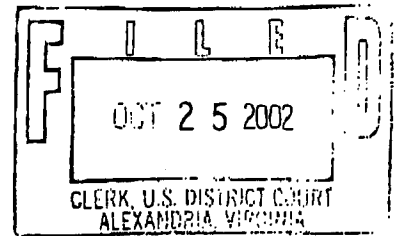


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION



UNITED STATES OF AMERICA)
)
 v.)
)
 ZACARIAS MOUSSAOUI)
 a/k/a "Shaqil,")
 a/k/a "Abu Khalid)
 al Sahrawi,")
)
 Defendant.)

Criminal No. 01-455-A

UNDER SEAL

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ORDER

The defendant, pro se, has filed a Motion to Postpone the [REDACTED] of Brother Bafana (Docket #600) in which he requests that the Fed. R. Crim. P. 15 deposition of Faiz Bafana, currently scheduled for October 30, 2002,¹ be delayed until he is afforded access to Abu Zubaydah and Ramzi Binalshibh, and is provided with information about al Qaeda's activities in [REDACTED]. Standby counsel have filed a motion in support of the defendant's motion (Docket #608) in which they request that the Bafana deposition be continued until February, 2003; and have also filed a Motion to Reissue CIA Subpoenas and to Provide Additional Information Relevant to Defendant Moussaoui's Motion to Continue the Deposition of Faiz Bafana ("Motion to Reissue CIA Subpoenas") (Docket #636) in which they seek discovery materials

¹ To accommodate scheduling issues and allow sufficient time to arrange for the necessary technology with which to conduct a deposition [REDACTED], counsel for the United States and standby defense counsel agreed to delay the deposition until the week of November 4, 2002.

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materials they believe are relevant to the Bafana deposition. Specifically, standby counsel contend that the requested postponement would allow them sufficient time to conduct a thorough investigation [REDACTED] on Mr. Moussaoui's behalf. Standby counsel also argue that outstanding discovery requests and any disputes concerning certain classified information related to the deposition of Bafana, must be resolved pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, before the deposition. Alternatively, in their Motion to Establish Procedures for the Deposition of Faiz Bafana (Docket #628), standby counsel request permission to participate in the deposition by conducting a cross-examination of Bafana after Mr. Moussaoui completes his cross-examination.

The United States opposes any postponement of the Bafana deposition arguing that Mr. Moussaoui can adequately cross-examine Bafana without first interviewing Zubaydah and Binalshibh. Further, the United States contends that a continuance of the deposition date is unwarranted because both Mr. Moussaoui and standby counsel have had ample time to review the relevant discovery regarding Bafana.² The United States also opposes standby counsel's proposed alternative of permitting them to question the witness after Mr. Moussaoui completes his cross-

² The United States has also articulated significant logistical reasons for its opposition to any postponement of the Bafana deposition in an ex parte submission.

examination claiming that such a proposal is inconsistent with the defendant's right of self-representation.

The [REDACTED] issues involved in scheduling the Bafana deposition, as explained in the United States' ex parte submission, convince us that it is crucial that this deposition go forward as scheduled. Although we find the requests articulated in standby counsel's Motion to Reissue CIA Subpoenas to be reasonable, we are not persuaded that either the pro se defendant or standby defense counsel must have access to particular discovery, including interviews with Binalshibh and/or Zubaydah, before they can meaningfully cross-examine Bafana. Accordingly, the defense motions to postpone the deposition of Faiz Bafana (Docket #s 600 and 608) are DENIED, and standby counsel's Motion to Reissue CIA Subpoenas (Docket #636) is GRANTED; and it is hereby

ORDERED that the deposition of Raiz Bafana take place on Monday, November 4, 2002 at 10:00 a.m. Eastern Standard Time;³ and it is further

ORDERED that the Clerk issue the requested subpoenas duces tecum.

If subsequent discovery productions, including any response to the CIA subpoenas, reveal information which would have been

[REDACTED]

relevant to the Bafana deposition, and the Court determines that the defendant has been prejudiced by his inability to use such evidence in his ~~cross-examination~~ of the witness, the United States will not be permitted to use the Bafana deposition in its case-in-chief unless [REDACTED]

The United States' objection to standby counsel participating in the Bafana deposition strikes us as an attempt to take unfair advantage of the pro se defendant. Because Mr. Moussaoui retains the ultimate right to determine what, if any, portions of standby counsel's cross-examination to use at trial, neither the defendant's right to represent himself nor any legitimate Government interest is harmed if experienced standby counsel also cross-examine the witness. Accordingly, standby counsel's Motion to Establish Procedures for Bafana Deposition (Docket #628) is GRANTED and it is further

ORDERED that standby counsel may cross-examine Bafana after Mr. Moussaoui completes his cross-examination. If the Court finds it appropriate, the United States may have an opportunity to conduct a second re-direct examination.

In its Response to Defendant's and Standby Counsel's Motions to Postpone Bafana Deposition (Docket #629), the United States requests that the Court preside over the Bafana deposition to facilitate the prompt resolution of any evidentiary or procedural

disputes. Given the frequent requests for judicial intervention during a previous Fed. R. Crim. P. 15 deposition in this case, we find good cause for this request, which is GRANTED; and it is hereby

ORDERED that the ~~Fed. R. Crim. P. 15~~ deposition of Faiz ~~Barna~~ will be held in Courtroom 700 with the Court presiding.⁴

The Clerk is directed to forward copies of this Order to the defendant, pro se; counsel for the United States; standby defense counsel; the United States Marshal; and the Court Security Officer.

Entered this 25th day of October, 2002.

/S/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

~~_____~~
~~_____~~
~~_____~~ we require at least one member of the prosecution and standby counsel teams to be present along with the defendant in the courtroom, which will be sealed.