

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA)	
)	
v.)	NO. 1:09-CR-206-GBL
)	
DINORAH COBOS,)	
RAYMOND AZAR,)	
SIMA SALAZAR GROUP,)	
d/b/a SSG OFFSHORE PLC,)	
d/b/a SSG,)	
d/b/a SALAZAR CO.,)	
d/b/a SALAZARCO,)	
d/b/a SIMA INTERNATIONAL,)	
d/b/a PRO-SIMA,)	
d/b/a PRO-SIMA INTERNATIONAL,)	
)	
Defendants)	
)	

**DEFENDANT RAYMOND AZAR'S MOTION TO DISMISS
INDICTMENT ON THE BASIS OF GOVERNMENTAL MISCONDUCT**

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 3

FACTS 4

ARGUMENT..... 9

I. Legal Standard..... 9

II. When Faced With a Conflict Between Rochin and Ker-Frisbie, Due Process Dictates that Ker-Frisbie Must Yield..... 11

III. Mr. Azar was Tortured by Agents of the United States Government; and Torture Shocks the Conscience..... 13

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**DEFENDANT RAYMOND AZAR’S MOTION TO DISMISS
INDICTMENT ON THE BASIS OF GOVERNMENTAL MISCONDUCT**

COMES NOW the Defendant, Raymond Azar (“Mr. Azar”), by and through counsel, and hereby moves this honorable Court to dismiss the May 6, 2009 indictment returned by the Grand Jury on the grounds that the outrageous, torturous conduct of the Government in this case during the arrest and interrogation process violated Mr. Azar’s constitutional rights. In support thereof, Mr. Azar states as follows:

SUMMARY OF ARGUMENT

The United States Government employed “enhanced interrogation methods” – torture – during the arrest, interrogation and transport of Mr. Azar. The torture of Mr. Azar, which was both psychological and physical, included sleep and sensory

deprivation, exposure to aversive environmental conditions, hooding, forced nudity (while being photographed), deprivation of Mr. Azar's basic needs, including food, and veiled threats of harm to him and to his family.

Mr. Azar's detention, conditions of confinement, and interrogation were unlawful, shock the conscience and violated, among other things, his right to procedural and substantive due process and his right to be free from cruel and unusual punishment. Accordingly, Mr. Azar asks that the indictment against him be dismissed.

FACTS

A. Raymond Azar

Raymond Azar is a citizen of Lebanon who had never been to the United States prior to his arrest. Mr. Azar was born in 1964 and is married with four children, ages 4 to 19; his children and his wife live in Lebanon. He is an owner and employee of Sima International, a Lebanese construction contractor. Related companies conduct business in Iraq and Afghanistan. A native Arabic speaker, Mr. Azar speaks and understands little English.¹ Having gone to school only until the age of 14, has never taken any classes or had formal education in English. He has no prior experience with the American legal system; nor does he have a criminal record. He also requires prescription eyeglasses.

B. The Arrest and Initial Interrogation

On April 7, 2009, Mr. Azar, along with co-defendant Dinorah Cobos ("Ms. Cobos"), arrived at Camp Eggers in Kabul, Afghanistan, to discuss with a Colonel for the

¹ While Mr. Azar understands the certain English words and phrases, he cannot comprehend the full substance of an English conversation. This is precisely the reason why the armed men who arrested Mr. Azar should have been accompanied by an interpreter. *See* FBI Legal Handbook for Special Agents, ("Confessions and Interrogations") ("Interpreters – When to Use") (2003), available at https://foia.fbi.gov/filelink.html?file=/legal_handbook_spec_agent/legal_handbooks_spec_agent.pdf (interpreters should be used "when there is doubt of the interviewee's ability to use and understand the English language and the interviewing Agent is not qualified to use the principal language of the interviewee.")

U.S. Army Corps of Engineers (“ACES”) the status of ongoing government construction projects on which Pro Sima had provided services.

Mr. Azar and Ms. Cobos were advised that prior to meeting with the Colonel, they were to go to the cafeteria to exchange pleasantries with the contracting officer on the projects. When they entered the cafeteria, Mr. Azar and Ms. Cobos were suddenly accosted by a swarm of more than 10 men wearing flack jackets and carrying military-styled assault rifles. Mr. Azar was handcuffed and shackled at the waist and feet, causing Mr. Azar to feel faint. He was taken outside where he was then stripped of his jacket, prescription eye-glasses, wallet, and watch. The armed men then took him to a caravan of sport utility vehicles with tinted windows that were surrounded by more armed men in flack jackets. Mr. Azar was placed in the back of one of the SUVs between two men who had side arms and held assault rifles. There were two additional armed men in the front seats of the vehicle. The armed men drove Mr. Azar through Afghanistan to Bagram Airbase, located approximately two hours away. Mr. Azar asked where they were taking him, but no one would tell him.

