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 RESPONSE TO PADILLA'S OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DENYING MOTION TO SUPPRESS PHYSICAL EVIDENCE AND ISSUE WRITS AD TESTIFICANDUM

I. INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The United States of America, through its undersigned Attorneys, files this response to Padilla's Objections (Objections) (DE 587) to Magistrate Judge Brown's Corrected Report and Recommendation (R&R) (DE 568) denying Padilla's Motion to Suppress Physical Evidence and Issue Writs Ad Testificandum. The government additionally responds to overlapping issues raised by Padilla in his Reply (Reply) (DE 537) to the government's Response (Initial Response) (DE 436) to Padilla's Motion to Suppress Physical Evidence and Issue Writs Ad Testificandum (Initial Motion) (DE 365/376).

Padilla seeks to suppress physical evidence seized pursuant to his arrest on a Material

[1] The government is submitting to the Court, through the Court Security Officer, a classified, *ex parte* declaration, pursuant to the Classified Information Procedures Act (CIPA) § 4, 18 U.S.C. App. III § 4, in support of the government's response to Padilla's Objections to the Magistrate Judge's Corrected Report and Recommendation.

Witness Warrant (18 U.S.C. § 3144) on May 8, 2002 at Chicago O'Hare International Airport. Padilla's theory of suppression is based on *Franks v. Delaware*, 438 U.S. 154 (1978); Padilla challenges the affidavit supporting the Material Witness Warrant. The affidavit relied on two sources, CS-1 (Abu Zubaydah) and Subject-1 (Binyam Muhammad)[2], to establish that Padilla had information material to a grand jury investigation.

Padilla's position has changed over time. In his Initial Motion, Padilla raised four specific *Franks* challenges to the affidavit:

A. Abu Zubaydah suffered from multiple gunshot wounds when he provided the information included in the affidavit;

B. Assuming Abu Zubaydah was injured, the affidavit does not specify what medical attention Abu Zubaydah had received or whether medical attention, other than medication, was withheld while he was interrogated;

C. The government fails to explain how it came into possession of a passport that Padilla lost and which it later showed to Abu Zubaydah;[3] and

D. The individual Padilla identifies as Binyam Muhammad was tortured during the time period in which he was interviewed by the Federal Bureau of Investigation (FBI).

Initial Motion, p. 6.

In his Reply to the government's Initial Response, Padilla raised three additional factual

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[2] The sources are referred to as CS-1 and Subject-1 in the Material Witness Affidavit. The identities of the sources were classified at the time the Material Witness Warrant was executed, and remained classified at the time the government filed its Initial Response to Padilla's Initial Motion. The identities of CS-1 and Subject-1 have now been declassified, and thus are referred to by name, Abu Zubaydah and Binyam Muhammad respectively, unless quoting directly from the Material Witness Affidavit.

[3] In the government's Initial Response to Padilla's Initial Motion, the government filed a separate classified *ex parte* declaration, pursuant to CIPA § 4, to provide the Court with additional information that is pertinent to, but not necessary to the resolution of, paragraph C above. The government now re-submits this classified *ex parte* declaration.

Franks challenges to the affidavit and supplemented a prior claim:

E. Showing a single photograph each of Padilla and Binyam Muhammad to Abu Zubaydah was suggestive and unreliable, and therefore unlawful (Reply pp. 5-6);

F. Abu Zubaydah was mentally incompetent (Reply, p. 6);

G. The portion of the affidavit which states that Padilla "is currently on a flight from Pakistan to Chicago . . ." was false insofar as Padilla was actually on a flight that originated from Zurich, Switzerland (Reply, p. 7); and

H. All statements attributed to Binyam Muhammad were false and are the product of torture (Reply 5, Exhibit A, "Affirmation of Andrew G. Patel, pp. 2-10).[4]

In his Objections to the R&R, Padilla raises an additional factual *Franks* challenge to the affidavit:

I. Based on statements from high-level public officials and other reports in the press, Abu Zubaydah had been detained in a special program housed outside of the United States operated by the Central Intelligence Agency, and, as Padilla interprets these statements, Abu Zubaydah was tortured while detained outside of the United States.

Padilla's allegations are meritless. To start, the government denies all claims of torture raised by Padilla. Neither the affiant nor the government agents he consulted had any awareness of what was not in fact true, viz., that Abu Zubaydah or Binyam Muhammad had been tortured, or that reports reviewed by the affiant about interviews of Abu Zubaydah and Binyam Muhammad contained information that was the product of torture.

Padilla's claims, moreover, are irrelevant as a matter of law. Even assuming that statements from a high-level government official that appeared in the press in early September, 2006 raise

[4] The Affirmation was filed by Padilla Attorney Andrew G. Patel rather than Subject -1 or Binyam Muhammad's attorney, because Mr. Patel alleges that Subject 1's attorney was prevented, due to existing regulations at Guantanamo Bay Cuba, from allowing Binyam Muhammad to review a draft affidavit that would allegedly contain the same facts described in Mr. Patel's affirmation (Affirmation of Andrew G. Patel 2). *See infra*.

legitimate questions about factors or omissions that concern the reliability of information provided by Abu Zubaydah, Padilla is not entitled to the relief he seeks. Padilla cannot assert the constitutional rights of a third party and he cites no law suggesting that he may. Moreover, neither the affiant nor the agents he consulted had any additional information concerning Abu Zubaydah's reliability beyond what is stated in the Material Witness Warrant Affidavit. Further, any questions raised about the reliability of the information provided by Abu Zubaydah are answered by corroborating information provided by Binyam Muhammad. In other words, even assuming that Abu Zubaydah's reliability is called into question, the corroboration of Abu Zubaydah's information in the affidavit establishes probable cause to believe that Padilla could provide material testimony to a grand jury investigating past and future attacks against the United States by Al Qaeda and associates of Al Qaeda.

