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

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

REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S AND STAND-BY COUNSEL'S MOTIONS FOR A CONTINUANCE

COMES NOW stand-by counsel for Mr. Moussaoui and replies to the government's opposition to the motion of Mr. Moussaoui for a continuance and stand-by counsel's support thereof. The government's response ignores reality. As much as it would like the trial to proceed on schedule, it cannot force a *pro se* defendant or standby counsel to be prepared (ready for trial) in the present circumstances, particularly when the government is the architect of those circumstances. It is the government which has so swamped Mr. Moussaoui's boat with discovery that he cannot bail it out in time to be prepared for trial on the date currently set. Even as he and stand-by counsel endeavor to do so, the government continues to turn over still more discovery (forty more CD-ROMs on August 15th, plus government exhibits we have never seen before that are wholly or partially in a foreign language, probably Malay).

First, to justify the denial of a continuance, the government points to what we believe is the evidence that Mr. Moussaoui's waiver of counsel in this case was anything but unequivocal. He claims he needs the additional time to consult with counsel—as if he does not understand that he has waived that right. However, he does have a dilemma that is not self-inflicted, and that is the sheer volume of the discovery material. Stand-by counsel have been endeavoring to address this for

Mr. Moussaoui in the event he ever taps us, directly or indirectly,[1] for assistance. The fact is that if he does, we will not be in a position to provide that assistance without the additional time requested. It is not as if we could process the material more quickly than we are doing at the current time, the problem is the nature and size of this task which we believe is being addressed efficiently and expeditiously, but still not quickly enough to be completed in time for the currently scheduled trial date.

We do not question that the government has tried in many instances to ease the burden of coping with the large volume of discovery materials. However, the government's good faith is not the issue. The request for a continuance should not be viewed as a suggestion that the government has been totally unsympathetic to defense problems. They have steered us clear of things we do not need to look at (for example, 400 classified audio tapes[2]) and provided other assistance in a collegial, professional manner. The one area where we believe we have legitimate grievances is with the redaction of certain FBI 302s. We have not demanded that all 302s be unredacted, as the government claims. (*See* Gov't. Response at 10.) But, many of these 302s appear to contain information material to the preparation of the defense, *i.e.*, information the defense intends to use as part of its case—and we have been denied unredacted copies of them. We believe our grievances in this regard are appropriate. Further, as to the dead hijackers, the government does not even try to justify the redactions, and yet these are the ones that are giving us the most trouble. The government says that the redactions in 302s of hijacker information is of no concern because the

[1] It appears that Mr. Moussaoui, without changing his view that we are adverse to him, will be seeking assistance from Professor Reza, who has indicated he will need assistance from us precisely in the areas related to our discovery review.

[2] Of course, this raises the issue of why these were given to us in the first instance.

information has been provided in other discovery information. (Gov't. Response at 11.) Yet the government does not tell the Court how many hours it takes to match up the redacted 302s with these other documents. There is no cross-reference or index to go to—and we are using literally hundreds of man-hours and a sophisticated litigation support system to try to do this in an organized way and it still takes inordinate amounts of time. Yet, to go on and on about the redactions at this length suggests that they are the major source of the problem when they are not. Even when shedding the irrelevant, the source of the problem is the sheer volume of the material that is pertinent to the case.

In short, the government construes our request for a continuance as an attack on its good faith in providing discovery. The fact is that the government's good faith, even with the redactions of which we complain as merely "mindless"rather than as some intentional effort to frustrate us, is not in question or at issue. The issue is the nature of the case itself. The massive amount of discovery means a massive amount of time to review it *and then to put it to its intended use.* In order to do this, more time is needed. The government is not to blame for the voluminous amount of discovery. No one is. But the fact remains that we cannot process the information in a meaningful way in the time allowed, and if we cannot do this with the resources available to us, then Mr. Moussaoui sitting alone in his cell certainly cannot.

