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,
_____/

REPLY TO THE GOVERNMENT'S RESPONSE TO THE MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATIONS OF SIXTH AMENDMENT RIGHTS

Mr. Jose Padilla, through undersigned counsel, replies to the government's response to his motion to dismiss the indictment based on speedy trial violations of his Sixth Amendment rights and in support states:

Introduction

The government's response to Mr. Padilla's motion to dismiss the indictment based on speedy trial violations of his Sixth Amendment rights is premised on the assertion that his right to a speedy trial did not attach until he was indicted on November 17, 2005. The government's assertion is based on the elevation of form over substance, unsupported by the cases it cites, and is not countenanced by the Constitution. Since Mr. Padilla's right to a speedy trial attached on May 8, 2002, the delay in bringing him to trial is presumptively prejudicial and the indictment against him should be dismissed.

Argument

The government urges the Court to hold that Mr. Padilla's right to a speedy trial under the Sixth Amendment did not attach until the grand jury indicted him on November 17, 2005 because he was not, until then, "accused within the meaning of the Sixth Amendment speedy trial right." Govt. Response (hereinafter "GR") at 5. The Sixth Amendment is not so hypertechnical in its protection of fundamental rights, however, as to require a formal complaint or indictment for an individual's right to a speedy trial to commence. The government nonetheless clings to its argument because, if the Court acknowledges that Mr. Padilla's speedy trial rights vested upon his detention as an enemy combatant in 2002, it must conclude that the delay in indicting him was presumptively prejudicial, and the indictment must be dismissed.

Mr. Padilla concedes that "the [speedy trial] protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *United States v. Marion*, 404 U.S. 307, 313 (1971) (quoting U.S. Const., amend. VI). However, the *Marion* court did not intend to limit the notion of being "accused" only to those situations where a complaint or indictment had been filed. Instead, the Court defined "accused" as being "arrested, charged or otherwise subject to formal restraint," stating that "it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provisions of the Sixth Amendment." *Id*. at 320. The *Marion* Court concluded that, while it refused to extend the Sixth Amendment to the period prior to arrest or actual restraint upon a defendant, "[i]nvocation of the speedy trial provision … need not await indictment, information, or other formal charge." *Id*. at 321 & n. 12 (citing ABA Standards Relating to Speedy Trial, defining the moment which

invoked the speedy trial right as commencing on "the date the charge is filed, *except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode*, then the time for trial should commence running from the date he was held to answer.") (emphasis supplied).

The government's suggestion that Mr. Padilla's detention was wholly unrelated to the instant charges is unsupportable. The indictment alleges that Kifah Wael Jayyousi, Adham Amin Hassoun, and Kassem Daher ran a cell whose purpose was to raise funds for violent jihad and recruit mujahideen fighters. DE 141 at ¶¶ 7-9. The indictment also alleges that Mohamed Hesham Youssef and Mr. Padilla were recruited as mujahideen fighters and traveled abroad for the purpose of engaging in violent jihad. *Id*. at ¶¶ 10-11. During that travel abroad, the indictment alleges that Mr. Padilla completed a mujahideen data form for the purposes of receiving training in violent jihad. *Id*. at ¶ 83.

The government alleges that during this training, Mr. Padilla received instruction regarding the construction of a radiological device and the use of natural gas to blow up apartment buildings. Those alleged activities were the stated basis for his detention as an enemy combatant. In a press conference held by then-Deputy Attorney General James Comey, available at http://www.usdoj.gov/dag/speech/2004/dag6104.htm, the government took the opportunity to

> tell the full story of Jose Padilla. It will allow the American people to understand the threat he posed and also understand that the president's decision was and continues to be essential to the protection of the American people.
>
> It will also serve to underscore the danger that we still face from al Qaeda, and why that terrorist organization so badly wants operatives who can move freely into and out of the United States.

Id.

