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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULRAHIM ABDUL RAZAK AL
GINCO,

Civil No. 05-CV-1310 (RJL)

Petitioner,

TRAVERSE

v.

BARACK OBAMA, et al.,

Respondents.

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The petitioner, through his attorneys, Federal Public Defender Steven T. Wax and Chief Deputy Federal Public Defender Stephen R. Sady, respectfully submits this Traverse to the government's Return, requesting that the Court grant the writ of habeas corpus because the statements asserted by the government are insufficient to carry the initial burden of proof, because the legal bases asserted by the government are foreclosed as a matter of law, and, in the alternative, because Mr. Janko's affirmative case establishes that he is not an enemy combatant.¹

I. Succinct Statement Of Reasons To Grant The Writ

At the time of the Authorization for the Use of Military Force, the Taliban held Mr. Janko in a political prison in Kandahar for being an American spy based on a false confession coerced 20 months earlier by brutal torture committed by top Al Qaeda operatives. Upon the liberation of Kandahar in December 2001, Mr. Janko remained at the prison with four other non-Afghans as guests of the warden, seeking help from non-governmental organizations and speaking to journalists. Mr. Janko asked journalists to contact the Americans at the nearby Kandahar Air Base to offer his testimony to human rights violations by Al Qaeda and the Taliban, including crimes against persons believed to be Americans.

¹ Despite the caption, Mr. Janko prefers this spelling, which the government also uses in its Return.

On or about January 22, 2002, Americans came to the prison to speak to the former prisoners. Two days later, a military team transported Mr. Janko and the others to the air base where, at first, they were treated relatively well and separated from other detainees. Then, after a press conference by Attorney General Ashcroft, Time Magazine reported that Mr. Janko had been identified as an internationally wanted terrorist, a mistake based on the erroneous belief that an Al Qaeda torture tape of Mr. Janko was a suicide martyr tape.

When Mr. Janko's interrogator saw the magazine article, she concluded, erroneously, that Mr. Janko had tricked her and others. The interrogation team proceeded to apply aggressive and brutal techniques, including sleep deprivation, stress positions, assault, exercise to exhaustion, menacing with dogs, and threats. As a consequence, Mr. Janko made false statements that he was an Al Qaeda member and had knowledge of Al Qaeda plans and personnel. After about 100 days at the Kandahar Air Base, Mr. Janko was sent to Guantanamo ^{S1} [REDACTED] ^{S1} [REDACTED] as a terrorist on the international most-wanted list. The government later recognized that the most-wanted listing as an international terrorist was based on a mistake regarding Al Qaeda's torture tape.

In this context, the government's Return fails to establish a sufficient factual basis for detention for six separate and interrelated reasons that require entry of

judgment for Mr. Janko before the burden shifts to Mr. Janko to rebut the government's case. First, the Return is infected with reliance on the products of both Al Qaeda torture and the coercive American interrogation in Kandahar. Under the Due Process Clause, the Convention Against Torture, and international humanitarian law, the products of torture cannot be used – including derivative evidence and decision-making – against Mr. Janko. Because the Return is tainted with the products of torture and coercion, the government has failed to carry its initial burden of proof.

Second, because the government relies solely on statements attributed to Mr. Janko, at the same time characterizing the statements in the Return as being made by a ^{S6} [REDACTED] liar, the evidence is not credible and is insufficient to carry the initial burden of proof. The government's selective and out-of-context attribution of statements in the narrative is too unreliable to support the decision to detain. Further, the government is foreclosed by the Due Process Clause from taking opposing positions regarding the reliability of Mr. Janko in general while at the same time basing seven years of incarceration on selected uncorroborated statements.

Third, under the basic rules for assessing intelligence, the purportedly inculpatory information is too unreliable to carry the government's burden. The original products of torture and products of the erroneous most-wanted designation infected the intelligence-gathering process, creating a bias that pervades the Return.

The government's evidence falls far short of the reliability standard outlined in *Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008). Further, the government's narrative adds a level of distortion and unreliability by mischaracterizing reports and taking statements out of context. From the government's own declaration regarding proper intelligence collection and analysis, the evidence does not carry an initial burden of proof.

Even if the evidence were sufficient, the legal basis for detention is insufficient as a matter of law because no relevant act occurred during the time of war. First, even assuming that Mr. Janko went to Afghanistan to fight – which he did not – the temporal nexus required by the Supreme Court is missing. The government's statement of the basis for detention alleges actions only during ^{S1} [REDACTED] ^{S1} [REDACTED] January 2000. The government has provided no evidence that, for the next 20 months, Mr. Janko did anything but suffer torture and imprisonment at the hands of Al Qaeda and the Taliban. The Authorization for the Use of Military Force, which provides the statutory basis for detention of enemy combatants, did not occur until September 18, 2001. The military's authority must be based on an act "*during*, not before, the relevant conflict." *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 (2006) (emphasis in original).

Second, no precedent has ever found detention authorized under circumstances approaching this case. Mr. Janko, as a freed political prisoner, cannot be detained as an enemy combatant absent an allegation that he violated the laws of war. The protection of civilians in wartime applies with special force to a person approaching the United States to provide testimony to human rights violations, including crimes against Americans.

Third, the government's legal basis statement omits an essential element of the enemy combatant definition: "engaged in hostilities against the United States and its coalition partners." The government's statement of the legal basis for detention, on its face, fails to allege a required element for detention, which is understandable because no legitimate basis for such a claim exists.

If the factual and legal insufficiency of the government's Return do not resolve this case, Mr. Janko will establish an affirmative case that he is innocent of being an enemy combatant. The external evidence strongly corroborates Mr. Janko's account of being a moderate, apolitical student who ran away from home in the United Arab Emirates, seeking to become a refugee in the West, who then was conscripted by the Taliban and tortured and imprisoned as a spy when he tried to leave. When liberated from his prison, rather than escaping, he approached the United States through

journalists to provide testimony regarding Al Qaeda and Taliban human rights violations against him and others, including persons believed to be Americans.

In addition to consistent accounts to the Court in a sworn declaration, and to both CSRTs and the ARB, extensive extrinsic evidence supports Mr. Janko's factual assertions, including:

- His family has submitted detailed declarations regarding Mr. Janko's moderate and well-behaved background and the circumstances surrounding his departure from home around January 2000;
- Taliban officials provided contemporaneous press statements in 2000 announcing Mr. Janko's capture and supposed confession to being an American and Israeli spy;
- The description of Al Qaeda's physical torture applied against Mr. Janko is confirmed by expert testimony and the statements of other detainees;
- Other Taliban prisoners state Mr. Janko was held in the Sarpusa prison in Kandahar up to the time when, following 9/11, the Taliban fled Kandahar in December 2001;
- Western journalists confirm that Mr. Janko was freed from the Taliban political prison in December 2001, sought assistance from the United Nations and the Red Cross, and asked the journalists to tell the Americans at the Kandahar Air Base he would provide testimony regarding Al Qaeda and Taliban human rights violations;
- The American mistaken belief that Mr. Janko was a terrorist is confirmed by the sequence of Attorney General Ashcroft's press conference, the Time Magazine article, and the references to Time as the trigger for American torture of Mr. Janko;

- The description of physical torture by Americans is confirmed by S1 [REDACTED], expert testimony, and other detainees;

- Mr. Janko's torture-induced mental condition, exacerbated by years of stressful incarceration and inappropriate behavior modification in Guantanamo, is corroborated by expert testimony and his personal background.

Especially given the weakness and unreliability of evidence asserted by the government, the documented history that Mr. Janko never acted as a belligerent against America and its allies forecloses a finding that he is an enemy combatant under any reasonable definition of the term. Given the statutory and constitutional protections for civilian witnesses, Mr. Janko should be found to be not an enemy combatant under a higher standard for procedural protections than would otherwise apply.

II. Mr. Janko Moves For Judgment Granting The Writ Because The Government's Return On Its Face Is Factually Insufficient To Establish A Lawful Basis For Detention.

Under governing habeas corpus law and this Court's management order, the government has the initial burden of establishing a sufficient basis for the lawful detention of a prisoner who seeks a writ of habeas corpus. *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004).² The

² See *Boumediene v. Bush*, Civil No. 04-1166 (RJL) (Government's Response to Court Order of July 30, 2008, Regarding Habeas Procedures, filed Aug. 12, 2008) at 15 & n.3 (recognizing that the government must put "forth credible evidence that the habeas petitioner meets the enemy-combatant criteria" and that the petitioner may

government relies extensively and pervasively on statements and reports that are the products of torture, on statements by Mr. Janko that the face of the Return itself contends are unreliable, and on exhibits that lack the level of corroboration needed to support indefinite detention as an enemy combatant. The Court should issue the writ based on the failure of the government to establish sufficient evidence that Mr. Janko's detention is lawful.

A. The Return Fails To Establish A Lawful Basis For Detention Because The Government Relies On Evidence And Decision-Making That Are The Products Of Torture, Both By Al Qaeda And By United States Personnel.

Statements that are the products of torture should 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” and also because of “the likelihood that the confession is untrue.” *United States v. Karake*, 443 F. Supp.2d 8, 51 (D.D.C. 2006) (quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), and *Linkletter v. Walker*, 381 U.S. 618, 638 (1965)); see *Watkins v. Sowders*, 449 U.S. 341, 347 (1981).³ Similarly, under Article 15 of the Convention Against

file a motion for judgment at this stage); *Boumediene v. Bush*, Civil No. 04-1166 (RJL) (Petitioner's Joint Reply to Court Order of July 30, 2008, Regarding Habeas Procedures, filed Aug. 19, 2008) at 7-8.

³ Involuntary confessions are not only unreliable but, even if true, the evidence must be excluded “because of the ‘strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of

Torture, the United States “shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture as evidence that the statement was made.”⁴ The repugnance for the use of products of torture is so profound as to have become part of international humanitarian law. *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (the prohibition against official torture has attained the force of a *jus cogens* norm).

The prohibition on the use of the products of torture applies to derivatives as well as the statements themselves. *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963); *Lam v. Kelchner*, 304 F.3d 258, 268 (3d Cir. 2002). “[T]he rule against involuntary confessions is an essential element of due process.” *Navia-Duran v. INS*, 568 F.3d 803, 811 (1st Cir. 1977); accord *Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir. 1960) (alien’s involuntary statement used in civil deportation proceeding violates due process). Further, the derivatives include not only the

securing a conviction, wrings a confession out of an accused against his will.” *Watkins*, 449 U.S. at 347 (quoting *Jackson v. Denno*, 378 U.S. 368, 385 (1964) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960))).

⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, implemented in the United States by Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231.

evidentiary results of the torture but the discretionary decisions made in reliance on the products of torture. *Murray v. United States*, 487 U.S. 533, 543 (1988).

In *Murray*, Justice Scalia addressed the Fourth Amendment's exclusionary rule in the context of an illegal search that was followed by a search with a warrant. In remanding the case, the Court instructed that the lower court needed to determine the taint from both inclusion of evidence in the search warrant affidavit and the effect of the illegal search on the decision to seek the warrant:

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case *if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry*, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

Murray, 487 U.S. at 543 (emphasis added).

In the context of involuntary statements, the government bears a heavy burden of establishing that the subsequent statements were not coerced or tainted by the torture and the prisoner's consequent vulnerability. *See Kastigar v. United States*, 406 U.S. 441, 461 (1972) (government bears the "heavy burden of proving that all evidence it proposes to use was derived from legitimate independent sources"); *United States v. Kilroy*, 27 F.3d 679, 683 (D.C. Cir. 1994) (same). The government cannot meet this burden because the government continued to exploit Mr. Janko's

vulnerabilities through coercive tactics such as environmental domination, sophisticated interrogation strategies, behavior modification, and inducements.⁵

The voluntary or involuntary character of a confession is determined according to the totality of the surrounding facts, including prior coercion. *Lyons v. Oklahoma*, 322 U.S. 596, 603 (1944) (“[T]he fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary.”); *Lisenba v. California*, 314 U.S. 219, 240 (1941) (“The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances.”). Here, the interrogators at Guantanamo knew or should have known that Mr. Janko was

⁵ Promises of leniency or privileges, especially to a vulnerable person, to overpower the person’s resistance, undermines voluntariness. *Haynes v. Washington*, 373 U.S. 503, 512-13 (1963) (promise that defendant could call his wife if he confessed involuntarily induced confession after defendant was held incommunicado for seven days); *Leyra v. Denno*, 347 U.S. 556, 559-60 (1954) (promise of medical treatment improperly induced defendant to confess); *Fikes v. Alabama*, 352 U.S. 191, 196-98 (1957) (repeated questioning and “pressure applied against the power of resistance of this [isolated] petitioner, who cannot be deemed other than weak of will or mind, deprived him of due process of law”); see *Arizona v. Fulminante*, 499 U.S. 279, 286-87 (1991) (statement involuntary where incarcerated informant was promised protection from fellow inmates).

especially vulnerable from the Al Qaeda torture, the Taliban imprisonment, and the Kandahar Air Base coercion.

In *Killough v. United States*, Judge Wright, in his concurring opinion, stated: “The ‘broken’ man, who has already yielded to coercion, is not so easily revived.” 315 F.2d 241, 250 (D.C. Cir. 1962) (*en banc*) (citing *Malinski v. New York*, 324 U.S. 401, 428-29 (1945)). Judge Wright went on to state:

Admittedly, it is difficult to determine whether there is a connection between two confessions. But, human nature being what it is, we must recognize a presumption that one is the fruit of the other

[T]he burden should be on the Government to show that a second confession did not spring from a mind in which all the mechanisms of resistance are still subdued by defeat and the apparent futility of further combat.

Killough, 315 F.2d at 249-50. Cf. *Colorado v. Connelly*, 479 U.S. 157 (1986) (interrogator must know of a special vulnerability for the factor to be considered in assessing voluntariness). Mr. Janko is the “broken man” described by Judge Wright. He was broken by two years of torture and abusive imprisonment by the Taliban and Al Qaeda and by American interrogators in Kandahar. The interrogation techniques that dominated Mr. Janko’s will continued after he was transferred to Guantanamo.

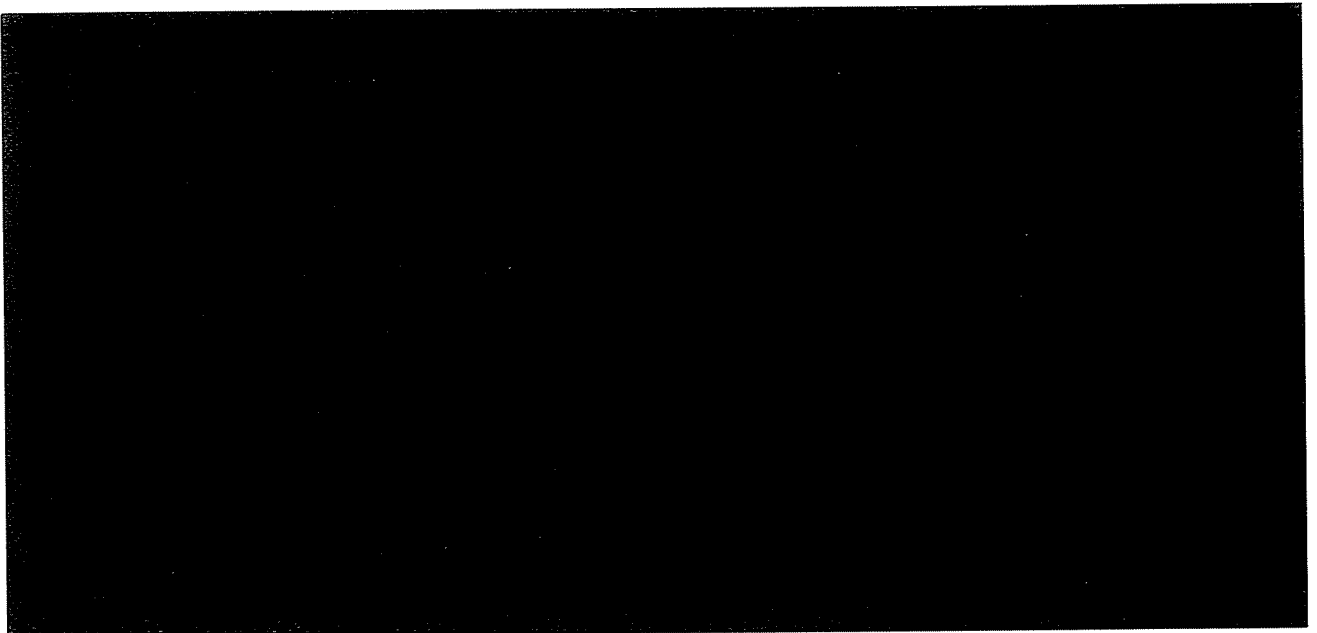
1. Al Qaeda And The Taliban Extracted Involuntary Statements From Mr. Janko By Applying Torture Including Beating, Electric Shock, The Falaka, Water Torture, Threats, Sleep Deprivation, Extreme Cold, And Stress Positions.

