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 OPPOSITION TO DEFENDANT PADILLA'S MOTIONS TO DISMISS FOR LACK OF SPEEDY TRIAL AND FOR PRE-INDICTMENT DELAY

The United States of America, through undersigned counsel, respectfully submits this consolidated Opposition to defendant Jose Padilla's "Motion to Dismiss Indictment for Speedy Trial Violations In Derogation of Sixth Amendment Rights" ("Speedy Trial Motion") and his "Motion to Dismiss the Indictment for Pre-indictment Delay" ("Pre-indictment Delay Motion"). Padilla's Speedy Trial motion must be denied as it is premised upon the mistaken assumption that his detention as an enemy combatant of the United States, without having been charged with any criminal offense, triggered his Sixth Amendment right to a speedy trial. It was only after Padilla's November 17, 2005 indictment on the pending charges that his Sixth Amendment speedy trial right was engaged. The interval between that indictment and the present time is not itself of sufficient duration or effect to trigger further inquiry or entitle him to dismissal of these charges.

Padilla's motion to dismiss for alleged pre-indictment delay in violation of the Fifth Amendment's due process clause should also be denied. He fails completely to show the kind of

prejudice required for a due process violation in this context. His contention that, while detained as an unlawful combatant, he suffered memory loss and thus will be unable effectively to present a defense at trial is simply "not [in itself] enough to demonstrate that [he] cannot receive a fair trial and therefore justify the dismissal of the indictment." United States v. Marion, 404 U.S. 307, 326 (1971). Moreover, his attempt to inject into the analysis the supposed conditions of his detention fails, because the only kind of prejudice considered in this context is prejudice to the ability to present a defense to an indictment. Padilla's argument on this front also falls short because he does not make even a threshold showing, or produce any evidence, that the lapse of time between his initial detention by the military and his indictment was the product of an "intentional device [by the government] to gain a tactical advantage over the accused." Marion, 404 U.S. at 324. Both of Padilla's motions should be denied as a matter of law.

BACKGROUND

On May 8, 2002, Padilla was arrested in the secure customs area of Chicago's O'Hare International Airport pursuant to a material witness warrant issued in the United States District Court for the Southern District of New York in connection with grand jury proceedings investigating the September 11 attacks. See Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005), cert. denied, 126 S. Ct. 1649 (2006). Padilla was then transported to New York, where he was initially held at a civilian correctional facility. See id.

On June 9, 2002, the President made a formal determination that Padilla was an enemy combatant against the United States. See Padilla, 423 F.3d at 390. The President found, in particular, that Padilla: was "closely associated with al Qaeda, an international terrorist organization with which the United States is at war"; had "engaged in . . . hostile and war-like acts, including

conduct in preparation for acts of international terrorism" against the United States; "possesse[d] intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; and "represent[ed] a continuing, present and grave danger to the national security of the United States," such that his military detention was "necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." Id. at 389 (quoting the President's order). Citing his authority under Article II of the Constitution and under Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (AUMF), the President directed the Secretary of Defense "to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." Padilla, 423 F.3d at 389 (quoting the President's order). Immediately upon issuance of the President's order, the Department of Justice moved the District Court for the Southern District of New York to vacate the material witness warrant, and the motion was granted. That same day (June 9), Padilla was transferred to military control and taken to the Consolidated Naval Brig in Charleston, South Carolina. See id. at 390.

On June 11, 2002, Padilla filed a petition for a writ of habeas corpus in the Southern District of New York, arguing that his military detention violated the Constitution. See Padilla, 423 F.3d at 390. The Supreme Court ultimately dismissed Padilla's petition without prejudice, holding that it should have been filed in the District of South Carolina instead of the Southern District of New York. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004). Soon after the Supreme Court's decision, Padilla filed a habeas petition in the District of South Carolina, again claiming that his detention violated the Constitution. See Padilla, 423 F.3d at 390. The district court granted the petition. See id. On September 9, 2005, the Fourth Circuit reversed, holding that, based on the facts alleged by

the government, the President had authority to order Padilla detained as an enemy combatant. In particular, the court relied on evidence that Padilla: trained with and was closely associated with al Qaeda both before and after the September 11 attacks; engaged in armed conflict against the United States and allied forces in Afghanistan; and, after eluding those forces, accepted a mission from al Qaeda to enter the United States and carry out attacks on American citizens within American borders. Id. at 390-397.

