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,
_____/

MR. PADILLA'S REPLY TO THE GOVERNMENT'S RESPONSE TO THE MOTION TO DISMISS FOR OUTRAGEOUS GOVERNMENT CONDUCT

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

Introduction

In its response to Mr. Padilla's motion to dismiss the indictment based on outrageous government conduct, the government claims that no federal court recognizes this basis for dismissal. That claim is patently and demonstrably false. The government also claims that Mr. Padilla was treated humanely during his detention as an enemy combatant. This unsupported claim is also false. Finally, the government desperately urges this Court to deny Mr. Padilla's motion without the benefit of a hearing. As demonstrated below, Mr. Padilla's request for a hearing should, under Eleventh Circuit precedent, be granted so that this Court can make credibility determinations regarding Mr. Padilla's claim that he was tortured and the government's claim of humane treatment.

Argument

A. The Doctrine of Outrageous Government Conduct is Recognized by the Eleventh Circuit and Almost Every Other Circuit in the United States

The government criticizes Mr. Padilla for his reliance on the Supreme Court's admonition in *United States v. Russell*, 411 U.S. 423 (1973), that in the proper circumstance "the conduct of law enforcement agents [could be] so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id*. at 431-432. The government maintains that *Hampton v. United States*, 425 U.S. 484 (1976), nullifies *Russell's* warning that outrageous government conduct could preclude the government from pursuing a criminal prosecution. Nothing could be farther from the truth.

The facts in *Hampton* are completely inapposite to Mr. Padilla's circumstances and his motion to dismiss for outrageous government conduct. In *Hampton*, the defendant sold drugs to undercover agents and alleged that those drugs had been supplied to him by an undercover informant. *Id*. at 485-486. Conceding that an entrapment defense was unavailing due to the fact that the defendant did not lack predisposition, the defendant nonetheless requested a modified entrapment instruction wherein the jury could acquit if it found that the government, via the informant, supplied him with the drugs he sold to the undercover officers. *Id*. at 487-488. The district court's denial of the requested instruction was the issue before the Supreme Court in *Hampton*.

The Court affirmed the denial of the requested instruction, relying on long-standing precedent that the defense of entrapment "focuses on the intent or predisposition of the defendant to commit the crime." *Id*. at 488 (internal quotations omitted). The defendant in *Hampton* did not allege any mistreatment or misconduct on the part of the government. Instead the defendant alleged that the government's involvement in his offense exceeded the bounds of

due process. The Supreme Court disagreed. That holding, however, has no bearing on the instant motion, which does not concern entrapment or Mr. Padilla's intent.

In its response, the government selectively quotes a passage from *Hampton* to suggest that *Hampton* overrode *Russell's* warning that outrageous government conduct could divest the government of jurisdiction to prosecute the victimized defendant. The government's response asserts that *Hampton* cautioned "that *Russell*'s dicta was 'not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve.'" Govt. Response (hereinafter "GR") at 7. This assertion is false and the government's selective quotation is misleading. The unexpurgated passage is quoted below:

> To sustain petitioner's contention here would run directly contrary to our statement in *Russell* that *the defense of entrapment* is not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations.

Id. at 490 (citing *Russell*, 411 U.S. at 435) (emphasis supplied). Obviously, the above-quoted language in *Hampton* signifies that courts cannot employ the entrapment defense to sanction the government for improper conduct since that defense focuses on the defendant's intent to commit an offense. Nothing in *Hampton* indicates a retreat from the principle enunciated in *Russell* that grave consequences can result from outrageous government conduct. In fact, *Hampton* reiterates the admonition of *Russell* in stating that the Executive Branch's prerogatives in enforcing federal laws are "subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Hampton*, 425 U.S. at 490.[1]

[1] It is worth noting that the plurality decision in *Hampton* cited by the government failed to gain a majority. Justices Blackmun and Powell wrote separately to say that, although the facts of *Russell* and *Hampton* did not warrant dismissal under due process, they were "unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." *Hampton*, 425 U.S. at 493 (Powell, J., concurring). Obviously, plurality decisions are not binding precedent and cannot overturn a previous decision of the Court. *See Tex. v. Brown*, 460 U.S. 730, 737 (1983).