II. FACTUAL STATEMENT

On May 8, 2002, Padilla arrived at Chicago O'Hare International Airport on an international flight from Zurich, Switzerland at approximately 1:00 p.m. (C.D.T).[5] Padilla cleared the Immigration inspections area, and then proceeded to the Customs inspections area, where a secondary examination was performed. During the secondary examination, it was discovered that while Padilla claimed he only had $8,000, he actually possessed over $10,000 in cash, which was in violation of currency reporting requirements. At approximately 3:00 p.m., Padilla was escorted

[5] In the Magistrate Judge's R & R, the Court incorporates a section of a separate Report and Recommendation denying Padilla's Motion to Suppress Airport Statements (R&R Airport Statements) (DE 549), also issued by Magistrate Judge Brown, that sets forth facts surrounding Padilla's arrest pursuant to the Material Witness Warrant at issue in this motion. Where relevant, the government likewise relies upon the transcript from the evidentiary hearing held (Transcript Airport Statements) (DE 500/501) on Padilla's Motion to Suppress Airport Statements (DE 291).

to a conference room located inside the Customs inspections area. (R & R Airport Statements, pp. 1-2).

Prior to Padilla's arrival at Chicago O'Hare International Airport, FBI Special Agents Russell Fincher and Craig Donnachie had traveled from New York to speak with and attempt to gain the cooperation of Padilla, who they believed had information which would prevent a terrorist attack. Agents Fincher and Donnachie, along with Chicago FBI agents Robert Holley and Todd Schmitt, participated in an interview of Padilla in a conference room, which began at approximately 3:15 p.m. and ended sometime between 7:05 and 7:35 p.m. when Padilla declined to speak further to agents without an attorney, and was ultimately arrested by Agent Fincher on the Material Witness Warrant currently at issue. (R & R Airport Statements, pp. 2-7).

Near the end of the interview, but prior to actually placing Padilla under arrest, Agent Fincher told Padilla that he would like Padilla to work with him and help him more fully understand the issues they had discussed. If Padilla were to volunteer, Agent Fincher explained, the FBI would arrange for a hotel that evening and they would all travel to New York the next day so that Padilla could then testify in front of a grand jury in New York. Otherwise, Agent Fincher indicated that he would have to serve Padilla with a grand jury subpoena, which he showed to Padilla, to compel his testimony before the grand jury. Padilla asked procedural questions about the grand jury subpoena process, which Agent Fincher answered. After considering the information, Padilla stated that he was not going to volunteer to go to New York and that if Agent Fincher wanted him to go, he would have to arrest Padilla. The same thing happened again: Agent Fincher informed Padilla that he did have a Material Witness Warrant that he could use to arrest Padilla, but that he would rather have Padilla volunteer the information, and that he did not want to arrest Padilla. Padilla responded that

he was not going to volunteer and that Agent Fincher would have to arrest him. Following this exchange, Padilla was arrested by Agent Fincher and read his *Miranda*[6] rights pursuant to a Customs Advice of Rights Form. (R & R Airport Statements, pp. 6-7; Transcript Airport Statements, pp. 86-92).

Pursuant to the arrest on the Material Witness Warrant, while remaining in the Customs inspections area, FBI agents seized all of Padilla's hand carried luggage.

A. Probable Cause and the Affidavit

The affidavit supporting the Material Witness Warrant relies on two sources, Abu Zubaydah and Binyam Muhammad, to establish that Padilla had information material to a grand jury investigating past and future attacks against the United States by members and associates of Al Qaeda. The affidavit begins by stating that on or about April 22 and 23, 2002, Abu Zubaydah provided information to law enforcement officers and others while being detained in a foreign country. (Material Witness Affidavit, p.3 ¶ 4). This introductory statement about Abu Zubaydah includes a footnote in which the affiant related background information about Abu Zubaydah with specific details about his credibility:

> Based on information developed by the Government, CS-1 has been involved with Al Qaeda for several years, and is believed to have been involved in the terrorist activities of Al Qaeda. In addition to the specific interviews referenced above, CS-1 has been interviewed on prior occasions. It is believed that CS-1 has not been completely candid about his association with Al Qaeda, and his own terrorist activities, during these interviews with U.S. personnel. Much of the information provided by CS-1 about other individuals during earlier interviews, has, however, been corroborated and has proved accurate and reliable. Some of the information provided by CS-1 about other individuals during earlier interviews remains uncorroborated, and may be a part of an effort by CS-1 to mislead or confuse U.S. law enforcement. In addition, at the time of the interviews referenced above, CS-1 was being treated with various types of medication.

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Material Witness Warrant Affidavit, n.1.

The affidavit then explained that Abu Zubaydah provided information about two individuals, one whom he initially referred to as a "South American" and then later identified as "Abdullah Al Muhajir." Abu Zubaydah also provided the name of the second individual to the interviewing officers. The affidavit refers to the second individual as "Subject-1." On or about April 23, 2002, Abu Zubaydah was shown two photographs, one that was taken from the U.S. passport of Jose Padilla, which had been recovered from Padilla's person. Abu Zubaydah identified the individual in that photograph as the person he knew as "Abdullah Al Muhajir." The other photograph was taken from a fake passport recovered from Binyam Muhammad, which Abu Zubaydah identified as the individual whom he previously had named and described as the second individual in the company of the "South American." (Material Witness Affidavit, pp. 3-4, ¶ 4a).

Abu Zubaydah further stated that Padilla and Binyam Muhammad had asked Abu Zubaydah for his opinion on their plan to build an explosive device that would combine uranium or other nuclear or radioactive material with an "ordinary" explosive device (hereinafter called a "dirty bomb"), and then detonating the dirty bomb in the United States. Abu Zubaydah told Padilla and Binyam Muhammad that he (Abu Zubaydah) did not think the plan would work, but Binyam Muhammad thought it would work. Abu Zubaydah also indicated to the government that he did not think Padilla and Binyam Muhammad were members of Al Qaeda. Abu Zubaydah further stated that he believed the dirty bomb plan was still in the idea phase, as Padilla and Binyam Muhammad did not have any radioactive material yet, but they had mentioned stealing radioactive material from an unnamed university. Abu Zubaydah believed that Padilla and Binyam Muhammad had consulted an unidentified Internet website to learn how to assemble a dirty bomb. Abu Zubaydah was not

aware of any associates of Padilla and Binyam Muhammad in the United States, but thought that Padilla seemed very familiar with the Washington, D.C. area (Material Witness Affidavit, pp. 4-5, ¶¶ 4b-4d).

