UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
— versus —	**98-cr-1023 (LAK)**
	Declaration & Memorandum in Support of Motion
ANAS AL LIBY, **Defendant.**	

STATE OF NEW YORK}
COUNTY OF WESTCHESTER} *s.s.:*

1. I am Bernard V. Kleinman, attorney of record for the above-named Defendant, Anas al Liby.

2. I make the annexed motion based upon the records in my office, notes and conversations with my client, and upon the records and pleadings previously filed in this matter.

3. All statements herein are made based such review of the record, or upon information and belief, based upon such record.

4. This is a motion directing the United States Government to preserve all records, notes, recordings and other documents, in whatever form created and preserved,

whether electronic, video, audio, handwritten notes, hard copy, or in whatever other form said records may exist, as related to the subject herein.

5. In addition thereto, this motion seeks an Order directing the Government to allow Defense counsel access to and the right to inspect the physical location where the Defendant was held and interrogated prior to his arrival in the United States, on or about October 12th, 2013.

6. Upon information and belief, on or about October 5th, 2013, forces of the United States military, designated as Delta Force operatives of the U.S. Army, seized the named Defendant from his home, in Tripoli, Libya.

7. Upon information and belief this action was taken without the permission, knowledge or acquiescence of the sovereign State of Libya.

8. Upon information and belief, the Defendant was forcibly removed from his vehicle, outside of his home, in the early morning hours, with the use of extreme physical force.

9. He was then blindfolded, had "earmuffs" placed over his ears to prevent him from hearing anything going on, and was bound and gagged.

10. Upon information and belief he was then forcibly removed to a site in or around Tripoli, Libya.

11. From that location he was transported, within a matter of hours, to the U.S.S. San Antonio, a U.S. naval vessel believed to have been operating in international waters off the coast of Libya.

12. From that time until on or about October 12th, 2013, the Defendant was subjected to daily interrogation by agents of the United States Central Intelligence Agency ("CIA"), and other un-named intelligence agencies of the United States.[1]

13. At no time was the Defendant ever informed that he was under arrest.

14. At no time was the Defendant ever informed that anything he might say could and would be used against him in a court of law.

15. At no time was the Defendant ever informed that he had the right to have counsel.

16. At no time was the Defendant informed that if he could not afford to have counsel, one would be appointed to represent him.

17. For the entire length of his extraordinary interrogation he was kept incommunicado from his family, his friends, his associates, his Government — the

[1] Whether, and to what degree, other intelligence agencies of other nations either participated in the abduction and kidnapping of the Defendant, and/or his subsequent interrogation, is a matter, at this time, unknown. However, this formal request includes any such information as shared with said foreign intelligence agencies, and any and all information regarding such foreign involvement in the Defendant's kidnapping and interrogation.

sovereign State of Libya — or anyone else who might provide him with assistance and succor.

18. Upon information and belief he was subjected to daily interrogation by professional interrogator[s] of the CIA in an unrelenting, hostile, and extraordinary manner.

19. Upon information and belief this interrogation was conducted in a manner in violation of the Defendant's rights under the Fifth and Sixth Amendments to the federal Constitution, and under applicable treaties and conventions to which the United States is a signatory.[2]

20. Furthermore, this interrogation was conducted in a manner of inhumane treatment. Notwithstanding the changes effected by both Congress[3] and the

---

[2] See generally 42 U.S.C. § 2000dd-0(2), which defines "cruel, inhuman, or degrading treatment or punishment", as those terms are defined in the "United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture ["torture Convention"] and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

See also 22 C.F.R. § 95.1(b), containing a detailed definition of "torture", for the purposes of implementing the Torture Convention in Extradition Cases.

[3] In 2005 Congress passed the Detainee Treatment Act, Pub. L. No. 109-148, codified at 42 U.S.C. §§ 2000dd, 2000dd-0, and 2000dd-1, which applied the U.S. Army Field Manual to all military interrogations.

It should be noted that the Act specifically provides that

> No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

42 U.S.C. § 2000dd(a).

See also 42 U.S.C. § 2000dd-0(1).

