IN THE UNITED STATES MILITARY COMMISSION

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AMICUS CURIAE SUBMISSIONS ON BEHALF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES

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INTRODUCTION

1. This brief is submitted by Amanda June Gargus Chadwick, Esq., licensed to public practice of law in the state of Alabama before the highest court in the state (Bar ID 1413G29Z), on behalf of the Bar Human Rights Committee of England and Wales (BHRC). I am not party to any other Commission case in any capacity nor do I have an attorney-client relationship with any person whose case has been referred to a Military Commission or serves as counsel in habeas proceedings for any detainees. I certify, by submitting this brief that I in good faith as a licensed attorney believe the law is accurately stated. I have read and verified the accuracy of all points of law cited in the brief, and I am not aware of any contrary authority not cited in the brief or not substantially addressed by the contrary authority cited in the brief.

2. BHRC is the international human rights branch of the Bar of England and Wales. It is an independent body concerned with protecting the rights of advocates, judges and human rights defenders around the world. The Committee is concerned with defending the rule of law and internationally recognised legal standards relating to human rights and the right to a fair trial. The remit of the BHRC extends to all countries of the world, apart from its own jurisdiction of England and Wales. This reflects the Committee's need to maintain its role as an independent but legally qualified observer, critic and advisor, with internationally accepted rule of law principles at the heart of its remit.

3. It is understood that in considering the issue of personal jurisdiction in this case the Military Commission is invited by the prosecution to admit into evidence statements taken from the Defendant by investigators of the Federal Bureau of Intelligence in January 2007. It is understood that while the US Government insists that those statements were not obtained by torture or coercion, it is accepted that the Defendant had been subject to torture and inhuman and degrading treatment in the 3.5 years from April 2003 that he was detained incommunicado by the Central Intelligence Agency.

4. As such this brief seeks to assist the court with submissions relating to the international law relating to the admissibility of evidence obtained as a result of torture and the scope of the prohibition.

SUMMARY OF SUBMISSIONS

5. In summary it is respectfully submitted that:

(i) The prohibition of torture is recognised and enshrined in primary international and regional human rights instruments. It is absolute and non-derogable. This prohibition has achieved *jus cogens* status under customary international law, and imposes obligations *erga omnes* on each State. As a result, no State may recognise as lawful a situation arising from a violation of the prohibition of torture, and all States have a legal interest in the performance of the obligations arising from the prohibition.

(ii) The exclusionary rule encompasses the principle that evidence obtained as a result of torture is not admissible in a court of law. The exclusionary rule is an essential component of the prohibition of torture. International human rights instruments, and international and regional courts have developed rules enshrining this principle. State practice reflects both the general prohibition and the exclusionary rule, such that it may be considered a norm of customary international law.

(iii) The scope of the exclusionary rule may encompass both statements extracted directly through the use of torture, and subsequent statements given in lawful interrogation that confirm or replicate the statements made during torture.

PART I: THE PROHIBITON OF TORTURE

International and regional human rights law

6. The prohibition of torture is universally recognised and enshrined in primary international and regional human rights instruments:

(i) The United Nations Commission on Human Rights ('UNCHR') prepared the International Covenant on Civil and Political Rights 1966 ('ICCPR'). Article 7 of ICCPR states:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The ICCPR has been ratified by 154 states, including the United Kingdom and the United States of America.

(ii) The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1] ("Declaration against Torture") contains a guideline of measures that should be taken by States to ensure the prohibition of torture. Article 3 of the Declaration states:

"No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment".

(iii) The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT")[2] requires states to take active and "effective" measures to "prevent acts of torture".[3] 140 States are party to UNCAT, including the United Kingdom and the United States of America.

