

**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 REPLY IN FURTHER SUPPORT OF MOTION TO QUASH
IMPROPER DEFENSE SUBPOENAS**

The United States of America, through undersigned counsel, hereby replies to defendant Padilla’s response to the government’s motion (DE 712) for entry of an order quashing a series of improper defense subpoenas. Because it is now apparent (if there were any question before) that these subpoenas were issued unlawfully without the Court’s approval, they should be quashed, and the Court should enter an order ensuring that no subpoenas may be issued by the defense without prior leave of Court in accordance with Fed. R. Crim. P. 17.

The defense does not even try to argue that these subpoenas comply with Rule 17. In his seven page response, Padilla makes just one reference to Rule 17, arguing that Rule 17 “authorize[s] a defendant, in advance of any trial, to obtain evidence to be used in his defense at trial.” Resp. at 6. But Rule 17 also imposes strict limitations on how the defense may obtain such evidence, and sets forth procedural requirements that cannot be avoided by the fiat of defense counsel. *See, e.g., United States v. Beckford*, 964 F. Supp. 1010, 1026 (E.D. Va. 1997) (emphasizing that the “explicit language” of Rule 17 must “be heeded by the courts and given its full and proper effect”). Padilla

does not dispute that, contrary to the rule, he failed to obtain leave of court for these subpoenas (let alone for return of these subpoenas before trial). And he does not dispute that, contrary to Rule 17, he made these subpoenas returnable on dates when no hearings are scheduled and when this Court is out of session (a Sunday).

It is not surprising that Padilla's response, in place of legal analysis, offers such irrelevancies as a quip by a New York state judge and a reference to the Korean War. *See* Resp. at 2 n.2 & 7. This choice of anecdote over analysis is no accident. Padilla has nothing to say on the merits. These subpoenas are defective on their face, should be quashed, and the Court should not countenance any future violations of Rule 17. *See United States v. Keen*, 509 F.2d 1273, 1274 (6th Cir. 1975) (describing as "highly improper" the practice of obtaining blank subpoenas and compelling witnesses to attend an unauthorized court proceeding).

Equally unconvincing is Padilla's suggestion that all of the material sought in these subpoenas is relevant and admissible at trial. To reiterate, a Rule 17 subpoena is not a discovery device. Rather, a Rule 17 subpoena may only be used to gather evidence that is likely to be both relevant and admissible at trial. *See United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991).

Padilla says that the information he seeks in these subpoenas about his confinement is relevant because the government at trial may seek to introduce against him in rebuttal certain statements he made while in military custody. That argument – the only one made regarding relevance – is faulty because Padilla seeks far more than merely information about the circumstances of his statements; indeed, he demands documents about all enemy combatants over time. *See* Motion to Quash, Ex. A (demanding records "regarding enemy combatants to include enemy

combatant [Padilla]”). Such a request has nothing to do with Padilla’s own statements. Moreover, speculation about the potential use, if any, of Padilla’s statements at trial if he were to open the door to such evidence is an entirely insufficient basis for upholding burdensome Rule 17 subpoenas to third parties. The defendants are fishing for information, based at most upon a hypothetical, and that is exactly what the rules forbid.

For all of these reasons, the Court should grant the government’s motion to quash and enter an appropriate order ensuring future compliance with Rule 17 by the defense.

Respectfully submitted,

R. ALEXANDER ACOSTA
United States Attorney

s/ John C. Shipley _____
RUSSELL R. KILLINGER
Fla. Bar No. 0312851
BRIAN K. FRAZIER
Court No. A5500476
JOHN C. SHIPLEY
Fla. Bar No. 069670
Assistant United States Attorneys

STEPHANIE K. PELL
Court No. A5500301
Attorney, United States Department of Justice
Criminal Division, Counterterrorism Section
99 N.E. 4th Street, 8th Floor
Miami, Florida 33132
Tel: (305) 961-9000
Fax: (305) 530-4675

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2006, I electronically filed the foregoing document, Government's Reply In Further Support of Motion to Quash Improper Defense Subpoenas, with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served today by mail for those counsel and/or parties who are not authorized to receive or did not receive Notices of Electronic Filing as follows:

Andrew G. Patel, Esq.
2301 Collins Avenue
Apt. PH-10
Miami Beach, Florida 33139
Attorney for Defendant Padilla

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