

Case No. 15-1331

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RASMIEH YUSEF ODEH

Defendant-Appellant,

On Appeal from the United States District Court
For the Eastern District of Michigan Southern District

**BRIEF *AMICUS CURIAE* TORTURE EXPERTS INTERNATIONAL
REHABILITATION COUNCIL FOR TORTURE VICTIMS,
BELLEVUE/NYU PROGRAM FOR SURVIVORS OF TORTURE,
PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL, REDRESS
AND WORLD ORGANISATION AGAINST TORTURE
IN SUPPORT OF DEFENDANT-APPELLANT**

KATHERINE M. GALLAGHER
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Attorney for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *amici curiae*, the International Rehabilitation Council for Torture Victims, Bellevue/NYU Program For Survivors of Torture, Public Committee Against Torture In Israel, REDRESS, and World Organisation Against Torture, state that they all are non-profit corporations; that none of *amici curiae* has any parent corporations; and that no publicly held company owns any stock in any of *amici curiae*.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST.....	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
I. THE PSYCHOLOGICAL EFFECTS OF TORTURE MAY IMPACT A VICTIM’S ABILITY TO ACT VOLUNTARILY, CONSCIOUSLY OR INTENTIONALLY.....	6
A. The psychological impact of torture, including sexual violence as torture, is profound.....	6
B. The psychological effects of torture cause victims to adopt coping strategies that compel them to act involuntarily, unconsciously, and unintentionally.....	10
II. HEALTH PROFESSIONALS SHOULD BE CONSULTED TO ASSESS THE IMPACT OF TORTURE ON VICTIMS	14
A. The complexity of psychological effects of torture upon its victims requires an expert evaluation.	14
B. Courts and other adjudicative bodies regularly employ psychological experts in cases involving torture victims.....	16
III. THE UNCONSCIOUS COPING MECHANISMS ADOPTED BY TORTURE SURVIVORS CAN NEGATE ELEMENTS OF BOTH SPECIFIC AND GENERAL INTENT CRIMES.....	20
A. Psychological evidence that would negate the general intent requirement of Defendant’s crime should not be barred.	20
B. The testimony of Defendant’s expert witness supports a legally acceptable theory of lack of <i>mens rea</i>	24
CONCLUSION	28
APPENDIX.....	29
CERTIFICATE OF COMPLIANCE.....	33
CERTIFICATE OF SERVICE	34

TABLE OF AUTHORITIES

CASES

Almaghzar v. Gonzales, 457 F.3d 915 (9th Cir. 2006) 17

Hanaj v. Gonzales, 446 F.3d 694 (7th Cir. 2006)..... 17

Morgan v. Mukasey, 529 F.3d 1202 (9th Cir. 2008) 17

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United States v. Bailey, 444 U.S. 394 (1980) 21

United States v. Bueno, 2006 WL 240060 (D. Mass. Jan. 5, 2006) .22, 23, 26, 27

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United States v. Fazzini, 871 F.2d 635 (7th Cir.1989) 21

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United States v. Williams, 892 F. 2d 296 (3d Cir. 1989)..... 24

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United States v. Yousef, 327 F.3d 56 (2d Cir. 2003) 17

Zeru v. Gonzales, 503 F.3d 59 (1st Cir. 2007).17

FEDERAL STATUTES

Title 18 U.S.C. §1425(a).....24

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Affaire R.J.c.France, Eur.Ct. H.R. App. No/ 10466/11 (Dec. 19, 2013) 18

Akkoc v. Turkey, Eur.Ct. H.R. App. No.22947/93-22948/93 (Oct. 10, 2000); .. 18

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Safia Ishaq Mohammed Issa (represented by REDRESS and the African Centre for Justice and Peace Studies) v Sudan, Afr. C.H.R., Admissibility Decision, (May 29, 2014) 18

Bouabdallah Ltaief v Tunisia, Commc’n No. 189/2001, U.N. Committee against Torture (Nov. 14, 2003)..... 18

Falcon Rios v Canada, Commc’n No.133/1999 (Nov. 23, 2004)..... 18

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D. Bogner et al., *Impact of sexual violence on Home Office interviews*. 191 British Journal of Psychiatry 75 (2007) 8

E. Carlson et al., *Dissociation in Posttraumatic Stress Disorder Part I: Definitions and Review of Research*, 4 PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, AND POLICY 479 (2012)..... 12, 13

R. Gurr & J. Quiroga, *Approaches to torture rehabilitation: A desk study covering effects, cost-effectiveness, participation, and sustainability*, 11 TORTURE: Q. J. OF REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE (SUPP. NO. 1) 1 (2001)..... 7

G. Gyulai et al., 1 CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES: A MULTIDISCIPLINARY TRAINING MANUAL 89 (G. Gyulai, ed., 2013)..... 9, 13

J. Herlihy & S. Turner, <i>The Psychology of Seeking Protection</i> , 21 INT’L JOURNAL OF REFUGEE LAW 171 (2009).....	11, 14
Independent Forensic Expert Group, <i>Statement on Virginity Testing</i> , 25 TORTURE 62 (2015)	8
International Rehabilitation Council for Torture Victims (IRCT), <i>Psychological Evaluations of Torture Allegations – A Practical Guide to the Istanbul Protocol – for Psychologists</i> (2009).....	6
Kolk et al., <i>Dissociation, Somatization, and Affect Dysregulation: The Complexity of Adaptation of Trauma</i> , 153 AM. J. OF PSYCHIATRY 83 (1996).....	13
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M. Schauer & T. Elbert, <i>Dissociation Following Traumatic Stress</i> , 218 J. OF PSYCHOLOGY 109 (2010).....	11, 12, 13
D. Silove, <i>The Global Challenge of Asylum</i> , in <i>Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims</i> 12 (J.P. Wilson & B. Drozdek eds., 1994)	9
F. Somnier, et al., <i>Psychological Consequences of Torture: Current Knowledge and Evidence</i> in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 56 (M. Başoğlu, ed., 1992).....	7
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H. Zawati, <i>Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity</i> , 17 TORTURE 27 (2007).....	7

STATEMENT OF INTEREST

Amici curiae,¹ International Rehabilitation Council for Torture Victims (IRCT), Bellevue/NYU Program For Survivors of Torture, Public Committee Against Torture in Israel, REDRESS and World Organisation Against Torture (OMCT), are experts on the rights of victims of torture, including their right to redress and rehabilitation, and have extensive expertise on the psychological and physical effects of torture on victims.²

Amici curiae are deeply concerned by the district court's exclusion of expert testimony on the long-lasting and debilitating effects of torture on a survivor, and specifically, testimony on the symptoms and effects of post-traumatic stress disorder (PTSD). In excluding such testimony, the district court prohibited the jury from hearing that torture, including acts of sexual violence and rape, can cause a victim to involuntarily practice techniques including avoidance and dissociation that lead to compartmentalization or narrowing so as not to trigger a recollection of the trauma.

