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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Judge Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S RESPONSE TO THE GOVERNMENT'S MOTION TO SET TRIAL DATE

Defendant Zacarias Moussaoui, through counsel, files his response to the Government's Motion to Set Trial Date (filed Oct. 27, 2004, dkt. no. 1199) (the "Motion"). For the following reasons, Mr. Moussaoui respectfully requests that the Court not set a trial date at this time, but defer action on this case until the Supreme Court acts on his petition for certiorari.

Setting of a Trial Date

The government is correct that the mandate from the Fourth Circuit has issued. However, the defense interpreted the District Court's letter to counsel of September 30, 2004 to mean that there are to be no further proceedings in the District Court until the appellate process has been completed. Since counsel, consistent with Mr. Moussaoui's direction, believe that a petition for certiorari is well-advised, we intend to file a timely petition in the United States Supreme Court. Accordingly, the appellate process has not yet concluded and setting a trial date would be premature.

The filing of a cert petition is not being taken for purposes of delay. It will raise

issues the Court of Appeals recognized as both "grave" and "of significance." Slip Op. 1.[1] Because the issues Defendant intends to raise are serious and non-frivolous, considerations of judicial economy compel that no further action in the District Court be taken until the possibility of intervention by the Supreme Court has been fully explored.

The concern for judicial economy in this case is profound, and defense counsel intend to raise that concern as part of the argument in favor of granting cert.[2] As this Court well knows, the judiciary is working under severe budgetary constraints which include funding for panel attorneys and defender offices. *See* letter dated September 2, 2004 to, *inter alia*, Frank Dunham, from Circuit Executive Samuel W. Phillips attaching article from the *Los Angeles Daily Journal* (reporting that "[t]he entire federal judiciary is predicting fearsome consequences [including] understaffed clerk offices, slashed funds for juror pay and probation services, layoffs of thousands of court personnel and irreparable damage to the morale of the third branch" if an appropriation is not passed into law by September 30, 2004).[3] The costs of foreign travel, experts, completion of the review of discovery material

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[1] "Slip Op." and "Class Slip Op." refer to the unclassified and classified versions, respectively, of the opinion issued by the Court of Appeals on September 13, 2004.

[2] Defense counsel reached this conclusion even before the government announced it had as many as five foreign depositions to schedule and take. *See* Motion at 4.

[3] The September 2, 2004 letter and the *Los Angeles Daily Journal* article are attached. To date, that appropriation has not been passed and the entire judiciary, including the Federal Public Defender Office, are operating under a continuing resolution at FY 2004 authorization levels. Forecasts of what the Supreme Court might be willing to undertake when no such funding crisis existed are inapplicable to the current situation when the resolution of the grave constitutional issues could save a lengthy and expensive

which has continued to flow in even when counsel were not working on trial preparation,[4] and re-engaging two panel attorneys in trial preparation, all of which has been on hold since November 2003 at the direction of this Court to conserve these scarce resources, will be overwhelming.[5] Forcing the defense to fully re-engage in the litigation at the trial court level before knowing that certiorari will be denied thus could cause a profligate expenditure of extremely scare judicial resources.

The defense is fully committed to minimizing the delay from the process of seeking certiorari by pledging to timely prepare and file the petition with diligence. It is due no later than January 11, 2005, and it will certainly be filed on or before that date. Given the interests of judicial economy, particularly in these days of limited funding when we are

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trial process.

[4] To date, the defense has received approximately 1092 computer discs containing unclassified discovery, many of which contain over 2000 images on each disc. Approximately 370 of these disks contain over 1.2 million pages of material (including some 18,000 FBI 302s), while 437 disks contain "computer media" consisting of downloads from harddrives, e-mail accounts, etc. (Approximately thirty-two disks have been delivered to the defense since this Court stayed all proceedings in this case in November 2003.) In addition, the defense has received approximately 1825 unclassified audio and video tapes, as well as approximately 210 actual computer harddrives.

As for the classified discovery, the protected status of that material prohibits a precise description of the material received to date, but suffice to say that dozens of classified computer disks have been produced containing tens of thousands of pages of classified documents, as well as video tapes and hundreds of audio tapes. The government's recitation of what must be dealt with in CIPA proceedings understates the magnitude of that task for the defense has not completed the designation process for much of the classified material received since the appellate process began.

