

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

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<b>SHERIF el-MASHAD, <i>et al.</i>,</b>	)
	)
<b>Petitioners,</b>	)
	)
<b>v.</b>	)
	)
<b>GEORGE W. BUSH, <i>et al.</i>,</b>	)
	)
<b>Respondents.</b>	)
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**CASE NO. 1:05-CV-00270 (JR)**

**PETITIONER ALGAZZAR’S SUPPLEMENTAL MEMORANDUM**

Petitioner Adel Fattouh Ali Algazzar (“Algazzar”), by counsel, hereby submits this Supplemental Memorandum, consenting to the partial modification of the Court’s April 7, 2005 Stay Order (“Stay Order”), and his rendition to Egypt. Algazzar respectfully requests, however, that Respondents be required to provide counsel for Petitioner Algazzar with 7 days advance notice of his rendition to Egypt, so that they may coordinate efforts in Egypt to help ensure his safety and humane treatment. Additionally, as Algazzar’s pretrial detention at Guantanamo as an “enemy combatant” and the Combatant Status Review Tribunal’s October 29, 2004 determination that Algazzar is “properly classified as an enemy combatant and is a member of, or affiliated with, al Qaida” have clear collateral consequences sufficient to avoid a finding of mootness, this Court should continue to exercise

jurisdiction over Algazzar's habeas corpus petition following his rendition.

**FACTUAL BACKGROUND**

In November 2005, Petitioner Algazzar, Carol Elder Bruce and David Dickman met and conferred in Guantanamo. Although counsel for Algazzar expressed concerns for his safety if the Stay Order were modified to permit his rendition to Egypt, Algazzar made his wishes clear. The following facts are including primarily to assist the Court's understanding of the Algazzar's decision.

Algazzar was born on October 22, 1965 in Cairo, Egypt. After receiving his Master's Degree in Economics (Accounting) in 1988, Algazzar operated his own business for two years selling auto parts. In 1990, Algazzar went to Saudi Arabia to take a job as a salesman with the Alghamdi Company, working in Al-Asha, Saudi Arabia. Algazzar stayed with the Alghamdi Company until 1992, when his employment contract expired, and he returned to Cairo. After Algazzar returned, he met his wife, and they were married in January 1993.

In February 1993, Algazzar returned to Saudi Arabia to work for the Abdullah Latif Jameel Company, one of the largest Toyota automobile distributorships in Saudi Arabia. In September 1994, Algazzar returned to Cairo and began driving a taxi. Algazzar saved enough money to build a second level onto his father's home where he could live with his wife and children. Algazzar and his wife have three sons and a daughter.

Between 1994 and 2000, Algazzar made four pilgrimages to Mecca as part of his religious practice. Each pilgrimage lasted approximately two weeks. During one of these trips, Algazzar met an individual named Yassin, who was from Lahore, Pakistan. Yassin and Algazzar became friends, and Yassin told him that, in Pakistan, he could practice his religion freely.

In September 2000, Algazzar decided to go to Pakistan, without his family, to see what it would be like to live there. Upon arriving in Lahore, Algazzar met Yassin and stayed at Yassin's house. Algazzar had subleased his taxi in Cairo and the money from the sublease went to support his wife and children. He stayed in Lahore for approximately one year, and led a very normal life preaching and making friends. On one occasion, in January 2001, Algazzar visited a training camp for the Lashkar-e-Tayyiba, an organization he understood to be supported by the Pakistani Government. Algazzar was only there for two days and when he later learned during a radio broadcast that the United States considered the organization a terrorist organization, he cut off all contact.

After the attack on the United States on September 11, 2001, Algazzar saw reports on television about the number of refugees fleeing Afghanistan because of the United States bombing campaign. In November, Algazzar went to Quetta, Pakistan, near the Afghan border, and volunteered at the Red Crescent office to help the Afghani refugees

that were coming into Pakistan. Because of the number of refugees, Pakistan closed the border.