¹ *Amici curiae* submit this brief in accordance with Federal Rule Appellate Procedure 29 and certify that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity contributed money that was intended to fund the preparation or submission of this brief. Appendix A contains a fuller description of *amici curiae*'s interests.

² Appendix A contains a fuller description of *amici curiae*'s interests.

Evidence of the adoption of unconscious or involuntary coping mechanisms, based on extensive research on the symptoms and effects of PTSD, should have been factored into the fact-finder's assessment of Defendant-Appellant Odeh's mental state when considering the charges against her.

Amici curiae are experts in assisting victims of torture obtain justice and rehabilitation and accordingly have developed an understanding or expertise of the physical and psychological effects of torture. Over the last thirty years, *amici curiae*'s understanding of the serious and far-reaching psychological effects of torture has also increased markedly due to clinical experience and scientific research.

This increased understanding torture's damaging and long-lasting effects has informed the recognition of their rights, including rights to due process and to redress. This entails a holistic approach to considering the effects of torture in legal proceedings, including any evidence that reflects on the traumatic impact of torture and its consequences.

Based on their experience, *amici* view it as imperative that a trier of fact understand and consider the psychological effects of torture and how the psychological symptoms and disabilities caused by torture might interfere with the ability of victims to act voluntarily, consciously or intentionally. Torture survivors adopt strategies to psychologically navigate everyday situations and, particularly,

situations that could trigger memories of, or are associated with, the circumstances that gave rise to torture. Under international standards, psychological evidence, including evidence of such responses, is now considered a key component of proving torture and interpreting the actions and testimony of victims.

The charges in this case required the jury to make a determination of whether Defendant-Appellant Odeh acted “knowingly.” *Amici* respectfully submit that in proceedings such as these where a full understanding of the mental state of a torture survivor is at issue, courts should allow, and generally do allow, the admission of expert testimony on the psychological effects of torture.

Accordingly, *amici* urge this Court to reverse the district court’s ruling that excluded all evidence of Defendant-Appellant Odeh’s torture and its psychological effects, and allow the jury to factor that evidence in its assessment of whether she acted “knowingly.”

SUMMARY OF THE ARGUMENT

The Defendant-Appellant, Ms. Rasmieh Yousef Odeh, asserts that she is a victim of torture, including sexual violence and rape. She was diagnosed as suffering from post-traumatic stress disorder (PTSD) following an evaluation by a qualified clinical psychologist. Defendant-Appellant Odeh was denied the opportunity to present evidence at trial on the symptoms of PTSD, the

psychological effects of having endured and survived torture, and the impact of these symptoms on her mental state in relation to the charges against her.

When considering the admissibility of psychological evidence, the question is not whether the crime is specific or general intent – it is whether the psychological evidence could negate an element of the offense. In this case, knowledge or willfulness is an element of the offense. Testimony from a clinical psychologist on Defendant-Appellant’s mental health is clearly relevant to that *mens rea* determination. In this case, that testimony was wrongfully excluded.

In the experience of *amici*, including the IRCT’s experience in treating tens of thousands of torture victims worldwide per year, and as supported by scientific literature, all torture produces psychological effects, which may be long-term, far-reaching, and even more debilitating than its physical effects on victims. The most common of these are PTSD and major depression.

Extensive research carried out primarily in the last thirty years clearly establishes that torture victims often develop psychological symptoms and responses, such as avoidance and dissociation, to avoid retraumatization. These responses can affect volition as it relates to action and intention. Such psychological responses serve as defense mechanisms that compel victims to act based on involuntary and unconscious motivations, even in common and everyday

situations, to protect themselves from retraumatization. Victims of sexual violence exhibit an even greater likelihood of avoidance and dissociation.

In adjudications involving torture victims, the medical certainty of the psychological effects of torture, which are often long-term and far-reaching, and the subsequent need for rehabilitation, mandates consideration of whether the psychological effects of a victim's torture are legally significant. Whether the victim acted "knowingly" requires an examination of the voluntariness, consciousness, and intention behind the victim's actions – and whether those actions were an involuntary, unconscious or unintentional result of trauma.

The complex task of assessing the psychological effects of torture requires expertise. The district court below excluded expert testimony of a licensed clinical psychologist and expert on the psychological symptoms and effects of torture who had evaluated Defendant-Appellant Odeh's mental health. Where reasonable grounds exist to believe that a victim's actions may be impacted by psychological trauma following the torture experience, a court should seek the expert assessment of mental health experts and consider all expert evidence before it.

This case should be remanded to allow the jury to hear the expert testimony and consider the impact, if any, of the expert's evaluation of Defendant-Appellant's psychological state has on the question of whether she acted willfully or knowingly in regard to material facts at issue.

ARGUMENT

I. THE PSYCHOLOGICAL EFFECTS OF TORTURE MAY IMPACT A VICTIM'S ABILITY TO ACT VOLUNTARILY, CONSCIOUSLY OR INTENTIONALLY

A. The psychological impact of torture, including sexual violence as torture, is profound.

Every type of torture, whether or not it leaves visible evidence on victims' bodies, produces psychological harm and suffering. A primary purpose of torture is, in fact, to destroy the psychological functioning and social integrity of its victims.³

According to the United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, "Istanbul Protocol"):

One of the central aims of torture is to reduce an individual to a position of extreme helplessness and distress that can lead to a deterioration of cognitive, emotional and behavioural functions. Thus, torture is a means of attacking the individual's fundamental modes of psychological and social functioning. Under such circumstances, the torturer strives not only to incapacitate a victim physically, but also to disintegrate the individual's personality. The torture attempts to destroy a victim's sense of being grounded in a family and society as a human being with dreams, hopes and aspirations for the future.⁴ (emphasis added).

