UNITED STATES COURT OF MILITARY COMMISSION REVIEW

In re:	)	Case No. _________
	)	
ABD AL-RAHIM HUSSEIN	)	
AL-NASHIRI,	)	**PETITION FOR A WRIT OF**
	)	**MANDAMUS & PROHIBITION**
Petitioner.	)	
	)	
	)	Date: 03 June 2021
	)	
	)	
	)	

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Petitioner, Abd Al-Rahim Hussein Al-Nashiri, ("Petitioner"), petitions this Court to issue a writ of mandamus and prohibition vacating Ruling AE 353AA, issued by COL Lanny Acosta, JA, USA on 18 May 2021, and directing COL Acosta to reconsider any other ruling on which the government offered *ex parte* evidence that is inadmissible under 10 U.S.C. § 948r without considering or relying upon the inadmissible evidence.

JURISDICTION

The Court may grant this relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a); the Military Commissions Act, 10 U.S.C. §§ 950c and 950f (2009) ("MCA"); the Regulation for Trial by Military Commission ¶ 24-2.b.5 (2011) ("R.T.M.C."); Rules for Military Commission 1110(b), 1111, and 1201(c) of the Manual for Military Commissions (2012) ("R.M.C."); and Rules 2(b),

and 21(b) of the Court of Military Commission Review ("CMCR") Rules of Practice (2008). *See also In re Al-Nashiri*, 791 F.3d 71, 75-76 (D.C. Cir. 2015).

RELIEF SOUGHT

Petitioner, Abd Al-Rahim Hussein Al-Nashiri, petitions this Court to issue a writ of mandamus and prohibition vacating Ruling AE 353AA, issued by COL Lanny Acosta, JA, USA on 18 May 2021, and directing COL Acosta to reconsider any other ruling on which the government offered *ex parte* evidence that is inadmissible under 10 U.S.C. § 948r without considering or relying upon the inadmissible evidence.

STATEMENT OF FACTS

Petitioner, Abd Al-Rahim Hussein Al-Nashiri, is a citizen of Saudi Arabia, born into a lower-class Yemeni family. In October 2002, Petitioner was seized in the United Arab Emirates and thereafter taken into the custody of the Central Intelligence Agency ("CIA") as the second prisoner in its newly formed Rendition, Detention, and Interrogation ("RDI") Program. The objective of the RDI Program was to "induce learned helplessness" in the captives on "the theory that the detainees might become passive and depressed in response to adverse or uncontrollable events, and would thus cooperate and provide information." SSCI Report 11, n. 32. Experimental psychologist Dr. Martin Seligman introduced this concept in the 1960s, after conducting experiments in which he subjected dogs to random electric shocks. Dogs that could not control or influence their suffering in any way "learned" to become helpless, collapsing into passivity.

In pursuit of the CIA's objective to "induce learned helplessness," Petitioner was first taken to Detention Site COBALT. SSCI Report 66-67. This would be the first of over half a dozen

secret black sites around the world where Petitioner would be disappeared and tortured for four (4) years. SSCI Report 72. While "[v]irtually no documentation of [Petitioner's] time at COBALT exists[,] [c]ertain facts can be ascertained from then-prevailing standard operating procedures." *In re Al Nashiri II* (Tatel, J. dissenting, page 6). Alternately described as a "dungeon" and as a "kennel" where detainees acted like cowering dogs, "COBALT operated in total darkness and the guard staff wore headlamps." *Id*. "Detainees were subjected to loud continuous noise, isolation, and dietary manipulation" on the "alternating schedule of one meal on one day and two meals the next day. They were kept naked, shackled to the wall, and given buckets for their waste." *Id*. at 6-7. Sleep deprivation of detainees was achieved by shackling their wrists "to a bar on the ceiling, forcing them to stand with their arms above their heads." *Id*. at 7. In a rare instance of record-keeping, "[o]n one occasion, [Petitioner] was forced to keep his hands on the wall and not given food for three days." *Id*.

