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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 1:16CR143**
	)	
MOHAMAD JAMAL KHWEIS	)	**The Honorable Liam O'Grady**
	)	
Defendant.	)	**Hearing Date: April 12, 2017**

DEFENDANT'S MOTION TO SUPPRESS

PLEASE TAKE NOTICE that on April 12, 2017 at 9:00, the accused, Mohamad Jamal Khweis, by counsel, will move this Honorable Court to suppress his statements and their fruits from use at trial in the Government's case-in-chief. Suppression should be granted on three grounds: 1) Mr. Khweis' statements are fatally tainted by a violation of the *McNabb-Mallory* rule and 18 U.S.C. 3501(c) through the use of a secret detention; 2) Mr. Khweis' statements and consent to search his phone are the product of government coercion; 3) the government violated Mr. Khweis' Fifth Amendment right against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Missouri v. Seibert*, 542 U.S. 600, 613-14 (2004).

Mr. Khweis, a U.S. Citizen, was held in a secret detention in Erbil, Iraq for over two months for U.S. interrogations. Before interrogations began, a consular from the U.S. State Department advised Mr. Khweis that his right to remain silent and the presumption of innocence were not present in Iraq. Then, for the first set of interrogations, Mr. Khweis was not *Mirandized.* The FBI interrogated Mr. Khweis at least eleven times over the first three weeks. During each interrogation, Mr. Khweis begged, pleaded, and wept, imploring the agents to bring him back home, even if it meant returning home to face criminal charges. The lead FBI interrogator continued to advise him (even after decisions were made) that no decisions had been

made, but that being *consistent* and truthful in his statements would help him return home. Over the course of these interrogations, Mr. Khweis' statements went from benign to increasingly inculpatory. The lead FBI Interrogator led him to believe that U.S. must be able to charge him with a crime if he wished to return home, and Mr. Khweis was desperate to return home.

After three weeks of un-*Mirandized* FBI interrogations, there was silence. Mr. Khweis wondered if he had lost his chance to come home forever. He wondered if he would ever be reunited with his family again, or if he would remain just another inmate, lost and forgotten in a prison in the Middle East. But Mr. Khweis was given a second chance. After ten days, a second team of FBI agents *Mirandized* and interviewed Mr. Khweis three additional times. These *Mirandized* interviews followed admonishments at the end of his un-*Mirandized* interrogations, that his story be consistently truthful if he wanted a chance to return home. And so he spoke. For these reasons, and others described in more detail below, Mr. Khweis' statements were not made knowingly and voluntarily, they were elicited in violation of Mr. Khweis' Constitutional rights, and should be suppressed from the Government's use at trial.

BACKGROUND

Mr. Khweis is a twenty-seven year old high school graduate from Fairfax, Virginia. He lives with his parents, and prior to his arrest, worked as a metro bus driver. In late 2015, Mr. Khweis traveled to several countries in Europe, and then Turkey, Syria, and Iraq. While in Syria and Iraq, Mr. Khweis is alleged to have stayed in ISIL safehouses, and interacted with members of ISIL. He is alleged to have engaged in religious services with others in the community. After three months, Mr. Khweis fled to Kurdish-held territory in an effort to escape ISIL.

I. Khweis' Surrender to Kurdish Forces

Mr. Khweis attempted to escape Iraq several times. Initially he was unsuccessful, however, he finally departed one evening and started walking for miles. He walked through the night before encountering anyone. Finally, at a military checkpoint near Sinjar Mountain, he discovered Kurdish forces. He hid, but eventually moved closer. One officer fired a warning shot, and suddenly a crowd of armed Kurdish military officers surrounded him. They grabbed Mr. Khweis, forced him to remove his clothing, confiscated all of his belongings, including his cell phones, and assaulted him.[1] Mr. Khweis was then permitted to dress, and was forced into a vehicle to travel to a Kurdish prison. Below is an image from this encounter.

[2]

[1] The Kurds provided these phones to U.S. law enforcement a few days later, and the agents downloaded and analyzed their data.

[2] http://www.thedailybeast.com/articles/2016/03/14/american-isis-fighter-captured-in-iraq.html (last accessed Feb. 6, 2017).

Mr. Khweis was transported a large Kurdish counter-terrorism prison ("CTD") in Erbil, Iraq, where he was to spend the next three months. Within the first few days, Kurdish officials took Mr. Khweis to a local news station and ordered him to provide an interview. He explained that he met a girl while in Turkey whose family was from Iraq. He discussed the method by which "Daesh," as he called the group, facilitated the couple's travel.[3]

II. Mr. Khweis' Detention and U.S./Kurdish Working Arrangement

Mr. Khweis was held in at CTD prison for months and never charged with a crime or violation. No Kurdish court, U.S. Court, or neutral fact-finder ever evaluated the evidence supporting Mr. Khweis' detention. Under Kurdish law, the Kurdish authorities were required to bring Mr. Khweis before a Judge within 24 hours. *See* Def.'s Ex. 1, *Fact Sheet for Americans Imprisoned in Iraq* at 2 ("Within 24 hours of detention, a detainee will appear before an Investigative Judge (IJ) (the equivalent of the prosecutor in the U.S.), The IJ will review the evidence provided by the police, may meet with the arrestee and lawyer, and then determine whether to issue a detention order, which authorizes pretrial detention.").[4]

Mr. Khweis, however, never saw a Kurdish judge and there were no Kurdish charges ever filed against him. Instead, he was held at the behest of the U.S. Government agents for questioning. The Kurds were eager to accommodate the U.S. requests, provided the information was shared between the forces. Thus, the Kurds and the U.S. officials involved in this matter established a close working arrangement that included sharing information and unlimited U.S. access to Mr. Khweis. Emails evidenced this arrangement.

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[3] "Daesh" is considered the derogatory term for ISIL. *See* Nicola Oakley, Suchandrika Chakrabarti, *What does Daesh mean? ISIS 'threatens to cut out the tongues' of anyone using this word*, Daily Mirror (July 26, 2016) (available at http://www.mirror.co.uk/news/world-news/what-daesh-mean-isis-threatens-6841468) (last accessed Feb. 6, 2017).

[4] Defendant's Exhibit 1 is an information sheet on the judicial system in Iraq. A U.S. State Department consular proved this document to Mr. Khweis when she first visited him.

The day Mr. Khweis was detained, on March 14, 2016 a Department of Defense employee ("DoD") sent an email to another DoD employee stating in relevant part, "CTD [Kurdish Counter-Terrorism Directorate] will bring detailed information in the morning (identification, etc.) on the reported AMCIT [American Citizen]. We will facilitate FBI access to the detainee. More to follow as this develops. First report."[5]

The following day, on March 15, 2016, a DoD employee sent an email to two other DoD employees stating,

"Sir, we will get access [to Mr. Khweis] along with the FBI in the near term. Still working what/when that looks like. We are getting the initial documentation on who he is in the next 12 hrs delivered to us from the CTD. **[The Kurdish General] is more than willing to cooperate as usual**. We will keep everyone updated once we sit down with the CTD again tomorrow. **A great example of what a 10 plus year relationship does for us**." (emphasis added).

Most explicitly, the lead FBI Interrogator sent an email on March 15, 2016, the day after Mr. Khweis was detained, stating in part "**[w]e now have unlimited access [to Mr. Khweis] and they welcome us there any day or night since we are collaborating with them. Sharing information with them going forward on Khweis is critical to success**.[6] The details of events leading up to this were as follows:

[5] Redacted copies of all emails referenced in this motion will be provided to the Court at the time of the hearing.

[6] The lead FBI Interrogator, an FBI Legal Attaché, is also referred to as "ALAT" or "LEGATT."

3/15:
We were advised that Mohammad Khweis was arrested by the Peshmerga and turned over to Erbil CTD. We obtained permission to interview him. When we arrived at CTD, we were escorted into Gen [redacted] office. He advised us that no US personnel would have access to him now would we have access to the phones. He was upset with a recent issue where a no information was shared with them by US personnel holding an ISIL [redacted] subject in Iraq. Peshmerga were being attacked with chemical weapons and the US was not sharing intelligence. After discussing the situation with him, he agreed to provide me access to the detainee for 1 hour, and also agreed to let us rip the phones in their presence and return the phones to them (which [redacted] and [redacted] did last night). Just wanted you to understand the difficulties that existed initially. We now have unlimited access and they welcome us there any day or night since we are collaborating with them. Sharing information with them going forward on Khweis is critical to success and continued access, so tearlines are critical.

Thus, the U.S. admittedly had unfettered access to Mr. Khweis as long as they shared information with the Kurds. And the U.S. did share information. An English-speaking Kurdish official was present for every single interview with Mr. Khweis. The Kurds brought Mr. Khweis to the location requested by the U.S., and on the days requested by the lead FBI Interrogator. The Kurds offered Mr. Khweis' electronic devices to U.S. officials to download their data.

Evidence of this collaboration is seen throughout Mr. Khweis' detention. On March 15, 2016, the lead FBI Interrogator emailed another FBI Agent, stating,

Gen [redacted -high ranking Kurdish official] asked wants us to address one issue with the detainee tonight.

On March 16, 2016, the lead FBI Interrogator emailed another FBI Agent who found information on Mr. Khweis, asking:

Can I share this information with our Kurdish investigators?

On March 26, 2016, the lead FBI Interrogator emailed other agents,

CTD is finalizing an official document that provides us the account information (facebook, twitter, email, [redacted]) obtained through their investigation. They concurred with our use of their information in legal processes to secure additional information about these accounts. [redacted] had asked for this information and it will be forwarded to him. They would really like to see the US start sharing back information to assist in their investigation. I'm sure information pertaining from these accounts will generate good SDRs and even more information collected in subsequent interviews.
[redacted] about everything that I have written about in the past week. He wants

Throughout Mr. Khweis' detention, the lead FBI Interrogator continued to protect the U.S.-Kurdish working arrangement, stating in an email on April 1, 2016, "**hopefully you can**

share some of that back…that is the only way I'm going to be able to keep getting them to help us on this."