³ See International Rehabilitation Council for Torture Victims (IRCT), *Psychological Evaluations of Torture Allegations – A Practical Guide to the Istanbul Protocol – for Psychologists* 5 (2009) (hereinafter "IRCT 2009").

⁴ OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, *ISTANBUL PROTOCOL: MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* at §235, U.N. Doc HR/P/PT/8/Rev.1, (2004) *available at*

The scientific literature, which is corroborated by *amici*'s experience in their collective treatment of approximately 100,000 torture survivors worldwide each year, establishes the psychological consequences of torture to be often more persistent and troublesome than the physical effects and physical disability.⁵ When a victim of torture is untreated, the victim's psychological functioning may be especially impaired.⁶

The pain and suffering experienced by victims of torture in the form of sexual violence and rape, such as Ms. Odeh, may be especially acute and lead to particularly grave, pronounced, and long-lasting psychological effects and trauma. *See generally* Istanbul Protocol §§ 215-32. Victims of sexual torture often experience intense shame and humiliation. *Id.*⁷

The UN Special Rapporteur on violence against women considered that “the consequences of sexual violence are physically, emotionally and psychologically

<http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>; *see also* K. Alden, *The Psychological Consequences of Torture* in THE MEDICAL DOCUMENTATION OF TORTURE 117, 119 (M. Peel & V. Iacopino eds., 2002).

⁵ *See e.g.*, F. Somnier, et al., *Psychological Consequences of Torture: Current Knowledge and Evidence* in TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES 56, 63 (M. Başoğlu, ed., 1992).

⁶ R. Gurr & J. Quiroga, *Approaches to torture rehabilitation: A desk study covering effects, cost-effectiveness, participation, and sustainability*, 11 TORTURE: Q. J. OF REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE (SUPP. No. 1) 1, 11 (2001), *available at* <http://doc.rct.dk/doc/MON2001.055.pdf>.

⁷ *See also* H. Zawati, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity*, 17 TORTURE 26, 33-37 (2007).

devastating for women victims.”⁸ Studies have found that, in light of the intimate nature of the sexual attack and pronounced feelings of humiliation and shame, victims of sexual torture may be particularly likely to experience symptoms of avoidance and dissociation (*see* Section I.B.).⁹ Because sexual torture is often a taboo subject and stigmatizes victims, rehabilitation from sexual torture can also be particularly challenging.¹⁰ Victims of sexual torture may be unwilling to disclose their trauma because of intense humiliation, self-disgust, and feelings of worthlessness.¹¹ Victims also are often stricken by apathy, emotional numbing, and withdrawal, which contribute to difficulties functioning in normal life and pose a further obstacle to rehabilitation.¹²

Although there may be considerable variability in the psychological effects of torture, one of the main characteristics of trauma is its incompatibility with an ordinary understanding of reality: “Traumatized persons perceive daily experience in a special way, the experience of trauma and its consequences might distort their

⁸ *Report of the Special Rapporteur on violence against women, including its causes and consequences, in accordance with Resolution 1997/44 of the Commission*, ¶ 14, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998) (*submitted by Radhika Coomaraswamy*).

⁹ *See* D. Bogner et al., *Impact of Sexual Violence on Home Office Interviews* 191 *BRITISH JOURNAL OF PSYCHIATRY* 75, 77-80 (2007).

¹⁰ Sexual torture may have even greater significance in particular populations, such as within Muslim populations. *See, e.g.,* Physicians for Human Rights, *Systematic use of Psychological Torture by US Forces*, 15 *TORTURE* 1, 57-58 (2005).

¹¹ *See* D. Bogner et al., *supra* n. 9.

¹² *See, e.g.,* Independent Forensic Expert Group, *Statement on Virginity Testing*, 25 *TORTURE* 62 (2015).

picture about the ordinary elements of life.”¹³ Psychological effects of trauma are involuntary and can be severely debilitating or can interact with concentration, attention and memory functions.¹⁴

The Istanbul Protocol describes generally an international consensus on documenting psychological responses to torture. The Protocol, drafted by seventy-five experts and forty organizations in medicine, psychology, law, and human rights, was adopted by the United Nations in 1999 as a key international standard on the legal, medical, and psychological investigation and documentation of torture.¹⁵

According to the Protocol, the most common psychological effects from torture are PTSD and major depression.¹⁶ Istanbul Protocol §§ 234-259.

¹³ G. Gyulai et al., 1 CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES: A MULTIDISCIPLINARY TRAINING MANUAL 89 (G. Gyulai, ed., 2013).

¹⁴ T. Wenzel, A. Frewer, & S. Mirzaei, *The DSM 5 and the Istanbul Protocol: Diagnosis of Psychological Sequels of Torture*, 25 TORTURE 51, 53 (2015).

¹⁵ *Id.* Key umbrella health care organizations have endorsed the Protocol, including the World Medical Association, the World Council of Psychotherapy, and the World Psychiatric Association. International courts and bodies also have utilized it, including the European Court of Human Rights and the Inter-American Court of Human Rights.

¹⁶ The effects may include: avoidance and emotional numbing; hyperarousal symptoms; damaged self-concept and foreshortened future; dissociation, depersonalization, and atypical behavior; somatic complaints; sexual dysfunction; and neuropsychological impairment.

Although posttraumatic stress disorder and depression exist in the everyday population, their prevalence is much higher in traumatized populations. Istanbul Protocol §§ 236-37. *See also* D. Silove, *The Global Challenge of Asylum, in Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War*

The Diagnostic and Statistical Manual produced by the American Psychiatric Association characterizes PTSD by symptoms of intrusion and protection.¹⁷ Intrusive symptoms include hyperarousal, such as hypervigilance or an exaggerated startled response, and re-experiencing of the traumatic event. DSM-V; Istanbul Protocol §§ 252-57. In re-living the traumatic event, victims may have involuntary flashbacks and nightmares, experience intense psychological distress upon exposure to triggers, dissociate, and have uncontrollable physiological reactions when exposed to cues that resemble or symbolize the traumatic event. DSM-V; Istanbul Protocol § 244.