The proof that Mr. Janko made video-recorded statements that resulted from torture is incontrovertible: after brutal torture at the hands of Al Qaeda leaders, they made a video recording of Mr. Janko falsely confessing to being an American spy. The account of torture is confirmed by the expert testimony of Professor Darius Rejali, an internationally recognized expert in the sociology of torture, the statements of other Sarpusa prisoners, and the content and images of the torture tapes themselves.

Through cleared notes, counsel provided Professor Rejali with descriptions of the brutal torture inflicted upon him by Al Qaeda between the time he was arrested as a spy in late January 2000 and when he was transferred to Taliban custody. Professor Rejali analyzed several of the torture techniques distinct to Afghanistan and described how a person from Syria and the United Arab Emirates would not be familiar with them. Traverse Ex. 10 at 5-7. For example, Mr. Janko described the Afghan type of electric torture using a magneto and attaching wires to toes and ears, as well as the falaka, which involved holding the feet in a particular way while the

soles were beaten. Traverse Ex. 10 at 5. Further, the taped confession had characteristics typical of the products of torture. Traverse Ex. 10 at 8-9.

The statements of other detainees confirmed the testimony provided by Mr. Janko regarding his torture. Al Qaeda denounced as spies and horribly tortured Ayrat Vakhitov, Sadeeq Turkistani, and Jamal al Harith. Traverse Exs. 12, 13. Most obviously, the Abu Dhabi tape is the product of torture because, in this context, no one would falsely confess to being an American and Israeli spy – not to mention engaging in homosexual and decadent acts – unless forced to so. Traverse Exs. 22, 23. As family members point out, Mr. Janko appears to be under extreme stress, underweight, and speaking in a stilted manner regarding content that is patently false. Traverse Ex. 15 at 4; Traverse Ex. 16 at 4; Traverse Ex. 17 at 3.



[REDACTED] From the first encounters with Americans, Mr. Janko consistently described the torture he suffered and provided information regarding the persons responsible for the human rights violations he suffered. Traverse Ex. 62.

2. American Interrogators At The Kandahar Air Base Coerced Involuntary Statements From Mr. Janko By Means Of Threats, Assault, Sleep Deprivation, Use Of Dogs, Exercise To Exhaustion, And Stress Positions.

Once the Time Magazine article identified Mr. Janko as a terrorist, the Kandahar Air Base interrogators began using brutal torture. The descriptions provided by Mr. Janko match closely the following from Mr. Vakhitov, who was housed near Mr. Janko. Mr. Vakhitov provided the following detailed account:

About a month after our arrival at the Kandahar air base, things became much worse. Our chief interrogator was a woman who called herself S3 [REDACTED] who worked with another interrogator who had S3 [REDACTED] tattooed on his arm. The military police were from an S3 [REDACTED] the soldiers said they had previously been deployed in Kosovo. We were transferred to a large hangar divided with wire into separate areas. Without warning, the interrogators began treating Abdul Rahim and me very badly. The first day we spent together in the same area, and I saw Abdul Rahim brought back from interrogation with red patches on his face and with his clothing ripped. Abdul Rahim was very intimidated and told me that he had been shown an article in a magazine and that statements he made on Abu Dhabi television were being twisted into meaning he was a terrorist.

From that time, Abdul Rahim received very bad treatment. From my area, I saw and heard interrogations of Abdul Rahim using sleep deprivation, exercise like push-ups and sit-ups to the point of exhaustion, police dogs set on Abdul Rahim, and forcing him to stay in uncomfortable positions for long times, such as kneeling on gravel with

his hands on his head for hours at a time. I suffered the same treatment. The mistreatment was not only painful but humiliating because it was in front of other prisoners. Although Abdul Rahim never resisted or used violence, when Abdul Rahim was taken to interrogation, a group of soldiers would jump on him, forcibly immobilize him, and rough him up. Abdul Rahim sometimes came back from interrogation with his clothing ripped. Abdul Rahim was treated worse than other prisoners, and the prisoners used their treatment of Abdul Rahim to try to make me confess to being a Russian spy. The interrogator with the S3 tattoo said words to the effect: See how we're treating your friend Abdul Rahim; we can do the same to you.

I could not hear what was said during Abdul Rahim's interrogations, but he told me they wanted him to admit he was a terrorist involved in bombings. Abdul Rahim told me that he had told the interrogators everything they wanted him to say, just as he had done when the Taliban tortured him and then had him interviewed on videotape for Abu Dhabi television admitting he was an American spy. Abdul Rahim told me that he told the interrogators what they wanted to hear to make the torture stop.

Traverse Ex. 12 ¶¶ 14-16. The detail is thorough: the interrogator named S1 S3 S1 S3; the magazine article that set off the torture; the tattoo of the other interrogator; the assaults, sleep deprivation, exercise to exhaustion, and use of dogs.

As reflected in the expert testimony of Professor Rejali, the techniques described are typical of coercive interrogation used by Americans at that place and time. Traverse Ex. 10 at 25. The tactics of torture that leave no marks violated the Army Field Manual then in effect and constitute torture within the practical and legal

meaning of the term. Traverse Ex. 10 at 34-36. The torture of a vulnerable previous victim of torture affects subsequent interrogations. Traverse Ex. 10 at 46-47.

The government admits the use of coercion: in Return Exhibit 75, the Executive Note states that American military personnel S1 S1 implemented tactics in S1 S1 in interrogation of Mr. Janko, and used the S1 S1 (emphasis added). In this context, the ordinary and reasonable meaning of S1 – used twice in the Executive Note – means the physical torture described by Mr. Janko and Mr. Vakhitov.

3. The Products Of Al Qaeda Torture And American Coercion Pervade Subsequent Interrogations And Decision-Making, Requiring A Finding That The Return Is Insufficient To Establish A Lawful Basis For Imprisonment.

Mr. Janko is imprisoned in Guantanamo because Al Qaeda torture videos led Mr. Janko's American rescuers to torture him into making more false inculpatory statements. The premise of the Return – sometimes hidden, sometimes overt – lies in the false and unreliable products of despicable acts committed against Mr. Janko's

body and mind. Both the evidentiary and the decision-making products of torture require a finding that the government failed to carry its initial burden of proof.

a. The Narrative And Attached Exhibits Include The Direct Products Of Torture.

The text of the Return explicitly relies on the products of torture. The government's narrative cites to S2 [REDACTED] generated by coercive American interrogation in support of its assertion that Mr. Janko has been S1 S5 [REDACTED] with interrogators. Return ¶ 21. In two places, the narrative explicitly relies on Kandahar reports as substantive evidence of Mr. Janko's supposed terrorist affiliation. Return ¶¶ 37, 44. The narrative relies on two of the coerced Kandahar interrogations for the proposition that Mr. Janko has significant involvement with Al Qaeda and incorporates by reference the products of the S2 [REDACTED] in ¶ 21 to argue that Mr. Janko is a threat. Return ¶ 44.

The exhibits to the Return are replete with products of the Kandahar coercion and documents derived from them. The government included in the Factual Return S2 [REDACTED] resulting from interrogations of Mr. Janko at Kandahar after the date that coercive tactics began to be used on him. Return Exs.

S2 [REDACTED]

S2 [REDACTED]

The government's Return also includes the S2 [REDACTED] for Mr. Janko, which summarizes

fourteen other interrogation reports that – judging by their S2 numbers – also occurred during this period. Return Ex. 69 at 3-4. Every S2 summarized in the S2 appears to come from the time of the S2 detention.

The Al Qaeda torture tapes also pervade the Return, both overtly and covertly.

The narrative includes S1

S1 Return ¶ 42. S1 S5

S1 S5, which is readily seen as false by

comparing S1

S1. Compare Traverse Ex. 23 with Traverse Ex. 37.

The government also asserted the content of the Al Qaeda-sponsored Abu Dhabi TV video as corroborating that Mr. Janko is a threat to the United States. Return ¶ 45 & n.16. The government included an exhibit that mischaracterized the videotape recovered on March 22, 2003, as a S1 S5 involving exchanges that were

S1 S5 Return Ex. 63 at 1.

b. The Government Cannot Demonstrate That Guantanamo Interrogation Reports Are Not The Products Of Al Qaeda Torture And American Torture.

The government never unequivocally admits that the Al Qaeda videos were the product of torture, thereby allowing for their use as baseline documents for other interviews. Neither does the government admit that American interrogators tortured the torture victim at the Kandahar Air Base. The seminal interrogation document is

S2

S1

S1

Return Ex. 75. This denomination of

Mr. Janko as a terrorist has never been clearly corrected.

S1 S2 S5

S1 S2 S5

S1 S2 S5

Return Ex. 46 at

1. Nevertheless, Department of Defense interrogators kept referring to the video as evidence Mr. Janko was a terrorist, and two years later, the first CSRT detained him on bases including that he had volunteered to be a suicide martyr. Return Ex. 64 at

2. Even in the Return, the government hedges, stating only – in the passive voice –

S1 S5

Return at 19 n.14.

Although the government changed its methods, interrogators continued to apply techniques designed to overbear Mr. Janko's will. Instead of overt violence and threats of violence, Mr. Janko was pressured by offers of ^{S1} to induce him to provide statements with the intent to exploit his vulnerabilities in the controlled environment of Guantanamo. Interrogator bias is a chronic and pervasive problem leading to unreliable reports and coerced false statements. Traverse Ex. 10 at 38-44. Once an individual is misidentified as a suspect, the selection error is reinforced by the strong tendency toward assuming the individual is an enemy. Traverse Ex. 10 at 39-42. The behavioral sequelae of coercive interrogation also can reinforce the selection error. *Id.* at 44-47.

Without admitting that Al Qaeda torture occurred, and without admitting American torture occurred, the government cannot establish causation independent from torture because, given the interrogators' continuing dominant position over Mr. Janko, the Kandahar and Guantanamo interrogations are closely related. Under normal interrogation protocol, interrogators are aware of and exploit statements made

in earlier sessions. Mr. Janko's many subsequent interrogations are tainted by the starting assumption that Mr. Janko is an admitted Al Qaeda member who traveled to Afghanistan to fight and was a suicide martyr, which assumption is derived from the false statements to Al Qaeda to try to stop the torture and from false statements made to American interrogators to try to stop the torture.

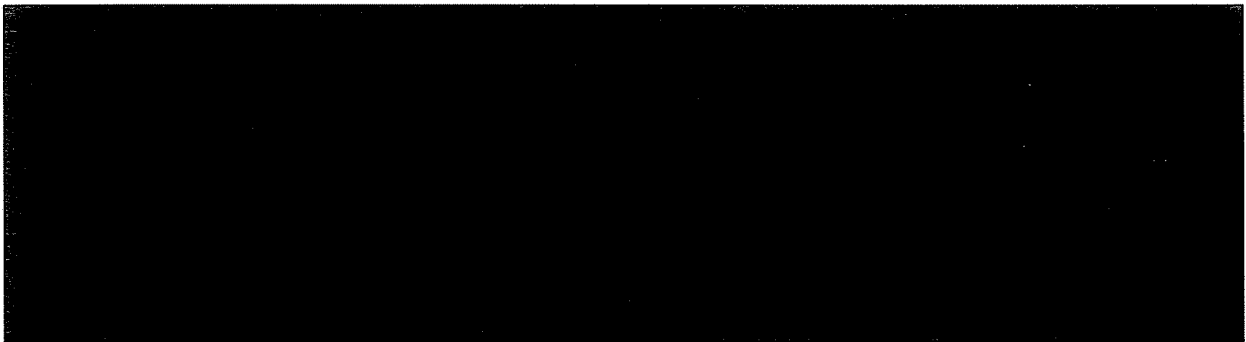
The effects of the torture are also manifest in Mr. Janko's vulnerability. Dr. Kinzie describes how being a torture victim results in complex post-traumatic stress disorder and major depression. Traverse Ex. 11 at 5. He also states that behavior modification regimens, such as at Guantanamo, exacerbate the psychic pain of persons who suffer from PTSD. He also explains why a diagnosis involving personality disorders under those circumstances is inappropriate and permits activities that aggravate and inflict inappropriate regimens on a person with PTSD. Traverse Ex. 11 at 8-9.



The two Al Qaeda torture tapes also suffuse the Return in more subtle ways. Because the government never unequivocally admits that the Al Qaeda videos were the product of torture, there is no effort to insulate their use as providing base assumptions for other interviews. Mr. Janko's denomination as an internationally wanted terrorist, from the documents provided, has never been clearly corrected. The many subsequent interrogations are tainted by the starting assumption that Mr. Janko

is an admitted Al Qaeda member who traveled to Afghanistan to fight, which assumption is derived from the false statements made under torture and in fear for his life.

c. The Government Cannot Demonstrate That Decision-Making Regarding Mr. Janko Is Independent Of The Products Of Torture.

The decisions in this case are directly derived from the products of torture. The first Combatant Status Review Tribunal justified detention based on the charge that Mr. Janko was a "suicide martyr." Return Ex. 64 at 2. The CSRT repeatedly questioned Mr. Janko regarding the video. Return Ex. 64 at 10, 11. The origin of that accusation traces back to the video recording that resulted in the press conference that resulted in the Time article that resulted in the Kandahar interrogations. The first CSRT also relied on Kandahar interrogations, including the assumption Mr. Janko was an admitted Al Qaeda member.



 Even after Mr. Janko provided the military with proof the tape was the product of torture,  S1 S2

[REDACTED] and the first CSRT were used as part of the evidence in support of the second CSRT's determination.⁷

Even more perniciously, the evaluative reports and recommendations for release were negated by citation to Kandahar coerced statements. Apart from the CSRT process, recommendations for release were negated based on the products of torture. For example, on [REDACTED] the Criminal Investigation Task Force (CITF) found that Mr. Janko should be released, especially because [REDACTED]

[REDACTED]

Traverse Ex. 42 at 2. However, based on a laundry list of Kandahar coerced statements, the Joint Task Force disagreed, trumping the CITF recommendation. Traverse Ex. 43. [REDACTED]

[REDACTED]

[REDACTED] Traverse Ex. 75.

Similarly, the government's decision to file its Return in this case is derived from the products of Al Qaeda and Kandahar torture. Not only is direct and

⁷ Although the products of torture are barred in CSRTs, the CSRT record reflects no effort to effectuate this prohibition on the use of either the Al Qaeda or the Kandahar Air Base products of torture. U.S. Dep't. Of State, Legal Advisor John B. Bellinger III, *U.S. Delegation Oral Responses to Article 15 Committee Questions*, Geneva, Switzerland (Question 42) (May 5, 2006) ("Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Boards and Administrative Review Boards.").

derivative evidence used, the government never made a determination that Mr. Janko is a victim of torture, so never had the occasion to determine whether – in light of the proof of torture – the government should continue to attempt to detain him independently from the products of torture. The government has provided no basis for detention decisions independent of the fall-out from the terrible torture Mr. Janko suffered in Afghanistan.

The products of torture create an appearance, which the government has never rebutted, that his continued incarceration is the result of the tragic and embarrassing errors that made Mr. Janko a torture victim three times over. The causation is simple: Mr. Janko clearly understands that his imprisonment results from his torture by Al Qaeda and by misguided Americans:

[T]hey accused me of being a spy. And here, you guys accuse me of being al Qaida. No mercy. Who am I? . . . You take me from that prison and nothing changed in my life, I was taken from prison to prison. (Return Ex. 65 at 5.)

