IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

UNITED STATES OF AMERICA,)	
)	
V.)	Crim. No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

MOTION TO SET GUIDELINES TO BE USED IN DETERMINING DEFENDANT'S COMPETENCY TO KNOWINGLY AND VOLUNTARILY EXERCISE SIXTH AMENDMENT RIGHTS

COMES NOW the defendant, ZACARIAS MOUSSAOUI, by counsel and for reasons set

forth in the Memorandum in Support hereof, respectfully requests that guidelines for the competency

examination ordered by the Court be established that are consistent with the considerations set forth

in the accompanying Memorandum.

Respectfully submitted, ZACARIAS MOUSSAOUI By Counsel

Frank W. Dunham, Jr. Federal Public Defender Eastern District of Virginia 1650 King Street, Suite 500 Alexandria, VA 22314 (703) 600-0808

/**S**/

Gerald T. Zerkin Assistant Federal Public Defender Eastern District of Virginia 830 E. Main Street, Suite 1100 Richmond, VA 23219 (804) 565-0880

/S/

Edward B. MacMahon, Jr. 107 East Washington Street P.O. Box 903 Middleburg, VA 20117 (540) 687-3902

/S/

Judy Clarke Federal Defenders of Eastern Washington and Idaho 10 N. Post, Suite 700 Spokane, WA 99201 (703) 600-0855

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Set Guidelines to Be Used in Determining Defendant's Competency to Knowingly and Voluntarily Exercise Sixth Amendment Rights was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 24th day of April, 2002.

/S/ Frank W. Dunham, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

UNITED STATES OF AMERICA,)	
)	
V.)	Crim. No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

MEMORANDUM IN SUPPORT OF MOTION TO SET GUIDELINES TO BE USED IN DETERMINING DEFENDANT'S COMPETENCY TO KNOWINGLY AND VOLUNTARILY EXERCISE SIXTH AMENDMENT RIGHTS

The Court has directed that a competency examination be conducted to determine whether the defendant, Mr. Moussaoui, is competent to knowingly and voluntarily exercise his right under the Sixth Amendment to waive the assistance of counsel and represent himself. The Court requested that the parties agree on guidelines for this procedure.¹

The defense team and the government team have discussed the possibility of agreement on "guidelines." From conversations with counsel, we know we will be unable to reach agreement because of fundamentally different views over what is involved.² The government sees "competency" here as a rather perfunctory determination that can be quickly made. To the contrary, given Mr. Moussaoui's open court declarations, it is a far more difficult determination, the making of which must be undertaken carefully and with full information.

¹ "[T]he government team and the defense team [should] get together, draft, if you can for us, an order with the guidelines [for conducting the competency examination] that you want, if you can come to agreement on that." (Tr. of April 22, 2002 hearing at 56.) "We want to get this matter resolved quickly, alright?" (*Id.* at 57.)

² We have also tried to agree with the government on the appropriate professional to conduct the competency examination. It is apparent that we cannot reach agreement on this issue so each side will be submitting to the Court its own list of names.

The defendant has stated, in open court, that he believes defense counsel, in essence, are in a conspiracy with the government to engineer his demise.³ No defendant rationally holding such a belief would countenance, or should be required to accept, the continuation of those attorneys in the service of his defense, *even as standby counsel*. On the other hand, if the belief is not rationally based, but is instead the product of paranoid ideation or other mental condition, it could not possibly then be said that the defendant is competent to make a knowing and voluntary decision to waive the right to the assistance of counsel. Instead, it would be the unknowing and coerced product of an unhealthy mental state.

The competency examination ordered by the Court must be directed, at least in part, towards answering the question of whether Mr. Moussaoui really believes that his attorneys are in conspiracy with the government to harm him and, if so, whether that belief, true or not, is the product of competent, rational thinking or the product of paranoia or other mental condition which in turn may be but a symptom of some other problem. No psychiatrist or clinical psychologist could possibly answer this question in one short session with Mr. Moussaoui and nothing more.

In *Godinez v. Moran*, 509 U.S. 389, 402 (1993), the United States Supreme Court explained the distinction between competency to stand trial and competency to waive the right to counsel. "The focus of the competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the 'knowing and voluntary inquiry' [required before a waiver of counsel should be accepted], by contrast, is to determine whether the

³ "Under the cover of assistance of the defense counsel, the legal version of humanitarian assistance, the United States are orchestrating my sending to the safe haven, Bosnia style.

