

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	
)	

GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION TO SET
GUIDELINES TO BE USED IN COMPETENCY EVALUATION

_____The United States takes issue with the premise and several points put forth in defendant’s motion regarding the guidelines to be used in determining defendant’s competency. In an apparent effort to obfuscate a well-defined and straight-forward issue, the defense seeks to expand the issue of defendant’s competency into mental health testing of whether he is knowingly and voluntarily waiving his counsel.

The defense motion is based on a flawed premise: That the standard for competence to waive counsel is higher than or different from the standard for competence to stand trial. On the contrary, it is settled beyond peradventure that the standard for competency to stand trial is the same as the standard for competency to waive counsel. Godinez v. Moran, 509 U.S. 389, 391, 398-99 (1993). Therefore, the issue for the competency determination here is just “whether the defendant has ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and has ‘a rational as well as factual understanding of the proceedings against him.’” Id. at 396 (quoting Dusky v. United States, 362 U.S. 402 (1960)).

The defense confuses the standard of competence to stand trial or waive counsel with the requirement that any such waiver must be knowing and voluntary. The Court must, of course,

make two separate determinations: “In addition to determining that a defendant who seeks to . . . waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.” *Id.* at 400. Thus, “[i]n this sense there *is* a ‘heightened’ standard for . . . waiving the right to counsel, but it is not a heightened standard of *competence*.” *Id.* at 401 (emphasis in original).¹ Here, the Court should assure itself that the defendant is competent, and then take up the separate question whether the defendant knowingly and voluntarily waives his right to counsel.

The defense apparently seeks to stretch the Court’s call for a competency examination into psychiatric consultation on the “knowing and voluntary” question. This attempt should be rejected. Although 18 U.S.C. § 4241(a) provides for a competency examination, there is no such authority for mental health testing on the “knowing and voluntary” issue. The Court can find that the defendant knowingly and voluntarily waives a constitutional right without a psychiatric examination. Indeed, courts routinely make such findings in, for example, guilty pleas. See Fed. R. Crim. P. 11.

Second, the question is whether “the defendant may be *presently* suffering from a mental disease or defect rendering him mentally incompetent” to stand trial and to waive his counsel. 18 U.S.C. § 4241(a) (emphasis added). The defense effort to broaden the inquiry into Moussaoui’s past conduct and statements should be rejected. Although the doctor appointed to

¹ The quotation the defense takes from Godinez does not explain the “distinction between competency to stand trial and competency to waive the right to counsel.” (Mem. 2) As Godinez makes clear, there is no such distinction. Instead, and patently, that quotation explains the difference between the competency inquiry and the “knowing and voluntary inquiry.” 509 U.S. at n. 12.

perform the competency exam may request background information on Moussaoui, there is no basis for the defense demand that the doctor be provided “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 in the past.” (Mem. 3-4) Neither does the doctor have the need to review classified material.

Finally, the defense filing relating to alleged contact between the government and the defendant is misleading. On April 23, 2002, government counsel received a message from Captain Mitchell of the Alexandria Detention Center that Moussaoui wanted to talk with prosecutors about the death penalty and classified information. Government counsel immediately contacted defense counsel and informed them of this message. Government counsel told Captain Mitchell that, as far as we were concerned, Moussaoui was still represented and that we could not talk to him without counsel present. We then told defense counsel that, although we believed that it would be legally permissible for us to speak with the defendant, we would not have contact with the defendant without defense counsel present or without permission from the Court.

Respectfully submitted,

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Date: April 25, 2002

Certificate of Service

I certify that a true and correct copy of the foregoing Government's Response to Defendant's Motion to Set Guidelines to be Used in Competency Evaluation was served by fax and U.S. mail, on April 25, 2002, on the counsel listed below:

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