Second, standby-counsel does not disagree that the public's interest in having a speedy trial in this case is strong. However, the public's interest in having a trial that is *fair,* given the magnitude and importance of this case—not to mention Mr. Moussaoui's interest in having a fair trial in light of the consequences to him—is equally, if not more, compelling than the interest in speed alone. The inability of the defense to adequately prepare for trial threatens the latter interest. Additionally, the government neglects the primary interest identified by Congress as the public interest in a speedy

trial in criminal cases generally when a defendant is detained pre-trial, as Mr. Moussaoui is, which is fiscal—that is, the cost to the taxpayers of holding defendants as pre-trial detainees for lengthy period of time. H.R. Rep. 1508, 93d Cong., 2d Sess. (1974) (accompanying Pub. L. 93-916, which enacted the Speedy Trial Act), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7409. In light of the huge amounts of money already spent by both sides on this case and, if a conviction results, the amounts of money that will continue to be spent over the next few years as the case proceeds through direct appeal and post-conviction proceedings, the cost of another two months of detention is negligible, and cannot be used to justify the infringement of Mr. Moussaoui's right to be prepared to defend himself, which is a necessary prerequisite to a fair trial.

Third, the government incorrectly suggests that we ask for an amount of time far beyond what would be permitted under the Speedy Trial Act. Although Mr. Moussaoui has waived the statutory right to a speedy trial, it is appropriate to recognize that if the Speedy Trial Act were to be applied, the 70-day period would still be running on September 30, the date the trial is currently scheduled to start. The government obtained the Second Superseding Indictment in this case on July 16, and Mr. Moussaoui was arraigned on it on July 18. Even if no time were to be excluded, the 70 days would expire on September 26. However, excluding the excludable time related to the ongoing CIPA proceedings, which are not scheduled to be completed until September 12, the 70-day period would still be running well past September 30, and would not expire until November 21, at the earliest.

Fourth, the government's claim that this request for a continuance is made "on the eve of trial, (Gov't. Response at 2), and "at the last minute," (*id*. at 6) is simply wrong. A request made two months ahead of trial cannot possibly be characterized as "on the eve" or "at the last minute."

Moreover, with two months' notice, there will be no "undue burden" imposed upon the government's witnesses to reschedule their testimony. (Gov't. Response at 2.) *Cf. United States v. Bakker*, 925 F.2d 728, 735 (appropriate to consider imposition upon government witnesses in denying five-day continuance requested by defense in middle of trial where defendant had nine months to prepare). Certainly, that factor alone does not justify denying a timely pre-trial request for continuance in this case, where the stakes are so high for both Mr. Moussaoui and for the American public.

Fifth, when compared to cases in which district courts within the Fourth Circuit have granted continuances, the facts of this case practically require that a continuance be granted. For example, in *United States v. Odom*, 674 F.2d 228, 229 (4th Cir. 1982), the district court granted the defense's request for a continuance that was made only twelve days before trial, based on the need to complete psychiatric evaluations that were required for a defense based upon mental health; the court continued the trial for two and one half months. In *United States v. Patterson*, 277 F.3d 709, 711 (4th Cir. 2002), the district court granted the government's request for a continuance of one month, made just six days before trial, in order to locate a witness where the witness had been arrested and the U.S. Marshal's Service would have to charter a plane or drive to get the witness to trial on time, thus creating hardship for the marshals. In *United States v. Keith*, 42 F.3d 234, 236 (4th Cir. 1994), the district court granted the government's request for continuance, made just several days before trial, based on the illness of the assistant U.S. Attorney; the trial was continued for two weeks. And in *United States v. Bourne*, 743 F.2d 1026, 10-29-03 (4th Cir. 1984), the district court granted a two-month continuance, based on the government's request—made a mere five days before trial—because a witness had medical problems. In comparison, Mr. Moussaoui's request for a

continuance, in which stand-by counsel joins, made over two months in advance of trial, must be granted when its denial will result in the complete inability of the defendant and of his stand-by counsel, to be prepared for what will be one of the most important criminal trials this country has ever seen or will expect to see.

Finally, the government's approach is characterized by its blatant reference to what it would take to obtain reversal of a decision to deny a continuance. (See Gov't. Response at 1-2.) The issue is not, nor should it ever be, what this Court can safely do without being reversed. The sole issue is whether the defense genuinely needs more time for preparation—and if it does, the request should be granted. The government's efforts to take advantage of a defendant's inability to prepare for trial by the date currently set should not be rewarded.

For the reasons previously set forth, we respectfully request a sixty (60) day continuance for the start of trial in this case.

Respectfully submitted this 15th day of August, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply to Government's Response to Defendant's and Stand-by Counsel's Motions for Continuance 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 on August 15, 2002 and on August 16, 2002, 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.

/S/
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