(iv) Article 3 of the European Convention on Human Rights ("ECHR") provides that:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

7. The *jus cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their

[1] General Assembly Resolution 3452 of 9 December 1975.
[2] General Assembly Resolution 39/46 of 10 December 1984
[3] Article 2(1).

apprehension and prosecution" (*Demjanjuk v Petrovsky* (1985) 603 F. Supp. 1468 F.2d 571).[4]

8. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v Furundzija* authoritatively expressed the link between the universality of the prohibition of torture, and its place in international law:

> "There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Peña-Irala*, 'the torturer has become, like the pirate and the slave trader before him, hostis humani generis, an enemy of all mankind'. This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination."[5]

9. The prohibition also holds a fundamental place in the common law. Lord Hoffman in *A and Others v The Secretary of State for the Home Department* stated that "the rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system":[6]

> "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured".[7]

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[4] R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147.
[5] [1998] ICTY 3. Para 147.
[6] [2006] 2 AC 221. Para 83.
[7] *Ibid.* Para 82.

The absolute and non-derogable nature of the prohibition of torture

10. The primary international instruments contain express mention of the absolute and non-derogable character of the prohibition against torture.[8] This has consistently been reinforced, and the absolute and non-derogable nature subsists in relation to the threat posed by global terrorism.

    (i) Article 2(2) UNCAT specifically provides that:

    "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

    (ii) Responding to the terrorist attacks of September 2001, the United Nations Special Rapporteur on Torture stated:

    "However frustrating may be the search for those behind the abominable acts of terrorism and for evidence that would bring them to justice, I am convinced that any temptation to resort to torture or similar ill-treatment or to send suspects to countries where they would face such treatment must be firmly resisted."[9]

11. The European Court of Human Rights ("ECtHR") has, on numerous occasions, reiterated the non-derogable nature of the protection against torture in relation to the threat posed by terrorism.[10]

    (i) "Article 3 (art. 3) enshrines one of the most fundamental values of democratic society…The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention …Article 3 (art. 3) makes no provision for exceptions and no

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[8] Article 4(2) ICCPR.

[9] Statement by the Special Rapporteur to the Third Committee of the General Assembly, delivered on 8 November 2001, Annex III, UN Doc. E/CN.4/2002/76, p. 14

[10] See *Ireland v UK* (1978) 2 EHRR 25, para. 163; *Selmouni v France* (1999) 29 EHRR 403, para. 95.

derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation."[11]

12. In addition, it is of significance that there is a substantial body of jurisprudence developed internationally and contained in both communications and concluding observations of the Committee Against Torture (CAT) and in the Human Rights Committee and the Inter-American Court of Human Rights which supports the proposition that functional immunity has no application at all in relation to allegations of torture. It is submitted that the exclusionary rule is *de minimis* in the context of this jurisprudence.

13. The Spanish Audiencia Nacional in Auto del Juzgado Central de Instruccion No.4 (2008) confirmed the criminal charges against high-ranking military commanders in office, including the incumbent Chief of Staff of the Rwandan Army without raising the question of functional immunity.

14. In *Ali Ali Reza v Grimpel* (International Law Reports vol 47 pp.275 – 277) a French court denied immunity to a foreign minister of state. In *Jane Doe et al (plaintiffs) v Xia Deren et al (defendants) [Nos C 02-0672 CW, C 02-0695 CW 349 F.Supp.2d 1258 pp.1285ff]* the United States Foreign Sovereign Immunity Act (FSIA) was considered in a case brought by Falun Gong practitioners against local government officials of the People's Republic of China. The District Court held:

> *"the mere fact that acts were conducted under color of law or authority, which may form the basis of state liability by attribution, is not sufficient to clothe the official with sovereign immunity."*

15. The Court considered that the legal question was "whether acts by an official which violate the official laws of his or her nation but which are authorised by covert unofficial policy of the state may be deemed to be within the official's scope of authority under the FSIA" and then dismissed the Defendants' claim to immunity

[11] *Chahal v United Kingdom* [1996] ECHR 54 At [79].

because the alleged human rights violations were "inconsistent with Chinese law" (ibid. pp.1287 – 1288)[12].

