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	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S *PRO SE* PLEADING ENTITLED "REDACTION TO COVERUP THEIR LIES"

Defendant has filed a *pro se* pleading entitled "Redaction To Cover Up Their Lies" (Docket No. 821) in which he complains that the Government has changed its theory on the defendant's role in the September 11 attacks and that, because of the existence of classified material in this case, he would not have learned of the Government's theory until "the opening statement at trial . . . ." Def. Mot. at 2.[1] The day after defendant filed his *pro se* pleading, the Court directed the Government to respond to the pleading, noting that it "agrees with the defendant's skepticism of the Government's ability to prosecute this case in open court in light of the shroud of secrecy under which it seeks to proceed." Order at 1-2. As demonstrated below, the indictment in this case provides ample notice to the defendant of the charges, far exceeding that to which defendant is entitled. This is particularly true in this case where the defendant has received generous discovery. Moreover, defendant knew and acknowledged when he decided to represent himself that he will not receive classified information in this case. The existence of classified information is neither unique to this prosecution or worrisome and, instead, is routinely

[1]Standby counsel have not set forth a position on this pleading.

dealt with under the Classified Information Procedures Act. Therefore, defendant's motion must be denied.

As the Court has described, the defendant says "he is entitled to know the facts underlying the Government's theory so that he can prepare his defense." Order at 1. Although the defendant is entitled to know the charges against him, and is entitled to discovery, under Fed. R. Crim. P. 16, of the evidence the Government intends to offer in its case-in-chief, he is not entitled to a preview of the Government's theory in this case, or as the defendant put it, to the Government's "opening statement" to the jury. Def. Mot. at 2. As the Supreme Court has observed: "There is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Moreover, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." United States v. Bagley, 473 U.S. 667, 675 (1985). We have honored our Brady responsibilities to date and will continue to do so in a timely manner. See United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985) (explaining that "[n]o due process violation occurs as long as Brady material is disclosed to a defendant in time for its effective use at trial").

To the extent defendant asserts that he is unaware of the charges against him, the claim woefully fails. While the Sixth Amendment mandates that a defendant "be informed of the nature and cause of the accusation," it has long been accepted that an indictment normally satisfies this notice requirement. See Fed. R. Crim. P. 7(c)(1) ("The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . ."); Russell v. United States, 369 U.S. 749, 760-64 (1962); United States v. Darby, 37

F.3d 1059, 1063 (4th Cir. 1994) (indictment ensures compliance with Sixth Amendment mandates); United States v. Fogel, 901 F.2d 23, 25 (4th Cir. 1990) ("One of the principal purposes of an indictment is to apprise the accused of the charge or charges leveled against him so he can prepare his defense."). "[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Smith, 44 F.3d 1259, 1263 (4th Cir. 1995). Moreover, the Fourth Circuit has observed that "it is incorrect to require, as [the defendant] appears to suggest, that the indictment must enumerate every possible legal and factual theory of defendants' guilt." United States v. American Waste Fibers Co., Inc., 809 F.2d 1044, 1047 (4th Cir. 1987).

The indictment in this case far exceeds the notice requirements of the Sixth Amendment and Fed. R. Crim. P. 7(c)(1). For example, Count One, which is then incorporated by reference into the other counts, alleges 110 overt acts and describes in detail the evolution of the charged conspiracy. More particularly, 21 of the overt acts detail the defendant's acts in furtherance of the charged conspiracy, often listing the precise dates and locations of his conduct. Yet, other than Count Five, none of the charged conspiracies require proof or allegation of an overt act.

Moussaoui does not, because he cannot, complain about the notice provided to him in the indictment. Indeed, nothing in his motion cites any ambiguity or legal defect in the charges levied against him. Instead, defendant appears to be complaining about his recent discovery of a perceived shift in the Government's theory of the case. Claiming surprise, or rather a right not to be surprised, by the Government's theory, the defendant asserts that he is wrongly being kept in

the dark about the Government's theory because it is classified. Def. Mot. at 2. From this, the defendant demands information beyond that already provided in unclassified discovery.