B. The psychological effects of torture cause victims to adopt coping strategies that compel them to act involuntarily, unconsciously, and unintentionally.

The psychological effects of torture can impact the actions of torture victims in a manner that may not be wholly within their control or consciousness. It is well-established that torture survivors develop coping mechanisms to avoid the acute trauma that accompanies recollection of the circumstances of their torture. *See* Istanbul Protocol § 142. These coping mechanisms, including avoidance and

and Torture Victims 12-31 (J.P. Wilson & B. Drozdek eds., 1994). Studies of tortured refugees document a much higher prevalence of PTSD. M. Başoğlu et al., *Psychological Effects of Torture: A Comparison of Tortured with Nontortured Political Activists in Turkey*, 151 AM. J. OF PSYCHIATRY 76-81 (1994).

¹⁷ Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, (5th ed. 2013) (hereinafter "DSM-V").

dissociation, can result in a torture survivor acting instinctually from a place of self-preservation – not consciously from a place of awareness or volition.¹⁸

A physiological understanding of trauma and PTSD contributes to the view that psychological responses to trauma are unconscious and involuntary. For instance, studies have shown that when confronted with trauma reminders, torture victims typically reflexively “replay” their original response to the traumatic event.¹⁹ Victims who suffer from PTSD or severe trauma may generally re-experience the same “fight,” “flight,” “freeze” or “fawn” responses that they underwent during the torture. These responses are controlled by the involuntary and automatic parts of our nervous system – the sympathetic and parasympathetic branches that control adrenaline flow and the return of our bodies to homeostasis. For victims who may have experienced a strong parasympathetically dominated “shut-down” during their torture are likely to subsequently respond to traumatic memories and triggers by dissociating.²⁰

¹⁸ J. Herlihy & S. Turner, *The Psychology of Seeking Protection*, 21 INT’L JOURNAL OF REFUGEE LAW 171, 177-178 (2009).

¹⁹ Schauer & Elbert, M. Schauer & T. Elbert, *Dissociation Following Traumatic Stress*, 218 J. OF PSYCHOLOGY 109, 119 (2010) (“Survivors of trauma, who were rewarded with survival as a result of their “shut down” during the offense, will also show a strong vasovagal dissociation; response when confronted with trauma reminders, even decades later”).

²⁰ *Id.*

Evoking memories related to past torture, including during an interview processes, may have a retraumatizing effect on most victims.²¹ *See* Istanbul Protocol §149; IRCT at 12. Torture survivors will often exhibit symptoms of dissociation and avoidance to prevent such retraumatization. Both of these symptoms involve the involuntary and unconscious motivations of victims to avoid trauma and pain by altering the way they act, experience, and interpret “ordinary elements of life.”

Dissociation is a defense mechanism that protects the victim from the original anxiety and pain of the torture experience and remembering it.²² Dissociative reactions may include derealization, depersonalization and atypical behavior, such as a disruption in the integration of consciousness, self-perception, memory, and even fainting.²³ In dissociation, victims may feel ‘split in two’ or

²¹ When a victim re-experiences trauma, they experience a sudden involuntary ‘reliving’ of parts of the traumatic experience, often without any specific stimulus, and that individual is often unable to fully distinguish between what is reality and what is past memory. *See* G. Gyulai et al., *supra* n. 13.

²² E. Carlson et al., *Dissociation in Posttraumatic Stress Disorder Part I: Definitions and Review of Research*, 4 PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, AND POLICY, 479, 479-80 (2012); B.A. Van Der Kolk, *Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study*, 8 J. OF TRAUMATIC STRESS 505-525 (1995).

²³ *See id* at 484. *See also* M. Schauer & T. Elbert, *supra* n. 19. *Id.* at 110 (explaining dissociation “is an adaptive, and when strike is close, final remaining survival response to specific types of life-threats that include nearness of a superior perpetrator or other situations dominated by helplessness”).

have an ‘out-of-body’ experience where they are watching themselves from a distance being tortured.²⁴

Torture victims who re-experience their trauma through flashbacks or dissociation may act in sudden, involuntary, and unconscious ways in response to triggers that may be commonplace.²⁵ The most typical example is of the person with past exposure to combat who may hear a car backfire and jump to the ground, momentarily perceiving it as gunfire.²⁶

Avoidance is another defense mechanism and can be a “vital, unconscious survival strategy” for victims of torture.²⁷

Avoidance often proves to be the only tool to mobilise against being re-traumatized and the only possibility to survive. Victims may even “keep a distance” from their own body and mind, they may leave behind memories and the past in order to forget, and to carry on their life without the trauma that has changed their life so dramatically.²⁸

²⁴ *Id.*; Kolk et al., *Dissociation, Somatization, and Affect Dysregulation: The Complexity of Adaptation of Trauma*, 153 AM. J. OF PSYCHIATRY, 83 (1996).

Dissociative experiences generally fall into one of three domains: (1) loss of continuity in subjective experience accompanied by involuntary and unwanted intrusions into awareness or behavior; (2) an inability to access information or control mental functions that are normally amenable to such access or control; or (3) a sense of experiential disconnectedness that may include distortions in perceptions about the self or the environment. Carlson et al., *supra* n. 22.

²⁵ See Schauer & Elbert, *supra* n. 19, at 113 (finding dissociation manifests as “partial or even complete failures to deliberately control processes and take actions that can normally be influenced by an act of volition, for example, the ability to bring accessible information into conscious awareness”).

²⁶ See Carlson et al., *supra* n. 22 at 480.

²⁷ G. Gyulai et al., *supra* n. 13.

²⁸ *Id.* at 99

This defense consists of a persistent avoidance of stimuli associated with the traumatic event as evidenced by one or both of the following: (1) efforts to avoid distressing thoughts, or feelings about or closely associated with the traumatic event and (2) efforts to avoid external reminders (people, places, conversations, activities, objects, situations) that arouse distressing memories, thoughts, or feelings closely associated with the traumatic event.²⁹ As two experts explain,

Due to being subjected to ... sudden, unbidden and painful memories, many individuals develop strategies for avoiding any triggers, or situations which will cause the memories to recur. For example, many refugees in a clinical setting report ... avoiding walking past a police station.... Despite a claimant being perfectly well aware that they must fully disclose and explain their experiences in order to have the best chance of being recognized as a refugee, the need to avoid the ‘reliving’ of past experiences is also very compelling.³⁰

For torture survivors suffering from PTSD, “avoidance can become a way of life, and indeed some of the strategies may not be conscious.”³¹

II. HEALTH PROFESSIONALS SHOULD BE CONSULTED TO ASSESS THE IMPACT OF TORTURE ON VICTIMS

A. The complexity of psychological effects of torture upon its victims requires an expert evaluation.

²⁹ Am. Psychiatric Ass'n, Diagnostic & Statistical Manual of Mental Disorders, (5th ed. 2013).

