

Pre-approved for Public Filing by the CSO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE:)	
)	
GUANTANAMO BAY)	Misc. No. 08-442 (TFH)
DETAINEE LITIGATION)	Civil Action No. 1:04 CV 1194 (HHK)
)	
)	
)	

**PETITIONER MUSA’AB OMAR AL MADHWANI’S TRAVERSE IN RESPONSE TO
RESPONDENTS’ FACTUAL RETURN**

Respondents have detained Musa’ab Omar Al Madhwani (“Musa’ab” or “Petitioner”) unlawfully at the Guantánamo Bay Naval Base for almost six years, since late fall 2002. On July 15, 2004, Musa’ab filed his Petition for Writ of Habeas Corpus with this Court. On October 6, 2004, the Respondents filed their Factual Return to Petition for Writ of Habeas Corpus by Petitioner Musa’ab Omar Al Madhwani (“Factual Return”) (Dkt. 33). Musa’ab respectfully submits this Traverse in Response to Respondents’ Factual Return. Because Respondents’ allegations are factually and legally insufficient to justify Musa’ab’s indefinite detention, this Court should release Musa’ab from Respondents’ custody or order an evidentiary hearing in which Respondents are required to establish an adequate basis for his detention.

I. Musa’ab Denies Each And Every One Of Respondents’ Allegations.

Musa’ab is a citizen of Yemen and has been held by the United States for almost six years. He is neither an enemy of the United States nor a combatant. Respondents rest their conclusion of “enemy combatant” status on two vague and unsubstantiated allegations (Factual Return at 24, Ex. R-1):

3.a. *The detainee is an Al Qaeda fighter.*

3.b. *The detainee participated in military operations against the coalition.*

The allegations presented in Respondents' Factual Return are insufficient to justify Musa'ab's continued detention. Musa'ab denied these allegations during his Combatant Status Review Tribunal ("CSRT") hearing and again denies them here, as attested in his Declaration dated July 1, 2008, attached hereto as Exhibit A. Musa'ab was not an al Qaida fighter; he was never a member or associate of al Qaida. (Ex. A, at ¶ 3.) Further, he never participated in, let alone witnessed, any fighting against the coalition or anyone else. (*Id.*)

Musa'ab was invited to visit Afghanistan in the summer of 2001 by two men he met in a neighborhood coffee shop. Those men told Musa'ab he could teach children or do anything he wanted; they never mentioned anything about training or fighting. Musa'ab had no intention of training or fighting. If Musa'ab had known or been told he was going to a training camp, he would not have gone to Afghanistan. (*Id.* at ¶ 1.)

When Musa'ab arrived in Afghanistan, his passport and personal papers were confiscated and he was told he had to attend a training camp for two months. (*Id.* at ¶ 2.) The events of September 11, 2001 occurred less than a month later. Musa'ab did not want to participate in any fighting, so he left the camp and traveled to Pakistan in the hope of returning to Yemen. (*Id.*) Musa'ab was never involved in any combat; he never fought on the side of Al Qaida or the Taliban; and he never fought against the United States or coalition forces. (*Id.* at ¶ 3.) Musa'ab was arrested by Pakistani forces in Pakistan in September 2002. (*Id.* at ¶ 4.)

Because Musa'ab has denied Respondents' allegations and Respondents have presented no credible evidence to the contrary, their allegations are factually insufficient to support an "enemy combatant" determination. To the extent Musa'ab's Declaration does not address

certain aspects of Respondents' allegations, this is the inevitable result of Respondents' designation of those allegations as classified and counsel's inability to discuss with Petitioner the classified allegations against him.

II. Respondents' Allegations Do Not Satisfy Any Reasonable Definition of "Enemy Combatant."

Even if Respondents' allegations were true – and they are not, as demonstrated in the attached Declaration – they are insufficient to justify Musa'ab's continued detention because they do not satisfy any reasonable definition of "enemy combatant." Nor do they satisfy any of the shifting definitions of "enemy combatant" that Respondents have adopted in the past six and one-half years, including the definition provided by Congress in the Authorization for Use of Military Force ("AUMF"); Respondents' definition as accepted in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); or the Department of Defense's definition in the CSRT Procedures.

Respondents' definitions of an "enemy combatant" have expanded exponentially since Musa'ab arrived at Guantánamo in late 2002. Under the AUMF passed on September 18, 2001, Congress authorized the President "to use all necessary and appropriate force against":

those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(AUMF, Pub. L. 107-40 § 2(a), 115 Stat. 224, 224 (2001)). In *Hamdi*, decided in June 2004, Respondents defined "enemy combatant" as "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 517. In the CSRT Procedures promulgated in July 2004 and 2006, the Department of Defense defined an "enemy combatant" as (Encl. 1):

an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Under any of these definitions, however, Musa'ab would not qualify as an "enemy combatant." Under *Parhat v. Gates*, the government must justify detaining an alleged "enemy combatant" in one of two ways. No. 06-1397, slip op. at 16-17 (publicly released version) (D.C. Cir. June 20, 2008). First, the government may prove that Musa'ab is an "enemy combatant" by proving that he is a member of al Qaida or the Taliban (*id.*) – a burden that Respondents unsuccessfully attempt to meet with their broad and unsupported allegations. Second, absent proof of al Qaida or Taliban membership, "the government must prove by a preponderance of the evidence" each of the following three elements: "(1) the petitioner was part of or supporting 'forces'; (2) those forces were associated with al Qaida or the Taliban; and (3) those forces are engaged in hostilities against the United States or its coalition partners." *Id.* Respondents have not met – and cannot meet – the elements of either of these tests.