What they have done is a sophisticated version of the Troy horse or the kiss of death." (Tr. at 6.)

defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.* at 401 n.12 (emphasis in original) (citations omitted). In this case, coercion could arise from the defendant's stated notions of his counsel's intent if predicated on a delusional belief.

Since *Godinez*, courts have recognized that a defendant's thought process in making the decision, rather than the decision itself, must also be intelligent and voluntary. *See Wilkins v. Bowersox*, 933 F. Supp. 1496, 1514 (W.D. Mo. 1996) *aff*'d, 145 F.3d 1006 (8th Cir. 1998). In *Wilkins*, the defendant was obsessed with his intent to get the death penalty.⁴ But, the court found that the defendant's attempt to waive counsel on his way to that goal was flawed because the trial court did not make a "'penetrating' and 'comprehensive' examination of all the circumstances or 'investigate as long and thoroughly' as the circumstances of this case demanded to determine if [the defendant] actually made a knowing, intelligent, and voluntary waiver." *Wilkins, supra* at 1510 (quoting *von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948)). The professional(s) conducting the competency examination here need(s), at a minimum, the benefit of the following information as a history before it can be said that the examination was both penetrating and comprehensive:

1. Time to interview defense counsel who have spent well over one hundred (100) hours with Mr. Moussaoui.

2. Time to review any material in the possession of the government that would aid in determining whether Mr. Moussaoui has acted irrationally or arguably based on paranoid thinking

⁴ Mr. Moussaoui's open court remarks could be viewed as contrary to the best interests of an individual facing capital charges in connection with the events of September 11.

in the past. The government has a *Brady* obligation in this regard and should expedite discovery in this area to include any interviews of persons who have had interaction with him.

3. Time to review a classified document that defense counsel have seen and which we believe may be relevant to any competency determination.

4. Any information gathered by the defense during the course of its investigation.

In addition, the Court should preclude the government counsel from taking advantage of the situation by making contact with the defendant until the competency determination has been made and the Court has ruled on Mr. Moussaoui's motion to represent himself.⁵

Finally, it is respectfully requested that the Court consider appointing "conflicts counsel" for Mr. Moussaoui to assist him in matters that arise between now and the time that a determination on his motion to represent himself is made because appointed counsel may be witnesses and take a contrary position on these issues from those advanced by the defendant. *See, e.g., United States v. Wadsworth*, 830 F.2d 1500, 1511 (9th Cir. 1987); *United States v. Boigegrain*, 155 F.3d 1181, 1193 (10th Cir. 1998) (Holloway, J., dissenting), *cert. denied*, 525 U.S. 1083 (1999).

⁵ Mr. Moussaoui has contacted government counsel and has requested to meet with them to discuss classified information. Government counsel indicated that they might decide to proceed with such a meeting over the objection of counsel.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Court establish guidelines for the competency determination procedure consistent with what is requested herein; that the government attorneys be directed not to contact Mr. Moussaoui until this competency procedure is concluded; and, that the Court consider appointment of "conflicts counsel."

> Respectfully submitted, ZACARIAS MOUSSAOUI By Counsel

/S/ Frank W. Dunham, Jr. Federal Public Defender Eastern District of Virginia 1650 King Street, Suite 500 Alexandria, VA 22314 (703) 600-0808

/**S**/

Gerald T. Zerkin Assistant Federal Public Defender Eastern District of Virginia 830 E. Main Street, Suite 1100 Richmond, VA 23219 (804) 565-0880

/S/ Edward B. MacMahon, Jr. 107 East Washington Street P.O. Box 903 Middleburg, VA 20117 (540) 687-3902

/S/

Judy Clarke Federal Defenders of Eastern Washington and Idaho 10 N. Post, Suite 700 Spokane, WA 99201 (703) 600-0855

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Motion to Set Guidelines to Be Used in Determining Defendant's Competency to Knowingly and Voluntarily Exercise Sixth Amendment Rights was served via facsimile and first class mail upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 24th day of April, 2002.

/S/

Frank W. Dunham, Jr.