16/31

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

DEC

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	SECRET CLASSIFIED
	)	FILING/UNDER SEAL

STANDBY COUNSEL'S OPPOSITION TO GOVERNMENT'S MOTION TO RECONSIDER ORDER TO DISCLOSE DECLARATION[1]

Standby counsel, on behalf of Zacarias Moussaoui, herewith file their Opposition to the Government's Motion to Reconsider Order to Disclose Declaration.

INTRODUCTION

On October 2, 2002, the Court ordered the government, by December 2, 2002, to provide a report as to the status of defense requests for access [redacted][2] The same deadline was subsequently imposed for defense requests for access [redacted][3] On December 2, 2002, the government filed the required report, but it disclosed virtually nothing new, and was no more than a request for a further forty-five day postponement of consideration of the defense

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[1] Pursuant to the Court's Order of October 3, 2002, on December 24, 2002, a copy of this pleading was provided to the Court Security Officer ("CSO"), via Deborah Falk, for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to standby counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Mr. Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

[2] *See* Oct. 2, 2002 Transcript of CIPA Hearing Before the Honorable Leonie M. Brinkema at 47 (filed Oct. 4, 2002) ("In 60 days, I expect a report from the government . . . ."). *See also id.* at 37, 38; Order from U.S. District Judge Leonie M. Brinkema at 1 (filed Oct. 25, 2002) (ordering the prosecution by December 2, 2002 to "advise the Court as to the status of defense requests for access [redacted]

[3] *See* Order from U.S. District Judge Leonie M. Brinkema at 1 (filed Oct. 25, 2002) (ordering that "the United States respond to the defendant's request for access [redacted] by Monday, December 2, 2002").

motions for access.[4] In support of that request, the government submitted a classified, *ex parte* "Declaration of Robert A. Spencer" (the "Declaration"). Standby counsel and the defendant opposed the request for more time.[5]

The Court, in its order of December 13, 2002, granted the government additional time.[6] However, "[h]aving reviewed [the] declaration," the Court did not "find any legitimate reason why [the Declaration] was filed ex parte given that standby counsel have been granted national security clearances."[7] The Court therefore ordered that a copy of the Declaration be produced to standby counsel "forthwith."[8]

In response, the government filed a Motion to Reconsider Order to Disclose Declaration (the "Government's Motion") asking the Court to reconsider that part of the December 13 Order that requires the government to share the Declaration with cleared defense counsel.[9] In support, the government argues that: (1) the sole and limited

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[4] The defense (collectively standby counsel and Mr. Moussaoui) filed motions seeking access [redacted] on September 10, 2002 with supplemental filings on that issue on October 3, October 17, and November 27, 2002. The defense also filed motions and/or supplemental pleadings seeking access [redacted] on September 19, September 20, October 3, October 4, October 16, December 9, and December 13, 2002, and [redacted] on October 16 and November 6, 2002. On September 19 and 26, 2002, the government filed a motion requesting additional time to respond to the defense motions requesting access [redacted] On September 27 and October 25, 2002, respectively, the government requested additional time to respond to defense motions requesting access [redacted]

[5] *See* Standby Counsel's Response to Government's Status Report Concerning Defendant's Request for Access [redacted]

[6] *See* Order by U.S. District Judge Leonie M. Brinkema at 2-3 (filed Dec. 13, 2002).

[7] *See id.* at 3.

[8] *Id.*

[9] Motions to reconsider are not favored. Absent a need to accommodate an intervening change in controlling law, to account for new evidence not previously available, or to correct a clear error of law, a court should not be asked to reconsider a ruling previously made. *United States v. Dickerson,* (continued...)

purpose of the Declaration was to provide a status report to the Court and counsel do not currently have a need to know the Declaration's contents given that the Court has already ruled on the government's December 2 request for additional time; (2) even if there is a defense need for the information in the Declaration to respond to the government's expected January 9, 2003 filing, there is no need to turn over the Declaration now; (3) before allowing cleared counsel to see the Declaration, in order to protect national security information, the Court should follow the procedures set forth in the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"); and (4) standby counsel do not have an independent discovery right to any information in the Declaration six months prior to trial.