In its response, the government asserts that "federal courts have refused to recognize [the defense of outrageous government conduct]." GR at 6. It is true that the Seventh Circuit in *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995), rejected the defense of outrageous government conduct. However, *Boyd* is readily distinguishable from the instant matter. *Boyd* involved the defendant's supported allegation that the prosecution withheld exculpatory evidence from the defense. *Id.* The court then held that absent some showing of prejudice, the court would not reverse the convictions, and in so holding, declined to accept a species of the outrageous government conduct defense that would require dismissal of the indictment without reference to whether the defendants suffered some prejudice. *Id.* *Boyd* thus stands for the wholly uncontroversial proposition that prosecutorial misconduct will not result in a reversal unless that misconduct resulted in some prejudice to the defendant. *See United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998). It is nonetheless true, though, that the Seventh Circuit has declined to recognize the defense of outrageous government conduct.

The government's broader assertion that "federal courts have refused to recognize [the defense of outrageous government conduct]," GR at 6, is patently false. Every circuit, with the single exception of the Seventh, explicitly recognizes the continued authority of a court to dismiss an indictment in the face of outrageous government conduct, including the Eleventh Circuit. *See United States v. Guzman*, 282 F.3d 56, 59 (1st Cir. 2002); *United States v. Williams*, 372 F.3d 96, 111-112 (2d Cir. 2004); *United States v. Barbosa*, 271 F.3d 438, 469 (3d Cir. 2001); *United States v. Lewis*, 53 F.3d 29, 35 n. 9 (4th Cir. 1995); *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003); *United States v. Blood*, 435 F.3d 612, 629-630 (6th Cir. 2006); *United States v. Boone*, 437 F.3d 829, 841-842 (8th Cir. 2006); *United States v. Holler*, 411 F.3d 1061, 1065 (9th Cir. 2005); *United States v. Garcia*, 411 F.3d 1173, 1181 (10th Cir. 2005); and

United States v. Chastain, 198 F.3d 1338, 1352 (11th Cir. 1999); *see also United States v. Sanchez*, 138 F.3d 1410, 1413 (11th Cir. 1998) ("This Court recognizes the defense of outrageous governmental conduct, …"); *United States v. Schlei*, 122 F.3d 944, 952 (11th Cir. 1997) (recognizing the existence of the defense of outrageous government conduct while denying it due to the defendant's lack of standing). The government's assertion that no circuit recognizes the doctrine of outrageous government conduct exceeds the bounds of puffery.

It is important to note that not all claims of outrageous government conduct are alike. The vast majority of cases dealing with claims of outrageous government conduct involve issues of government participation in the offense or zealous inducement of the commission of an offense. *Russell* and *Hampton* are examples of claims where dismissal was sought due to the fact that the government exceeded the bounds of due process in facilitating the criminal act. Admittedly, most claims of this sort fail. However, there is another species of outrageous government conduct involving the government's "coercion, violence or brutality to the person" of the defendant that, theoretically, can rise to a level where courts may dismiss an indictment. *United States v. Walls*, 70 F.3d 1323, 1330 (1995) (quoting *United States v. Kelly*, 707 F.2d 1460, 1476 (D.C. Cir. 1983).

Obviously, Mr. Padilla's motion falls under that second type of claim. Repeatedly in its response, the government bemoans that Mr. Padilla has failed to cite any precedential authority for his application. There is a logical explanation for this failing: the government's brutal treatment of Mr. Padilla is without precedent. Fortunately, our government usually observes the rule of law. Lamentably, it did not do so in Mr. Padilla's case, and most certainly brutalized, tortured and coerced him. Mr. Padilla's motion to dismiss his indictment owing to such

treatment is alive and well everywhere outside of the Seventh Circuit, and the government's claims to the contrary are simply false.

B. Mr. Padilla Was Not Treated Humanely; He Was Tortured

In its response, the government alleges that Mr. Padilla was treated humanely. Reasonable people often disagree on the precise meaning of ordinary words, yet whatever definition the government is employing does great violence to the adverb humanely.

In his motion to dismiss for outrageous government conduct, Mr. Padilla made specific and detailed allegations of the conditions of his confinement and the torture he endured. These allegations include isolation; sleep and sensory depravation; hoodings; stress positions; exposure to noxious fumes; exposure to temperature extremes; threats of imminent execution; assaults; the forced administration of mind-altering substances; denial of religious practices; manipulation of diet; and other forms of mistreatment. Despite these specific allegations, the government does not make any effort to deny or confirm that Mr. Padilla was subjected to the conditions he has alleged. If Mr. Padilla's allegations were false it would be a simple matter for the government to deny that Mr. Padilla was ever deprived of sleep or sensory stimuli, or assert that he was never assaulted or administered mind-altering substances against his will. The government's silence on these issues speaks volumes of Mr. Padilla's allegations of torture. Mr. Padilla asserts that he was not treated humanely, but instead was tortured and that the government's conduct was outrageous.