On November 17, 2005, a grand jury in this District returned an indictment charging Padilla with conspiring to murder, maim, and kidnap individuals outside of the United States, in violation of 18 U.S.C. §§ 2 and 956(a)(1) (Count One); conspiring to provide material support to terrorists, in violation of 18 U.S.C. §§ 371 and 2339A(a) (Count Two); and providing material support to terrorists, in violation of 18 U.S.C. § 2339A(a) (Count Three). Specifically, the indictment alleges that, *inter alia*, Padilla participated in a North American support cell that sent money, physical assets, technology, and "mujahideen" (warrior) recruits to overseas conflicts in furtherance of the destruction, murder, maiming, kidnaping, and hostage-taking of governments, institutions, and individuals who do not share the cell's radical ideology. Indictment ¶¶ 1-6, 12-14. The indictment further alleges that Padilla "was recruited by the North American support cell to participate in [this] violent jihad," id. ¶ 11, and that he "traveled overseas for that purpose," id.; see id. ¶¶ 26, 28, 48, 56, 62-74, 77, 81, 83-85, 89-90.

On November 20, 2005, the President determined that "it is in the interest of the United States that Padilla be released from detention by the Secretary of Defense and transferred to the control of the Attorney General for the purpose of criminal proceedings against him." The President's memorandum to that effect made clear that it "supersede[d]" his June 9, 2002, directive

to the Secretary of Defense to detain Padilla as an enemy combatant. The memorandum thus ordered the Secretary of Defense to release Padilla from the Department of Defense's control and transfer him to civilian custody upon the Attorney General's request. On January 5, 2006, Padilla was transferred and taken into civilian custody, where he has since been detained.

On April 3, 2006, the Supreme Court denied Padilla's petition for a writ of certiorari to review the Fourth Circuit's holding that the President had authority to order Padilla's military detention. Padilla v. Hanft, 126 S. Ct. 1649 (2006). On October 4, 2006, Padilla filed the instant motions to dismiss the indictment predicated on an alleged violation of his Sixth Amendment right to a speedy trial and prejudice resulting from alleged inordinate preindictment delay.

ARGUMENT

I. PADILLA IS NOT ENTITLED TO DISMISSAL OF HIS INDICTMENT ON THE GROUND THAT HIS SIXTH AMENDMENT SPEEDY TRIAL RIGHT HAS BEEN VIOLATED; ON THE CONTRARY, NO SPEEDY TRIAL VIOLATION EXISTS.

In his Speedy Trial Motion, Padilla argues that his May 8, 2002 detention as an unlawful combatant[1] triggered his Sixth Amendment right to a speedy trial, and that the ensuing delay in bringing him to trial is unlawful. The basic premise of this argument is wrong, however, because Padilla's speedy trial rights did not attach until his indictment in November 2005; during the period of his detention as an unlawful combatant, Padilla was not an "accused" within the meaning of the Sixth Amendment speedy trial right, and thus any asserted "delay" between May 8, 2002 and November 17, 2005 is immaterial for this purpose. And using the correct date of November 17,

[1]Although Padilla's motions do not make this clear, he was initially detained on May 8, 2002 on a federal material witness warrant, and only subsequently, on or about June 9, 2002, as an enemy combatant. That distinction does not matter for present purposes, as under any set of facts, his motions fail as a matter of law.

2005, it is plain that the relatively short period of time that has elapsed between then and now does not support dismissal under the criteria of Barker v. Wingo, 407 U.S. 514 (1972).