The government's arguments should be rejected because: (1) regardless of its limited purpose, the *ex parte* Declaration helped explain and support the government's contested position that it should be granted more time to address the access motions filed by the defense many months ago; (2) the defense has an urgent current need for information concerning the witnesses to whom access is sought; (3) CIPA procedures are inapplicable to the issue of whether the government-initiated Declaration should be produced to standby counsel and even if applicable, those procedures have been satisfied; and (4) standby counsel do not need an independent discovery right in order to be entitled to receive the Declaration now, but if they do, such a right exists here.

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[9] (...continued)
971 F. Supp. 1023, 1024 (E.D. Va. 1997) (Cacheris, C.J.). *See also id.* ("A motion to reconsider cannot appropriately be granted where [a] moving party simply seeks to have the Court 'rethink what the Court ha[s] already thought through – rightly or wrongly.'") (citation omitted). The government does not suggest a change in law, new evidence or a clear error of law. Instead, it merely says, in effect, that the Court should have exercised its discretion differently.

ARGUMENT

I. The Declaration Should Be Produced Because The Government Relied Upon It In Support Of Its Request For An Extension Of The December 2 Deadline

The government filed the Declaration in support of its request for a postponement of the December 2 deadline to provide a status report as to defense requests for access [redacted] Even without seeing the Declaration, it is obvious that it provided factual support for the government's request. Since the government knew its request for more time would be opposed and the matter was adversarial, the government assumed the risk, in filing the Declaration *ex parte*, that the Court would direct that it be shared with standby counsel.

The government does not cite any authority suggesting that the Court's directive to produce the Declaration to standby counsel is anything other than, as we contend, a matter within the Court's complete discretion. Material submitted by a party for the purpose of advancing that party's litigation position ordinarily should be shared with the opposing side. Indeed, *ex parte* proceedings are disfavored. The reasons for this are manifold. As the Seventh Circuit Court of Appeals summarized:

> [E]*x parte* communications are disfavored. They should be avoided whenever possible and, even when they are appropriate, their scope should be kept to a minimum. Courts have discussed in other contexts the dangers of allowing *ex parte* proceedings in criminal cases. [citing cases] *Ex parte* communications between the government and the court deprive the defendant of notice of the precise content of the communications and an opportunity to respond. These communications thereby can create both the appearance of impropriety and the possibility of actual misconduct. Even where the government acts in good faith, and diligently attempts to present information fairly during an

> *ex parte* proceeding, the government's information is likely to be less reliable and the court's ultimate findings less accurate than if the defendant had been permitted to participate. "However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case." An *ex parte* proceeding "places a substantial burden upon the trial judge to perform what is naturally and properly the function of an advocate."

United States v. Napue, 834 F.2d 1311, 1318-19 (7th Cir. 1987) (citations omitted).

In reliance upon such reasons, even when national security information is at stake, courts have resisted accepting material *ex parte*, especially where, as here, all counsel are cleared and there is no threat of public disclosure of the classified information. For instance, United States District Judge Royce Lamberth ruled in *United States v. Rezaq*,[10] that the government could not file with the court *ex parte* classified statements that the government did not want to disclose to cleared defense counsel under § 4 of CIPA.[11] In so doing, the court noted the "very strong presumption against *ex parte* proceedings," 156 F.R.D. at 527, and gave four reasons for its decision. First, it observed that "[d]efense counsel have received security clearances, and there is every reason to think that [they] can be trusted with this sensitive information." *Id.* Second, the court acknowledged the general principle that "'[e]*x parte* proceedings are generally disfavored, even when the federal rules expressly permit them.'" *Id.* (quoting

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[10] *United States v. Rezaq*, 156 F.R.D. 514 (D.D.C. 1994), *modified in part*, 899 F. Supp. 697 (D.D.C. 1995).

[11] The statements were in support of the government's motion under CIPA to deny or limit production of classified discovery to the defense. *See Rezaq*, 156 F.R.D. at 526. The court noted the difference between cleared defense counsel and the defendant, and agreed with the former and the government that the defendant, Omar Mohammed Ali Rezaq, an "accused terrorist" who did not have a security clearance, should "generally be barred from receiving the supporting statements." *Id.* Upon the request of the government and with the consent of the defense, Judge Lamberth subsequently modified his ruling to "permit the government to file future motions for leave to file submissions *ex parte*." *See United States v. Rezaq*, 899 F. Supp. 697, 707 (D.D.C. 1995).