Respondents have failed to show – by any standard – that Musa'ab is a member of al Qaida or the Taliban. Respondents allege that Musa'ab was an al Qaida fighter, but they provide no evidence that he ever fought or engaged in any hostilities against anyone on behalf of al Qaida or any other organization. Nor could they provide such evidence, because it does not exist. Musa'ab was never on a battlefield and did not even witness any fighting (Ex. A, at ¶ 3), and Respondents do not allege otherwise. Furthermore, Respondents have not alleged that the two men who allegedly recruited Musa'ab or the camp he allegedly attended before September 11, 2001 were even associated with al Qaida. In fact, in a failed attempt to show that Musa'ab was an al Qaida fighter, Respondents allege that the training camp was affiliated with

the Taliban – not al Qaida. Not only are these allegations contradictory, but even if the camp was affiliated with the Taliban, the D.C. Circuit recognized in *Parhat* that “the Taliban was the ‘Afghani Government’ in 2001, and not all entities provided with housing by that government ... were ‘associated’ with the Taliban in a sense that would make them enemy combatants.” Slip op. at 20. Respondents’ allegations are therefore wholly insufficient to show that Musa’ab was an al Qaida or Taliban member or that he was a combatant of any sort. These allegations fail to support an “enemy combatant” determination.

In the absence of proof that Musa’ab was an al Qaida or Taliban member, Respondents must prove the three elements laid out in *Parhat*. Respondents have not proved and cannot prove any of these elements.

First, Respondents have not alleged, much less proved, that Musa’ab was “part of or supporting ‘forces.’” Respondents allege, without more, that Musa’ab was an al Qaida fighter, but Musa’ab has denied this allegation and the Government has failed to put forth any evidence to support its contention. Furthermore, the Government has failed to allege when or how Musa’ab provided support to any armed “forces.” Musa’ab was not captured on the battlefield in Afghanistan or anywhere else. He was not armed or carrying any indicia of military activity when he was arrested. Indeed, Respondents have not even alleged that Musa’ab was ever on a battlefield. He was arrested in an apartment in Pakistan, where he was staying while he attempted to return home to Yemen.

Second, Respondents have failed to allege that Musa’ab was “associated” with the Taliban or al Qaida. The CSRT Procedures do not define “associated,” but “under the government’s own definition, the evidence must establish a connection ... that is considerably closer than the relationship suggested by the usual meaning of the word ‘associated.’” *Parhat*,

slip op. at 19. In the face of Musa'ab's denial of Respondents' allegations, the Government must prove that Musa'ab was indeed "associated" with al Qaida. This it cannot do. Furthermore, allegations of weapons training alone do not justify an "enemy combatant" classification. *See id.* at 22 n.8.

Third, Respondents have not adequately alleged that Musa'ab engaged in hostilities against the United States or its coalition partners. *See id.* at 17, 22. Despite Respondents' broad allegation, Respondents' supporting allegations merely assert that Musa'ab left a training camp and traveled to Kabul, that Kabul fell three days later, and that Musa'ab then traveled to Pakistan, where he was captured. Even if correct, Musa'ab's itinerary does not furnish a basis for labeling him an enemy combatant. Respondents do not allege that Musa'ab used a weapon or fought in, engaged in, or witnessed any hostilities against the United States or coalition forces. They do not allege that Musa'ab was on or near a battlefield at any time. Respondents' allegations are therefore insufficient to meet the broad definition of "enemy combatant" under the CSRT Procedures, and Respondents' Factual Return is insufficient to support an "enemy combatant" determination.

III. On Information And Belief, Respondents' Allegations Are Based On Statements Obtained Through Torture And/Or Coercion And Are Thus Insufficient To Support An "Enemy Combatant" Determination.

The Supreme Court has consistently held that the Due Process Clause of the Fifth Amendment prohibits the government from depriving a person of liberty based on statements obtained by torture. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Rochin v. California*, 342 U.S. 165, 173-74 (1951). Not only is evidence secured through torture inherently unreliable, but allowing detention based on such evidence corrupts the judicial process. As the Supreme Court stated in *Rochin*, coerced confessions "offend the community's sense of fair play and

decency. ... [T]o sanction [such] brutal conduct ... would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.” 342 U.S. at 173-74.