Abu Zubaydah further stated that Padilla and Binyam Muhammad had asked Abu Zubaydah to put them in touch with another individual known by Abu Zubaydah to be a member of Al Qaeda (hereinafter referred to as Subject-2). Abu Zubaydah expressed the belief to Padilla and Binyam Muhammad that Subject-2 would be interested in working with them because: (1) they were not Arab and thus would draw less attention; (2) they could travel freely with passports that would not draw much attention; and (3) they were willing to work. While, according to Abu Zubaydah, Binyam Muhammad was willing to become a martyr, Padilla was not. (Material Witness Affidavit, p.5, ¶¶ 4e-4f).

The affidavit then turned to information provided from an interview of Binyam Muhammad in early April, 2002. The affiant explained that Binyam Muhammad had been detained in Pakistan by the Pakistani authorities while trying to board a flight, on suspicions that his non-U.S. passport was fraudulent (which it was). The affiant explained that he had read reports prepared based on the interview of Binyam Muhammad, and had spoken with other law enforcement officers regarding this interview. Binyam Muhammad stated that he went to Pakistan in November 2001 for training in Afghanistan and had met Padilla there in 2001. Binyam Muhammad and Padilla traveled together to Pakistan at the behest of Abu Zubaydah to receive training in "wiring explosives." Binyam Muhammad further stated that, while in Pakistan, he and Padilla researched the construction of a uranium-enhanced device, which would be detonated in the United States. Binyam Muhammad and Padilla discussed this plan with Abu Zubaydah, who referred them to other members of Al Qaeda

for further discussion of the operation. Binyam Muhammad further indicated that Al Qaeda officials held at least two separate meetings with Padilla. Although Binyam Muhammad was not a party to those conversations, Binyam Muhammad believed that, during those conversations, Al Qaeda officials directed Padilla to return to the United States to conduct reconnaissance on behalf of Al Qaeda within the United States. (Material Witness Affidavit, pp. 5-7, ¶¶ 5-5d).

B. Corroboration and the Affidavit

The information provided by Abu Zubaydah and Binyam Muhammad, in separate interviews, conducted at different times, established and corroborated facts supporting probable cause to believe that Padilla had material information relevant to a grand jury investigating past and future attacks by members and associates of Al Qaeda:

(1) Abu Zubaydah described two individuals (Padilla and Binyam Muhammad), subsequently identified by him from photographs taken from passports recovered from their persons, as persons who had sought his opinion about detonating a radioactive device in the United States. Binyam Muhammad stated that he and Padilla traveled together to Pakistan where they discussed with Abu Zubaydah a plan to detonate a uranium-enhanced explosive device in the United States; and

(2) Abu Zubaydah stated that Padilla and Binyam Muhammad had asked Abu Zubaydah to put them in touch with another individual known to Abu Zubaydah to be a member of Al Qaeda. Binyam Muhammad stated that Abu Zubaydah referred Padilla and Binyam Muhammad to other members of Al Qaeda for further discussion of the dirty bomb operation. Binyam Muhammad further indicated that Al Qaeda officials held at least two separate meetings with Padilla and, although not party to those conversations, Binyam Muhammad believed that Al Qaeda officials

directed Padilla to return to the United States to conduct reconnaissance on behalf of Al Qaeda within the United States.

III. *FRANKS v. DELAWARE* AND THE STANDARDS OF ANALYSIS

Padilla mischaracterizes his burden under *Franks v. Delaware*. It is well settled that a defendant has a limited constitutional right to challenge the veracity of a warrant affidavit. To be entitled to an evidentiary hearing, the defendant must make a "substantial preliminary showing" that "(1) the affiant deliberately or recklessly included false statements, or failed to include material information in the affidavit; and (2) the challenged statement or omission was essential to the finding of probable cause." *United States v. Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006) (*quoting Franks*, 438 U.S. at 155-56).

Franks challenges concern the affiant alone, not anyone else. *See, e.g.*, *Franks*, 438 U.S. at 171-72 ("The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant"); *United States v. Novaton,* 271 F.3d 968, 986 (11th Cir. 2001) (similar). Further, the "substantiality requirement" – which the defendant bears the burden of satisfying before being entitled to a *Franks* hearing – is not "lightly met":

> [T]he challengers's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Arbolaez, 450 F.3d at 1294, (*quoting Williams v. Brown*, 609 F.2d 216, 219 (5th Cir. 1979)) (*quoting Franks*, 438 U.S. at 272).

Even negligent omissions or statements in an affidavit do not establish a basis for a *Franks*

hearing. See *O'Ferrell v. United States*, 253 F.3d 1257, 1270-71 (11th Cir. 2001) (no hearing required because possible falsehood in affidavit likely resulted from negligence and not recklessness); *United States v. Wuagneaux*, 63 F.2d 1343, 1355 (11th Cir. 1982) (even if proven, allegations of negligence or innocent mistake in an affidavit in support for an application for a search warrant are insufficient to require a *Franks* hearing). The mere fact that an informant's trial testimony "contradicts information attributed to that informant in an affidavit supporting a warrant does not entitle a defendant to suppression. Instead, the defendant must show that it is the agent, and not the informant, who has made misrepresentations." *Novaton*, 271 F.3d at 988-89. Indeed, "it will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant has acted from bad motive or recklessly in conducting his investigation and making the affidavit." *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980).[7]

The materiality standard is also significant. To be entitled to relief under *Franks*, "a defendant must show not only that misrepresentations or omissions were intentionally or recklessly made, but also that, absent those misrepresentations or omissions, probable cause would have been lacking. That is the test of materiality, and *materiality is essential no matter how deliberate or reckless the misrepresentations were*." *Novaton*, 271 F.3d at 987 (emphasis added).