President[4] after the revelations of physical abuse and torture as conducted by the CIA in the name of national security, such measures (even if actually observed by the participants and interrogators) could easily lead to harsh, improper and inhumane treatment that would taint any and all subsequent interrogations, even if preceded by a *Miranda* warning and waiver execution, and conducted by the FBI or some other federal law enforcement agents.[5]

21. Upon information and belief, these interrogations were videotaped, and otherwise recorded by the CIA, among other U.S. Government agencies.

22. It is, furthermore, reasonable and logical to presume that the interrogator[s] produced hard copy notes of their actions, and provided reports to other representatives of the United States Government (both in the Executive and Legislative branches).

The degree and extent to which the United States Government violated this statute in the kidnapping, abduction, and interrogation of the Defendant are issues to be raised similarly in any subsequent motions made pursuant to Rule 12(b).

[4] On January 22, 2009, President Obama issued Executive Order 13491, which directed the CIA to adopt the methods of interrogation as set forth in the U.S. Army Field Manual. See E.O. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

[5] Both the Detainee Treatment Act and E.O. 13491 refer to the U.S. ARMY FIELD MANUAL, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, referenced as FM 2.22.3 (Sept. 2006 ed.).

23. Upon information and belief, after approximately one week of being subject to this interrogation, the Defendant was transported — again blindfolded and otherwise held in an inhumane manner — from the U.S.S. San Antonio to the United States, arriving in Westchester County on or about October 12th, 2013.

24. Not until his arrival in the United States was the Defendant duly informed of his rights under *Miranda*, and was formally advised of the charges against him as set forth in S10 98-cr-1023.

25. Upon receiving the rights' notice, the Defendant executed a waiver of said rights.

26. The Defendant thereafter, under questioning from agents of the FBI, proceeded to make a detailed statement.

27. Affirmant herein has been advised by the United States Government that the Government will seek to have this statement admitted at any trial of the Defendant.

28. It is the position of the Defendant, to be set forth more formally in a succeeding motion (pursuant to F.R. Crim. P. 12(b)(3)(C)), that this statement was given in violation of the Defendant's rights under the Fifth and Sixth Amendments, and ought to be suppressed.

29. As part and parcel of this motion to suppress, it is essential for defense counsel to be granted access to all of the sought after records, and to have access to the physical location, for inspection, of where the Defendant was held and interrogated, as they may reasonably be believed to relate to issues of the voluntariness of the subject statement, and whether the Defendant did, in fact, knowingly and voluntarily waive his Fifth and Sixth Amendment rights as defined by the Supreme Court.

30. Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure provides that, "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E).

31. Based upon the plain language of the Rule, in order for evidence to be discoverable under this provision, the evidence must be (1) tangible, (2) within the Government's possession, custody or control, and (3) material to preparing the defense.

32. In the case at bar, in order for the Defendant to adequately challenge the admissibility of any statement made to federal law enforcement officers, he must have

access to the preceding events, the above-referenced location (*i.e.*, the U.S.S. San Antonio),[6] and the attendant records. Only under such circumstances can the Court fully digest the totality of the circumstances under which the Defendant made said statement.

33. Defendant recognizes that in any decision regarding such a motion the matter is left to the informed and reasoned discretion of the trial court. See generally *United States v. Nobles*, 422 U.S. 225, 235 (1975).

34. However, under subsection (a)(1)(B), as amended, it is mandatory that the Government disclose to defense counsel any statements that come within the Rule's purview — "[u]pon a defendant's request the government must disclose . . ." Emphasis added.

35. The Government cannot be heard to object to the disclosure of the subject records on the basis that they are being held not by the Justice Department (if in fact this is true that they are not in their possession), and that they are being held by an independent entity (*i.e.*, the CIA or Department of Defense) unrelated to the criminal case before this Court.

[6] There can be no question that within the purview of Rule 16 (a)(1)(E) are physical objects, within the custody and control of the United States Government, and that such physical objects would extend to a naval vessel. *See, e.g., United States v. Salad*, 779 F. Supp.2d 503 (E.D. Va. 2011) (Defendant's right under R. 16 (a)(1)(E) extends to a yacht seized by the United States in the course of a piracy and murder case).