Defendant's motion, then, amounts in part to nothing more than a demand for a bill of particulars. "A bill of particulars is a defendant's means of obtaining specific information about charges brought in a vague or broadly-worded indictment." United States v. Dunnigan, 944 F.2d 178, 181 (4th Cir. 1991), reversed on other grounds, 507 U.S. 87 (1993). The purpose of a bill of particulars is to inform the defendant in sufficient detail of the charges pending against him to minimize surprise and allow a defendant effectively to prepare for trial. United States v. Fletcher, 74 F.3d 49, 53 (4th Cir. 1996); United States v. Butler, 885 F.2d 195, 199 (4th Cir. 1989). However, "[a] bill of particulars is not to be used to provide detailed disclosure of the Government's evidence in advance of trial." United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 405 (4th Cir. 1985). Moreover, the defendant may not use a bill of particulars to obtain the Government's theory in advance of trial. See, e.g., United States v. Richardson, 130 F.3d 765, 776 (7th Cir. 1997) (defendant "is only entitled to know the offense with which he is charged, not all the details of how it will be proved."); United States v. Hajecate, 683 F.2d 894, 898 (5th Cir. 1982) ("bill of particulars cannot be required to compel revelation of the full theory of the case or all the evidentiary facts"); United States v. Gibson, 175 F. Supp.2d 532, 537 (S.D.N.Y. 2001) ("[i]t is not the function of a bill of particulars to allow defendants to preview the evidence or theory of the government's case"); United States v. Welch, 198 F.R.D. 545, 549 (D. Utah 2001) ("Government is not required to explain its theories of prosecution"); United States v. Hsin-Yung, 97 F. Supp.2d 24, 37 (D.D.C. 2000) (bill of particulars not "a devise for allowing the defense to preview the Government's theories or

evidence"); United States v. Hunter, 13 F. Supp.2d 586, 590 (D. Vt. 1998) (bill of particulars "not available to compel the government to disclose its legal theory or the details of how it intends to prove the charges."). Moreover, it is well settled that when a defendant has already obtained information equivalent to that sought through a bill of particulars by other means, such as discovery, the provision of a formal bill of particulars is inappropriate and redundant. See United States v. Duncan, 598 F.2d 839, 849 (4th Cir. 1979) (defendant allowed to inspect Government's investigative file); United States v. Schembari, 484 F.2d 931, 935 (4th Cir. 1973) (same); United State v. Torres, 901 F.2d 205, 234 (2d Cir. 1990) (defendants provided with a wealth of evidentiary detail from discovery, including electronic intercepts, search evidence, and exhaustive supporting affidavits); United States v. Mittal, 1999 WL 461293 at *9 (S.D.N.Y. 1999) (Indictment coupled with ample time to review discovery sufficient).[2]

Defendant's complaints that the Government has changed its theory from the so-called "20th hijacker" theory to the "5th pilot" theory are as irrelevant as they are inaccurate. Contrary to defendant's assertions, the Government has never described the defendant in the indictment or any pleading as the "20th hijacker." Instead, the indictment alleges that the defendant was part of a conspiracy to kill Americans by flying hijacked commercial airliners into buildings. And, while the charged conspiracy resulted in the September 11 attacks, and the murder of nearly 3,000 innocent victims, the Indictment does not, because it need not, outline a particular theory of the defendant's guilt. However, the Indictment does spell out with clarity the actions the

[2]Defendant's motion is particularly galling given that the Government already has identified for defendant, by providing hard copies of, the documents which the Government expects to introduce in its case-in-chief, or it considers material to defendant or otherwise significant. This process began in July 2002.

defendant and his co-conspirators took to prepare themselves to participate in such an attack, including attendance at flight schools and flight simulator training facilities, purchase of knives and other tools to be used in the hijackings, and receipt of money from common *al Qaeda* sources.

