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	)	

STANDBY COUNSEL'S RESPONSE TO GOVERNMENT'S OPPOSITION TO MOTION FOR DISCOVERY OF AGREEMENT BETWEEN GERMANY, FRANCE AND THE UNITED STATES AND EVIDENCE SUBJECT AND/OR RELEVANT TO THAT AGREEMENT[1]

In its Opposition to standby counsel's motion for discovery of the agreements between the United States and the countries of France and Germany (the "Opposition"), the government concedes that it is in possession of documents that it received pursuant to the agreements and that it intends to introduce these documents at trial. Opposition at 2. The government also concedes, as it must, that these documents are discoverable, *see* Fed. R. Crim. P. 16(a)(1)(E)(ii) (requiring production of documents in the government's possession that the government intends to use in its case-in-chief at trial), and acknowledges that it has and will continue to produce these documents to the defense. Opposition at 2. Hence, the government does not take issue with production of the documents subject to the agreements (item F in standby counsel's motion), but rather merely objects to production of the agreements and related correspondence (items A - E and G in standby counsel's motion) (collectively, the "Agreements"). *See* Opposition at 2 ("[T]he only issue remaining before the Court is whether the defense is entitled as a matter of right to the production of the letters

[1] Pursuant to the Court's Order dated October 3, 2002, before filing, this pleading was presented to the Court Security Officer for review. That review indicated that this pleading does not contain any classified information.

rogatory or treaty requests and related correspondence with Germany/France leading to the production of [the] evidence.").

As for the Agreements, the government cites three bases for opposing production. First, the government says that the Agreements should not be made public absent a showing of materiality. Opposition at 2-3. Second, the views of France and Germany on the death penalty as reflected in the Agreements are not appropriate factors for the sentencing jury to consider. *Id*. at 3-4. And, third, production of the materials is not necessary to ensure U.S. compliance with the Agreements. *Id*. at 4-7. As detailed more fully below, these bases are insufficient to justify denying pre-trial production of the requested documents and as such, standby counsel's motion for discovery should be granted.

Agreements Should Not Be Made Public

Citing *United States v. Rezaq,* 156 F.R.D. 514 (D.D.C. 1994), the government first contends that "international communications should not be made public absent a demonstration of materiality by the defense." Opposition at 2. In *Rezaq*, the defendant, who was facing trial on charges of air piracy and murder, claimed that his prosecution was in violation of an agreement between the United States and Malta; to wit, that the former would not prosecute him if Malta convicted him first. *Id*. at 521-22. The defendant sought production of all documents related to the alleged agreement, but the district court denied that request because the defendant could adduce no more than mere speculation that any such agreement ever existed. *See id*. at 522 (noting that the discovery request "has [no] more than speculative applicability" and that "[the]

defendant has produced little to convince this court that this defense is not created out of thin air").

Here, of course, there is more than mere speculation that an agreement exists between the United States and France/Germany. Indeed, just the opposite is true: the government concedes that it has entered into agreements with those countries to obtain evidence it intends to use at Mr. Moussaoui's trial. *See* Opposition at 1-2.[2] And the government does not dispute that pursuant to those agreements, none of that evidence can be used directly or indirectly to impose the death penalty on Mr. Moussaoui. *See* Opposition *passim* and at 2 (stating that "certain written assurances" were made by the U.S. Government to get the evidence); *see also* Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 (quoting the German Embassy in Washington, D.C. as stating, "[t]he United States of America has assured [us] that the evidence and the information submitted by Germany will not directly or indirectly be used against the defendant nor against a third party towards the imposition of the death penalty"). Therefore, *Rezaq* does not support the government's argument and, as discussed more fully below, that case actually bolsters standby counsel's position that the Agreements should be produced in this case.

The government also cites three cases for the general proposition, which standby counsel do not contest, that communications between countries generally

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[2] *See also* Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 ("French and German authorities have agreed to turn over documents relating to terror suspect and French national Zacarias Moussaoui, after being assured by the Justice Department that the evidence will not be used to seek or impose the death penalty, officials said yesterday."); Larry Margasak, *Germany, France Agree to Cooperate in Moussaoui Case*, Assoc. Press, Nov. 28, 2002 (same). A copy of the former article is appended to standby counsel's motion.