In justifying Mr. Padilla's detention as an enemy combatant, Mr. Comey alleged a series of facts that are essentially identical to the allegations in the Mr. Padilla's indictment. Mr. Comey alleged that Mr. Padilla confessed that while performing a religious pilgrimage in Saudi Arabia, he was recruited to attend an al Qaeda training camp and that he traveled in May of 2000 to Yemen, where the recruiter introduced him to a sponsor who arranged for his training in Afghanistan by al Qaeda. Mr. Comey also alleged that Mr. Padilla admitted to completing a mujahideen data form in order to receive training at an al Qaeda camp, also claiming that the FBI found Mr. Padilla's application in a binder that contained 100 other such applications, typewritten, each with the title at the top, "Mujahideen Identification Form/New Applicant Form." *Id*.

Mr. Comey went into great detail regarding the mujahideen data form allegedly completed by Mr. Padilla. Mr. Comey alleged that Mr. Padilla's application was dated July 24, 2000, and that Mr. Padilla filled out the application using one of his aliases, "Abu Abdullah Al-Muhajir." Mr. Comey also asserted that, despite the use of an alias, the application was attributable to Mr. Padilla since it listed his date of birth of October 18, 1970, and had other information consistent with Mr. Padilla, including that the applicant was: an American citizen; spoke Spanish and English and was proficient at Arabic; and that he had traveled throughout Afghanistan, Yemen, Saudi Arabia and Egypt. *Id*.

Mr. Comey concluded the press conference by commenting on substantial evidence that the government will be seeking to introduce in Mr. Padilla's trial. Mr. Comey alleged that Khalid Sheikh Mohammed had given Mr. Padilla $5,000.00 and that, additionally, Ammar al-Baluchi, described as Mr. Mohammed's right-hand man, gave Mr. Padilla another $10,000.00 in cash. Mr. al-Baluchi supposedly gave Mr. Padilla travel documents, a cell phone, and an e-mail address to be used to notify Mr. al-Baluchi when Mr. Padilla reached the United States. Mr.

Comey concluded that when Mr. Padilla arrived in Chicago on May 8, 2002, he was carrying the cash and all the other items given to him by his al Qaeda handlers. *Id*. Both the existence and the admissibility of these items have been, and will continue to be, at issue in Mr. Padilla's trial.

There can be no dispute that Mr. Padilla's detention as an enemy combatant and his prosecution in the instant matter are based on the same alleged conduct and are part of the same alleged criminal episode. The government's theory in the instant case is that Mr. Padilla was recruited for the purposes of committing violent jihad and traveled abroad to attend a training camp. It is these allegations of training purportedly received by Mr. Padilla at that camp that formed the basis for his detention as an enemy combatant. The charges in the instant indictment, as alleged by the government, are based upon the same facts relied upon in the government's decision to have him declared an enemy combatant. Indeed, in the event that Mr. Padilla is convicted of any count, the government will undoubtedly argue that his sentence should be enhanced for his alleged role in setting a radiological dispersal device pursuant to the relevant conduct provision of the United States Sentencing Guidelines. *See* U.S.S.G. § 1B1.3.

It is undeniable that Mr. Padilla was "accused" for the purposes of the Sixth Amendment's speedy trial rights from at least the time of his designation as an enemy combatant on June 9, 2002. The cases cited in the government's response do not alter that conclusion and are readily distinguishable from the instant matter. The government relies on *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976), in arguing that Mr. Padilla was not "accused" for speedy trial purposes until he was indicted in the instant matter. However, the facts in *Duke* bear no resemblance to Mr. Padilla's. In *Duke*, the defendant was serving a prison sentence when he was found in possession of marijuana. *Id*. at 387. He was placed in administrative segregation for his offense and ten months later he was indicted for the possession of marijuana. *Id*. at 388. Obviously, the court held that his placement in administrative segregation was not an "accusal"

