

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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

UNITED STATES OF AMERICA

vs.

**JOSE PADILLA,
a/k/a "Ibrahim,"
a/k/a "Abu Abdullah the Puerto Rican,"
a/k/a "Abu Abdullah Al Mujahir,"**

Defendant.

**GOVERNMENT'S UNOPPOSED MOTION FOR LEAVE TO FILE SUR-REPLY
REGARDING DEFENDANT PADILLA'S "MOTION TO DISMISS FOR
OUTRAGEOUS GOVERNMENT CONDUCT"**

Pursuant to S.D. Fla. L.R. 7.1(c) and the Court's inherent power, the United States of America, through undersigned counsel, hereby moves for leave to file a sur-reply responding to the new arguments and exhibits filed by defendant Padilla in support of his "motion to dismiss for outrageous government conduct." Padilla's arguments, and the allegations of "torture" underlying them, are without merit. But Padilla in his reply memorandum has put before the Court purported evidence in the form of three affidavits plus additional exhibits that should have been provided earlier, if at all, so the government would have an opportunity to respond. To explain why Padilla's new evidence and arguments do not permit dismissal of the indictment, the government seeks leave to file a sur-reply of not more than ten (10) pages.

In his motion, Padilla asked this Court to dismiss the indictment against him based upon his supposed "torture" while in military custody as an unlawful enemy combatant. Padilla's motion did not attach any purported evidence. The government responded to that motion based upon its

content, pointing out that the motion fails as a matter of law, and that the relief Padilla seeks is unprecedented. The government did not attach any evidence to its response, because Padilla had submitted none and, more fundamentally from our perspective, none is necessary to deny the motion. Yet in his reply, Padilla attached a host of affidavits and exhibits – none of which were presented prior to the government’s response. This purported evidence includes (1) an affidavit from the defendant, (2) an affidavit from a psychiatrist named Angela Hegarty, (3) a declaration from one of Padilla’s lawyers, Andrew Patel, (4) an essay on the “neuropsychiatric effects of solitary confinement,” and (5) still images from a video of the defendant.¹ None of this evidence constitutes rebuttal to the government’s response, as the government’s response addressed the legal deficiencies in Padilla’s motion and set forth why, even assuming that all of Padilla’s allegations were true, his request for dismissal fails.

Rule 7.1(c) of the Local Rules for the Southern District of Florida provides that a reply memorandum “shall be strictly limited to rebuttal of matters raised in the memorandum in opposition.” A moving party may not raise new arguments or present new evidence in a reply. *See Martinez v. Weyerhaeuser Mortgage Co.*, 959 F. Supp. 1511, 1515 (S.D. Fla. 1996); *see also Schurr v. A.R. Siegler, Inc.*, 70 F. Supp. 2d 900, 912 (E.D. Wis. 1999) (intent of local rule limiting scope of reply memoranda “is to ensure that a responding party has a full and fair opportunity to respond to all of the moving party’s arguments”).

In its sur-reply, the government expects to address why, Padilla’s purported evidence notwithstanding, his motion still fails as a matter of law, because the relief he seeks is not available.

¹Significantly, Padilla’s counsel failed to inform this Court that the still photographs were taken as Padilla was being escorted to voluntary dental surgery. Far from proving any abuse, these photographs highlight the absurdity of Padilla’s assertion: namely that the United States was callous enough to mistreat Padilla while conscientious enough to tend to his toothache.

The government also expects to address Padilla's new legal position, which represents an apparent about-face from his opening memorandum. Finally, the government expects to address why Padilla's evidence has nothing to do with dismissal on any permissible ground, but has in fact been submitted to shape the Court's views on his alleged incompetency to stand trial, an issue that is not ripe (if it ever will be).²

On December 7, 2006, the government contacted Padilla's counsel regarding this motion. Padilla's counsel indicated that they did not oppose the government's request for leave to file a sur-reply. Accordingly, this request is unopposed.

Conclusion

Wherefore, the Court should allow the government the opportunity to file a sur-reply of not more than ten (10) pages regarding Padilla's motion to dismiss for outrageous government conduct.

Respectfully submitted,

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United States Attorney

s/ John C. Shipley
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²It remains the government's position that no hearing is required or appropriate regarding this motion. However, if a hearing occurs, the government reserves the right to question Padilla as a witness regarding any matter within the scope of his affidavit, in which he claims that all of the factual allegations made by his lawyers are true. *See, e.g., United States v. United States Currency in the Sum of \$185,000*, – F. Supp. –, 2006 WL 2831163 (E.D.N.Y. Sept. 29, 2006), at *5 (“[A] witness may not give direct testimony and then invoke his privilege on cross-examination. It matters not, as here, that the witness attempts to give his direct testimony through an affidavit.”).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 8, 2006, the undersigned electronically filed the foregoing document, Government's Unopposed Motion for Leave to File Sur-reply with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today by U.S. mail for those counsel and/or parties who are not authorized to electronically receive or did not electronically receive the Notices of Electronic Filing as follows:

Andrew Patel, Esq.
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Dated: December 8, 2006

s/ John C. Shipley
John C. Shipley
Assistant United States Attorney