After an unidentified number of days at COBALT, Petitioner was rendered to Detention Site GREEN in November 2002, and then to Detention Site BLUE in December 2002. SSCI Report 67. During this period of his detention, Petitioner was subjected to a program of "extreme physical, psychological, and sexual torture." *In re Al-Nashiri*, 835 F.3d 110, 142 (D.C. Cir. 2016). That program included being waterboarded at GREEN. *Id*. And at BLUE, the program encompassed Petitioner being "regularly strung up on the wall overnight" and being "forced into 'stress positions'" that risked dislocation of his joints, "menaced" with a handgun that a government agent "racked … 'once or twice' close to [Petitioner's hooded] head." *Id*. Throughout this timeframe, Petitioner is reported to have made various statements to CIA interrogators that

the Prosecution below stipulated were obtained by illegal torture and cruel, inhuman, and degrading treatment. AE 353Y, at 5.

On 28 October 2009, President Obama signed into law the Military Commissions Act of 2009, Pub. L. 111-84 §§ 1801-1807 (2009) ("2009 Act") (codified at 10 U.S.C. § 948a, *et seq*.). On 20 April 2011, Col. Edward Regan preferred eleven charges against Petitioner to Mr. MacDonald, based his alleged involvement in the attempted bombing of the USS THE SULLIVANS, the bombing of the USS COLE, and the bombing of the *M/V Limburg*, under the 2009 Act.[1] On 28 September 2011, Mr. MacDonald issued orders convening a military commission to hear all but two (2) of the charges preferred by Col. Regan. MacDonald further referred the case as capital.[2]

On 19 March 2021, in response to the Commission's order in AE 353U, compelling discovery into Muhsin al-Fadhli, the Prosecution filed AE 353V. Mr. al-Fadhli was assassinated by the United States in a drone strike in 2015, which the Department of Defense justified on the ground that he "was a senior al-Qaida facilitator who was among the few trusted al-Qaida leaders who received advance notification of the Sept. 11, 2001, terrorist attacks on the United States ... and also was involved in terrorist attacks that took place in October 2002, including against U.S. Marines on Faylaka Island in Kuwait and on the French ship MV Limburg." *Pentagon Official*

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[1] On 15 September 2011, Col. Regan forwarded a second charging document to Mr. MacDonald. The first and second charging documents differed only in the identification of alleged victims, who were non-fatally injured, and how certain allegations were worded.

[2] Mr. MacDonald struck allegations of Destruction of Property in Violation of the Law of War and Attempted Destruction of Property in Violation of the Law of War. These were the only charges that by statute were not death eligible.

Confirms Death of Khorasan Group Leader, DOD News (21 July 2015) *available at* https://www.defense.gov/Explore/News/Article/Article/612673/.

AE 353V itself is a classified filing. But in an unclassified paragraph, the Prosecution invited the Commission's attention to the classified Addendum at Attachment E, which "outlines a view of the roles of Mr. Fadhli and Abu Assem Al-Makki—and by implication of Mr. Al-Nashiri's role—that is necessarily that of the Prosecution." AE 353V at 21. The Prosecution further argued that, in determining whether it has met its discovery obligations, "there is a need to consider the Prosecution's recitation of facts." *Ibid*. These "facts" include statements attributed to Petitioner in the first weeks of his captivity when he was being actively and brutally tortured in Detention sites COBALT, GREEN, and BLUE.

On 31 March 2021, Petitioner filed a timely motion to strike, objecting to the inclusion of Attachment E as a violation of the 2009 Act's clear prohibition on the use of statements obtained by torture. AE 353W. "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, whether or not under color of law, shall be admissible in a military commission." 10 U.S.C. § 948r (cleaned up). Petitioner further challenged the Prosecution's apparent practice, suggested in its motion papers, of relying on statements obtained by torture in *ex parte* sessions with the military judge. *Id*. at 3-4 ("Without the defense present to alert the Commission as to where and how the Government obtained the evidence the prosecution is now using to shape its discovery obligations and the summaries and substitutions it seeks, the Commission's understandable lack of familiarity with the underlying facts would permit the prosecution to use evidence barred by 10 U.S.C. § 948r undetected."). The Prosecution opposed

Petitioner's motion to strike but did not dispute that Attachment E should be deemed to "fall within the section 948r(a) prohibition." AE 353Y, at 5.