for the purposes of speedy trial analysis since the defendant was already incarcerated on the underlying offense. *Id*. at 390. Another case relied upon by the government, *United States v. Mills*, 704 F.2d 1553 (11th Cir. 1983), involve facts essentially identical to *Duke*, wherein a prisoner made the unavailing claim that being placed in segregation triggered his speedy trial rights. *Mills*, 704 F.2d at 1556-57. The government also relies on *United States v. Sprouts*, 282 F.3d 1037 (8th Cir. 2002), wherein the defendant made a similarly weak claim of speedy trial rights. In *Sprouts,* the defendant escaped from prison and the escape was discovered after his voluntary return. *Id*. at 1040. He was indicted for escape approximately ten months later. *Id*. The defendant claimed, unsuccessfully, that his continued detention after voluntarily returning to prison had triggered his speedy trial rights. *Id*. at 1042-43. Obviously, these cases bear no similarity to Mr. Padilla's detention as an enemy combatant and offer the Court no guidance as to when Mr. Padilla's rights under the Sixth Amendment attached.

Equally distinguishable are cases cited by the government wherein the defendant claimed that speedy trial rights under the Sixth Amendment attached upon arrest by state authorities for conduct that was later indicted federally. The courts in *United States v. Wallace*, 326 F.3d 881 (7th Cir. 2003), *United States v. Jones*, 129 F.3d 718 (2d Cir. 1997), *United States v. Walker*, 92 F.3d 714 (8th Cir. 1996), and *United States v. Dickerson*, 975 F.2d 1245 (7th Cir. 1992), all held that arrest by the state, a different sovereign from the United States, did not trigger the defendants' speedy trial right under the Sixth Amendment. Cases involving detention by different sovereigns have no bearing on the instant matter where Mr. Padilla's detention was solely attributable to the conduct of the United States' government.

In claiming that Mr. Padilla's right to a speedy trial did not attach until he was indicted in the instant matter, the government also relies on *United States v. D'Aquino*, 192 F.2d 338 (9th Cir. 1951). As a preliminary matter, it should be noted that it was decided well before *Marion*

and *Doggett v. United States*, 505 U.S. 647 (1992), which are the leading cases in Supreme Court jurisprudence regarding Sixth Amendment speedy trial rights. In *D'Aquino*, the defendant was convicted of treason for participating in broadcasts designed to lower the moral of American soldiers and their allies. *Id*. at 347-348. The defendant, an American citizen residing in Japan, had worked for Radio Tokyo during World War II and was detained by military authorities for approximately one year. *Id*. at 349. After her release from military custody, the defendant remained at liberty for almost two years when she was arrested and indicted for treason. *Id*. The defendant claimed, *inter alia*, that her right to a speedy trial attached when she was detained in military custody almost three years prior to her indictment. *Id*. at 349-350. The court disagreed, holding that her right to a speedy trial did not attach until the indictment against her was returned. *Id*. at 350.

The facts of *D'Aquino* are distinct from those present here in many significant ways. First, *D'Aquino* was decided well before *Marion,* in which the Supreme Court clarified what events trigger the attachment of speedy trial rights under the Sixth Amendment. That alone makes *D'Aquino* of dubious precedential value. Also significant is the fact that the defendant in *D'Aquino* was detained by the military acting as the occupying sovereign of Japan, further attenuating the link between her military detention and the attachment of speedy trial rights. *Id*. at 349, 354-355. Nor is there any evidence in *D'Aquino* that the defendant's military detention was in any way related to her subsequent indictment.

Most significant of all, though, is that the defendant's detention in *D'Aquino* was not continuous, but instead punctuated by almost two years of liberty. The defendant in *D'Aquino* petitioned for a rehearing after the court affirmed her conviction. That petition was denied in a written decision by the court elaborating the bases for its affirmation of the conviction. *See D'Aquino v. United States*, 203 F.2d 390 (9th Cir. 1951). In its decision denying the rehearing

the court stated that a significant basis for the denial of the defendant's speedy trial rights was the fact that the prior military detention preceded the indictment by a significant amount of time. The court held:

> whatever may be the situation where detention so immediately precedes the attempted prosecution as fairly to be deemed a part thereof, here, the detention had long since terminated. … We think that the detention by the military authorities which so long preceded the initiation of the present prosecution is simply not relevant to the question of a speedy trial.