United States v. George, 786 F. Supp. 11, 16 (D.D.C. 1991)). Third, *ex parte* communications tax judicial resources and "force this court into the very awkward position of making defendant's case and then deciding his claim." *Id.* Finally, receipt and consideration of *ex parte* communications creates the appearance of impropriety. *Id.* ("Requiring the court to do defense's job as well as its own . . . raises the appearance of impropriety . . .").

These very same considerations apply here. First, defense counsel have been cleared to receive classified information such as that contained in the Declaration and they can be trusted to protect the confidentiality of same.[12] Second, as noted, *ex parte* communications are disfavored.[13] Third, the existence of the *ex parte* Declaration, that the Court has now seen and presumably relied upon in ruling on the government's December 2 request for a postponement,[14] has put the Court in the very awkward position of having relied upon relevant information that the defense neither saw nor commented upon. The sensible solution to this problem was for the Court to order the release of the Declaration to cleared counsel, which it did. Otherwise, in subsequent filings, the Court would not receive the benefit of defense arguments on the substance of the Declaration, and related matters. *See, e.g., Molerio v. Federal Bureau of*

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[12] Cleared counsel are certainly aware of their obligation to protect classified information and, absent court authorization to do so, will not share such information with any third party, including Mr. Moussaoui.

[13] Even under CIPA, *ex parte* communications are permissive and not mandatory. *See* CIPA § 4 ("The court *may* permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.") (emphasis added).

[14] *See* Order by U.S. District Judge Leonie M. Brinkema at 3 (filed Dec. 13, 2002) (stating that the Court has "reviewed" the Declaration).

Investigation, 749 F.2d 815, 820 (D.C. Cir. 1984) (noting that the district court "was unwilling to require the government to present the secret material *in camera*, since that would compromise the court's objectivity by forcing it to evaluate evidence without the assistance of opposing counsel"). It also would force the Court "to perform what is naturally and properly the function of an advocate." *United States v. Solomon*, 422 F.2d 1110, 1119 (7th Cir.) (summarizing the misgivings of the Supreme Court on the use of *in camera* inspections of confidential material), *cert. denied sub nom. Sommer v. United States*, 399 U.S. 911 (1970). Finally, by ordering production of the Declaration, the Court avoids the appearance of impropriety, which is one of the chief concerns with *ex parte* communications.

It is also important to recall that the government is the architect of the January 22, 2002 Protective Order, which not only contemplates, but requires that "attorneys for the defense . . . *shall be given access* to classified documents and information" not only "as required by the government's discovery obligations," but also "*otherwise as necessary to prepare for proceedings in this case.*"[15] The Court has apparently determined that standby counsel have a need to know the information in the Declaration and that providing a copy of it to them, given their security clearances, is neither a security violation, nor inconsistent with what the Protective Order in this case both contemplates and requires.

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[15] *See* Protective Order by U.S. District Judge Leonie M. Brinkema at ¶ 12 (filed Jan. 22, 2002) (the "Protective Order") (emphasis added). Paragraph 18.f of that Order prohibits disclosure of any such information by defense counsel to any unauthorized person. This paragraph provides a layer of protection for the government when it grants access to defense counsel in this case that does not apply to many of its officials [redacted]

Finally, implicit, in the Court's order to produce the Declaration is a determination that it should never have been filed *ex parte* in the first place. Standby counsel should have been provided the Declaration so that they could have been better informed as to the shape of its response to the government's request for a forty-five day postponement. The mere fact that the Declaration contained classified information was insufficient for submitting it to the court *ex parte* in support of a contested matter where standby counsel were cleared and subject to the prohibitions of the Protective Order. The Court, having found no "legitimate reason" for utilizing the *ex parte* procedure, but having apparently having relied upon the Declaration in ruling on the government's postponement request, acted appropriately when it directed disclosure of the Declaration to standby counsel.