²⁹ Herlihy & Turner, *supra* n. 18.

³⁰ *Id.* at 177.

³¹ *Id.*

A psychological evaluation of a torture victim should be conducted by an experienced and properly trained clinician. In recent years, numerous evaluative tools and guides for medical professionals have been developed to standardize interview and testing techniques and to ensure that evaluations are conducted in a manner that “does no harm” to the torture survivor.³² Assessment of the psychological effects of torture require an understanding of the experience of trauma, not only at the individual level, but at the family and community levels as well.³³ Assessment must also be personalized, taking into account an understanding of the method(s) of torture used and the victim’s individual context. “The psychological consequences of torture, however, occur in the context of personal attribution of meaning, personality development and social, political and cultural factor.” Istanbul Protocol §234.

An evaluation will generally include a detailed description of the individual’s history, a mental status examination, an assessment of social functioning, and formulation of clinical impressions, and, if appropriate, a psychiatric diagnosis. Istanbul Protocol § 261. Each victim will have personalized psychological responses to torture and personalized triggers, which their

³² See PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS: A HEALTH PROFESSIONAL’S GUIDE TO MEDICAL AND PSYCHOLOGICAL EVALUATIONS OF TORTURE, (2001).

³³ IRCT 2009, *supra* n. 3, citing I.A. Kira, *Torture Assessment and Treatment: The Wraparound Approach*, 8 TRAUMATOLOGY 61-90 (2002).

unconscious defense mechanisms will employ for self-protection. *See Istanbul Protocol*, § 236.

Qualified medical and psychological experts can assist adjudicative bodies in determining whether a torture victim's actions or intentions were unconsciously motivated or controlled by the psychological effects of their torture. These experts should be consulted when such matters have legal relevance.³⁴

Indeed, when reasonable grounds exist to suggest that a torture victims' actions were an involuntary and unconscious result of their torture – including when an expert psychological evaluation of the victim is offered to this effect – a court refusal to consider such evidence places it at risk of attributing to a torture victim actions or interpretations that are beyond the victim's control.

B. Courts and other adjudicative bodies regularly employ psychological experts in cases involving torture victims.

As the Special Rapporteur on Torture recently affirmed, “[s]pecialized health professionals can, through careful and thorough evaluation of physical and psychological sequelae, provide crucial medical and psychological findings and evidence that can be communicated to the judiciary and other bodies adjudicating

³⁴*See Interim report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 51, U.N. Doc. A/69/387 (Sept. 23, 2014) (*submitted by Juan Mendez*) (“prosecutors and judges are often unable to evaluate adequately forensic evidence because of its complexity or often substitute their own reasoning for that of the expert”).

civil, administrative and criminal matters.”³⁵ When taken in accordance with the Istanbul Protocol, forensic psychological evaluations “should be considered as reliable evidence.”³⁶

U.S. courts and administrative bodies routinely use expert witness testimony on the psychological impact of torture in cases involving torture victims. *See, e.g., Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007); *Almaghzar v. Gonzales*, 457 F.3d 915 (9th Cir. 2006). In fact, in both the immigration and criminal contexts, disputes regarding this type of expert testimony tend to focus not on admissibility, but rather on credibility determinations and/or relative weight accorded to testimony that has already been admitted. *See, e.g., Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006); *United States v. Yousef*, 327 F.3d 56, 126 (2d Cir. 2003); *Zeru v. Gonzales*, 503 F.3d 59, 72-73 (1st Cir. 2007).

Notably, the Eighth Circuit has held that, in immigration proceedings, exclusion of expert witness testimony on the physical and psychological effects of torture may amount to denial of a fair hearing in violation of the petitioner’s due process of law. *Tun*, 485 F.3d at 1016. The petitioner need only demonstrate that the outcome of the proceeding “may well have” been different if the expert witness had been permitted to testify. *Id.* at 1025-26. *See also, Morgan v. Mukasey*, 529

³⁵ *Id.* at ¶ 47 (“forensic evaluation of victims contributes to the assessment of acute and long –term medical and psychological care and rehabilitation they require”).

³⁶ *Id.* at ¶ 52.

F.3d 1202, 1211 (9th Cir. 2008) (holding that the Board of Immigration Appeals’ “brush-off” of psychological reports finding that Petitioner suffered from torture-related PTSD was an “error of law invalidating the decision of the BIA”).

Moreover, international and regional human rights bodies such as the United Nations Committee against Torture,³⁷ the Inter-American Court and Commission on Human Rights,³⁸ the European Court of Human Rights³⁹ and the African Commission on Human and Peoples’ Rights⁴⁰ ascribe an important role to medical, including, psychological evidence, in establishing one of the elements of torture, i.e. severe physical or mental pain or suffering.⁴¹ Such evidence is considered in a variety of contexts: as evidence to substantiate claims of torture; to identify appropriate measures of protection, particularly in cases involving sexual violence; and, more broadly, to afford victims of torture with a right to redress as enshrined

³⁷ See, e.g., *Bouabdallah Ltaief v Tunisia*, Commc’n No. 189/2001, U.N. Committee against Torture, ¶ 105 (Nov. 14, 2003); *Falcon Rios v Canada*, Commc’n No.133/1999, ¶¶ 8.4-8.5 (Nov. 23, 2004).

³⁸ See, e.g., *Case of the Miguel Castro-Castro Prison v Peru*, Inter-Am. Ct.H.R. (Merits, Reparations and Costs), ¶¶ 287-288; 293 (Nov. 25, 2006).