[5] Based on the government's Motion, it appears that the government's trial preparation efforts have not been "on hold." Thus, the government is prepared to proceed on a much more ambitious schedule.

operating under a continuing resolution which has the entire judiciary funded at FY 2004 levels, it makes little sense to embark on a course which would require a substantial expenditure of judiciary dollars if there is any chance that intervention by the Supreme Court would make those expenditures unnecessary. Accordingly, proceeding in serial, rather than in parallel, fashion in this case is the most prudent course. Given the extraordinary amount of time which has expired since the initial indictment in this case was filed on December 11, 2001, it can hardly be any significant hardship on the government to permit Mr. Moussaoui to pursue Supreme Court review before being forced to go forward with a trial for his life.[6]

Moreover, the certiorari petition will present substantial questions. The Court of Appeals has recognized this case presents "questions of grave significance . . . that . . . do not admit of easy answers." Slip Op. 1.[7] These questions revolve around the meaning of the language in the Sixth Amendment requiring that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor," U.S. Const. amend. VI, and the propriety of seeking the death penalty in a case where the government cannot satisfy its due process obligation to produce all favorable

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[6] All of the District Court delays in this case since February 7, 2003, when the government filed its first notice of interlocutory appeal, are traceable to the government, with the exception of the approximately three month period after the mandate was issued on June 30, 2003 in *Moussaoui I* (No. 03-4162) and the onset of the current appeal on October 7, 2003.

[7] The "questions of grave significance," the Court of Appeals wrote, include "questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks." Slip Op. 1.

evidence before trial and the sentencing jury, if any, is precluded from considering all of the circumstances of the offense.

The Fourth Circuit's opinion recognizes, as did this Court, that the witnesses at issue are amenable to the Court's process, that they can offer "material evidence on Moussaoui's behalf," that Mr. Moussaoui's constitutional right to obtain their exculpatory testimony is not outweighed by the government's national security interests, and that the substitutions proposed by the government for the deposition testimony of the witnesses were inadequate. Slip Op. 1-2, 27, 45, 47, 49-54, 57. Nonetheless, the Court of Appeals effectively deprives Mr. Moussaoui of his Sixth Amendment right to use the District Court's "compulsory process for obtaining witnesses in his favor" because, the Fourth Circuit says, he can use unnamed, unsworn government agents' non-verbatim and admittedly incomplete written summaries reflecting only some of what the agents say the witnesses purportedly said.

The Supreme Court has recently shown that it intends to ensure that the rights enshrined in the Sixth Amendment are strictly construed and literally implemented. *See Crawford v. Washington*, 124 S. Ct. 1354 (2004) (holding that the Sixth Amendment's Confrontation Clause bars the admission against a defendant of inculpatory testimonial statements from an unavailable declarant whom the defendant did not have a prior opportunity to cross-examine); *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (holding that it was a violation of the Sixth Amendment for a state judge to increase a defendant's sentence beyond the presumptive guideline range where neither the defendant admitted as part of the guilty plea, nor a jury found beyond a reasonable doubt, the facts giving rise

to the increase).

The Supreme Court may well take the same approach with the Compulsory Process Clause advanced by Mr. Moussaoui here, and conclude, as the defense will contend, that furthest from the Founders' intent when that clause was penned, was that a defendant would be forced to proceed with a trial, at which he faces the death penalty, with unsworn statements from anonymous persons as a substitute for the core live "witnesses in his favor;" witnesses who are within the reach of the Court's (and the government's) power to produce. *Cf. Crawford*, 124 S. Ct. at 1363 (stating that "the principal evil at which the [Sixth Amendment's] Confrontation Clause was directed was . . . [the] use of *ex parte* examinations as evidence against the accused").

Moreover, because the summaries from which the substitutes will be drawn are incomplete - making it impossible to determine whether the government has satisfied its due process obligation to produce all favorable evidence before trial - the approach taken by the Court of Appeals also violates the Fifth Amendment. Similarly, the Eighth Amendment (as well as the Fifth and Sixth Amendments) is violated because, although the Court of Appeals will allow the defense to submit questions to the witnesses, none of those questions have any assurance of being answered. Mr. Moussaoui cannot constitutionally prepare or present a defense, particularly as to a potential death sentence, under such constraints. The Court of Appeals' procedure subverts not only Mr. Moussaoui's Sixth Amendment entitlement to the effective assistance of counsel, *see Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2541-42 (2003), but also his due process and Eighth Amendment right to present to the sentencing jury "any of the circumstances of the

offense," *see Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *cited with approval in Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

Should the Supreme Court agree to consider any of these important issues, and ultimately rule favorably for the Defendant, significant government and judicial resources, including scarce defender services funds needed for CJA counsel and operation of defender offices, will have been wasted if the parties have simultaneously proceeded towards trial. We are charged with better stewardship of limited judicial resources than such a course would demonstrate.