A. Padilla's Detention as an Unlawful Combatant Did Not Trigger His Sixth Amendment Right to a Speedy Trial.

The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions that the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. It is clear from the Amendment's plain language that only an "accused" in a "criminal prosecution" has a right to a speedy trial under the Sixth Amendment. Such a reading of the speedy trial right is confirmed by the amendment's origin and history, which reflect the antecedent British and colonial understanding that the right belonged to those imprisoned upon accusation for an offense, and that it secured for such individuals the right not to "'be long detained but at the[ ] next coming [of the justices such persons be] given full and speedy justice . . . without detaining [them] long in prison.'" Klopfer v. North Carolina, 386 U.S. 213, 223-25 (1967) (quoting Sir Edward Coke, The Second Part of the Institutes of the Laws of England, 43 (5th ed. 1797)).

Consequently, as the Supreme Court explained in United States v. Marion, 404 U.S. 307, 313 (1971) (emphasis added):

> the protection of the 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. These provisions would seem to afford no protection to those not yet accused . . . .

"So viewed, 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 320-21

(emphasis added). Accord, United States v. Loud Hawk, 474 U.S. 302, 310 (1986) (quoting Marion and reiterating that "when no indictment is outstanding only the '*actual* restraints imposed *by holding to answer a criminal charge* . . . engage the particular protections of the speedy trial provision of the Sixth Amendment") (emphasis added); United States v. MacDonald, 456 U.S. 1, 6 (1982) ("A literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and criminal prosecution begins."); United States v. Lovasco, 431 U.S. 783, 788 (1977); Dillingham v. United States, 423 U.S. 64, 65 (1975) ("the government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him"); United States v. Ingram, 446 F.3d 1332, 1339 (11th Cir. 2006) ("Only pretrial delay following a person's arrest, charge or indictment is relevant to whether the Speedy Trial Clause of the Sixth Amendment is triggered").[2]

Applying these authorities, which make clear that the Sixth Amendment speedy trial right is triggered only when the defendant is arrested or held to answer on a criminal charge, federal courts have repeatedly rejected attempts like Padilla's to start the speedy trial clock on the date the defendant was detained for reasons *other* than a criminal charge. Of these decisions, perhaps none is closer than United States v. D'Aquino, 192 F.2d 338 (9th Cir. 1951). There, the defendant, a United States national, worked as a propagandist during World War II for the Imperial Japanese Government, broadcasting programs specifically designed to cause disaffection by members of the armed forces of the United States and their allies. Following the surrender of Japan, she was

[2]The Supreme Court in Marion left no doubt that the "detention" it contemplated as sufficient to trigger the Sixth Amendment speedy trial right was detention for a criminal accusation leading to prosecution, based upon the government's assertion that probable cause existed to believe the accused had committed a crime. 404 U.S. at 320.

interned by United States military authorities from October 17, 1945 until October 25, 1946 and then released. Thereafter, she was indicted for treason and taken into custody, pursuant to a warrant for her arrest, on August 26, 1948. Prior to trial, D'Aquino claimed that her internment by U.S. military authorities triggered her Sixth Amendment right to a speedy trial. In summarily rejecting the claim, which is virtually indistinguishable from Padilla's claim today, the court held that "wholly apart from whether [such] detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a formal complaint is lodged against the defendant in a criminal case." Id. at 350.

The former Fifth Circuit, whose decisions are binding on this Court, dealt with a similar situation in United States v. Duke, 527 F.2d 386 (1976).[3] In that case, the court held that the placement of a federal prisoner in administrative segregation – which it described as "an internal disciplinary measure" – pending an investigation of prison misconduct, and prior to being charged with an offense, did not trigger his Sixth Amendment speedy trial right. The court reasoned that "Marion speaks of the 'actual restraints imposed by arrest and holding to answer a criminal charge' as engaging the speedy trial protection of the Sixth Amendment. . . . Here the defendant was not 'charged' with a crime and hence was not subject to 'the anxiety and concern accompanying public accusation' that Marion saw as a major reason for giving an accused a speedy trial." Id. at 389-90. Moreover, said the court, "administrative segregation alone of the defendant did not render him an 'accused.' Because he was not an accused during the alleged delay, [his] claim must be judged under the Marion standard [for pre-indictment delay], which requires a showing of actual prejudice

[3]Decisions of the former Fifth Circuit prior to October 1, 1981 are binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

and intentional delay." Id. at 390. See also United States v. Mills, 704 F.2d 1553, 1556-57 (11th Cir. 1983) (citing Duke and holding that "we have previously held that placement in segregation within a prison does not initiate the accusatory phase or trigger the sixth amendment").

