

Melissa A. Goodman (mgoodman@aclu.org)
Jonathan L. Hafetz (jhafetz@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004-2400

Arthur B. Spitzer (artspitzer@aol.com)
American Civil Liberties Union
1400 20th Street, NW, Suite 119
Washington DC 20036-5920

Douglas N. Letter (douglas.letter@usdoj.gov)
Robert M. Loeb (robert.loeb@usdoj.gov)
August E. Flentje (august.flentje@usdoj.gov)
Civil Division, Appellate Staff, Room 7242
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington DC 20530-0001

Walter Dellinger (wdellinger@omm.com)
O'Melveny & Myers LLP
1625 Eye Street, NW
Washington DC 20006-4001

/s/
David R. Berz
WEIL, GOTSHAL & MANGES LLP