In this case, Padilla has alleged a variety of *omissions* by the affiant (*see supra* Padilla allegations A, B, D, F, H). Even assuming Padilla could establish the veracity and materiality of the alleged omissions, he must prove that when the allegedly omitted material is "added in" to the

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[7] Fifth Circuit precedent issued prior to October 1, 1981, is binding on this Court unless subsequently overruled by the Eleventh Circuit sitting en banc or by the Supreme Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209-10 (11th Cir. 1981) (*en banc*).

facts presented in the warrant affidavit, no probable cause exists for the warrant. *Novaton*, 271 F.3d at 986-87 (to be successful under *Franks*, defendant must carry his burden of proving "(1) that the alleged misrepresentation or omissions were knowingly or recklessly made . . . and (2) that the result of excluding the alleged misrepresentation and including the alleged omissions would have been a lack of probable cause for the issuance of the warrants") (*citing United States v. Jenkins*, 901 F.2d 1075, 1080 (11th Cir. 1990)).[8]

Furthermore, in Padilla's case, the probable cause at issue concerns not whether Padilla committed a crime, but whether – less than eight months after the September 11th 2001 attacks on the United States by Al Qaeda – there was reason to believe that he could provide material testimony to a grand jury in the Southern District of New York investigating "plans and conspiracies by members and associates of Al Qaeda who have conducted terrorist attacks against the United States and U.S. interests including . . . the September 11th terrorist attacks . . . [and] plans or conspiracies to conduct similar attacks in the future . . . ." (Material Witness Affidavit, p 2, ¶ 2). To issue a material witness warrant pursuant to 18 U.S.C. § 3144, a judicial officer must have probable cause to believe that (1) "the testimony of a person is material in a criminal proceeding" and (2) "it may

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[8] In his Objections to the R&R, Padilla asks the Court to excise all statements from Abu Zubaydah and Binyam Muhammad, because Padilla claims they are the product of torture and, a reviewing court has an obligation "to excise illegally obtained information from a warrant application." (Objections, pp. 1, 8-10). Padilla's demand for the immediate excisement of all alleged "illegally obtained evidence" simply does not comport with *Franks* law and analysis. Rather, this Court must first determine if Padilla has met his burden in establishing a deliberate or reckless omission or misstatement on behalf of the affiant, and, in the event that Padilla has made this showing, determine whether probable cause to issue a material witness warrant exists if the omission(s) is/are added in or the misstatement(s) is/are extracted. Contrary to those well understood procedures, Padilla instructs this Court to hold a hearing and make a finding that the information in the warrant was illegally obtained, and then automatically extract all of the alleged illegally obtained evidence. Padilla cites no *Franks* case (and the government is aware of none) supporting his claim.

become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144; *Bacon v. United States*, 449 F.2d 933, 942-43 (9th Cir. 1971) (holding that probable cause is the appropriate standard for § 3144 material witness warrants).[9]

IV. PADILLA'S *FRANKS* CHALLENGE FAILS

The vast majority of Padilla's *Franks* challenge concerns issues of credibility pertaining to the two sources, Abu Zubaydah and Binyam Muhammad. Padilla contends there was information known to the affiant and undisclosed to the Judge who signed the warrant that affected the credibility of the information provided by the sources. (*see supra* Padilla allegations A, B, D, F, H above). Padilla further claims that Abu Zubaydah and Binyam Muhammad were tortured. Padilla also asserts that the affidavit contains a "factual impossibility," claiming that the affidavit indicates that the government somehow came into possession of a passport that Padilla had lost and later showed to Abu Zubaydah. (*see supra* Padilla allegation C above). Relatedly, Padilla argues that the procedure of showing a single photograph each of Padilla and Binyam Muhammad to Abu Zubaydah was suggestive and unreliable, and therefore unlawful (*see supra* Padilla allegation E above). Finally, Padilla alleges that the portion of the affidavit which states that Padilla "is currently on a flight from Pakistan to Chicago . . ." is false because Padilla was actually on a flight that originated from Zurich Switzerland (*see supra* Padilla allegation G above). Padilla claims that

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[9] Padilla urges this Court to apply a novel theory of "willful blindness," "deliberate ignorance," or "conscious avoidance" under which knowledge could be imputed to a *Franks* affiant who allegedly should know of certain conduct and purposely contrives to avoid learning it. (Objections, p. 11). While Padilla may wish to incorporate a "deliberate ignorance" theory, he cites no case for this proposition. In any event, Padilla has offered no proof in his case that the affiant or other agents either willfully blinded themselves from or consciously avoided any facts that were critical to a determination of probable cause. Magistrate Judge Brown rejected the doctrine of "willful blindness" or "deliberate ignorance" insofar as the Court found Padilla had offered no proof that the affiant "should [have] know[n] of alleged conduct concerning Abu Zubaydah and/or Binyam Muhammad or that he purposely contrived to avoid learning it." (R & R, p. 6).

agents knew Padilla had not been in Pakistan for more than a month and that the Material Witness Affidavit was "structured to mislead Judge Mukasey that Padilla was on his way directly from Pakistan to attack the United States." (Reply, p. 8). None of these allegations entitle Padilla to relief under *Franks*.

1. Allegations Concerning Credibility of Information Provided by Abu Zubaydah

In his initial motion, Padilla claimed when Abu Zubaydah provided the information referenced in the Material Witness Affidavit, Abu Zubaydah was suffering from multiple gun shot wounds and had been administered medications that were not specifically identified in the affidavit.