* * *

After two years the Americans came and saved me from the prison. When the Americans came I told them about the videotape the Taliban made of me. By me telling them about the video it created confusion to the point that the Americans believed I was working with al Qaida. Here I am now I don't know if I am a spy for America or I work for al Qaida. (Return Ex. 65 at 3.)

See also Return Ex. 64 (“[T]hey beat and tortured me . . . military intelligence, they told me to say I’m Al Qaida, so, I told them, okay, I’m Al Qaida. How I told Taliban I’m a spy, now I tell you guys I’m Qaida.”).

d. The Government’s Citation To Private Letters Home And Comparisons Between Guantanamo And The Sarpusa Prison Do Not Establish An Independent Basis For Guantanamo Interrogations And Detention Decisions.

The government relies on Mr. Janko’s description of Guantanamo as a vacation compared to the Sarpusa prison in support of its suggestion that the Kandahar interrogations are unrelated to the Guantanamo interrogations. Return ¶ 42 n.12. The documents do not support the claim.

During the ARB proceedings, the Presiding Officer asked Mr. Janko what he would say about his experience in Guantanamo if he were home. Return Ex. 65 at 16. Mr. Janko apparently interpreted the question as reflecting concern about bad publicity and proceeded to assure the officer that he will tell them he “had a good time here”:

I would tell them that I was on vacation after Taliban prison. I had fun and it was like I was hanging out until procedures were complete. Just like when you go certain places it takes awhile for you to get your visa and stuff. I will tell them it just took some time, but I will write a book. I will write about the guards that were with me and my friends. I will write about the doctors and the nurses who have spoiled me for the last two to three years while I was in the Psych ward. I had a good time here.

Id. This statement is evidence of the inherent coercion in the Guantanamo interrogations. Mr. Janko guesses, perhaps incorrectly, what the questioner wants to hear and fashions the answer to try to maximize his chances at desperately desired freedom. The suggestion that the exchange shows all is well is contradicted S2

S2 S1
S1
S1
Return Ex. 69 at 4.

The government also relies on S1 S2 Return ¶ 42
n.12. Aside from the evidence of the absolute domination the government exercises over Mr. Janko that includes S1 S2 provide no credible evidence. S1 S2

S1 S2 S1 S2
Return Ex. 70.
S1 S2
S1 S2 S1 S2
Return Ex. 71.
S1 S2
regarding Mr. Janko's

S1 S2
Guantanamo nightmare.
S1 S2
S1 S2
Return Ex. 69 at 5.

Torture includes a wide array of coercive and injurious techniques. Those employed by Al Qaeda were shamelessly brutal: Mr. Janko suffered beatings, electric shock, near drowning, hanging from the ceiling, and intolerable conditions, all the while under immediate threat of death. His feet were bound, then beaten until they were black. Under torture and duress, Mr. Janko made statements videotaped by his captors.

Instead of receiving the treatment and consideration that torture victims should receive, Mr. Janko faced the nightmare of another round of coercive interrogation, this time by United States interrogators at the Kandahar Air Base, accusing him based on statements he made under torture to save his life. In violation of the most fundamental protections of the Constitution, the Convention Against Torture, and international humanitarian law, the products of Mr. Janko's torture continue to be used to subject him to Guantanamo imprisonment. The government's failure to establish that its evidence and the decision-making underlying the Return are free from taint requires that the Court find that Mr. Janko's detention is unlawful and that he should be released.

B. Because The Government Relies Solely On Mr. Janko's Statements And Denounces Him As A ^{S6} [REDACTED] Liar, The Statements Cannot Suffice To Establish Enemy Combatant Status.

The government's Return is fundamentally flawed: the government affirmatively represents to the Court that ^{S6} [REDACTED] and that he is a liar, then depends almost entirely on his uncorroborated statements to justify seven years in prison. The government cannot have it both ways. As a matter of common sense, when the government affirmatively asserts that ^{S1 S5 S6} [REDACTED] ^{S1 S5 S6} [REDACTED] and ^{S1} [REDACTED] (Return ¶¶ 20, 21), especially with no corroboration of the statements upon which it relies, the government has failed to provide the Court with the initial showing based on credible evidence to establish a lawful basis for detention. The government cannot, consistent with due process, categorically denounce Mr. Janko's reliability, then rely on selected statements attributed to Mr. Janko to establish the lawfulness of seven years of indefinite detention. *See Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000) ("[T]he use of inherently factually contradictory theories violates the principles of due process.").

C. The Government's Return Is Insufficient To Provide A Credible Basis For Indefinite Detention Because The Reports Are Not Reliable, The Government's Interpretation Of The Reports Is Flawed, And No Sufficient Corroboration Is Provided.

The government's Return must pass a minimal level of reliability in order to meet the government's initial burden of proof. *Parhat*, 532 F.3d at 849; *Boumediene v. Bush*, CV 04-1166 (RJL) (Order filed Aug. 27, 2008). The government provides the thinnest factual basis for a determination that Mr. Janko is an enemy combatant: uncorroborated statements that the government selectively denounces and adopts that are all infected with their origin in torture, coercion, and flawed reporting.

1. The Reports Attached To The Return Are Categorically Of Low Reliability And Are Specifically Unreliable Because Of The Effects Of Torture And Interrogator Bias.

Many of the government's exhibits are raw intelligence reports, either in the form of Intelligence Information Reports (IIRs), Summary Intelligence Reports (SIRs), or law enforcement reports of the Federal Bureau of Investigation and the Criminal Investigative Task Force (FD 302s and FM 40s).⁸ The interrogation reports of other people contain multiple levels of hearsay. None, including the reports of interrogations of Mr. Janko, purport to be verbatim accounts, and few are

⁸ These different kinds of interrogation reports are described in the "Declaration of ^{S3} [REDACTED] Background Declaration – *Intelligence 101* (Sept. 19, 2008)." Return Ex. 1 at 6-7.

corroborated by additional information in the record; yet the government's Return cites to them as purported evidence and urges the Court to rely on them.⁹ Because of the multiple levels of hearsay, and because of the lack of corroboration, these reports are insufficient to satisfy any standard of proof that Mr. Janko is an enemy combatant.

These interrogation reports are analogous to police reports in terms of their unreliability as evidence. At least two kinds of reports are in fact law enforcement reports. Uncorroborated police reports are considered categorically unreliable. *Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003) (citing *United States v. Bell*, 785 F.2d 640, 643-44 (8th Cir. 1986)); *Farrish v. Mississippi State Parole Board*, 836 F.2d 969, 978 (5th Cir. 1988); *United States v. Comito*, 177 F.3d 1166 (9th Cir. 1999). See also *United States v. Mezas de Jesus*, 217 F.3d 638, 641 n.6 (9th Cir. 2000) (finding police reports insufficiently reliable to establish disputed facts at sentencing); *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995) (hearsay evidence did not have minimal indicia of reliability required for admission at sentencing where it consisted of unsworn accomplice statements). The raw intelligence reports are not considered reliable enough to be used by the intelligence community in the absence of corroboration. As described in the "*Intelligence 101*"

⁹ Compare 18 U.S.C. § 3500(e)(2) (defining "statement" as a written statement signed or adopted; a recording, transcription, or substantially verbatim recital; or recorded testimony).

Declaration (Return Ex. 1), the raw reports are not directly disseminated to the intelligence community, but rather are analyzed in combination with other sources to determine, among other things, their credibility:

The analysis and production step . . . includes integrating, evaluating and analyzing all available data . . . Analysts consider the information's reliability, validity, and relevance . . . They integrate data from multiple sources into a coherent whole and form judgments about its collective meaning. The result is finished intelligence assessments

Return Ex. 1 at 5.

The *Intelligence 101* Declaration explicitly likens the interrogation reports to law enforcement reports of informant statements, with all the inherent issues of unreliability:

Several factors help determine the credibility of a HUMINT source,

S1

S1

Much like informant reports received by law enforcement official[s], HUMINT sources are carefully screened and subsequently rated on their reliability, S1

S1

Return Ex. 1 at 8. Analysis of the reliability of information includes analyzing whether the source S1

S1

Return Ex. 1

at 8. All of this assessment occurs during the analysis stage of intelligence gathering. Although the government here suggests that the Court should base its determination on the raw intelligence reports themselves, and provides those reports as supposed

“evidence,” the government’s own Declaration makes clear that the intelligence community does not rely on them in that manner. Nor should the Court.

Raw reports, in the absence of corroboration, are not considered sufficiently reliable even for use at a CSRT. The Declaration of ^{S3} [REDACTED], *Use of Intelligence Products in The Targeting and Operation Cycles in Operation Enduring Freedom* (Aug. 22, 2008), describes that ^{S1} [REDACTED] ^{S1} [REDACTED]. That declaration describes a process of ^{D1 D2} [REDACTED] which uses the acronym ^{D1 D2} [REDACTED]. The ^{D1 D2} [REDACTED] process is used to create “multi-source and corroborated intelligence products to provide the clearest possible picture of the operational environment.” Return Ex. 2 at 1. Notably it is these final products, not the raw reports themselves, that are considered reliable enough to submit to a CSRT:

Unlawful Enemy Combatant Status Determinations. The intelligence products developed and validated through the ^{D1 D2} [REDACTED] process . . . and physical evidence from the objective . . . when subjected to thorough review and analysis by the commanders making the actual determination, generally form the factual basis for that legal determination.

Return Ex. 2 at 3-4.

The analysis step also ^{S1} [REDACTED]

^{S1} [REDACTED]

^{S1} [REDACTED]

Return Ex. 2 at 3. In other words, despite the fact that the intelligence

community S1

S1

S1

the government's Return asks the Court to make

that leap of faith and consider these reports reliable.

The Court of Appeals has already noted its unwillingness to make that jump in reviewing intelligence reports used to confine a Guantanamo detainee:

The government here insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be true . . . We do not in fact know that the departments regard the statements in those documents as reliable . . . Nor do we know whether the departments rely on those documents for decisionmaking purposes in the form in which they were presented to the Tribunal, or whether they supplement them with backup documentation and reliability assessments before using them to take actions of consequence.¹⁰

To be clear, we do not suggest that hearsay evidence is never reliable – only that it must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability.

Parhat, 532 F.3d at 849. The statements attributed to Mr. Janko, even if not inadmissible, lack probative value.

¹⁰ As this Court knows from the declarations cited above, the intelligence community does not in fact rely on uncorroborated hearsay documentation in making important decisions.

2. The Government's Skewed Interpretation Of Its Exhibits Demonstrates The Absence Of Credible Evidence To Support Detention.

The government's Return presents a story that is unrecognizable in the full context of its own documents. *Haynes*, 373 U.S. at 513 ("Certainly, we cannot accord any conclusive import to such an admission, particularly when, as here, it is immediately followed by recitations supporting the petitioner's version of events."). Despite readily available press accounts and independent eyewitnesses that confirm Mr. Janko's core account, the government ignores hard evidence and, instead, concocts a version of events by selectively adopting fragments of stories that are patently false or have very limited bases in reality. The government's Return continues the interrogators' bias and error: instead of recognizing that Mr. Janko initially contacted the United States to provide information he had learned as a brief conscript and long-term prisoner of Al Qaeda and the Taliban, the government reads declarations of innocence and informational assistance as admissions. And nowhere does the government take into account the psychic pain of a torture victim tortured by his rescuers. These errors taint each section of the Return.

a. Return Paragraphs 22-26: The Government's Account Of Mr. Janko's Travel To Afghanistan Is Unreliable And Based On Speculation.

The government provides no evidence that Mr. Janko was anything other than the moderate, apolitical student he has repeatedly claimed to be. In the course of responding to repeated interrogations, Mr. Janko provided information – not admissions – regarding the activities of others. In the tightly regulated United Arab Emirates, with the additional oversight by Syrian authorities, the lack of any concrete evidence of any extremism by Mr. Janko strongly supports his claims.

S1

S1

Return ¶ 24. The government's expressed skepticism

regarding his account finds no basis in reliable evidence. The government claims that

Mr. Janko did not need money

S1

S1

S1

Return Ex. 10 at 3.

In a footnote, the government cites but appears not to adopt absurd statements

S1 S6

. See, e.g., Return Ex.

32 at 1 n.4

S1

S1
S1
S1
S1
S1
S1
S1
Return Ex. 42 at 1
S1
Return Ex. 42 at 1-2
S1
S1
11

The absurdity of S1 is established by witnesses and logic. The family documents his history as a relatively protected and well-behaved young man who could not be S1 Traverse Exs. 14-17. S1 is obviously false because the United States did not help him in or after Sarpusa. The true account of Mr. Janko's departure is doubly corroborated because his family members, while he was virtually incommunicado in Guantanamo, have provided the same detailed account of Mr. Janko running away from home. And of course nothing about S1 would make Mr. Janko an enemy combatant.

The government S1
S1

¹¹ The government's footnote 4 contains further citations to S1
S1

S1 [REDACTED] hence the government's use of the passive voice. Return ¶¶ 22, 23. Again,

rather than

S1

S1 S6

S2 S6

S1

S1

Return Ex. 60 at 1.

S1
S2

S1 S2 S5

S1 S2 S5

Id.

The government

Return ¶ 23.

S1 S2

S1 S2

Return Ex. 44 at 1-2. There is no basis for any reliability assessment and, in any event, no connection to information known to Mr. Janko or acted on by him.¹²

¹² S1 S2 [REDACTED] are not probative for the same reasons and those stated in the motion to strike.

In the next paragraph, the government notes Mr. Janko did not have his passport, but ignores that Mr. Janko has provided the government with a copy of the document, proving the truth of his claim that his father maintained his passport. Return ¶ 25. The family declarations provided a complete explanation along with a copy of the passport from the Ajman police department. Traverse Exs. 14-17. The government's portrayal of Mr. Janko's statements is unfair: S1

S1

S1

Return Ex. 64 at 5; Return Ex. 10 at 4.



The government also omits that Mr. Janko sought refuge in the West through the United Nations High Commission of Refugees, and the United States, German, and Canadian embassies. This omission makes a difference: the detail and consistency of his assertions would have been easily corroborated when made, and demonstrate that he went to Afghanistan to become a refugee and travel to the West. See, e.g., Traverse Ex. 68 at 1; Return Ex. 10 at 4; Return Ex. 64 at 9. The government S1

S1


Traverse Ex. 55; Traverse Ex. 59.

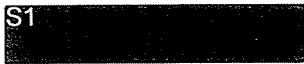
His Afghan friend gave him the name of a village and the name of a newspaper reporter to help him. Return Ex. 10 at 4-5. Once he arrived, the Taliban took away his papers with this information. Return Ex. 64 at 6.





- b. **Return Paragraphs 27-30: The Government Provides No Credible Evidence That Mr. Janko ^{S1}  ^{S1}  The Taliban And Admits That The Civil War Involved “Eventual,” Not Current, Allies Of The United States.**

The government concedes in ¶ 27 that the civil war involved the Taliban and “eventual” allies of the United States. The government lists crimes in Kenya and Tanzania but provides no link to Mr. Janko. Mr. Janko’s travel to Afghanistan was not to be involved in war but to seek passage to the West.

The government correctly describes Mr. Janko’s idiosyncratic manner of traveling to Afghanistan, but then provides no reliable evidence that ^{S1} 

^{S1}  Return ¶ 29. Mr. Janko repeatedly and in detail described how he obtained assistance from Afghan deportees to arrive at the border. Return Ex. 10.

¹³ In a footnote, the government refers to contradictory statements ^{S1 S6}  ^{S1 S6}  the first and direct answer was that Mr. Janko said he did not go to fight but to be a refugee. Return Ex. 16 at 5.

However, once there, he found himself out of money, thinly clad, in the Hindu Kush in January. His fellow travelers advised him to seek help reaching the addresses given to Mr. Janko from local authorities. Return Ex. 10 at 5. As the government concedes, S1 [REDACTED]

Return ¶ 29.

The government's reliance on the 2008 CSRT transcript does not establish any bad act or intent by Mr. Janko. He said he did not fight against the United States or its allies and that he ran away from home and was not in Afghanistan for jihad. Return Ex. 66 at 9; *see generally* Traverse Ex. 85. The government's reliance on Return Exhibit 30 is also misplaced. S1 [REDACTED]

S1 [REDACTED]

S1 [REDACTED]

Return Ex. 30 at 1.