The Red Crescent had a large refugee camp at the border, however, and Algazzar crossed into Afghanistan to assist with the refugees. Algazzar was only in Afghanistan for about two hours when there was a United States bombing attack and he was hit with shrapnel, badly wounding his leg. Algazzar lost a lot of blood and eventually passed out.

When Algazzar awoke, he was in a hospital in a small town in Pakistan. His passport, his money and all of his papers were gone. Algazzar was then transported by ambulance to a hospital in Quetta, Pakistan. There, he underwent surgery on his leg. While in the hospital, Algazzar contacted the Red Crescent and, after about one week, he was moved to the Red Crescent hospital in Quetta. While there, he underwent four additional operations on his leg.

After about 25 days in the Red Crescent hospital, Pakistani Intelligence agents told Algazzar that he was going to be sent to a larger hospital with better facilities. Instead, when Algazzar was taken outside on the stretcher, there were many Pakistani soldiers. Algazzar was handcuffed and goggles were put over his eyes, and he was taken by ambulance to the Quetta airport. The Pakistanis turned Algazzar, along with five other patients who had been transported in ambulances, over to American Forces. Algazzar was in handcuffs, and a dark green hood was

put over his head. Algazzar was then put on a trolley on the plane, his body was taped down, and he was flown to Kandahar, Afghanistan.

When Algazzar arrived at Kandahar, he was taken on a stretcher to a tent. Algazzar had an open wound on his leg from the surgeries with a dressing around it. As soon as Algazzar got to the tent, the dressing was cut off with scissors. Algazzar was naked the first day he was there, and on the second day, he was given a jumpsuit to wear. The wound got very dirty, and it was only on the second day that a dressing was put on it. Algazzar remained in Kandahar until he was transported to Guantanamo Bay, Cuba on January 21, 2002.

When Algazzar arrived at Guantanamo Bay, he was given a cavity search and a medical examination. Algazzar was put in Camp X-Ray for about 25 days. Many times Algazzar was kept naked, and was sometimes escorted by female guards on either side. He was often taken by force to take showers. Algazzar was beaten and had to sleep on the concrete floor of the cell. In the cell, there were buckets provided for urination and defecation. Guards would come in every night and wake Algazzar up and tell him to move the buckets from one area of the cell to another. Algazzar was given shorts when he was in his cell, but was forced to remove them before he left his cell. Algazzar had to shower with the open wound and asked many times to go to the clinic to have his wound examined and treated. The morning shift would tell him that the night shift would take care of it, and the night shift would tell him that

the morning shift would do so. Finally, a nurse came and said that he had medication for the wound, but would only provide it if Algazzar first confessed to being a member of al Qaida. When Algazzar did not do so, the nurse put the medication back in his pocket and left.

Ultimately, the wound on Algazzar's leg started causing very serious pain, and he was taken to the hospital. The doctors took x-rays and told Algazzar he had gangrene and that the only way to address the problem was to amputate his leg. Algazzar had been told in the hospital in Pakistan that there were some operations that could be done to treat his leg, including leg stretching, that would not result in him losing his leg. The American doctor said that kind of operation cost a lot of money, and started showing Algazzar prosthetics for his leg. Algazzar refused to have his leg amputated.

Nurses would come in to dress wounds, but would not do Algazzar's. Finally, Algazzar's leg began to stink and turn black, and caused him great pain. Algazzar went back to the doctor and told him to amputate the leg. The first surgery was done on February 15, 2002; Algazzar has had ten additional surgeries on his leg. While in the hospital, Algazzar remained shackled to his bed and could not move. Algazzar was told that his amputated bone and body parts had been sent back to the United States, instead of buried as if they were his whole body, as the Muslim faith requires.

While in Guantanamo, Algazzar was told by his interrogators that he had passed his polygraph test. Algazzar also participated in the unclassified portion of his Combat Status Review Tribunal (“CSRT”) hearing, and refuted all allegations against him, however, the CSRT determined him to be an “enemy combatant and a member of, or affiliated with, al Qaida.”

