

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 04-60001-CR-COOKE/BROWN(s)(s)(s)(s)(s)

UNITED STATES OF AMERICA,

vs.

JOSE PADILLA,

Defendant,

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**REPLY TO THE GOVERNMENT'S RESPONSE TO THE
MOTION TO DISMISS FOR PRE-INDICTMENT DELAY**

Mr. Jose Padilla, through undersigned counsel, replies to the government's response to his motion to dismiss the indictment based on pre-indictment delay and in support states:

Introduction

The government's response to Mr. Padilla's motion to dismiss the indictment based on pre-indictment delay fails to grasp the ordinary meaning of prejudice, and creates an artificial distinction concerning the prejudice required under the Fifth and Sixth Amendments. The government's motion also ignores the actual specific allegations of prejudice in Mr. Padilla's motion. Finally, the

government completely ignores Mr. Padilla's arguments regarding the tactical advantage that was deliberately gained through the government's delay in bringing an indictment against Mr. Padilla.

Argument

A. Mr. Padilla Was Prejudiced by Pre-indictment Delay

It is well settled that a defendant must demonstrate prejudice owing to pre-indictment delay in order to prevail on a motion to dismiss. *See United States v. Lovasco*, 431 U.S. 783, 790 (1977). One manner in which Mr. Padilla has established prejudice is through the three years and eight months he was incarcerated prior to his indictment in this matter. The government refuses to acknowledge that Mr. Padilla was prejudiced by his onerous detention as an enemy combatant incident to the instant indictment. In its refusal to give prejudice its ordinary meaning the government finds refuge in the fact that other pre-indictment delay cases do not present prejudice in the form of pre-indictment detention, but instead are limited to prejudice of the sort that impairs one's defense at trial. The reason for the lack of precedent in this area is because the manner in which the government has treated Mr. Padilla is unprecedented.

Pre-indictment delay cases, as a rule, do not involve lengthy periods of pre-indictment incarceration because the Speedy Trial Act, 18 U.S.C. § 3161, mandates

that an indictment or information must be filed within thirty days of a defendant's arrest. As such, all other claimants of pre-indictment delay have been either at liberty or incarcerated for unrelated charges. The government's unique treatment of Mr. Padilla has put him in the unique situation where he was in federal custody for a lengthy period of time without having charges brought against him. As such, he has suffered a prejudice never endured by another defendant in the history of the United States. The fact that Mr. Padilla has been singled out for worse treatment than any other defendant before him should not deprive him of the opportunity to claim prejudice that is readily apparent.

Mr. Padilla has also claimed that he has been prejudiced regarding his ability to mount a defense. Apart from the ordinary loss of witnesses, evidence and the general dimming of memories that is attendant to the lengthy delay present here, the nature of Mr. Padilla's detention has substantially impaired his own ability to assist in his defense. The extended torture visited upon Mr. Padilla has left him damaged, both mentally and physically. Worse still, the government continues to exacerbate the damage done to Mr. Padilla by threatening him with being re-designated as an enemy combatant regardless of the outcome of the instant matter. The government's treatment of Mr. Padilla has robbed him of his personhood because he has been repeatedly shown that the government has complete and

unfettered control over his life. The adverse consequences of Mr. Padilla's torture at the hands of the government have prejudiced him severely.

B. The Government's Delay Gained it Many Tactical Advantages

The government's response blithely ignores the manifold advantages it has gained from the delay in indicting Mr. Padilla. Those advantages are obvious and undeniable. Ironically, the government flaunts some of the tactical advantages it has gained in its very response to Mr. Padilla's motion.

First, by indefinitely detaining Mr. Padilla the government gained the greatest advantage of all: it incapacitated Mr. Padilla without him being able to challenge the allegations against him and without the government having to expose itself to the risk and expense of a public adversary process. Second, the government's torture of Mr. Padilla has, as it well knew, damaged Mr. Padilla and significantly impaired his ability to mount a defense. The interrogation methods inflicted on Mr. Padilla were specifically designed to break him down and damage his psyche, which clearly has impaired Mr. Padilla's ability to defend himself.

Lastly, the government's delay in bringing an indictment in this case permitted it to coerce statements from Mr. Padilla pertinent to the instant matter. These forced interrogations were conducted in flagrant violation of Mr. Padilla's Fifth Amendment right to remain silent and his Sixth Amendment right to counsel.

Nevertheless, the government's response indicates its intention to use those coerced statements to impeach Mr. Padilla or in rebuttal to any defense Mr. Padilla may present. Additionally, even if the government does not directly use any coerced statements made by Mr. Padilla it has utilized those statements to further its investigation and acquire more evidence.

Conclusion

The delay in bringing an indictment against Mr. Padilla has prejudiced him through the onerous detention he endured for three years and eight months, and through the significant impairment of his defense. In delaying his indictment the government has gained numerous, tangible tactical benefits. Mr. Padilla respectfully requests that the indictment against him be dismissed for pre-indictment delay and requests a hearing on this motion.

Respectfully submitted,

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By: *s/ Orlando do Campo*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Orlando do Campo
Orlando do Campo