Thus, between the Indictment and the unclassified discovery provided to date, the defendant cannot claim unfair surprise. The discovery includes statements defendant has made during interviews with law enforcement officers, in many of his pleadings and court appearances, as well as to others. Of course, the defendant knows full well that these unclassified statements substantiate the charges against him, including the allegation that he is associated with *al Qaeda*, as well as the Government's theory that the defendant was preparing to fly an airliner into a building in the United States. The Government also has provided a plethora of unclassified documentary evidence that directly links the defendant to the facilitators in the hijacking plot, and that plainly demonstrates that he followed the same method as the other hijackers in preparing himself to use hijacked airliners to commit mass murder.

Defendant's complaints about his inability to obtain classified material are also meritless. The defendant does not have, and never will have, the requisite security clearance to review classified information. In this he is not unusual. The courts have held that defendants in terrorist prosecutions may be barred from reviewing classified intelligence. See United States v. Bin Laden, 2001 WL 66393 at *2-4 (S.D.N.Y. 2001) (upholding protective order barring defendant terrorists from reviewing classified materials in lieu of access to materials by cleared defense counsel); United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994), vacated in part on other grounds, United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995) (upholding protective order

barring classified information from defendant terrorist). Thus, the defendant has no colorable objection to a similar limitation in this case, which would have been imposed even if he had not elected to proceed *pro se* in this case.

Moreover, any remaining objections were explicitly waived by the defendant when he chose to invoke his right to self-representation. During the Faretta hearing on June 13, 2002, the Court specifically informed defendant that he would not have access to classified information; yet, the defendant elected to proceed *pro se*. 6/13/02 Tr. 35. Thus, defendant cannot now complain about the denial of his access to classified information, particularly because the Court, as the Government suggested, appointed standby counsel, who have the proper security clearances and are reviewing the classified materials on the defendant's behalf.[3] To paraphrase the Seventh Circuit, because defendant's "choice to proceed *pro se* was intelligently and voluntarily made with the knowledge that access to [classified materials] would not be allowed," there is no constitutional injury. United States ex rel. George v. Lane, 718 F.2d 226, 233 (7th Cir. 1983). See also Bin Laden, 2001 WL 66393 at *3-4 (defense counsel can act as proxy for

[3]Cf. United States v. Taylor, 183 F.3d 1199, 1204 (10th Cir. 1999) (no Sixth Amendment violation when court refused to grant defendant access to law library because *pro se* defendants have no right to access law library materials and because court had appointed stand-by counsel, who could obtain legal materials for defendant and so was constitutionally acceptable alternative to access); United States v. Knox, 950 F.2d 516, 519-20 (8th Cir. 1991) (no Sixth Amendment violation where court denied defendant access to law library because defendant refused assistance of standby counsel); United States v. Sammons, 918 F.2d 592, 602 (6th Cir. 1990) (court's limitation of defendant's access to law library not improper because "by knowingly and intelligently waiving his right to counsel, the appellant also relinquished his access to a law library") (citations omitted).

defendant in reviewing classified materials).[4]

Finally, there is the defendant's and the Court's concern about "the Government's ability to prosecute this case in open court in light of the shroud of secrecy under which it seeks to proceed." Order at 1-2. As noted, the evidence the Government intends to introduce against the defendant will be unclassified. As in other cases involving national security, however, there is discovery in this case that is classified. This information is classified because the unauthorized disclosure of it could cause grave danger to the national security of the United States. See Executive Order 12958, § 1.3(a)(1) ("Top Secret shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe."). And, especially in the current conflict begun by *al Qaeda* against the United States, the national interest dictates great care in the handling of this sensitive and life-saving information. See United States v. Walker-Lindh, 198 F. Supp.2d 739, 742 (E.D. Va. 2002) ("given the nature of al Qaeda and its activities, and the ongoing federal law enforcement