II. The Information In The Declaration Is Necessary For The Defense To Adequately Prepare For Proceedings In This Case

[redacted]

The defense investigation does not end [redacted]

The case has been converted from the wholly circumstantial - which it was at the outset - to a case where there is [redacted] in the Indictment and Mr. Moussaoui's role, if any, in them. Thus, even given the Court's generous trial continuance, it is not hyperbole to say that the defense investigation will almost surely be at square one if and when it first gains access [redacted]

[redacted]

[redacted]

The government's case never turned on these men [redacted] and it is understandable that it does not share the defense sense of urgency on the access issue. Conversely, from the standpoint of the defense, the access issue is the most critical of the many issues in this case. Further, because the government on January 9 likely will refuse defense access [redacted] see Protective Order at ¶ 12, most notably the tentative hearing scheduled for January 22, 2003. Indeed, the fact that the government felt it necessary to submit the Declaration, *per se* defines it as information "necessary to prepare for proceedings in this case." And the Protective Order's language is not permissive, it is mandatory: "[t]he . . . attorneys for the defense . . . *shall* be given access to classified documents and

[redacted]

information . . . as necessary to prepare for proceedings in this case." *Id.* (emphasis added).[19]

III. CIPA Procedures Are Inapplicable To The Issue Of Whether The Declaration Should Be Produced To Standby Counsel. But If Applicable, Those Procedures Have Been Satisfied Here

A. CIPA procedures are inapplicable because production of the Declaration is not a discovery issue

The government argues that the decision to disclose the information in the Declaration should be made pursuant to the procedures provided in CIPA. However, nothing in that Act suggests that CIPA was intended to provide the government with a sword instead of a shield where classified information is concerned. CIPA was intended to protect the government from the problem of graymail by harmonizing a defendant's right to use exculpatory classified information at trial with the government's right to safeguard that material from public disclosure. *See United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719, *3 (S.D.N.Y. 2001) (citing cases). It was never intended to provide a procedure allowing the government, independent of its discovery obligations, to provide classified information to the Court in support of a contested matter without also sharing that information with cleared opposing counsel operating under a Protective Order.

The government argues that it is entitled, under CIPA § 4, to protect the Declaration by deleting specified items, offering substitute summaries, and admitting

[19] Cases cited by the government for the proposition that the Court was not required to turn over the Declaration, *see United States v. Bin Laden*, 126 F. Supp.2d 264 (S.D.N.Y. 2000) and *United States v. Ott*, 827 F.2d 473 (9th Cir. 1987), do not say or even suggest that the Court was precluded from doing so. Indeed, *United States v. Rezaq*, discussed above, found that a district court clearly has the authority to eschew *ex parte* filings and direct production of same to opposing counsel. *See* 156 F.R.D. at 527.

relevant facts that the classified information would tend to prove. *See* Government's Motion at 4. But § 4 only deals with classified information made available to the defense as *discovery information*. *See* CIPA § 4 (specifying that, with permission, the government may delete classified information "from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure"). The classified Declaration, conversely, was not filed as discovery information; it was filed as a statement by one of the prosecutors in support of a substantive motion. The Court having found no reason to justify the Declaration's *ex parte* filing, has apparently concluded that it should be provided to the defense as part of the ordinary adversarial process that obligates a moving party to serve a complete copy of its pleading on opposing counsel. Nothing in CIPA was ever intended to excuse the government from this basic obligation.

Whether to submit classified information to the Court in support of a motion is the government's choice, but the fact that the Declaration contains classified information does not provide a right to engage in *ex parte* practice, particularly where counsel are cleared and are subject to a Protective Order that together constitute more than adequate protection for the government's security concerns. If substitutes, summaries and deletions could have been utilized without altering or diluting the thrust of the Declaration, then they should have been used in the first instance and a copy served on standby counsel. But that was a choice the government had before it filed its

Declaration *ex parte*. It is not a choice the government has now, after the Declaration has been filed and relied upon by the Court.[20]

B. Even if applicable, the CIPA procedures have been satisfied

Section 4 of CIPA permits, but does not require, a court to authorize deletions, substitutions and summaries with regard to classified discovery information, but only after the government has made a "sufficient showing."[21] *See* CIPA § 4 ("The court, *upon a sufficient showing*, may authorize the United States to delete specified items of classified information from documents[,] . . . to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts . . . .") (emphasis added).[22] The court may, but is not required to, allow that "showing" to be made in an *ex parte* submission to the court. *See United States v. Rezaq*, 156 F.R.D. 514, 527 (D.D.C. 1994) (finding that a district court has the authority to prohibit *ex parte* filings under § 4 of CIPA because, in part, "[r]equiring the court to do [the] defense's job as well as its own not only raises the appearance of impropriety, it taxes scarce judicial

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[20] The government's request, absent reconsideration, to allow it to withdraw the Declaration, *see* Government's Motion at 5, as if to pretend it does not exist, ignores the fact that the Court has already read and considered it in the ongoing litigation over witness access. Further, it appears that the Declaration contains information that the Court has determined should be turned over to standby counsel. Indeed, the Declaration itself may constitute admissible evidence in this case.