Courts elsewhere have reached the same conclusion when confronted by a defendant's argument that detention for some reason other than in connection with a criminal charge should start the speedy trial clock. In United States v. Wallace, 326 F.3d 881 (7th Cir. 2003), for example, the defendant was arrested by state authorities on April 26, 1999, but not charged with a federal offense resulting from the same incident until two years later. Rejecting the defendant's argument that the state arrest triggered his Sixth Amendment speedy trial right for purposes of any federal offense, the court reasoned that, because "it is well settled that the Sixth Amendment speedy trial right has no application prior to arrest or indictment," the "arrest by state authorities on a state charge . . . does not start the Sixth Amendment speedy trial clock for purposes of the subsequent federal charge." Id. at 885-86. See also United States v. Walker, 92 F.3d 714, 719 (8th Cir. 1996); United States v. Dickerson, 975 F.2d 1245, 1252 (7th Cir. 1992). The court reached the same outcome in United States v. Sprouts, 282 F.3d 1037 (8th Cir. 2002). That case involved a defendant who was charged with escaping from a federal prison camp during November 1999 and then voluntarily returning to the facility after a brief sojourn, but was not actually indicted for that offense until August 16, 2000. Prior to trial, the defendant moved to dismiss the escape charge on speedy trial grounds, claiming that his continued detention triggered his Sixth Amendment right. The Eighth Circuit rejected that claim, observing that "[the defendant] was not arrested for the escape because he was already incarcerated on another charge. Therefore, he did not become accused for purposes of the Sixth Amendment speedy trial provision until he was indicted on August 16, 2000." See also United

States v. Jones, 129 F.3d 718, 724 (2nd Cir. 1997) (federal custody, pursuant to a writ of habeas corpus *ad testificandum,* does not constitute being "held for the purpose of answering federal charges," so as to trigger the Sixth Amendment speedy trial right, "until the date of the federal indictment").

Padilla's detention as an unlawful combatant is indistinguishable from the kinds of detentions discussed in D'Aquino and the foregoing cases. At no time between his initial detention on May 8, 2002, until his indictment on November 17, 2005, was Padilla the subject of "actual restraints imposed by arrest and holding to answer a criminal charge." Marion, 404 U.S. at 320. Prior to November 17, 2005, "the Government [neither] assert[ed] probable cause to believe [Padilla] [had] committed a crime," nor obtained a "formal indictment or information." Id. Instead, Padilla's detention throughout that period was predicated upon entirely separate and unrelated grounds, first pursuant to the material witness warrant and thereafter pursuant to the designation of the President, acting pursuant to authority granted by Congress under the AUMF, that Padilla was an enemy combatant whose detention was necessary to prevent him from aiding an enemy military force against which the United States was engaged in military operations. As the Fourth Circuit observed, Padilla's detention was predicated upon facts which "unquestionably establish[ed] that Padilla pose[d] the requisite threat of return to battle in the ongoing armed conflict . . . and that his detention [was] authorized as a 'fundamental incident of waging war,' in order 'to prevent [his] return to the battlefield.'" Padilla, 423 F.3d at 396 (internal citations omitted). Consequently, for Sixth Amendment purposes, the speedy trial right did not attach until November 17, 2005 – less than one year ago. That finding makes all the difference for his motion.

B. None of the Factors for Assessing Whether a Defendant Has Been Denied The Right to a Speedy Trial Support Dismissal Here.