36. In any demand for documents or records held by a federal agency other than the U.S. Attorney's Office, the standard to be applied

> is the level of involvement between the United States Attorney's Office and the other agencies. . . . The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was a "joint investigation" with another agency.

United States v. Upton, 856 F. Supp. 727, 749, 750 (E.D.N.Y. 1994).

In accord see *United States v. Martoma*, 2014 WL 31704 at *5 (S.D.N.Y. 2014); *United States v. Finnerty*, 411 F. Supp.2d 428, 432-33 (S.D.N.Y. 2006).

See also *United States v. Ghailani*, 687 F. Supp.2d 365, 370-72 (S.D.N.Y. 2010), recognizing that the Second Circuit has not defined "government" under Rule 16, but, nevertheless, referring to, and quoting from *Upton*, *supra*. *Id.* at 370, n. 17 ("See, e.g., *United States v. Chalmers*, 410 F. Supp.2d 278, 288 (S.D.N.Y. 2006) ("The prosecution concedes that the Second Circuit has not defined 'the government' for Rule 16 purposes.").), & n. 21, respectively.

37. In other words, the issue of whether the CIA and the U.S. Navy are, in a particular case, subject to Rule 16 disclosure is a fact based issue, only to be determined by the evidence. In the case at bar, the Government made plain, in its public pronouncements, that it had seized the Defendant in the course of its prosecution of the Embassy Bombings case. See Dep't of Defense News Release 700-13 (Oct. 6, 2013), annexed hereto as Exhibit A.

38. While the Department of Defense stated that the Defendant was being "detained under the law of war",[7] upon information and belief, his interrogation was intimately tied (both directly and indirectly) to the prosecution here in the Southern District of New York.

39. The Government is under an obligation to preserve and produce all "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This duty or obligation extends to

[7] Whether in fact the Defendant was lawfully detained "under the law of war" is a matter that is still subject to challenge in the context of a jurisdictional challenge to be made before this Court. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), made clear that the Constitution does not permit the detention (and derivatively the interrogation) of an individual by the military who is solely subject to civilian prosecution; holding that the suspension of the Great Writ could not be applied to a citizen of Indiana, a state that was not in rebellion against the Union at the time President Lincoln exercised his authority under the Constitution to suspend the Writ. 4 Wall. at 132. See also *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), properly characterizing defendant as an "enemy combatant" who was captured by U.S. military during the invasion of Afghanistan, *id.* at 523; *Ex parte Quirin*, 317 U.S. 1 (1942), holding that the military had authority to detain German citizens, who, while born in Germany, lived in the United States for a number of years, and then returned to Germany between 1933 and 1941. *Id.* at 36-37.

See also *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), *cert. denied* 547 U.S. 1062 (2006), upholding transfer of defendant from civilian custody to military custody where defendant took up arms against the United States, on behalf of al Qaeda, and then traveled to the United States in order to pursue his aims against this country.

In the case at bar, the Defendant, by the Government's own Indictment (1) accuses the Defendant of acts against the interests of the United States more than four years prior to the actual bombing, and (2) seized him in Tripoli, Libya, a nation with which we were not and are not at war, and when he has (even if the Government's claims are to be believed) abandoned any combatant role for years.

any evidence that may be used to impeach a witness that the Government is planning on calling. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). It is recognized that "*Brady* does not, however, require the prosecution to disclose *all* exculpatory and impeachment material; it need disclose only material 'that, if suppressed, would deprive the defendant of a fair trial.' " *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001). Emphasis in original; quoting *United States v. Bagley*, 473 U.S. 667, 675 (1985). The obligation of the Government to preserve and disclose evidence will "extend[ ] only to material evidence ... that is known to the prosecutor." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998).

40. Although in the civil context, as Courts have described it, the duty to preserve the sought after records can be described as follows,

> 1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering the evidence preservation.

Daniel v. Coleman Co., Inc., 2007 WL 1463102 at *2 (W.D. Wash. 2007), quoting *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D. Pa. 2004).

In accord see *United States ex rel. Smith v. The Boeing Co.*, 2005 WL 2105972 at *2 (D. Kan. 2005).

41. This standard allows for this Court to determine if the subject evidence — the records and notes of the CIA and the physical location of the interrogation (*i.e.*, the U.S.S. San Antonio) — is reasonably necessary and material for the Defendant to effectively challenge the statement he made to the FBI, and whether it ought to be admitted at any trial.

