

**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.

**ADHAM AMIN HASSOUN,
a/k/a "Abu Sayyaf,"
MOHAMED HESHAM YOUSSEF,
a/k/a "Abu Turab,"
KIFAH WAEL JAYYOUSI,
a/k/a "Abu Mohamed,"
KASSEM DAHER,
a/k/a "Abu Zurr," and
JOSE PADILLA,
a/k/a "Ibrahim,"
a/k/a "Abu Abdullah the Puerto Rican,"
a/k/a "Abu Abdullah Al Mujahir,"**

Defendants.

**GOVERNMENT'S RESPONSE TO DEFENDANT PADILLA'S
CIPA § 5 NOTICE OF INTENT TO USE CLASSIFIED MATERIAL**

The United States of America hereby files this response to Defendant Jose Padilla's notice of intent, filed under § 5 of the Classified Information Procedures Act, 18 U.S.C. App. 3, to use classified material at the upcoming hearing on Padilla's competency issues (D.E. 853). Padilla has announced his intention to place into evidence isolated portions of classified videotapes of interrogation sessions that took place at the Naval Consolidated Brig as far back as 2002, despite the fact that the videotapes are completely irrelevant to Padilla's present ability to communicate with his attorneys and has never been reviewed by any mental health expert. The videotapes in this respect contain isolated, historical sideshows, meant to divert this Court's attention away from the central issue before it, which is Padilla's present ability to understand the proceedings and

communicate with his counsel. The videotapes are classified and cannot be played in open court, but this Court should not even consider them in the privacy of chambers. There are at least three independent reasons for denying Padilla's request to place the classified videotape excerpts into evidence.

First, the videotapes are irrelevant to the pending competency proceedings and beyond the scope of any required fact-finding, a point consistent with this Court's recent comments from the bench. As this Court correctly noted at the recent hearing on Padilla's motion to compel, what may or may not have occurred during Padilla's military detention should not be the focus of the competency hearing. In this belief, the Court is in good company. The Eleventh Circuit has repeatedly held that, in making a competency determination, the court must focus on whether the defendant has the present ability to understand the proceedings and consult with counsel. See, e.g., Watts v. Singletary, 87 F.3d 1282, 1286 (11th Cir. 1996). For this reason, Padilla's request to use videotaped excerpts of historical incidents, which occurred years ago, threatens to steer the hearing badly off course. Padilla is threatening to turn the hearing on his present mental functioning into a referendum on his past treatment in military custody. One issue has absolutely nothing to do with the other, and this Court should summarily deny the request, consistent with its views expressed from the bench last week.

Second, the videotapes do not fit within the scope of the evidence that this Court has already deemed admissible in the upcoming competency hearing. The competency evidence will first and foremost consist of the testimony of the mental health experts who have rendered reports on Padilla's mental functioning. However, based on Padilla's request, this Court will also hear testimony from individuals who provided information to the court-appointed expert. This Court

further made clear that this additional evidence will be narrowly restricted only to the issue of present mental functioning. What is uncontroverted is that no mental health expert has seen, consulted, or otherwise considered the videotapes or their contents. In this sense, the videotapes do not fit within this additional category of non-expert related evidence that has been deemed potentially admissible. The videotapes do not inform or influence any expert opinion, such that it is completely inapplicable to the upcoming hearing.

Third, if this Court opens up the hearing to such an extent that the isolated videotape excerpts are considered, then that decision will open the floodgates to all full-length, unexcerpted videotapes of military interrogations. The videotaped interrogations that Padilla wants to place at issue—the ones that he has cherry-picked out of a mountain of such videotapes—sometimes focus on only an isolated comment. But other interrogation sessions with Padilla were taped, and there are approximately 150 to 200 total hours of such videotaped interrogations. If one such tape, or isolated excerpts, are to be considered, then the government will move all such tapes into evidence. This Court will then be required to review 150 to 200 hours worth of Padilla interrogations, to take in the full picture of how he was treated. These additional videotapes are an indispensable component of the full and complete picture of Padilla's military detention, and of the record that the government seeks to make on this issue. If a single videotape is allowed, then all videotaped interrogations must be transmitted to the Eleventh Circuit on appeal in the event that Padilla is found incompetent. Of course, if this Court denies Padilla's request to use the isolated excerpts, then there would be no reason to review all full-length, unredacted interrogations, because all such tapes would then be irrelevant to the hearing.

As a final matter, it is worth reiterating that the videotapes and their contents are classified.

This Court has entered a CIPA protective order. Perhaps anticipating that the request to use the videotape excerpts will be denied, counsel for Padilla signaled at the last hearing that they intend to put “hypothetical” questions to the court-appointed expert, based on what occurred during the videotaped interrogations at issue. More specifically, counsel for Padilla plan to ask whether the court-appointed expert’s opinion would change if he knew that so-and-so had occurred, with the so-and-so being something that appears on the classified videotapes. The government objects to the use of these so-called “hypotheticals” as not properly noticed under CIPA, which means that the government must now interpose a general objection to any disclosure of this classified information. These questions would also violate the CIPA protective order. This Court has already warned against further violations of its protective orders. The anticipated “hypotheticals” would cross that line again.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2007, the undersigned electronically filed the foregoing document, Government's Response To Defendant Padilla's CIPA § 5 Notice of Intent To Use Classified Material, with the Clerk of the Court using CM/ECF.

s/ Brian K. Frazier
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Assistant United States Attorney