**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 MOTION TO QUASH IMPROPER DEFENSE SUBPOENAS**

Pursuant to Fed. R. Crim. P. 17 and the Court's inherent power, the United States of America, through undersigned counsel, hereby moves for entry of an order quashing a series of improper subpoenas the defense has served or attempted to serve on present or former Department of Defense officials or officers at the Consolidated Naval Brig in Charleston, South Carolina where defendant Padilla was held as an unlawful enemy combatant prior to this case.

**Summary of Argument**

These subpoenas represent the defense's latest tactic to divert attention from the criminal acts charged in the indictment under the guise of dredging up support for defendant Padilla's sensationalistic but totally meritless motion to dismiss for outrageous government conduct. We are aware of four subpoenas duces tecum that the defense has served or attempted to serve thus far, including one addressed to Major General D.D. Thiessen, a two-star general who is the Commander of Marine Forces, Japan; upon information and belief, the defense is seeking to serve similar subpoenas on additional individuals within the Department of Defense.

These subpoenas patently violate Fed. R. Crim. P. 17 because they call for the subpoenaed

witnesses to appear in this Court on dates when *no* hearing has been set – on Padilla's motion to dismiss for outrageous government conduct or any other subject. These subpoenas are especially improper given the defense's awareness of the fact that the government has argued – supported by case law – that no hearing on the motion should occur, period. Moreover, the very idea of subpoenaing third parties for materials about Padilla's confinement is prohibited by Rule 17, which does not allow subpoenas to be used as a discovery device. In that regard, the subpoena to Major General Thiessen is especially unfounded, because it seeks information about enemy combatants *other* than Padilla – unbounded by time, place, war or circumstance – that has nothing to do with this case. The law does not allow a criminal defendant to "shake the trees" with a subpoena and see what falls to the ground.

From the government's perspective, these subpoenas cannot be viewed in isolation: They are illustrative of a recent defense strategy of turning the Court's attention away from the defendants' misconduct and toward the alleged mistreatment of Padilla while confined as an enemy combatant. In furtherance of that strategy, the defense has now waited until its reply to provide the purported "evidence" supporting Padilla's outrageous government conduct motion, contrary to the Local Rules. It has also served these subpoenas in violation of Rule 17, and in so doing has burdened third parties (including Mr. Lawrence, who is not even employed by the United States). The Court should not allow this to continue, not least because Padilla's alleged conditions of confinement are irrelevant to the trial.

## Background

The subpoenas at issue are attached as Exhibit A to this motion. Major General Thiessen is a senior officer within the Marine Corps and currently in charge of all Marine Corps forces in

Korea. The Thiessen subpoena calls for this witness to travel to this Court on "January 08, 2007 @ 9 a.m." and produce "all records . . . utilized for/in preparation of any briefs or written reports to the Secretary of Defense regarding the treatment and/or procedures regarding enemy combatants to include enemy combatant [Padilla]." The subpoena contains an additional line stating "Attn: Judge Advocate Division," but does not clarify what if any connection exists between Major General Thiessen, that division and Padilla.

Two other subpoenas are directed toward senior officers at the Naval brig where Padilla was housed as an enemy combatant. One subpoena is addressed to Sandy Seymour, Technical Director, and the other is addressed to Major Christopher Ferry, Security Officer, c/o Naval Weapons Station. Both subpoenas call for "any and all communications, including electronic and written communications, orders to include special procedures and communications, and logs to include medical and visitation logs pertaining to [Padilla]."

The final subpoena of which we are aware is directed toward Jonathan Lawrence, a retired Navy Petty Officer who worked at the Brig in Charleston and currently is a police officer in that city. This subpoena has a different, but equally faulty, return date: January 28, 2007 (a Sunday). The subpoena calls for the production of medical records relating to Padilla's confinement. The subpoena does not set forth the basis, if any, for the defense's apparent belief that Lawrence individually possesses any such records.

The defense did not contact undersigned counsel about these subpoenas prior to their service, and we are not aware of any order from this Court authorizing them. Once the undersigned did became aware of them, we contacted Padilla's counsel to state the concerns set forth in this motion. As of this date, however, defendants have not withdrawn the subpoenas, and upon information and

belief, intend to continue serving these kinds of subpoenas.

