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 DEFENDANT'S AND
STANDBY COUNSEL'S MOTIONS FOR A CONTINUANCE

The *pro se* defendant and standby counsel have submitted motions to delay the start of the trial in the above-captioned case. The defendant seeks a delay to "an undetermined date," while standby counsel have requested a sixty-day continuance. For the reasons set forth herein, these motions should be denied.[1]

I. The Public Interest in a Speedy Trial of This Case

Congress and the courts have steadfastly recognized the public's interest in speedy justice. *See United States v. Jarrell*, 147 F.3d 315, 318 (4th Cir. 1998) (discussing defendant's inability to waive the public's interest in a speedy trial); *United States v. Keith*, 42 F.3d 234, 238 (4th Cir. 1994) ("[i]n general, a defendant cannot waive his right to a speedy trial" because "a defendant cannot waive the public's interest in a speedy trial"). Indeed, the "central intent" of the Speedy Trial Act was to "protect society's interest" in "speedy justice." *United States v. Willis*, 958 F.2d 60, 63 (5th Cir. 1992). For these and other reasons, a district court's denial of a

[1] In the same pleading, standby counsel have renewed their motion to grant access of classified material to the uncleared, *pro se* defendant. (Mem. at 1-2). For the reasons discussed in the Government's Memoranda of June 7, 2002 (at pp. 25-29) and August 8, 2002, this motion should be denied. Also, standby counsel also have repeated their request to provide Moussaoui with access to their website. (Mem. at 2-3). However, because the Government has not been provided with the letter from an unnamed vendor submitted in support of the application, the Government cannot further respond to this request.

continuance will be reversed only where a defendant can demonstrate an abuse of the court's "broad discretion" and a showing of prejudice by the defendant. *United States v. Bakker*, 925 F.2d 728, 735 (4th Cir. 1991); *see also United States v. Jordan*, 466 F.2d 99, 101 (4th Cir. 1972).

Here, the public's interest in a speedy trial could not be more compelling. The Indictment in this case charges several conspiracies that resulted in the horrific terrorist attacks of September 11, 2001, and the deaths of nearly 3,000 people. Moreover, as is clear from the Indictment, the attacks of September 11 were more than just acts of mass murder. They were volleys in a declared war against the United States and were intended to terrorize the entire nation. Thus, the victims' and the nation's interest in a fair and speedy trial is beyond dispute.

However, because of the complexity of this case, the trial already has been delayed well beyond that which is normally permitted by the Speedy Trial Act or the practice of this Court. As it currently stands, the trial will not begin until nearly ten months after the defendant's arraignment and over one year after the attacks of September 11. While this delay was reasonable under the circumstances, no more delay, particularly requested on the eve of trial, should be permitted. As discussed further below, the discovery has been provided both to the defendant and standby counsel in a timely and user-friendly fashion, and no further delay is therefore necessary to ensure a fair and expeditious trial of this case.

Moreover, the Government already has issued numerous trial subpoenas and has informed the many witnesses (including victim witnesses) it expects to testify about the timing of the trial. Therefore, a further delay of this trial will impose an undue burden on these witnesses and is an independent basis to keep the current trial schedule. *See Bakker*, 925 F.2d at 735 (in denying continuance, the trial court "properly factored into its decision the interests of some

twenty government witnesses who had been sent home when Bakker was committed for a psychiatric exam . . .); *see also Morris v. Slappy*, 461 U.S. 1, 11 (1983) (permissible to account for schedule of witnesses in deciding continuance motion).

II. The Requests for Further Delay are Unpersuasive

Weighed against the overwhelming public interest in a speedy trial in this case, the *pro se* defendant and standby counsel have asked for a further delay in the trial. In support of their motions, the defendant and standby counsel complain about everything from prison conditions to the volume of discovery provided to date. Upon closer examination of these claims, however, it is clear that there is no valid basis to further postpone the trial of this case and therefore the motions should be denied.

A. The Defendant's Motion

"In the vast majority of cases, the defendant will be quite happy to delay the final determination of his guilt or innocence." *Willis*, 958 F.2d at 63. This case is no exception. Here, the *pro se* defendant claims that he should be given an indefinite continuance because of the restrictions placed on him under the Special Administrative Measures ("SAM"), and the purported lack of information standby counsel have provided to him regarding the "status" of his defense. (Docket #379, Mem. at 1-2). Furthermore, Moussaoui claims that an adjournment will permit standby counsel the opportunity to share any information with Charles Freeman and Professor Sadiq Reza. (Mem. at 2, 4).

