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 MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DATED JULY 23, 2004, REGARDING MENTAL HEALTH EVIDENCE

The United States respectfully requests the Court to reconsider one aspect of the Court's Order dated July 23, 2004, regarding mental health evidence. While we have no objection to the Court's ruling staying resolution of the Government's Supplemental Motion until return of the mandate, we respectfully request the Court to revisit its decision, set out in footnote 1, in which the Court ruled:

> To the extent the United States asks the Court to limit any contact between mental health professionals and the defendant, this Motion is DENIED. The disclosure requirements of Rule 12 will prevent any prejudice to the prosecution from such contacts.

Contrary to the Court's finding, the Government may suffer significantly if the defendant's mental health expert has access to the defendant before the Court enforces Rule 12.2. The majority of mental health tests will be skewed by a "practice effect" if given twice. Moreover, depending on the type of mental health testing the defense intends to pursue, only a limited number of scientifically acceptable tests exist for a particular area. For example, if the defense expert wants to examine the defendant's IQ and administers the only tests scientifically acceptable to test one's IQ, the Government's expert will be unable to test the defendant because

any results would be skewed by the "practice effect" caused by administering the same tests twice. See United States v. Beckford, 962 F. Supp. 748, 765-66 (E.D. Va. 1997) (requiring the parties to seek agreement regarding testing to avoid "practice effect"). The one-sided access to the defendant now allowed by the Court's Order defeats the Government's ability to challenge the defendant's expert witness testimony and would undercut the purpose of Rule 12.2 , as well as the case law, such as Judge Payne's decision in Beckford, which led to the modification of the rule to apply to capital cases: namely, giving the parties equal ability to test the defendant.

During the deposition on June 10, 2004, Mr. Zerkin agreed that the defense mental health experts would not have any contact with the defendant until the Court addresses the Government's mental health motion. Footnote 1 of the Court's Order appears to release Mr. Zerkin from his commitment and significantly undercuts the Government's discovery rights regarding mental health evidence. Therefore, we respectfully request the Court to reconsider its ruling in footnote 1 and rule that no mental health expert from either side may have access to the defendant until the Court resolves the now-stayed Government's mental health motion.[1]

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: _____/s/_____
Robert A. Spencer
David J. Novak
David Raskin

[1] One of the key components of the Government's proposed order regarding mental health evidence requires the parties' mental health experts to apportion the testing so as to avoid the skewing of results caused by the "practice effect." See Paragraph (6) of Proposed Order.

Certificate of Service

The undersigned hereby certifies that on the 26th day of July, 2004, a copy of the Government's motion was faxed and mailed to the following attorneys for the defendant:

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