# 11TH CIRCUIT: PADILLA'S TORTURE DOESN'T MERIT A BIG DOWNWARD DEPARTURE, JUST BECAUSE WE SAID SO

Here's how an 11th Circuit panel of Judges Joel Dubina, William Pryor, and Rosemary Barkett dismissed Jose Padilla's objection to his conviction because of the abuse he suffered while in government custody in the South Carolina brig in the years leading up to his indictment.

> Although we have never acknowledged the existence of the outrageous government conduct doctrine, we note that the actionable government misconduct must relate to the defendant's underlying or charged criminal acts. "Outrageous government conduct occurs when law enforcement obtains a conviction for conduct beyond the defendant's predisposition by employing methods that fail to comport with due process guarantees." Ciszkowski, 492 F.2d at 1270 (majority opinion) (citing United States v. Sanchez, 138 F.3d 1410, 1413 (11th Cir. 1998)).
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> Padilla does not allege any government intrusion into his underlying criminal conduct. **Padilla does not claim that the government caused him to leave the United States to be a jihad recruit**. Instead, his claim of outrageous government conduct relates to alleged mistreatment he received at the brig after the conclusion of his criminal acts and prior to the indictment on the present charges. **Thus, even if we were to adopt it, the doctrine does not apply in this situation**, and the district court

> properly concluded that Padilla was not entitled to the relief he sought in his motion for dismissal of his indictment. See United States v. Morrison, 449 U.S. 361, 365–66, 101 S. Ct. 665, 668–69 (1981) (stating that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate" and that the remedy in such situations "is limited to denying the prosecution the fruits of its transgression"). [my emphasis]

In other words, since the abuse the government inflicted on Padilla didn't induce him to take up jihad, it is irrelevant to his guilt or innocence in this case.

Having thus dismissed this and a number of other objections, the Circuit also remanded his case for harsher sentencing. Here's how Dubina and Pryor threw out Judge Marcia Cooke's reduction of Padilla's sentence based on this abuse.

> Lastly, we have held that a district court may reduce a sentence to account for the harsh conditions of pretrial confinement, United States v. Presley, 345 F.3d 1205 (11th Cir. 2003), but that decision does not justify a downward departure as extensive as the one the district court gave Padilla. In Presley, we held that a district court had discretion to lower a 30 year sentence by two and one-half years when the defendant had been confined for six years prior to trial, five of which were spent in a 23 hour a day "lockdown." Id. at 1219. Here, the district court reduced Padilla's sentence by 110 months largely based on the harsh conditions of his prior confinement and then lowered his sentence by another 42 months to account for the time Padilla spent in pre-trial confinement, for a total of 152 months' departure. **Although some downward variance is allowed in this circumstance, the district court abused its discretion**

> **when it varied Padilla's minimum Guidelines sentence downward by 42 percent**, a period more than three and one-half times his period of actual pretrial confinement.6 **Accordingly, the district court substantively erred in imposing Padilla's sentence, and we vacate and remand his sentence to the district court for re-sentencing**.
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> 6 Although the government does not challenge the district court's decision to reduce Padilla's sentence by 42 months to reflect his time of pretrial confinement, we note that the Attorney General must already give Padilla credit for his time served in pretrial confinement. 18 U.S.C. § 3585(b); United States v. Wilson, 503 U.S. 329, 334, 112 S. Ct. 1351, 1354 (1992). On remand, we remind the district court that we "have determined that custody or official detention time is not credited toward a sentence until the convict is imprisoned." Dawson v. Scott, 50 F.3d 884, 888 (11th Cir. 1995). [my emphasis]

What's chilling about this passage is the failure to even describe Padilla's treatment. Rather than question whether a complete elimination of due process and extreme psychological and physical abuse introduces real issues to merit a downward departure, the majority instead ignored the actual treatment Padilla experienced in making a technical argument for vacating the sentence.

In doing so, they even ignored the evidence presented at the sentencing hearing that Barkett laid out in her dissent.

> Padilla presented substantial, detailed, and compelling evidence about the inhumane, cruel, and physically, emotionally, and mentally painful conditions in which he had already been detained for a period of almost four years. **For example, he presented evidence at sentencing of being kept in extreme isolation at the military brig in**

> **South Carolina where he was subjected to cruel interrogations, prolonged physical and mental pain, extreme environmental stresses, noise and temperature variations, and deprivation of sensory stimuli and sleep**. In sentencing Padilla, the trial judge accepted the facts of his confinement that had been presented both during the trial and at sentencing, which also included evidence about the impact on one's mental health of prolonged isolation and solitary confinement, all of which were properly taken into account in deciding how much more confinement should be imposed. **None of these factual findings, nor the trial judge's consideration of them in fashioning Padilla's sentence, are challenged on appeal by the government or the majority**. Indeed, the majority accepts that our decision in Pressley allows for a sentence reduction to account for the conditions of defendant's pre-trial confinement, but then asserts that Pressley does not permit a reduction as "extensive" as the one given here.