[4]In other cases involving materials relating to the application for orders under the Foreign Intelligence Surveillance Act, the courts have in fact held, over Fifth and Sixth Amendment claims, that even cleared defense counsel may not be entitled to certain classified discovery. United States v. Squillacote, 221 F.3d 542, 554 (4th Cir. 2000); see also United States v. Isa, 923 F.2d 1300, 1306-07 (8th Cir. 1991) (rejecting 6th Amendment claim); United States v. Ott, 827 F.2d 473, 475 (9th Cir. 1987) (rejecting 5th Amendment challenge); United States v. Belfield, 692 F.2d 141, 148-49 (D.C. Cir. 1982) (rejecting 5th and 6th Amendment claims). In FISA, as with CIPA, "Congress has made a thoroughly reasonable attempt to balance the competing concerns of individual privacy and foreign intelligence." Belfield, 692 F.2d at 141. In so doing, the courts have noted that "[i]t is not in the national interest for revelation of . . . [national security information] beyond the narrowest limits compatible with the assurance that no injustice is done to the criminal defendant . . . ." Id. (quoting United States v. Lemonakis, 485 F.2d 941, 963 (D.C. Cri. 1973)).

investigation into al Qaeda, the identities of the detainees, as well as the questions asked and the techniques employed by law enforcement agents in the interviews are highly sensitive and confidential."); United States v. Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) ("The concerns [of premature disclosure of classified information] are heightened in this case because the Government's investigation is ongoing, which increases the possibility that unauthorized disclosures might place additional lives in danger."); see also United States v. Ott, 637 F. Supp. 62, 65 (E.D. Ca. 1986) ("In the sensitive area of foreign intelligence gathering, the need for extreme caution and sometimes even secrecy may not be overemphasized."), aff'd., 827 F.2d 473, 475 (9th Cir. 1987).

The existence of classified information in this case, however, is neither unique nor cause for alarm. As noted above, other prosecutions have been brought against terrorists, and in particular al Qaeda associates, which involved substantial amounts of national security information. See, e.g., Walker-Lindh, 198 F. Supp.2d at 743-44 (E.D. Va. 2002) (granting Government's request for protective order of sensitive national security information in prosecution of Taliban terrorist); Bin Laden, 58 F. Supp.2d at 122-23 (describing significant volume of classified material that will not be shown to defendants); United States v. Abdel Rahman, 870 F. Supp. 47 (S.D.N.Y. 1994) (granting in part Government's motion for protective order regarding classified information in prosecution of leader of *al Qaeda* affiliated group *al Gama'at al Islamiyah*).[5] As with this case, those cases involved extremely sensitive materials

[5]Classified information, of course, has also been implicated in other cases not involving terrorism, including at least ten espionage prosecutions in this Court. See United States v. Squillicote, 221 F.3d 542 (4th Cir. 2000); see also United States v. O'Hara, 301 F.3d 563 (7th Cir. 2002), cert. denied, 123 S. Ct. 611 (2002) (prosecution of international art thief); United States v.

the protection of which was essential to the efforts to confront the threat of terrorism. Yet, those cases proceeded without either the disclosure of any classified material or the violation of the defendants' fair trial rights. Bin Laden, 2001 WL 66393 at *3-4 (rejecting Fifth and Sixth Amendment objections to limits on defendant review of classified information); Abdel Rahman, 870 F. Supp. at 52-53 (granting Government's request to withhold certain classified information from defendant); cf. United States v. Walker-Lindh, 2002 WL 1974284 at *1-2 (E.D. Va. 2002) (granting Government's request, submitted *ex parte*, to withhold classified information from defendant). This was done, as it is always done in national security cases, by following the guidelines set forth in the Classified Information Procedures Act, which governs the discovery and use of classified information during a criminal prosecution, and protects the Government against graymail by the defense. See 18 U.S.C. App. III; United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) ("CIPA was enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him."); Bin Laden, 2001 WL 66393 at *4 (interpretation of CIPA that bars defendant from reviewing classified information constitutional as applied); Abdel Rahman, 870 F. Supp. at 50-53 (applying CIPA to Government's motion to withhold classified

---

Johnson, 139 F.3d 1359 (11th Cir. 1998) (prosecution for violations of the Arms Export Control Act involving the exporting of zirconium compacts designed for use in bombs); United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997) (prosecution of corrupt Panamanian dictator for racketeering and drug offenses); United States v. Baptista-Rodriguez, 17 F.3d 1354 (11th Cir. 1994) (prosecution of international drug traffickers); United States v. Fowler, 932 F.2d 306 (4th Cir. 1991) (prosecution of government contractor for acquiring and disseminating classified information); United States v. North, 910 F.2d 843 (D.C. Cir. 1990) (prosecution arising from Iran/Contra affair).

information).

