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	)	

MOTION IN SUPPORT OF DEFENDANT'S REQUESTS FOR ACCESS TO EVIDENCE, ACCESS TO SECURE WEBSITE AND FOR A CONTINUANCE

COMES NOW, stand-by counsel, joining in motions by Mr. Moussaoui which we construe as requests for (1) access to classified information, (2) access to the secure website used by stand-by counsel to manage the discovery, and (3) for a continuance of the trial date.

ACCESS TO CLASSIFIED INFORMATION

On August 1, 2002, Mr. Moussaoui filed a motion "What have you got to hide? Motion to get access to so called secret evidence" (C.R. 385), and a motion "Right to Know What Against Me. Motion to force the US government to Declassified information in my case" (C.R. 386), which we construe to seek the kind of relief previously sought by us on Mr. Moussaoui's behalf by our "Motion for Access by Defendant to Classified and Sensitive Discovery and For Relief From Special Administrative Measures Concerning Confinement" (*See* C.R. 165, 166, 177), filed June 7, 2002.[1] The Court noted at the *Faretta* hearing on June 13, 2002 that "nothing is written in stone in this case,

[1] Additional information was filed under seal, pursuant to the Court's order of June 11, 2002 that defense counsel provide to the Court, under seal and through the Court Security Officer, examples of the classified materials at issue and an explanation of why they believe these materials constitute either mitigation or Brady evidence. Since that time, substantial classified information has been designated for defense use at trial pursuant to C.I.P.A.

and there's going to be a reasonable balancing done as to the discovery in this case." [Tr. at 17].[2] However, the Court did not rule on the motion. We urge the Court to consider the June 7, 2002 Motion and Memorandum of Law filed by counsel [C.R. 165-166], when considering Mr. Moussaoui's motions regarding access to secret evidence and classified information.[3]

WEBSITE

On July 29, 2002, Mr. Moussaoui filed a motion "STOP THE MOCKERY OF JUSTICE MY CELL IS FULL OF BOXES OF CD Motion to have during trial preparation and at trial access to evidence through a Secure Internet Site." [C.R. 369]. Stand-by counsel supported Mr. Moussaoui's request to have access to our secure website. [C.R. 374]. In response, the government expressed concern with Mr. Moussaoui having an internet connection because it would enable him to communicate with others, and recommended that the secure site be copied onto a server to be wired to Mr. Moussaoui's computer. The option recommended by the government

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[2] As part of the *Faretta* colloquy, the Court did advise Mr. Moussaoui that "there will be clearly information that is covered by both CIPA, which would be national security types of information, as well as sensitive airport information that could be relevant to your defense to which you will not be able to get access," to which Mr. Moussaoui responded that he understood. [Tr. at 35]. The Court wanted Mr. Moussaoui to know of the difficulties of proceeding *pro se*, and Mr. Moussaoui responded that if he could represent himself, he "would be able to immediately make a motion" that would result in his release. [Tr. at 35, 59]. Mr. Moussaoui's unreasonable belief that he would be able to immediately make a motion and in "ten minutes, say–five minutes, two minutes, okay, to say a very simple thing why the government will be compelled to withdraw the case today" indicates that he may well not have appreciated that the *Faretta* waiver included a waiver of the right to review evidence.

[3] We also note that we were recently advised that even the fact of the existence of some classified material cannot be revealed to Mr. Moussaoui and that each such request by him should be considered by the Court Security Officer.

would be both impractical and expensive. Attached to this pleading, under seal and *ex parte*,[4] is a letter from the vendor of the secure site advising of the various options for allowing Mr. Moussaoui access to the site from the jail. A simpler alternative, which we endorse, is to configure Mr. Moussaoui's internet connection so that he can only access the IP address of the website, which would give him access to the system, but not allow browsing of other sites or otherwise communicate outside the system. [See Attachment A, under seal, *ex parte*].

A CONTINUANCE IS NECESSARY

On August 1, 2002, Mr. Moussaoui filed a motion "IT IS TIME FOR JUSTICE Motion to have honest amount of time to prepare the complex case of Leonie Brinkema," which we construe as a request for a continuance of the trial date.

At the arraignment on the second superceding indictment, the Court asked Mr. Moussaoui whether he needed a continuance because he had filed a motion protesting the amount of time he had to prepare. [Tr. July 18, 2002 at 10]. Mr. Moussaoui responded that he needed time to think about this "because you just put the matter in front of me, and this matter need some thought." [Tr. at 10]. The Court denied a recess and advised Mr. Moussaoui it did not think there was any basis for a continuance. [Tr. at 11]. Mr. Moussaoui then told the Court he thought there was, including within his reasons that it would take him until the trial date to just load the different disks. [Tr. at 11-12]. Later in the same hearing, however, Mr. Moussaoui told the Court he wanted to plead guilty. [Tr. at 26]. We withheld our support and request for a continuance as stand-by counsel pending Mr. Moussaoui's determination as to whether to request one.

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[4] The letter is provided under seal, and *ex parte*, because it contains information identifying the system (which the government is aware of) as well as work product (to which the government is not entitled).