S1 [REDACTED]

S1 [REDACTED]

S1 [REDACTED]

supports Mr. Janko's

innocence.

c. Return Paragraphs 31-34: The Government's Claims Regarding The Guesthouse Are Unreliable, Especially Given The Second CSRT's Finding Of Insufficiency.

The second CSRT panel found that the guesthouse allegation did not provide an adequate basis for detention. The government's assertions in ¶¶ 31-34 should be

disregarded because with identical parties, the government failed to produce sufficient evidence on this claim, thereby foreclosing further litigation in a forum where the parties are the same and the standard of proof is higher. *See Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (constitutional aspect to collateral estoppel). The bar on asserting this ground is especially appropriate where the CSRT had S1 S2 that the government did not produce with the Return.¹⁴

If the Court reaches the question, allegations in this section are baseless. The government provides no contradiction to S1 S1 S1 The government never mentions the name of the guesthouse in the Return, perhaps because the guesthouse is not named in the affidavit of Dennis Joyner on guesthouses. Return Ex. 6.

The government claims in ¶ 32 that Mr. Janko S1 S1 This is a mischaracterization of the relevant documents. With no spot cite, the government claims support from the 2005 ARB, but the statement was that, S1 S1 Return Ex. 65

¹⁴ *See, e.g.*, Traverse Ex. 71 at 1 S1 S5 session.”), Traverse Ex. 72 at 2 S1 S5

at 10. Mr. Janko's ARB testimony specifically denied the allegation in the Return that he "serviced and repaired weapons": "I participated in cleaning weapons not fixing them. I never used heavy weapons in my life and it took me five days to clean these weapons." Return Ex. 65 at 4.¹⁵

The overall unreliability of all guesthouse information

S1

S1

Traverse Ex.

S1

37 at 6.

S1

S1

Traverse Ex. 69.

S1

¹⁵ The government attributes to Mr. Janko other statements showing

S1

S1

S1

S1

Return Ex. 10 at 6; *see also* Return Ex. 10 at 6

S1

S1

Return Ex. 23 at 1

S1

S1

Return

Ex. 15 at 1

S1

Traverse Ex. 36 at 5.

S1

S1

Traverse Ex. 37 at 6.

S1

S1

S1

Despite the absence of any such statement anywhere else, the government claims that Mr. Janko

S1

S1

Return Ex. 15 at 1

S1

S1

S1

Any activity at the guesthouse was involuntary and innocuous.

S1

S1

S1

¹⁶ Under

the higher standard applied in this Court, the government failed to establish by

¹⁶ Return Ex. 74

S1

S1

S1

credible evidence that Mr. Janko serviced or repaired weapons at the guesthouse, or that anything that occurred there was voluntary.

d. Return Paragraphs 35-42: The Government's Claims Regarding The Training Camp Are Exaggerated And Unsubstantiated.

The government begins its allegations regarding the training camp by injecting a report irrelevant to Mr. Janko. The interrogation report regarding David Hicks (Return Ex. 9) provides the Court no reliable information because the government 1) omits the government's own charge that Mr. Hicks did not enter Afghanistan until January 2001 – a full year after Mr. Janko had been incarcerated by Al Qaeda and the Taliban;¹⁷ 2) fails to provide any information regarding the reliability of a statement made by a convicted criminal during post-arrest interrogation;¹⁸ and 3) does not advise the Court that, S1 S2

S1 S2 ¹⁹ The Hicks

¹⁷ The government's charging document expressly states that Mr. Hicks arrived in Afghanistan in January 2001, one year after Mr. Janko's incarceration. *Hicks v. Bush*, Civil No. 02-299 (CKK), document 218-2 (charges, filed Mar. 12, 2007) at 6 ¶ 24(a).

¹⁸ The product of post-arrest interrogation of a criminal suspect is inherently unreliable. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 131 (1999); *Lee v. Illinois*, 476 U.S. 530, 545 (1986).

¹⁹ By leaving out the date Mr. Hicks entered Afghanistan, the significance is lost of S3 S2 S1

report includes statements that are absurdly general – if not worse – regarding what an “Arab” or a “Muslim” would think or do. The report never mentions Mr. Janko or anything about him.

The statement in ¶ 35^{S1} is exculpatory^{S1}
^{S1} *Accord* 9/11 Commission

Report at 67. However, the Hicks statement does not address that issue^{S1}
^{S1}
^{S1} The Hicks statement has no

probative value on any issue in Mr. Janko’s case except to highlight the crass injustice of a convicted Al Qaeda criminal, who is now free, being used to indefinitely detain a man who came to America’s attention when he offered to provide testimony against Al Qaeda criminals.

The government’s Return omits the many references to Mr. Janko’s fear that forced him to go to the training camp. *See, e.g.*, Return Ex. 64 at 6 (“If I don’t go to that camp, they can do whatever they want to me, kill me; I’m already scared that they

^{S1} Return Ex. 8 at 2-3. ^{S1 S5}
^{S1 S5} Return Ex. 10 at
6.

are going to kill me.”). [REDACTED]

In ¶ 37, the government claims a statement in the 2008 CSRT demonstrates he knew who funded the camp. Once again, the context of the statement is that Mr. Janko was forced to go there and had no prior knowledge of anything about the camp because he was trying to be a refugee. All his information came from having been conscripted and later imprisoned. [REDACTED]

[REDACTED] Return Ex. 48 at 1-2 [REDACTED]

[REDACTED]²⁰

The statements attributed to Mr. Janko [REDACTED]

See, e.g., Return Ex. 10 at 6; [REDACTED] The government appears to claim an inconsistency because, [REDACTED]

[REDACTED] Return ¶ 38. No credible evidence contradicts Mr. Janko’s repeated statements regarding his limited participation before

²⁰ This product of American torture not only is absurd in its listing of persons and their nefarious doings [REDACTED], but includes the manifestly false statement: [REDACTED]

[REDACTED] Return Ex. 48 at 3.

being arrested when he tried to leave the camp. And the government's characterization of an admission and denial are unsupported by credible evidence.

The danger of distorting exhibits is further illustrated by the government's claim that Mr. Janko admitted S1 [REDACTED]

Return ¶ 38. The document cited provides not an admission, S1 S2 [REDACTED]
S1 S2 [REDACTED]

S1 S2 [REDACTED] The full sentence is exculpatory to Mr. Janko: S1 [REDACTED]

S1 [REDACTED]

S1 [REDACTED] Return Ex. 46 at 2 (emphasis added). Even

assuming S1 [REDACTED], the full

context is completely consistent with his assertion he was involuntarily at the camp and became a suspected spy when he tried to leave. Excitement during training is neither inculpatory, relevant, nor surprising.

In ¶ 39 the government S1 S6 [REDACTED]

S1 S6 [REDACTED]

S1 S6 [REDACTED]

S1 S6 [REDACTED] knew that Mr. Janko had been in

prison for two years before the Taliban fled Kandahar and that Mr. Janko did not come to Afghanistan to fight: "On one occasion S1 S6 [REDACTED] asked [Mr. Janko]

if he came to Afghanistan to train with the Arabs, but [Mr. Janko] said he was a refugee.” Return Ex. 16 at 5; [REDACTED] S1 S6

S1 S6

S1 S6

S1 S2 S6

S1 S2 S6

S1 S2 S6

The multiple hearsay by a non-percipient

witness is not reliable.

S1 S5

S1 S5

Return Ex. 40 at 3.

S1 S2 S6

S1 S2 S6

S1

Mr. Janko has consistently denied any training other than small arms.

S1

S1

Return Ex. 40 at 1.

S1

The next two paragraphs of the Return – ¶¶ 40 & 41 – question whether Mr. Janko tried to leave the camp after 18 days leading to his arrest as a spy. The

government admits that its exhibits are replete with consistent statements that Mr. Janko, after S1 days, tried to leave and did not want to fight. Remarkably, despite the absolutely consistent statements that he initiated departure, the government twists statements attributed to him to claim S1

S1

S1

Return ¶ 41. The government's citation S1 S2

S1 S2

(Return Ex. 56 at 2) S1 S2

S1 S2

S1 S2

21

The government's reference in ¶ 41 to the 2004 CSRT is not supported by any fair reading of the transcript. He stated that he attempted to leave the camp:

I saw that when they finished with light weapons, they would send them to tactical training, and then to the fighter lines/weapon lines. When they told me that, I cowered. I told them please, I want to go home, and to see my family, my friends, please let me go, and see them, please let me go back to the U.A.E. I feel bad that I ran away from home.

Return Ex. 64 at 6. Similarly, the government's repeated used of "admitted" regarding his gregariousness is unfair: the text of the statements attributed to

21 S1

Mr. Janko are in no way inconsistent with his statement in the same document that he said “he didn’t want to go to war and wanted to return to Pakistan” then go home. Return Ex. 23 at 2. The government’s repeated characterizations of his statements are also distorted: the fact he was not trusted makes perfect sense if, as was the case, he had no intention to join a cause he did not believe in but instead had been conscripted. The statements do nothing to belie the statements that he initiated departure; in fact, they support those statements.²²

The last paragraph of this section jumps to a discussion of Mr. Janko’s torture by Al Qaeda, video-recorded confessions, and – in a footnote – torture by Americans. Return ¶ 42. The government’s failure to fully acknowledge the fact of both Al Qaeda and United States torture demonstrates the lack of credibility that pervades its Return. Rather than candidly admitting that Al Qaeda torture occurred and that this fact utterly contradicts the claim of enemy combatant status based on S1 days at the camp, the government temporizes, referring to “claimed” torture and S1

S1

Then the government uses the same slur by reference to “claimed” torture by Americans in Kandahar, at the same time smearing S6 with another

²² The last sentence of ¶ 41 is a non sequitur: the obviously false claim S1 S1 has nothing to do with Mr. Janko’s attempt to leave the camp, which immediately led to his arrest and torture by Al Qaeda.

detainee's uncorroborated hearsay and referring to American torture as "thorough" interrogation. Return ¶ 42. In the same breath, the government explicitly relies on Kandahar documents while following the interrogators' never corrected false assumption up to the present. Although not quoted in the Return, S1 S2

S1 S2 Return Ex. 75 at 1.

In a cruelly ironic footnote, the government takes advantage of words produced by Al Qaeda torture to attack Mr. Janko. Return ¶ 42 n.12. This paragraph establishes that the government's Return not only provides no credible evidence because it relies on the products of Al Qaeda and United States torture, it also demonstrates that the decision to file a Return itself is tainted by the absence of any effort to break away from the evidence and decision-making that resulted from despicable, brutal, and readily verifiable torture.

e. Return Paragraphs 43-46: The Government Provides Insufficient Evidence That Mr. Janko Is A Threat To The United States.

The government admits that Mr. Janko has repeatedly stated that he harbors no ill will toward Americans and despises Al Qaeda and the Taliban. Return ¶ 43. The government omits the actions that confirm Mr. Janko's statements: the government does not deny that he approached Americans to testify against Al Qaeda and the Taliban; the record is rife with evidence that other detainees hate and threaten him

because he is aligned with Americans; and he has excellent relationships with Americans, as reflected, for example, S1 S5

S1 S5

S1 S5

Traverse Ex. 51 at 1. The interrogation reports are full of information regarding S1

S1

, including statements while he was in Sarpusa.²³

The government pays lip service to the origin of Mr. Janko's knowledge in his brief period in a guesthouse and camp and lengthy Taliban imprisonment, but then claims S1 S5

S1 S5

Return ¶ 44. Even with all the unreliability of reporting previously discussed, the claims are baseless from the face of the documents the government cites:

• Return Ex. 50: Coerced Kandahar Air Base interrogation S1
S1 S2
S1 S2 Mr. Janko renounced his statements made under torture.²⁴

²³ E.g., Return Ex. 18 at 2 ("The Taliban allegedly tortured RAHIM to the extent that he had very little use of his right arm. As a result, RAHIM spoke very badly of the Taliban.").

²⁴

• Return Ex. 49: Coerced Kandahar Air Base interrogation S1 S2

S1 S2 and Mr. Janko renounced his statements made under torture.

• Return Ex. 26: Summary report S1 S2 S5 S1 S2 S5

• Return Ex. 57: S1 S2 S5 S1 S2 S5

• Return Ex. 22: The government finds it “notable” in footnote 15 of its Return that Mr. Janko S1 S1

S1 described the details of his torture and imprisonment in a manner consistent to the detail with his statements to the Court and to the CSRTs and ARB.

The following paragraph of the Return continues with a purported admission that is not an admission by taking a fragment of a sentence out of context from a sentence taken out of context. Return ¶ 45. The government finds it notable that

S1 S1 citing to Return Exhibit 29. But even

worse, the government left out

S1

S1

S1

Id. The statement in full has the opposite meaning of what the government asserted. Similarly, Mr. Janko's 2004 CSRT statement is the opposite of what the government asserts. Rather than indicating that his imprisonment prevented him from killing, he stated that he requested to leave the camp because he was there involuntarily and did not want to fight. Return Ex. 64 at 6.

The government cites unreliable inferences based on unreliable data to suggest,

S1

S1

Return ¶ 44. In support, the government refers to detailed and entirely exculpatory 2004 CSRT testimony. The "apparent admission that he was fighting in Bagram with the Taliban and al-Qaida" comes from the following word salad: "In Bagram, fighting, because I went to administer, I just turn and ran away from my

father. But they caught me in a border city and they put me in prison.” Return Ex.

64 at 3.²⁵ Moments later, the transcript reads:

[T]hey forced me, tortured me to say I’m an American spy, or spy for any intelligence service. So, if the interrogation people said that, that’s proof of a lie. The testimony is that I’m not al Qaida, that I’m not a murderer, or Jihad for others. I must be a coward. I must pray for those people in this world. (Very inaudible and broken.) I’m not al Qaida.

Id. The Alice-in-Wonderland interpretation continues with the ARB, from which the government finds menace in the consistently exculpatory testimony that, in response to a question, Mr. Janko does not consider himself a soldier and will never again in his life be a soldier. Return Ex. 65 at 15.

The government also relies on a report that documents the following story to

S1 [REDACTED] Return Ex. 28 at 1 S1 S5
S1 S5 [REDACTED]

his damaged mind produced the following that the government suggests the Court should rely on:

²⁵ The government has refused to produce the audio recording of the proceeding.

S1 S5

Return Ex. 28 at 4. This quality of evidence is simply worthless.²⁶

Lastly, the government's claim that

S1

S1

is false. Return ¶ 46. Mr. Janko has had excellent relations with many American guards, mental health personnel, interrogators, and legal workers. He is also mentally ill, in a nightmarish crossfire between Al Qaeda torturers and Americans, some of whom tortured him. In that context, as Dr. Kinzie's declaration bears out, statements during bursts of anger are understandable manifestations of torture-induced mental illness. Traverse Ex. 11.²⁷ There is also natural tension between some guards and their prisoners. As reported by the Behavioral Sciences Consultation Team, the mental illness is treatable and, even if

²⁶ The government also

S1 S5

S1 S5

S1 S5

which provides no

basis for any suggestion to this Court. Return Ex. 54 at 1.

²⁷

S2

S2

untreated, does not create the type of risk contemplated by indefinite detention in Guantanamo. Traverse Ex. 68 at 2.

f. Return Paragraphs 17-21: The General Background Regarding Mr. Janko Is Incorrect And Unreliable.

Mr. Janko, given the months of Al Qaeda torture, and the inhuman brutality of that torture, would have symptoms associated with Post Traumatic Stress Disorder. Traverse Ex. 11. Add to that over a year in a horrendous Taliban prison, then torture for several months by Americans, and the [REDACTED] becomes absurd. Return ¶ 20. As internationally recognized psychiatric expert on torture victims Dr. J. David Kinzie stated in his declaration:

- PTSD and Major Depression are major mental illnesses that are the virtually inevitable psychological damage caused by torture;
- Such conditions are exacerbated by continued incarceration, especially the application of behavior modification by custodians;
- [REDACTED] where there is a major mental illness and absence of other diagnostic criteria;
- The prescribing of psychotropic drugs indicates [REDACTED] because medications are generally not the appropriate treatment for [REDACTED] beyond brief emergency intervention.