On 18 May 2021, the Commission denied Petitioner's motion to strike. AE 353AA. It concluded that "the prohibition on statements obtained by torture contained in 10 U.S.C. § 948r(a) applies to the admission of those statements into evidence at trial." AE 353AA at 5-6. As a consequence, "10 U.S.C. § 948r(a) does not bar the Commission from considering the statements referenced in AE 353W on relevant interlocutory issues." *Id*. at 6.

REASONS FOR GRANTING THE WRIT

I. Standard of Review.

The D.C. Circuit has relied upon a three-part test to determine whether a writ of mandamus should be issued:

> First, the party seeking mandamus must have "no other adequate means to attain the relief he desires." ... Second, he must show that "his right to issuance of the writ is clear and indisputable." ... And even if the first two conditions are satisfied, the court must believe "the writ is appropriate under the circumstances."

In re Al-Nashiri, 835 F.3d 110, 135–36 (D.C. Cir. 2016) (*quoting Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004)).

II. Petitioner has no other adequate means of relief

A writ is warranted when needed to correct an erroneous ruling that "has a direct bearing on the information that will be considered by the military judge when determining the admissibility of evidence, and thereafter the evidence considered by the [military commission] on the issues of

guilt or innocence—which will form the very foundation of a finding and sentence." *LRM v. Kastenberg*, 72 M.J. 364, 368 (C.A.A.F. 2013). The need for extraordinary relief is particularly warranted where, as here, the pervasive use of prohibited evidence in pre-trial promises to shape every aspect of the record in ways that will necessarily "frustrate[] later review." *In re Al Baluchi*, 952 F.3d 363, 368 (D.C. Cir. 2020).

If AE 353AA is permitted to stand, the Commission will continue to base its conclusions of law and fact on evidence that § 948r explicitly prohibits it from using. Not only will the public reputation of these proceedings and the United States justice system more broadly be fatally compromised in the eyes of the world, the record will be irreparably contaminated in ways that cannot be corrected through post-trial appellate review.

On post-trial review, this Court has a statutory duty to determine whether the findings and sentence "on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d). Even if, as the Commission concluded, the use of torture evidence is inadmissible at trial, its use throughout the pre-trial process on everything from mixed questions of law and fact to the admissibility of the evidence that is ultimately presented to the members will be irreparably corrupted by torture.

Even apart from the ways in which AE 353AA will irreparably frustrate this Court's ability to review the record, post-trial review is inadequate because "facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 42 U.S. at 381. Hence, the Supreme Court and the D.C. Circuit have affirmed that a discovery ruling may be corrected via mandamus when

allowing it to stand would result in the violation of an important principle of constitutional or international law.

In *Cheney*, the Supreme Court held that "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a co-equal branch's ability to discharge its constitutional responsibilities." *Id*. at 382. And in *Papandreou*, the D.C. Circuit issued a writ of mandamus to enforce a claim of foreign sovereign immunity because to allow unlawful discovery against a foreign sovereign would independently violate "the demands of international comity." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Here, mandamus is the only means to prevent the United States from violating a *jus cogens* prohibition of international law.

The United Nations Convention Against Torture ("UNCAT") was signed by the United States on 18 April 1988 and was ratified by Congress on 21 October 1994. The absolute prohibition of torture and the use of its fruits have become accepted as a matter of customary international law, or *jus cogens*, thus obligating even those states that are not parties to the UNCAT to prevent acts of torture by its state actors as well as the use of statements derived from torture in its judicial proceedings. United Nations Committee Against Torture, General Comment No. 2 on the Implementation of Article 2 by States Parties ¶ 6 (2007).

Article 15 of the UNCAT requires that the exclusionary rule be applied in *all* instances in which the state attempts to use evidence derived from torture to prosecute a victim of that torture: "Each State Party shall ensure that any statement which is established to have been made as the

result of torture shall not be invoked as evidence *in any proceedings*, except against a person accused of torture as evidence that that statement was made."