42. While it is recognized that not all internal records and reports of the United States as demanded herein are subject to preservation and disclosure (see F.R.Crim.P. 16(a)(2)), rough notes of investigators and agents are discoverable. See *United States v. Floyd*, 247 F. Supp.2d 889, 899 (S.D. Ohio 2002).

43. Even where said notes end up being incorporated into final reports, said notes are subject to disclosure. *United States v. Paoli*, 603 F2d. 1029, 1036-37 (2d Cir. 1979). And, where the final reports, themselves, have been produced the agents' handwritten notes may be subject to disclosure. See *United States v. Scotti*, 47 F.3d 1237, 1249 (2d Cir. 1995). At the very least, a comparison of the agents' notes and the written reports may well allow defense counsel to impeach the witness's credibility by showing poor memory or possible bias of interest. See *Rosenburg v. United States*, 360 U.S. 367, 370 (1959).

44. In the case at bar, the need for such an Order requiring the Government to preserve the subject records is evidenced by the fact that, unfortunately, the CIA has a long and storied history of destroying evidence that it deems harmful to its reputation, or that demonstrates the CIA has violated the law, or otherwise engaged in inhumane conduct. *See, e.g., Ritchie v. United States*, 451 F.3d 1019, 1024 (9th Cir. 2006) (CIA destruction of records relating to its LSD experiments on unwitting individuals); *Kronisch v. Gottlieb*, 2000 WL 534301 at *2 (2d Cir. 2000) (same); *American Civil Liberties Union v. Dep't of Defense*, 2009 WL 8739232 (S.D.N.Y. 2009) (CIA destruction of videotapes of torture interrogation of suspected terrorists); *Abdah v. Bush*, 2008 WL 114872 (D.D.C. 2008) (CIA destruction of videotapes of torture interrogation of suspected terrorists).

45. This Circuit has long recognized an obligation on the Government's part to preserve any and all notes, *etc.*, that may be "relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 148 (2d Cir. 2008), *cert. denied sub nom. Al-Owali v. United States*, 556 U.S. 1283 (2009), quoting *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

See also *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Slovin v. Target Corp.*, 2013 WL 840865 at *3 (S.D.N.Y. 2013).

46. Thus, in the absence of any such Order from this Court it is not unreasonable to assume that the CIA and/or the Department of Defense and/or whatever other agencies engaged in the "pre-arrest interrogation" of the Defendant may well destroy said records. *See, e.g.*, Statement of CIA Director Hayden on the Taping of Early Detainee Interrogations, Dec. 6, 2007, annexed hereto as Exhibit B; "CIA Interrogation Tape Destruction Will Result In No Charges," *Huffington Post*, Nov. 9, 2010, annexed hereto as Exhibit C.[8]

47. Under the aforesaid circumstances, and based upon the history of actions of the CIA, among other agencies with regard to the preservation of evidence, in the absence of an Order from this court such records may well be destroyed.

WHEREFORE, Affirmant respectfully prays that the Court grant the relief sought herein.

Dated: February 3, 2014
White Plains, NY

[8] The very fact that the responsible individuals in the CIA (or its contractors) were never held to account for the destruction of the "torture tapes" makes the need for such a preservation order all the more important. With no accountability or liability, there is little, if any, incentive to preserve evidence that might be damaging to the CIA's practices and reputation (such as it is).

Bernard V. Kleinman
Attorney for Defendant al Liby

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
	:	
	:	
— versus —	:	**98-cr-1023 (LAK)**
	:	
	:	
	:	
ANAS AL LIBY,	:	
Defendant.	:	

CERTIFICATE OF SERVICE

Bernard V. Kleinman, being an attorney duly admitted to practice law before this Court, does solemnly affirm, under the laws against perjury of the United States, that he did serve a copy of the within Notice of Motion, Affirmation & Memorandum in Support Thereof, and Exhibits, upon all parties in this case, by ECF filing with this Court, on the 3 day of February, 2014.

Bernard V. Kleinman, Esq.

Dated: Feb. 3, 2014
White Plains, NY