Traverse Ex. 11 at 5-7. The Court has ordered production of mental health records and the petitioner has a request for authorization of access for a security-cleared

psychiatrist who will be able to provide further assistance regarding the mental health issues.

The government further exploits its torture of Mr. Janko by citing reports made under physical and psychological duress as evidence that he is ^{S1 S5} [REDACTED] liar. Return ¶¶ 20, 21. As previously briefed, most of the reports relied on in ¶ 21 refer to statements that are the immediate products of admitted coercion by interrogators at the Kandahar Air Base. To coerce false statements, then use them to call a man a liar when he explains he was forced to make those statements, is profoundly unfair.

The government also uses Mr. Janko's products of mental illness to claim he is ^{S1 S5} [REDACTED] Mr. Janko has cut himself, banged his head until he bleeds, attempted to hang himself, and otherwise manifested mental illness in an environment that, according to Dr. Kinzie, is the exact opposite of the appropriate treatment for a torture survivor. Traverse Ex. 11 at 8-9. Counsel observed Mr. Janko during the period when some of the statements relied on by the government were made. Traverse Exs. 40, 41. The use of mental illness in Return ¶ 21 to insult Mr. Janko's character is wrong.

The government's reliance on an expert on counter-interrogation demonstrates the government's hopelessly unreliable showing. Return ¶ 21. The government cites to an expert who describes counter-interrogation techniques, none of which Mr. Janko

had knowledge of or practiced. Return Ex. 5. [REDACTED]

[REDACTED] Return Ex. 5 at 2. In contrast, Mr. Janko initiated contact with Americans, provided detailed and corroborated accounts of his and others' activities, [REDACTED] and claimed torture only when he truly had been tortured.³³

The government also denounces Mr. Janko for drug use, including in the publicly released documents the claim he frequently used hashish and heroin. Return ¶ 20. The claim of frequent use is based on a statement attributed to [REDACTED] a Saudi who came to Afghanistan after 9/11, then was tortured and imprisoned by the Taliban as a spy. Return Ex. 18 at 2. [REDACTED] arrived at Sarpusa prison just a week before the American bombing started and could have little first-hand knowledge regarding Mr. Janko, who had been in custody the previous two years, especially regarding frequent drug use. Return Ex. 18 at 5. The credibility of

³³ The government's claim that Mr. Janko provided an evolving account is addressed in a later section. The government never provides the Court with the chronological sequence that is necessary to see the consistency of his statements in the context of the acknowledged coercion by force, mental illness, and [REDACTED], which contradicts the claim that the government provided a "representative sample" of documents. Return ¶ 21 n.1. Further, in the absence of mental health records, the statements, especially the relatively recent more bizarre ones, should be correlated to Mr. Janko's medications and acute psychological distress.

these statements is further eroded based on inconsistent statements made at other times.³⁴ His relevant statements are that Mr. Janko was tortured based on spy allegations by the Taliban, that Mr. Janko had been tortured to the extent he had little use of his arm and, as a consequence, “spoke very badly of the Taliban,” and that he believed Mr. Janko had been in prison for two or three years prior to Mr. Bukhary’s arrival. Return Ex. 18 at 2.³⁵

3. The Return Lacks Credible Evidence Because Mr. Janko’s Uncorroborated Purported Statements Are Tainted By The Results Of Torture And Ensuing Mental Illness.

The government’s Return is insufficient because the unreliable accounts of purported statements of Mr. Janko do not establish a sufficient basis for detention. The unreliability is especially apparent given the statements in the reports themselves, for example:

• [REDACTED]

(Return Ex. 26.)

³⁴ [REDACTED] in *Gharami v. Bush*, Civil No. 05-CV-429 (RJL), Classified Memorandum Opinion at 3-4 (January 30, 2009).

³⁵ Mr. Bukhary’s recorded CSRT statements, from the context, include mistranslation of “tortured” as “bothered” (“Translator: He asked what is the word for ‘bothered’”) and describe brutal Taliban torture consistent with Mr. Janko’s reports. Traverse Ex. 39 at 2-3 (“I like to talk because I found that nobody bothers me. Nobody beats me. Nobody hits me. They have an art in interrogation.”), 5, and 7.

• S1 S5
S1 S5

Traverse Ex. 45 at 2.

• S1 S5
S1 S5
S1 S5 Traverse Ex. 47.

• S1 S5
S1 S5 Traverse Ex. 51 at 3.

• S1 S5
S1 S5 Traverse Ex. 44 at 1.

• S1 S5
S1 S5 Traverse Ex. 77.

• S1 S5
S1 S5 Return Ex. 39.

• S1 S5
S1 S5 Return Ex.
41.

The torture and mental health issues alone would establish unreliability. As a whole, with no corroboration, the massive reliance on Mr. Janko's statements does not support a prima facie case.

III. Mr. Janko Moves For Judgment Granting The Writ Because, As A Matter Of Law, The Government's Statement Regarding The Legal Basis For Detention Does Not Establish The Temporal Nexus Or Otherwise Meet The Definition Of Enemy Combatant.

Mr. Janko never participated in belligerent acts against the United States. As a result of his imprisonment, Mr. Janko could not have participated in hostilities against the United States and coalition forces. Because the government asserts no act after January 2000 as a basis for enemy combatant status, Supreme Court authority bars designation as an enemy combatant because lawful military detention must occur during, not before, the time of the statutorily authorized hostilities. *Hamdan*, 548 U.S. at 600. The Return also fails to establish conduct that meets any plausible definition of enemy combatant. In fact, the government never claims Mr. Janko was part of or supporting forces "engaged in hostilities against the United States or its coalition partners," as required by this Court's definition of enemy combatant.³⁶ Each of these failings provides an independent basis for issuance of the writ as a matter of law.

³⁶ Mr. Janko respectfully notes his continuing objection to this definition and submits that, under the individualized facts of this case involving a civilian reporting to American authorities human rights violations including crimes against Americans, the only basis for detention should be proof of a violation of the law of war by a higher standard than a preponderance, including beyond a reasonable doubt.

A. Mr. Janko's Indefinite Detention Is Unlawful Because The Government's Statement Of Legal Basis For Detention Alleges No Acts During The Statutory Authority For Military Action.

Because Mr. Janko was a non-combatant prisoner of the Taliban well before and after 9/11, and because there is no allegation of belligerent conduct after early 2000, the government's statement of legal basis for the detention fails to establish initial military jurisdiction over Mr. Janko and fails to provide a basis for the enemy combatant designation. The Supreme Court in *Boumediene* focused this Court's inquiry as "whether the AUMF authorizes" indefinite detention as an enemy combatant. 128 S. Ct. at 2271-72. Consistent with that approach, the Supreme Court in *Hamdan* firmly limited the Department of Defense's lawful actions to those authorized by statute, including prominently the limitation to the temporal period of the authorization for war. *Hamdan*, 548 U.S. at 597-99 (any offense "must have been committed within the period of the war") (citing William Winthrop, *Military Law and Precedents* at 837 (rev. 2d ed. 1920) (hereinafter Winthrop)). The earliest time for Department of Defense jurisdiction would be September 11, 2001. *Hamdan*, 548 U.S. at 599 n.31.

Based on *Boumediene*, the same temporal qualification outlined in *Hamdan* applies to Mr. Janko because the same statutory authorization is the predicate for detention of enemy combatants as for prosecution by military tribunals. Jurisdiction

must be based on acts “*during*, not before, the relevant conflict.” *Hamdan*, 548 U.S. at 600 (emphasis in original); *see also Hamdi*, 542 U.S. at 518 (detention applies to individuals who fought against the United States “for the duration of the particular conflict in which they were captured”). In *Hamdan*, the Supreme Court expressly disregarded any government claims regarding acts prior to September 11, 2001. 548 U.S. at 599-600. The Executive Order authorizing detention includes the temporal limitation to individuals who, “at the relevant times,” are aliens determined to be members of Al Qaeda or engaged in acts of terrorism. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror*, 66 Fed. Reg. 57833 (Nov. 13, 2001). Under the laws of war, the military cannot legally assume jurisdiction based on conduct *before* the war or other exigency authorizing the exercise of military power. Traverse Ex. 9 (Declaration of Gary D. Solis) ¶ 29 (“Just as a baseball pitcher cannot strike out a batter before a game starts, a military tribunal cannot have jurisdiction over acts alleged to have occurred before an armed conflict began.”).

For almost two years before his liberation from the Taliban prison, Mr. Janko was nothing more than a non-combatant victim of torture and illegal incarceration by the Taliban. He was despised by the Taliban for being a spy for the United States and Israel, an offense for which he barely escaped with his life. Unless he committed a

violation of the laws of war during the war, he is, like other non-combatants, “in general exempt from military arrest or restraint of the person.” Winthrop at 816. All statements and actions attributed to Mr. Janko so far predated 9/11 that no conceivable basis exists for his being held as an enemy combatant during the later war and statutory authorization for detention.

The limitation of detention authority to persons involved in belligerent acts *during* the conflict is necessary to the rationale for designating and incapacitating enemy combatants. “The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518. This rationale has no application in the present case where, for 20 months before the 9/11 attacks on America, Mr. Janko was a torture victim and prisoner of Al Qaeda and the Taliban. Mr. Janko was not fighting on the field of battle when detained, he was voluntarily coming forward to help the United States against Al Qaeda and the Taliban by testifying to their human rights violations.

The government’s asserted legal basis for detention is fatally flawed by its failure to allege a temporal nexus with the AUMF. The government’s statement of the legal basis for detention asserts only conduct in early 2000 – 20 months before the AUMF. This failing alone requires issuance of the writ.

B. A Taliban Torture Victim And Political Prisoner Who Came To The Military's Attention When He Offered To Provide Testimony To Al Qaeda and Taliban Human Rights Violations Does Not Meet Any Plausible Definition of Enemy Combatant.

An enemy combatant is “part of or supporting forces hostile to the United States or coalition partners and ‘engaged in an armed conflict against the United States’ to justify his detention.” *Hamdi*, 542 U.S. at 526; *accord Hamdan*, 548 U.S. at 570 n.1. The AUMF authorized “necessary and appropriate” force against persons the President “determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” AUMF §2(a); *see Little v. Barreme*, 6 U.S. 170 (1804) (military constitutionally limited to seizure of ships as specified in authorizing legislation). Under any permissible reading, Mr. Janko is not an enemy combatant.

The paradigmatic person to be held as an “enemy combatant” is a member of Al Qaeda or the Taliban captured fighting on the battlefield against the United States and its allies. *Hamdi*, 542 U.S. at 521, 531. No conceivable definition of enemy combatant would include a freed political prisoner who had been subjected to brutal torture and confinement by the enemy prior to the war. In the present case, there is no allegation that Mr. Janko engaged the United States on the battlefield in support of our enemies. On the contrary, the Taliban considered him an enemy to be tortured,

humiliated, and condemned, and as he stated to the CSRT – with no contradiction in the Return – “We said we would be witnesses against the Taliban and al Qaida.” Return Ex. 64 at 6.

The government presents no evidence controverting the fact that Mr. Janko was a freed political prisoner after about 20 months of torture and imprisonment by the Al Qaeda and the Taliban. “Political prisoners of the enemy would generally be civilians, as would persons volunteering to provide evidence against the enemy.” Traverse Ex. 9 ¶ 20 (Declaration of Gary D. Solis). As a civilian, the military has no authority over Mr. Janko unless he directly participated in hostilities: “[A] civilian may be treated as a combatant (albeit an unlawful combatant) whenever he/she takes a direct part in hostilities Absent direct participation in hostilities a civilian is not a combatant, and not a lawful object of either military armed force or detention as a combatant, and he is not subject to prosecution in a military forum.” *Id.* at ¶ 22.³⁷

Upon his liberation from the Taliban prison, Mr. Janko properly sought refuge through the intervention of non-governmental humanitarian organizations, such as the

³⁷ Persons not engaged in armed conflict are entitled to be free of restraint in the absence of a violation of the laws of war. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Winthrop at 816.

International Committee of the Red Cross and the United Nations.³⁸ The exhibits filed by the government include corroboration from many witnesses that Mr. Janko had been tortured and imprisoned in Sarpusa until the Taliban fled Kandahar. The government never contradicts the assertion in Mr. Janko's testimony that, through journalists, he contacted Americans to provide testimony and to seek help.

Professor Solis, a military expert on law of war, found no case that even approached the hypothetical matching the facts of this case:

Under the law of war, the individual in the hypothetical is not an enemy combatant because he took no part, direct or otherwise, in on-going hostilities – the predicate for either unlawful combatancy or enemy combatancy. I know of no precedent for an individual being detained as an enemy combatant under circumstances approaching those of the hypothetical.

Traverse Ex. 9 ¶ 30. Rather than authorizing detention, Mr. Janko's initiation of contact with United States authorities to report and to provide testimony against his Taliban torturers should provide a high level of protection compared to battlefield seizures. The former political prisoners reported that two persons abused by the Taliban were believed to be Americans, which should implicate the protections for

³⁸ Those who have been mistreated by the adversary power, such as concentration camp survivors, should be given special care by organizations such as the International Committee of the Red Cross. This Country signed the Fourth Geneva Convention protecting noncombatants largely in response to the inhumane manner in which displaced persons were treated in the wake of World War II. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348, 364 (1987).

witnesses to crimes in violation of the laws of the United States. Traverse Ex. 4, ¶ 45; Traverse Ex. 61 at 4.³⁹

Whatever the full extent of protection due to a witness coming forward to assist the United States, the Supreme Court has foreclosed the possibility that such a person could be indefinitely detained. *Hamdi*, 542 U.S. at 521 (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”). Under the laws of war, witnesses do not fall within the scope of military authority for indefinite detention. Given the sliding scale of protections due aliens, Mr. Janko took steps placing him on a higher level of the “ascending scale of rights as he increases his identity with our society.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)). As a friendly alien who has offered America assistance, as opposed to an enemy taken on the battlefield, his status as a witness alone should foreclose his indefinite detention.

The government’s legal burden is especially insurmountable in light of two principles raised by Mr. Janko’s involuntary conscription, attempt to leave, and offer to testify against Al Qaeda and the Taliban. First, to have legal significance,

³⁹ *In re Quarles*, 158 U.S. 532, 536 (1895) (recognizing the constitutionally protected right to be a witness in federal court); see 18 U.S.C. § 3144 (protections under the federal material witness statute); 8 U.S.C. § 1101(a)(15)(s) (provisions for immigration protection of alien witnesses).

participation in a hostile force must be voluntary. In the context of American citizens in an enemy army during wartime, the Supreme Court has held that expatriation could not occur “unless the conduct is engaged in voluntarily.” *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958) (citing *Mandoli v. Acheson*, 344 U.S. 133 (1952); *Acheson v. Hisao Murata*, 342 U.S. 900 (1952); *Acheson v. Kiyokuro Okimura*, 342 U.S. 899 (1952)).

[H]ere petitioner showed that he was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject. . . . The Government’s only affirmative evidence was that petitioner went to Japan at a time when he was subject to conscription.

Nishikawa, 356 U.S. at 136-137. The Court must consider the factors – such as Mr. Janko’s fear of being killed if he refused – depriving the person of full exercise of free will:

We think this type of case cannot simply be decided either by proof that the citizen voluntarily entered the foreign state (even the one of which he is a national) which subsequently drafted him, or by evidence that his foreign army service occurred pursuant to a draft law. The additional factors of actual, in fact, duress and coercion at the time of the conscription, on the other hand and of a free exercise of the will and of the mind, on the other, must bear heavily on the eventual answer. In other words, there must be consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom.

Acheson v. Maenza, 202 F.2d 453, 458 (D.C. Cir. 1953); *see also Tomasicchio v. Acheson*, 98 F. Supp 166, 173-174 (D.D.C. 1951) (“The plaintiff might well have

feared severe reprisals if he either protested or contested the order to the draft.”); *see also Breyer v. Ashcroft*, 350 F.3d 327, 337 (3d Cir. 2003) (“We think that Breyer’s demonstrated inability to secure release from the Waffen SS and his subsequent desertion can be, for the reasons discussed, sufficient to defeat the presumption of his continued military service was voluntary . . . Furthermore, his repeated attempts to secure both temporary and permanent release, followed by desertion of his unit demonstrate Breyer’s lack of commitment to service in the Waffen SS.”). Here, Mr. Janko’s short-lived connection with al Queda and the Taliban – five days in a guesthouse and eighteen days at a training camp – was involuntary to begin with, and by trying to leave, resulted in his torture and imprisonment, demonstrating no voluntary participation.