³⁹ See, e.g., *Akkoc v. Turkey*, Eur.Ct. H.R. App. No.22947/93-22948/93, ¶¶ 107, 116 (Oct. 10, 2000); *Affaire R.J.c.France*, Eur.Ct. H.R. App. No/ 10466/11, ¶ 42 (Dec. 19, 2013) (finding that a medical legal report submitted by a Sri Lankan asylum seeker to French authorities formed an important piece of evidence which needed to be taken into consideration by French immigration authorities).

⁴⁰ See, e.g., *Safia Ishaq Mohammed Issa (represented by REDRESS and the African Centre for Justice and Peace Studies) v Sudan*, Afr. C.H.R., Admissibility Decision, ¶ 67 (May 29, 2014).

⁴¹ See *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/69/387, ¶ 52 (Sept. 23, 2014).

in international law.⁴² Expert medical evidence is also used to explain potential difficulties in giving evidence, any inconsistencies or contradictions in statements made and a reluctance to divulge a full account of events.⁴³

International bodies have recognized that the physical, psychological and other related effects of torture constitute a significant obstacle to such victims in legal proceedings.⁴⁴ The Guidelines of the UN High Commissioner for Refugees recognize that the psychological impacts of torture can even impact disclosures by refugees to state authorities in third countries: “[a] person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority.”⁴⁵ Accordingly, treaty bodies have emphasized the importance of taking psychological evidence into consideration in relation to any statements made by torture survivors.

Notably, the International Association of Refugee Law Judges Guidelines on the Judicial Approach to the Evaluation of Expert Medical Evidence (‘Guidelines’) provide that “[A]ny medical report or psychiatric report deserves careful and

⁴² See UN Committee against Torture, General Comment No.3- Implementation of article 14 by States parties, U.N. Doc. CAT/C/GC/3, ¶¶ 13, 25, 35 (Nov. 19, 2012).

⁴³ See International Association of Refugee Law Judges Guidelines on the Judicial Approach to the Evaluation of Expert Medical Evidence, ¶ 3.1, June 2010 (hereinafter “Guidelines”).

⁴⁴ See U.N. Committee against Torture, General Comment No.3, *supra* n. 42, ¶ 38

⁴⁵ United Nations High Commissioner for Refugees (1992), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/Eng/REV.1 ¶ 1998 (Reedited Jan. 1992).

specific consideration, bearing in mind, particularly, that there may be psychological consequences from ill-treatment which may affect the evidence given by the applicant. Attention should be given to each and every aspect of medical reports.” The Guidelines therefore stipulate that “[m]edical evidence should form an integral part of any findings of credibility and should not be separated from other evidence.”⁴⁶

III. THE UNCONSCIOUS COPING MECHANISMS ADOPTED BY TORTURE SURVIVORS CAN NEGATE ELEMENTS OF BOTH SPECIFIC AND GENERAL INTENT CRIMES⁴⁷

A. Psychological evidence that would negate the general intent requirement of Defendant’s crime should not be barred.

It is well established that a court may not exclude evidence directly negating an element of the crime charged. *See, e.g., United States v. Smith-Baltiher*, 424 F.3d 913, 922 (9th Cir. 2005). Although the 1984 Insanity Defense Reform Act (IDRA) intended to preclude “the use of ‘non-insanity’ psychiatric evidence that points toward exoneration or mitigation of an offense because of a defendant’s supposed psychiatric compulsion or inability or failure to engage in normal reflection,” *United States v. Cameron*, 907 F.2d 1051, 1066 (11th Cir.1990) (internal citations omitted), the IDRA “does not preclude a defendant from offering

⁴⁶ Guidelines, *supra* n. 43, ¶¶ 3.3 and 6.1(a).

⁴⁷ *Amici* take no position on whether 18 U.S.C. § 1425(a) should be considered a specific intent or general intent crime.

evidence to negate a requisite state of mind” that is an element of the crime charged. *United States v. Schneider*, 111 F.3d 197, 201 (1st Cir.1997).

Some courts began to use the distinction between “general intent” and “specific intent” crimes in order to navigate the boundary between impermissible “non-insanity psychiatric evidence” and permissible “negation of *mens rea*” evidence.⁴⁸ According to the courts that have relied on the general/specific intent distinction to make determinations about the admissibility of psychological evidence, a defendant cannot use psychological evidence that she did not act with *purpose* as a defense against a general intent crime, which by definition does not require purpose; rather, this type of psychological evidence can be admitted only to negate the mental state element of a specific intent crime, which by definition *does* require purpose. *See, e.g., United States v. Gonyea*, 140 F.3d 649, 650 (6th Cir.1998); *United States v. Fazzini*, 871 F.2d 635, 641 (7th Cir.1989); *Cameron*, 907 F.2d at 1063 n. 20; *United States v. Twine*, 853 F.2d 676, 679 (9th Cir.1988).

Thus, upon closer examination, it becomes clear that the question with which these courts have grappled when considering the admissibility of psychological evidence is not whether the crime is specific or general intent; it is

⁴⁸ Broadly speaking, general intent crimes require the mental state of knowledge (awareness of the near-certainty of the result of one’s conduct), while specific intent crimes require the more culpable mental state of purpose (conscious desire for the result of one’s conduct). *United States v. Bailey*, 444 U.S. 394, 405 (1980).

whether the psychological evidence can negate an element of the crime.⁴⁹ *United States v. Marengi*, 893 F.Supp. 85, 90 (D.Me.1995) (“This Court concludes...that the IDRA does not preclude the admissibility of psychiatric evidence to directly negate *mens rea* and, additionally, predicts that, if the issue were squarely before the Court of Appeals for this circuit, the court would probably join the consensus of all of the other courts which have reached the issue and admitted such evidence”). *See also*, *United States v. Pohlot*, 827 F.2d 889, 905-06 (3d Cir. 1987) (“District courts should admit evidence of mental abnormality on the issue of *mens rea* only when, if believed, it would support a legally acceptable theory of lack of *mens rea*”); *United States v. Willis*, 187 F.3d 639 (6th Cir. 1999) (“the Defendant may present only expert psychiatric testimony that offers a legally acceptable theory of lack of *mens rea*”).