16. The District Court, Southern District of New York denied immunity to the defendant who was a Ghanaian security officer. In rejecting immunity claims, the District Court observed:

"Assasie- Gyimah does not claim that the acts of torture he is alleged to have committed fall within the scope of his authority. He does not argue that such acts are not prohibited by the laws of Ghana; nor could he….The Court finds that the alleged acts of torture committed by Assasie- Gyimah fall beyond the scope of his authority as the Deputy Chief of National Security of Ghana. Therefore, he is not shielded from Cabiri's claims by the sovereign immunity provided in the FISA" (Bawol Cabiri v Baffour Assasie-Gyimah 18 April 1996 921 F.Supp. 1189 p.1198)

The *jus cogens* and *erga omnes* status of the prohibition of torture

17. It is widely accepted in international governance, and regional and domestic jurisprudence, that the prohibition of the use of torture has an enhanced status as a *jus cogens*, or pre-emptory norm, of international law.[13] The fundamental and overriding nature of the prohibition also imposes obligations *erga omnes*. Thus, all States must recognise as unlawful any situation or consequence resulting from a breach of the prohibition. It is submitted that the use of evidence obtained through torture is one such unlawful consequence.

The duty of states in relation to torture

The *jus cogens* and *erga omnes* nature of the prohibition of torture places a duty on States to take action to prevent breaches of the prohibition.

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[12] See also Court of Appeals for the Ninth Circuit *Re Estate of Ferdinand Marcos. Maximo Hilao et al (class plaintiffs); Vincente Clemente et al (class plaintiffs); Jaime Piopongco et al (class plaintiffs). Plaintiffs-Appellees, v Estate of Ferdinand Marcos, defendant – appellant, 16 June 1994 (25 F.3d 1467 p.1472 International Law Reports vol 104 pp. 119 -133* – **Court held that acts of torture, execution and disappearances were not covered by authority enjoyed by President Marcos even while in office and that, therefore, immunity could not be applied.**

[13] Report of the Special Rapporteur on Torture (P Kooijmans), E/CN.4/1986/15, at para. 3; *Al-Adsani v UK* (2002) 34 EHRR 11; *Siderman de Blake v Argentina* 965 F. 2d 699 (22 May 1992), 717; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147 197-199.

18. In *Prosecutor v Furundzijia* [1998] ICTY 3 the International Criminal Tribunal for the Former Yugoslavia stated:

"Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate ……It would be senseless to argue on the one hand, that on account of the jus cogens value of the prohibition against torture treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State, say taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law."

19. Further, the scope of the preventative duty is set out in the United Nations Human Rights Council ("UN Human Rights Council") General Comment 20:

> "The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction."[14]

20. It is submitted that the principle of non-admissibility of evidence obtained by torture (known as the exclusionary rule) is a fundamental feature of this preventative duty. It is recognised as such in primary international and regional human rights instruments, and in international criminal law.

PART II: THE ADMISSIBILITY OF EVIDENCE ACQUIRED THROUGH THE USE OF TORTURE

21. The second sections of these submissions deals with the exclusionary rules that have developed regarding the admissibility of evidence obtained through torture.

[14] Concerning the prohibition of torture and cruel treatment or punishment, UN Doc. HRI/GEN/1/Rev.7, para. 12 (10 March 1992).

International and regional human rights instruments

22. The exclusionary rule is enshrined in Article 15 UNCAT:

> "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

23. The UN Human Rights Council General Comment Number 20 also reiterates the link between the prohibition of torture and the exclusionary rule:

> "It is important for the discouragement of violations under article 7[15] that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[16]

24. In the Statement from the UN Special Rapporteur on UNCAT, the link between the prohibition on torture and the duty of national governments to implement the exclusionary rule is made clear:

> "Governments should be aware that they cannot go on condemning the evil of torture on the international level while condoning it on the national level. The judiciary in each and every country should bear in mind that they have sworn to apply the law and to do justice and that it is within their competence, even when the law is not in conformity with international standards, to bring the law nearer to these standards through the interpretation process. The judiciary should be aware that there is no place for impartiality if basic human rights are violated because, by virtue of their oath, they can only choose the side of the downtrodden. It is within their competence to order the release of detainees who have been held under conditions which are in flagrant violation of the rules; it is within their competence to refuse evidence which is not freely given; it is within their power to make torture unrewarding and therefore unattractive and they should use that power."[17]

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[15] Article 7 ICCPR.
[16] *Ibid.*
[17] 49th session Koojimans, 1992. Para 591.