Algazzar was also interrogated by a delegation from Egypt in Guantanamo, and was told that he had been convicted in absentia in Egypt after he had left in 2000 for being a member of an organization called Al Wa’ad. The delegation told him that he had been sentenced to three years in prison. Algazzar was also told that if he returned to Egypt, he would be re-tried and re-sentenced.

## **ARGUMENT**

### **A. This Court Should Modify Its Stay Order**

After losing his leg to an infection that went untreated for over three weeks, being held virtually incommunicado for more than three years, and being prevented from seeing, or even speaking to his father, his mother, his brother, his sisters, his wife, or his four minor children, Algazzar’s hope that “justice” will one day reach the shores of Guantanamo has grown dim. Indeed, one can only imagine the true horrors Algazzar has endured to have caused him to consent to his immediate rendition to Egypt – a country plagued by repeated and

credible instances of prisoner abuse and torture – rather than spend a single additional day in U.S. custody at Guantanamo.

Although Respondents characterize Algazzar's concerns for his well-being upon rendition to Egypt as a "hypothetical parade of horrors," and even go so far as to claim that his concerns are "supported by no evidence," Respondents' Reply Memorandum in Support of Motion for Partial Modification of the Court's April 7, 2005 Order and Opposition to Petitioner's Motion for Discovery 1-2 (filed Nov. 14, 2005), Respondents have once again failed to address the documented torture, ill-treatment and abuse suffered by Egyptian nationals, including two men who were returned to Egypt from Sweden in 2001. These men were tortured and abused in Egypt despite the fact that Sweden had received diplomatic assurances from the Egyptian Government that they would be treated humanely upon their return. See *Empty Promises: Diplomatic Assurances No Guard Against Torture*, Human Rights Watch Report (April 2004), available at <http://hrw.org/reports/2004/un0404> (previously attached to Pet.s' Mot. in Opp. to Resp. Mot. to Modify Court's Stay Order as Ex. 19).

Diplomatic assurances neither protect individuals from torture or ill-treatment once rendered to a third country, nor satisfy Respondents' obligations under the Convention Against Torture and principles of *nonrefoulement*. See *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, Human Rights Watch Report (April 2005), available at



<http://hrw.org/reports/2005/eca0405/index.htm> (attached hereto as Ex. A. Simply put, for Respondents to presume that the United States Government's diplomatic policies and procedures will be sufficient to protect Algazzar from torture or mistreatment upon rendition to Egypt – i.e., to succeed where other countries have failed – betrays their own arrogance, and feigned ignorance of reality.

That Respondents requested permission to transfer Algazzar to Egypt without informing this Court of his conviction in absentia and outstanding sentence in Egypt is also troubling. Egypt requested that the United States return Algazzar to Egypt in 2004, and it was publicly surmised at that time that “if the [Egyptian] government is pressing for the repatriation of El- Gazzar [a.k.a. Algazzar] it is only to imprison him again after he was found guilty, in absentia, of belonging to the outlawed Al-Waad group.” See Gihan Shaine, *Forgotten in Guantanamo: Egyptians Will Challenge Their Detention in US Courts*, available at [www.CagePrisoners.com](http://www.CagePrisoners.com), Aug. 13, 2004 (Ex. B); see *Egypt Asks U.S. to Hand Over Its Guantanamo Detainees*, REUTERS, (Nov. 19, 2004), available at [www.CagePrisoners.com](http://www.CagePrisoners.com) (Ex. C). Respondents' lack of candor with the Court is particularly troubling given that the “Convention Between the U.S. and the Ottoman Empire Relating to Extradition,” 19 Stat. 572, does not include “crimes of association” as an extraditable offense. (Attached hereto as Ex. C). As it appears Algazzar was convicted in absentia by Military Tribunal in Egypt for a crime of

association – i.e., associating with the Al Wa’ad organization – Respondents sought this Court’s permission to “render” Algazzar to a country that they would likely have been prevented from extraditing him to pursuant to the applicable extradition treaty between the U.S. and Egypt.<sup>1</sup>