Courts have consistently underscored this point in two ways: first, by explaining that the reason psychological evidence would rarely negate the general intent element of a crime is because general intent only requires knowledge of the physical act of the offense, which is difficult to disprove which is difficult to disprove, *see, e.g.*, *United States v. Bueno*, 2006 WL 240060, at *4 (D. Mass. Jan. 5, 2006) (internal citations omitted) (“mental conditions or defects would rarely, if ever, negate a general intent requirement, given that general intent demands only

⁴⁹ Indeed, even a general intent statute requires a finding of acting with knowledge; a general intent crime must not be confused with a strict liability offense.

proof of knowledge with respect to the *actus reus* of the crime”); *Pohlot*, 827 F.2d at 897 n. 4 (“most states, however, limit psychiatric evidence to specific intent crimes on the theory that mental abnormality can virtually never disprove the *mens rea* required for general intent crimes so that psychiatric evidence would be misleading”); and second, by stating in no uncertain terms that if psychological evidence *is* probative as to the defendant’s knowledge of the *actus reus* of the crime, then that evidence would not be precluded. *United States v. Ramirez*, 495 F. Supp. 2d 92, 113 n. 25 (D. Me. 2007) (“To be clear, even if the crime is a general intent crime, psychological evidence may be relevant. Under the state of the law in this circuit, a defendant may present psychological evidence to counter the Government’s case-in-chief on a general intent crime, assuming the evidence is probative as to *actus reus* of the crime”). Notably, no court has said that a defendant cannot use psychological evidence to disprove the “knowledge” element of a general intent crime. Psychological evidence of Defendant’s lack of knowledge of the *actus reus* of her general intent crime is admissible.

Finally, although there is a rule prohibiting voluntary intoxication defenses to general intent crimes, courts have rejected these defenses “not because general intent crimes require no proof of *mens rea*, but because the relevant *mens rea* has been established by a common law presumption, i.e., a person who voluntarily becomes intoxicated is presumed to intend all the actions that follow.” *United*

States v. Williams, 892 F. 2d 296, 303 (3d Cir. 1989). The same common law presumption that applies to individuals who become voluntarily intoxicated cannot be considered to apply to victims of torture. As set forth in Section I, the very purpose of torture is to overwhelm an individual’s will. The resulting effects or coping mechanisms, such as avoidance or dissociation, often manifest themselves involuntarily and automatically – without the victim’s volition or even awareness.

B. The testimony of Defendant’s expert witness supports a legally acceptable theory of lack of *mens rea*.

Title 18 U.S.C. §1425(a) punishes anyone who, contrary to law, “*knowingly* procures...the naturalization of any person[.]” 18 U.S.C. § 1425(a) (emphasis added). The testimony of Defendant’s expert witness, Dr. Mary Fabri, if believed, can be found to support a legally acceptable theory of lack of *mens rea* by demonstrating that Defendant did not *knowingly* misrepresent whether she was arrested or convicted when filling out her citizenship application. During the evidentiary hearing, Dr. Fabri testified that Defendant *automatically* – not consciously, intentionally, or irresistibly – filters her memory as a result of her PTSD. When asked whether it is typical for someone with chronic PTSD to interpret a question in manner that “would cognitively filter recalling past trauma” – referring to Defendant’s interpretation of questions on her citizenship application – Dr. Fabri replied, “There’s a strong possibility that that would be a protective

way that narrowed focus would have them look at the question in a narrow way so that it would be interpreted, during my life in the US, not to include, my life back home where these terrible things happened to me.” By explaining the operation of a probable automatic cognitive filtration and consequent lack of knowledge, Dr. Fabri’s testimony, if believed, can be found to support a legally acceptable theory of lack of *mens rea*. Thus, this testimony should not be barred.

Whenever courts have excluded psychological evidence for general intent crimes, they have done so upon finding that the evidence does not negate the requisite *mens rea*. Oftentimes, rather than disprove the defendant’s knowledge of the actus reus, the evidence suggests that the defendant felt compelled to commit the crime (*See, e.g., Gonyea*, 140 F.3d at 650) and/or could not appreciate the wrongfulness of the act because of a mental condition. Unlike Defendant’s expert testimony, such evidence – precisely the kind that the IDRA sought to preclude – does not suggest the defendant’s lack of knowledge of the physical act of the crime; instead, it provides an affirmative defense – an argument that mental condition should excuse an otherwise culpable defendant.

The defendant in *Willis*, 187 F.3d 639 for example, faced a felon-in-possession charge and proffered expert testimony that he suffered from Paranoid Personality Disorder and armed himself not for the purpose of breaking the law but because he believed he needed a gun to protect himself. As the court said, “These

statements do not assert that the condition caused Defendant not to *know* that he was carrying a gun; in fact, they support the notion that the Defendant *did* know, but had no choice but to carry the gun.” *Id* at 7. Significantly, when the defendant presented a new theory on appeal, claiming that he did not even know that he possessed a gun, the court withheld judgment. *Id*. Thus, *Willis* leaves open the possibility that psychological testimony could be admissible for general intent crimes.

By contrast, the expert testimony proffered by the defendant in *Bueno*, 2006 WL 240060, was found by the court to bear on the defendant’s lack of *mens rea*. The defendant was charged with transporting illegal aliens and contended that evidence of his mental limitations should be admitted to show that he did not know that the passengers were illegally present in the United States because he could not make the necessary inferences that a normal person might have made under the circumstances. Rather than claim that he lacked control over his conduct, that his cognitive deficiencies excuse his conduct, or “that he lacked the *capacity* to form the requisite *mens rea*,” the defendant “claims that he simply did not have the *mens rea* because he did not draw the necessary inferences,” *id.* at *5, due to his lower-than-normal reasoning abilities. The court reasoned,

Whether Santos-Bueno actually knew the passengers were illegally present in the United States is a question that requires an examination of his subjective state of mind. The government’s case, at least in part, requires the

jury to conclude that defendant necessarily made certain factual inferences using his reasoning ability. Without any evidence to the contrary, a jury would likely assume that defendant has normal cognitive abilities and would therefore be able to draw reasonable inferences from a given set of facts. Dr. Gansler would testify in substance that defendant's cognitive abilities were in fact impaired, and that defendant would therefore, as a general matter, have more difficulty drawing reasonable inferences from his surroundings than would an average person. Evidence that his reasoning ability is impaired is thus relevant and is not offered to show an inability to control his impulses or to make reflective decisions. It therefore does not implicate the prohibitions of IDRA. *Id.* at *6.