First, I met with the Security Council leader last night. He will have the document you requested to me by 1100 Saturday, since Friday is a day off for all Kurds. I will scan and send it to you so you have all the key social media accounts from their investigation of Khweis. Hopefully you can share some of that back..that is the only way I'm going to be able to keep getting them to help us on this.

An email on April 3, 2016 from the lead FBI Interrogator to the State Department discussed providing the Kurds a notarized summary of information, and on April 18, 2016, the lead FBI Interrogator received and distributed copies of the Kurdish unclassified reports.

III. The Taint/Clean Interrogation Plan

To interrogate Mr. Khweis during this hold, the U.S. Government devised a two-step technique designed to circumvent the *Miranda* requirement. The plan involved so-called "taint" interrogations in which U.S. interrogators purposefully avoided administering *Miranda* warnings, followed by the insertion of a second team of interrogators who would "clean" the taint of Mr. Khweis' prior statements so they could be used against him in a criminal trial.[7] *See* Email from a DoD employee on March 30, 2016, ("Way ahead: one more un-*Mirandized* interview session followed by clean team arrival from WFO [Washington Field Office]"). At no time was Mr. Khweis informed by the "clean" team of the inadmissibility of his prior statements or the reason for the two interrogations.

In fact, immediately prior to any interrogations, a U.S. State Department consular provided Mr. Khweis with a pamphlet on Iraqi attorneys and the judicial system. This document explained that "Iraqi proceedings are non-adversarial and the attorneys do not argue the case for either side." The information also stated in bold and italics that ***"the presumption of innocence,***

[7] The "taint" team and "clean" team are not defense inventions, but were the terms used by the FBI and others throughout this case to discuss the two teams.

***the burden of proof beyond a reasonable doubt, and the right to remain silent do not apply in Iraq.*"** *See* Def.'s Ex. 1 (emphasis in original). Thus, prior to being interrogated, not only was Khweis *not* advised of his *Miranda* warnings, he was specifically told he did *not* have the right to remain silent. And so began almost six weeks of interrogations.

IV. Mr. Khweis' Tainted Interrogations

Prior to each interrogation, a Kurdish official led Mr. Khweis into a room for questioning by U.S. Government agents. This Kurdish CTD Officer (who spoke English and Arabic) then remained for the entirety of the interviews. During the interviews, Mr. Khweis begged authorities to go home. He begged to see his family. He cried day and night, depserate to know whether he would ever be home again, or whether he would be left to waste away in Erbil, in a facility crawling with bugs, where he slept on the floor, and hardly understood anyone.

But no one answered his cries. No one answered his inquiries.

Mr. Khweis did not know if he would ever be released. He did not know whether he would ever be reunited with his family. During each encounter with U.S. law enforcement, Mr. Khweis implored the agents to tell him whether travel plans were being contemplated. Each time the answer was the same – that a decision had not been made, the investigation was still pending, and charging decisions were made by Department of Justice or the U.S. Courts. Then the U.S. Agents would ask Mr. Khweis to recall details of his travels.

Reports from the FBI Interviews show the following:

- During the interview on 3/15/16, "[The lead FBI Interrogator] explained that a decision had not been made whether or not [KHWEIS] would be charged or whether he would be extradited to the US. [The lead FBI Interrogator] emphasized that he could never make any promises as those decisions are made by Federal Judges and/or the US Department of Justice."

- During the interview on 3/17/16, "[The lead FBI Interrogator] reminded [KHWEIS] that a decision had not been made by the US whether he would be charged with a crime or

not. [The lead FBI Interrogator] stated that any decision regarding his possible extradition and future charges, if any at all, would be made by the Department of Justice and US Federal Courts."

- During the interview on 3/18/16, "[The lead FBI Interrogator] reminded [KHWEIS], as he does every day, that a decision had not been made by the US whether he would be charged with a crime or not. [The lead FBI Interrogator] stated that any decision regarding his possible extradition and future charges, if any at all, would be made by the Department of Justice and US Federal Courts."

- During the interview on 3/19/16, "[The lead FBI Interrogator] reminded [KHWEIS] that a decision had not been made by the US whether he would be charged with a crime or not **because the investigation is still pending**. **KHWEIS stated that he preferred to be returned to the US for any potential prosecution**. [The lead FBI Interrogator] stated that any decision regarding his possible extradition and future charges, if any at all, would be made by the Department of Justice and US Federal Courts. At the conclusion of the previous interview, [The lead FBI Interrogator] had advised KHWEIS that some of the information provided to date by KHWEIS did not appear to be completely credible. **[The lead FBI Interrogator] discussed the importance of collecting and reporting accurate information**." (emphasis added).

- During the interview on 3/20/16, "Once again, [The lead FBI Interrogator] reminded [KHWEIS], as he does everyday, that a decision had not been made by the US whether he would be charged with a crime or not because the investigation is still pending. KHWEIS reiterated that he preferred to be returned to the US for any potential prosecution. [The lead FBI Interrogator] refused to provide any statements regarding future decisions to be made regarding his possible extradition and future charges, if any, by the Department of Justice and US Federal Courts."

- During the interview on 3/23/16 "At the end of the interview [KHWEIS] asked if he would be going back to the US. [The lead FBI Interrogator] advised KHWEIS that the U.S. has not made a determination on whether or not to charge him. Additionally, [The lead FBI Interrogator] reiterated that likewise, no decision was made regarding the KRG possibly extraditing him."

- During the interview on 3/26/16 "KHWEIS stated that his *only concern* was whether he would be able to go back to the US or not. [The lead FBI Interrogator] once again advised that no decision has been made on whether he would be charged by the US or whether he would be extradited by the KRG. [The lead FBI Interrogator] explained how either a DoJ prosecutor, a Grand Jury, or a Federal Judge would decide if he would ever be charged and extradited. Law enforcement officers could never make this decision." (emphasis added).

- During the interview on 3/31/16 "As with every interview session, [The lead FBI Interrogator] stated that no decision had been made on whether he would be charged by the US. **KHWEIS wanted to know what timeline was on that decision, and was**

> **advised that a decision would not be made until the US had collected and evaluated all the evidence in order to assess if charges were merited**. **KHWEIS wanted to know how long that would take. [The lead FBI Interrogator] did not commit to an answer, indicating it would *still take a couple of weeks to vet the information he provided***, but stated the entire process would be lengthy. Even if the US decided to charge him, further coordination with the KRG was necessary to determine if extradition was a possibility. KHWEIS emphasized he wanted to return to the US." (emphasis added).

- Further during that same interview, "At the end of the interview, KHWEIS again asked about the investigative and prosecution process, and asked how long he would be in Iraq. ***[The lead FBI Interrogator] advised that it takes time to verify the information he provided, particularly on those occasions when he did not tell the truth***." (emphasis added)

- "[The lead FBI Interrogator] also stated that ***his story had to be consistently truthful in order for investigators to determine if a crime has been committed.*** KHWEIS was told he has been inconsistent regarding the explanation of his intent upon arrival in the Islamic State in Syria." (emphasis added).

- During the interview on 3/31/16 "As with every interview session, [The lead FBI Interrogator] stated there still were four options that could occur regarding KHWEIS. These options included: criminal charges by the Kurds, no charges by the Kurds, criminal charges by the US, or no charges by the US. Any decision on whether the US would charge, no charge, and/or extradite him would only occur after the investigative results were reviewed by the FBI, Department of Justice, and possibly the Federal Court. KHWEIS appeared frustrated because [The lead FBI Interrogator] refused to make any promises or estimates on when that would occur."

  Even further still, the agent's handwritten notes of these interrogations state, "Speech – No promise, may not return to US, may not be charged ***I remind being truthful expedite the process*** for us to determine what happened." (emphasis added). They also state, "At end of interview, Khweis asked about what would happen next. ***Discussed his story having to be consistent before any decisions made.***" (emphasis added). Thus, over the weeks of interrogations, Mr. Khweis' statements became increasingly inculpatory in the hope of relieving his suffering and reunited with his family. In reality, however, contrary to the lead FBI Interrogator's representations, a charging decision had already been made, and the lead Interrogator himself acknowledged this only five days into interrogating Mr. Khweis.

Withholding this information was simply a way to pressure Mr. Khweis to provide inculpatory information.

On March 19, 2016, in the middle of these tainted interviews in which the lead FBI Interrogator repeatedly advised Mr. Khweis that no decision had been made, the agent sent an email to other law enforcement agents acknowledging that the case would be prosecuted by the U.S. He stated, "There are certain requirements I am being held to in reporting to the Dept of Justice regarding every interview session ***now that this case is going to be prosecuted***." (emphasis added). Again on March 21, 2016, he wrote that he was conducting the interviews in accordance with DoJ policies, not DoD, in preparation for possibly testifying.

My reference to Dept of Justice requirements was just to alert them that I must be prepared to provide information to prosecutors (and possibly testify to if required) regarding issue including his condition, treatment, promises made, attempts at coercion, incentives to cooperate, etc. after every interview session. If they were going to be participating, I wanted them to know before we started to make sure I knew beforehand if they planned to use any techniques regarding these issues so I can discuss them with you guys prior.

Basically, I was letting them know that we are running the sessions in accordance with DoJ policies, not DoD.

Nevertheless, the lead FBI Interrogator continued to advise Mr. Khwies that no decisions had been made with respect to prosecution, but that being truthful and *consistent* would expedite the process.

V. Subject and purpose of tainted interviews- "lining up" Mr. Khweis for clean team confession

Despite referring to these tainted interrogations as "intel interviews," these three weeks of interrogations were not simply intelligence-gathering missions. The large focus of the interviews was to obtain a confession from Mr. Khweis and then once the confession was elicited, to ensure that his statements remained consistent for the clean interviews. For example, the day after Mr. Khweis' capture, on March 15, 2016, the lead FBI interrogator wrote to another FBI agent:

. We are def a go for Thurs. CTD loves us right now and we have him cracking a little more each time.