Even knowing the danger he faces at the hands of Egyptian authorities, however, Algazzar has instructed counsel to not oppose Respondents’ October 17, 2005 Motion for Partial Modification of the Court’s April 7, 2005 Stay Order, and to permit his rendition to Egypt. Although Algazzar has fallen through the cracks of the normal judicial protections available in extradition proceedings, this Court should still urge the United States Government to utilize its best efforts to: monitor Algazzar’s condition and treatment in Egypt on a routine and periodic basis; obtain permission from the Egyptian government for a third-party, such as the International Red Cross Organization, to also monitor Algazzar’s condition; obtain assurances from Egypt that Algazzar will not be detained, re-sentenced, or re-tried in connection with his conviction in absentia by Egyptian military tribunal; and to ensure that Algazzar is not tortured or ill-treated upon his return to Egypt. Algazzar also respectfully requests that Respondents be required to provide 7 days

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<sup>1</sup> On September 9, 2002, the Higher Military Court in Hikestep, Egypt, issued its verdict in case number 24 of 2001 (military crimes), known as ‘al-Waad (The Promise) Organization’. See <http://www.eohr.org/annual/wr02/ar7.htm>. The case involved ninety-four accused, of which six were sentenced in absentia. *Id.*

advance notice of his rendition to Egypt, so that counsel for Algazzar can coordinate efforts in Egypt to help ensure his safety, post-rendition.

Rendering Algazzar from U.S. custody to Egyptian custody does not moot Algazzar's habeas corpus petition before this Court, however.

**B. This Court Should Continue to Exercise Jurisdiction Over Algazzar's Habeas Corpus Petition**

It is well-settled that "[a]s long as the habeas corpus petition was filed in federal court at a time when the petitioner was in custody, an action challenging that custody is not necessarily mooted by the petitioner's release from custody prior to final trial and appellate adjudication of the petition." Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 361-62 (4th ed. 2001).

As the Seventh Circuit held in *Bryan v. Duckworth*, a petition for habeas corpus is not mooted by the petitioner's release from custody prior to final trial and appellate adjudication of the petition if there is any possibility that the conviction that led to his being in custody will have an adverse effect on him at some later date. 88 F.3d 431 (7th Cir. 1996).

As the court noted:

If a prisoner, while in custody, files a petition for habeas corpus challenging the conviction that has led to his being in custody, and is then released while the petition is pending, the petition is not moot unless there is no possibility that the conviction will have "collateral consequences," which is to say an adverse effect on him at some future time .... So unlikely is a conviction to have no collateral consequences that it is the respondent's burden to plead and prove that the petitioner's conviction will not.

*Id.* at 432-33 (emphasis added), citing, *Sibron v. New York*, 392 U.S. 40, 50-58 (1968) and *D.S.A. v. Circuit Branch 1*, 942 F.2d 1143, 1146 n.3 (7th Cir. 1991).

The United States Supreme Court has upheld the presumption of continuing collateral consequences from a wrongful criminal conviction.

In *Spencer v. Kemna*, the Court held that:

In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences .... [I]n the context of criminal conviction, the presumption of significant collateral consequences is likely to comport with reality. As we said in *Sibron [v. New York]*, 392 U.S. 40 (1968)], it is an “obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.”

523 U.S. 1, 8-12 (1998).

Where the habeas corpus petition challenges the constitutionality of the pretrial detention, courts similarly inquire (in determining mootness) whether the pretrial detention has any collateral consequences. *See e.g., Fassler v. United States*, 858 F.2d 1016, 1018 n.3 (5th Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989) (challenge to pretrial detention was moot after petitioner was convicted because pretrial detention had “none of the disabilities or burdens which have concerned the [Supreme] Court” in determining writs of habeas corpus not moot because of collateral consequences to the individual.).