Involuntary confessions violate fundamental human values and are inherently unreliable. *See Jackson v. Denno*, 378 U.S. 368, 386 (1964). Statements “extracted only after countless hours of repetitive questioning over a period of many months, during which time they were subjected to periods of solitary confinement, positional torture, and repeated physical abuse” must be deemed involuntary and thus inadmissible. *U.S. v. Karake*, 443 F. Supp. 2d 8, 50-51 (D.D.C. 2006); *see also Patterson v. Burge*, 328 F. Supp. 2d 878, 896-897 (N.D. Ill. 2004) (holding that a confession made after being beaten, suffocated, and threatened with other torture was involuntary and violated due process).

Furthermore, under the CSRT Procedures, Musa’ab’s Tribunal had the obligation to assess the reliability of evidence submitted by the Government. *See Parhat*, Slip op. at 24. The Tribunal must have “had – and [taken] – the opportunity to assess the reliability of the evidence that the government presented to it.” *Id.* at 38. The Tribunal is able to assess the reliability of hearsay evidence only if the evidence is presented in proper form or with “sufficient additional information” – including the Government’s sources or its underlying reporting. *See id.* at 24, 29. Without the ability to assess reliability, the Government’s rebuttable presumption “becomes effectively irrebuttable.” *Id.* at 25.

First, on information and belief, the CSRT relied on false statements made by Musa’ab while being subjected to torture, coercive techniques, and/or abusive interrogation tactics. Musa’ab was tortured and/or coerced at both the Prison of Darkness and Guantánamo. When first captured, Musa’ab was taken to the Prison of Darkness. He was interrogated frequently

during the 40 days he was held there. As he stated in his Declaration, Musa'ab falsely admitted the interrogators' accusations "just to stop the torture and abuse." (Ex. A, at ¶¶ 10, 14.) While held at the Prison of Darkness, Musa'ab was subjected to various forms of torture, including food and sleep deprivation, extreme temperatures, and various forms of physical abuse. (*Id.* at ¶¶ 8-10.) For example, Musa'ab was partially suspended by his left hand for his entire detention at the Prison of Darkness, so that he could not sit and was forced to rest all his weight on one leg. This resulted in permanent nerve damage to one leg. (*Id.* at ¶ 8.)

Musa'ab was later transferred to Guantánamo, where he was initially held in isolation and interrogated frequently. Musa'ab told an interrogator that he made false admissions at the Prison of Darkness because he was tortured. The interrogator became angry and threatened to send Musa'ab back to Bagram or the Prison of Darkness. "Because [he] feared that the torture would resume," Musa'ab again made false admissions at Guantánamo. (*Id.* at ¶ 14.) Musa'ab was tortured, coerced, and subjected to abusive interrogation techniques. His statements are therefore inherently unreliable in any court of law and do not provide sufficient justification for an "enemy combatant" determination.

Second, on information and belief, the CSRT relied on statements and information obtained from other prisoners – held in Guantánamo and elsewhere – through torture, coercive techniques, and/or abusive interrogation tactics in its determination of whether Musa'ab was an enemy combatant. On information and belief, the CSRT accepted these statements and information uncritically and accorded them equal weight with any other evidence. On information and belief, the CSRT was unable to and/or did not assess the reliability of these statements because the Government did not present the Tribunal with additional information about those statements.

Because the Government and the Tribunal relied on statements obtained through torture and/or coercion without assessing the reliability of those statements, Respondents' allegations and evidence are insufficient to support a determination that Musa'ab is an "enemy combatant" or to justify Musa'ab's detention.

WHEREFORE, Musa'ab respectfully requests that this Court order his release from Respondents' custody or order an evidentiary hearing where Respondents must establish an adequate basis for Musa'ab's continued detention.

Dated: July 28, 2008

Respectfully submitted,

/s/ David W. DeBruin
One of the Attorneys for the Petitioners
Musa'ab Omar Al Madhwani

David W. DeBruin (DDC Bar No. 337626)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W., Suite 1200
Washington, DC 20005-3823
Tel: (202) 639-6000
Fax: (202) 639-6066

Patricia A. Bronte
Sapna G. Lalmalani
JENNER & BLOCK LLP
330 North Wabash Ave.
Chicago, IL 60611
Tel: (312) 923-8357
Fax: (312) 840-7757

Shayana Kadidal [D.C. Bar No. 454248]
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
T: (212) 614-6464
F: (212) 614-6499

Darold W. Killmer
Mari Newman
Sara Rich
KILLMER, LANE & NEWMAN LLP
1543 Champa Street, Suite 400
Denver, Co 80202
T: (303) 571-1000
F: (303) 571-1001

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2008, I caused the foregoing Traverse in Response to Respondents' Factual Return to be delivered to the below-listed counsel of record in the above-captioned matters through the CM/ECF system:

Andrew I. Warden
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530

Terry Marcus Henry
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, D.C. 20530

/s/ David W. DeBruin