



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 24<sup>th</sup> day of April, 2002.

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/S/  
Frank W. Dunham, Jr.



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.<sup>3</sup> 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

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<sup>3</sup> “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 (8<sup>th</sup> Cir. 1998). In *Wilkins*, the defendant was obsessed with his intent to get the death penalty.<sup>4</sup> 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

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<sup>4</sup> 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.<sup>5</sup>

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 (9<sup>th</sup> Cir. 1987); *United States v. Boigegrain*, 155 F.3d 1181, 1193 (10<sup>th</sup> Cir. 1998) (Holloway, J., dissenting), *cert. denied*, 525 U.S. 1083 (1999).

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<sup>5</sup> 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

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