Second, Mr. Janko’s attempt to leave the camp and offer to provide testimony cleansed him of any association with Al Qaeda and the Taliban by analogy to common law principles of withdrawal. *See United States v. Walls*, 70 F.3d 1323, 1327 (D.C. Cir. 1995) (one can withdraw from a conspiracy by “the making of a clean breast to the authorities or communication of the abandonment in a manner reasonable calculated to reach co-conspirators”); *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964); *United States v. Weisz*, 718 F.2d 413, 435 n.132 (D.C. Cir. 1983); *United States v. Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976); *see also*

United States v. Fox, 189 F.3d 1115, 1118 (9th Cir. 1999) (conspirator can withdraw from a conspiracy by: (1) disavowing the unlawful goal of the conspiracy; (2) affirmatively acting to defeat the purpose of the conspiracy; or (3) taking “definite, decisive, and positive” steps to disassociate himself from the conspiracy). This principle applies in both civil and criminal contexts, in which a party may abandon the intention of committing a crime or illegal contract before it has been completed and thereby avoid penalty. *Bannon v. United States*, 156 U.S. 464, 469 (1895); *United States v. Britton*, 108 U.S. 199, 205 (1883); *Purcell v. Miner*, 71 U.S. 513, 518 (1866). Although Mr. Janko never engaged in voluntary conduct nor belligerent acts, his role as a person who attempted to leave, then became a voluntary witness, forecloses enemy combatant status.

C. Because The Government Does Not Allege That Mr. Janko “Engaged In Hostilities Against The United States Or Its Coalition Partners,” The Return Does Not Adequately Allege The Elements For Enemy Combatant Status.

The government’s statement of the legal basis for detention filed on December 9, 2008, cites this Court’s definition of enemy combatant, but then only alleges two of the three elements, omitting an allegation that Mr. Janko “engaged in hostilities against the United States or its coalition partners.” The government’s legal justification for detention repeats reference to the same five days in a guesthouse and 18 days at a training camp in January 2000 in support of two elements of the

definition, but omits entirely the third element. In subsection A, the government claims Mr. Janko was part of or supporting Al Qaeda and the Taliban; and in subsection B, the government asserts that Mr. Janko committed belligerent acts and directly supported hostilities in aid of enemy forces. Nowhere does the government allude to any engagement “in hostilities against the United States or its coalition partners.”⁴⁰ The missing element alone forecloses an enemy combatant finding.

IV. Even If The Return Were Sufficient, The Petitioner’s Affirmative Evidence Establishes That His Detention As An Enemy Combatant Is Unlawful And That He Is Innocent Of That Designation.

In his formal statements to the Court, Mr. Janko has established that he is not an enemy combatant. These statements are completely consistent with his statements to both CSRTs and to the ARB. Mr. Janko presents incontrovertible extrinsic evidence corroborating the essentials of his innocence: at the time of his contact with Americans in January 2002, he was a free man in Kandahar who had recently been liberated from a Taliban political prison; he was seeking refugee assistance from non-governmental organizations in Kandahar; and he initiated contact with Americans through journalists to offer testimony regarding Al Qaeda and Taliban human rights violations. He also provides corroboration of his torture and imprisonment by Al

⁴⁰ The failure to allege hostilities against the United States and its partners is not surprising given its assertion that, in early 2000, “the Taliban was mired in a civil war with the United States’ *eventual* allies, the Northern Alliance, in Afghanistan.” Return ¶ 27 (emphasis added).

Qaeda and the Taliban for the previous 20 months, as well as details regarding his departure from home to seek refugee status in the West and involuntary conscription by the Taliban for less than a month before they arrested him.

A. Mr. Janko's Initial Petitions To This Court And Declaration Of January 7, 2009, Provide A Detailed Account Of Mr. Janko's Activity And Conduct That Establishes He Is Not An Enemy Combatant And That He Should Be Treated As A Protected Civilian.

Mr. Janko's formal statements relate a single account that establishes that he is not an enemy combatant because he did not voluntarily affiliate himself with the Taliban and Al Qaeda and because – in any event – he became their victim for 20 months before the AUMF, then allied himself with the United States by approaching the Americans and offering to be a witness against the Taliban and Al Qaeda.

On June 30, 2005, Mr. Janko submitted a pro se document to this Court stating that there was no basis for him to be held in Guantanamo as an enemy combatant. Traverse Ex. 2. Mr. Janko stated that he was jailed by Al Qaeda and Taliban forces for two years before the events of September 11, as the Red Cross could corroborate, and he had been “accused of being a spy working for the United States of America.” Traverse Ex. 2. Mr. Janko further alleged that he did not “pose any threat to the United States and its allies and the proof is the accusation of Al Qaeda and Taliban to me stating I was an American spy and not only that but also that I cooperated with

the interrogators for the past three years up to the present time, and I am requesting from the interrogators to make a statement of that.” Traverse Ex. 2.

On August 2, 2005, Mr. Janko filed a supplemental petition for writ of habeas corpus stating the following:

. . . I am and was a victim of Al-Qaida and the Taliban in the past. I have spent two years in their prison that so-called SAREEZAH prison in QANDAHAR, AFGHANISTAN. Then the America[n] forces appeared and apprehended me; from prison they brought me to here, hence the ICRC requested from the American forces to release us. The American forces made promises that they were going to release us three days later. However, they’ve gone back on their promise and since those three days, here we are approaching the fourth year. How can that be? I was informed that it’s my right to object in the America[n] courts. Therefore, I would say with all pride that I’m not a threat to the U.S.A. or to any of its allies. I was a university student and I am wholly prepared to cooperate with the American government[.] [T]his is in addition that I was cooperative and I have been for a period of more than three years. Thus, what do the American forces want with me?

Traverse Ex. 3. He asked the Court how he could be an enemy combatant when the Americans freed him from the Taliban jail and he considers himself “a friend to the Americans and I want you to know that I am not a threat at all.” *Id.*

In Traverse Exhibit 4, Mr. Janko submits his declaration detailing the facts leading to his incarceration. The statement tracks the statement of material facts submitted in support of his summary judgment motion on September 21, 2006. He described his departure from home to seek refugee status in the West:

Because I wanted to go Europe or North America, I contacted several embassies and a United Nations office in Abu Dhabi seeking assistance. After my efforts to produce a way out of the country failed, I heard from a college friend connected to the Afghan embassy that, without a passport, I could be deported to Afghanistan and, as a refugee there, travel to Europe through humanitarian organizations. I followed his suggestions and was eventually deported to Pakistan and, with help from Afghan deportees, arrived at the border with Afghanistan in January 2000, still planning to seek passage to Europe as a refugee.

Id. at ¶¶ 17-19. When his Afghan companions could no longer assist, he consulted with local officials who insisted that he accompany them:

The Afghans with whom I traveled could no longer assist me and suggested I seek help from Afghan government personnel in traveling on to the addresses my friend had given me. When I explained I needed help, the Afghans wanted me to talk through an interpreter. The interpreter asked why I was in Afghanistan. When I told him, he refused to help. He told me to go back where I came from but I had no money and I could not get out of the mountains where I was. My friends had already left and I had only thin clothing and light shoes in the snow and cold of the border area. The interpreter told me I could either come with Afghans or he would leave me. He told the Afghans to take me to a guest house in Kabul. I only went with them because otherwise I would have died in the mountains.

Traverse Ex. 4, ¶¶ 20-21.

Mr. Janko explained that he did not voluntarily involve himself with the guest house or the training camp:

Although I repeatedly told the Afghan government personnel that I did not want to go to the guest house, they insisted that I go with them to the guest house for five days. After those five days, a truck arrived to take me to a camp near Kabul. I did not go voluntarily to the guest house or

to the camp; I accompanied them because I was afraid they were going to kill me.

Id. at ¶¶ 22-23. At both the guest house and the camp, he performed only low-level tasks:

While I was at the guest house, I only cleaned weapons upon instructions that I had to perform the task; I did not repair or maintain weapons or receive training. While I was at the training facility, I was treated with suspicion and given low level jobs such as hauling water, cutting wood, and cleaning small arms.

Id. at ¶¶ 24-25. When he attempted to leave the camp after two and a half weeks, he was taken into custody and accused of spying for the United States:

After seventeen days during which the only training I received was on small arms, I attempted to leave the camp, advising the camp leader that I wanted to return home. When I stated I wanted to leave, the camp leaders took me into custody the 18th day and accused me of spying for the United States and Israel. The accusation only came after I told them I wanted to leave.

Id. at ¶¶ 26-28.

Mr. Janko was then tortured into making video-recorded false confessions:

First in Kabul, and later in Kandahar, the Taliban, as well as Al Qaeda officials, subjected me to severe torture and threats of death during long interrogation sessions. The torture inflicted upon me included severe beatings, electric shock, being hung from the ceiling, water torture, striking the bottom of my feet with clubs, striking my hand with the butt of a gun, and sleep deprivation. They also extinguished cigarettes into my legs. As a result of the torture and threats starting in January 2000, I falsely confessed to being a spy for the United States and Israel, which was videotaped by my captors.

Id. at ¶¶ 29-31. After three months of torture, the Taliban placed him in a political prison where he survived through terrible living conditions:

After three months of torture, I was transferred to a political prison in Kandahar called Sarpusa after the neighborhood where it was located. I believe the Taliban Islamic Court in Kandahar sentenced me in May 2001, to a 25-year prison sentence on the false accusation of being a spy. The prison where I was confined also housed about 1,200 political prisoners, mostly Afghans from the Northern Alliance. The conditions in the Taliban prison were terrible: one piece of bread to eat all day, overcrowding, filthy living conditions, an abundance of rats and insects, poor medical care, and rampant disease. The International Committee of the Red Cross visited me while I was in the Sarpusa prison. I remained in the prison, after the initial three months of torture, between approximately May 2000 to January 2002.

Id. at ¶¶ 34-39. As a result of American bombing of Kandahar, Mr. Janko was freed from imprisonment, continuing to live in a wing of the prison while seeking assistance from non-governmental agencies:

On or about December 18, 2001, the Taliban abandoned the prison in Kandahar due to American bombing, and the new Afghan government took over. Almost all the political prisoners left the prison, eventually leaving behind myself, Jamal Al-Harith from Great Britain, Sadeeq Turkestani, a Uighur from Saudi Arabia, Abdul Hakeem Al-Bukhary from Saudi Arabia, and Ayrat Vakhitov from Russia. We remained as guests in the juvenile wing of the prison because the new warden warned us that local Afghans might be hostile to us. Between mid-December 2001, and January 24, 2002, I and the others visited offices of the Red Cross and the United Nations, seeking assistance in returning to our home countries.

Id. at ¶¶ 40-43. During this time of freedom, Mr. Janko spoke with journalists and expressed his willingness to be a witness to the human rights violations he suffered,

which resulted in a visit from persons who identified themselves as military intelligence:

Between mid-December 2001, and January 24, 2002, I and the others spoke to numerous journalists regarding our treatment as prisoners of the Taliban. I stated that I had been tortured and asked the journalists to contact the American military so I could testify regarding the human rights violations committed against me and others, including two prisoners I believed to have been Americans who were killed at the prison. On January 22, 2002, Americans visited the prison, advised they were from military intelligence, took photographs of us, and said they wanted information and we would be transferred home in about two weeks.

Id. at ¶¶ 44-46.

Two days later, a military detachment took the former prisoners to the Kandahar Air Base where he was treated relatively well until “the interrogators began treating me very badly after showing me a Time magazine article claiming I was a terrorist.” Traverse Ex. 4 ¶¶ 47-49. “My bad treatment by the Kandahar air base interrogators, after they confronted me with the magazine article, included striking me on the forehead; threatening to remove my fingernail; sleep deprivation; exposure to very cold temperatures; exercise to exhaustion doing sit-ups, push-ups, and running in chains; stress positions for hours at a time; use of police dogs; and rough treatment to take me to interrogation, although I did not resist or use violence.” Traverse Ex. 4 ¶ 50. In late April or early May 2002, Mr. Janko was taken to Guantanamo. Traverse Ex. 4 ¶ 51.

B. Mr. Janko Has Corroborated His Statements To The Court With Declarations Of Percipient Witnesses, Expert Testimony, Photographs, Contemporaneous News Reports, And Video Recordings.

In stark contrast to the government's Return, Mr. Janko has provided the Court with abundant extrinsic evidence that corroborates his account of innocence.

1. In January 2000, Mr. Janko Was A 22-Year-Old Syrian Kurd Student, With No History Of Political Or Religious Extremism, Who Left Home Over A Family Squabble.

From family accounts and his passport, Mr. Janko is a ^{S6} born on ^{S6} in northwest Syria. His father is a teacher of Islamic education, and Mr. Janko has ten brothers and sisters. Traverse Ex. 14 at 1-2 ¶¶ 1-2. He lived in Syria attending public school until the age of 13, when the family moved to the United Arab Emirates. Traverse Ex. 15 at 2 ¶ 2.

In the United Arab Emirates, Mr. Janko continued attending school for two years of post-high school education. Mr. Janko's adult brothers are teachers and businessmen. Traverse Ex. 15 at 2 ¶ 2; Traverse Ex. 16 at 2 ¶ 2; Traverse Ex. 17 at 2 ¶¶ 1, 2. From childhood, Mr. Janko had medical issues regarding a seizure disorder and, as a consequence, took medications prescribed by physicians and received special care from his family. Traverse Ex. 15 at 2 ¶ 4. Just prior to running away from home, Mr. Janko attended school and lived with his two brothers, ^{S6} and

S6 [REDACTED] which is north of Dubai and

S6 [REDACTED] where the rest of the family was living. Traverse Ex. 14 at 2 ¶ 4; Traverse Ex. 15 at 3 ¶ 5; Traverse Ex. 16 at 3 ¶ 5; Traverse Ex. 17 at 2 ¶ 5.

Mr. Janko's family confirms that Mr. Janko maintained close contact with them and engaged in no misbehavior beyond the normal. Traverse Ex. 14 at 2-3 ¶ 5; Traverse Ex. 15 at 2 ¶¶ 3, 4; Traverse Ex. 16 at 2 ¶ 3. Mr. Janko had no affiliation or beliefs regarding extreme politics or religion. Traverse Ex. 14 at 2-3 ¶ 5; Traverse Ex. 15 at 2 ¶ 4; Traverse Ex. 16 at 2 ¶¶ 3, 4; Traverse Ex. 17 at 2 ¶¶ 3, 4. He had friends and associates of all backgrounds, as is not uncommon in the blended society of the United Arab Emirates. Traverse Ex. 14 at 2-3 ¶ 5.⁴¹

A family argument led to his sudden departure from the United Arab Emirates in either December 1999 or January 2000. Traverse Ex. 15 at 3 ¶ 6; Traverse Ex. 16 at 3 ¶ 6; Traverse Ex. 17 at 3 ¶ 5. Mr. Janko borrowed money – 400 to 500 dirhams – from outside the family for expenses related to a school trip. Traverse Ex. 14 at 3 ¶ 6; Traverse Ex. 15 at 3 ¶ 5; Traverse Ex. 16 at 3 ¶ 5; Traverse Ex. 17 at 2-3 ¶ 5. When his brother S6 [REDACTED] insisted that his strict father be told that Mr. Janko borrowed money outside the family, Mr. Janko ran away from home. Traverse Ex.

⁴¹ "Abdul Rahim socialized with people of all backgrounds and showed a kind heart to all the communities in the United Arab Emirates, which includes a blend of different religious sects such as Hindus, Christians, Muslims, non-Muslims, and the like. Abdul Rahim dealt with all as his brothers."

14 at 3 ¶ 6; Traverse Ex. 15 at 3 ¶ 5; Traverse Ex. 17 at 2-3 ¶ 5. The issue was not the relatively small amount of money involved but the honor of the family, which was sullied by the suggestion that the family would not or could not take care of Mr. Janko's financial needs. Traverse Ex. 14 at 3 ¶ 6; Traverse Ex. 15 at 3 ¶ 6; Traverse Ex. 16 at 3 ¶ 5; Traverse Ex. 17 at 3 ¶ 6.