should be kept confidential. *See* Opposition at 2-3 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320-21 (1936), *In re Letters Rogatory From Tokyo*, 539 F.2d 1216, 1219 (9th Cir. 1976), and *Matos v. Reno*, 1996 WL 467519, at *2, 1996 U.S. Dist. LEXIS 11748, at *5 (S.D.N.Y. 1996)). Of course, confidentiality concerns here can be addressed by producing the Agreements under seal or designating them as "confidential" under the terms of the Protective Order that has been entered in this case. *See* Protective Order at ¶¶ 18.f and 19 (filed Jan. 22, 2002) (prohibiting the public disclosure of information covered by the Protective Order); *see also* Local Criminal Rule 57 (prohibiting the dissemination of evidence to the press and public). More importantly, however, as the government itself acknowledges, confidentiality concerns cannot override a defendant's right to receive documents that are material to preparing his defense or that the government intends to use at trial. *See* Opposition at 2 (stating that "international agreements should not be made public *absent a demonstration of materiality by the defense*") (emphasis added); *see also* Fed. R. Crim. P. 16(a)(1)(E) (requiring production of documents that are material to preparing the defense or that the government intends to use in its case-in-chief at trial).[3] Accordingly, the fact that the Agreements should not be made public should not prevent disclosure of them to the defense.

[3] Interestingly, the agreement with France does not require the United States to preserve the confidentiality of the requested documents, or the request itself, unless France specifically asks the United States to do so. *See* Treaty on Mutual Legal Assistance in Criminal Matters Between the United States of America and France, Dec. 10, 1998, art. 14, ¶ 2, __ U.S.T. __, *at* http://thomas.loc.gov/home/treaties/treaties.htm#text, 106th Congress, T.Doc.106-17. Moreover, the agreement allows for the production of such documents when required in a criminal case. *See id*. at ¶ 4 ("Nothing in this Article [on confidentiality] shall preclude the use or disclosure of information or evidence to the extent that an obligation exits . . . to do so in a criminal proceeding.").

The Views Of France And Germany On The Death Penalty Are Irrelevant

The government next asserts that the contents of the Agreements and specifically, the views of France and Germany regarding the death penalty, are not appropriate factors for the sentencing jury to consider. Opposition at 3. Like the government's first argument, this contention also lacks merit.

As an initial matter, the government does not indicate in its Opposition whether it intends to use the Agreements in its case-in-chief at trial. Obviously, if it does the Agreements are relevant and must be produced. Fed. R. Crim. P. 16(a)(1)(E)(ii) (requiring production of documents that the government intends to use in its case-in-chief at trial). Moreover, to the extent the government claims that the Agreements are inadmissible evidence at any penalty phase of this case, that claim should be rejected as premature, as, at this point, all that standby counsel seek is production of the Agreements. Questions of admissibility can be decided by the Court later at trial and, for this reason, such questions should not factor into the issue of the materiality of the Agreements. As the court observed in *United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (Robert E. Payne, J.),

> At the outset, it must be noted that the Court is not called upon, at this stage of the case, to determine whether certain evidence will be admitted at sentencing, or to decide which mitigating factors will be submitted to the jury at the penalty phase (if there is one). Rather, at present the Court must decide whether the defendants are entitled to the production of what they describe to be *Brady* evidence which would be material to the establishment of . . . mitigating factors, or which would otherwise be material to mitigation argument.

With respect to the government's contention that the views of France and Germany on the death penalty are immaterial, the government's argument falls wide of the mark. It is not just those views that make the Agreements material, but the fact that the U.S. Government has agreed that none of evidence derived from the Agreements may be used directly or indirectly to impose the death penalty on Mr. Moussaoui.

What makes such evidence material is the government's concession that it intends to introduce at trial the evidence turned over to it pursuant to the Agreements. Opposition at 2. Perforce, the government will be in breach of the Agreements once the evidence is introduced in the guilt phase. This is a natural consequence of the fact that the jury that determines guilt is the same jury that determines punishment and hence, if there is a penalty phase, the jurors can consider any "guilt" evidence in deciding the issue of death. Thus, despite what the German and French governments have been told, *no* circumstance or procedure exists whereby the evidence "will not directly or indirectly be used against the defendant . . . towards the imposition of the death penalty."[4] Dan Eggen, *U.S. to Get Moussaoui Data From Europe*, Wash. Post, Nov. 28, 2002, at A19 (quoting a statement from the German Embassy in Washington, D.C. relating the German Government's understanding of the agreement).