**Argument**

Fed. R. Crim. P. 17 governs the issuance of subpoenas in criminal cases. Under Rule 17, a subpoena must be tied to a trial or relevant court hearing. Fed. R. Crim. P. 17(a) (stating that subpoena "must state the court's name and the title of proceeding . . . and command the witness to attend and testify at the time and place the subpoena specifies"); *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991). Although the rule allows for production of subpoenaed documents in advance of a trial or scheduled hearing, a party seeking early production must first obtain leave of court, and even then, the rule requires that the documents be produced to the court, not counsel. Fed. R. Crim. P. 17(c)(1). Rule 17(c)(2) allows the court to quash a subpoena where compliance would be unreasonable or oppressive.

These subpoenas, issued without the government's knowledge and apparently as well without the Court's knowledge, plainly violate Rule 17, by calling for the production of documents on a date when no court hearing is scheduled.[1] The first three subpoenas call for the witnesses to appear in this Court on January 8, 2007. No hearing is scheduled for that date – on any topic, let alone the topic ostensibly prompting the subpoenas (Padilla's outrageous government conduct motion). That is bad enough. But worse still is the fact that the defense served these subpoenas tied to a non-existent hearing despite knowing full well that the government, in its response to Padilla's motion, has taken the position that no evidentiary hearing should ever be conducted, because the motion fails as a matter of law. It is hard to imagine a less proper use of Rule 17 than issuing

[1]Rule 17(b) sets forth a procedure for an indigent defendant to obtain an *ex parte* order directing the issuance of a subpoena. We are not aware of any such order in this case.

subpoenas to obtain discovery on collateral issues under the guise of calling for production of documents at a non-existent hearing.

The fourth subpoena is just as misleading. It appears that the defense has altered a portion of the return date on the earlier subpoenas to read "January 28, 2007" instead of "January 8, 2007." But that date is a ***Sunday***, a day when no hearing is scheduled and the Court would not even be in session to receive the subpoenaed documents as contemplated by Rule 17.[2]

In *Noriega*, Judge Hoeveler rejected a similar attempt to serve document subpoenas not tied to trial or a relevant hearing. In that case, the government, without applying to the court, served subpoenas duces tecum upon a correctional center, seeking pretrial production of tape recordings of the defendant's telephone conversations. 764 F. Supp. at 1492. As the court put it, "[t]he subpoenas duces tecum served on MCC suggested that the tapes were sought pursuant to court hearings when in fact no proceedings in this case were scheduled on the dates indicated in the subpoenas." *Id.* Thus, reasoned the court, the "return dates on the subpoenas were selected not to reflect actual court dates but rather to enable the prosecution to examine these recordings prior to trial in order to obtain additional discovery against the defendant." *Id.* The court therefore found that the subpoenas constituted "precisely the kind of unwarranted [discovery] expedition which Rule 17(c) does not permit." *Id.* at 1493. The court also observed that there was no justification for the "examination of [the subpoenaed documents] without prior court knowledge and authorization," explaining that this ran counter to Rule 17's unambiguous placing of pretrial production within the

[2]This Court previously scheduled trial for the two-week period starting January 22, 2007, but prior to the issuance of this subpoena, the Court had already indicated trial would be stayed pending the Eleventh Circuit's disposition of the government's pending appeal. In any event, it cannot seriously be suggested that the purpose of this subpoena is to obtain Padilla's medical records for admission at trial.

discretion of the court. *Id.* ("This is to ensure that subpoenas are not used for impermissible discovery, which is more likely to be the case when advance production of materials is sought."). Other courts too have firmly rejected attempts to subpoena documents in a criminal case under the pretext of obtaining the documents for a non-existent hearing. *See, e.g., United States v. Singletary*, 2006 WL 560146 (M.D. Fla. Mar. 7, 2006), at *1 (quashing defense subpoenas for materials "apparently targeted largely due to their perceived relevance to" a *Franks* motion, because "there is no *Franks* hearing scheduled").

The subpoenas in this case, like those in *Noriega*, are at best premature, and at worst an attempt to lead the subpoena recipient to believe that the requested documents have been sought in connection with an actual court hearing when, in fact, no such hearing exists. The fact that the defense did not advise the government – or, to our knowledge, the Court – about these facially invalid subpoenas in advance makes this tactic even more improper, and the subpoenas themselves more inaccurate.

