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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO STANDBY
COUNSEL'S PLEADING REGARDING DISCOVERY

The *pro se* defendant submitted a motion that standby counsel print out several categories of discovery materials. In response, standby counsel have filed a submission explaining the impracticality of honoring the defendant's request. Proceeding further, however, standby counsel have asked this Court to exercise its broad discretion to "control discovery" in this case. The United States submits this response to the demand by standby counsel.[1]

I. Status of Discovery

In explaining the practical difficulties of printing out all the discovery, standby counsel have made certain assertions about the status of discovery that merit a response. For example, standby counsel repeatedly make reference to the volume of the discovery materials and to the timing of the production of these materials. For example, counsel assert that "most" of

[1] The Government submits this response even though the defendant, exercising his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975), has yet to indicate whether he is willing to adopt the motion submitted by his standby counsel. *See McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984) ("*Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.")

the documents "have absolutely nothing to do with the case" and claim that "most" of the CDs containing the discovery materials were produced "during the months of June and early July."

A couple of points are worth noting. First, standby counsel neglect to inform the Court about the efforts the Government has made to streamline the discovery in this case, and the unprecedented lengths the Government has gone, with the full knowledge of defense counsel, to produce the discovery in a format that would be far more user-friendly than traditionally provided. For example, the day before the initial arraignment of the defendant on January 2, 2002, counsel for the United States met with defense counsel and outlined our plan for discovery in this case, advising defense counsel that it was our intention to scan the discovery materials and produce them electronically. This, we believed, would be to the mutual benefit of the parties as it would avoid the storage problems standby counsel touched upon in its submission and, more importantly, permit counsel to search through the materials to identify certain documents. We explained that this plan would mean that there would be some initial delay in providing materials, but that in the long run, this method of discovery production would better facilitate trial preparation.[2]

To date, we have provided virtually all of the discovery in this case in the format we committed to adopting. Thus, for example, counsel can conduct electronic searches to identify the defendant's bank records, as well as the bank records of the other hijackers.

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[2] During this same meeting, we advised counsel that the investigation into the events of September 11, as well as the investigation of *al Qaeda* was an on-going task, and that we expected there would be newly-discovered materials that would be produced somewhat later than those items that had been in the possession of the prosecution earlier. Thus, for example, some of the materials produced (after great effort) in July were found in Afghanistan after many of the other materials obtained earlier by the prosecution were provided to counsel.

Moreover, because the Government has provided the vast majority of the 302s generated in this case, the defense can isolate other information that may relate to these documents, thus assisting in their pre-trial investigation efforts. Finally, contrary to standby counsel's representation, our estimate is that we provided nearly 85% of the discovery CDs and audio and video tapes on or before June 1, 2002.

Second, counsel for the United States met with defense counsel on March 11, 2002, in an effort to define more precisely the parameters of what the defense would consider "discoverable" in this case. We explained that while we believe there were substantial materials that were not relevant to the prosecution of this case, we did not want to triage the materials unilaterally and later be accused of failing in our discovery obligations.[3] Thus, we invited defense counsel to give us guidance on ways we could further limit the extent of the discovery in this case. Concurrent with this request, we informed defense counsel that if no agreement could be reached, we would err on the side of disclosure, a posture we thought defense counsel would welcome. Our effort, however, was met by a refusal to provide any limits on the discovery materials. Instead, defense counsel requested we provide "all of the material." (*See* Letter of Frank W. Dunham, Jr., Esq., April 5, 2002). More problematic, our effort was met with

[3] That said, two members of the trial team spent weeks reviewing thousands of FBI records relating to certain materials to identify those materials that had no conceivable relevance to this case, resulting in the exclusion of a substantial percentage of these materials from discovery. A similar review was made by others of the documentary materials (telephone records, photographs, etc.), the vast majority of which were deemed irrelevant and not provided to defense counsel. Thus, by engaging in this time-consuming process, the Government already has identified tens of thousands of items that it will not be relying upon at trial.

extraordinary demands for discovery beyond that which we could have deemed imaginable.[4] Thus, given defense counsel's early position regarding the discovery in this case, there is no valid basis to object to the volume of materials provided to date. *See United States v. Kenny*, 462 F.2d 1205, 1212 (3d Cir. 1972) (upholding district court's refusal to require the government to identify trial exhibits among discovery materials: "The court leaned heavily toward liberal discovery throughout the case, and the defendants cannot be heard to complain about the balance of the burden of preparation which it struck between the prosecution and the defense.").