Barkett goes on to note what the thinness of the passage above makes clear: the majority offered no real reason to find that Cooke had abused her discretion, they just said she had and left it at that.

> The majority fails to identify any clear error in the trial judge's decision to vary downward, and **instead arbitrarily concludes that the variance was just too much**. In blatantly substituting its own view for the discretion of the trial judge, the majority contravenes the well-established principle that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." Gall, 552 U.S. at 51. This principle exists because "[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and

> hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Id. (emphasis added) (internal quotation marks omitted). Thus, by declaring, without explanation, that the downward variance the trial judge applied in this case due to the harsh conditions of Padilla's pre-trial confinement was too "extensive," the majority impermissibly usurps the discretion of the sentencing judge in direct contravention of clear and unequivocal Supreme Court and Circuit precedent.

And while Barkett doesn't say it, it seems important that the Circuit did not have to confront the obvious wreck Padilla's treatment has made of him. No one wants to mention that, I guess, but it seems critically relevant to the sentencing question.

There's one more sleeper issue in the opinion that may be far more important, generally, for terrorism cases moving forward. As part of the majority's explanation for rejecting Cooke's assertion that Padilla was likely to be a decreased recidivism risk when he got out of jail in his fifties, the majority argued that terrorists are like sex offenders.

> Second, Padilla's sentence unreasonably fails "to protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). The district court explained that given Padilla's age when he is eligible to leave the criminal system, he will unlikely engage in new criminal conduct. [Doc. 1373, p. 14.] The government argues to the contrary that "the risk of recidivism upon release is very real. That risk is greater because Padilla has literally learned to kill like a terrorist." [Gov't Br., p. 75.] We agree that the district court failed to consider the nature of Padilla's crimes and his terrorism training. **Although recidivism ordinarily decreases**

> **with age, we have rejected this reasoning as a basis for a sentencing departure for certain classes of criminals, namely sex offenders**. See United States v. Irey, 612 F.3d 1160, 1213–14 (11th Cir. 2010) (en banc), cert. denied, .131 S. Ct. 1813 (2011). We also reject this reasoning here. "[T]errorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." United States v. Meskini, 319 F.3d 88, 92 (2d Cir. 2003). **Padilla poses a heightened risk of future dangerousness due to his al-Qaeda training. He is far more sophisticated than an individual convicted of an ordinary street crime**. [my emphasis]

Aside from all the evidence that, throughout his life, Padilla is profoundly unsophisticated, the majority gloms Irey onto Meskini with no evidence specific to Padilla to argue he's so sophisticated he'll always be a heightened risk. Terrorists are like sex offenders because they are.

Barkett was having none of this.

> While the majority recognizes that a trial judge may find that recidivism generally decreases with age,12 it not only rejects that presumption for Padilla, **but goes one step further and decides that trial judges may no longer consider, for anyone convicted of a terrorism-related offense, the likelihood that the risk of recidivism will decrease with age. The majority does so, even <u>in the absence of any evidence</u> supporting that conclusion**, and even though the government does not challenge on appeal as clearly erroneous the trial judge's fact-finding that Padilla would be unlikely to engage in new criminal activity when released from prison.13
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> 13 The government makes only a passing and conclusory reference to recidivism on the

> last page of its brief without specifically addressing the sentencing court's fact-finding. The totality of the government's argument regarding recidivism is the following: "[The risk of recidivism upon release is very real. That risk is greater because Padilla has literally learned to kill like a terrorist." Even if this brief statement is construed as a challenge to the trial judge's fact-finding that Padilla is not likely to commit future crimes when released from prison in his mid-fifties, the government's argument fails to explain why Padilla should be presumed dangerous after serving a seventeen and one-half years' sentence and remaining subject to an additional twenty years of supervised release. [underline emphasis original, my bolding, citation to footnote 12—a Sotomayor opinion on recidivism and age—removed]

She goes on to argue that Pryor misapplied Irey to this issue, partly because that was just advisory discussion, but also because that decision had at least pointed to actual evidence to make its argument about recidivism. And she then notes that Meskini—the only precedent cited for the claim that terrorists are a greater risk—upholds trial judge discretion, precisely what the majority opinion overrules in this case.

Padilla's lawyers plan to appeal this decision, if not to the full 11th, then to SCOTUS. And while they're doing that, of course, his two Bivens suits against Rummy and John Yoo will be wending their way through the courts as well. And of those three legal proceedings, it seems only the Ninth Circuit believes the government owes a citizen anything for having tortured him.