After the lead FBI Interrogator elicited an un-*Mirandized* confession, the next step was for him to ensure that Mr. Khweis' confession carried through to the clean team, or as the lead FBI interrogator himself said, that Mr. Khweis be "lined up" for the clean team interrogations. The lead FBI Interrogator discussed this objective of "lining up Mr. Khweis" for the clean team with others. He stated in an email on *March 26, 2016* (early on in this case) that the "**extensive time we took getting [Khweis] comfortable with telling the truth will make it far easier for subsequent interviews here and in the US**." Specifically, he stated:

information collected in subsequent interviews.
KHWEIS is now very comfortable talking about everything that I have written about in the past week. He wants to cooperate fully with the US. He definitely would prefer to return to the US as soon as possible. I told him again today that a decision has not been made whether to charge and/or extradite him. This was time very well spent because the extensive time we took getting him comfortable with telling the truth will make it far easier for subsequent interviews here and in the US.

The interrogators continued to visit and question Mr. Khweis with the explicit goal of keeping his statements on track and "constant." An email sent from a DoD employee to the lead FBI Interrogator on March 31, 2016 states "RE: Khweis, Rgr. We will be there. We don't necessarily have any SDRs, [i.e. specific inquires] but ***figured one last session of familiar faces will keep his story on track/constant.*** If you don't see any need, we can always waive off." (emphasis added). In fact, one last session of familiar faces *did* occur, with an explicit effort to keep Mr. Khweis' story on track and consistent.

On April 7, 2016, the lead FBI Interrogator wrote to other agents,

We had a great interview with Khweis today. He would not stop talking in an attempt to fill in gaps he previously created. He is going to be very easy to deal with from a clean team perspective.

Finally, the next day, on April 8, 2016, summing up the past three weeks, the lead FBI Interrogator wrote to other agents that Mr. Khweis was **"lined up perfectly for the clean team."**

He is lined up perfectly for the clean team. He keeps asking where I am going to be through this process, but I can't discuss with him the clean team process. I just told him I may have to go back to the states for a few weeks, so don't panic if you don't see me every day but I'll be back. [redacted]

Back at the CTD prison, however, Mr. Khweis was unaware that there *was* a "clean" team when the lead FBI Interrogator left him that day. All Mr. Khweis knew was silence. For ten days Mr. Khweis received no visits from U.S. Officials. He waited, despondent in this silence. He wondered if this was no longer a wait, but was now actually his fate – his fate as another nameless prisoner, lost a filthy cell in the middle east, among rows of inmates, and eventually forgotten. He sat resigned, alone in his cell, and he wept.

VI. Clean team interviews

But Mr. Khweis was provided another chance. The FBI agents who arrived ten days later, were not the same agents Mr. Khweis spoke to before. These were different agents, though they presented their credentials and were from the same agency. The lead FBI Interrogator's admonishment that his story must be "consistent," were a few of the last words to Mr. Khweis from the FBI as this "clean" team offered Mr. Khweis his *Miranda* warnings. Mr. Khweis was desperate to escape the Kurdish prison, and he wanted to see his family again. It was in this context that the clean round of interviews commenced, and Mr. Khweis spoke.

In late April, after the substantive, or narrative, interviews were complete, and knowing that charges would be filed against Mr. Khweis, State Department, DOJ, and FBI Officials began to discuss logistics for Mr. Khweis' transfer back to the U.S. On May 11, 2016, the formal criminal charges were filed in U.S. Court charging Mr. Khweis with providing material support to a terrorist organization. Nevertheless, the lead FBI Interrogator continued to conceal this fact from Mr. Khweis, and advised others to do so as well. On May 16, 2016, the consular notified the lead FBI interrogator that she needed to obtain a temporary passport application from Mr.

Khweis for entry into the U.S. He cautioned the consular that she "should preface [her] meeting tomorrow by saying that it is for a one-time passport and that *a decision has not been made yet whether he will be returned to the US*." (emphasis added). This statement was, of course inaccurate, as the decision was clear, US charges were *filed*, and the lead interrogator himself had already acknowledged a U.S. prosecution months prior. *See supra,* March 19, 2016 email from lead FBI Interrogator ("There are certain requirements I am being held to in reporting to the Dept of Justice regarding every interview session now that this case is going to be prosecuted.").

Finally, after Mr. Khweis completed the passport application paperwork, on June 8, 2016, he was transported home. While on the plane, Mr. Khweis initially began speaking with the Agents. However, knowing that he was finally on his way back to the United States, he chose to invoke his right to remain silent.

VII. U.S. Requests for the Kurds to continue holding Mr. Khweis for FBI Interrogations

Throughout most of this process, the Kurds were eager to be rid of Mr. Khweis. While they expressed initial interest over intelligence information, the Kurds sought to end Mr. Khweis' un-charged, un-evaluated detention well before the U.S. was prepared to relinquish access. The Kurds were particularly sensitive to Mr. Khweis' continued detention after a human rights organization expressed concerns about the treatment of detainees at CTD. Nevertheless, pursuant to pleas, mainly from the lead FBI Interrogator, the Kurds continued to hold Mr. Khweis to allow further U.S. Interrogations.

For months, the Kurds held Mr. Khweis without charging him and without bringing him before a Judge, to accommodate U.S. law enforcement interrogations. These interrogations included interviews designed to elicit statements for use at a criminal trial. The emails highlight this holding arrangement.

On April 7, 2016, the day of the final tainted interview, the lead FBI interrogator wrote to other agents:

The Kurds put big pressure on me today to get the clean team piece working. They want it started in approximately 10 days otherwise he will be put in their court system, be represented by council, and our ability to communicate with him will be extremely difficult (if at all). They can't extend this any longer without producing him to the court. I asked for two weeks and they said that was too long. I need your help trying to make this happen as we have several cases with these guys involving American ISIL fighters and I need to help them help us.

The next day, on April 8, 2016, the lead FBI Interrogator warned other agents that if the U.S. does not hurry, Mr. Khweis would be taken to a Kurdish judge, he would be produced in court, "**and then we are screwed**." In this email he indicated that they need to "**stop the Kurds from having to do what they legally have to do (start him in their prosecution system which will cause us to miss out on all the current intl he has due to are [sic] inability to get regular access to him)**."

The Bu needs to interview him with a clean team ASAP, complaint him immediately, extradite him, follow up with all the "good to know" SDRs in the US, and stop the Kurds from having to do what they legally have to do (start him in their prosecution system which will cause us to miss out on all the current intel he has due to are inability to get regular access to him). I'm trying to work with [redacted] to get it moving, he seems like a great guy and totally gets it. People just have to understand that one day they may call me and say, the judge ordered them to produce him in court and then we are screwed.

The lead FBI Interrogator also stated,

I have to stop the intel interviews this weekend b/c we are running into problems where the Kurds will have to take him to court in a few days since the Bu will not commit to charging him. If he goes to court, he gets an attorney, gets moved to another facility, and access is very difficult.

The admonishments from the lead FBI Interrogator continued to convey the anxiousness from the Kurds, especially when the International Red Cross expressed concern regarding CTD's treatment of detainees. On April 10, 2016, the lead FBI Interrogator wrote:

We conducted our final interview today and the attenuation period has started. KRG CTD provided me 7 days (but I can get up to 10) until the clean team interviews start, otherwise they will need to turn Khweis over to the court. He will be transported from the area and assigned an attorney. I'm not sure how we will get access (or if based upon his atty) after that point. They really want to help us but the ICRC is now meeting with Khweis (1st meeting today) and the clock is now ticking to get him to a court (hence the 7 day guidance). It is no longer just us and CTD monitoring his progress through the system. Just so you understand, the ICRC has sent a letter to President [redacted] advising him of their concern with the treatment of detained individuals, so the government traveled t the consulate and told me this week they will not ask for extensions from the court if they order him to appear.

The lead FBI Interrogator continued to prod the FBI to hurry on April 12, 2016, noting that the clean team needed to be there within "the 10 days I asked for [from the Kurds]." He stated that "[The Kurds] don't want him held without appearing before a judge and getting an attorney when the [International Red Cross] comes back."

Also, let me know if the clean team will not be here by the 19th. We will possibly have to turn him over to the court as that is the limit to the 10 days I asked for. If that happens, we'll have to stop the clean team from coming out until we sort out if the judge/defense attorney will let us hav access and I'll have to find out where they send him to. As stated, they don't want him held without appearing before a judge and getting an attorney when the ICRC comes back.

Explicitly, on April 20, 2016, a U.S. law enforcement official stated, ***"Essentially they [the Kurds] are tired of delaying their processes to accommodate USG [United States Government]."***

The Kurds gave us a deadline to tell them if we are going to charge Khweis (and probably show them some proof). Essentially they are tired of delaying their processes to accommodate USG. This stems from Human Rights Org scrutiny they get and pressure from their judiciary to put the person into their system. Last night they initially denied clean team access but (redacted-Lead FBI Interrogator] got them 7 days.

Further still, reports show that:

[redacted] ALAT [redacted] was directed by General [redacted] to provide an answer to CTD by 04/26 on whether or not the US will charge him. If the US elects to not charge him by this date, General [redacted] will turn KHWEIS over to the KRG court system and he will be mostly non-accessible to the US for further investigation or extradition. He also may be sentenced and deported immediately to any area outside Kurdistan.

[redacted] Based upon our request, on 04/24, General [redacted] agreed to extend the deadline for an answer on a possible US prosecution until the end of this week (approximately 04/30).

On May 6, 2016, the lead FBI interrogator continued to follow up:

Is there any update on possible charges, kurds called me yesterday but I reminded them [redacted - top Kurdish Official] gave us until next Friday.

Still, on May 19, 2016, an email sent from the lead FBI interrogator to another FBI Agent stated in relevant part:

He is going to ask me when they can deport him. If it is several weeks he will crush me.

A follow-up email from the lead FBI interrogator on May 23, 2016 states that ***CTD is "still holding him waiting for our word"***:

hopefully we have the letters by your COB tuesday. I was at CTD yesterday so they are still holding him waiting for our word.

Is there any update on visas/travel, etc? CC'ing [redacted]. I will definitely be asked a time frame for taking him away.