Instead, the armed men aggressively interrogated Mr. Azar during the entire ride to Bagram. Mr. Azar told his abductors frequently that he did not speak or understand English well. He also informed them that he could not read English. Despite these statements, the armed men questioned him in English throughout the trip; no one translated the questions into Arabic. During this interrogation, the armed men, among other things, indicated that they wanted Mr. Azar to admit to participating in making alleged payments to a U.S. government employee. After more than an hour of repeated questioning, the armed men presented him with a rights waiver form in English only and abruptly ordered Mr. Azar to “sign it!” Disoriented and dizzy, he asked what it was; and one of the men told Mr. Azar something to the effect of, “it’s nothing, sign it and you’ll go home.” Without providing Mr. Azar with his prescription eyeglasses or explaining his rights in English or Arabic, they demanded that he sign the English-only

waiver form. They told Mr. Azar that they were mainly interested in Ms. Cobos and her relative, not in him.

Mr. Azar told the armed men that he was unaware of the reasons for their treatment of him at which point the armed man in the front passenger seat removed a photograph of Mr. Azar's wife and four children from Mr. Azar's wallet, showed it to Mr. Azar and stated that if Mr. Azar did not admit to paying the government employee, he would "never see them again." Mr. Azar took this as a threat to do physical harm against members of his family and/or himself, which caused him to experience even greater feelings of stress and horror. Mr. Azar was further told that if he signed the form and admitted to participation in the alleged plan to pay a government employee, Mr. Azar would be sent home within days. Frightened for his immediate safety and that of his family members, and under the belief that he would end up in the prison camp at either Guantanamo Bay or Abu Ghraib to be tortured, Mr. Azar signed the waiver form and began agreeing with statements made by the armed men, even those statements he did not understand.

C. Bagram Airbase

Upon arriving at Bagram, armed men took Mr. Azar to a small office and sat him in a chair, in isolation, for approximately seven hours with his hands and feet still bound, where he was forcefully ordered not to move. For approximately seven hours straight, Mr. Azar could think of nothing but what the armed men might attempt to do to him and/or to his family next.

At about midnight, armed men took him through the cold winter's rain (with nothing to protect him from the elements) to an empty, unheated, metal shipping container where they put him in a cell with bars that had a single bed, no pillow and one very thin blanket in it. The cell was brightly lit and had guards stationed outside its bars. Mr. Azar's handcuffs and leg irons were finally removed. It was very cold, with the

overnight temperature going as low as 1 degree Celsius. The metal container was windowless, and the bright lights were left on for the entire evening. Mr. Azar was wet from the rain and cold, was alone in an unheated, brightly lit shipping container, and he had not eaten. When Mr. Azar requested a blanket from the guards, they laughed and shouted at him, "No!" Additionally, the guards sat at opposite ends of the container, one in front of each cell of Mr. Azar and Ms. Cobos. The guards spoke to each other in loud tones constantly throughout the night, with their voices echoing loudly through the empty metal container, which ensured that Mr. Azar would be unable to sleep. Mr. Azar requested that the light be turned off and that the guards lower their voices, but the guards ignored him.

Early the next morning, several armed men entered the container, grabbed Mr. Azar, handcuffed and placed leg irons on him, and walked him again through the rain, this time, to another office where there were approximately 10 armed men in the room. They again questioned Mr. Azar in English, continued to threaten him and again told him that he had to admit that he knew of and approved the alleged payments to a government employee or else he would not see his children again. The agent pointed to his youngest son in the photo and told Mr. Azar that he would never see him grow up; as for his oldest child, a girl, the agent threatened that she would someday marry and have children but that he (Mr. Azar) would never see his grandchildren. If Mr. Azar confessed, he was told, he would see his children very soon. Mr. Azar began to cry.

The armed men told him again that an airplane was waiting, and that he would be put on the airplane if he did not talk. The agents refused to tell him where the airplane would take him. Without providing him with his eyeglasses or explaining his rights in Arabic, they again demanded that he sign an English-only waiver form. This time, they said he would be flown home if he signed the form. Terrified, Mr. Azar signed the form, but he refused to sign a written statement prepared by the agent. At that point, one of the armed men said that Mr. Azar would be taken to an airplane to go to jail and never to see

his family again because, according to the armed man, Mr. Azar would not “help” and would not “talk.”