These allegations are irrelevant. The affidavit gave the Court issuing the Material Witness Warrant a strong basis to question issues of credibility pertaining to information provided by Abu Zubaydah. In fact, immediately after stating that Abu Zubaydah provided information to law enforcement officers while being detained in a foreign country, the affiant, in a detailed footnote, provided information about prior interviews where Abu Zubaydah had not been completely candid with law enforcement and may have, in earlier interviews, purposely tried to mislead or confuse U.S. law enforcement (Material Witness Affidavit, p. 3, n.1). The footnote stated that at the time of the interviews referenced in affidavit, "Abu Zubaydah was being treated with various types of medication." (*Id.*).[10]

[10] Magistrate Judge Brown found that even if the affiant "was or should have been aware of 'multiple gunshot wounds' and the exact nature of the medical attention that was being given to Abu Zubaydah, that information was not essential to a finding of probable cause" (R & R, p. 6) (*citing Novaton*, 271 F.3d at 987). Magistrate Brown recognized that the affidavit reflects that "a sufficient portion of the information provided by Abu Zubaydah as it relates to Defendant's potential as a material witness was corroborated by information gained in separate interviews with Binyam Muhammad and his wife." (*Id.*) (*citing United States v. Adwadallah*, 349 F.3d 42, 65 (2d Cir. 2003)) ("The ultimate inquiry is whether, after putting aside erroneous information and material omissions, there remains a residue of independent and lawful information sufficient to support probable
(continued...)

2. Allegations of Torture

Padilla also alleges that Abu Zubaydah and Binyam Muhammad were tortured. As previously stated, the government denies these allegations. However, Padilla's claims fail for independent reasons, as demonstrated below.

(a) Padilla lacks standing to assert violations of others' constitutional rights on his own behalf

Padilla's central legal contention is that "[i]nformation that is unlawfully obtained may not be used to obtain a valid warrant under the Fourth Amendment." (Objections, p. 9). He is mistaken. As an initial matter, the government may in fact rely on illegally obtained evidence in variety of circumstances. Thus, for example, the government may use illegally seized evidence to impeach a criminal defendant's testimony on cross-examination. *See Walder v. United States*, 347 U.S. 62 (1954); *Havens v. New York*, 446 U.S. 620 (1980). Likewise, in the context of the Fifth Amendment Self-Incrimination Clause, the government may use statements taken in violation of *Miranda* for impeachment purposes, *see Harris v. New York,* 401 U.S. 222 (1971); and may introduce physical evidence seized as a result of a *Miranda* violation, *see United States v. Patane,* 542 U.S. 630 (2004). *See generally Miranda v. Arizona*, 384 U.S. 436 (1966).

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[10](...continued)
cause.") (citations omitted).

The government is now aware that the individual believed to be Binyam Muhammad's wife on or about May 8, 2002 is not in fact Binyam Muhammad's wife. The significance the information attributed to "Binyam Muhammad's wife" in the Material Witness Affidavit is the corroboration of Abu Zubaydah's description of Binyam Muhammad as someone who was willing to become a martyr. The woman believed to be Binyam Muhammad's wife had indicated in an interview that her husband would often become emotional and cry when he discussed his willingness to die for his God. (*See* Material Witness Affidavit, p. 5 and p. 7, n. 2). The removal of this fact does not undermine the overall finding of probable cause that Padilla could provide material testimony to a grand jury investigating past and future attacks by Al Qaeda and its associates.

Pretrial probable-cause determinations are no exception. In *United States v. Calandra,* 414 U.S. 338 (1974), for example, the Supreme Court held that the exclusionary rule does not apply at grand jury hearing; thus, a grand-jury witness may be compelled to testify about evidence that officers turned up during an unlawful search. *Id.* at 347-52. The Court stated that "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *Id.* at 348. The Court explained that the exclusionary rule was inapplicable in part because "[a] grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Id.* at 343; *see id.* at 349 (similar). Much like a judge evaluating a warrant application, the Court noted that it is the grand jury's responsibility to "determin[e] whether there is probable cause to believe a crime has been committed . . . ." *Id.* at 343.

More importantly for this case, the government may use evidence obtained through allegedly unlawful means to prosecute persons who are not personally aggrieved by the use of such means. Padilla contends that Abu Zubaydah and Binyam Muhammad were tortured and, thus, the government may not use information obtained from them to obtain a material-witness warrant. (Objections, p. 9). But, an unwavering line of Supreme Court authority holds that a criminal defendant may not assert the privacy interests of a third party. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 910 (1984); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Brown v. United States*, 411 U.S. 223 (1973); *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963). *Cf. United States v. Payner*, 447 U.S. 727 (1980). Hence, the Court has held that "[i]t has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search

or seizure." *United States v. Padilla*, 508 U.S. 77, 81-82 (1993) (per curiam) (emphasis in original) (citations omitted).[11]

Padilla argues that the United States may not lawfully "obtain information by means of torture." (Objections, pp. 8-9). That argument does not assist him. The right to be free of governmental coercion is a personal right. *See Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994) ("Overbearing tactics violate the right of the person being interrogated to be free from coercion"); *Gonzales*, 164 F.3d at 1289 (same). A third party like Padilla, who does not contend, in this context, that *he* was tortured or mistreated, has no standing to assert a violation of such a right.

Buckley is instructive in this connection. There, the court of appeals considered a money-damages action in which a criminal defendant (Buckley) alleged that two witnesses (Cruz and Hernandez) had been coerced by the government into providing adverse trial testimony. The court explained:

> Coercing witnesses to speak . . . is a genuine constitutional wrong, but the persons aggrieved would be Cruz and Hernandez rather than Buckley. Overbearing tactics violate the right of the person being interrogated to be free from coercion. Buckley

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[11] The same principle holds true outside the Fourth Amendment context. Thus, for example, the government may introduce testimony of a third party obtained through a violation of *Miranda. Michigan v. Tucker,* 417 U.S. 433 (1974). *See also Tileston v. Ullman*, 318 U.S. 44 (U.S. 1943) (holding that a physician could not challenge state conception statutes on ground that application of the statutes as to him would deprive certain of his patients, who were not parties to the action, "due process of law") (per curiam); *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999) ("Obviously, defendants cannot seek to vindicate any violations of the subject witness' Fifth Amendment rights. Instead, defendants must point to violations of their own constitutional rights") (*citing Clanton v. Cooper,* 129 F.3d 1147, 1158 (10th Cir.1997)); *United States v. Sims*, 845 F.2d 1564, 1568 (11th Cir. 1988) (defendant lacked standing to assert violation of coconspirator's Sixth Amendment Right, which yielded information against defendant, because defendant's rights not violated and defendant may not benefit from alleged violation of others' rights). As one commentator explained, "[i]n most areas of constitutional law, it is . . . necessary that the adverse interest be based upon an alleged violation of the individual raising the claim rather than the violation of the rights of some third party." 6 Wayne R. LaFave, *Search and Seizure* 127, § 11.3 (4th ed. 2004) (footnote and citation omitted).

