UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	)	Misc. No. 08-442 (TFH)
JALAL SALIM BIN AMER, Petitioner,	)	
v.	)	Civil No. 04-CV-1194 (HHK)
GEORGE W. BUSH, et al., Respondents.	)	

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE AMENDED FACTUAL RETURN

I. INTRODUCTION

Petitioner has opposed Respondents' Motion for Leave to File Amended Factual Return,[1] which was filed only eleven weeks after the Supreme Court's landmark decision in Boumediene was issued. Petitioner has argued that the motion should be denied because of undue delay, undue prejudice, futility, and other miscellaneous reasons. First, there has been no undue delay because the legal landscape that informed the calculus for the type of evidence to be submitted in

[1] In his Notice of Filing, Petitioner stated that on October 6, 2008 counsel had submitted to the Court Security Officer (CSO) the opposition to the motion to amend. The date stamp on the classified opposition filed with the CSO indicates it was filed on October 7, 2008. Using the date indicated on the copy obtained from the CSO, this Reply is due on October 20, 2008 according to the local district court rules. L. Civ. R. 7(d).

defense of a wartime habeas case changed after the Supreme Court's recent landmark Boumediene decision was issued. Second, Petitioner has failed to articulate any specific prejudice the detainee has or will suffer if the amendment is granted. Third, Petitioner has failed to carry his heavy burden of demonstrating that the amendment would be futile as a matter of law. Finally, Petitioner's miscellaneous arguments either go to the merits of the case or do not otherwise warrant denial. Before addressing these arguments seriatim, we turn first to the applicable standard for granting a motion to amend.

II. STANDARD FOR AMENDING PLEADINGS IN CONSTITUTIONAL HABEAS

Petitioner argues that Respondents have failed to satisfy the standard for amending pleadings set forth in Rule 15 of the Federal Rules of Civil Procedure. Not all of the Federal Rules of Civil Procedure necessarily apply in statutory habeas cases. See Fed. R. Civ. P. 81(a)(4) (federal rules may apply under certain circumstances); Fed. R. Hab. P. 11 (federal rules may be applicable when not inconsistent with statutory provisions or habeas rules); Rumsfeld v. Padilla, 542 U.S. 426, 452 (2004) (Kennedy, J., concurring) ("Although [statutory] habeas actions are civil cases, they are not automatically subject to all of the Federal Rules of Civil Procedure."). Moreover, this is constitutional habeas, not statutory habeas, and the Supreme Court explicitly "[did] not hold" that constitutional habeas proceedings for wartime status detentions must duplicate proceedings under modern statutory habeas practice. Boumediene v. Bush, 128 S. Ct. 2229, 2267, 2274 (2008); id. at 2278 (Souter, J., concurring) ("[L]egislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). Nevertheless, the Court need not decide whether Rule 15 of the Federal Rules of Civil Procedure applies to constitutional habeas because

Respondents have satisfied even the liberal amendment policy of Rule 15 advocated by Petitioner.

Rule 15(a) instructs courts to "freely give leave when justice so requires" that an amendment be made to a pleading. Fed. Civ. P. 15(a); Kreiger v. United States Dep't of Justice, 529 F. Supp.2d. 29, 39 (D.D.C. 2008). Although the grant or denial of leave to amend is committed to the sound discretion of the trial court, it is an abuse of discretion to deny leave to amend unless there is sufficient reason such as undue delay, undue prejudice, or futility of amendment. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996); Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996). The burden is on Petitioner to establish sufficient reasons for denial. City of Moundridge v. Exxon Mobil Corp., 250 F.R.D. 1, 6 (D.D.C. 2008); Dove v. WMATA, 221 F.R.D. 246, 247 (D.D.C. 2004). Petitioner has failed to carrying this heavy burden.

III. DELAY FROM THE FILING OF THE ORIGINAL RETURN UNTIL THE MOTION TO AMEND DOES NOT WARRANT DENIAL OF MOTION

Petitioner argues that the motion to amend should be denied because Respondents have failed to explain why the delay in providing the evidence contained in the amended return, filed on August 29, 2008, was not contained in the original return on October 13, 2004. (Pet. Opp. at 4-12). Respondents have valid reasons for not providing this information earlier. When Respondents filed their return four years ago, the Supreme Court had strongly suggested that a rudimentary military process like that afforded under the Geneva Convention would be constitutionally sufficient, Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004), and that existing habeas precedents also strongly suggested that habeas review would be limited at most to legal

challenges on a closed record. See, e.g., *In re* Yamashita, 327 U.S. 1, 8 (1946); *Ex Parte* Quirin, 317 U.S. 1, 25 (1942). Given this legal background and the concomitant national security and other calculi involving the type of evidence necessary for such proceedings, Respondents relied upon the record from the Department of Defense Combatant Status Review Tribunal (CSRT) process as a factual return in this and other Guantanamo habeas cases.