The absence of any court hearing scheduled for the return date on the subpoenas is the most striking defect with these subpoenas, but not the only one by any means. The documents sought in these subpoenas have absolutely no relevance to any issue to be tried in this case. A Rule 17 subpoena may be issued only when the party seeking it has shown that the requested documents are relevant and admissible and that the subpoena itself describes the requested documents in sufficiently specific terms. *See United States v. Nixon*, 418 U.S. 683, 700 (1974). To meet this burden, the party generally must show a likelihood that the documents sought are "relevant to the offenses charged in the indictment" and also must make a "sufficient preliminary showing that [the material] contains evidence admissible with respect to the offenses charged." *Id.*

These subpoenas seek information that has nothing to do with the offenses charged in the indictment, which pre-date Padilla's confinement and arise out of the defendants' support for groups committed to violent jihad. Rule 17 is not a discovery device. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). It is merely an aid for obtaining relevant and evidentiary materials which the moving party plans to use at trial or in some other court proceeding. *See Nixon*, 418 U.S. at 699-700; *United States v. Cuthbertson*, 630 F.2d 139, 144 (3rd Cir. 1980). Courts routinely quash subpoenas such as these that are nothing more than a fishing expedition to obtain additional impermissible discovery. *See Cuthbertson*, 630 F.2d at 144; *see also Bowman Dairy*, 341 U.S. at 220-221; *Noriega*, 764 F. Supp. at 1493 ("If the [subpoenaing party] cannot reasonably specify the information contained or believed to be contained in the documents sought, but merely hopes that something useful will turn up, this is a sure sign that the subpoena is being misused.").

Neither can these subpoenas be justified as seeking information relevant to Padilla's outrageous government conduct motion. First, the subpoena to Major General Thiessen calls for all documents pertaining to *any* enemy combatant, not merely Padilla – with *no* limitation whatsoever as to scope, date or purpose. Indeed, although it is difficult to discern, the fact that the subpoena references the "Judge Advocate Division" suggests that the defense is seeking privileged and/or classified materials about enemy combatants generally, from all time. This unjustifiable demand demonstrates that these subpoenas are simply a broad dragnet meant to transform pre-trial activity in this case from preparation for a trial about the defendants' criminal conduct into an inquiry into the designation and treatment of unlawful enemy combatants.

Second, the other subpoenas completely lack the specificity required by Rule 17. There is no clear statement of what, if any, material the defense seeks to obtain from these requests that

would be admissible in support of Padilla's motion (assuming that the motion is the true motivation behind these subpoenas). *See United States v. Layton*, 90 F.R.D. 514, 516 (N.D. Cal. 1981) ("A mere hope that a document, if produced, might contain evidence favorable to this case is not sufficient."). To reiterate, Rule 17 does not allow the subpoena power to be used for discovery. Only when a party seeks a narrow, clearly-defined set of documents that are relevant and admissible may the court allow a defense subpoena in a criminal case. These subpoenas do not come close to meeting that standard. *See United States v. Brooks*, 966 F.2d 1500, 1505 (D.C. Cir. 1992) (quashing subpoena where defendant was "improperly trying to use subpoena as a discovery tool")*; United States v. Arditti*, 955 F.2d 331, 346 (5th Cir. 1992) (subpoena properly quashed when defendant attempted to use subpoena to gain knowledge that he could not obtain under Rule 16).

In summary, these subpoenas bear no resemblance to any subpoena permissible under Rule 17. They are improper in many respects – the defects cited above being only the most obvious.[3]

**Conclusion**

For all of these reasons, the Court should quash the subpoenas attached to this motion, and any similar subpoena served by the defense subsequent to this motion in violation of Fed. R. Civ. P. 17. The Court should also rule that no subpoenas may be issued by the defense without prior leave of Court in accordance with Rule 17, and grant such other relief as may be just and proper.

[3]Among other things, the subpoenas (1) seek documents which have been sought and/or already produced in regular discovery under Fed. R. Crim. P. 16, (2) are an attempt to get around adverse case law limiting permissible areas of discovery from the government in this case, and (3) were served or attempted to be served without regard for the standard regulations governing such requests for official information (*see United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951)). In addition, as noted above, the subpoena to Major General Thiessen appears to seek information that is privileged and/or classified. The government reserves the right to assert all of these more detailed objections if necessary, in a motion to quash or otherwise.

Respectfully submitted,

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