In sum, defense counsel believe the prudent course, consistent with our understanding of this Court's letter of September 30, is to defer any further action on this case[8] until the Supreme Court acts on Mr. Moussaoui's cert petition, and to further defer, should the Court grant the petition, until a decision is rendered.

Other Matters Pending Before the Court

In its Motion, the government also updates the Court on its view of "the current status of issues pending before the Court" and how long it would take to resolve them. Motion at 2. It should come as no surprise that the defense has quite a different view of what remains to be done and, more importantly, how long it will take. Defense counsel do not endeavor here to engage in a point-by-point refutation because to do so would require

[8] This would include any pending motions before the Court, *e.g.*, the Government's Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed Apr. 8, 2002, dkt. no. 93) and the Government's Supplemental Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed July 6, 2004, dkt. no. 1176).

court-appointed co-counsel to do exactly what we are seeking to avoid, that is, re-engage at the district court level before we have a final answer as to what will be necessary. However, there is one clear example of a task omitted from the government's recitation that demonstrates why even the proposed schedule provides inadequate time for trial preparation.

The Fourth Circuit has directed a procedure with regard to the missing witnesses designed to attempt to level the playing field between the government and the defendant with regard to them. *See* Class. Slip Op. 62-63. Even the Acting Solicitor General was unable to tell the Court of Appeals how long this process would take. Specifically, he could not even exclude the possibility that it would take as much as a year. The government's Motion does not even refer to this process.

Finally, with regard to the issue of stipulations, *see* Motion at 5, on November 2, 2004, the Supreme Court heard arguments on whether an attorney in a capital case provided ineffective assistance of counsel when he conceded facts necessary to a determination of guilt without the client's consent. *Florida v. Nixon*, 857 So.2d 172 (2003), *cert. granted*, 124 S. Ct. 1509 (U.S. Mar. 1, 2004) (No. 03-931). Here of course, when it comes to stipulations, defense counsel will not only not have consent, but will likely have active opposition. It is reasonable, therefore, and also is in the interests of judicial economy, to defer addressing the stipulation issue until the Supreme Court renders its opinion in *Florida v. Nixon*, since it may provide important guidance on just how far defense counsel may proceed with regard to factual stipulations when the defendant

objects.

Conclusion

For the foregoing reasons, the Government's Motion to Set a Trial Date should be denied.

Respectfully submitted,

ZACARIAS MOUSSAOUI
By Counsel

/S/

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CERTIFICATE OF SERVICE[9]

I HEREBY CERTIFY that on this 8th day of November 2004, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, 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

[9] Pursuant to the Court's order of October 3, 2002 (dkt. no. 594), the instant pleading was presented to the CSO for a classification review before filing. That review determined that the pleading is not classified. A copy of this pleading was not provided to Mr. Moussaoui until after completion of the classification review.

by FACSIMILE upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0099 (AUSA Raskin).

/S/
Kenneth P. Troccoli

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September 2, 2004

VIA FACSIMILE

Louis Allen, Esquire
Frank Dunham, Esquire
Brian Kornbrath, Esquire
Thomas McNamara, Esquire
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Re: National Budget Freeze

Dear Colleagues:

Enclosed is an article from the Los Angeles Daily Journal which you may have seen. It reinforces my concern for your offices and your ability to meet your responsibilities for indigent defendants.

When you have a moment, I would appreciate hearing from you about the potential impact upon your offices and how you propose to continue effective operations. Of course, I suspect that additional responsibilities will be placed upon panel attorneys.

With kindest regards,

Sincerely,

Samuel W. Phillips

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Enclosure

Los Angeles Daily Journal

Budget Freeze Worries Defenders
Federal Judiciary Could Be Facing Layoffs, Cutbacks, Threats to Morale

By John Ryan
Daily Journal Staff Writer

LOS ANGELES - Federal public defenders in Los Angeles are growing increasingly anxious that a national budget freeze will prevent them from representing all the poor defendants entitled to their assistance.