The armed men then took Mr. Azar to another room, and – now over 18 hours after he was initially arrested – the armed agents stripped him of his clothing, took photographs of him nude, touched him about his body, and, among other things, performed a cavity “search” on Mr. Azar. The armed men talked and laughed throughout this process. Mr. Azar was then given a paper-thin jumpsuit, with no underwear, and a hood was stretched over his head, covering his nose, ears, and part of his mouth. He was provided with slippers which provided little to no protection from the cold rain. He was re-handcuffed and chained about his waist and legs; and taken to a waiting car for a short ride, after which he was placed on an airplane. Particularly because he was wet and clothed only in the jump-suit and hood, Mr. Azar was very cold. Mr. Azar could not see or hear anything. He asked for a blanket but was told there were none. At this point, Mr. Azar was convinced that the armed men thought he was a terrorist, and he feared that the flight was headed for Guantanamo Bay, where he would be further tortured.

D. Flight to the United States

For the first leg of the flight to Manassas, Virginia, for approximately the first seven hours, Mr. Azar was confined to a small seat. His hands and legs were bound, the hood blocked his vision completely and obstructed his hearing. He was told not to stand up; nor could he recline his seat. At this point, Mr. Azar still had not eaten; nor could he sleep.

During the second leg of the flight, Mr. Azar was taken to another part of the plane where a male and female agent questioned him. The hood was snatched from his head, while his hands and feet remained shackled. Over 30 hours after being abducted, and after he had been questioned repeatedly for several hours, Mr. Azar was finally given

water to drink and a banana to eat. He was also given a bag of Cheetos™, which he did not consume.

One of the men told Mr. Azar that if he confessed, he could go home in one month. He was then threatened that he would not see his family again if he did not say he approved the alleged payments of the government employee. They again told Mr. Azar that they were mainly interested in evidence against Ms. Cobos and her relative, not him. Mr. Azar again informed them that he did not speak English well and that he had even more difficulty reading English.

After the interrogation, one of the men urged Mr. Azar to sign a handwritten statement, written by the man in English, which Mr. Azar could not read. Mr. Azar refused to sign it. The hood was then placed back on his head, and the men moved Mr. Azar back to his seat, where he was confined for the remainder of the flight (approximately seven more hours).

Upon landing, Mr. Azar was taken off the airplane and placed in the custody of two agents who were waiting for the airplane to arrive. Mr. Azar was then told that it was 6 a.m. and that he was in the United States. He was driven to a jail, now known to be in Alexandria, Virginia. Mr. Azar was arraigned the next day, where, upon hearing Mr. Azar speak, the magistrate judge insisted that he be provided an interpreter. Mr. Azar's prescription glasses were not returned to him until one month after he was taken into custody by the armed men, now believed to be from the Federal Bureau of Investigation ("FBI").

ARGUMENT

I. Legal Standard

A constitutional right is violated the moment torture or its close equivalents are brought to bear. *Chavez v. Martinez*, 538 U.S. 760, (2003)(Kennedy, concurring).

Dismissal is appropriate where the evidence reflects that the conduct of U.S. Government

actors is so violative of a defendant's due process rights that it "shocks the conscience."

Rochin v. California, 342 U.S. 165, (1952)(*"Rochin"*).

The primary basis for this rule is the necessity for some deterrent to ensure that law enforcement officials do not abuse the authority which has been ceded to them. As famously noted by Justice Brandeis, "[t]he court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination" *United States v. Toscanino*, 500 F.2d 267, 274 (2nd Cir. 1974) (citing *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, dissenting)).

Rochin involved police officers' insertion of an emetic solution into the defendant's stomach in order to induce vomiting. The "proceeds" of the vomiting included two morphine pills which were used as evidence against the defendant. The Court noted that it was "compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience and ... is bound to offend even hardened sensibilities." *Rochin* at 172.

Allegations of outrageous conduct are analyzed by the totality of the circumstances. *United States v. Davis*, 877 F.2d 60, *2 (4th Cir. 1989)(unpublished); *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981).