> cannot complain that the prosecutors may have twisted Cruz's arm, any more than he can collect damages because they failed to read Cruz *Miranda* warnings or searched Cruz's house without a warrant. Rights personal to their holders may not be enforced by third parties. Let us suppose the prosecutors put Cruz on the rack, tortured him until he named Buckley as his confederate, and then . . . began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not; Cruz himself would be the only victim.

Buckley, 20 F.3d at 794-95 (emphasis added) (citations omitted).

Nor may Padilla prevail based on the assertion that his Fifth Amendment Due Process rights were somehow violated. (Objections, p. 9); *cf. United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999) (suggesting in *dicta* that "defendants' due process rights would be implicated if the subject witness was coerced into making *false* statements and those statements were admitted against defendants at trial") (emphasis in original). The Fifth Amendment is a trial right, the "goal" of which is "'assuring trustworthy evidence.'" *United States v. Patane*, 542 U.S. 630, 631 (2004) (*quoting Oregon v. Elstad*, 470 U.S. 298, 308 (1985)); *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (describing the Fifth Amendment as a " 'trial right'"). "The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony." *Elstad*, 470 U.S. at 307-08 (emphasis in original).

Padilla is not claiming that either Abu Zubaydah or Binyam Muhammad will be case-in-chief witnesses against him or that their testimony will otherwise be admitted in the government's case-in-chief, and any such trial claim plainly would be premature. Further, Padilla does not claim that the physical evidence he seeks to exclude is itself untrustworthy or unreliable. Thus, Padilla's claims fail to implicate *his* due-process rights. As the Supreme Court observed in the course of reviewing a "flagrantly illegal search" that produced fruits the government sought to introduce against a third party, "even if we assume that the unlawful . . . search was so outrageous as to offend fundamental

canons of decency and fairness, the fact remains that [t]he limitations of the Due Process Clause . . . come into play only when the Government activity in question violates some protected right of the *defendant*." *Payner*, 447 U.S. at 728, 737 n.2 (citations and internal quotation marks omitted) (emphasis in original); *see also United States v. Noriega*, 117 F.3d 1206, 1214 (11th Cir 1997) ("[W]hatever harm Panamanian civilians suffered during the armed conflict that preceded Noriega's arrest cannot support a due process claim in this case"); *United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993) ("[T]he trial court lacked authority under the due process clause to dismiss a charge on the basis that governmental misconduct caused conscience-shocking harm to non-defendants"). Tellingly, Padilla is unable to cite a single case supporting his claim that the alleged mistreatment of Abu Zubaydah and Binyam Muhammad violated his protected due-process rights. (See Objections, p. 9).

Padilla relies upon *Rochin v. California* 342 U.S. 165 (1952), *Breithaupt v. Abram*, 352 U.S. 432 (1957), and *Chavez v. Martinez*, 538 U.S. 760 (2003). These cases are inapt. None of them involves a defendant who alleges that government mistreated a third party. Moreover, *Rochin* is distinguished in *Breithaupt*, which holds that the police did *not* deprive the defendant of due process under the Fourteenth Amendment by having a doctor withdraw the defendant's blood (which was admitted as evidence at trial) while the defendant was unconscious and had not consented. *Chavez* is even further afield. There, the Ninth Circuit found that the plaintiff, who had been shot by the police, could bring a civil-rights action against the police, reasoning that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity." *Id*. at 765 (citation and internal quotation marks omitted); *see also id.* at 765-66. The Supreme Court reversed. The Court held that "contrary to the Ninth Circuit's view, mere coercion does not violate

the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Chavez*, 538 U.S. at 769 (citations omitted).[12]

(b) Information provided by Abu Zubaydah was corroborated

Regardless of Padilla's standing problem, he would not be entitled to *Franks* relief even if the statements by a high-level government official Padilla cites raised questions about the reliability of information provided by Abu Zubaydah. The key information provided by Abu Zubaydah is corroborated by Binyam Muhammad. As recognized by the Eleventh Circuit, "a defendant must show not only that misrepresentations or omissions were intentionally or recklessly made, but also that, absent those misrepresentations or omissions, probable cause would have been lacking." *Novoton*, 271 F.3d at 987. Thus, even assuming there are significant omissions in the Material Witness Affidavit concerning the credibility of information provided by Abu Zubaydah, the information is corroborated by interviews of Binyam Muhammad taken at a separate time and at a separate place. Given this significant corroboration, when taking into account the alleged omissions, Padilla has not met the substantial preliminary showing of a *material* omission that undermines the overall probable cause in the warrant.

[12] The Supreme Court's decision in *Payner* precludes Padilla from invoking the Court's supervisory powers to achieve what he could not by asserting others' rights. In *Payner*, the Court held that a federal court may not "use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights." 447 U.S. at 733. *Payner* concluded that "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *Id*. at 735. In so holding, the Court emphasized that such evidence could not be suppressed under the Fourth Amendment and reasoned that the lower court's invocation of its supervisory powers did nothing to alter the relative values assigned to the underlying interests. *Id.* at 736. Thus, *Payner* holds that society's interest in adjudicating guilt and innocence on the basis of full information outweighs its interest in punishing governmental misconduct directed against third parties. *See also United States v. Hastings*, 461 U.S. 499, 505 (1983) (holding that the court's supervisory power could not be used to reverse a defendant's conviction in order to punish the government for misconduct that did not prejudice the defendant).