In Barker v. Wingo, 407 U.S. 514, 530 (1972), the Court identified four factors which "courts should assess in determining whether a defendant has been deprived of his right [to a speedy trial]." They include: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Id. The first of these components – length of delay – "is to some extent a triggering mechanism. Unless there is some delay which is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance." Id.; see Doggett v. United States, 505 U.S. 647, 651 (1992) ("[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay."). Thus, as the Eleventh Circuit explained in United States v. Clark, 83 F.3d 1350, 1352 (11th Cir. 1996), "[o]nly if this threshold point [of presumptive prejudice] is satisfied may the court proceed with the final three factors in the Barker analysis." See also United States v. Frye, 372 F.3d 729, 736 (5th Cir. 2004) (same).

The time elapsed between the return of this indictment on November 17, 2005, and the instant motion falls short of the amount of time deemed sufficient to trigger an inquiry concerning the other three Barker factors. See Knox v. Johnson, 224 F.3d 470, 476 (5th Cir. 2000) ("a delay of less than one year is not sufficient to trigger an examination of the Barker factors"); United States v. De Rose, 74 F.3d 1177, 1185 (11th Cir. 1996) (eight-month delay between accusation and trial insufficient to permit further inquiry); United States v. Gerald, 5 F.3d 563, 566 (D.C. Cir. 1993) (eleven month delay between formal charges and trial, part of which was consumed litigating pretrial motions, insufficient to support further inquiry); compare Doggett, 505 U.S. at 652 n.1 (delays exceeding one year may be presumed prejudicial); Frye, 372 F.3d at 737 (same). Because the lapse

of time here was less than one year, this Court should not even consider Padilla's arguments under the remaining Barker factors. But even if the Court were to consider the other factors, it is clear that the delay at issue here (properly calculated) is neither extreme nor particularly unusual in a complex case, and weighs against dismissal.

The remaining Barker factors, to the extent they are considered, likewise weigh against dismissal. As the Court is aware, the time between Padilla's November 17, 2005 indictment and the present has been consumed largely by litigating the defendants' pretrial motions.[4] In no sense has this delay been caused by government obstruction, such as "[a] deliberate attempt to delay the trial in order to hamper the defense" or its negligence. Barker, 407 U.S. at 531; see also Loud Hawk, 474 U.S. at 316 (government not responsible for delay attributable to its interlocutory appeal where its appeal was taken in good faith); Gerald, 5 F.3d at 566 (time between initiation of charges and trial consumed by litigation of motions not delay attributable to the government). The second Barker factor – reason for the delay – therefore cuts against dismissal.

So too does the third Barker factor: whether and when the defendant asserted his speedy trial right. See Barker, 407 U.S. at 531-32 ("[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of that right."); Frye, 372 F.3d at 739. The most Padilla can say is that he asserted his Sixth Amendment right inferentially by undertaking appeals concerning the propriety of his detention as an enemy combatant and, in that context, challenged the government to charge him with a criminal offense and to prove the charge at trial. But these arguments were not made for the purpose contemplated by

[4]Notably, Padilla makes no claim that his statutory speedy trial right has been violated; nor could he, as his pretrial motions resulted in excludable time. See 18 U.S.C. § 3161, et seq.

the Supreme Court in Barker: to obtain the prompt disposition of pending criminal charges. Padilla made his demand to be charged with a criminal offense not to obtain an expedited trial on such a charge, but rather for a distinct purpose: to challenge his designation as an enemy combatant and secure his release from military custody. See Frye, 372 F.3d at 739 (informal reference to speedy trial right, made in the context of motion to dismiss an indictment on unrelated grounds, does not weigh in defendant's favor).

The fourth Barker factor – prejudice to the defense – also cuts against Padilla's request for dismissal of this indictment. Where, as here, the lapse of time between the initiation of criminal charges and the defendant's detention thereon is insubstantial, and the lapse is not due to intentional or negligent pretrial conduct by the government, the defendant is required to demonstrate actual prejudice resulting from the delay as a precondition to relief. See Clark, 83 F.3d at 1353-54 (stating that, absent government negligence and substantial delay, the defendant must demonstrate "particularized prejudice," and finding that a 14 month delay attributable to the government was not of sufficient duration to relieve defendant of his obligation to demonstrate actual prejudice); see also Doggett, 505 U.S. at 657.