It is true, generally, that a court's power to try a criminal defendant is not impaired by the government's use of even forcible abduction to bring the defendant

within the court's jurisdiction. *Frisbie v. Collins*, 342 U.S. 519, 522, (1952)(“*Frisbie*”);² *Ker v. Illinois*, 119 U.S. 436, 444, (1886)(“*Ker*”)³ (sometimes referred to collectively as “*Ker-Frisbie*”). However, the government's power is not without limits – torture must not be tolerated under any circumstances. *See, e.g. Al-Marri v. Pucciarelli*, 534 F.3d 213, 307 (4th Cir. 2008)(Wilkinson, J. concurring in part and dissenting in part), cert. granted, 129 S.Ct. 680 (2008).

II. When Faced With a Conflict Between *Rochin* and *Ker-Frisbie*, Due Process Dictates that *Ker-Frisbie* Must Yield

There is an inherent contradiction and resulting question when the rules of *Rochin* and that of *Ker-Frisbie* overlap: would dismissal be appropriate if the government's forcible abduction and corresponding violation of a defendant's due process rights is so unacceptable and inappropriate that it “shock[s] the conscience?” The Second Circuit has answered this question in *Toscanino*, holding in the affirmative, that dismissal would be appropriate under these circumstances.

In *Toscanino*, the defendant was charged with conspiracy to import and distribute narcotics. Authorities from the United States kidnapped the defendant in Uruguay, blindfolded him, denied him sleep, and physically tortured him before drugging him and putting him on a commercial flight to the United States, where he was prosecuted.

² *Frisbie* involved a *habeas* proceeding where the defendant, who was living in Chicago, Illinois at the time, was abducted from Chicago by Michigan state police officers who returned *Frisbie* to Michigan to face charges. *Frisbie* alleged that he was forcibly seized, handcuffed, and blackjacked by the officers. *Frisbie* at 520. There were no allegations of torture in *Frisbie*.

³ *Ker* involved an individual being transferred against his will from Peru to the United States to stand trial in Cook County, Illinois. There are no allegations of torture or any misconduct in *Ker*'s transfer to the United States to face charges. Indeed, the defendant in *Ker* only claimed that he was entitled to asylum in a foreign country and that the

Toscanino at 270. The court described that the government's conduct towards *Toscanino* as "reminiscent of the horror stories told by our military men who returned from Korea and China." *Id.*

The Second Circuit noted that due process requires the court to divest itself of jurisdiction over a defendant where such jurisdiction has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights. *Id.* at 275. The Court then remanded the case to the District Court for an evidentiary hearing regarding the government's methods. *Id.* at 281.

The Fourth Circuit briefly addressed *Toscanino* in *United States v. Wilson*, 721 F.2d 967 (4th Cir. 1983) ("*Wilson*"). *Wilson* involved a ruse to entice a defendant to travel to the Dominican Republic where he was arrested and transported back to the United States to face charges. There were no allegations of physical or psychological abuse. The Fourth Circuit noted the potential conflict between *Rochin* and *Ker-Frisbie*, but determined that the facts did not indicate conduct that "shocked the conscience," and that no reprehensible methods were used, such as torture, as there were in *Toscanino*.

In the case at bar, however, the conduct of the FBI agents certainly shocks the conscience. As with *Toscanino*'s reference to military efforts in Korea and China, the behavior exhibited by the federal agents in detaining and interrogating Mr. Azar is "reminiscent of the horror stories" seen by cameras in the infamous Abu Ghraib prison.

United States had no right to remove him forcibly from Peru to face charges in the United States.

III. **Mr. Azar was Tortured by Agents of the United States Government; and Torture Shocks the Conscience**

The Obama Administration has condemned the use of torture, specifically with regard to due process. “What I have said is that my administration is going to operate in a way that leaves no doubt that we do not torture, and that we abide by the Geneva Conventions, and that we observe our traditions of rule of law and due process.”⁴ This Court has similarly condemned torture. In *United States v. Abu Ali*, 395 F.Supp. 2d 338, 379 (E.D. Va. 2005) *aff’d*, 528 F.3d 210 (4th Cir. 2008), this Court wrote:

“the Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings. This Court takes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the United States Constitution and of those international documents on human rights to which the United States is a signatory ... are upheld in word, deed, and spirit.”

⁴ (Feb. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/.

See also Remarks of President Barack Obama -- Address to Joint Session of Congress (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ (“I can stand here tonight and say without exception or equivocation that the United States of America does not torture.”);

Remarks By National Security Adviser for Obama Administration James L. Jones At 45th Munich Conference On Security Policy, (Feb. 9, 2009) *available at* http://www.whitehouse.gov/the_press_office/RemarksByNationalSecurityAdviserJonesAt45thMunichConferenceOnSecurityPolicy/ (“The NSC has worked closely with the White House Counsel’s office as we implement the President’s orders to ban torture.”);

available at <http://www.examiner.com/x-536-Civil-Liberties-Examiner~y2009m1d16-Eric-Holder-says-waterboarding-is-torture-gun-control-less-likely> (authorizing torture “would violate the international obligations that all civilized nations have agreed to ... the Geneva Conventions.”)