[21] The statute is silent as to what it is that the government must "sufficiently show." We believe that as to deleted matter, the government must "sufficiently show" that the defense has no imaginable need to know; that is, that the information is totally unrelated to any subject matter involved in the case. Similarly, substitutions must provide factually equivalent information and impact. *See, e.g.*, *United States v. Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988) (finding no abuse of discretion in the district court's refusal to accept the government's proposed substitution under CIPA where the substitution would not have been as effective as the original classified material in supporting the defendant's arguments).

[22] The government thus is wrong to assert, as it does, that it is "entitled" under CIPA to delete classified material and to offer substitute summaries and statements of same. *See* Government's Motion at 4. It is only "entitled" to utilize these alternatives once the Court finds that a "sufficient showing" under § 4 has been made, and even then, the Court has the power to control the extent and content of the deletions and substitutions or to deny their use altogether.

resources as well"), *modified in part*, 899 F. Supp. 697, 707 (D.D.C. 1995) (allowing the government "to file future motions for leave to file submissions *ex parte*, with the understanding that such motions must be served on the defendant").

Because the entirety of CIPA § 4 sets forth a procedure that is both permissive and optional, there simply is no violation of CIPA when this Court declines to authorize any of the alternatives available to the government under that section. Therefore, implicit in the Court's December 13 Order directing the production of the Declaration, is either that (a) the government has not made a "sufficient showing" justifying the redaction, deletion, or substitution of any of the information contained in the Declaration;[23] or (b) that the government has made a "sufficient showing," but the alternatives available under § 4 are not appropriate. Either way, the Court has satisfied § 4 by ordering the production of the *entire* Declaration. It is likewise apparent that the Court believes that the Protective Order is sufficient to protect against unauthorized disclosure of the information in the Declaration and that the § 4 alternatives are not necessary to safeguard the national security interests of the United States.

Providing the entire Declaration to cleared counsel also allows counsel and the government to work together on deletions and substitutions before any public disclosure of the classified information is made. This is the preferable procedure, for then counsel can perform their function as an advocate, leaving the Court to "judge." *Dennis v. United States*, 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for

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[23] Of course, if the government made no showing, that would constitute an insufficient showing.

judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

To the extent the government argues that it has not been provided an opportunity to make its "sufficient showing" under CIPA § 4, that argument comes too late. Such a showing should have been made and the remedies of § 4 invoked before the government chose to use the Declaration to advance its litigation position and before the Court relied on the Declaration in granting the government's request to postpone consideration of the defense motions for access. Further, the government's national security concerns with regard to sharing classified information with standby counsel ring hollow [redacted]

IV. Standby Counsel Do Not Need An Independent Discovery Right In Order To Be Entitled To Receive The Declaration Now, But If They Do, Such A Right Exists

As argued above, see Part III.A., the Declaration is not "discovery"; it is a prosecutorial statement filed in support of a substantive government motion.[25] As such, to be entitled to receive the Declaration, standby counsel do not need an "independent discovery right at this juncture to any information contained in the Declaration." See Government's Motion at 5. Nor does the *Brady* caselaw support the government's contention that the Declaration need not be produced now, even assuming that an [redacted]

[25] Simply put, when filing a document *ex parte*, the moving party has the burden to establish that *ex parte* procedures should be utilized. The government failed to meet that burden here and therefore, the Court ordered production of the Declaration. Hence, the concept of "discovery" in the traditional sense, is simply inapplicable to the instant situation.

independent discovery right to receive the information now must be established.[26]

Brady requires that favorable information be disclosed to the defense in sufficient time to allow the defense to make effective use of the information. Thus, the Fourth Circuit noted in *United States v. Elmore*, that in order to be effective under *Brady*, "'disclosure . . . must be made at a time when the disclosure would be of value to the accused.'" *United States v. Elmore*, 423 F.2d 775, 779 (4th Cir.) (quoting *Hamric v. Bailey*, 386 F.2d 390, 393 (4th Cir. 1967)), *cert. denied*, 400 U.S. 825 (1970). "Manifestly, a more lenient disclosure burden on the government would drain *Brady* of all vitality." *Elmore*, 423 F.2d at 779.

