

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

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

**MOTION FOR EARLY PRODUCTION OF
GOVERNMENT’S WITNESS LIST AND TO SET DISCOVERY DEADLINES AND
MEMORANDUM IN SUPPORT THEREOF**

On behalf of pro se Defendant, Zacarias Moussaoui, standby counsel move this Court for an order directing the Government to produce a list of all witnesses it intends to call at trial, including the name and address of each witness, sixty (60) days prior to trial, and an order setting discovery deadlines of sixty (60) days before trial for the Government’s production of summary expert reports, *Jencks Act*, *Giglio*, and Federal Rule of Evidence 404(b) materials.¹

BACKGROUND

Mr. Moussaoui has been indicted by a grand jury of this Court on six (6) charges, four of which carry the death penalty.² The Government has filed a notice of intent to

¹ Pursuant to the Court’s August 22, 2002 order, a copy of this motion was provided to Mr. Moussaoui for his review before the motion was filed. The relief requested herein for the early production of the Government’s witness list is consistent with that requested by Mr. Moussaoui. See “Motion to Have the Name and Address of Each ‘Professional’ Witness Sixty Day Before the Parody of Trial Play” at 2 (filed Sept. 3, 2002) (requesting that the names and addresses of the Government’s witnesses be produced “at least 60 day[s]” before the start of the trial). The relief requested herein to set discovery deadlines is inconsistent in part with that requested by Mr. Moussaoui. See “Moussaoui Deadlines to Government Liars” at 1 (filed Sept. 3, 2002) (moving “to set a discovery deadline of ninety day[s] before trial for the Government’s production of remaining expert . . . reports”).

² Conspiracy to Commit Acts of Terrorism Transcending National Boundaries (18 U.S.C. § 2332b(a)(2), (c) (Count One)); Conspiracy to Commit Aircraft Piracy (49 U.S.C. § 46502(a)(1)(A), (a)(2)(B) (Count Two)); Conspiracy to Destroy Aircraft (18 U.S.C. §§ 32(a)(7) and 34) (Count Three)); Conspiracy to Use Weapons of Mass Destruction (18 U.S.C. § 2332a(a) (Count Four)); Conspiracy to Murder United States Employees (18 U.S.C. §§ 1114 and 1117) (Count Five)); and Conspiracy to Destroy Property (18 U.S.C. § 844(f), (i), (n) (Count Six)).

seek his death. The jury trial is scheduled to commence December 9, 2002.

ARGUMENT

I. Early Production Of Government's Witness List

In a prosecution for a capital offense, the Government is required to provide the defendant with a list of witnesses it intends to call at trial. 18 U.S.C. § 3432.

Specifically, pursuant to section 3432,

A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness

The purpose of this section “is to reduce the chance that an innocent defendant would be put to death by providing a pretrial safeguard not available in noncapital criminal prosecutions.” *United States v. Steel*, 759 F.2d 706, 709-10 (9th Cir. 1985). In other words, the statute attempts to prevent the defendant from being surprised by prosecution witnesses used against him at trial, *Hall v. United States*, 410 F.2d 653, 661 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969), and aims “to afford the accused an opportunity to endeavor to ascertain what testimony he will have to meet and to prepare to meet it.” *United States v. Soblen*, 203 F. Supp. 542, 552 (S.D.N.Y. 1961), *aff’d*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962) (citations omitted).

The discovery in this case is massive. The paper trail is complex. Many first names and other identifying particulars have been redacted from the documents provided to the defense by the Government. As a result, and not surprisingly, efforts by the defense to organize and assimilate the data have been impeded.

Most significantly, however, is the fact that Mr. Moussaoui is pro se and because he is alone, he needs more than the usual time to prepare for trial. (Although the Court has appointed standby counsel for the Defendant, he cannot be required to use them if he does not want to.) He is inundated with thousands of pages of material that he must read, absorb, and organize. Thus, Mr. Moussaoui is already at a severe disadvantage as compared to the Government when it comes to adequacy of time to prepare. Compounding this disadvantage is the hostile environment in which Mr. Moussaoui is forced to function. He has been held in solitary confinement in Alexandria for over nine months under some of the most restrictive conditions ever to be imposed on a pre-trial detainee. These conditions eviscerate his ability as a pro se defendant to effectively prepare for trial.

Hence, a list of numerous witnesses provided immediately before trial is akin to having no witness list at all. This is especially true when the witnesses are located all across the United States. See *United States v. Willis*, 33 F.R.D. 510, 512 (S.D.N.Y. 1963) (ruling that because the prospective witnesses were “officers, crew and passengers scattered far and wide . . . it is clear that a minimum three-day compliance with [section 3432] will not afford the defendant a fair opportunity for adequate trial preparation”). The circumstances of Mr. Moussaoui’s case demand that the Government’s witness list be provided at least sixty (60) days prior to trial if the purposes of section 3432 are to be fulfilled. Indeed, this Court allowed twenty-nine (29) days in *United States v. Wills* and Mr. Moussaoui’s case is far more complex.