Padilla does not make that showing. As the Eleventh Circuit explained in Clark, actual prejudice can be shown in three ways: (1) the effects of oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) impairment of the accused's defense. 83 F.3d at 1354. Padilla cannot show the first two potential grounds of prejudice. Although he claims that his detention was both oppressive and marked by anxiety as to when he would be "brought to trial" on the "accusations against him" (Speedy Trial Motion at 13), he refers only to his detention as an enemy combatant, not his pretrial detention on the instant criminal charges.

Padilla does claim that his defense has been hampered by the delay in bringing him to trial, but again, his argument does not focus on the relatively short period of time between his indictment and the present. In any event, his argument is purely speculative, backed by no proof. For example, he speculates that, due to the passage of time, his memory has been impaired and he now finds it more difficult to locate witnesses and investigate facts potentially helpful to his defense, such as the origin and chain of custody of the "mujahideen data form" filled out in his handwriting that was located in Afghanistan in 2001. But none of these assertions is sufficiently particularized to demonstrate the type of trial prejudice necessary to support a claim of a Sixth Amendment speedy trial violation. As the Supreme Court explained in Loud Hawk, in assessing a claim of prejudicial post-indictment delay in violation of the Sixth Amendment, "[the] *possibility* of prejudice is not sufficient to support [a defendant's] position that [his] speedy trial rights were violated." 474 U.S. at 315 (emphasis added). Consequently, it is insufficient to merely claim that "'[w]itnesses have disappeared; recollections are dim; and the investigation is impaired.'" United States v. Williams, 372 F.3d 96, 113 (2nd Cir. 2004). Instead, a defendant must "articulate prejudice with . . . . specificity." Id.; see also United States v. Schlei, 122 F.3d 944, 988 (11th Cir. 1997) (no prejudice despite intervening death of potential witness where defendant could not show that witness's testimony would have been favorable); United States v. Juarez-Fierro, 935 F.2d 672, 676 (5th Cir. 1991) (conclusory statements about the prejudice insufficient); see also United States v. Jackson, 446 F.3d 847, 851 (8th Cir. 2006). Padilla's claims of prejudice are so conclusory and speculative that they do not come close to satisfying the standard of concreteness required by Loud Hawk and the cases decided in its wake. This Barker factor as well weighs against dismissal.

Finally, Padilla's more general argument that the government could or should have indicted

him earlier than it did is irrelevant to proper Sixth Amendment speedy trial analysis. As the Supreme Court explained in Marion, 404 U.S. at 321-22, in rejecting a similar claim, "[w]e decline to extend the reach of the [Sixth] Amendment to the period prior to arrest. . . . Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defense of witnesses, and otherwise interfere with his ability to defend himself. But this possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context." For all of these reasons, Padilla's motion to dismiss based upon the alleged violation of his Sixth Amendment right to a speedy trial has no merit and should be denied.

II. PADILLA IS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT DUE TO PRE-INDICTMENT DELAY IN VIOLATION OF THE FIFTH AMENDMENT.

In his Pre-indictment Delay Motion, Padilla takes the same general set of allegations and repackages them in a different argument: as he sees it, the government's failure to indict him earlier than it did violated his rights under Fifth Amendment's substantive due process clause. That argument too is without merit and should be denied as a matter of law.

As the Supreme Court explained in Marion, although the statute of limitations constitutes the primary bulwark against excessive pre-indictment delay, it "does not fully define [a defendant's] rights with respect to events occurring prior to indictment. Thus . . . the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that preindictment delay . . . caused substantial prejudice to [the defendant's] right to a fair trial *and* that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324 (emphasis added); see also United States v. Gouvea, 467 U.S. 180, 192 (1984). Padilla has failed to demonstrate either of the requirements in Marion.

A. Padilla Has Not Suffered "Prejudice" of the Type Required to Establish a Due

Process Violation Based Upon Pre-Indictment Delay.

