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 GOVERNMENT'S MOTION AND SUPPLEMENTAL MOTION REGARDING MENTAL HEALTH EVIDENCE

In its Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed April 8, 2002, dkt. no. 93) (the "Motion"), the Government sought an order

> (1) requiring the defendant . . . to file a notice of intent by a date certain set by the Court specifying: a) the mental health experts who will testify or whose opinions will be relied upon and their qualifications, b) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions; (2) requiring the defendant, if he gives notice of intent to raise a mental health defense, to submit to an examination by an expert or experts of the Government's choosing; and (3) requiring the exchange between defense and Government experts of all materials upon which they may rely to form the basis of the opinions, including all medical records and other records.

Motion at 2.

In its Supplemental Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed July 6, 2004, dkt. no. 1176) (the "Supp. Motion"), the Government brought to the Court's attention the related provisions of Rule 12.2 of the Federal Rules of Criminal Procedure, which were passed subsequent to the filing of the Motion, and reasserted its right to the relief it had requested originally. In addition, the Government noted that, in its opinion, the Government would be entitled to a reciprocal examination even if the defendant did not submit to an examination conducted by a defense expert. Supp. Motion at 4.

ARGUMENT

The Government's motions remain premature. No trial date has been set and the defense, at Mr. Moussaoui's request, is preparing a petition for writ of certiorari in the Supreme Court. As he did in the Court of Appeals, the Defendant will support this Court's decision to strike the death penalty. Thus, until the Supreme Court acts on the Defendant's petition, it is unnecessary to address the issues raised in the Government's motions as the Supreme Court may agree that the death penalty should be stricken from the range of possible punishments. Moreover, it is unnecessary for the Court to address the Government's motions while there remains pending another motion, challenging the death penalty, which may render moot the issues raised in the motions. *See* Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death (filed Apr. 25, 2002, dkt. no. 117).

Further, it is entirely unnecessary for the Court to address the Government's motions at this time, since (1) as the Government itself notes, Rule 12.2 specifies the relief, if any, to which the Government is entitled; (2) pursuant to the decision of the Fourth Circuit, no trial should occur until the defense has had the opportunity to obtain information with regard to the missing witnesses through the prescribed process, *see* Class. Slip Op. 62-63, a process whose duration even the Acting Solicitor General could not specify; (3) the information obtained as a result of that process could be particularly relevant to any mental health evaluation; and (4) as the stay issued by this Court on November 5, 2003 (dkt. no. 1111) is still in effect, thus precluding defense counsel from fully developing the predicate life history for a mental health evaluation, the defense is not now, and will not in the near

future be, in a position to comply with Rule 12.2.

The only specific relief sought by the Government, beyond Rule 12.2 itself, is its request for a date certain by which the Defendant must file his notice. *See* Motion at 2; Supp. Motion at 4 (requesting that the Court require the defendant "to file a notice of intent not later than 20 days after the return of the mandate from the Fourth Circuit"). Of course, in the absence of a trial date, there is no reason to set a filing date for the notice. Moreover, it would be inappropriate to do so given the Defendant's inability to provide such a notice in the immediate future.

The Government's Supplemental Motion adds nothing new to the mental health examination issue except, as noted above, its suggestion that the Government is entitled to an examination even if the Defendant refused one by the defense's own expert. Quite appropriately, however, the Government does not seek any relief on this issue at this time, since before this issue would be ripe, the defense would have to provide the requisite notice, and the Defendant would have to refuse an examination by the defense's own expert. Thus, this issue is premature as well.

Finally, the Defendant believes that before this motion can be fully briefed, and before there is any additional litigation on the mental health issues, the Government should be required to designate a walled-off Assistant U.S. Attorney to handle such issues. While it is possible to protect the results of any defense mental health examinations from disclosure prior to completion, *see, e.g.*, *United States v. Beckford*, 962 F. Supp. 748, 763-64 (E.D. Va. 1997) (imposing "strict limitations on the examination and discovery procedures employed and the disclosure of any statements made by the defendant during

the [mental health] examination"), it is impossible to fairly litigate any procedural questions related to such examinations without divulging confidential or work product information. *See United States v. Sampson*, 335 F. Supp.2d 166, 243-44 (D. Mass. 2004) (designating, with the agreement of the parties, "'fire-walled' AUSAs" to handle all issues related to the mental health testing of the defendant given that "[i]t was foreseeable that issues would arise during the course of the examinations -- such as non-cooperation by the defendant or the unexpected need to do additional testing -- that would have to be communicated to a government attorney, to defense counsel, and to the court") (citing *United States v. Allen*, 247 F.3d 741, 773-74 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002)).[1]

CONCLUSION

For the foregoing reasons, the Court, respectfully, should defer consideration of the Government's Motion and Supplemental Motion until (1) the Supreme Court has ruled on Defendant's petition for writ of certiorari, (2) this Court has ruled on Defendant's pending

[1] Defendant notes, however, that the cases cited by the Government do not support its argument that "the Government's discovery rights - including its right to examine the defendant - exist regardless of whether the defendant submits to an examination conducted by a defense expert." Supp. Motion at 4. The cited authorities simply do not address the point, since in none of them did the defendant refuse to participate in an examination by the defense expert. Moreover, *Beckford's* mandatory forfeiture of the right to present mental health testimony in the event the defendant refuses to participate in the Government's examination, 962 F. Supp. at 765, has been replaced in Rule 12.2(d) with a *permissive* sanction of forfeiture. And even then, the forfeiture is only as to the right to present "expert evidence . . . on the issue of the defendant's mental disease, mental defect, or any other mental condition." Fed. R. Crim. P. 12.2(d). Indeed, under Rule 12.2(c)(1), the Government is not even *entitled* to a reciprocal examination; rather, the court "may" order such an examination. Fed. R. Crim. P. 12.2(c)(1)(B).

Motion to Strike Government's Notice of Intent to Seek a Sentence of Death, and (3) the Court has scheduled a trial date.

Respectfully submitted,

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CERTIFICATE OF SERVICE[2]

I HEREBY CERTIFY that on this 1st day of December 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 by FACSIMILE upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0099 (AUSA Raskin).

[2] 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.

Kenneth P. Troccoli