Id. at 391. Taken together, the two *D'Aquino* decisions are of no precedential value in this Court's ruling on the instant motion. Further, the elaboration provided in the denial of the petition for rehearing suggests that if the defendant's detention had been continuous, as was Mr. Padilla's, the Court may have reversed the conviction.

The government's reliance on *D'Aquino* is curious for altogether different reasons, however. *D'Aquino* is the appeal of the notorious "Tokyo Rose" case.[1] There never was an actual "Tokyo Rose" and the moniker was a fictitious name that American soldiers used for all of the female voices on the nightly Radio Tokyo propaganda shows. Ms. Iva Toguri D'Aquino did work for Radio Tokyo yet always maintained her innocence and her loyalty to the United States.

Ms. D'Aquino was a natural-born United States citizen who was visiting a sick relative in Japan when hostilities broke out between the United States and Japan. Ms. D'Aquino began working as a typist at Radio Tokyo and eventually moved up to the position of radio announcer. After the surrender of Japan, Ms. D'Aquino was detained in military custody and repeatedly interrogated for nearly a year. No evidence of wrongdoing was uncovered and Ms. D'Aquino was released after one year of military detention.

When Ms. D'Aquino applied for a U.S. passport in 1947, press accounts claimed that

[1] See generally Eric L. Muller , *Loyalty And Criminal Justice: A Mini-Symposium: The Japanese American Cases – A Bigger Disaster Than We Realized*, 49 How. L.J. 417, 467-470 (2006); Wikipedia, the Free Encyclopedia, available at http://en.wikipedia.org/wiki/Tokyo_Rose#_note-BBCRose.

"Tokyo Rose" had applied for a passport, inflaming the passions of the public that clamored for her prosecution. Despite the flimsy evidence against Ms. D'Aquino, she was convicted and sentenced to ten years imprisonment.

After her trial, two prosecution witnesses recanted their testimony, stating that they had been threatened by the government and had been told what to say and what not to say just prior to testifying. In one of his last acts in office, President Gerald Ford pardoned Ms. D'Aquino in 1977. It is ironic that in Mr. Padilla's matter, the government would rely on a case whose prosecution is a blemish on our justice system and involves the persecution of an innocent scapegoat caught up in post-war hysteria.

Conclusion

Mr. Padilla's detention as an enemy combatant was based on the same events that underpin the instant indictment. His right to a speedy trial commenced when he was subjected to oppressive incarceration and public accusation as an enemy combatant. The government's delay in bringing Mr. Padilla to trial is presumptively prejudicial and the indictment against Mr. Padilla should be dismissed. Mr. Padilla respectfully requests a hearing on this motion.

Respectfully submitted,

MICHAEL CARUSO
ACTING FEDERAL PUBLIC DEFENDER

By: s/ *Orlando do Campo*

Michael Caruso
Acting Federal Public Defender
Florida Bar No. 0051993
michael_caruso@fd.org
Anthony J. Natale
Supervisory Assistant Federal Public Defender
Florida Bar No. 296627
anthony_natale@fd.org
Orlando do Campo
Supervisory Assistant Federal Public Defender
Florida Bar No. 156582
orlando_do_campo@fd.org
150 West Flagler, Suite 1700
Miami, Florida 33130
Tel/Fax (305) 530-7000/(305) 536-4559
Andrew G. Patel, Esq.
agpatel@aol.com
111 Broadway, Suite 1305
New York, New York 10006.
Tel/Fax: (212) 349-0230/(212) 346-4665

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