Finally on May 28, 2016 a State Department Official wrote to other State Department Officials:

All:

I spoke with our ALAT here in Erbil this morning... there are multiple unique sensitivities on this case... but the bottom line is we need to move the USC SUBJECT out of the Kurdish region and to the U.S. by June 8 or the USC SUBJECT risks being moved to another Kurdish venue and then an entire separate set of due process protocols will take place which may further delay HIS removal.

Ultimately, Mr. Khweis never saw a Kurdish judge, no Kurdish charges were ever filed, and the transfer on June 8, 2016 was easily achieved.

VIII. Law-enforcement "gate-keeping" a secret detention

During this time, back in the United States, Mr. Khweis' parents were distraught. They, like Mr. Khweis, did not know his fate. They did not know if they had lost their son forever, or whether they would be able to see him again. They quickly retained an attorney for themselves and for their son. Mr. Khweis' parents retained Attorney John Zwerling for Mr. Khweis on April

7, 2016. Mr. Zwerling immediately contacted the government. Mr. Zwerling knew colleagues with contacts to attorneys in Iraq who could assist, and Mr. Zwerling wanted to advise his client to remain silent until certain parameters could be established. Yet, it was not until 18 days later – after all the substantive interviews were complete – that Mr. Zwerling was informed about Mr. Khweis' location. Mr. Zwerling was advised that this delay was because Mr. Khweis had not authorized Mr. Zwerling on his "Privacy Act Waiver" form that was provided through State Department Consular visits.

As it turns out, there were coordination issues and tension between the Consular Section of the State Department and the law enforcement side (the FBI "LEGATT" and State Department Diplomatic Security "RSO"). As the law enforcement officers relentlessly interrogated Mr. Khweis, the consular office sought to maintain regular visits with him, relay messages from his family, and, at one point, notify Mr. Khweis of his retained attorney. The consular visits, it seemed, interfered, or potentially interfered, with the law enforcement objectives. Thus, the FBI developed a "gate-keeping" role that elevated the secrecy and inaccessibility of Mr. Khweis' detention, and prevented his attorney from reaching him.

Early on in Mr. Khweis' detention, on March 20, 2016, the consular section (referred to as "ACS") requested a visit with Mr. Khweis while the law enforcement interrogations were in full force. The lead FBI Interrogator responded:

[redacted], the preference is for a visit to wait until the questioning during this critical phase is complete. Over the next week [redacted] will have a better indication when a good time would be for a follow-up from ACS.
If you begin to get pressure from DC to conduct another visit, please let us know.
We can discuss more off line if needed.
thanks

Evidently, the coordination was not easily achieved because the two sections continued to conflict with visits. Two days after her initial request, on March 22, 2016, Mr. Khweis'

Consular officer wrote to the law enforcement side requesting a visit with Mr. Khweis later that week,

The law enforcement responded on that same day,

The best time will be during the attenuation period. This will likely be later this week or early next.

Seven days later, on March 29, 2016, Mr. Khweis' consular officer *again* contacted the law enforcement side to request a visit. She was again rebuffed by the lead FBI interrogator, telling her to wait until the attenuation period.

Mr. Khweis' consular officer appeared frustrated because that same day she wrote an email to her boss, asking for a call regarding guidance on "the roles and responsibilities of Consular vs. law enforcement for private American Citizens." Her boss then wrote a follow up email that same day on March 29, 2016 to a State Department director stating in relevant part,

I'm troubled by the implication below that RSO and LEGATT would play a gate-keeping role for consular access. As you and I know, this is not appropriate and I will raise my concern to the Erbil Front Office. I would appreciate your guidance on how often you think consular visits would be appropriate in a case such as this, where the Amcit is getting daily visits from USG law enforcement teams.

Thanks,

The parties continued the conversation, adding more individuals to the conversation, and implied that the FBI was obstructing the Consular visits to Mr. Khweis.

Ultimately, the Consular General, corresponded to include both sides. He stated asked for a phone call to discuss accommodating consular visits that balances both the counsel and national security responsibilities for Mr. Khweis' case.

Despite these conversations, however, it appears that the FBI *did* end up serving as the "gate-keeper" to consular visits with Mr. Khweis because Mr. Khweis' consular officer continued to request permission for her visits from the law enforcement side, and was

continually rebuffed. During a critical time for both the consular section and the law enforcement side, the law enforcement side prevailed.

Specifically, Mr. Khweis' consular was scheduled to visit Mr. Khweis on April 19, 2016, and had notified law enforcement of this visit several days prior. *See* April 15, 2016 State Department email (email from consular notifying law enforcement side that April 19, 2016 was a scheduled consular visit). The April 19th visit was critical because up to that point, the consular was still unable to advise Mr. Zwerling, Mr. Khweis' retained attorney, of Mr. Khweis' location, and she was unable to advise Mr. Khweis that Mr. Zwerling had been retained for him. She intended to bring Mr. Khweis the Privacy Act Waiver form on that visit to obtain permission to speak with Mr. Zwerling.

The April 19th visit was also critical for law enforcement, however, because the "clean" team interviews were about to commence. Thus, when the consular side emailed the Regional Security officer (law enforcement side) on April 18, 2016,

> Would you please advise if we are set for tomorrow's prison visit to Asaysh to see Mohamad Khweis!
>
> Thank you,

The RSO responded,

> I will reach out today again, but [redacted - Kurdish CTD Official #1] told me this week was not good for them. Possibly Saturday or Sunday? Thanks.

The consular side then said,

> Our preference is this week but if they couldn't accommodate us, Saturday or Sunday are fine too.

It is clear why that week "was not good for them" – not because of sensitive intelligence matter, or any type of imminent threat – it's because Kurdish CTD Official #1, and the RSO were both

present, and coordinated, the law enforcement visits, and the "clean" team interviews were that week. Thus, Mr. Zwerling was shielded from knowing Mr. Khweis' location while the clean team interrogators questioned Mr. Khweis, and Mr. Zwerling was unable to attempt to arrange for an attorney in Erbil to advise Mr. Khweis to remain silent until ground rules could be negotiated.

IX. Timeline

A detailed timeline of events is as follows:

Mar 14, 2016	Khweis arrested and detained by Kurdish forces
Mar 15, 2016	Khweis meets w/ US Consular at Kurdish Counterterrorism Prison
March 15, 2016	First FBI "tainted" interrogation
March 15, 2016	Second FBI "tainted" interrogation
March 15, 2016	Third FBI "tainted" interrogation
March 17, 2016	Fourth FBI "tainted" interrogation
Mar 17, 2016	Khweis forced to interview w/ Kurdish TV
March 18, 2016	Fifth FBI "tainted" interrogation
March 19, 2016	Sixth FBI "tainted" interrogation
March 19, 2016	The lead FBI Interrogator emails stating he will conduct interviews according to Dept of Justice "now that this case is going to be prosecuted"
March 20, 2016	Seventh FBI "tainted" interrogation
March 23, 2016	Eighth FBI "tainted" interrogation
Mar 22, 2016	Consular contacts law enforcement to request a prison visit w/ Mr. Khweis.

	Wants to relay message from his parents and update PAW. Law enforcement tells her to wait for the "attenuation period"
March 26, 2016	Ninth FBI "tainted" interrogation
March 29, 2016	Consular again requests to visit Khweis
March 31, 2016	Tenth FBI "tainted" interrogation. FBI agent reminds Khweis to be truthful and *consistent*.
April 5, 2016	Client meets w/ US Consular and consular notes: next visit scheduled for on or about April 19.
April 7, 2016	Eleventh FBI "tainted" interrogation
April 7, 2016	Attorney Zwerling emails Assistant U.S. Attorney confirming representation and further that AUSA "please insure that [Khweis] not be questioned until I can meet with him and you and I can work out the ground rules."
April 10, 2016	Twelfth & final FBI "tainted" interrogation
April 11, 2016	Zwerling emails AUSA again to confirm representation and to prevent further questioning
April 12, 2016	Khweis' mother calls State Dept, informs them of attorney
April 13, 2016	Khweis' mother emails State Dept w/ lawyer's name
April 14, 2016	Zwerling calls State Dept, leaves message for consular
April 14, 2016	Counselor emails Khweis' mother and says she cannot speak to the lawyer directly about the case until she receives permission from Khweis through an updated Privacy Act Waiver.

April 15, 2016	Consular team emails law enforcement team to advise them of their upcoming consular visits with Khweis, **including April 19 visit.**
April 18, 2016	Consular team emails law enforcement team to ensure the following day's consular visit is ok
April 18, 2016	Law enforcement team replies to consular team, and advises that Kurdish CTD Official #1 said tomorrow's visit was "not good for them" and asks about waiting a week.
April 19, 2016	***Date that Consular was supposed to visit Khweis to update his Privacy Act Waiver form so that consular could speak to attorney regarding Khweis. This visit did not occur because the CTD official said the day was "not good for them."***
April 20, 2016	1st FBI "clean" (Mirandized) interrogation
April 21, 2016	2nd FBI "clean" interrogation
April 23, 2016	3rd FBI "clean" interrogation
April 23, 2016	Consular visits Mr. Khweis (four days after visit was scheduled, see above). Khweis updates Privacy Act Waiver to include Zwerling
April 25, 2016	Consular emails Zwerling stating Khweis updated his Privacy Act Waiver, and advises Zwerling where Khweis is being held
April 26-27	State Dept/FBI/DOJ email logistics on Khweis transfer to U.S.
May 3, 2016	Law enforcement ask Khweis questions about photos, Khweis is Mirandized

May 9, 2016	Law enforcement ask Khweis questions about photos, Khweis is Mirandized
May 11, 2016	**Criminal charges filed in E.D. Va. against Khweis**
May 16-17, 2016	Emails between consular and FBI interrogator. Consular advises FBI interrogator that she needs to bring Khweis a temporary passport application [so he can be returned to the US to face the criminal charges], requests help in coordinating visit. **FBI interrogator reminds counselor that she "should preface [her] meeting tomorrow by saying that it is for a one-time passport and that a decision has not been made yet whether he will be returned to the US."**
May 19, 2016	Khweis meets w/ consular, and requests meeting w/ attorney. Khweis completes a new passport application.
May 19, 2016	Consular emails Zwerling stating Khweis wants to see him or a local lawyer.
June 8, 2016	Khweis departs Kurdistan on a U.S. Government flight. On the plane he initiates conversation with agents, but then invokes his right to remain silent.

