

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,)	
Defendant)	

GOVERNMENT’S RESPONSE TO STANDBY COUNSEL’S
MOTION FOR EARLY PRODUCTION OF GOVERNMENT’S
WITNESS LIST AND TO SET DISCOVERY DEADLINES AND
GOVERNMENT’S REQUEST FOR RECIPROCAL DISCOVERY

The United States respectfully responds to Standby Counsel’s Motion for Early Production of Government’s Witness List and to Set Discovery Deadlines as follows:

Eight months before trial, standby counsel complain that they need early production of the following: a list of Government witnesses with their addresses, Jencks and Giglio material, expert witness summaries, and notice of Rule 404(b) material. They make such a request despite an unprecedented production of discovery by the Government to date, which includes production of Rule 16 material, production of a significant portion of Jencks material, and the production of 167,000 unclassified FBI-302s, which were produced in a format conducive to computer searches.¹ In short, the Government has far exceeded the demands of Rule 16 and 18 U.S.C. § 3500. Yet, to this point, we have not received **any** discovery from the defense – not the first piece of paper -- despite the Government’s requests and standby counsel’s acknowledgment that

¹In addition, the Government continues to turn over any new discoverable material that comes into its possession.

they have discoverable items in their possession. It is within this context that standby counsel's request must be examined.

Witness List

Standby counsel initially seek early production of a witness list pursuant to 18 U.S.C. § 3432, which provides, in relevant parts, as follows:

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 . . . a list of . . . the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each . . . witness, except that such list of the . . . witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

The purpose of this statute is to avoid surprise for a capital defendant at trial. Hall v. United States, 410 F.2d 653, 661 (4th Cir. 1969). While the statute mandates production of the witness list at least three days before trial, it leaves to the discretion of the Court whether to order production earlier. Generally, the courts in other federal capital cases have either denied requests for a witness list earlier than three days before trial or have ordered the Government to file a witness list up to ten days before trial. See United States v. Tipton, 90 F.3d 861, 888-89 (4th Cir. 1996) (ordering production of witness list 10 days before trial); United States v. Edelin, 128 F. Supp.2d 23, 31-32 (D.D.C. 2001) (allowing Government to withhold witnesses' names until 3 days before their testimony due to danger to safety of witnesses); United States v. Cooper, 91 F. Supp.2d 79, 83 (D.D.C. 2000) (requiring production of witness list 8 days before trial); United States v. Aiken, 76 F. Supp.2d 1339, 1344-45 (S.D. Fla. 1999) (ordering production of witness list and Giglio material 10 days before trial); United States v. Feliciano, 998 F. Supp. 166, 174-75 (D. Conn. 1998) (ordering production of a witness list 10 days before trial in accord with

district's standing order); United States v. Nguyen, 928 F. Supp. 1525, 1551 (D. Kan. 1996) (denying request for production earlier than 3 days before trial); United States v. Walker, 910 F. Supp. 837, 861 (N.D.N.Y. 1995) (denying defendant's request for early production).

In this case, the Court has scheduled trial to begin on June 30, 2003, with jury selection to begin on May 27, 2003. The Government proposes that the Court order that the witness list must be filed not later than May 12, 2003, which is 49 days prior to trial and 15 days before jury selection. Considering the amount of discovery already provided by the Government and the year and a half that the defense will have had to prepare for trial, this proposal more than adequately addresses the purposes of § 3432.

Standby counsel, however, seek more than just a list of witnesses. Ignoring the Court's ruling on June 25, 2002, standby counsel also seek the addresses of witnesses. See Motion at 5 ("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."). This request directly contradicts the Court's ruling on June 25, 2002, granting the Government's Motion to Withhold Places of Abode of Prospective Witnesses Pursuant to 18 U.S.C. § 3432 (docket no. 215) and ordering that the Government need only identify the country of residence as the place of abode for prospective witnesses. 6/25/02 Tr. at 29-31. For the reasons stated by the Court during the hearing on June 25, 2002, standby counsel's request for the addresses of the witnesses should be denied, again.

Additionally, because of the magnitude of this case, the Court should also order the defense to file a witness list on the same date as the Government. The Fourth Circuit in United States v. Fletcher, 74 F.3d 49 (4th Cir. 1996), held that it was not an abuse of discretion for the

district court to compel production of witness lists by **both sides** before trial. Id. at 54 (“We previously have interpreted Rule 16 of the Federal Rules of Criminal Procedure governing discovery and inspection as placing the decision regarding pre-trial disclosure of witness lists within the sound discretion of the trial court.”). The same theory applies in this case. This Court should hold the defense to the same standard as the Government to avoid any surprise to either side at trial.