Third, part of the large volume of material can be explained by the decision of the United States, in good faith, to provide more materials than the law required us to produce at this time. For example, we estimate that we have provided more than 150,000 FBI "302" reports to date (all electronically copied and searchable), even though we are not required to produce most of this material. Aside from greatly assisting counsel in trial preparation, thus reducing the risk of a last-minute delay of the trial, these documents should also help counsel in reviewing the

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[4] A few examples suffice to make the point. In a letter to the Government, standby counsel demanded the Government produce all documents relating to Ramzi Yousef (Letter of Frank Dunham, Jr., Esq., April 5, 2002 at 7). This is a frivolous request as Yousef has nothing whatsoever to do with this case, yet it was a request that if honored would have required the Government to locate and produce massive amounts of additional discovery. Similarly unreasonable were demands for information regarding all "Middle Eastern" men who received flight training in the United States, and for materials "indicating the process by which President Clinton determined which camps in Afghanistan to target and which ones not to attack" [in August 1998, after the East Africa embassy bombings]. (*See* Letters of Frank W. Dunham, Jr., Esq., dated May 31, 2002).

other discovery materials.[5] Bluntly put, the good faith of the United States to expedite trial of this case should not be misconstrued by standby counsel to flout the discovery rules.

Fourth, the large volume of discovery materials, the majority of which were produced earlier than counsel claim, reflect the extent of the global and on-going criminal conduct of the defendant and his co-conspirators. *See United States v. Reddy*, 190 F. Supp. 2d 558, 571 (S.D.N.Y. 2002) ("While this case is document-intensive, that circumstance is consistent with the nature of the alleged fraud."). Thus, the fact that there are many bank, telephone and travel records is not due to any conduct by the United States. Nor is it the responsibility of the United States that much of the conspiratorial activities in this case occurred abroad, thus further hindering our ability to provide foreign materials earlier. *Cf. United States v. El-Hage*, 213 F.3d 74, 80 (2d Cir.) (substantial discovery burdens result of complex, international terrorism case), *cert. denied,* 121 S. Ct. 193 (2000).

II. There Is No Need or Legal Basis for "Control" of Discovery

Relying on a selective portrayal of the discovery process in this case, standby counsel ask the Court to impose certain onerous burdens on the Government. Because neither the factual record nor the applicable law supports this request, it should be denied.

As a factual premise to their request, standby counsel claim that the discovery is not organized by subject matter category, and is not fully indexed. First, this is not entirely true as much of the discovery is categorized. For example, many of the *al Qaeda* discovery materials

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[5] In response to this effort to facilitate trial preparation, defense counsel complained that the first names of the witnesses discussed in these reports were redacted, claiming that this violated *Brady*.

have been identified as such, as have the materials that were found in Afghanistan. Similarly, and most importantly, the materials relating directly to the defendant, which were among the first materials produced, were identified as such in the letters that accompanied the production of the materials. Second, the geographical categorization is informative as, for example, items found in Boston logically would relate to those items seized from the hotels and the airport where some of the hijackers launched from on September 11. Similarly, the materials from Washington would be the likely place to find materials relating to the Pentagon, and the same would hold true for New York and the World Trade Center. And, as a final example, it should surprise nobody that the materials relating to the hijackers' training and residence in Newark and Florida would be found among the items provided from those FBI field offices. Thus, while we concede that we have not provided a precise outline of the discovery by precise category, a process that no doubt would have delayed discovery in this case, we do not think it accurate to describe the discovery as unmanageable, particularly in the user-friendly format in which it was produced. Third, while some of the discovery has not yet been accompanied by full indices, a shortfall we hope to remedy by the end of next week, all of the materials were provided in the company of correspondence that described at least the origin of the materials.[6]

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[6] Standby counsel also complain that the discovery was not explicitly tagged as being Rule 16 or *Brady* material. That, however, is not a grievance that requires much response, for the law does not require us to guess about what may be considered material to the defense, or in what way it is material. *See United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("The Government has no obligation to disclose possible theories of the defense to a defendant. If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense. To hold otherwise would impose an insuperable burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning."); *United States v. LaRouche Campaign*, 695 F. Supp. 1290, 1296 (D. Mass. 1988) ("any determination as to whether the government had a

Beyond the flawed factual underpinnings of standby counsel's motion, the request should be denied as a matter of law. According to standby counsel, the court has the discretion to "regulate" the discovery in this case by requiring the Government, over two months before trial, and well before it is fully aware of the defense strategy to be employed in this case, to identify the materials it will not be relying on at trial. "The clear language of Rule 16(a)(1), however, does not require the Government to identify which documents fall in each category – it only requires the production of documents responsive to any category." *United States v. Nachamie*, 91 F. Supp. 2d 565, 569 (S.D.N.Y. 2000); *see also Reddy*, 190 F. Supp. 2d at 571 ("It is clear that Rule 16(a)(1)(C) does not require the Government to identify specifically which documents it intends to use as evidence.") *United States v. Greyling*, 2002 WL 424655 at *3 (S.D.N.Y. 2002) ("Fed. R. Cr. P. 16(a)(1)(C) only requires that the Government afford defendants an opportunity to inspect the documents it intends to introduce at trial. It does not require the Government to *identify* which documents it intends to introduce.") (emphasis in original); *United States v. Alvarado*, 2001 WL 1631396 at *5 (S.D.N.Y. 2001) (denying motion to require Govemment to identify exhibits to be used at trial); *United States v. Savin*, 2001 WL 243533 at *6 (S.D.N.Y. 2001) ("neither Rule 16(a) nor the case law regarding bills of particular . . . support the notion that the government must identify the documents it intends to offer at