The “collateral consequences” doctrine has also been applied to judicial findings other than criminal convictions. *See, e.g., Bryan*, 88

F.3d at 433; *Demjanjuk v. Petrovsky*, 10 F.3d 338, 355-56 (6th Cir. 1993). In *Bryan*, the petitioner was challenging a sanction imposed by a prison's disciplinary board. 88 F.3d at 433. Although the Seventh Circuit noted that while this was not a "conviction" *per se*, it found that the collateral consequences of a disciplinary order were sufficient to "stave off a finding of mootness." *Id.* The court also found that collateral consequences were presumed, and the burden of rebutting the presumption was on the respondent. *Id.*

In his civil denaturalization proceeding, John Demjanjuk was found by the Northern District Court of Ohio to be "Ivan the Terrible" – a notorious Ukrainian guard who committed unspeakable atrocities upon Jewish prisoners in a Nazi concentration camp during WWII. *Demjanjuk v. Petrovsky*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982). Demjanjuk's subsequent civil extradition order to Israel, *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio 1985), *aff'd per curiam*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), was based largely upon the District Court's finding that Demjanjuk was "Ivan the Terrible." *Demjanjuk*, 10 F.3d at 356. In *Demjanjuk*, by its own motion, and acting pursuant to Fed. R. Civ. P. 60(b)(6) and the All Writs Act, 28 U.S.C. § 1651, the Sixth Circuit found that its denial of Demjanjuk's petition for habeas corpus relief from his extradition warrant had been improvident. *Id.* at 339. In so doing, the court also considered whether Demjanjuk's

claims had been rendered moot by virtue of his subsequent acquittal and release in Israel, post-extradition from the U.S. The Sixth Circuit determined Demjanjuk's petition was not moot, however, because of "the collateral consequence of being found by the district court to be Ivan the Terrible." *Id.* at 355 ("[u]pon reflection ... we are convinced that the collateral consequences of being found by the district court to be Ivan the Terrible require corrective action").

Collateral consequences sufficient to avoid mootness include, "concrete disadvantages or disabilities that ha[ve] in fact occurred, that [a]re imminently threatened, or that [a]re imposed as a matter of law," including risk of "deportation or denial of naturalization." *Spencer*, 523 U.S. at 8-12; *see also Ginsberg v. New York*, 390 U.S. 629, 633 n.2 (1968) (finding collateral consequences sufficient to overcome suggestion of mootness); *Pollard v. United States*, 352 U.S. 354, 358 (1957) (finding that "[t]he possibility of consequences collateral ... is sufficiently substantial to justify our dealing with the merits"); *United States v. Romero-Vilea*, 850 F.2d 177, 179 (3d Cir. 1988) (finding potential for deportation due to conviction adequate collateral consequence to preserve habeas petition filed during detention); *York v. Tate*, 858 F.2d 322, 325 (6th Cir. 1988) (finding habeas corpus petition not mooted by prisoner's release).

Where collateral consequences are likely to result from the unlawful pretrial detention of an individual, as here, a habeas corpus

petition challenging the constitutionality of that detention should not be mooted by virtue of the release, rendition, transfer, or extradition of the detainee to a third country. *See Spencer*, 523 U.S. at 8-12; *Bryan*, 88 F.3d at 432-33; *Demjanjuk*, 10 F.3d at 355-56.

In this case, Algazzar's habeas corpus petition challenging the constitutionality of his pretrial detention in Guantanamo was properly filed in federal court while he was in custody<sup>2</sup> and should not be mooted by virtue of his rendition to Egypt. In fact, so likely is involuntary detention in Guantanamo and the CSRT's finding that Algazzar is an "enemy combatant" to have collateral consequences, that it should be Respondents' burden to plead and prove that they will not. *See Bryan*, 88 F.3d at 433. Even if Algazzar bears the burden, however, this burden is easily met. *See Kemna*, 523 U.S. at 7, 14.