The government's breach of its promise not to rely on evidence from France and Germany is powerful mitigating evidence, and none of the many cases cited by the government in its Opposition say that a capital defendant cannot present such

[4] Of course, the government could agree to conspicuously mark the evidence that is subject to the Agreements. Then, when the evidence is offered for admission at trial, the jury could be instructed as to the source of the evidence and the limitations imposed upon its use. This procedure is a simply way for the government to comply with the "written assurances" it has given to the French and German Governments.

mitigating evidence to the sentencing jury. Indeed, in *Rezaq*, the only reason that evidence of the U.S.-Malta agreement not to prosecute the defendant was not producible, was that evidence of such an agreement was speculative and "created out of thin air." 156 F.R.D. 514 at 522. In contrast, as noted above, it is uncontested that an agreement to share information exists with France and Germany the terms of which prohibit the direct or indirect use of the shared evidence to impose a death sentence. *Rezaq* thus supports production of the Agreements here. *See also United States v. Bin Laden*, 156 F. Supp.2d 359, 368-71 (S.D.N.Y. 2001) (allowing a capital defendant to present during the penalty phase of his trial the holding of the Constitutional Court of South Africa in support of his argument that he was eligible for the death penalty only because South Africa failed to properly apply its extradition law).[5]

It is also important to remember that "at this pre-trial stage, the defendant[] need only establish a 'substantial basis for claiming' that a mitigating factor will apply at the penalty phase, in order to invoke the Government's obligation under *Brady* and its progeny to produce any evidence which is material to that mitigating factor." *Beckford*, 962 F. Supp. at 811 (citing *United States v. Agurs*, 427 U.S. 97, 106 (1976)). Clearly, more than a "substantial basis" exists here that the foregoing argument regarding the government's breach constitutes a statutory or non-statutory mitigator. *See also United States v. Cooper*, 91 F. Supp.2d 90, 101 (D.D.C. 2000) (stating that the Federal Death

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[5] The government attempts to distinguish *Bin Laden* by saying that its holding is limited to the "'particular facts of [the] case.'" Opposition at 4, n.2 (citation omitted). However, the general principle of *Bin Laden* cannot be so limited, namely, that statutory and non-statutory mitigating factors should be broadly construed and that "it is appropriate for jurors to consider questions of proportionality and equity when they are evaluating whether a death sentence is appropriate." 156 F. Supp.2d at 369 (citing *Beckford*, 962 F. Supp. at 811-16, for the proposition that "'proportionality, equity, and fairness' are the goals 'which underlie' the mitigating factor regarding equally culpable defendants").

Penalty Act, 18 U.S.C. §§ 3591-3598, "clearly states that the enumerated [mitigating] factors are not exclusive and *any* mitigating factor may be considered by the jury").

Finally, for all of the above reasons, the government's offer to "stipulate that Germany and France object to the imposition of the death penalty," Opposition at 4, is inadequate. As noted, it is not just those views, but also the government's promises (and breach thereof) that are material. Moreover, even an adequate stipulation cannot be forced upon Mr. Moussaoui or his standby counsel.

Production Of The Documents Is Unnecessary To Ensure U.S. Compliance With The Agreements

Also missing the mark is the government's last argument that "discovery is [not] appropriate or necessary in order to guarantee that the United States abides by the assurances [made in the Agreements]." Opposition at 4. As argued above, the Agreements themselves are only one component of the mitigating evidence; evidence of the breach of those Agreements also is mitigating and hence, material.

More particularly, given that the jurors who determine guilt and sentence are one and the same, it is *impossible* for the government, once it introduces the pertinent material into evidence at trial, not to "directly or indirectly . . . use [the material] against the defendant . . . towards the imposition of the death penalty." Eggen, *supra* page 3, at A19 (quoting the German Embassy in Washington, D.C.). That is, breach of the Agreements is inevitable and the jury that will be given the evidence from France and Germany is entitled to know this fact when considering the adequacy of that evidence.

Hence, the government's assertion that the only "remedy" available for a breach of the Agreements is a "diplomatic" one, Opposition at 4, is incorrect. None of the

cases the government cites, *see id*. at 4-7, say that an inter-government agreement can abrogate a federal district court's Article III power to act as gatekeeper of evidence in a capital prosecution. Nor do those cases undermine a capital defendant's right to have the sentencing jury consider all relevant mitigating evidence. It is fundamentally unfair to allow the government to argue to the jury that the material from France and Germany should be given weight, and, at the same time, prevent the defense from pointing out to the jury that the material was utilized in contravention of the Agreements under which the material was obtained. Certainly, the Court has the power to decline to take part in such a ruse. *See Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("[N]o distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

Accordingly, for the foregoing reasons and any others adduced at a hearing on this matter, standby counsel move this Court to grant their motion and order the government to immediately produce to Mr. Moussaoui and standby counsel the material requested therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Government's Opposition to Motion for Discovery of Agreement Between Germany, France and the United States and Evidence Subject and/or Relevant to that Agreement 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 15th day of April 2003.

/S/
Kenneth P. Troccoli