The United States Constitution affords every person the right not "to be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. If this right is to mean anything, it must, at a minimum, ensure that only statements knowingly and voluntarily made, and their fruits thereof, are admitted at trial.

ARGUMENT

I. MR. KHWEIS' STATEMENTS AND THEIR FRUITS ARE FATALLY TAINTED BY VIOLATION OF THE *MCNABB-MALLORY* RULE AND 18 U.S.C. §3501 THROUGH THE USE OF A SECRET DETENTION

i. Legal Standard

A. Federal Presentment Requirement

Federal Rules of Criminal Procedure 5 requires that a defendant be taken "without unnecessary delay before a magistrate judge," and further, that "[i]f a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause [] be promptly filed in the district where the offense was allegedly committed." *See* Fed. R. Crim. P. 5(a)(1)(A) and (b). "The requirement that a defendant be presented to a judge as soon as reasonably practical following his arrest is well-established. The Supreme Court of the United States has consistently held that even voluntary confessions are inadmissible if given after an unreasonable delay in presentment. This exclusionary rule came to be known as the *McNabb-Mallory* rule, named after the leading cases in which it was applied." *United States v. Fontane-Medina*, 2011 U.S. Dist. LEXIS 149051 *46 (S.D. Fla. Nov. 27, 2011) (citing *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957))(emphasis added).

Following the Court's establishment of the *McNabb-Mallory* rule, Congress enacted 18 U.S.C. § 3501(c). Title 18 U.S.C. § 3501(c) established parameters for a confession made while an individual was under arrest or other detention. It states:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate [magistrate judge] or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the

> confession is left to the jury and if such confession was made or given by such person *within six hours* immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(emphasis added). The purpose of Rule 5, *McNabb-Mallory*, and 18 U.S.C. § 3501(c) is to prevent "secret detentions." *See United States v. Corley*, 556 U.S. 303 (2009). Individuals must not be detained without charges, and must also promptly be advised of the charges on which they are being held.

In *United States v. Corley*, FBI Agents took Corley, a suspected bank robber, to the FBI office, which was also the same building as chambers for the nearest Magistrate Judges. *See id.* at 311. The agents did not bring the defendant before a magistrate judge, but questioned him instead, selling him on the benefits of cooperating, in hopes of getting a confession. After about 9.5 hours, Corley provided an oral confession. He then indicated he was tired, the agents held him overnight, and resumed questioning the next morning. In the morning, Corley provided a written confession. In total, Corley was held for 29.5 before he was presented to a Magistrate Judge. *See id.*

The Government argued that 18 USC §3501 abrogated *McNabb-Mallory* entirely, and focused only on whether the confession was voluntary. The Supreme Court rejected the Government's argument and held that Corely's confession was inadmissible because of the delay in presentment. The Supreme Court found that 18 U.S.C. 3501(c) modified *McNabb-Mallory*, but did not abrogate it. Specifically, the Court said,

> We hold that §3501 modified *McNabb-Mallory* without supplanting it. Under the rule as revised by §3501 a district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was "reasonable considering the means of transportation and the distance to be

> traveled to the nearest available [magistrate judge]"). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was "made voluntarily and . . . the weight to be given [it] is left to the jury." *Ibid.* **If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed**.

Id. at 322 (emphasis added) (citations omitted).

Notably, in rejecting the Government's argument, the Supreme Court stated, "[w]ithout *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, even though 'custodial police interrogation, by its very nature, isolates and pressures the individual,' inducing people to confess to crimes they never committed. *Id.* (citing *Dickerson v. United States*, 530 U.S. 428, 435 (2000). As a policy matter, the Court advised, "[W]e have always known what custodial secrecy leads to. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far." *Id.*at 320. The Court reiterated that "***delay for the purpose of interrogation is the epitome of unnecessary delay.***" *Id.* at 309 (internal quotations omitted)(emphasis added).

Further, this right does not disappear overseas. The Constitution restrains the federal government "whenever and wherever the sovereign power of that government is exerted." *Balzac v. Porto Rico*, 258 U.S. 298, 312, 66 L. Ed. 627, 42 S. Ct. 343 (1922); *see also United States v. Yunis,* 859 F.2d 953 *, 1988 U.S. App. LEXIS 14342 (D.C. Cir. 1988) (deciding whether a defendant's Fifth Amendment right was violated overseas, and specifically noting that "…in *Bram v. United States*, 168 U.S. 532 (1897), the Court excluded a confession from an American trial, notwithstanding that the coercive interrogation was conducted by a foreign police officer in a foreign country."). Furthermore, in *United States v. Bin Laden*, the Southern District

of New York undertook the §3501(c) and *McNabb-Mallory* analysis for defendants held overseas. *See* 132 F. Supp. 2d 198, 208-09 (S.D.N.Y. 2001) ("…the purpose of the rule (to ensure that the federal government does not improperly conspire with other agencies to evade the requirements of Rule 5(a)) seems equally applicable in the international context.")

B. The "Working Arrangement" Rule

In this case, the Government will likely argue that Rule 5, § 3501 (c), and *McNabb-Mallory*'s Constitutional protections require that the defendant either be in federal custody or held on federal charges, and that Mr. Khweis was in neither position. *See United States v. Bin Laden*, 132 F. Supp. 2d at 208-09. While true in part, it is also well-established that, **"[F]ederal officials may not collude with [foreign] officers to circumvent federal presentment requirements**." *Id* at 208 (emphasis added). This is known as the "working arrangement" rule. *Id.* The "working arrangement" rule was designed to ensure that the federal government does not improperly conspire with local law enforcement to evade the requirements of Rule (5)(a)) *Id.*

When raising a working arrangement issue, "defendants bear the burden of establishing that [the foreign] custody was improperly used to circumvent the rigors of Rule 5(a). Mere suspicion of a collusive arrangement is insufficient. To satisfy their burden, the Defendants must show that the Government made deliberate use of [the foreign] custody to postpone their presentment requirements." *Id.* (emphasis added) (internal citations omitted). If, from an objective appraisal of the surrounding circumstances, it appears that a person is detained in local custody for the purpose of allowing federal officers to obtain a confession before he is taken to a commissioner for arraignment in accordance with Rule 5, the confession is *ipso facto* inadmissible. *See United States v. Chadwick*, 415 F.2d 167, 170 (10th Cir. N.M. 1969); *see also United States v. Alvarez-Sanchez*, 511 U.S. 350, 359-69 (U.S. 1994).

Courts have examined many factors to determine whether a "working arrangement" was present. In *Bin Laden,* the court examined which authorities brought the charges and which authorities dominated the questioning, (citing *United States v. Coppola*, 281 F.2d 340, 341 (2d Cir. 1960); *United States v. Frank*, 8 F. Supp. 2d 284, 298 (S.D.N.Y. 1998) (discussing who "conducted and controlled" the investigation)). In fact, the court stated in *Bin Laden,* "the early and significant involvement of the Americans in the investigation of these Defendants makes this case a closer 'working arrangement' call than many others." *United States v. Bin Laden*, 132 F. Supp. 2d at 209-210. In addition to examining who conducted the questioning, courts discussed who retrieved and returned the prisoner to and from his cell, whether there were any unconventional actions by the foreign government at the exclusive direction of the foreign government, whether there were foreign charges, and whether there was only nominal local involvement. *See United States v. Broadhead*, 413 F.2d 1351, 1359 (7th Cir. Ind. 1969); *United States v. Bin Laden*, 132 F. Supp. 2d at 208-09; *United States v. Chadwick*, 415 F.2d at 170. For example, in *Bin Laden,* the court found that the Kenyans controlled the investigation, and because the defendants were being held on Kenyan charges then "the Americans could not reasonably be expected to arrange presentment before a United States magistrate. *United States v. Bin Laden*, 132 F. Supp. 2d at 208.

In *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), the Fourth Circuit touched on this issue in the context of *Miranda* and assessed whether the Saudi and U.S. Governments were engaged in a "joint venture." In finding that the two Governments were not engaged in a "joint venture," the court emphasized several factors. One, the court noted that the defendant was held pursuant to *a Saudi government order*, two, "the Saudi government refused to accommodate a request by the United States to directly question [the defendant]," and three, the Saudi

interrogators also refused to ask seven of the thirteen questions (a majority) submitted by the United States." *Id.* at 229 n. 5. Overall, as the court in *Bin Laden* found, the context makes it clear whether it was the foreign or the U.S. federal government that drove the investigation. *See United States v. Bin Laden*, 132 F. Supp. 2d at 208-09.

ii. Anlaysis

Unlike the defendants in *United States v. Bin Laden* or the defendant in *United States v. Abu Ali*, Mr. Khweis *wasn't* held on Kurdish charges or presented before a Kurdish judge. *See* 132 F. Supp. 2d at 208-09. Not once did discovery reveal a charging instrument or any type of presentment by the Kurds, and Mr. Khweis was clearly held *for* the U.S. FBI Interrogators. *See supra*, Background, part VII. at pp. 15, 17 ("Essentially [the Kurds] are tired of delaying their processes to accommodate the USG."; and "[if[the judge ordered them to produce [Khweis] in court…then we are screwed.").

In this case, it was not the practicality of the situation that caused a delay. *See* 18 U.S.C. §3501(c). In fact, the Kurdish government was eager, and even pushing, for Mr. Khweis to depart. *See supra*, Background, part VII. at p. 17 ("He is going to ask me when they can deport him. If it is several week he will crush me."). However, pleading with Kurdish officials, the agents actively tried to prevent Mr. Khweis from being presented to *any* court. The U.S. agents did not use those three months to negotiate a transfer, or to request extradition. Thus, unlike *Bin Laden* and *Abu Ali*, the idea that joint charges impeded the Government's ability for presentment is not present in this case.

A. Khweis was in *de facto* U.S. Custody

Any assertion that Mr. Khweis' lengthy detention was a result of him being in "Kurdish custody" is tenuous at best. There were no Kurdish charges filed in the entire three-month span.