Then, more than three and one-half years later, the Supreme Court issued its landmark decision in Boumediene v. Bush, 128 S. Ct. 2229 (2008) and the calculus changed. The Supreme Court made clear that the CRST did not adequately substitute for habeas review. This change in the legal landscape necessitated reconsideration of the type and quantum of evidence appropriate for consideration in defending a wartime habeas case. Respondents presented their revised evidentiary presentation to the Court, along with a motion to amend, only eleven weeks after the Boumediene decision was issued. Given the dangers of erroneous release of enemy combatants during a time of war and the Supreme Court's related admonition that "a habeas corpus court [should not] disregard the dangers the detention in these cases was intended to prevent," Boumediene, 128 S. Ct. at 2276, amendment of the factual return in this case should be allowed.[2]

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[2] Petitioner makes two other minor arguments for denial based on delay. First, Petitioner argues that denial is appropriate because it is unlikely that this will be Respondents last attempt to offer additional evidence. (Pet. Opp. at 8-9). But it would be improper to deny this motion to amend simply because another motion may (or may not) be forthcoming in the future when each motion must be adjudged on its own merits. Cf. Harris v. Secretary, U.S. Dep't of Veteran Affairs, 126 F.3d 339, 344 (D.C. Cir. 1997) (noting that Rule 15(a) instructs district courts to "determine the propriety of amendment on a case by case basis."). Second, Petitioner complains (in a footnote) that Respondents have taken, what he characterizes as, "significant redactions" on four documents. (Pet. Opp. at 7 n.6). The national security explanation for the redactions on three of those four documents is set forth in an affidavit by a qualified individual from the redacting agency. In any event, questions concerning the issue of redactions are appropriate, if

In any event, with respect to any delay in filing this motion to amend, "delay without the requisite prejudice is ordinarily insufficient to justify denial of leave to amend." Dove v. WMATA, 221 F.R.D. 246, 249 (D.D.C. 2004); see also Atchinson v. District of Columbia, 73 F.3d 418, 426 (D.C. Cir. 1996) ("Consideration of whether delay is undue, however, should generally take into account the . . . possibility of any resulting prejudice."); Triad at Jeffersonville I, LLC v. Leavitt, 563 F. Supp.2d 1, 11 (D.D.C. 2008) (stating that in most cases delay alone will not result in a denial of the motion to amend and that the amendment will be allowed if there is no prejudice to the non-movant).

As we will demonstrate in the next section, Petitioner has failed to demonstrate any prejudice.

IV. PETITIONER HAS NOT, AND WILL NOT, SUFFER UNDUE PREJUDICE

Petitioner argues that he will suffer undue prejudice if the amendment is allowed. First, he argues that, had the amendment been made earlier, he could have been investigating the additional facts asserted in the amended return. (Pet. Opp. at 7). Despite the fact that he has evidently carefully combed through the return, Petitioner's counsel does not specify – and he has the burden – what additional investigation he would have to do that he has not already done. Moreover, "[i]nconvenience or additional cost . . . is not necessarily undue prejudice," Dove v. WMATA, 221 F.R.D. 246, 248 (D.D.C. 2004), and petitioners will, in any event, have the opportunity to marshal their case and present evidence in response to the amended return such that no prejudice warranting denial of the motion to amend exists.

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at all, in merits-related proceedings and do not warrant rejection of Respondents' motion to amend.

Second, Petitioner claims that "it is likely that some exculpatory evidence Petitioner's counsel would have been able to collect in 2004 . . . will be unavailable today." (Pet. Opp. at 7). This argument is nebulous. Petitioner fails to identify a single document or witness that has been – or is likely to have been – lost. This is critical because "[u]ndue prejudice is not mere harm to the non-movant but a denial of the opportunity to present facts or evidence which would have been offered had the amendment been timely." City of Moundridge v. Exxon Mobil Corp., 250 F.R.D. 1, 6 (D.D.C. 2008); Dove, 221 F.R.D. at 248. Consequently, the amendment should be allowed and Petitioner can address in the Traverse any additional facts asserted in the amended return.