25. The role that the judiciary and legal profession play in enforcing the exclusionary rule and thus the prohibition of torture is further set out in The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1990:

> "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods". [18]

26. UN Human Rights Council Resolution 13/19 also addresses the 'role and responsibility of judges, prosecutors and lawyers' in relation to torture, and states that they 'play a critical role in safeguarding' the non-derogable right to freedom from torture.[19] The Human Rights Council:

> "Strongly urges States to ensure that no statement that is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, and calls upon States to consider extending that prohibition to statements made as a result of other cruel, inhuman or degrading treatment or punishment, and recognizes that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment."[20]

27. The ECtHR has stated that the exclusionary rule is essential for upholding Article 3 ECHR, and also Article 6 ECHR, that guarantees the right to a fair trial:

> "[T]he Court considers that the admission of torture evidence is manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only

[18] UN Doc. A/CONF.144/28/Rev.1. Para 16.
[19] UN Doc. A/HRC/Res/13/19.
[20] *Ibid.* Para 7.

immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial".[21]

International and regional courts

28. International criminal courts have developed exclusionary rules that reflect the position of international human rights law.[22]

29. The International Criminal Court ("ICC") was established by the Rome Statute, on 17 July 1998.

    (i) Article 55(1) of the Rome Statute provides that:

    "In respect of an investigation under this Statute, a person:
    (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
    (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment".

    (ii) The exclusionary rule is contained in Article 69(7) of the Rome Statute, which provides as follows:

    Evidence obtained by means of a violation of this Statute or internationally recognised human rights shall not be admissible if:
    (a) The violation casts substantial doubt on the reliability of the evidence; or
    (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

30. A further example is from the ICTY:

    (i) Rule 95 of the Rules of Procedure and Evidence provides that:

    "no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings".

[21] *Othman (Abu Qatada) v. The United Kingdom* [2012] ECHR 56, para. 267.
[22] See: Rule 95 of the Special Court for Sierra Leone Rules of Procedure and Evidence; Rule 162 of the Special Tribunal for Lebanon Rules of Procedure and Evidence; Rule 138 of the Kosovo Specialist Chambers Rules of Procedure and Evidence; Rule 21(3) of the Extraordinary Chambers in the Courts of Cambodia Internal Rules.

(ii) In considering the exclusionary rule, the ICTY Trial Chamber has observed that there was 'no doubt' that statements obtained from suspects which were not voluntary, or which seemed to be voluntary but were obtained by oppressive conduct, could not pass the test under Rule 95 and thus could not admitted into evidence.[23]

31. In consequence it is submitted that the exclusionary rule enshrined in international human rights law, has become a fundamental procedural norm in international criminal courts.

State practice

32. States have interpreted existing statutory and common law provisions in line with the intent of international human rights instruments such as Article 15 UNCAT.

(i) Under the common law of England and Wales, evidence obtained by means of torture is inadmissible in legal proceedings. This exclusionary rule is on a statutory footing in section 76(2) Police and Criminal Evidence Act 1984, in relation to confessions made by accused persons. In *A and others v. Secretary of State for the Home Department*, the House of Lords definitively restated the common law position, and held that the common law exclusionary rule is mirrored in Articles 3 and 6 ECHR, and section 15 UNCAT.[24]

(ii) In Germany, Article 15 UNCAT has legal effect,[25] and section 136(a) of the German Procedure Code specifically addresses the issue of coerced confessions and states that "statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use."