Moreover, as recognized by Magistrate Judge Brown, Padilla offers "no proof" that the affiant "should know of the alleged conduct concerning Abu Zubaydah and/or Binyam Muhammad or that he purposely contrived to avoid learning of it" (R & R, p. 6). With respect to Binyam Muhammad, Padilla claims that he "sought an affidavit" from Binyam Muhammad but that he was unable to obtain one due to the regulations at Guantanamo Bay. In this connection, Padilla has submitted an "Affirmation" by one of his attorneys, Andrew G. Patel. Patel indicates that he spoke with Binyam Muhammad's attorneys, who attempted to give Binyam Muhammad a copy of a draft affidavit in support of the instant motion, but that Binyam Muhammad would not sign the draft because the current regulations did not afford him an adequate opportunity to review it. Padilla excoriates the government for suggesting that he must comply with the law and produce reliable supporting documentation of claims, to include statements of witnesses. *See Arbolaez*, 450 F.3d at 1294 (allegations of deliberateness or recklessness "must be accompanied by an offer of proof . . . . Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained"). Specifically, Padilla argues that the government cannot rely on this standard when, as Padilla alleges, the government has a complete monopoly on access to relevant information (Objections, p. 10).[13]

Once again, Padilla's claims are in error. Prior to the filing of its response to Padilla's initial motion where Padilla made the allegations of torture pertaining to Binyam Muhammad, the government prosecutors spoke with other attorneys at the Department of Justice and in other branches of government to determine if there were regulations in place at Guantanamo Bay that

[13] Magistrate Judge Brown again found this argument to be unconvincing, writing that "[d]efendant offers no legal support for this argument, which in essence would do away with the 'substantial preliminary showing' requirement of *Franks.*" (R & R, p. 5).

would forbid Padilla from obtaining an affidavit from Binyam Muhammad, or prevent Binyam Muhammad from comprehensively reviewing an affidavit, to support Padilla's *Franks* allegations. There is no such regulation. The government confirmed this information with the Staff Judge Advocate's Office at Guantanamo Bay (JTF-GTMO). The government has also sought information from Guantanamo Bay to determine what may have prevented Binyam Muhammad from fully reviewing the material that Mr. Patel alleges Subject 1's attorney was prepared to shown him. There is not enough information in Padilla's pleadings (e.g., a specific date) to assist the government or officials at Guantanamo Bay in investigating what might of happened. If Padilla and/or Binyam Muhammad's counsel wish to further pursue this matter, JTF-GTMO can be contacted, and is aware of the issue. As the record stands, however, Padilla has not shown that there was any reckless or deliberate omission or misstatement concerning the reliability of information provided by Binyam Muhammad.[14]

3. Allegations of Factual Impossibility Regarding Photograph of Padilla

Another *Franks* challenge raised in Padilla's Initial Motion concerns the affiant's failure to disclose the circumstances under which the government obtained the photograph of Padilla that was shown to Abu Zubaydah. The Material Witness Affidavit indicates that Abu Zubaydah was shown a photograph "from the U.S. Passport of Jose Padilla, which was recovered from Padilla's person, and was identified by Abu Zubaydah as the individual he knew as "Abdullah Al Muhajir." (Material Witness Affidavit, p. 4, ¶ 4a). In his Initial Motion, Padilla complains that the government could not

[14] The government notes that Magistrate Judge Brown was generally unconvinced with Padilla's explanation for the lack of documentation to support Padilla's allegations with respect to Subject–1. Specifically, when Mr. Patel alleges that he reviewed unclassified documents to support his affirmations, Magistrate Judge Brown opines that "if the documents reviewed are unclassified, those documents could have been, but have not been, submitted to the Court for review." (R & R, p. 8, n.8).

have shown Abu Zubaydah the photograph from the passport that Padilla had with him when he returned to the United States because the Material Witness Warrant was signed five minutes before Padilla's plane landed in Chicago. (Initial Motion, p. 4, ¶ 15). Padilla therefore opines that the affidavit must refer to a passport that he reported lost when filling out an application for a new passport on February 16, 2001 (at the office of the American Consulate General in Karachi, Pakistan). (Initial Motion, p. 5, ¶ 16). In short, Padilla argues that it was a "factual impossibility" for Abu Zubaydah to view either the passport Padilla lost or the passport that he had with him when he landed at Chicago O'Hare International Airport on May 8, 2002.

Padilla's argument is falsely premised upon a reading of the words "a photograph" to mean the actual photograph attached to the passport(s), as opposed to a copy. Padilla's conclusion, therefore, is bald speculation. While Padilla chooses only to recognize a single, myopic conclusion, there are several reasonable scenarios that can explain how it was possible that Abu Zubaydah was shown a copy of a photograph from a passport which was recovered from Padilla's person. In the context of a *Franks* analysis, the self-serving conclusion drawn by Padilla does not amount to either a deliberate or reckless inclusion of false statements, or an omission of material information known to the affiant.

Having reviewed the parties pleadings, including the government's *ex parte* declaration, Magistrate Judge Brown appropriately rejected Padilla's claim finding that Padilla failed to make a substantial preliminary showing that the reference to the photograph was a misrepresentation or an omission. In addition, the Court noted that Padilla has failed to establish the relevancy or materiality of the issue since there is no claim in Padilla's initial motion that the photograph that was shown was actually not of the Defendant. (R & R, p. 7). Padilla further argues that any reference

to the identification of Padilla should be stricken from the affidavit because Abu Zubaydah was shown a single photograph of Padilla. Magistrate Brown appropriately rejected this argument as irrelevant in that Padilla states no legal support, in the context of a *Franks* challenge, for the supposition that "showing a witness a single identification photograph for use in preparing a material witness arrest warrant is improper." (R & R, p. 7, n. 7). [15]

4. Allegations Concerning Padilla's Travel Itinerary

Padilla states that the Material Witness Affidavit misstates his travel itinerary as it indicates that Padilla "is currently on a flight from Pakistan to Chicago." (Material Witness Affidavit, p. 7, ¶ 6a). Padilla is correct that on May 8, 2002, he flew from Zurich, Switzerland to Chicago. While the affidavit fails to make clear the specific itinerary, there is no credible evidence proffered by Padilla to suggest that this was a deliberate or reckless misstatement on behalf of the affiant, as opposed to a simple mistake due to the fast-moving pace of the investigation. *See Martin*, 615 F.2d at 329 ("It will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant has acted from bad motive or recklessly in conducting his investigation and making the affidavit").

