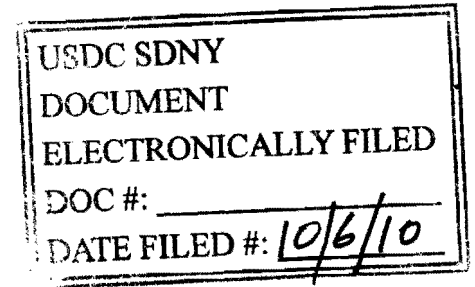


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA,

-against-



S10 98 Crim. 1023 (LAK)

AHMED KHALFAN GHAILANI,

Defendant.
----- x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge*.

The defendant, Ahmed Khalfan Ghailani, is charged with murder and other offenses in connection with the 1998 bombings of the U.S. embassies in Kenya and Tanzania. The Court previously rejected his motions to dismiss the indictment on the grounds that he was deprived of a speedy trial and that his treatment by the Central Intelligence Agency ("CIA") was so outrageous as to require termination of the charges. The matter now, however, is before the Court on Ghailani's motion to preclude the government from calling Hussein Abebe as a witness against him on the ground that Abebe's testimony would be the product of statements made by Ghailani to the CIA under duress.

Abebe was identified and located as a close and direct result of statements made by Ghailani while he was held by the CIA. The government has elected not to litigate the details of Ghailani's treatment while in CIA custody. It has sought to make this unnecessary by asking the Court to assume in deciding this motion that everything Ghailani said while in CIA custody was

coerced.¹ In these circumstances, the Constitution does not permit Abebe to testify in this criminal trial unless the government has sustained its burden of proving that (1) the connection between Ghailani's coerced statements and Abebe's testimony is sufficiently remote or attenuated, or (2) there is another basis upon which that testimony properly may be received.

The Court has had the benefit of extensive evidentiary submissions, a three-day hearing at which Abebe and representatives of the Federal Bureau of Investigation, the CIA, the Tanzanian National Police testified, legal briefs, and skilled argument. On the basis of that record – including importantly its assessment of the credibility of the only witnesses called to testify who actually were present when Abebe was persuaded to confess his role, to implicate Ghailani, and to cooperate with authorities – it now finds and concludes that the government has failed to prove that Abebe's testimony is sufficiently attenuated from Ghailani's coerced statements to permit its receipt in evidence. In a previous decision, it rejected the other bases advanced by the government for allowing Abebe to testify. *United States v. Ghailani*, __ F. Supp.2d __, 2010 WL 3430514 (S.D.N.Y. Aug. 17, 2010). Accordingly, the motion to preclude Abebe's testimony is granted.

The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.

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"THE COURT: Here you . . . are asking me to assume for the purposes of deciding the motion that everything Ghailani said from the minute he arrives in CIA custody till the minute he gets to Guantanamo at least is coerced? MR. FARBIARZ: Yes, Judge, yes.

"THE COURT: Here we have really coerced testimony. MR. FARBIARZ: Yes." Tr., Sept. 15, 2010, at 370.

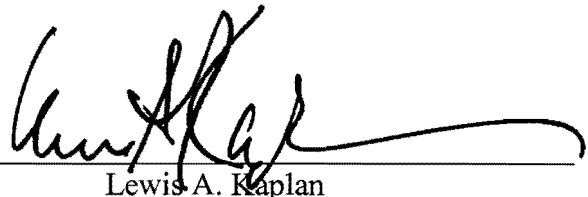
See also Gov't Mem. [DI 927] at 11.

Moreover, it is appropriate to emphasize that Ghailani remains subject to trial on the pending indictment, that he faces the possibility of life imprisonment if convicted, and that his status as an “enemy combatant” probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end even if he were found not guilty in this case.

This brief order will be supplemented by an opinion containing the Court’s findings of fact and conclusions of law. In view of the classified nature of much of the evidence and in accordance with the Classified Information Procedures Act, that opinion will be filed with the Court Security Officer. A redacted version will be filed publicly as soon as possible.

SO ORDERED.

Dated: October 5, 2010

A handwritten signature in black ink, appearing to read "Lewis A. Kaplan", is written over a horizontal line.

Lewis A. Kaplan
United States District Judge