Padilla attempts to satisfy the "prejudice" prong of Marion in two ways, neither of which suffices. First, he contends that the Court should consider the allegedly inhumane treatment he received while detained as an enemy combatant, much as a court considers the defendant's "oppressive pretrial detention" and "anxiety" over the delayed resolution of criminal charges in the Sixth Amendment speedy trial context. The problem with this argument is simple: pre-indictment delay is not analyzed under the Sixth Amendment, it is analyzed under the Fifth, and the Supreme Court has adopted a materially different standard for prejudice in the Fifth Amendment context.

As explained above, in Marion the Supreme Court defined "prejudice" resulting from pre-indictment delay as "[a]ctual prejudice to the defense of a criminal case," such as will materially affect the defendant's "right to a fair trial." 404 U.S. at 324. Indeed, in that case, the Supreme Court denied relief to the defendant because "[n]o actual prejudice to the conduct of the defense [was] alleged or proved." Id. at 325; see also Gouvea, 467 U.S. at 192 ("The Fifth Amendment requires dismissal of an indictment . . . if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and *that it caused him actual prejudice in presenting a defense)* (emphasis added); Lovasco, 431 U.S. at 790.

The adoption of different standards make sense. "Prejudice" has a broader meaning in the Sixth Amendment speedy trial context, because extreme delay in bringing a person to trial on criminal charges not only may impair the ability to mount a defense, but may also prolong the opprobrium and restraints on freedom caused by the lodging of formal criminal charges. See Barker, 407 U.S. at 532-53. As the Supreme Court explained in MacDonald, "[t]he Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense

caused by the passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." 456 U.S. at 8. Accordingly, Padilla's attempt to prove prejudice by drawing the Court to (wholly unsupported) allegations about his detention is misplaced; his assertions of prejudice resulting from the alleged conditions of his detention are entitled to no consideration in the Fifth Amendment analysis. See Jackson, 446 F.3d at 851 (rejecting claims of pre-indictment delay prejudice based on "emotional, financial and social distress" because "[o]ur Fifth Amendment pre-indictment delay cases . . . have consistently limited the prejudice inquiry to the effects of the delay on the defendant's ability to present an effective defense"); see also United States v. Bartlett, 794 F.2d1285, 1290 (8th Cir. 1986) (defendant's incarceration on parallel state charges – later dismissed – by itself does not constitute "actual prejudice for the purpose of the due process clause" which focuses upon the "due process rights to a fair trial and prejudice to the defense of the case").

The second way Padilla tries to show the prejudice required by Marion is the more conventional approach of claiming that the government's delay in indicting him has hampered his ability to mount a defense to these charges. This argument is as speculative as it is unsupported, however. As the Supreme Court pointed out in Marion:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost. In light of the statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and therefore justify the dismissal of the indictment. Events of the trial may

> demonstrate actual prejudice but at present appellees' due process claims are speculative and premature.

404 U.S. at 325-26. Even when a defendant can demonstrate that pre-indictment delay precipitated medical conditions that impaired his memory, the mere loss of or impairment of memory does not constitute actual prejudice for purposes of the due process clause. See United States v. Avalos, 541 F.2d 1100, 1107 (5th Cir. 1976) ("This Court has consistently held that speculative allegations, such as general allegations of loss of witnesses and failure of memories are insufficient to establish the requisite actual prejudice [to make out a due process violation]"); see also Jackson, 446 F.3d at 851-52 (rejecting claim of prejudice due to pre-indictment delay absent specific evidence demonstrating witness memory loss); United States v. Wright, 343 F.3d 849, 859 (6th Cir. 2003); United States v. McDougal, 133 F.3d 1110, 1113 (8th Cir. 1998). Yet that is essentially all Padilla asserts. Accordingly, he fails to meet his burden of establishing the type of specific trial prejudice necessary to trigger an inquiry whether he is entitled to dismissal due to extreme pre-indictment delay.

B. Padilla Has Failed to Demonstrate That the "Delay" at Issue Was the Product Of an Effort by the Government to Secure a "Tactical Advantage."