Although Defendant's mental condition is obviously very different from Mr. Santos-Bueno's, the same reasoning can be applied to her case. Defendant is not asserting that she had an irresistible impulse to answer the questions on her citizenship application the way she did, nor does she claim that her PTSD excuses her conduct, nor does she claim that she lacks the capacity to knowingly procure her citizenship by misrepresentation.

Instead, Defendant claims that she simply did not *have* the requisite *mens rea* because of her PTSD. Expert testimony is relevant for the same reason that Mr. Santos-Bueno's was relevant: just as Mr. Santos-Bueno's expert testimony established that he did not know that the passengers he was transporting were illegally present in the U.S., Defendant's expert testimony, if believed, would support a legally acceptable theory of lack of *mens rea* – namely, that Defendant did not know she was misrepresenting herself on her citizenship application. Thus, this case can be easily distinguished from cases like *Willis* and *Gonyea* because the

evidence that Defendant seeks to admit could support a legally acceptable theory that negates the requisite *mens rea* for her alleged offense.

CONCLUSION

For the foregoing reasons, the Court should remand the case to the district court with instruction to admit testimony related to the psychological impacts of torture.

Respectfully submitted,

/s/ Katherine M. Gallagher

Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel: (212) 614-6455
Email: kgallagher@ccrjustice.org

Attorney for *Amici Curiae*
Torture Experts

On the brief: Ruhan Nagra, Stanford Law School '16

APPENDIX

Amicus curiae **International Rehabilitation Council for Torture Victims**

(IRCT) is the world's largest membership organization working in the field of health-based rehabilitation of torture victims. The IRCT is an independent non-profit and comprises of 144 rehabilitation centers in seventy-four countries, including sixteen rehabilitation centers in the United States. Every year, the IRCT's global network of rehabilitation centers treats approximately 100,000 torture survivors worldwide. The IRCT is a global leader in the field of torture rehabilitation. The IRCT's founders, including Dr. Inge Genefke, pioneered the field since the 1970s. The IRCT also publishes the TORTURE Journal, a peer-reviewed scientific journal, indexed in the U.S. National Library of Medicine (MEDLINE). TORTURE publishes original research on biomedical, psychological, and social aspects of torture. The IRCT conducts activities worldwide, including filing amicus briefs, to support torture victims' right to rehabilitation and justice. The IRCT enjoys consultative status with the United Nations Economic and Social Council (ECOSOC) and participatory status with the Council of Europe. The IRCT also is an originator of the Istanbul Protocol, an international standard-setting instrument for the investigation and documentation of torture. The United Nations adopted this Protocol in 1999, and most

international courts have promoted it, including the European Court of Human Rights and the Inter-American Court of Human Rights.

Amicus curiae **Bellevue/NYU Program for Survivors of Torture (PSOT)** provides comprehensive medical, mental health, social and legal services to victims of torture and other human rights abuses. Founded in 1995, PSOT has cared for thousands of men, women and children from over 90 countries, worldwide. PSOT is recognized internationally for its excellence in clinical evaluation and treatment, education and research. PSOT staff are leaders in the field of evaluating and documenting signs of torture/mistreatment, including in forensic/legal settings. PSOT's Director, Dr. Allen Keller has over 25 years of experience in evaluating individuals alleging torture. Dr. Keller and several of his colleagues have examined several individuals who were detained at Guantánamo and Abu Ghraib. Dr. Keller has testified in Federal Immigration Court, and Federal court in criminal cases. He has also served as an expert for prosecution regarding torture, including in Boise, Idaho.

Amicus curiae **Public Committee Against Torture in Israel (PCATI)** is a social change and human rights organization, helping victims of torture in the effort to obtain restitution and justice. PCATI visits prisoners and other victims of torture on a regular basis, conducting an average of 250 prison visits a year and reaching out to hundreds of freed prisoners and detainees. PCATI provides legal

assistance to victims of torture by Israeli security forces or victims of torture present in Israel, bringing their claims to court and engaging in national and international advocacy. Established in 1990, the organization has accumulated a wealth of practical knowledge and legal experience over the past three decades. Led by the IRCT, PCATI has introduced the use of the Istanbul Protocol in Israeli courts. It is currently the only organization in Israel to conduct assessments based on the Istanbul Protocol and is leading the institutionalization of these assessments within the Israeli health and legal systems.

Amicus curiae the **Redress Trust (REDRESS)** is a non-governmental international human rights organisation with a mandate to obtain justice for survivors of torture; to hold accountable those governments who defy internationally accepted human rights standards by perpetrating torture; and to develop the means of ensuring compliance with international standards and securing remedies for victims. REDRESS is comprised of a staff of lawyers, researchers and administrators, supported by a Legal Advisory Council consisting of professors and practitioners with expertise in international human rights law. REDRESS has substantial experience intervening in cases as a third party on matters of international importance including before the Court of Appeal, the House of Lords, the European Court of Human Rights, the International Criminal Court, and the Supreme Courts of the United States and Canada.

Amicus Curiae **World Organisation Against Torture** (OMCT) is the main coalition of non-governmental organizations fighting against torture, summary execution, enforced disappearance, and all other cruel, inhuman or degrading treatment. With 297 affiliated organizations in its SOS-Torture Network, OMCT is one of the most important networks of non-governmental organizations working for the protection and the promotion of human rights in the world. OMCT's International Secretariat provides personalized medical, legal and/or social assistance to hundreds of torture victims. In the framework of its activities, OMCT also submits individual cases and reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights. It also provides amicus curiae briefs before domestic and regional courts or bodies on questions of international human rights law. OMCT enjoys consultative status with ECOSOC (United Nations), the International Labour Organization, the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

The brief contains a total of 6670 words, exclusive of the Table of Contents, Table of Authorities, Appendix A, the Certificate of Compliance and the Certificate of Service. It has been prepared using Microsoft Word 2010. The typeface is 14pt Times New Roman.

/s/ Katherine M. Gallagher

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, I electronically filed the foregoing brief with the Clerk of the United State Court of Appeals for the Sixth Circuit using the ECF system, which will send notification of such filing to the representatives of all parties.

/s/ Katherine M. Gallagher