In fact, the lead FBI Interrogator continued to beg Kurdish officials *not* to charge Mr. Khweis, not to move him to another prison, and to give the FBI more time to interrogate him. *See supra*, Background, part VII. at 15, April 7, 2016 email ("The Kurds put big pressure on me today to get the clean team piece working. They want it started in approximately 10 days otherwise he will be put in their court system, be represented by council, and our ability to communicate with him will be extremely difficult (if at all). They can't extend this any longer without producing him to the court.").

It is clear that the FBI was extremely worried that if Mr. Khweis was brought before a Kurdish judicial officer, the U.S. could no longer "conduct and control" its investigation. *See supra* Background, part VII. at p. 16, April 8, 2016 email **(**noting that if the U.S. can't **"stop the Kurds from having to do what they legally have to do (start [Khweis] in their prosecution system)**"… then the FBI will not get regular access to him and ***"then we are screwed."***) (emphasis added). From at least from April 7, 2016 to June 8, 2016, during the attenuation period and clean team interviews, the Kurds detained Mr. Khweis at the FBI's request, and they did so as a favor to the U.S. Government, and for U.S. Government interests. Contrary to U.S. Government interests, it is clear that the Kurds wanted Mr. Khweis removed from their prison, and possibly even deported from their country. *See supra*, Background, part VII. at p. 17, May 19, 2016 email ("[Top Kurdish official] is going to ask me when they can deport him. If it is several week he will crush me."). One email explicitly stated that Mr. Khweis was held *for the U.S.* and against the Kurds' wishes, "Essentially [the Kurds] are tired of delaying their processes to accommodate the USG." *Supra* Background, Part VII at p. 17.

The government will argue that the Kurds had their own investigation pending, and that they sought information from Mr. Khweis as well. This may arguably be true *for the beginning*

of the interviews, namely the tainted interrogations. However, after three weeks of over eleven interrogations, there is simply no logical reason that the Kurds would have an interest in Mr. Khweis' continued detention at CTD for *Mirandized* interviews that would yield no new information. At the end of the tainted interviews, if the Kurds believed they needed more information from Mr. Khweis they would have ensured they could obtain it before the U.S. advised him of his right to remain silent. In a country that does not embody the right to remain silent, it strains all logic to imagine that Kurdish officials had an interest in continuing Mr. Khweis' detention for a ten-day attenuation period and several *Mirandized* interviews. This attenuation period and *Miranda* warnings are U.S.-constructed judicial principles and have no relevance to any possible Kurdish objective.

Indeed, the evidence shows that the Kurds did not have an interest in holding Mr. Khweis. They wanted Mr. Khweis gone, and the lead FBI Interrogator pleaded with the Kurds for more time for attenuation and the clean team interrogations. *See supra* part VII:

- April 8, 2016, "…[W]e are running into problems where the Kurds will have to take [Khweis] to court in a few days…If he goes to court, he gets an attorney, gets moved to another facility, and access is very difficult."

- April 10, 2016, "KRG CTD provided me 7 days…until the clean team interviews start…otherwise they will need to turn Khweis over to the court…. I'm not sure how we will get access after that point. They really want to help us but the International Committee of the Red Cross [expressed] concern with treatment of detained individuals, so the government won't…ask for extensions…."

- April 12, 2016, "…[L]et me know if the clean team will not be here by the …10 days I asked for….[The Kurds] don't want him held without appearing before a judge and getting an attorney when the ICRC comes back."

- April 20, 2016, "The Kurds gave us a deadline…Essentially they are tired of delaying their processes to accommodate the USG. This stem from the Human Rights Org scrutiny they get and pressure from their judiciary to put the person into their system."

- May 6, 2016, "Is there any update on possible charges, kurds called me yesterday but I reminded them [top Kurdish official] gave us until next Friday."

- May 12, 2016, "[Top Kurdish official] is going to ask me when they can deport him. If it is several weeks he will crush me."
- May 23, 2016, "CTD… is still holding him waiting for our word."

The Government seeks to admit these *Mirandized* interviews, and the fruits from them, at trial. The FBI elicited these statements from Mr. Khweis during a period in which the FBI was essentially borrowing prison space from the Kurds for the sole purpose of obtaining a *Mirandized* confession to be used against Mr. Khweis at a criminal trial. Following the tainted interviews, rather than present him to a U.S. Magistrate judge, (or even a Kurdish judge) "FBI agents [] merely used the [Kurdish] jail as a temporary local detention site." *United States v. Broadhead*, 413 F.2d at1359. If the U.S. and Kurds wished to jointly hold Mr. Khweis following that time for the purposes of intelligence collecting, (evidence *not* admissible in a criminal trial) perhaps that is arguably permissible. But the detention went far beyond that. Contrary to fundamental Constitutional principles, the Government interrogated Mr. Khweis in "custodial secrecy" designed to elicit a confession for use at a criminal trial. *See United States v. Corley*, 556 U.S. at 309 ("delay for the purpose of interrogation is the epitome of unnecessary delay.").

B. The U.S. had a "Working Arrangement" with the Kurds

Even if the Court finds that Mr. Khweis was not in *de facto* U.S. Custody, Rule 5 and § 3501 (c)'s Fifth Amendment protections were implicated through the entirety of Mr. Khweis' arrest and detention – from March 14, 2016 to June 8, 2016, by the "working arrangement" rule. Mr. Khweis' detention and interrogations belie the principle that "federal officials may not collude with state officers to circumvent federal presentment requirements." *United States v. Bin Laden*, 132 F. Supp. 2d at 208. An "objective appraisal of the surrounding circumstances," shows that Mr. Khweis was detained "for the purpose of allowing federal officers to obtain a

confession before he is taken to a commissioner for arraignment in accordance with Rule 5." *United States v. Chadwick*, 415 F.2d at 170. Thus, "the confession is *ipso facto* inadmissible." *Id.*

In exchange for "unlimited access" to Mr. Khweis, and his continued detention, the U.S. freely shared information with the Kurds. The working arrangement was clear, and even explicit. *See supra* Background, part II. at p. 6, March 15, 2016 DoD email ("[The Kurdish General] is more than willing to cooperate as usual. We will keep everyone updated once we sit down with the CTD again tomorrow. **A great example of what a 10 plus year relationship does for us**.") (emphasis added).

The day after Mr. Khweis' arrest, the lead FBI Interrogator wrote in an email, that initially, the Kurds were reluctant to allow the U.S. access to Mr. Khweis because of a recent issue in which the U.S. did not share important information with the Kurds. However, the lead FBI Interrogator said, "After discussing the situation with him, he agreed to provide me access to the detainee…and agreed to let us rip the phones…. We now have unlimited access and they welcome us there any day or night since we are collaborating with them. Sharing information with them going forward on Khweis is critical to success and continued access." *See supra*, Background, part II. at p. 6.

The follow-up communications show the collaboration between the FBI and the Kurds. *See supra*, Background, part II,

- March 15, 2016, "[top Kurdish official] asked wants [sic] us to address one issue with the detainee tonight."
- March 16, 2016, "Can I share this information with our Kudish investigators?"
- March 26, 2016, "[CTD] would really like to see the US start sharing back information to assist in their investigation"
- April 1, 2016, "Hopefully you can share some of that back…that is the only way I'm going to be able to keep getting them to help us on this."

- April 3, 2016, "The [Kurds are] asking for a summary of information I have… I prepared the document."

U.S. Government officials directed Mr. Khweis' location for interrogations. U.S. Government officials directed when Mr. Khweis was interrogated. U.S. Government officials directed who was present – including the switch of the Kurdish representative for the "clean" interviews. The United States agents freely navigated through the prison compound, with "unlimited access" day or night, and questioned Mr. Khweis as though he were a U.S. prisoner, albeit a secret prisoner. The FBI "conducted" and "controlled" the investigation, and the Kurds were only nominally involved, especially when it came time for the "clean team" to elicit statements from Mr. Khweis to use in his U.S. criminal case. *See United States v. Bin Laden*, 132 F. Supp. 2d at 208; *See United States v. Broadhead*, 413 F.2d 1351, 1359.

C. U.S. agents further elevated Mr. Khweis' custodial secrecy

Unfortunately, the dubious legality of Mr. Khweis' situation extends beyond Mr. Khweis' secret interrogations because the FBI elevated the custodial secrecy by undermining counsel's attempt to reach his client though State Department channels. The emails show tension between the consular side and the interrogators. Law enforcement did not want the consular to visit Mr. Khweis with a Privacy Act Waiver or messages from family or an attorney because it could potentially interfere with their interrogations. *See supra* Background, part VIII. Mach 29, 2016 email from FBI lead interrogator (in response to consular's second request to visit Mr. Khweis, stating, "there are some concerns we have regarding the timing of this visit….[T]here will be an attenuation period where the visit would be more appropriate."). However, when the consular attempted to visit Mr. Khweis during that attenuation period, after Mr. Zwerling was retained,

the law enforcement side (working with the Kurds) requested that she wait an additional week. This additional week was critical because it was the week of the "clean" interrogations.

Had Mr. Khweis been detained at the local Alexandria jail, (or perhaps any jail in the U.S.) his attorney would not have required law enforcement approval to visit his client. However, in this case the FBI was in a unique position to unilaterally maintain Mr. Khweis' secret detention, even though at that point – on April 19, 2016 when the consular had previous advised she was scheduled for a visit – the intelligence interviews were complete. There was no sensitivity surrounding the timing, and there was no belief of an imminent threat. The *only* objective at that point was to obtain a "clean" confession for use at a criminal trial. Rarely is the FBI positioned to unilaterally seclude a defendant from an attorney's reach for weeks. The FBI was uniquely empowered in this situation to prevent counsel from accessing Mr. Khweis, and it used that power to maintain the "secret detention" of Mr. Khweis, holding him *incommunicado* until it elicited a *Mirandized* confession. *See United States v. Corley*, 556 U.S. 303. The implications of this detention cannot be ignored. "[W]e have always known what custodial secrecy leads to. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far." *United States v. Corely*, 556 U.S. at 320.