C. Mr. Padilla's Detailed Allegations Merit a Hearing

Throughout its response, the government urges this Court to deny Mr. Padilla's motion as a matter of law without an evidentiary hearing. The government even dedicates an entire section of its response to the argument that Mr. Padilla's motion should be denied with no further

inquiry due to the fact that he has submitted "no records, no affidavits, no testimony from himself or other witnesses." GR at 15. This is a puzzling request, since it is the practice in this District for the Court to take evidence in an evidentiary hearing.

It is interesting to note that one of the cases the government cites to support its argument that an evidentiary hearing should not be held actually dealt with a motion that was denied due to lack of evidentiary support *after conducting an evidentiary hearing*. *United States v. Apperson*, 441 F.3d 1162, 1192 (10th Cir. 2006) ("The district court conducted a post-trial evidentiary hearing on, and subsequently denied, the motion [to dismiss for outrageous government conduct]. In doing so, the district court noted that the motion was woefully lacking in any details.") (internal quotations omitted). In one of the other cases the government relied on, *United States v. Cannon*, 88 F.3d 1495 (8th Cir. 1996), it cannot be determined from the face of the decision whether the district court held an evidentiary hearing prior to denying the motion. Finally, in *Wade v. United States*, 504 U.S. 181 (1992), the Court held that the defendant was not entitled to an evidentiary hearing on remand due to the fact that his assertions, even if true, did not entitle him to relief. *Id*. at 186-187. In contrast, Mr. Padilla has made a substantial threshold showing wherein if the facts he alleges are true, he is entitled to relief. It is the law of the Eleventh Circuit that even the unsubstantiated allegations of a defendant require the court to make a credibility determination at an evidentiary hearing. *See Gallego v. United States*, 174 F.3d 1196, 1198 (11th Cir. 1999) (evidence based on nothing other than defendant's word requires a hearing so that credibility determinations can be made).

Although Mr. Padilla's allegations, with nothing more, should merit an evidentiary hearing, Mr. Padilla does not anticipate reliance on merely his word in meeting his burden of persuasion in this motion. Attached as Exhibit "A" is an affidavit from Mr. Padilla affirming

that all the factual allegations in his motion to dismiss the indictment for outrageous government conduct are true. Attached as Exhibit "B" is an affidavit from Dr. Angela Hegarty who has evaluated Mr. Padilla and concludes, to a reasonable degree of medical certainty, that Mr. Padilla was tortured during his detention as an enemy combatant and suffers from post-traumatic stress disorder as a result of the conditions of his confinement. Attached as Exhibit "C" is a memorandum from Dr. Stuart Grassian, a renowned expert on the deleterious effect of isolation, explaining the mental and physical problems that arise from prolonged isolation and sensory and sleep depravation. Attached as Exhibit "D" is a declaration from Andrew Patel, Esq., regarding his knowledge of Mr. Padilla's conditions of confinement and the adverse reactions Mr. Padilla has suffered due to the conditions of his confinement, including an inability to assist counsel. Attached as Exhibit "E" are still frames from an unclassified video of Mr. Padilla being transported from his cell to other parts of the facility where he was confined. These still frames show Mr. Padilla being brought out of his cell with a mask and earmuffs and all manner of restraints. One of the stills provides a partial vantage of Mr. Padilla's cell.

In addition to the attached affidavits, Mr. Padilla will separately file a request for a § 5(a) filing pursuant to the Classified Information Procedures Act, 18 U.S.C. App. III, supporting the allegations made by his motion. Also, undersigned counsel have made a specific discovery request for information pertinent to Mr. Padilla's conditions of confinement, including Mr. Padilla's interrogation plan, all orders authorizing interrogation techniques employed against Mr. Padilla, and the identities of all persons who conducted interrogations of Mr. Padilla or were responsible for making determinations on Mr. Padilla's condition of confinement. Finally, Mr. Padilla has also reiterated his demand that the government fully comply with this Court's Order, DE 572, compelling the government to turn over records generated during Mr. Padilla's

confinement. This Court ordered the government's compliance within thirty days of September 14, 2006. *Id.* As of this filing, almost eighty days have elapsed since September 14 and the government still has not fully complied with this Court's Order.

Conclusion

The law in this Circuit and Supreme Court precedent clearly recognize the doctrine of outrageous government conduct. Mr. Padilla's torture at the hands of the government constitutes outrageous government conduct. Respectfully, this Court should hold a hearing to determine the merits of Mr. Padilla's motion.

Respectfully submitted,

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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