If Congress and the White House fail to agree on a budget by Sept. 30, as has been widely reported for months, a continuing resolution will freeze government spending at 2004 levels for part or even all of fiscal year 2005. The entire federal judiciary is predicting fearsome consequences: understaffed clerk offices, slashed funds for juror pay and probation services, layoffs of thousands of court personnel and irreparable damage to the morale of the third branch. For indigent defendants, a hard freeze will create an unprecedented tension between the constitutional guarantee to a free lawyer and the money required to fund that entitlement.

Defenders say they will be unable to cover automatic cost increases in salaries, benefits and rent without cutting into the work they do on behalf of those least able to help themselves. "My reaction to this is that we're not going to take any appointment that we can't do right," said Maria Stratton, the federal public defender in Los Angeles. "It may well mean that we decline being appointed on cases." Details of the potential crisis came to all federal public defenders this summer in a memo from the office of defender services, a branch of U.S. courts' administrative body.

"Funding Defender Services in FY 2005 at its FY 2004 funding level would result in a $108 million shortfall out of $715 million in estimated requirements," Steven Asin, the deputy chief of defender services, wrote. If the public defender cannot provide an attorney, the court will appoint one from the indigent defense panel. Under a budget freeze, however, the panel's funding also could run dry, forcing panel attorneys either to accept delays in payment or to decline assignments.

"In general, people cannot afford to work if they're not getting paid," said Ronald Kaye, a former deputy federal public defender who is on the indigent defense panel for the Central District. Kaye, a partner at Pasadena's Kaye McLane & Bednarski, said the lack of funds would undermine a defendant's 6th Amendment rights to a fair and speedy trial and assistance of counsel. "Why do these issues always fall on the back of the poor criminal defendant?" Kaye asked. U.S. District Judge Consuelo Marshall, the chief judge for the Central District, said judges would have to find an attorney from the indigent panel willing to take a case.

Delays in payments could hinder the ability of panel attorneys to hire experts and investigators for clients, Marshall added. "We are very concerned that we are not being recognized as a co-equal branch of government," she said, referring to the budget crisis as a whole. Marshall added, however, that the worst-case scenarios being tossed around legal circles

can be avoided.

Earlier this year, the House passed an appropriations bill providing $5.5 billion for the judiciary, an increase of $430 million over the previous year. The Senate is expected to tackle appropriations issues when its members return after Labor Day. But they will have just three weeks before the end of the fiscal year. Political experts have predicted that lawmakers will seek a continuing resolution instead of trying to iron out appropriations bills, especially as an increasing amount of attention and effort is diverted to the upcoming congressional and presidential elections. The House amount is $175 million below what the judiciary requested but much better than a hard freeze.

"It's enough to fund current services," Karen Redmond, a spokeswoman for the administrative office of the U.S. courts, said. Redmond said that the judiciary is asking for an exemption from the freeze, which would allow the courts to be funded at the House's appropriation level if a budget agreement cannot be reached. Otherwise, she said, the judiciary is looking at layoffs or furloughs of 2,200-to-5,000 personnel and a 50 percent reduction in court operation costs.

Assuming law enforcement does not sustain deep cuts, the indigent caseload can only increase for fiscal year 2005, officials said. Homeland Security will be exempt from any spending freeze, they said. The Supreme Court decision in Blakely v. Washington, which held that juries had to determine the aggravating factors that increase a defendant's sentence, also will make it tough for defenders to live with budget cuts. The decision has created extra work for defenders, as they comb through cases that may benefit from the decision. The high court has scheduled oral arguments Oct. 4 to determine whether Blakely renders the federal sentencing guidelines unconstitutional, which could lead to thousands of appeals in cases in which judges boosted sentences without jury review.

Blakely, coupled with an increase in criminal cases, means that defender workload will outpace funding, even if a budget freeze is avoided. Asin said the House bill gives defender services a $78 million increase over last year's budget of $598 million, leaving a shortfall of $20 million from what public defenders expect they will need. The judicial budget for fiscal year 2004 kicked in late, as well, just this past February, and it also fell below the requested amount, leading to layoffs and other cost-cutting measures throughout the courts. Stratton said that the money for indigent-defense panel attorneys almost ran out in March of this year. "The administrative office told all defender offices to cut spending by 3 percent so they could put it in panel attorney appropriations," Stratton said. "So I ended up laying off a couple of employees."

Any layoffs in the judiciary will have a devastating impact on future prospects for hiring and retaining qualified individuals, Marshall said. People who once thought of jobs in the court system as secure will turn to the private sector, the jurist explained. "These are people who have developed expertise and who are not likely to come back to the judiciary," Marshall said.