As such, pre-trial production of *Brady* material is warranted in some circumstances. Indeed, "[i]t should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is given only at trial, and that the effective implementation of *Brady v. Maryland* must therefore require earlier production in at least some situations." *United States v. Deutsch*, 373 F. Supp. 289, 290 (S.D.N.Y. 1974). *Accord United States v. Partin*, 320 F. Supp. 275, 285 (E.D. La. 1970) (stating that "[i]f [the Brady information] is to be of any use to [the defendant] at all, common sense dictates that evidence in the government's possession favorable to the defendant should be made available to him far enough in advance of trial to allow him sufficient time for its evaluation, preparation, and presentation at trial"). Accordingly, the cases cited by the government on this issue, which merely found that disclosure of the *Brady*

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[26] Like the government, standby counsel assume for purposes of this argument that at least some of the information in the Declaration qualifies as *Brady* material. *See* Government's Motion at 5 (assuming that "certain information contained in the Declaration may qualify as Brady material").

material at trial was not reversible error under the particular circumstances presented, are simply inapposite.[27]

As discussed previously in Part II above, there is a current need in this case for the Declaration's information because that information obviously relates to the witness access issue presently pending before the court. As noted, standby counsel anticipate that on January 9, 2003, which is when the government must "advise the Court as to its ultimate position regarding the defense motions for access [redacted][28] the government will indicate that it will not grant defense access [redacted] We believe that the government will further contend that the case against Mr. Moussaoui can proceed without such access.[29] Standby counsel will then have only a very limited time to prepare a meaningful response in time for it to be filed and considered by the Court prior to the tentative hearing scheduled for January 22, 2003. As such, we have already begun working on our response and accordingly, and in order not to further delay consideration of this important issue, any information relating to the witness access issue must be produced now.[30]

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[27] The cases cited by the government, *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997), *cert. denied*, 523 U.S. 1078 (1998), *United States v. Walton*, 217 F.3d 443 (7th Cir. 2000), and *United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1997), none of which are Fourth Circuit cases, merely found that the disclosure of the *Brady* material was not too late under the circumstances presented and/or that there was no prejudicial error in the late disclosure. None of these cases stand for the proposition that a trial court, aware of potential *Brady* information, cannot order its immediate disclosure to the defense regardless of the stage of proceedings.

[28] *See* Order by U.S. District Judge Leonie M. Brinkema at 2 (filed Dec. 13, 2002).

[29] Significantly, the government does not say in its Motion that this criminal prosecution will be at an end if the government continues to deny defense access [redacted]

[30] Consideration also should be given to the time delays inherent in getting non-classified/redacted versions of the pleadings to Mr. Moussaoui, who, it bears repeating, is *pro se*. For example, Mr. Moussaoui has yet to receive a non-classified version of standby counsel's reply to the government's response to the defense motions for access [redacted] That reply was filed, and (continued...)

CONCLUSION

The problem here is one of the government's own making. It chose to make an *ex parte* filing on a contested issue of vital interest not only to the Court and the government, but also to the defense. The defense[31] should be on an informationally level playing field with regard to the issue of witness access, as the Court's order apparently provides. The government has made no showing, nor could it, that national security is in any way jeopardized by sharing classified information with cleared standby counsel when that counsel have a need for the information. Indeed, the Protective Order in this case requires no less.

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this matter, the Government's Motion to Reconsider Order to Disclose Declaration should be denied and the Declaration should be produced to standby counsel forthwith.

ZACARIAS MOUSSAOUI

By Stand-by Counsel

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[30] (...continued)
sent to the Court Security Officer for portion-marking, nearly one month ago, on November 27, 2002.

[31] Standby counsel's arguments in this Opposition should not be interpreted as waiving their on-going objection to any procedure, hearing or ruling that denies Mr. Moussaoui, as a *pro se* litigant, access to the classified discovery in this case. *See, e.g.*, Transcript of CIPA Hearing at 48 (filed Oct. 4, 2002) (objecting to Mr. Moussaoui's preclusion from the October 2, 2002 CIPA hearing).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Opposition to Government's Motion to Reconsider Order to Disclose Declaration 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 hand-delivering a copy of same to the Court Security Officer, via Deborah Falk, on this 24th day of December 2002.

/s/
Kenneth P. Troccoli