Pretrial detention in Guantanamo pursuant to the President's Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism ("President's Order on Detention"), 66 Fed. Reg. 57,833 (Nov. 13, 2000) has "concrete disadvantages or disabilities that ha[ve] in fact occurred, that [a]re imminently threatened, [or] that [a]re imposed as a matter of law." *See Bryan*, 88 F.3d at 432. For instance, although Respondents have expressed a desire to "windup wartime detentions in an orderly fashion" and release several individuals who have been determined "no longer enemy combatant" ("NLEC") – based on

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<sup>2</sup> *See Rasul v. Bush*, 124 S. Ct. 2686 (2004) (finding that detainees in Guantanamo Bay are entitled to invoke federal habeas corpus statute in Federal court).

the NLECs continued detention in Guantanamo, it seems reasonable to conclude that no third-country recipient is willing to take them. See Memorandum, *Qassim v. Bush*, Civ. No. 05-0497 (D.D.C. Dec. 22, 2005). Thus, the collateral consequences of stigma of having been detained in Guantanamo are clear. See *Demjanjuk*, 10 F.3d at 356. Additional collateral consequences that are “imminently threatened” as a result of detention in Guantanamo include deportation (or other removal proceeding), denial of passports, visas, the right to emigrate, or to become a naturalized citizen of another country.

In this case, the CSRT’s October 29, 2004 determination that Algazzar is an “enemy combatant and is a member of, or affiliated with, al Qaida” has additional collateral consequences to those noted above. The collateral consequence of stigma is also heightened, and is equal to that of Mr. Demjanjuk’s being found to be a notorious Nazi prison guard. See *Demjanjuk*, 10 F.3d at 355. However, unlike Mr. Demjanjuk, who was found to be a member of the Nazi Germany party more than 45 years after its defeat, Algazzar has been found to be a “member of, or affiliated with,” an active and notorious terrorist organization that the United States is currently seeking to eradicate pursuant to its “War on Terror.” As a result, even if Algazzar were to be released by the Egyptian authorities post-rendition, he would still be at risk of being captured and detained again by American and/or coalition forces pursuant to the President’s Order on Detention.



The CSRT's determination that Algazzar is an "enemy combatant and is a member of, or affiliated with, al Qaida" also has continuing collateral consequences that are "imminently threatened." *See Spencer*, 523 U.S. at 8-12. For instance, Respondents have expressed an intent to render Algazzar to Egypt for further detention and investigation as a direct result of his having been determined an "enemy combatant" by the CSRT. *See Resp. Mot. for Part. Modif.* at p. 3; *see also Declaration of Matthew Waxman of 10/14/05* at ¶ 3 (previously attached to Resp. Mot. For Part. Modif. as Ex. A) (distinguishing between those transfers for which "from the United States' prospective, [the transferee] can be released," and those transfers, such as Algazzar's, for which Respondents expect the receiving government to ensure "that the detainee will not pose a threat to the United States and its allies."); *Declaration of Pierre-Richard Prosper of 2/25/05* at ¶ 3 (previously attached to Resp. Opp. To Pet. Mot. For Preliminary Injunction as Ex. 2) (same). Additionally, the Egyptian delegation that visited Algazzar in Guantanamo informed him that he had been convicted in absentia and sentenced to three years hard labor, and that he would be retried and re-sentenced, if rendered to Egypt. The likelihood that Algazzar's Egyptian sentence will be enhanced as a result of his detention in Guantanamo and the CSRT's finding that he is an "enemy combatant and ... a member of, or affiliated with, al Qaida" seems not only possible, but probable.

The above collateral consequences are sufficient to rebut any suggestion of mootness of Algazzar's habeas corpus petition.

**CONCLUSION**

While this Court should not prevent Algazzar's rendition to Egypt, it should continue to exercise jurisdiction over his habeas corpus petition, and take whatever steps that justice requires to protect Algazzar's safety and well-being in Egypt.

January 17, 2006

Respectfully submitted,

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