In this case, CIPA already has been employed to provide discovery to cleared standby counsel and to declassify a large number of documents for the defendant's own review. However, as the Court is aware, the CIPA process has not yet been completed, as standby counsel continue to identify classified documents they wish to use at trial, and as the parties attempt to resolve the issues presented by standby counsel's designation of such classified documents. For example, as standby counsel continue to identify classified documents for use in the defense case, the Government continues its ongoing classification review to determine which documents can either be unclassified *in toto*, redacted to allow for their declassification, or offered as a suitable substitution under CIPA. To date hundreds of documents have been declassified in their entirety, or have been redacted to permit declassification. As the Court also is aware, however, the parties have submitted a schedule to the Court that will culminate in CIPA hearings this summer that will allow the Court to resolve any remaining disputes regarding classified information.

Given that the CIPA process has yet to run its course, then, any current concerns about the trial of this case are premature and therefore unfounded. United States v. Walker-Lindh, 198 F. Supp.2d at 744 (noting that balance of interests in protection of sensitive information may evolve by time of trial). The Government's case-in-chief will be comprised only of unclassified evidence, all of which has been provided to the defendant in discovery, and CIPA provides numerous mechanisms that permit the defense to make use of information essential to its case in a manner that may not jeopardize national security. 18 U.S.C. App. III, § 6(c)(1); United States v. Collins, 603 F. Supp. 301, 304 (S.D. Fla. 1985) ("Section 6(c) requires that a balancing test be

made in order to guarantee that the defendant is not prejudiced by the substitution. Simply put, section 6(c) does not preclude presentation of the defendant's story to the jury, it merely allows some restriction on the manner in which the story will be told.").

The trial of this case no doubt will involve the balancing of several competing interests as is often true in any complex prosecution. Of course, there is the defendant's constitutionally protected interest in a fair trial. On the other side, there is the "'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and the victims of crime alike." Calderon v. Thompson, 523 U.S. 538, 556 (1998) (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993)) (O'Connor, J., concurring). That interest could be no more profound than in this case, where heinous and unparalleled crimes shattered the lives of thousands of innocent victims and terrorized an entire nation. Indeed, regardless of its outcome, the trial of this case will allow each victim to participate, whether as a witness or as a distant observer, and thereby be recognized as an individual. See Payne v. Tennessee, 501 U.S. 808, 823 (1991) (victim impact evidence "is designed to show . . . *each* victim's 'uniqueness as an individual human being'") (emphasis in the original). However, in the fulfilment of the Government's unquestionable mandate to vindicate the rights of the thousands of victims in this case, the Government must also take great care to safeguard the intelligence needed to prevent more acts of unspeakable horror. Neither the confluence of these competing interests, nor the ability to accommodate them, is new. Rather, what is extraordinary in this case is the sheer magnitude of both. But this should not breed skepticism about the propriety of prosecuting this case in this Court. On the contrary, the challenge itself invites a reaffirmation of the ability of the courts to try complex criminal cases like this one, even when it involves a contumacious *pro se* defendant and even when it involves

national security information or other complex issues. Thus, the Government is fully confident that the Court will be able to try this case consistent with the demands of the law, and the defendant's motion should therefore be denied.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

Certificate of Service

I certify that on the 14th day of April 2003, a copy of the foregoing pleading was provided to the defendant via delivery to the U.S. Marshals Service and to the counsel listed below:

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118
(540) 687-3902
fax: (540) 687-6366

Frank W. Dunham, Jr., Esquire
Public Defender's Office
Eastern District of Virginia
1650 King Street
Alexandria, Virginia 22314
(703) 600-0808
Fax: (703) 600-0880

Alan H. Yamamoto, Esquire
108 N. Alfred Street
Alexandria, Virginia 22314
(703) 684-4700
fax: (703) 684-9700

/s/
David J. Novak
Assistant United States Attorney