Mr. Janko left home because he feared the quarrel regarding money would anger his father. Traverse Ex. 15 at 3 ¶ 6; Traverse Ex. 17 at 2-3 ¶ 5. Mr. Janko's family confirm the details of the incident leading to Mr. Janko's sudden departure. Traverse Ex. 14 at 3 ¶ 6; Traverse Ex. 15 at 3 ¶ 5; Traverse Ex. 16 at 3-4 ¶¶ 6, 7; Traverse Ex. 17 at 2-3 ¶ 5. Mr. Janko's father had control of Mr. Janko's passport, as he had for all his sons, so Mr. Janko did not have travel documents. Traverse Ex. 15 at 3 ¶ 7; Traverse Ex. 16 at 3 ¶ 7; Traverse Ex. 17 at 4 ¶ 7.

After a time looking for Mr. Janko and hoping he would return, Mr. Janko's father contacted the ^{S6} police on February 6, 2000, and filed the equivalent of a missing person report, a copy of which he retained, and turned Mr. Janko's passport in to the ^{S6} police at the same time. Traverse Ex. 14 at 3 ¶ 7; Traverse Ex. 15 at 4 ¶ 8. Mr. Janko's brother ^{S6} obtained a copy of the original passport on

September 6, 2006; the passport itself remains in the possession of the S6 police.

Traverse Ex. 15 at 4 ¶ 8.⁴²

2. Shortly After Arriving In Afghanistan, Al Qaeda And Taliban Personnel Took Mr. Janko Into Custody, Accused Him Of Being An American And Israeli Spy, And Tortured Him Into Making False Video-Recorded Confessions.

In the spring of 2002, both the Taliban Minister of Information and the Minister of Foreign Affairs announced Mr. Janko's capture and false confession, announcing he was a spy for the United States and Israel, and that he had confessed under interrogation, implicating others. Traverse Exs. 10-14. Abu Dhabi TV ran an excerpt of Mr. Janko's confession under torture (Traverse Ex. 23), and the Taliban's propaganda magazine ran an extensive account of the false confession. Traverse Ex. 22.

The fact of Mr. Janko's torture is to some extent self-evident: no one would voluntarily make such statements to Muslim fundamentalists regarding spying for the West and living a decadent lifestyle. Professor Darius Rejali, an internationally recognized expert on the sociology of torture, provided an extensive report on how Mr. Janko's description of the tortures inflicted were corroborated by the study of torture. Traverse Ex. 10 at 4-13. Family members also provided details of how the

⁴² A copy of Mr. Janko's passport is attached to Traverse Exhibit 15; the missing person report is attached to Traverse Exhibit 14.

TV excerpt appeared to be coerced. Traverse Exs. 14-17. The fellow Sarpusa prisoners corroborated the length of imprisonment and types of torture. Return Ex. 16 at 4-5; Traverse Ex. 5 at 5; Traverse Ex. 13; Traverse Ex. 39; Traverse Ex. 39 at 5.

Mr. Janko's statements that he was an American and Israeli spy were false, and his efforts to mollify his Taliban and Al Qaeda tormentors were the result of torture and threats of death. Mr. Janko did not live the decadent life described; the names of most individuals were simply made up on the spot; he did not attend the Hanifa school; and phrases Mr. Janko mouthed were foreign to his own background. Traverse Ex. 14 at 4 ¶ 8; Traverse Ex. 15 at 4 ¶ 9; Traverse Ex. 16 at 8 ¶ 8; Traverse Ex. 17 at 3 ¶ 6; Traverse Ex. 23.⁴³ Mr. Janko appears in the videotape to be extremely pale, underweight, and under extreme stress. Traverse Ex. 14 at 4 ¶ 9; Traverse Ex. 15 at 8 ¶ 8; Traverse Ex. 16 at 3 ¶ 6; Traverse Ex. 23.

Al-Qaeda members tortured Mr. Janko until he admitted he was a spy and subjected him to severe torture for three months.⁴⁴ Mr. Janko's torture took place

⁴³ Abu Dhabi television video included a post-interview disclaimer that the names appeared to be fictitious. Traverse Ex. 23.

⁴⁴ Return Ex. 64 at 3 ("They forced me, tortured me to say I am an American spy, or spy for any intelligence service"); Return Ex. 64 at 6 ("They took me to Kabul again and then to Kandahar. There they started beating and torturing me. They used electric shock on me to get information from me. They started to torture me a lot. I lost the use of my right hand because of that"); Return Ex. 65 at 10 ("They told me

under the supervision and participation of Al Qaeda officials, including Mohammed Atef and Sayf Al-Adl. Traverse Ex. 12 at 3 ¶ 7; Traverse Ex. 13. S2

S2

S1 S2 S5

S1 S2 S5

Traverse Ex. 68 at 1.

After three months of torture, the Taliban transferred Mr. Janko to a political prison called Sarpusa in Kandahar. The political prison where Mr. Janko was confined also housed between 1,200 and 2,500 political prisoners, mostly Afghans from the Northern Alliance. Traverse Ex. 39 at 5; Traverse Ex. 13; Traverse Ex. 19; Traverse Ex. 29. The conditions in the Taliban prison were terrible. Traverse Ex. 12 at 5 ¶ 10; Traverse Ex. 13 at 4 ¶ 9; Traverse Ex. 38 at 5; Traverse Ex. 39 at 2. The International Committee of the Red Cross visited Mr. Janko while he was in the Taliban prison. Traverse Ex. 12 at 3 ¶ 8; Traverse Ex. 33; Traverse Ex. 74.

3. American Bombing In Kandahar Led To The Liberation Of The Taliban Prison, After Which Mr. Janko And Other Former Prisoners Sought Aid From The Red Cross And The United Nations And Offered Americans Testimony Regarding Human Rights Violations.

On or about December 18, 2001, the Taliban abandoned the prison in Kandahar due to American bombing, and the new Afghan government took over. Traverse Ex.

to just say yes, so I told them I would if they would not touch me again. I had no choice but to say yes, they turned my life to hell and tortured me for three months.”).

12 at 3 ¶ 9; Traverse Ex. 39 at 5; Traverse Ex. 25; Traverse Ex. 26; Traverse Ex. 27. Almost all the political prisoners left the prison, eventually leaving behind Mr. Janko; Jamal Al-Harith from Great Britain, Sadeeq Turkistani, a Uighur from Saudi Arabia; Abdul Hakeeln Al-Bukhary from Saudi Arabia; and Ayrat Vakhitov from Russia (the Kandahar 5). Traverse Ex. 12 at 3 ¶ 9; Traverse Ex. 39 at 7; Traverse Ex. 38 at 5-6; Traverse Ex. 27; Traverse Ex. 28; Traverse Ex. 29 at 1; Traverse Ex. 31 at 2. The Kandahar 5 remained as guests in the juvenile wing of the prison because the new warden warned them that local Afghans might be hostile to foreigners or might sell them to the United States for a \$5,000.00 bounty. Traverse Ex. 12 at 4 ¶ 9; Traverse Ex. 26; Traverse Ex. 27 at 3; Traverse Ex. 31.

Between mid-December 2001, and January 24, 2002, Mr. Janko and others of the Kandahar 5 visited offices of the Red Cross and the United Nations, seeking assistance in returning to their home countries. Traverse Ex. 12 at 4 ¶ 10; Traverse Ex. 17 at 5 ¶ 11; Traverse Ex. 26; Traverse Ex. 27 at 2; Traverse Ex. 31 at 2. During this time, Mr. Janko and the other former prisoners spoke to numerous journalists regarding their treatment as prisoners of the Taliban. Traverse Ex. 12 at 4 ¶ 10; Traverse Ex. 25; Traverse Ex. 26; Traverse Ex. 27; Traverse Ex. 28 at 2-3;⁴⁵ Traverse

⁴⁵ “The marks of maltreatment are visible.”

Ex. 29 at 8;⁴⁶ Traverse Ex. 13; Traverse Ex. 31. Mr. Janko stated that he had been tortured by Mohammed Atef and other Al Qaeda officials and expressed his willingness to testify regarding the human rights violations committed against him. Return Ex. 64 at 6;⁴⁷ Return Ex. 65 at 14;⁴⁸ Traverse Ex. 13.⁴⁹

The journalists remember the Kandahar 5 and have provided statements corroborating that Mr. Janko was a free man after the Taliban left, that he and the others were seeking help from the Red Cross and the United Nations, and that Mr. Janko and the others asked the journalists to contact the Americans at the Kandahar Air Base to offer their testimony to Al Qaeda and Taliban human rights violations. Traverse Ex. 5; Traverse Ex. 6; Traverse Ex. 7; Traverse Ex. 8. The Kandahar 5, as well as the new warden of the Kandahar prison, told journalists they had been the victims of Taliban torture while in custody in the Taliban prison. Traverse Ex. 12 at 4 ¶ 10; Traverse Ex. 27 at 3; Traverse Ex. 29; Traverse Ex. 39 at 7. The contemporaneous article by Tim Reid in the London Times confirms that,

⁴⁶ “All say they were captured and accused of spying by the Taliban and tortured to make them confess.”

⁴⁷ “We said we would be witnesses against the Taliban and al Qaida.”

⁴⁸ “Abdul Rahim and his Russian friend told journalists, ‘we wanted to be witnesses against the Taliban in court.’”

⁴⁹ “The men – a Russian, a Syrian, a Saudi, and a Saudi-born stateless man – said al-Adl and Muhammed Atef, a close aid of bin Laden’s, killed in U.S. bombings in November, had interrogated them and authorized their torture.”

rather than being captured by Americans, Mr. Janko came to the Americans' attention on his initiative. Traverse Ex. 32 at 2.

In the first CSRT, Mr. Janko stated that "Mike," an Australian reporter for Time magazine, could corroborate his account. Michael Ware, the internationally known reporter for CNN, who is Australian and worked for Time in 2002, confirms that he spent about a month with Mr. Janko. Traverse Ex. 6 at 3. They shared meals together and drove around Kandahar looking for refugee assistance from the United Nations and the Red Cross for Mr. Janko and others. Traverse Ex. 6 at 6. Mr. Ware let the former prisoners, including Mr. Janko, use his satellite phone to make calls home (as confirmed by reports from Mr. Janko's family). Traverse Ex. 6 at 3.

Mr. Ware confirms that Mr. Janko asked journalists to contact the Americans to seek help and to testify regarding human rights violations.

On several occasions in December 2001 and January 2002 I had conversations regarding the plight of Mr. al-Ginco and the others with U.S. military, intelligence, and law enforcement officials - most based at Kandahar's airport, a few others within the residence of the Governor of Kandahar. Indeed, much of my contact with U.S. agencies or forces was at the behest of Mr. Ginko and the others. All were willing, and eager, to provide statements regarding: any details they had on the nature of the operations, structure, and counter-intelligence capabilities of the Taliban regime; any experiences regarding al-Qaeda's practices and interrogation techniques; and, at the relentless persistence of Mr. al-Ginko and the others, for me to open channels of communication with various U.S. government entities. Mr. al-Ginco and the others

repeatedly urged me to speak to U.S. authorities to offer the men's desire to co-operate with U.S. forces and return home.

Traverse Ex. 6 at 5. Mr. Ware's declaration includes his expert knowledge regarding Al Qaeda and the Taliban in Kandahar and his verifications of Mr. Janko's account of his mistreatment by our enemies and attempts to assist the United States. Traverse Ex. 6 at 2, 5.

Mr. Janko's freedom at the time he contacted the American military is also confirmed by extraordinary photographs by Thorne Anderson taken inside the juvenile wing of the Sarpusa prison where the former prisoners were staying while they sought a way out of Afghanistan. Traverse Ex. 5 at 2-4. The photograph of Mr. Janko shows a relaxed young man with a short beard. Traverse Ex. 1. In one photo, he shows the shackles that had confined him, in another he is talking and smoking with his friends, and in another he is clowning with weights. Traverse Ex. 5. The photographer's sworn declaration asserts that the former prisoners were free to come and go. Traverse Ex. 5 at 2. Pierre Lhuillery, a journalist from Agence Presse France, who accompanied Mr. Anderson, not only remembered that Mr. Janko wanted him to tell the Americans he would provide testimony against Al Qaeda and the Taliban, he even provided the name of the colonel to whom he passed on the former prisoners' request to bear witness against their tormentors. Traverse Ex. 7 at 4.

Tim Reid, a reporter for the London Times, remembers that Mr. Janko and the others were free to leave, that they sought assistance from humanitarian organizations, and that they explicitly requested that reporters contact the American military to provide testimony:

The other four “prisoners” all said they were desperate to be interviewed by the FBI. At the end of that week, three U.S. federal agents did indeed arrive at the jail.

Traverse Ex. 8 at 4 ¶ 10.

During the meetings I attended with Mr. Lhuillery he told the former prisoners that he was going to visit the local U.S. base at Kandahar airport and report from that location. When the former prisoners heard that he was going to visit the base they asked him to approach the commander at the base and ask the Americans for help. They wanted to tell the U.S. military about the things that the Taliban had done to them and try to get assistance in leaving Afghanistan.

Traverse Ex. 8 at 5 ¶ 13.

The contemporaneous articles from this time repeatedly confirm that the men were free, that they were seeking assistance from the United Nations and the Red Cross, and that they had been tortured under the Taliban regime. Traverse Ex. 25 at 2; Traverse Ex. 26 at 2; Traverse Ex. 28 at 2; Traverse Ex. 29 at 3; Traverse Ex. 30 at 2. On January 22, 2002, two Americans, one in uniform and the other in civilian clothes, visited the Kandahar at the prison, advised they were from military intelligence, took photographs of the former prisoners, and advised they wanted

information and would be transferred home in about two weeks. Traverse Ex. 18 at 4 ¶ 11.

4. The American Military Took Mr. Janko And Other Political Prisoners Of The Taliban Into Custody, Transported Them To The Kandahar Air Base, Then – When Interrogators Mistook Mr. Janko For A Terrorist Based On An Al Qaeda Torture Tape – Tortured Him Into Falsely Confessing To Al Qaeda Affiliations.

On January 24, 2002, the two Americans and a heavily armed detachment of American soldiers took Mr. Janko and the others of the Kandahar 5 into custody and transported them to the air base for what was supposed to be a few days. Traverse Ex. 18 at 4-5 ¶ 12; Traverse Ex. 21 at 7. On almost the same day, then-Attorney General John Ashcroft held a press conference announcing that videotape had been found in the wreckage of Mohammed Atef's dwelling in Kandahar, where Mohammed Atef had been killed by American bombing, and that five persons including "Abd Al-Rahim" were being sought as terrorists. Traverse Ex. 34; Traverse Ex. 36; Traverse Ex. 37.

The January 28, 2002, issue of Time magazine, contains an article reporting on Attorney General Ashcroft's press conference that included a photograph of "Abd Al-Rahim" with four others on different tapes. Traverse Ex. 37. The article reported the request of the government for public assistance to help "identify, locate and

incapacitate” the individuals depicted as terrorists. *Id.* The FBI listed Mr. Janko as a most wanted international terrorist based on the tape. Traverse Ex. 43. The press conference did not include audio of the tapes.

For the first days at the Kandahar air base, the Kandahar 5 were treated relatively well, being kept apart from other prisoners and receiving extra blankets and chocolate. Traverse Ex. 18 at 5 ¶ 13. S2 [REDACTED] first contacts with Americans S3 [REDACTED] indicate that Mr. Janko provided information regarding his seeking refugee status and his torture by Al Qaeda and the Taliban:

S1 [REDACTED]
S1 [REDACTED] S1 [REDACTED]
S1 [REDACTED]
S2 S3 [REDACTED] S2 S3 [REDACTED] Traverse Ex. 55.
[REDACTED] Mr. Janko’s torture

in prison is noted, S1 [REDACTED]
S1 [REDACTED]
S1 [REDACTED] Traverse Ex. 39.