To the extent the Government argues that providing Mr. Khweis with a list of Iraqi attorneys ameliorates this serious injustice, that argument is misplaced. At the same time the State Department handed Mr. Khweis a paper with attorneys names, on that very first day, it also handed him a document that said in Iraq the attorney would not actually argue on his behalf. *See* Def.'s Ex. 1. Then, throughout almost two weeks of interrogations, the FBI advised that Mr. Khweis that if he wanted the chance to return home, his story must be consistently truthful. Thus,

Mr. Khweis would have perceived any subsequent advice regarding a right to counsel as futile, and not only futile, but a possible impediment to ever seeing his family again. Mr. Khweis was unlawfully held in a Kurdish prison by the United States for almost three months in violation of Rule 5, *McNabb-Mallory*, and 18 U.S. C §3501(c). His statements, and their fruits, are fatally tainted by his three-month interrogation in secret detention and should be suppressed.

II. MR. KHWEIS' STATEMENTS AND CONSENT TO SEARCH HIS PHONE ARE THE PRODUCT OF GOVERNMENT COERCION

i. Legal Standard

The FBI agents didn't just improperly delay Mr. Khweis' presentment, the agents used that delay coercively. When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, the government must prove by at least a preponderance of the evidence that the confession was voluntary. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972); *see also Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (reaffirming *Lego*). A long line of Supreme Court precedent makes clear that involuntary confessions, i.e., the product of coercion, either physical or psychological, are inadmissible, "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured…." *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (citations omitted).

"[A] finding of coercion need not depend upon actual violence by a government agent…." *Ariz. v. Fulminante*, 499 U.S. 279, 287 (U.S. 1991). Court have considered less traditional forms of coercion, including psychological torture, and conditions of confinement in assessing the voluntariness of the statements. *See, e.g., Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (confession was involuntary; the defendant was held in solitary for 14 days, "saw not one

friendly face from outside the prison" and was "completely under the control and domination of his jailers"); *Stidham v. Swenson*, 506 F.2d 478 (8th Cir. 1974) (suspect's statement was involuntary, in part because suspect's imprisonment in solitary confinement for eighteen months in subhuman conditions, including a *bug-infested cell, lack of sufficient food, and denial of visits with family and friends*) (emphasis added); *Arnett v. Lewis*, 870 F. Supp. 1514, 1523-25, 1540 (D. Ariz. 1994) (confession was involuntary; defendant was incarcerated in "oppressive conditions," including the lack of adequate plumbing and heating, clean water, blankets and nutrition); *Townsend v. Henderson*, 405 F.2d 324, 326 (6th Cir. 1968) (statement found to be involuntary; defendant held in solitary confinement with inadequate food); *Wainwright v. LaSalle*, 414 F.2d 1235, 1237-39 (5th Cir. 1969) (court noted defendant was in "*continuous incommunicado custody for 12 hours*" before confession was elicited for the first time and the *ultimate confession followed prior denials*) (emphasis added).

To assess the voluntariness of a statement under principles of due process as well as the adequacy of a waiver of one's Fifth Amendment privilege against self-incrimination under *Miranda*, a court must consider the circumstances surrounding the interrogation and the length of the detention and the conditions of confinement. *See Miranda*, 384 U.S. at 476 ("whatever the testimony of the authorities as to the waiver of rights by an accused, the fact of *lengthy interrogation or incommunicado incarceration* before a statement is made is strong evidence that the accused did not validly waive his rights.") (emphasis added); *see also United States v. Karake*, 443 F. Supp. 2d 8, 87-89 (D.D.C. 2006).

Physical circumstances are only part of the analysis, however. Psychological coercion can render a statement involuntary as well, including the threat of not being able to see family again. When evaluating psychological coercion, the courts examine the totality of the

circumstances. Factors to consider are the defendant's demeanor at the time of his confession, evidence of psychological or emotional anxiety, whether the defendant is particularly susceptible to manipulation. *See United States v. Jacques*, 744 F.3d 804, 811-812 (1st Cir. 2014).

In *United States v. Tingle*, the Ninth Circuit held that law enforcement officers who warned a mother that she will not see her child in order to elicit "cooperation," was "patently coercive," and not "the product of a rational intellect and a free will" 658 F.2d 1332, 1336-37 (9th Cir. 1981); *see also United States v. McShane*, 462 F.2d 5 (9th Cir. 1972), ("[W]e can readily imagine that the psychological coercion generated by concern for a loved one could impair a suspect's capacity for self control, making his confession involuntary.").

The same voluntariness inquiries that apply to statements also apply to a consent to search. It is well-established that law enforcement must obtain either a warrant or consent to search electronic devices such as cell phones. *See Riley v. California*, 134 S. Ct. 2473 (2014). Coercion, both physical and psychological, is prohibited from being used to obtain consent. *See United States v. Hernandez*, 2015 U.S. Dist. LEXIS 114979, *11, 2015 WL 5007821 (W.D.N.C. July 28, 2015) ("Coercion may be actual or implied, and 'no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for unjustified police intrusion against which the Fourth Amendment is directed.' [T]he government must prove that 'an individual freely and intelligently [gave] ... unequivocal and specific consent to search, uncontaminated by any duress or coercion, actual or implied.") (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973); *U.S. v. Morrow*, 731 F.2d 233, 235-36 (4th Cir 1984)).

In *United State v. Hernandez*, the court held that the Government failed to demonstrate that Defendant's consent was voluntary, or more than acquiescence to a claim of lawful

authority. *United States v. Hernandez*, 2015 U.S. Dist. LEXIS 114979, *11.[8] In that case, when confronted by the police while at the police station, *Hernandez* allowed the agents to search two of his three phones. *Id.* at *5-6. The Government argued that the defendant's consent was voluntary because he limited his consent to search, allowing agents to search two phones, but not a third phone. *Id.* at *18-19. However, the court held that statements made by the agents, coupled with the fact that Defendant still had not received an attorney prior to the agents' consent request "rise to a level of coercion so that his consent appears to be no more than acquiescence to a claim of lawful authority." *Id.* at *19-20. The court explained, "In other words, having already requested an attorney to no avail, any refusal to provide consent was likely futile in Defendant's mind and for this reason prompted Defendant's consent. *Id.*

Importantly, the court in *Hernandez* noted that the most concerning factor was "the fact that the locations where Defendant gave verbal and written 'consent' were (1) in custody while at the police station and (2) in custody in a patrol car in front of the apartment residence to be searched right before the search was conducted, respectively." *Id.* at *20-21. The court explained that **"[T]he distinction between in custody consent in a public location and in custody consent in the confines of a police station is important**." *Id.* (citations omitted) (emphasis added). Furthermore, while an individual's signature on a consent-to-search form is indicative of voluntary consent, it is not dispositive. *See U.S. v. Digiovanni*, 650 F.3d 498, 513-15 (4th Cir. 2011); *United States v. Hernandez*, 2015 U.S. Dist. LEXIS 114979, *22-23.

[8] *United States v. Hernandez*, 2015 U.S. Dist. LEXIS 114979, is a Magistrate Judge's Report & Recommendation that the District Court later adopted in whole in *United States v. Hernandez*, 2016 U.S. Dist. LEXIS 8277 (W.D.N.C. Jan. 25, 2016) ("the Court finds that the M&Rs employed the correct legal standards and the findings are appropriate in light of the entire evidentiary record.").

ii. Analysis

Mr. Khweis' statements and the consent to search his phones were the product of coercion. As an initial matter, Mr. Khweis was extremely "susceptible to manipulation." *See United States v. Jacques*, 744 F.3d at 811-812. He was twenty-six years old, far from home, didn't speak Kurdish, and had been held in a Kurdish prison for the past six weeks. Mr. Khweis was continually admonished that it was possible he may never be returned back to his home and his family. Though the interrogations reports indicate that Mr. Khweis recounted no abuse, it is also important to note that that Mr. Khweis was permanently in the presence of a Kurdish official. The Kurdish were omnipresent, and he was never out from under their critical eye.[9]

Mr. Khweis routinely cried and begged the interrogating agents to bring him home. As any twenty-six year old would be, he was scared, exhausted, and vulnerable. No less than eleven times, the FBI interrogators listened to Mr. Khweis' pleas and advised him that no promises or decisions could be made about U.S. criminal charges, and then asked him to recount events. At times, the interrogator advised Mr. Khweis that he must be truthful and *consistent* to ensure the possibility of returning home. Specifically the FBI reports state, "At the end of the interview, KHWEIS again asked about the investigative and prosecution process, and asked how long he would be in Iraq. [The lead FBI Interrogator] advised that it takes time to verify the information he provided, particularly on those occasions when he did not tell the truth." The implication of this statement is clear – *"tell the truth, or you will not return home."* Then again, during a critical time in the interviews, shortly before the "clean" team was scheduled to begin, the FBI reports state, "[The lead FBI Interrogator] also stated that his story had to be consistently truthful in order for investigators to determine if a crime has been committed. KHWEIS was told he has

[9] Additionally, as stated *supra*, Background, part VI. at p. 16-17, the Red Cross had expressed concern about the treatment of detainees at CTD.

been inconsistent regarding the explanation of his intent upon arrival in the Islamic State in Syria." The implication is again obvious – *"be consistent or you will not return home."* The FBI interrogator admonished Mr. Khweis to be "consistent," knowing the clean team would shortly commence interviews.

Furthermore, even once the decision was made, and charges *had* been filed, the FBI interrogator still sought to ensure the illusion was maintained. When the consular sought to bring Mr. Khweis his temporary passport application, on May 16, 2016, the FBI interrogator reminded her to advise that she "should preface [her] meeting tomorrow by saying that it is for a one-time passport and that *a decision has not been made yet whether he will be returned to the US*." (emphasis added). While certainly law enforcement officers can lie to suspects, the lies must not amount to coercion. Continually advising Mr. Khweis that no decision so that he would continue to believe he may never return home to his family unless he is truthful, consistent, and cooperative over weeks of interrogations is coercive. The coercion was present through *all* the interviews, including the clean team. It is a fundamental principle in the United States that we do not condone law enforcement's use of coercion to elicit a confession or a consent to search, and the court should not allow such a practice in this case. *See Rogers v. Richmond,* 365 U.S. at 540-41. Therefore, Mr. Khweis' statements and the data from his phones should be suppressed from use at trial.