As authoritatively interpreted, Article 15 constitutes "an absolute prohibition on the use of statements made as a result of torture or other ill-treatment in any proceedings" that is itself "a norm of customary international law and is not limited to the Convention, which is only one aspect of it. The exclusionary rule must be considered as one element under the overarching absolute prohibition against acts of torture and other ill-treatment and the obligation to prevent such acts." Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/25/60 ¶ 17 (10 April 2014); *Id*. ¶ 22 ("As the prohibition against torture and other ill-treatment is absolute and non-derogable under any circumstances, it follows that the exclusionary rule must also be non-derogable under any circumstances, including in respect of national security."). Furthermore, contrary to the military commissions' fine parse of the prohibition, the "exclusionary rule is not limited to criminal proceedings but extends to military commissions, immigration boards and other administrative or civil proceedings. Moreover, the use of the phrase 'any proceedings' suggests that a broader range of processes is intended to be covered; essentially, any formal decision-making by State officials based on any type of information." *Id*. ¶ 30

As the House of Lords ruled more than a decade-and-a-half ago, "[T]he *jus cogens erga omnes* nature of the prohibition of torture requires member states to do more than eschew the practice of torture. ...There is reason to regard it as a duty of states, save perhaps in limited and exceptional circumstances, as where immediately necessary to protect a person from unlawful

violence or property from destruction, to reject the fruits of torture inflicted in breach of international law." *A v Secretary of State for the Home Department (No.2)*, [2005] UKHL 71 ¶ 34. International authorities are also uniform in treating the use of evidence obtained by torture in *any* proceeding for *any* purpose other than proving torture itself as a violation of this non-derogable prohibition of international law, rendering any proceeding such evidence taints fundamentally unfair. *See*, *e.g.*, *Kaçiu v. Albania*, App. Nos. 33192/07 & 33194/07 ¶ 117 (E.Ct.H.R., 25 June 2013) ("The admission of statements obtained as a result of torture or of other ill-treatment … to establish the relevant facts in criminal proceedings renders the proceedings as a whole unfair, irrespective of the provocative value of the statements and irrespective of whether their use is decisive in securing the defendant's conviction."); *Othman v. United Kingdom*, App. No. 8139/ 09 ¶ 267 (E.Ct.H.R., 17 January 2012) ("[T]he admission of torture evidence is manifestly contrary, not just to the provisions of Art. 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome."); *Cabrera García v. Mexico*, Series C, No. 220 ¶ 165 (IACtHR, 26 November 2010) (This "exclusionary rule" is "intrinsic to the prohibition of such acts," is "absolute," and is "irrevocable."); *Martín del Campo Dodd v. Mexico*, Opinion No. 9/2005) ¶ 10 (UNWGAD, 25 May 2005) ("[n]o kind of proceedings based on torture can be fair").

Absent mandamus from this Court, therefore, evidence obtained by torture will taint every aspect of the record that ultimately might go before this Court on an appeal from a final judgment. It will make the trial fundamentally and irredeemably unfair. And it will implicate the Commission, and by extension the United States, in the perpetration of a war crime.

III. Petitioner has a clear entitlement to relief.

As the Prosecution argued previously to this Court, Petitioner "has a clear and indisputable right to an expectation that the Military Commissions Act will be followed, that those who practice within this system will obey the rules attendant to Military Commissions, and that good faith will govern their actions." *United States v. Nashiri*, Case No. 18-002, Brief on Behalf of Appellant in Response to Specified Questions from the Court, at 11-12 (5 April 2018). Here, "this case begins and ends with the plain language of the statute." *Polfliet v. Cuccinelli*, 955 F.3d 377, 381 (4th Cir. 2020); *United States v. Matthews*, 68 M.J. 29, 37 (C.A.A.F. 2009) ("When the statute's language is plain, the sole function of the courts— at least where the disposition required by the text is not absurd—is to enforce it according to its terms.").