V. AMENDMENT OF RETURN IS NOT FUTILE

Petitioner argues that the motion to amend should be denied because the proposed amendment would be futile. (Pet. Opp. at 17-21). A proposed amendment may be considered futile only if it is so legally deficient that it would not survive a motion to dismiss. National Wrestling Coaches Ass'n v. Department of Educ., 366 F.3d 930, 945 (D.C. Cir. 2004); Krieger v. United States Dep't of Justice, 529 F. Supp.2d 29, 40 (D.D.C. 2008); see also Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980) ("Unless a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations, conjecture about the merits of the litigation should not enter into the decision whether to allow amendment."); Gallegos v. The Brandeis Sch., 189 F.R.D. 256, 259 (E.D.N.Y. 1999) ("A proposed claim may be labeled futile only where it is clearly frivolous or legally insufficient on its face. . . . [E]ven where the possibility of relief is remote, amendment must be permitted because it is the possibility of [success], not its likelihood, that guides the court's analysis."). Any such motion

to dismiss would be granted only, when taking all of the factual allegations as true, Respondents have failed, as a matter of law, to establish petitioner was an enemy combatant. Cf. Fed. R. Civ. P. 12(b)(6); Erickson v. Pardus, __ U.S. __, 127 S. Ct. 2197, 2200 (2007).

Petitioner made no attempt to prove, as a matter of law, that Petitioner is not an enemy combatant. Instead, Petitioner argues that the proposed amendment is futile because the return is "filled with generic statements that provide no material basis to justify Petitioner's detention," the purpose of which is to provide "physical bulk" to the return. (Pet. Opp. at 17). Petitioner expends a great deal of ink listing out all the documents (most with an explanatory parenthetical) that either do not refer specifically to Petitioner or that refer to him but, in Petitioner's opinion, are "non-substantive." (Pet. Opp. at 17-21). These documents were included in the return because they explained events, places, and people related to Petitioner's activities that form the basis of his detention as an enemy combatant. If Petitioner disagrees with Respondents regarding the quality of the evidence presented, the place to raise these issues is in the Traverse, not in an opposition to a motion to amend.

VI. PETITIONER'S MISCELLANEOUS ARGUMENTS DO NOT WARRANT DENIAL OF THE MOTION TO AMEND

Petitioner has made other miscellaneous arguments as bases for denying the motion to amend. First, Petitioner argued that the amendment should be denied because certain types of information in the return were obtained inappropriately and should be excluded. (Pet. Opp. at 12-17). Although Respondents vigorously oppose both the factual and legal arguments Petitioner has made, arguments regarding the veracity and utility of information relied upon in the return should be reserved for the merits proceedings.

Second, Petitioner accuses Respondents of purging all exculpatory information from the

record, citing as proof that one intelligence analyst's assessment was included in the 2004 return and was not included in the amended return. (Pet. Opp. at 21-22). This argument is without merit. Respondents have sought to *amend* their return, not to remove or expunge information from the Court record. Petitioner was able to cite to the document at issue in his opposition and will surely do so in his Traverse also. Moreover, without a constitutional mandate to do so, Respondents have included in the return information the petitioner will, and the Court may, consider potentially "exculpatory." Some documents – such as those Petitioner complains about being in the return even though they contain no statements tending to demonstrate Petitioner's status as an enemy combatant – were included precisely because they contained information that may be considered exculpatory. There is no merit to Petitioner's accusation.

Third, Petitioner complains that he is being kept at Guantanamo Bay simply because he is from Yemen and that country, according to Petitioner, is not a party to any political agreement that will allow his transfer or release to his home country. (Pet. Opp. at 2). This is a fundamental challenge to the legality of his detention and is best addressed in the context of the merits of this action.

Finally, Petitioner complains that he has not been afforded due process – notice and an opportunity to be heard – because Respondents have not provided him with an unclassified version of the return. (Pet. Opp. at 22-23). Respondents recognize the need to produce an unclassified version of this return as expeditiously as possible. Nevertheless, as the Supreme Court recognized in Boumediene, "[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ." Boumediene v. Bush, 128 S.Ct. 2229, 2276 (2008). This is one of those

occasions when accommodation is appropriate. Respondents have filed (as of October 20, 2008) 73 amended or original factual returns before the various judges of this Court. Respondents continue to expend tremendous resources producing these returns on a rolling basis. (Resp. Motion for Partial and Temp. Relief from the Court's July 11, 2008 Scheduling Order, dkt. No. 317). While Respondents are working to develop a process whereby unclassified versions of newly filed factual returns can also be produced, the document review and redaction resources required for production of such unclassified versions are the same review and redaction resources required for production of the more than fifty new factual returns Respondents are obligated to produce each month. Whatever the answer to the difficult question of how to allocate scarce resources to maintain national security and, at the same time, expeditiously effectuate the Boumediene mandate, denial of the motion to amend is most surely not the appropriate resolution.

VII. CONCLUSION

For the reasons set forth above and in Respondents' motion, the Motion for Leave to File Amended Factual Return should be granted.

Dated: October 20, 2008

Respectfully submitted,

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