Torture is defined in the United Nations Convention Against Torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him... information or a confession, punishing him for an act he... has committed or is suspected of having committed, or intimidating or coercing him.” United Nations Convention Against Torture, Article I. The Torture Victim Protection Act of 1991, which codifies an alien’s rights to sue in tort if subject to torture, defines torture as

“any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), *whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.*” 28 U.S.C. 1350 § 3(b)(1) (emphasis added)

A recent study concluded that psychological manipulation, including a myriad of tactics employed by the Government in this case, can cause as much mental and traumatic stress as physical torture:

In conclusion, aggressive interrogation techniques or detention procedures involving deprivation of basic needs, *exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment,* and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects. Such stressors satisfy the

criterion of “severe mental suffering,” which is central to the definition of torture in international conventions. *See* Metin Basoglu, Maria Livanou, and Cvetana Crnobaric, “Torture vs. Other Cruel, Inhuman, and Degrading Treatment,” 64 ARCHIVES OF GENERAL PSYCHIATRY 277 (Mar. 2007), available at: <http://www.archgenpsychiatry.com> (emphasis added).

Hooding – or the prolonged deprivation of sight – is a particularly despicable form of psychological torture. This Court has agreed that hooding is certainly antithetical to how criminal justice works in this country. *See United States v. Khan*, 309 F. Supp. 2d 789, 797 (referring to open court explanation of suppression hearing located in part in January 16, 2004 Transcript of Suppression Hearing Before the Honorable Judge Leonie M. Brinkema, United States District Judge at 116:22)(attached hereto as “Exhibit A”) (“*Khan* Suppression Hearing”)(“[t]hen he’s put on this plane under conditions which I said are certainly antithetical to how criminal justice works in this country, that is, the blindfold and that sort of thing.”). Further, in the *Khan* Suppression Hearing, the Court commented that the Court “can’t ever recall a time where I had interrogation of a defendant after the defendant had been kept in a blindfold situation for at least two hours, as I understand, on the plane.” *Id.* at 116:4. Here, Mr. Azar had been hooded for more than *seven* hours before his hood was removed initially. After an interrogation session on the airplane, Mr. Azar was again hooded for approximately seven additional hours. As such, Mr. Azar was hooded for nearly the entire flight – from Bagram, Afghanistan to Manassas, Virginia.

On January 22, 2009, several months prior to the arrest of Mr. Azar, President Obama issued an Executive Order, Executive Order 13491, § 3(b) (Jan. 22, 2009) (“Interrogation Techniques and Interrogation-Related Treatment”), which acted to

prohibit certain interrogation techniques, including hooding.⁵ This prohibition appropriately bans a practice known to induce severe mental distress.

Body cavity searches, as utilized in the case at bar, violate the Fourth Amendment when they are unreasonable and/or with punitive intent. *See, e.g. Bell v. Wolfish*, 441 U.S. 520, (1979)(“Bell”); *Amaechi v. West*, 237 F.3d 356, 361-363 (4th Cir. 2001); *Bushee v. Angelone*, 7 Fed. Appx. 182 (4th Cir. 2001). Courts gauge the reasonableness of a particular search by balancing the need for the search against the invasion of personal rights that the search entails. *Bell* at 545-546. To this end, a court must consider the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it was conducted. *Id.*

Threats involving family members – Coercive statements in an attempt to obtain confessions, again as utilized here by the FBI, are also violative of a defendant’s due process rights. *Lynumn v. State of Illinois*, 372 U.S. 528, (“*Lynumn*”). In *Lynumn*, the Court held a conviction invalid where a confession was made after the police had used coercive statements to illicit that confession. The defendant was told that her children would be taken from her if she did not cooperate, while encircled in her apartment by police officers. *Lynumn* at 534. The Court noted that the defendant had no