Even if Padilla were able to demonstrate actual prejudice to his ability to mount a defense, "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and [] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Lovasco, 431 U.S. at 790. There must be a "showing that the Government intentionally delayed [seeking an indictment] to gain some tactical advantage over [the defendant] or to harass [him]." Marion, 404 U.S. at 325; see also Lovasco, 431 U.S. at 795 (noting that investigative delay "is fundamentally unlike delay undertaken by the government solely 'to gain tactical advantage over the accused'"); United States v. Foxman, 87 F.3d 1220, 1223 (11th Cir. 1996) ("[S]ubstantial

prejudice from delay, standing alone, does not violate due process. The delay must also be the product of a deliberate act by the government designed to gain a tactical advantage.").

Padilla cannot make that showing, and does not even try to do so with any record evidence. His motion therefore fails at the threshold. He maintains abstractly that the government possessed sufficient evidence at the time of his "initial arrest on May 8, 2002" to indict him "but chose to defer that prosecution" (Pre-indictment Delay Motion at 16). But even if Padilla's assumption concerning the state of the government's investigation at that juncture were correct, that assumption would not meet his burden of demonstrating that the ensuing delay was the product of a calculated effort to achieve a tactical advantage at trial. As the Court explained in Lovasco:

> [r]equiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the government from giving full consideration to the desirability of not prosecuting in particular cases. The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the government's case, in order to determine whether prosecution would be in the public interest.

431 U.S. at 794. There is simply no evidence that the government's decision not to charge Padilla criminally earlier than it did (even assuming *arguendo* it could have) was made solely to gain a tactical advantage at trial. Absent such evidence, and Padilla provides none, his motion should be denied without further inquiry.[5]

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[5]The absence of any evidence for Padilla's claim is all the more significant because courts generally are reclutant to inquire into circumstances surrounding the decision to bring or not bring criminal charges. In cases involving alleged Fifth Amendment violations based upon selective prosecution, for example, the Supreme Court and the Eleventh Circuit have set an extraordinarily high bar before a defendant can obtain a hearing, let alone prevail. See United States v. Armstrong, 517 U.S. 456, 465 (1992) ("Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by

Padilla also suggests that the government delayed charging him, and instead prolonged his detention as an enemy combatant, to obtain additional time to "coerc[e] him to answer questions concerning matters relating to the charges he is facing" (Pre-indictment Delay Motion at 16-17). But again, Padilla presents no evidence that the sole purpose of detaining him as an enemy combatant and deferring possible criminal prosecution was to afford as much time as possible to secure incriminating statements admissible at possible future jury trial. On the contrary, the propriety of his detention has already been decided. Padilla, 423 F.3d at 390-97. Moreover, the government has already committed that it will not introduce in its case-in-chief any statement obtained from Padilla during his pre-indictment detention as a unlawful combatant. Such statements can therefore hardly be viewed as evidence of seeking to obtain a tactical advantage via pre-indictment delay. Simply put, Padilla provides no evidence to support his Fifth Amendment argument, and therefore his motion to dismiss this indictment on that basis fails as a matter of law.

CONCLUSION

For the foregoing reasons, Padilla's motions to dismiss for speedy trial violations and pre-indictment delay should be denied.

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revealing the Government's enforcement policy.") (internal citations and quotation marks omitted); United States v Smith, 231 F.3d 800, 807 (11th Cir. 2000) (same); Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993) (stressing that even an evidentiary hearing is improper unless "the defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive"); see also United States v Jennings, 991 F.2d 725, 730 (11th Cir. 1993) ("'This heavy burden imposed upon defendants is indicative of the policy of restraint that derives from a respect for executive, prosecutorial discretion implicit in constitutional separation of powers.'").

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2006, the undersigned electronically filed the foregoing document, "GOVERNMENT'S OPPOSITION TO DEFENDANT PADILLA'S MOTIONS TO DISMISS FOR LACK OF SPEEDY TRIAL AND FOR PRE-INDICTMENT DELAY," with the Clerk of the Court using CM/ECF and served in some other authorized manner those counsel who

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