Padilla claims that the testimony of Special Agent Fincher taken at a hearing held on

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[15] To assure this Court that there was no "factual impossibility," and thus no misstatement of fact, deliberate or innocent, the government filed with its initial response a separate classified *ex parte* declaration, pursuant to CIPA § 4, explaining how a photograph was taken from a passport recovered from Padilla's person. The government respectfully submits that this *ex parte* filing is not necessary to this Court's resolution of this matter, because Padilla has not made a "substantial preliminary showing" of a deliberate or reckless false statement or material omission. But, since Padilla has attempted to suggest that the affidavit contains a factual impossibility, the government's classified, *ex parte* submission demonstrates a good faith effort to elaborate on truthful factual details that cannot, for reasons of national security, be stated in any past or current unclassified pleading or affidavit.

Padilla's Motion to Suppress Airport Statements concerning Padilla's travel itinerary establishes that the affidavit clearly intended to mislead Judge Mukasey as to the need for the Material Witness Warrant. (Objections, pp. 12-13). Padilla insists that the misstatement is "material" under *Franks* because it was the *"only basis that the Court was given to believe that an arrest warrant and not a subpoena would be required to have Mr. Padilla appear before the grand jury*." (*Id.* at 13) (emphasis added). Padilla criticizes Magistrate Judge Brown for "refus[ing] to consider this evidence which was developed in his Courtroom after the motion was filed" that Padilla contends undermines the need for an arrest and not a subpoena" (*Id.*).

It is Padilla, not Magistrate Judge Brown, who has failed to consider the evidence in the affidavit and testimony taken at the hearing on the Motion to Suppress Airport Statements. To begin with, the Material Witness Affidavit sets out two separate factors for the "Need for Material Witness Warrant and Detention." The first factor is the statement that Padilla is currently on a flight from Pakistan to Chicago, that is presently scheduled to land today (May 8, 2002). (Material Witness Affidavit, p. 7, ¶ 6a). The second factor is the statement "[a]lthough Padilla is a U.S. Citizen, he has in the past demonstrated his willingness to travel extensively throughout the world, including but not limited to Pakistan and Afghanistan. Moreover, there is considerable incentive for Padilla to flee, if he is not detained, once he learns that he has been implicated in the plot to detonate a dirty bomb by CS-1 and Subject-1. Thus, there is no assurance that he would appear before the grand jury as directed." (Material Witness Affidavit, p. 7, ¶ 6b). Contrary to Padilla's argument, there were facts in the affidavit, apart from Padilla's travel itinerary, that established the need for arrest and detention to ensure Padilla's presence to testify in the grand jury. Reckless or not, a misstatement about the country of origin of Padilla's flight does not undermine the need for arrest and detention.

Padilla also "cherry picks" the testimony of Agent Fincher to suit his interests. It is clear from Agent Fincher's testimony at the hearing on the Motion to Suppress Airport Statements that Padilla needed to be arrested in order to secure his testimony in front of the New York grand jury. Specifically, Agent Fincher testified that he told Padilla he wanted Padilla to cooperate, had a subpoena in hand to serve upon Padilla, and did not want to arrest Padilla. (Transcript Airport Statements, pp. 86-90). Padilla, however, stated that he would not cooperate, and that agents would have to arrest him. (*Id.*). The testimony that Padilla criticizes the Magistrate Judge for allegedly ignoring proves the need for arrest and detention in order to secure Padilla's presence in front of the grand jury.

V. <u>NO LEGAL BASIS FOR ISSUANCE OF WRITS AD TESTIFICANDUM</u>

Finally, Padilla requests that this Court issue Writs Ad Testificandum for Abu Zubaydah and Binyam Muhammad, stating that such individuals are "essential" for his defense. (Objections, p. 14). This request is legally infirm. *Franks* involves challenging the representations or omissions made by the affiant in a warrant. *See Franks*, 438 U.S. at 171 (holding that the deliberate or reckless disregard whose impeachment is permitted is only that of the affiant, not any nongovernmental informant); *see also supra* argument that Padilla lacks standing to assert alleged constitutional violations of third-parties. Neither the affiant, nor any of the agents he spoke with in the course of the investigation that led to the issuance of the Material Witness Warrant interviewed Abu Zubaydah or Binyam Muhammad. The testimony of Abu Zubaydah and Binyam Muhammad, therefore, has no relevancy to what the affiant knew on or about May 8, 2002. As noted by the Magistrate Judge, Padilla's request for Writs Ad Testificandum is "conclusory" and not "supported by more than a mere desire to cross-examine." (R & R, p. 5., n.5) (*quoting Arbolaez*, 450 F.3d at 1249) (citations

omitted). The granting of such a request would in essence do away with the "substantial preliminary showing" of *Franks*. (*see Id.* at p. 5). Moreover, Padilla's reliance on dicta in *United States v. Rutledge*, 900 F.3d 1127 (7th Cir. 1990), is misplaced. *Rutledge* involved the use of a defendant's own statements against him at sentencing. It has nothing to do with inquiring into alleged constitutional violations of third-parties.

VI. CONCLUSION

WHEREFORE, the government respectfully requests that this Court adopt the Magistrate Judge's Corrected Report and Recommendation and deny Padilla's Motion to Suppress Physical Evidence and Issue Writs Ad Testificandum without further hearing on the matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2006, the undersigned electronically filed the foregoing document with the Clerk of the Court using CM/ECF and served by mail those counsel who are not authorized to receive electronically Notices of Electronic Filing:

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