III. THE GOVERNMENT VIOLATED MR. KHWEIS' FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION UNDER *MIRANDA* AND *SEIBERT.*

i. Legal Standard

Miranda warnings are designed as a prophylactic measure to deter U.S. Law enforcement from resorting to coercive interrogation techniques. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court has twice considered the effect of a prior, unwarned statement on the

admissibility of a subsequent *Mirandized* confession. *See Oregon v. Elstad*, 470 U.S. 298 (1985); *Missouri v. Seibert*, 542 U.S. 600 (2004). *Oregon v. Elstad* permits admission of an un-*Mirandized* confession if the *Miranda* violation is unintentional and the confession is knowingly and voluntarily made. *See Oregon v. Elstad*, 470 U.S. 298. *Missouri v. Seibert* creates an exception to that general rule whenever government officials deliberately withhold *Miranda* warnings as part of a two-step interrogation strategy. *See Wallace v. Branker*, 354 Fed. Appx. 807, 823-24 (4th Cir. 2009).

In *Oregon v. Elstad*, the initial *Miranda* violation in occurred at the time of the suspect's arrest, rather than in a formal custodial interrogation setting. *Oregon v. Elstad*, 470 U.S. at 300. Officers visited the suspect's home to execute an arrest warrant. They made "a brief stop in the living room" where one spoke with the defendant's mother while the other told the defendant he "felt' he was involved in the crime. *Id.* at 301, 315. The defendant replied by making an inculpatory statement. *Id.* at 301. The officers then executed the warrant and transported the defendant to the police station where they administered *Miranda* warnings prior to obtaining a full confession. *Id.*

The Court premised *Oregon v. Elstad*'s finding of admissibility on the unintentional nature of the *Miranda* violation at issue. *See Missouri v. Seibert* 542 U.S. at 615. The purpose of the arresting officers' presence in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest." *Id.* at 314. The lack of *Miranda* warnings was not intentional, but rather an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation.'" *Id.* at 315, 316. Furthermore, the initial questioning bore "none of the earmarks of coercion." *Id*. at 316. For these reasons

Miranda's primary functions as a prophylactic rule deterring unlawful police behavior and ensuring the trustworthiness of confessions were not implicated. *Id*. at 308.

The *Elstad* Court limited the scope of its holding and warned against efforts by law enforcement to misread its intent. "We must conclude," the Court wrote, "that *absent deliberately coercive or improper tactics in obtaining the initial statement*, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id.* at 314 (emphasis added). Indeed, Justice Brennan's dissent expressed concern that the Court's holding would validate question-first interrogation tactics. *Id.* at 319-321, 362-64.

Following *Elstad,* the Court heard *Missouri v. Seibert* and squarely addressed the issue of the question-first interrogation tactic used by law enforcement. In *Missouri v. Seibert,* the Court articulated an exception to *Elstad*'s general rule in favor of admissibility. Police in *Seibert* believed the defendant was involved in the murder of her twelve-year-old, physically handicapped son. 542 U.S. at 604. The arresting officer's superior instructed him to omit *Miranda* warnings pursuant to the department's question-first interrogation strategy. *Id*. During the initial un-*Mirandized* interrogation, the suspect admitted to the crime. *Id*. at 605. The officer then left for a twenty-minute break and returned to administered *Miranda* warnings. The then obtained a signed waiver of rights and a confession. *Id.* The officer never advised the defendant that her prior statements were inadmissible. *Id.*

Because no rationale in *Seibert* garnered a majority, and Justice Kennedy concurred on the narrowest grounds, his opinion is treated as the Court's holding. *See Wallace v. Branker*, 354 Fed. Appx. At 823. The four-Justice plurality considered it "likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation,

close in time and similar in content." *Missouri v. Seibert,* 542 U.S. at 610. Justice Kennedy concurred with the plurality that a deliberate question-first tactic violates *Miranda*, and that post-warning statements are then inadmissible. 542 U.S. at 618 (Kennedy, J., concurring). He wrote separately only to express his concern that the plurality's test would treat "intentional and unintentional two-stage interrogations" similarly. *Id*. at 621.

Justice Kennedy's analysis dictates that a confession elicited subsequent to intentional *Miranda* violation inadmissible unless specific curative steps are taken prior to the *Mirandized* interrogation. *Id.* These curative measures are "to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Id*. Justice Kennedy provided examples of two measures that "*[m]ay* suffice in *most* circumstances." *Id.* (emphasis added). First, a significant time lapse and variation of circumstances between the un-*Mirandized* and *Mirandized* interrogations might allow defendants "to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id*. Second, "*an additional warning that explains the likely inadmissibility of the pre-warning custodial statement may be sufficient*." *Id.* (emphasis added).

In cases where an intentional *Miranda* violation precedes a *Mirandized* interrogation, the Government faces a "heavy burden" of establishing a confession's admissibility. *See United States v. Capers*, 627 F.3d 470, 480 (2nd Cir. 2010). This is because *Miranda* places a "heavy burden [upon] the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." *Berhuis v. Thompkins*, 130 S.Ct. 2250 (2010). "Once a law enforcement officer has detained a suspect and subjects him to interrogation….there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed. Instead, the most plausible reason…is an illegitimate one, which is the

interrogator's desire to weaken the warning's effectiveness." *United States v. Williams* 435 F.3d 1148, 1159 (9th Cir. 2006).

ii. Analysis

In this case, it doesn't appear that the Government contests the deliberate two-step interrogation technique, particularly given their own references to the "taint" team, "clean" team, and "attenuation period." Thus, this Court should employ the *Missouri v. Seibert* analysis in which the omission was intentional, rather *Oregon v. Elstad*, in which the omission was unintentional. While the intentional two-step interrogation tactic does not categorically make Mr. Khweis' "clean" statements inadmissible, the Government cannot meet its "heavy burden" to demonstrate "that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." *Missouri v. Seibert,* 542 U.S. at 618.

By the time Mr. Khweis finally received his *Miranda* warnings he had been held in secret in a Kurdish prison for over four weeks, he never saw any neutral fact-finder, he was advised he *didn't* have the right to remain silent, he had already provided statements to the FBI over three weeks of interrogations, he was admonished that he must be consistently truthful if he wanted the opportunity to return home, and as his statements had changed from benign to inculpatory. Given these factors, the document he signed with *Miranda* advisements is hardly worth the paper upon which it is printed.

The agent's attempts to "clean" the Constitutional violations incurred by the tainted interrogation were not sufficient to relieve the taint of the Constitutional violation. First, the agents waited ten days to commence the clean interrogations. Instead of this period acting as an "attenuation period" for the purposes of the *Missouri v. Seibert* analysis, however, this period *furthered the coercive effect* of Mr. Khweis' secret detention. Mr. Khweis believed he had lost

his chance to help himself return home. Anyone in his position would easily believe that the agents had given up and left, and that this "attenuation period" was actually his new fate. Thus, the attenuation period prescribed in the prevailing case-law was insufficient to clean the taint of the prior interrogations. It only further the coerciveness rather than ameliorate it.

Second, the *Miranda* warnings themselves were essentially meaningless as everything leading up to that point, for the prior four weeks, undermined those rights. Unlike the suggestion in *Missouri v. Seibert,* ***Mr. Khweis' Advice of Rights Form did not contain any language discussing the inadmissibility of Mr. Khweis' prior statements***. 542 U.S. at 618. Moreover, Mr. Khweis had previously been advised he did *not* have the right to remain silent, and finally, he had been admonished just two weeks prior that he had to be *consistently truthful* if he wanted a chance to return home.

In this case, however, it is not only circumstantially clear that two-step interrogation technique was a deliberate attempt to circumvent *Miranda*, it is also explicitly clear. Excerpts from the lead FBI Interrogator's emails to others show that the final tainted interviews were *not* focused on collecting intelligence, but instead were deigned to weaken Mr. Khweis, elicit a confession, and then "line him up" for the clean team.

- March 15, 2016, "CTD loves us right now and we have him cracking a little more each time."
- March 26, 2016, "the extensive time we took getting [Khweis] comfortable with telling the truth will make it far easier for subsequent interview here and in the U.S."
- April 7, 2016, "We had a great interview with Khweis today. He would not stop talking in an attempt to fill in gaps he previously created. He is going to be very easy to deal with from a clean team perspective.
- April 8, 2016, "[Khweis] is lined up perfectly for the clean team. He keeps asking where I am going through this process, but I can't discuss with him the clean team process."

The lead FBI interrogator was not the only one who stated this illicit purpose of the tainted interviews. An email from a DoD employee to the lead FBI Interrogator stated, "We don't necessarily have any [specific inquiries]…but figured one last session of familiar faces will keep his story on track/constant." Rarely is it more evident than in this case, that the purpose of these tainted interrogations, especially the later interrogations, was not to collect intelligence, but to strategically and "illegitimately" circumvent *Miranda* by weakening its effectiveness. *See United States v. Williams* 435 F.3d 1148, 1159 (9th Cir. 2006). Therefore, Mr. Khweis' statements, and the fruits thereof, should be suppressed.

CONCLUSION

The United States of America is a great country in which the immense power of a Government is able to be juxtaposed so delicately and so intricately with the rights of individuals that many envy the balance. Here, we are assured that if the government over-reaches, the courts do not condone it, and do not allow the government to reap the fruit of their improper conduct. The seminal cases discussed above – *McNabb-Mallory, Miranda,* and *Seibert* – are indelible, fundamental principles of our judicial system, some so familiar they can be recited from memory. In this case, the government overreached. The government held Mr. Khweis in a secret detention for weeks while it interrogated him using techniques designed to undermine any subsequent warnings and to ultimately elicit involuntary statements.

For the reasons stated above, Mr. Khweis respectfully requests his statements, and their fruits, be suppressed from use during the Government's case in chief.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, hereby certify, that on the13th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following and all parties to this action:

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