(iii) In France, Article 15 UNCAT also has legal effect.[26]

(iv) The Canadian Charter of Rights and Freedoms of 1982 effectively embodies Article 15 UNCAT, and provides in section 24(2) that:

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[23] Prosecutor v Mucić and others, IT-96- 21, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997. Para 41.
[24] *Ibid*. Para 13.
[25] *El Motassadeq*, decision of the Higher Regional Court of Hamburg, 14 June 2005, para 2.
[26] *French Republic v Haramboure*, Cour de Cassation, Chambre Criminelle, 24 January 1995, No. de pourvoi 94-81254

> "Where […] a court concludes the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

PART III SCOPE OF THE EXCLUSIONARY RULE

33. Article 15 UNCAT prohibits the admission of, "any statement which is established to have been made as a result of torture". Whether a given statement has been made as a result of torture is a question of fact to be considered on the facts of a given case. However, it is submitted that when construed in accordance with object and purpose of the prohibition, it should be interpreted as encompassing subsequent ("clean") statements made, if such statements merely confirm or replicate the statements obtained during torture.

    (i) In the 2014 Report of the Special Rapporteur, the scope of evidence obtained as the result of torture is given an expansive definition. The report states that:

    > "The exclusionary rule extends not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means, but which originated in an act of torture."[27]

34. The ECtHR has ruled that statements obtained by the use of lawful interrogation, that replicate or confirm those directly obtained through the use of torture, may be viewed in turn as result of torture, and thus fall within the exclusionary rule.

    (ii) The ECtHR in *Harutyunyan v Armenia* held that:

    > "in the Court's opinion, where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible for this ill-treatment should not automatically lead to the conclusion that such confession

[27] Report of the Special Rapporteur on Torture (J. E. Mendez), A/HRC/25/60 (2014), at para. 29.

or later statements were not made as a consequence of the ill-treatment and the fear that a person may experience thereafter."[28]

The ECtHR considered various factors, including the witnesses' belief that they would be subjected to further torture, and actual threats of further torture, concluding that:

"the credibility of the statements made by them during that period [of lawful interrogation] should have been seriously questioned, and these statements should certainly not have been relied upon to justify the credibility of those made under torture."[29]

(iii) This proposition has been followed in the Inter-American Court of Human Rights in *Cabrera García and Montiel Flores v. México*.[30] The Court reiterated that:

"a subsequent confession may be the consequence of the mistreatment suffered by the person and, more specifically, because of the fear that remains after this type of experience".[31]

CONCLUSION

35. International human rights law holds the prohibition of torture as a fundamental pre-emptory norm. From this absolute and non-derogable prohibition stems the obligation on States to take active measures to prevent and discourage torture.

36. The exclusionary rule regarding the non-admissibility of evidence obtained as a result of torture is an essential corollary of the prohibition of torture and the preventative duty on States. The exclusionary rule has existed in the common law since well before the emergence of international human rights instruments, and those domestic provisions have been held to enshrine the principle of Article 15 UNCAT.

37. The scope of the exclusionary rule must be considered with its object and purpose in mind. As reflected in the judgments of the European Court of Human Rights and the

[28] [2007] ECHR 541. Para 65.
[29] *Ibid.* Para 65.
[30] Series C, No. 220, judgment of 26 November 2010.
[31] *Ibid.* Para. 167.

Inter-American Court of Human Rights it may encompass subsequent statements of confessions, where they follow or replicate statements made as a direct result of torture. To find otherwise would seriously undermine the exclusionary principle which is central to the states obligation to prevent and prohibit torture.

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As the submitter, I certify, by submitting the brief, that in good faith as a licensed attorney, believe the law is accurately stated. I have read and verified the accuracy of all points of law cited in the brief, and am not aware of any contrary authority not cited in the brief or not substantially addressed by the contrary authority cited in the brief.

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