Jencks and Giglio Material

Standby counsel next ask the Court to order the Government to provide Jencks and Giglio material for its witnesses 60 days before trial. Standby counsel know that the Fourth Circuit has made clear that the Court may not order production of Jencks material before the conclusion of the direct examination of the witness. United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994); see also United States v. Beckford, 962 F. Supp. 780, 787 (E.D. Va. 1997) (denying similar request for early production of Jencks material in a federal capital prosecution); 18 U.S.C. § 3500(a) (“no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of . . . discovery . . . or inspection until said witness has testified on direct examination in the trial of the case.”). Therefore, the request for early production of Jencks material must be denied.

Although the Government may not be ordered to produce the Jencks material early, the Government will agree to produce its Jencks material on May 27, 2003 – more than a month before trial and the day of jury selection – if the defense will agree to produce its Rule 26.2 material for its witnesses (other than the defendant) at the same time. Again, because of the size

of this case, the goal of avoiding surprise to either side should be pursued and the production by the defense of a witness list with a copy of their statements will ensure that the playing field is even.

Similarly, the request for early production of Giglio material should fail. The disclosure of the Giglio material has the practical effect of providing the defense with a witness list; therefore, production of this material should coincide with the filing of the witness list. United States v. Beckford, 962 F. Supp. at 788-89. Moreover, “ while Giglio material may have considerable impeachment value, the nature of that material usually does not require substantial advance time to prepare for its effective use at trial.” Id. at 788. Consequently, the Court should order production of Giglio material at the time of the filing of the Government’s witness list, which will provide the defense with ample time to prepare for its effective use at trial. See United States v. Aiken, 76 F. Supp.2d at 1344-45 (requiring production of Giglio material at same time of filing of Government’s witness list).

Expert Witnesses

Standby counsel next seek an order pursuant to Fed. R. Crim. P. 16(a)(1)(E) requiring the Government to disclose a summary of its expert witnesses 60 days before trial. The Government has already provided, and will continue to provide the defense, with the *curriculum vitae* of its expert witnesses as well as their reports as we have received them. The Government has no objection to the Court entering an order requiring the Government to provide notice not later than April 28, 2003 (more than 60 days before trial) of its expert witnesses, their qualifications, and a summary of their opinions as described in Rule 16(a)(1)(E) so long as the Court orders the defense pursuant to Rule 16(b)(1)(C) to provide the same information to the Government on the

same date. There is simply no reason to delay disclosure of the defense expert's names, qualifications, and summaries until 30 days before trial as requested by standby counsel.²

Rule 404(b) Material

Standby counsel request the Court to order the Government to file notice of its intention to introduce any evidence pursuant to Fed. R. Evid. 404(b) not later than 60 days before trial. The Government has no objection to this request and suggests that the Court order that such a notice should be filed no later than April 28, 2003.

Government's Request for Discovery

The Government has repeatedly asked standby counsel for discovery, but we have yet to receive the first piece of paper from them. In a letter dated September 9, 2002, Assistant United States Attorney Kenneth Karas wrote the following to Mr. Dunham: "As we mentioned to you on a previous occasion, we have yet to receive a single item of discovery from the defense. We are perplexed by this given that the case has been under indictment for ten months, and hereby request that you provide the discovery items to which we are entitled forthwith." None was provided. It is unlikely that standby counsel have no material subject to discovery in this case now eleven months after indictment. Because the Government has far exceeded its responsibilities under Rule 16, the Government respectfully requests the Court to order the defense to comply with Fed. R. Crim. P. 16(b)(1) forthwith, at the very minimum not later than February 1, 2003. Moreover, the Government respectfully requests the Court to order the defense to file any notice of alibi (Fed. R. Crim. P. 12.1), insanity defense (Fed. R. Crim. P.

²Standby counsel have told the Government that they intend to call, at a minimum, experts in aviation, fingerprints, and computers.

12.2), or defense based upon public authority (Fed. R. Crim. P. 12.3) not later than December 1, 2002. Quite simply, the rules of discovery are a two-way street designed to eliminate surprise to either side. To this point, the discovery has moved only in one direction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on October 24, 2002, a copy of the foregoing Government's Response provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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