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Brady obligation of disclosure of information at any particular time depends on what was or reasonably should have been known to the appropriate government representative(s) *at that time*.") (emphasis in original). As long as the material has been provided to the defense, and is readily available to counsel, the discovery obligation is met. *See United States v. Shoher*, 555 F. Supp. 346, 352 (S.D.N.Y. 1983) ("The Government is not required . . . to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshall on their own.").

trial."). Absent any provision in Rule 16, therefore, the Court is without the authority to "regulate" the discovery in the manner requested by standby counsel. *See Nachame*, 91 F. Supp. 2d at 570 ("Because the Government must produce documents meeting any of the three categories listed in Rule 16(a)(1)(C), a defendant cannot determine which documents fall into each category. But a court has no license to rewrite the Federal Rules of Criminal Procedure . . . . In the absence of any controlling authority interpreting the Rule as requiring this action, I cannot direct the Government, at this time, to identify the documents it intends to offer in its case-in-chief."); *Greyling*, 2002 WL 424655 at *3 (same); *Alvarado*, 2001 WL 1631396 at *5; *Savin*, 2001 WL 243533 at *6 ("Savin seeks identification of the documents the government intends to use at trial. This request goes beyond the government's obligation.").

The cases cited by standby counsel fail to substantiate the relief they request. (Mem. at 3, citing *United States v. McDade*, U.S. Dist. LEXIS 19254 (E.D. Pa. 1992); *United States v. Poindexter*, 727 F. Supp. 1470 (D.D.C. 1989); *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978). For example, "[t]he *Turkish* court cited no authority for its conclusion that the Government had an obligation to *identify* the documents it intended to use in its case-in-chief, . . . [and] the *Poindexter* court . . . simply compounded the error made in *Turkish*." *Nachamie*, 91 F. Supp. 2d at 569. Moreover, the markedly different facts in those cases make them distinguishable from this case. For example, in *Turkish*, the court cited the "unstructured nature of a charge of 'conspiracy to defraud the United States'" in support of its order in that case. *Turkish*, 458 at 880.[7] Moreover, in none of the cases, we assume, were the documents provided

[7] In contrast, the allegations in this case, particularly as they relate to the sole defendant, are specific and discrete. And, even though there are broad allegations regarding *al*

to the defense in the electronic format adopted in this case. Thus, the burdens of review of the material were likely far greater in those cases than this one.

Finally, even if the Court had the "broad discretion" standby counsel claim, it should not exercise it in the manner requested by counsel. The Government simply cannot at this stage of the proceedings guess what materials it might not use at trial, particularly given that the defense appears to be an ever-moving target. Moreover, identifying what the Government may not use will, *de facto*, disclose what documents the Government might use at trial, thus revealing prematurely the Government's case, something the Government should not be forced to do at this juncture. *See United States v. Davidoff*, 845 F.2d 1151, 1154 (2d Cir. 1985) (prosecution need not particularize all of its evidence, even in complex cases); *United States v. Kenny*, 462 F.2d at 1212 (district court properly "declined to require the Government to answer a set of interrogatories in the guise of a bill of particulars"). Pursuant to the custom in this District, the Government will provide timely notice of the exhibits it intends to introduce at trial. Under the circumstances, this is more than sufficient. *See Greyling*, 2002 WL 424655 at *3 ("The Government has represented that it

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Qaeda, there is more than adequate notice to the defendant of the charges against him and his identified cohorts. *See United States v. Bin Laden*, 92 F. Supp. 2d 225, 239, 243 (S.D.N.Y. 2000) (granting bill of particulars motion only as to general allegations involving certain defendants, but denying motion as to "background" section of indictment similar to the same section in this case, and as to other allegations regarding training camps provided and financed by *al Qaeda*)

will designate the tapes it will offer at trial in sufficient time to allow orderly trial preparation by all parties. Accordingly, there is no need to set a schedule for designation of those tapes.").[8]

Respectfully Submitted,

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By: /s/
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[8] The Government already has complied with the order of the Court involving the provision of hard copies of certain materials relating directly to the defendant, and will continue to provide draft translations of foreign language documents as they become available to us, thus making moot the other requests of standby counsel. (Mem. at 3-4).

CERTIFICATE OF SERVICE

I certify that on July 16, 2002, a copy of the attached Government's Response to Standby Counsel's Pleading Regarding Discovery was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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