Stand-by counsel continue to take seriously their obligation to be prepared to try this case [*See* C.R. 186, "Mr. Yamamoto and his co-counsel must be prepared to try this case if defendant becomes unable to do so."], and also need a continuance of the trial date. Though more time would be useful, we estimate that another 60 days of preparation time beyond the currently set trial date of September 30, is the absolute minimum necessary to complete the review of discovery, follow up on critical leads, and locate and subpoena defense witnesses.[5]

We knew at the beginning of this case that there would be substantial discovery involved. Indeed, the parties agreed to production of discovery by computer disk because of the volume of paperwork that would otherwise be involved. However, at the time the trial date in this case was set, defense counsel were unable to fully comprehend the staggering magnitude of the discovery that would ultimately be produced nor, as we shall discuss, the problems posed in organizing it by mindless redaction of the material by the government. Discovery continues to be produced to the present time. By our count as of mid-July, we received:[6]

- 1,189 disks
- 82 disks contain no index, and the number of images are unknown
- 520 disks contain "computer media" or a generic description such as "Discovery From Afghanistan," and the number of images are unknown. These 520 disks include, but are not limited to:
  - 54 e-mail accounts
  - 12 hard drives from public libraries
  - 1 university language center hard drive
  - 10 e-mail accounts from Kinko's locations
  - many of these disks contain Arabic documents with no translations

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[5] This continuance request takes into consideration that stand-by counsel can continue to prepare a defense during the jury selection and the government's case. It is, however, essential that substantial work be completed before trial to prepare for cross-examination.

[6] Attachment C to this motion are pictures showing the disks, hard drives, audio and video tapes provided to stand-by counsel (as well as to Mr. Moussaoui) by mid-July 2002.

- 1,262 cassette audio tapes–45 minutes each side estimating 912.75 hours of recordings equaling 157.75 days @ 6 hours a day
- 526 video tapes–estimating 789 hours taking 131 days @ 6 hours a day
- 202 computer hard drives, including the 80 GB maxtor hard drive of the e-mail system from the University of Oklahoma
- Approximately 400 classified audio tapes
- Approximately 170 classified CD-ROMs (the government recently declassified all but approximately 40 of these CD-ROMs)
- Two classified video tapes
- Approximately 755 pages of classified discovery.

Because of the ultimate timing of the production of discovery (production of the vast majority of the disks—1,060 disks—was in the four day period of May 29-June 1, and another large quantity–256 disks–between June 17 and July 17), in order to even complete the initial review of the large mass of discovery, we had to retain the services of two litigation support services who have dedicated 70 reviewers to the task.[7] This initial review should be complete by mid-August. However, these reviewers are not looking at video or audio tapes, nor the massive number of hard drives that must be examined.[8] After the review of the discovery is complete, leads must be followed (reviewers have noted some 4,600 leads to follow up at this point which will no doubt be reduced

[7] An illustration of the volume of discovery, and the impact on the parties in dealing with it, is that we very recently learned that 80% of the information provided to us as "classified" was erroneously marked as "classified." Apparently, if one item on a CD-ROM was classified, everything on the disk was deemed classified. This has not only kept non-classified information locked in the SCIF from June until now, but stand-by counsel have spent an estimated 200 hours in the SCIF reviewing these erroneously classified documents, when they could have been put on the system for the litigation support offices to review. We mention this not in a critical way, because mistakes happen, but the adverse impact on defense preparation time remains.

[8] We have a meeting on August 10 with government counsel at which we hope to narrow the review of the hard drives, video and audio tapes, by gaining a better understanding of the contents of these tapes. In addition, several CD-ROMs do not have an index, and certain of the drives are unreadable. We cannot play videos that have been produced on CD-ROM, and other CD's cannot be opened. We have reviewed some of the hard disks and need additional information to be able to analyze the drives. We hope to resolve these and other issues at this meeting.

significantly as the attorneys begin to sort through them), witnesses must be located (*see* the redaction problem discussed below) and interviewed, and appropriate subpoenas issued. Much of the work that remains must be done is overseas; and while we are able to follow up at this point on some work in some countries, France—where much of the work is—is generally "closed" for August vacations.

In addition to the sheer volume of discovery, and the time needed to digest it and follow up on necessary leads, we are hampered by the government's redactions of critical information. The first name of virtually every person interviewed by the government, as well as any identifying information for that person, has been redacted.[9] Many of these 302's were produced as Rule 16 or *Brady* material and the redaction of information related to the location of witnesses is not defensible. Other information, such as credit card account numbers used by one or more of the hijackers to buy plane tickets, telephone numbers listed by an alleged hijacker and addresses where one or more supposedly lived, is redacted. These redactions make it difficult to impossible to determine the significance of the information in the report or to match up the report with the documents referred to in the report. Moreover, in the numerous instances in which the subject of the 302 has the same last name as another alleged hijacker (several of the hijackers have the same last name), the redactions make it virtually impossible to readily identify the subject of the 302. (*See* Attachment B, Declaration of Steven C. Tabackman, filed *ex parte* and under seal.)

In sum, this case cannot be prepared by even the stand-by team the Court has kept in place by the scheduled trial date of September 30, and it surely cannot be prepared in that time, if ever, by

[9] Addresses and telephone numbers, along with city or town of residence and first names have not been provided.

a single individual who is locked in a cell, with virtually no access to the outside world. We request an additional minimum preparation time of 60 days, with trial to begin no earlier than November 30, 2002.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant our "Motion for Access by Defendant to Classified and Sensitive Discovery and For Relief From Special Administrative Measures Concerning Confinement," authorize Mr. Moussaoui to have access to our secure website as recommended by the vendor, and continue the trial date for a minimum of 60 days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion in Support of Defendant's Requests for Access to Evidence, Access to Secure Website and for a Continuance in was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 7th day of August, 2002.

/S/
Frank W. Dunham, Jr.