The defendant's motion should be swiftly denied. While Moussaoui lawfully remains

restricted by the SAM, this was a condition that he accepted before waiving his right to counsel.[2] He cannot now be heard to grumble that he does not have the same ability or wherewithal as his former counsel have to prepare his defense. *See United States v. Singleton*, 107 F.3d 1091, 1099 (4th Cir. 1997) (*pro se* defendant required to be prepared to try case as scheduled as condition of representing himself); *United States v. Byrd*, 208 F.3d 592, 593 (7th Cir. 2000) (no Sixth Amendment violation when *pro se* defendant was denied access to legal materials); *United States v. Taylor*, 183 F.3d 1199, 1204 (10th Cir. 1999) (no Sixth Amendment violation when court refused to grant defendant access to law library because *pro se* defendants have no right to access law library materials and because court had appointed stand-by counsel, who could obtain legal materials for defendant and so was constitutionally acceptable alternative to access). Nor is the defendant's self-inflicted dilemma grounds to ease the valid restrictions imposed by the SAM.

---

[2] For example, the following colloquy occurred on June 13:

> The Court: Are you aware that by being your own attorney, it will become more difficult for you to have access to evidence, access to witnesses, access to legal research because of the restrictions under which you are presently housed?
>
> Defendant: Absolutely.
>
> The Court: All right. Whereas if you had an attorney, as you have until recently working for you, these lawyers are able to see information, to contact witnesses, and to do things that you cannot do from your cell. Do you understand that?
>
> Defendant: I do.

(6/13/01 Tr. at 32).

Cf. United States v. Sammons, 918 F.2d 592, 602 (6th Cir. 1990) (court's limitation of defendant's access to law library not improper because "by knowingly and intelligently waiving his right to counsel, the appellant also relinquished his access to a law library"); *see also United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir.) (upholding SAM), *cert. denied*, 531 U.S. 881 (2000). Finally, no delay will achieve what the defendant appears to desire most – legal advice from individuals who are not counsel of record in this case. Regardless of when the trial begins, the defendant is not entitled to legal advice from individuals who are not permitted, by force of valid local rules, to act as legal counsel for the defendant.

The defendant was been provided with electronic copies of all of the discovery in this case, but initially chose not to accept the computer facilities that were offered to him to review the material. (6/13/01 Tr. at 55). Also, as per the Court's order, the Government has provided, and continues to provide, the core Rule 16 and *Brady* material to the defendant in hard copy. Thus, the defendant has had more than adequate access to the materials and his request for a continuance should be denied.

B.. Standby Counsel's Motion

Standby counsel have requested a sixty-day continuance.[3] In support of this request, standby counsel cite the "staggering magnitude of the discovery" and the "mindless redaction of

[3] Though they seek only a sixty-day continuance, the practical effect of standby counsel's motion could result in more delay. On the current schedule, it is the parties' expectation that the trial, and any penalty phase, would be completed by mid-December. However, if standby counsel's motion were granted, we would begin the taking of evidence, at the earliest, in mid-December. If the Court were to sit during the last week of December, it is likely that we will have a greater difficulty in selecting jurors who could be available during this time. If, to accommodate this large group of potential jurors, the Court did not sit during the last week of December, the trial would be further delayed and would spill well into 2003.

the material by the government." (Mem. at 4). To substantiate their claim regarding the volume of the discovery, standby counsel provide a list (and some photographs) of the number of CDs, computers, videos and pages of discovery produced in this case.