Although the statute only requires that the prosecution provide its list of witnesses to the Defendant not less than three (3) days prior to commencement of trial,

many courts have required production well in advance of trial. See, e.g., *United States v. Wills*, No. 99-396-A (E.D. Va. filed July, 31 2001) (Brinkema, J.) (ordering Government to produce its witness list twenty-nine (29) days prior to trial); *United States v. Lentz*, No. 01-150-A (E.D. Va. filed June 22, 2001) (Lee, J.) (ordering the production of the Government's non-expert witness list (including names, addresses and telephone numbers) thirty (30) calendar days prior to trial and the Government's expert witness list (including their opinions and the bases therefor) forty-five (45) calendar days before trial); *United States v. Willis*, 33 F.R.D. 510, 512 (S.D.N.Y. 1963) (section 3432 witness list and addresses ordered to be provided "not less than at least thirty (30) days before the commencement of trial"); *United States v. Feliciano*, 998 F. Supp. 166, 175 (D. Conn. 1998) (immediate disclosure of non-protected witnesses ordered, and disclosure of protected witnesses ordered ten (10) days prior to trial). See also *United States v. Chandler*, 996 F.2d 1073, 1098 (11th Cir. 1993) (section 3432 witness list and addresses provided two weeks before trial), *cert. denied*, 512 U.S. 1227 (1994).

Further, it is well established law that, in non-capital cases, the "granting of a defense request for a list of adverse witnesses is a matter of judicial discretion." *United States v. Chaplinski*, 579 F.2d 373, 375 (5th Cir.) (quoting *United States v. Hancock*, 441 F.2d 1285, 1286 (5th Cir. 1971)), *cert. denied*, 439 U.S. 1050 (1978). See also *United States v. Fletcher*, 74 F.3d 49, 54 (4th Cir.) (stating that Federal Rule of Criminal Procedure 16, governing discovery and inspection, is interpreted as "placing the decision regarding pre-trial disclosure of witness lists within the sound discretion of the trial court") (citations omitted), *cert. denied*, 519 U.S. 857 (1996); *United States v. John*

Bernard Industries, Inc., 589 F.2d 1353, 1358 (8th Cir. 1979) (“[T]he District Court had discretion to order the Government to disclose the witnesses it expected to call.”); *United States v. Sclamo*, 578 F.2d. 888, 890 (1st Cir. 1978) (stating that it was within the trial court’s discretion to deny the defendant’s request for a list of Government witnesses prior to trial where defendants “did not articulate any compelling need for disclosure”); *United States v. Cannone*, 528 F.2d 296, 299 (2d Cir. 1975) (“The general discretion of district courts to compel the Government to identify its witnesses is acknowledged widely”); *United States v. Anderson*, 481 F.2d 685, 693 (4th Cir. 1973) (trial court may, in its discretion, order the Government to produce a witness list under Federal Rule of Criminal Procedure 16), *aff’d*, 417 U.S. 211 (1974).

To force Mr. Moussaoui, a pro se defendant, to defend himself against such serious charges without providing him with an adequate opportunity to prepare to meet the Government’s evidence would significantly prejudice his right to a fair trial. In order to give him adequate time to make use of the list, undersigned respectfully request that the Court order the Government to provide its list of witnesses, with addresses, no later than sixty (60) days before commencement of trial. Requiring such disclosure is not unreasonable given the scope of the Government’s investigation, the potential for imposition of the death penalty, and the fact that there is no danger of harm to potential witnesses given the restrictions imposed on counsel (Local Criminal Rule 57)³ and the Defendant (the SAMs).

³ Local Criminal Rule 57(C)(4) prohibits counsel from publicly releasing “[t]he identity, testimony, or credibility of prospective witnesses.”

II. Early Production Of Summary Expert Reports, *Jencks* Act, *Giglio*, and 404(b) Materials

The same arguments for the early production of the Government's witness list apply with equal force to the production of the Government's summaries of its trial experts under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure, and material pursuant to the *Jencks* Act (18 U.S.C. § 3500) (witness statements), *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material), and Rule 404(b) (other crimes, wrongs, or acts). Production of this material will be meaningless unless provided to Mr. Moussaoui far enough in advance of trial for him to make use of it.⁴

Accordingly, standby counsel request that the Court order the following:

1. Pursuant to Fed. R. Crim. P. 16(a)(1)(E), the Government shall disclose to the Defendant a summary (including the experts' opinions and the bases for those opinions) of any testimony from its proposed experts sixty (60) calendar days before trial. The Defendant shall disclose a summary (including the experts' opinions and the bases for those opinions) of testimony of the Defendant's experts thirty (30) calendar days before trial.
2. The Government shall produce to the Defendant *Jencks* Act and *Giglio* materials for the witnesses who will testify in the Government's case in chief sixty (60) calendar days prior to trial.
3. The Government shall provide notice to the Defendant of the Rule 404(b) evidence sixty (60) calendar days before trial.

⁴ Of course, producing the material to the Defendant early puts him on notice that he will not be entitled to any trial recesses to review the material.

CONCLUSION

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel, on behalf of pro se Defendant Zacarias Moussaoui, move this Court to order the Government to provide to the Defendant, at least sixty days before trial, a list of the names and addresses of all of its non-expert and expert witnesses, and its summary expert reports, *Jencks* Act, *Giglio*, and Federal Rule of Evidence 404(b) materials.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Standby Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Early Production of Government's Witness List and to Set Discovery Deadlines and Memorandum in Support Thereof was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, 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 UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 30th day of September 2002.

_____/S/
Kenneth P. Troccoli