⁵ Executive Order 13491 dictates that Army Field Manual 2-22.3 will set the standard for acceptable interrogation techniques. The new Army Field Manual now expressly prohibits the use of hooding in interrogations: “If used in conjunction with intelligence interrogations, prohibited actions include, but are not limited to ... [p]lacing hoods or sacks over the head of a detainee; using duct tape over the eyes....” United States Dep’t of the Army, FM 2-22.3, “Human Intelligence Collector Operations,” at 5-75 (Sept. 6, 2006) (“Army Field Manual”). Available at <http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

previous experience with criminal law and had no reason not to believe that the police had ample power to carry out their threats. *Id.*

Sleep deprivation, as in Mr. Azar's case, can also constitute a violation of constitutional rights. *See United States ex rel. Lewis v. Henderson*, 421 F.Supp. 674, 682 (S.D.N.Y. 1976)(confession excluded based on impairments of sleeplessness and hunger); *Smith v. Campbell*, 295 Fed. Appx. 314, 319 (11th Cir. 2008)(circumstances certainly exist where depriving a suspect of sleep over a period of time would represent 'egregious conduct' constituting a constitutional violation); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999)(conditions designed to prevent sleep might violate Eighth Amendment); *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663 (E.D.N.Y. 2006)(claims stated might violate Fourth and Fifth Amendment where plaintiffs alleged, *inter alia*, sleep deprivation, confiscation of personal property, and unnecessary strip searches).

Any of these constitutional rights violations, particularly the hooding, would be sufficient for dismissal. Viewing this conduct by the totality of the circumstances, *see United States v. Davis*, 877 F.2d 60, 1989 WL 64308, *2 (4th Cir. 1989)(unpublished); *United States v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981), renders it even more shocking and egregious.⁶ Here, government agents physically and psychologically abused Mr.

⁶ It warrants noting that – as the Court is assuredly aware – generally, allegations of torture with regard to interrogations are related to cases alleging acts of terrorism and other similar crimes. Mr. Azar is alleged to have committed the white-collar crime of conspiracy to commit bribery. We have been unable to locate any authority where “enhanced interrogation tactics” were utilized in an interrogation regarding the conspiracy to commit bribery or similar white collar crimes. In analyzing the conduct of the Government by the totality of the circumstances – without trivializing the seriousness of the charged conduct here, yet juxtaposing this case to terrorism cases – the relatively

Azar for the purpose of obtaining information and a confession from him. The agents taunted him continually that the abuse would end if he confessed to being a co-conspirator to bribery and signed away his *Miranda* rights. Government agents aggressively interrogated Mr. Azar in English despite the fact that he was a Lebanese national who did not understand English, could not read the waiver form (both because it was in English and because the agents had taken Mr. Azar's eyeglasses), and did not have any familiarity with the American legal system. They isolated Mr. Azar and deprived him of sleep. They exposed Mr. Azar to aversive cold and rainy conditions, and deprived him of protection from those conditions. Mr. Azar was stripped of his clothing while agents took photos of him; bent Mr. Azar over the table; conducted a full body cavity "search," touching him all over his body, including a "search" of Mr. Azar's rectum and testicles. Other agents laughed while Mr. Azar was subjected to this dehumanizing behavior. Mr. Azar was hooded and – using his family photo – agents told him continually that he would not see his children or his grandchildren that his daughter would someday provide him. During these unconscionable acts, Mr. Azar was told repeatedly that this would all end if he simply provided information or confessed.

Based on Executive Order 13491, on the date that Mr. Azar was arrested – officials with the U.S. Government could not even interrogate a terrorist in the manner that Mr. Azar was "interrogated." Yet, Mr. Azar was treated *worse* than a terrorist. This shameful, inhumane conduct should not be countenanced by the Court.⁷

minimal severity of the crimes alleged against Mr. Azar should be recognized and accounted for.

⁷ Mr. Azar was lured under false pretenses to Afghanistan where, as noted above, he was arrested on an American military base. That notwithstanding, the Government wishes now to have it both ways – *i.e.*, the benefits of an arrest on an American military base

The United States Government tortured Mr. Azar in a reprehensible manner. To grant jurisdiction over Mr. Azar at all would allow the Government to enjoy the fruits of their misconduct. Dismissal is the only appropriate remedy for this Court to penalize the Government for its unacceptable conduct to deter the Government from using such abhorrent tactics in the future. The indictment of Mr. Azar should be dismissed.

An evidentiary hearing before the Court is requested.

Respectfully Submitted,

/s/ Edward Maginnis

James F. Hibey, *pro hac vice motion pending*

Joseph Walker, *pro hac vice motion pending*

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Counsel for Raymond Azar

without accepting the burdens of affording Mr. Azar his rights under the United States Constitution.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Edward H. Maginnis