Standby counsel's numeric description of the discovery (even supplemented by photographs of the materials) does not justify the last-minute request for a two-month continuance. First, as noted in the Government's Memorandum of Law dated July 16, 2002, the Government has employed numerous means to ease the burden of trial preparation for standby counsel (and the defendant). To begin, among the first discovery items produced by the Government were the materials found in Oklahoma and Minnesota that were seized from, or directly related to, the defendant. These materials were provided in February/March in electronic copy, and were among the first items produced in hard copy, pursuant to the Court's order earlier this summer. (7/25/02 Tr. at 15). Thus, while there are voluminous materials that relate to *al Qaeda* and to some of the activities of the other 19 hijackers, the core discovery materials relating directly to the defendant have long been available to the defendant and to standby counsel.[4]

Second, a simple recitation of the number of CDs provided in this case omits the fact that many of these CDs can be electronically searched (and the fact that many CDs have only a handful of images and/or files on them). Thus, unlike the traditional discovery production, even in large cases such as this one, where counsel would have to wade through stacks of paper,

---

[4] Given that the defendant has publicly admitted his membership in *al Qaeda*, there is less of a likelihood that his association with that group will be a disputed fact at trial. This may assist standby counsel in focusing their review of these materials.

standby counsel are able to search for materials that fit into their defense strategy. Moreover, as even standby counsel concede, over 90% of the CDs have indexes that further assist standby counsel in identifying and categorizing the discovery.[5] Similarly identified are the email accounts. For example, many of the email accounts are identified by either the subscriber or the location of their discovery.

Similarly misrepresented is the volume of audio and video tapes that have been provided. For example, standby counsel cite the capacity of each audio tape, not the amount of recorded information on those tapes. Moreover, approximately half of these tapes have been identified as being from the New York City Fire and Police Departments and consist of 911 calls, radio dispatches, or oral history interviews, many of which have been transcribed and provided to counsel. These tapes relate mostly to the penalty phase, and do not involve facts that are likely to be in dispute at either the guilt or penalty phase. The same holds true for the video tapes, many of which are tapes of the World Trade Center or are other crime scenes on September 11. Again, these are not items of evidence that we expect would be in dispute at trial. *See New York Times*, Aug. 9, 2002 ("All of this testimony is very sad, . . . and we would probably stipulate to all of it. I would stipulate to as much of this evidence as I could to avoid the obvious prejudice that it would case to the defense of the case.") (quoting Edward B. MacMahon, Jr.).

Many of the other audio tapes are from Afghanistan (very few of which we expect to use), or are tapes from electronic surveillance operations that we already have informed standby counsel we do not intend to use at trial. For example, many relate to intercepts over the Nairobi

---

[5] We expect the remaining indexes will be completed by next week.

telephone of Wadih el-Hage during 1996-97. While they might have been "discoverable" under a loose interpretation of Rule 16, they do not directly relate to the allegations in this case.

Third, standby counsel's claims ignore the other means by which the Government has assisted standby counsel in the review of the discovery. For example, we already have notified standby counsel that we do not intend to make use of the 400 classified audio tapes, and we do not believe they constitute *Brady* material. Also, we provided standby counsel with a chart of the more important computer media, and have agreed to provide further assistance in identifying other computer media (as well as audio and video tapes) that we believe may figure in the trial. Moreover, contrary to the representations of standby counsel (Mem. at 5 n.7), we long ago advised standby counsel of the fact that some of the CDs (approximately 150) were classified only temporarily until we could confirm that there were no classified materials contained in each CD.[6] These CDs were all declassified and re-produced to counsel within weeks of their initial production.[7]

Finally, and most importantly, standby counsel's claim continues to ignore the prior

---

[6] Counsel were notified of this fact when the CDs were produced to them both in writing and orally by our staff. For example, in one letter that accompanied the production of some of these CDs, we advised counsel that: "It is the government's intention to declassify a vast majority of the items saved on the CDs. Once a CD is declassified we will send copies of the declassified CDs to the Federal Public Defender's Offices in Alexandria and Richmond, Virginia." (Letter from AUSA Kenneth Karas to Frank W. Dunham, Jr., Esq., June 4, 2002).

[7] This duplicative production constituted the bulk of the 256 CDs that standby counsel cite in their pleading as being produced between June 17 and July 17. (Mem. at 5). Many of the other CDs were recently acquired FBI 302 reports and materials obtained from Afghanistan, which we previously had advised standby counsel would be provided later in discovery, as they were discovered after the case was indicted and would continue to be discovered as events unfolded in that country.

efforts of the Government, discussed in the Government's Memorandum of July 16, 2002, to limit the volume of discovery in this case. Counsel for the United States met with defense counsel in March to define more precisely the discovery boundaries in this case. We explained that while we believed there were substantial materials that were not relevant to the prosecution of this case, we did not want to exclude materials ourselves and later be accused of failing in our discovery obligations. 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 invitation, we advised counsel that if we could not reach an agreement, we naturally would have to err on the side of disclosure. In response, counsel refused to provide any limits on the discovery materials. Instead, defense counsel insisted we provide "all of the material." (*See* Letter of Frank W. Dunham, Jr., Esq., April 5, 2002). Moreover, counsel made extraordinary demands for discovery beyond that which could be viewed as discoverable. 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.").