Petitioner's entitlement to relief is clear and indisputable because "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made." 10 U.S.C. § 948r(a). That language admits of no qualification. As defined in Black's Law Dictionary, 58, admissible means "[c]apable of being legally admitted; allowable; permissible." Said differently, the use of evidence obtained by torture is not permissible. And if there were any doubt about the unequivocal character of that prohibition, that doubt is disposed of by § 948r's title, which reads "Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment." *See Valerio-Ochoa v. INS*, 241 F.3d 1092, 1096 (9th Cir. 2001).

To reach the contrary conclusion, the military commission looked, not to the language of the relevant statute, but to § 948r(c), which governs the admissibility of statements made by the accused, in general. Because that provision states a "statement of the accused may be admitted in evidence in a military commission," the commission concluded that "There is no reason to believe that Congress intended to use those similar and related terms within the same provision of the statute to refer to substantially different procedures for handling statements made by an accused." AE 353AA, at 3. But there is every reason to believe that Congress intended there to be a difference to evidence obtained through the government's gross, irredeemable criminality and that for which there may be some general dispute regarding voluntariness.

Even if there were some ambiguity in the text, which there is not, the military commission clearly and indisputably erred in holding that evidence obtained by torture should be treated the same as other forms of evidence that might be technically inadmissible at trial under the rules of evidence, such as hearsay, but could nevertheless be used for interlocutory rulings that presented mixed questions of law and fact. AE 353X, at 4. To be sure, judges are generally not constrained by the rules of evidence when making interlocutory rulings. *See* M.C.R.E. 104(a) ("In making [interlocutory] determinations [of fact] the military judge is not bound by the rules of evidence, except those with respect to privileges."); *cf*. Fed. R. Evid. 104(a). But the prohibition on using coerced confessions is not a technical rule of evidence. Rather, "[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 484–85 (1972). As the Prosecution stipulated below,

see AE 353Y at 5, he was tortured. And the reliance on evidence obtained via torture clearly and indisputably violates due process.

For decades, the Supreme Court has made it clear that when the actions of the executive branch "violate[ ] the 'decencies of civilized conduct[,]'" the Due Process Clause is likewise violated. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952)). And the boundaries of what constitutes "civilized conduct" are to be construed liberally; "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin*, 342 U.S. at 173 (quoting *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936)). Courts interpreting this standard are therefore to look to "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency[.]'" *Dowling*, 493 U.S. at 353 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam), and *Rochin*, 342 U.S. at 173) (internal citations omitted).

When the Government engages in conduct that is "brutal," those fundamental conceptions are breached, *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), "traditional ideas of fair play and decency" are contravened, *id.*, and the "rights 'implicit in the concept of organized liberty'" are violated, *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin*, 342 U.S. at 172); *see also County of Sacramento*, 523 U.S. at 847. In other words,

> the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.

Brown, 297 U.S. at 285-86.

"[T]o sanction the [Government's] brutal conduct . . . would be to afford brutality the cloak of law. Nothing could be more calculated to discredit law and thereby to brutalize the temper of a society." *Rochin*, 342 U.S. at 173-74.

The most instructive case on this question arose from Jim Crow Mississippi in the mid-1930s. On behalf of a unanimous Supreme Court in *Brown v. Mississippi*, Chief Justice Hughes grappled with how to handle criminal convictions procured by violence and brutality:

> Upon [one "ignorant" African-American defendant's] denial [of the murder at issue, the mob] seized him, and with the participation of the deputy [sheriff] they hanged him by a rope to the limb of a tree, and having let him down they hung him again, and when he was let down the second time, and he still protested his innocence, was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy [arrested him and drove him across state lines, where he] stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.
>
> The other two defendants[ ] . . . were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, . . . came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated , they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.

Brown, 297 U.S. at 281-82.

The Court refrained from getting into more detail about this "brutal treatment" to which the state's "helpless prisoners" were subjected; "[i]t is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within

the confines of a modern civilization which aspires to an enlightened constitutional government." *Id.* at 282.