Then, Mr. Janko reported that interrogators suddenly began treating him very badly after showing him a Time Magazine article claiming he was a terrorist. Traverse Ex. 4 at 8 ¶¶ 49-50. S3 [REDACTED] apparently believed that the Time article demonstrated that Mr. Janko was a terrorist, that he had tricked the

interrogators, and that he had information regarding Al Qaeda. Return Ex. 75; Traverse Ex. 40.⁵⁰ The interrogators then began a regime of physical coercion to force Mr. Janko to make statements. *Supra* at 15-17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a result of the coercive Kandahar interrogation and the Al Qaeda tape, Mr. Janko was sent to Guantanamo.

C. Mr. Janko's Statements To The Court Are Consistent With The Detailed Accounts He Provided To The First CSRT In 2004, The ARB In 2005, And The Second CSRT In 2008.

As in his formal statements to the Court, Mr. Janko's recorded statements provided to military authorities consistently provide the same account for his presence in Afghanistan, torture by Al Qaeda and the Taliban, and his initiation of contact with Americans. In the first CSRT and the ARB, he provided information that he was an open-minded student who ran away from home over a family dispute after he borrowed money for a school trip. Traverse Ex. 78. Mr. Janko went to Abu Dhabi to try to obtain refugee assistance from embassies there. Traverse Ex. 79. When other options failed, he went to a friend at the Afghanistan embassy who could

⁵⁰ "When the Americans came, I told them about the videotape the Taliban made of me. By me telling them about the video it created confusion to the point that the Americans believed I was working for al Qaeda. Here I am now I don't know if I am a spy for America or I work for al Qaeda." Return Ex. 65 at 5.

not help him with travel documents but suggested how he could be deported there by pretending to be an undocumented Afghan. Traverse Ex. 80.

At the Afghanistan border, his efforts to become a refugee were thwarted by being commandeered to a guesthouse and a training camp. Traverse Ex. 81. After five days in a guesthouse and 18 days at a camp, Mr Janko tried to leave the camp and, as a consequence, was arrested and tortured as a spy. Traverse Ex. 82.⁵¹ After being freed by American bombing, he offered to provide testimony against Al Qaeda and the Taliban. Traverse Ex. 84. Mr. Janko provided the 2008 CSRT with the same account he provided at the previous CSRT and ARB. Traverse Ex. 85.

D. The Statements Attributed To Mr. Janko [S1 S2] Are Virtually Identical To His Statements To This Court And To The Formal Military Proceedings.

In an exhibit included in the second CSRT but omitted from the Return, [S1 S2]

[S1 S2]

[S1 S2]

The account is virtually identical to the statements Mr. Janko has provided in formal and recorded settings. Traverse Ex. 68; Traverse Ex. 86.⁵²

⁵¹ Mr. Janko's military proceedings directly involved allegations based on the Al Qaeda torture tape making him a suicide martyr. Traverse Ex. 83.

⁵² [S1 S2] are sufficiently reliable to fall within an exception to the

S2 [REDACTED] Mr. Janko provided his upbringing and background with the explanation that he ran away from his father in January 2000 to seek asylum in the West. When all else failed, a friend told him how to be deported to Afghanistan and find help. Once at the freezing border with Afghanistan in January, and with no money, Mr. Janko was forced to go with the Taliban for training for 18 days, when he tried to leave the camp. As a consequence of asking to leave, the Taliban became suspicious, then tortured and imprisoned him as a spy. He was freed when the Taliban fell.

E. Mr. Janko's Interrogation Reports Provide a Generally Consistent Account Of His History And Affiliations Except When Coerced By Interrogators And, After Years Of Detention At Guantanamo, Embellished As A Result Of Increasing Mental Illness, Desperation, And S1 [REDACTED] By Interrogators.

Contrary to the government's assertions, Mr. Janko's current account of himself is consistent with the account he has given since the earliest days of his contact with the United States. With few exceptions, the "lies" the government attributes to Mr. Janko fall into two categories: 1) statements he made to interrogators at Kandahar between February and May 2002 under coercion that the government admits occurred and that the interrogators even at the time considered unreliable; and 2) S1 S2 [REDACTED]

hearsay rule. Fed. R. Evid. 803(4).

when a combination of increasing desperation, mental illness resulting from torture, and inducements by interrogators, led him to tell them what he thought they wanted to hear.

After Mr. Janko contacted the Americans through journalists, he spoke to United States personnel, providing the account the government questions in the Return. The very earliest interviews after Mr. Janko was liberated, but before he was branded a terrorist, provide a consistent account of his history and imprisonment as the account he gives now. *See* Traverse Exs. 55, 56, 61, 62, 63.⁵³ It is unclear the exact date on which the interrogators at Kandahar became aware of the videotape that was originally, although erroneously, believed to be a suicide martyr tape made by Mr. Janko. But one of the interrogators at Kandahar became aware of it after seeing an article about it in the January 28, 2002, issue of Time magazine.

S1 S2 S3 S5

S1 S2 S3 S5

S1 S2 S3 S5

Return Ex. 75

S1 S2

⁵³ Because reports are from this period are omitted from discovery and the government has not produced requested documents relating to Mr. Janko's initial custody, the record is incomplete.

The Kandahar interrogation reports that followed this coercion include

S1 [REDACTED]
S1 [REDACTED] Return Ex. 48 S2 [REDACTED] S1 [REDACTED]
S1 [REDACTED] Return Ex. 51 S2 [REDACTED]
S2 [REDACTED] S1 [REDACTED]
S1 [REDACTED] Return Ex. 49 S2 [REDACTED]
S2 [REDACTED] S1 [REDACTED] S1 S2 [REDACTED]
S1 S2 [REDACTED] Return Ex. 69.

Mr. Janko himself repudiated the claims about Al Qaeda involvement immediately when he reached Guantanamo. In a six-hour interrogation by numerous persons connected with both the FBI and the military upon his arrival in early May 2002, Mr. Janko told interrogators that these statements had been untrue and that he had given those statements in order to satisfy the interrogators. Return Ex. 10; *see also* Traverse Ex. 46; Traverse Ex. 47; Traverse Ex. 50.⁵⁴ In the May 7, 2002, interrogation, and in repeated interrogations over the next two years, he gave consistent accounts of his own history, ending with the imprisonment and torture by the Taliban. *See, e.g.*, Return Ex. 64; Traverse Ex. 57; Traverse Ex. 58; Traverse Ex.

⁵⁴ S1 S2 [REDACTED]
S1 S2 [REDACTED] Return Ex. 60 at 2. This appears to be a euphemism employed by the report writer; Mr. Janko lied to interrogators under coercion so they would stop torturing him.

65. He gave the same account at both his 2004 and 2008 CSRT's and in the statements filed with this Court.

For the next several years at Guantanamo, Mr. Janko gave consistent accounts of these activities S1

S1

S1

S1 S5

S1 S5

S1 S5

The only exceptions were those that credited the coerced Kandahar statements Mr. Janko had disavowed.

For example, S1 S2

S1 S2

S1 S5

S1 S5

S1 S5

Traverse Ex. 68 (bold print in original).

Similarly S1 S2 S5

S1 S2 S5

Traverse Ex. 73 at 2-3. S1 S2 S5

S1 S2 S5

S1 S2 S5

Return Ex. 73 at 1.

S1 S2 S5

S1 S2 S5

Id.

S1 S2 S5

S1 S2 S5

S1 S2 S5

Id.; see also Traverse Ex. 42.

Observations of his behavior show that his mental health issues were manifesting themselves in his interrogations. S2 noted that he had engaged in self-injurious behavior during the past week. Return Ex. 4 at

1. S2

S1 S2 S5

Traverse Ex. 51 at 3.

S2

S1 S5

Traverse Ex. 48.

S1 S5

S1 S5

S1 S5

Id.

S1 S2 S5

Mr. Janko had been detained despite the 2004 CSRT and then also remained detained following the 2006 ARB. He had been in continuous custody since 2000, been tortured by the Taliban as an American spy, then S1 by the Americans who believed him to be an Al Qaeda agent, then lived in a state of fear and isolation at Guantanamo where other detainees considered him a spy for the Americans.⁵⁵ He was estranged from his family, seriously mentally ill, and isolated from other human company. In support of its assertion that Mr. Janko S1 S5

⁵⁵ See, e.g., Return Ex. 11 at 1 (reporting Mr. Janko very upset by his treatment by other prisoners who called him a spy, leading him to cut and try to hang himself).

the examples listed by the Return all come from two time periods – either the coerced statements at Kandahar or the period starting in 2006. Return ¶ 21.

There is evidence that by early 2006 Mr. Janko had begun making up new stories to please new interrogators. See Return Ex. 28. S1 [REDACTED]

S1 [REDACTED] S1 S2 [REDACTED]

S1 S2 [REDACTED]

S1 S2 [REDACTED] Return Ex. 30. S1 S2 [REDACTED]

S1 S2 [REDACTED]

According to Return Exhibit 44, S1 S2 [REDACTED]

S1 S2 [REDACTED] Return Ex. 44 at 2.

S1 S5 [REDACTED] S1 S2 [REDACTED]

S1 S2 S5 [REDACTED]

S1 S2 [REDACTED] Return Ex. 32. S1 S5 [REDACTED]

S1 S5 [REDACTED]

S1 S5

S1 S5

Return Exs. 25, 45.

As the Return points out, S1 S2

S1 S2

Return at 10 n.4 (citing Return Ex. 37). S1

S1

S1

Return Ex. 37 at 3-4. S1

S1

Id.

S1

S1

S1

Return Ex. 37 at 4. S1

S1

S1

Return

Ex. 37 at 5. S1

S1

56

56

S2 S6

S2 S6

Traverse Ex. 41.

As a result,

S1 S5

S2

S2

S1 S5

S1 S5

S1 S5

Return Ex. 41 at 1, 3.

S1 S5

S1 S5

S1 S5

Return Ex. 41 at 4.

S1

S1 S5

S1 S5

S1 S5

Return Ex. 42 at 1.

S1

S1

S1

Return Ex. 42 at 2.

S1 S5

S1 S5

S1 S5

S1 S5

Return Ex. 42 at 3.

S1

S1

Many interrogation reports show coherent and understandable explanations for variations in Mr. Janko's accounts. Many interrogation reports, despite reporting other errors, relate an account that is relatively consistent with statements made that are recorded, in a formal setting, and that offer an opportunity for clarifications. At Kandahar, Mr. Janko told the same account he gives now, until he was coerced by interrogators into telling stories S1 S5. Then at Guantanamo he immediately disavowed those coerced tales for the same account he told initially at Kandahar and that he tells here. Not until 2006, after four years of relatively consistent accounts, did his statements once again become fanciful – not the sign of a dishonest man, but rather the sign of a desperate one, beset by mental illness and frustration that the truth had not set him free.

F. Mr. Janko's Affirmative Evidence Negates Enemy Combatant Status.

Under the legal principles requiring a temporal nexus and participation in belligerent activity, Mr. Janko is not an enemy combatant. *Supra* at 62-73.

V. The Second CSRT Violated The Constitution, Statutes, And Its Own Rules, Thereby Rendering Mr. Janko's Detention Unlawful.

Because the CSRT is the only formal process by which the government determined that Mr. Janko is an enemy combatant, this Court should review that process and the validity of the conclusions reached. The Supreme Court in *Boumediene* noted that the District Court may have authority coextensive with the Court of Appeals to review the validity of the CSRT procedures. *Boumediene*, 128 S. Ct. at 2270. This Court's authority is reinforced by the Court of Appeals' ruling that the District Court provides the only remedy for unlawful detention. *Bismullah v. Gates*, 551 F.3d 1068 (D.C. Cir. 2009).⁵⁷ In this case, the CSRT procedures and standards violated basic procedural due process rights.

Following the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), the Deputy Secretary of Defense hastily established the CSRTs, setting forth vague standards and procedures to be used in determining whether a detainee was properly classified as an enemy combatant. These procedures and standards fail to provide the most fundamental due process rights: a neutral decision-maker; adequate notice of the charges and evidence upon which the detention was based; and a meaningful opportunity to contest the allegations. Because the CSRT procedures – both on their

⁵⁷ Mr. Janko's petition under the Detainee Treatment Act is pending as *Ginco v. Gates*, CA 07-1090.

face and in practice – fail to satisfy even the minimum of due process, they are inconsistent with the Constitution and the laws of the United States. *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 563-67 (1974) (due process requires certain minimum procedural safeguards – timely notice, opportunity to be heard (including calling witnesses and presenting evidence) by an impartial hearing board, and written findings of fact supporting reason for decision – even for those not afforded the full panoply of procedural rights); *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.”).

Mr. Janko’s first CSRT lacked even the most basic protections, as exemplified by the CSRT’s consideration of the video and resulting interrogations that the government knew were the products of torture to conclude that Mr. Janko was a suicide martyr and, therefore, an enemy combatant. After Mr. Janko filed a petition under the DTA raising the numerous ways the CSRT violated fundamental rights, the military decided to conduct a new CSRT. Five months later, and after numerous representations to the Circuit Court that CSRT review proceedings were underway, the CSRT reconvened to reassess its determination that Mr. Janko was an enemy combatant based not on any “new” evidence, but rather on new theories.

Because the second CSRT determination is fraught with legal, factual, and procedural errors, Mr. Janko's detention continues to be unlawful. *See* Traverse Ex. 9 ¶¶ 31, 32. The following are examples of the fundamental errors underlying the second CSRT:

- the failure to include in the CSRT record exculpatory material provided to the military in the form of expert testimony provided by habeas counsel;
- the failure to provide the CSRT with legal arguments regarding the scope of admissible evidence and the CSRT's jurisdiction and authority, in violation of the regulation allowing such consideration upon the presentation of exculpatory extrinsic evidence (§ 4(b) of OARDECINST 5421.1 (May 7, 2007));
- the incorrect legal advice negating the requirement of belligerent action during the period covered by the Authorization for the Use of Military Force and nexus with the 9/11 attacks, especially where the tribunal questioned whether a person could be indefinitely detained based on eighteen days in a camp in January 2000;
- the definition of "enemy combatant" that exceeded the authorization that Congress gave the President in the AUMF to reach a non-combatant outside military jurisdiction;
- the use of the products of Taliban and Al Qaida torture in the second CSRT in violation of Article 15 of the Convention Against Torture;
- the extensive reliance on the products of American coercive interrogations at the Kandahar Air Base;
- the failure to protect Mr. Janko based on his status as a witness who approached the United States to provide evidence of human rights violations, including evidence that Americans were harmed;

- the failure to allow the presence of counsel, despite the request to appear as representative, witness, or observer;
- the failure to obtain a voluntary, knowing, and intelligent waiver from the prisoner regarding the presence of witnesses;
- the failure to apply relevant standards in its acceptance of statements not under oath and resulting from torture, mistreatment, and – later – the inducements of the Guantanamo behavior modification program;
- the failure to provide even the appearance of a neutral fact-finder where, during the hearing, a CSRT member asked Mr. Janko the mocking question whether he was a “goatherd,” a transparent reference to political controversy in the United States over whether over-inclusive and careless procedures had resulted in the capture and confinement in Guantanamo of innocent goatherds, and despite Mr. Janko’s confusion, the CSRT member persisted in asking whether Mr. Janko knew of any “goatherders” at Guantanamo.


These failures to comply with basic standards render the second CSRT determination invalid. The CSRT’s unprecedentedly broad definition of “enemy combatant” allowed for consideration of acts not covered under the AUMF, thereby allowing the CSRT to rely on the 18 days that Mr. Janko allegedly spent at the training camp in early 2000, nearly two years before 9/11 and the AUMF. Despite governing law, the CSRT made no effort to evaluate the effect of Mr. Janko’s torture, by both the Taliban and by Americans. The CSRT’s conclusions were not supported by legally admissible or credible evidence.

This Court should review the do-over CSRT for jurisdiction, procedural violations, and sufficiency, then invalidate the sham proceedings that persist in denouncing an innocent man as an enemy combatant.

VI. Conclusion

Mr. Janko has suffered enough. Al Qaeda criminals tortured and imprisoned him. When he went to Americans to report the crimes, he was mistaken for a terrorist and subjected to further torture. On the basis of false statements produced by torture, Mr. Janko was sent to Guantanamo. He was never an enemy combatant and should be freed.

Respectfully submitted this 6th day of March, 2009.



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