As further support for its motion, standby counsel cite the "mindless" redactions of "critical information" from the FBI reports provided in discovery. (Mem. at 4, 6). This claim is as meritless as it is cynical. Part of the large volume of discovery material in this case derives

from the determination of the United States, in good faith and in spite of no obligation to do so,[8] to provide more than 160,000 FBI "302" reports to date (electronically copied and searchable).[9] Aside from greatly assisting counsel in trial preparation, thus reducing the risk of a last-minute delay of the trial, we believed that providing these documents would help counsel in reviewing other discovery materials.

Demonstrating that no good deed goes unpunished, standby counsel have converted this production into a right to unredacted copies of every FBI 302. Yet, there is an overwhelming interest in protecting the anonymity of the civilians whose information is contained in those 302s. In doing so, we are endeavoring to do more than just protect their safety, but also their privacy. Sometimes we do this to honor a commitment given to these individuals. More generally, however, by protecting the witnesses' anonymity we encourage other civilians to continue to provide information to law enforcement. If witnesses, or potential witnesses, knew that their names would be provided routinely to counsel, particularly in a case such as this, we might see fewer individuals provide useful information.

Standby counsel have been provided, in these thousands of reports, a virtual blueprint of the investigation of this case. It is difficult to understand, therefore, how redacting the first

---

[8] Rule 16 does "not authorize the discovery or inspection or reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case." Fed. R. Crim. P. 16(a)(2) (emphasis added). "Nor does the rule authorize the discovery or inspection of statements made by the government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500." *Id.*

[9] It is simply wrong for standby counsel to assert that "[m]any of the 302's were produced as Rule 16 or *Brady* material." (Mem. at 6).

names and the addresses of the potential witnesses hinders their ability to ascertain the significance of the information contained in the 302s. Beyond this, the defense is not entitled to a list of potential witnesses, *see United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985), let alone a preview of what they might say, at this phase of the case. *See* Fed. R. Crim. P. 16(a)(2). Accordingly, there is nothing "mindless" about the redactions of the personal information provided by the individuals interviewed by the FBI in this case and, therefore, the trial should not be adjourned for this reason.[10]

Nor is there any undue prejudice to standby counsel from the other redactions in the 302s. While the 302s may have redacted the credit card numbers of the hijackers, this information has otherwise been provided to standby counsel in other discovery materials. For example, we have provided the bank accounts for the hijackers, as well as the records showing the method of payment they used to purchase items such as airline tickets. We also have provided information regarding the various telephone numbers and addresses they used. Thus, the fact that some of the 302s have this information redacted (as a result of the method we used to redact the personal information from all the 302s) does not mean that standby counsel are lacking the information they need to prepare the case for trial. Accordingly, this is no basis to adjourn the trial.

[10] Moreover, we previously have offered to standby counsel that we would contact particular witnesses they felt they were entitled to speak to under *Brady*.

III. Conclusion

For the foregoing reasons, the defendant's and standby counsel's motions for a continuance should be denied.

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By: /s/
Kenneth M. Karas
Robert A. Spencer
David J. Novak
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that on August 12, 2002, a copy of the attached Government's Opposition to Defendant's and Standby Counsel's Motions for A Continuance was sent by hand delivery, via the United States Marshal's Service to:

Zacarias Moussaoui
Alexandria Detention Center
2001 Mill Road
Alexandria, Virginia 22314

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

Frank Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street
Suite 500
Alexandria, Virginia 22314
Facsimile: (703) 600-0880

Gerald Zerkin, Esq.
Assistant Public Defender
One Capital Square, 11th Floor
830 East Main Street
Richmond, VA 23219
Facsimile: (804)648-5033

Alan H. Yamamoto, Esq.
108 N. Alfred St., 1st Floor
Alexandria, Va. 22314-3032
Facsimile: (703) 684-9700

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
Middleburg, VA 20118

_/s/_____
Kenneth M. Karas
Assistant U.S. Attorney