The question at hand when the Government has engaged in torture, violence, or brutality is thus an existential one, not a process issue. Hence in *Brown*, the state's attempts to make it into the latter – to argue that the matter came down to ineffective assistance of counsel, as defense counsel apparently had not moved for the confessions to be suppressed – were quickly and firmly rejected by the Supreme Court; what was at issue was not "mere error[ ]" or a "mere question of state practice," *Brown*, 297 U.S. at 286-87, but "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void[,]" *id.* at 286 (citing *Moore v. Dempsey*, 261 U.S. 86, 91 (1923)). The trial court's decision to permit conviction and sentence – a death sentence, no less – based on the use of torture rendered that conviction and sentence utterly "void for want of the essential elements of due process." *Id.* Indeed, said the Court just a few years later in *Chambers v. Florida*, 309 U.S. at 240, "[t]o permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

Despite this, the Prosecution insisted that the statements Petitioner indisputably made under torture nevertheless had a "lawful[ ]" place in a capital prosecution, *see* AE 353Y at 5; that they can form the basis for a "correct" ruling on a discovery matter, *see id.*; and that, although the government is apparently indifferent as to their actual truth or falsehood, *see id.* at 15. In other words, the Prosecution's claim was that Petitioner cannot be denied discovery – that in this capital case his right to discovery must be curtailed – because the Prosecution chose to structure its case around torture, and that moreover this choice is not only permissible but *understandable*.

The answer - one “so basic to our system of laws [that it] should go without saying,” *Al-Nashiri*, 921 F.3d at 239 - is no. To allow the taint of torture to pervade a criminal case is precisely what the Supreme Court, the D.C. Circuit, and due process forbids.

No court has ever sanctioned the use of torture in this way. No court has ever approved the government’s use of torture as a tool in discovery litigation. No court has ever viewed torture as a legitimate means of facilitating a court’s interlocutory fact-finding. No court has ever countenanced torture as means of limiting the rights of a defendant facing death at the hands of the Government that tortured him. A writ of mandamus is warranted here, as Petitioner has a clear and indisputable right to relief from being tried and potentially sentenced to death based upon evidence obtained by torture.

IV. Issuance of the writ is appropriate under the circumstances.

The issuance of the writ is appropriate under the circumstances of this case because of the extent to which torture and its fruits affect every pending military commission prosecution. As the SSCI Report makes clear, Petitioner is not the only military commission defendant to be subjected to illegal torture. Indeed, if AE 353AA is permitted to stand, it will serve as precedent to the September 11th Case, where questions of torture have been the primary driver of pre-trial delays. Carol Rosenberg, *The 9/11 Trial: Why Is It Taking So long?*, N.Y. Times (Apr. 17, 2020); Sacha Pfeiffer, *A Legacy of Torture is Preventing Trials at Guantanamo*, NPR (Nov. 15, 2019).

Issuance of the writ is therefore particularly appropriate here because this case “present[s] a novel legal question regarding the interpretation of the M.[C].R.E.” that affects every pending military commission.” *LRM*, 72 M.J. at 372; *see also Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975) (“[D]eparture from the final judgment rule [is warranted] when the appellate

court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice.”). Nothing short of intervention from this Court, therefore, unequivocally holding that evidence tainted by torture is inadmissible for any purpose, will be adequate to correct the military commission prosecutors’ moral blindness.

CONCLUSION

For the foregoing reasons, this Court should reaffirm this country’s commitment to a principle as basic as the right of human beings to be free from torture, vacate AE 353AA, and direct the military commission to reconsider *de novo* any prior ruling in which the government has relied upon evidence obtained by torture *ex parte*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 3 June 2021, I caused copies of the foregoing to be served on counsel for Respondent via e-mail.

Respectfully submitted,

/s/ BRIAN MIZER
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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of U.S.C.M.C.R. Rule of Practice 15(g) because it is less than 30 pages and contains fewer than 14,000 words.

2. This petition complies with the typeface and type style requirements of U.S.C.M.C.R. Rule 15(e) because it has been prepared in a monospaced typeface using Microsoft Word Version 2016 using 12-point Times New Roman font.

/s/ BRIAN MIZER
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Dated: 03 June 2021