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

UNITED STATES OF AMERICA	)	[redacted]
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF MAY 2, 2005

Defendant, Zacarias Moussaoui ("Moussaoui"), through counsel, files this opposition to the Government's Motion For Reconsideration of the Court's Order of May 2, 2005, Establishing, *Inter Alia*, Procedures for Implementing the Mandate of the Court of Appeals (filed May 13, 2005, dkt. no. 1282) (the "Motion").

INTRODUCTION

By motion filed April 7, 2005 (dkt. no. 1250), Moussaoui moved to reevaluate the orders issued pursuant to CIPA § 4 and to establish procedures for implementing the mandate of the Court of Appeals. The Government filed a written opposition to this motion on April 22, 2005 (dkt. no. 1262), to which the defense filed a written response on April 28, 2005 (dkt. no. 1272). Thereafter, the Court heard oral argument on the motion on April 28, 2005 after which it granted in part and denied in part the motion. The Court memorialized its ruling in a written order filed on May 2, 2005 (dkt. no. 1275) (the "May 2 Order").

The May 2 Order directed the Government, *inter alia*, to: (1) submit to the Court written representations to confirm "whether [redacted] (2) submit [redacted]

[redacted] (3) submit "a list of the titles and filing dates of all motions relating to these [redacted] witnesses that were previously filed ex parte pursuant to Section 4 of [CIPA], which the Court will then provide to defense counsel;" and (4) "not file [any future] Section 4 motions regarding these [redacted] witnesses ex parte except in the case of demonstrated extraordinary circumstances." May 2 Order at 1-3.

The Government's present Motion asks the Court to reconsider its May 2 Order "in its entirety." Motion at 2.[2] First, the Government argues that the May 2 Order is premature because the testimony [redacted] may no longer be relevant, and in any event, [redacted] have not yet been explored. Motion at 5-9. Second, the Government claims that the May 2 Order [redacted] because it [redacted] and [redacted] Motion at 9-10. Finally, the Government asserts that the May 2 Order's third and fourth directives are [redacted] and

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[1] The May 2 Order lists the kinds of information the Government must provide. The Court of Appeals issued a similar, albeit less comprehensive, order. See Classified Transcript of CIPA Proceeding held on June 3, 2004 at 68-69 (filed June 9, 2004, 4th Cir. No. 03-4792) [redacted] (Wilkins, C.J.).

[2] Despite this statement, it is not clear whether the Government seeks reconsideration of the first of the four directives of the May 2 Order [redacted]

[redacted] Motion at 10.

Each of these arguments should be rejected. The May 2 Order is entirely appropriate given the factual issues that must be resolved by the jury in this case and by the applicable legal standards, and is in full accord with the discretion that the Court of Appeals delegated to the District Court. In seeking reconsideration, the Government offers only criticism of the Court's order but it offers no valid legal reason or changed circumstances to justify the relief it seeks. Accordingly, the Motion should be denied.

ARGUMENT

Motions to reconsider are not favored. Absent a need to accommodate an intervening change in controlling law, to account for new evidence not previously available, or to correct a clear error of law, a court should not be asked to reconsider a ruling previously made. *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997) (Cacheris, C.J.), *modified*, 166 F.3d 667, 679 (4th Cir. 1999) (holding that a motion for reconsideration based on additional evidence may be denied unless the moving party provides "a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the [underlying] motion"), *rev'd on other grounds*, 530 U.S. 428 (2000); *see also id.* at 1024 ("A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court ha[s] already thought through – rightly or wrongly.'") (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (Warriner, J.).

Here, the Government does not suggest a change in law or provide a legitimate reason for its failure to advance arguments which were available to it at the time it briefed and argued the Defendant's motion. Nor, with the exception of Part II of its Motion (which in significant part merely restates arguments the Government previously made), does the Government suggest that the Court committed an error of law. Instead, the Government merely says, in effect, that the Court should have exercised its discretion differently. This failure in itself is reason enough to reject Parts I and III of the Motion. *See Dickerson*, 971 F. Supp. at 1024 (finding such a failure "fatal" to a motion to reconsider), *aff'd*, 166 F.3d 667, 680 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000). Moreover, irrespective of this failure, each of the Government's arguments are without merit.

I. THE ENEMY COMBATANT WITNESSES REMAIN RELEVANT AND MATERIAL TO THE DEFENSE IN THE PENALTY PHASE AND THE DISTRICT COURT ALREADY HAS SO FOUND.

Relying primarily on Moussaoui's recent entry of a guilty plea to the Second Superceding Indictment, the Government suggests that the Court [redacted] Motion at 5. The Court, however, already has made that assessment.

At the April 22, 2005 change of plea hearing, Moussaoui questioned the Court about the potential waiver of his right to continue to seek access to [redacted] In unequivocal terms, the Court informed Moussaoui that "access to certain witnesses' testimony . . . is still highly relevant to the sentencing phase." Transcript of April 22, 2005 Plea Hearing at 16 (filed Apr. 26, 2005, dkt. no. 1269) (the "April 22 Transcript"). The Court went on to explain:

THE COURT: And you have not waived with this guilty plea any issues you might have as to what the Supreme Court ruled in that case, because the argument that I think has properly been made is that that evidence constitutes mitigating evidence. Mitigation is an extremely important factor at the penalty phase, and, therefore, that issue and some of those other issues that relate to the penalty phase are not being waived in your guilty plea to the guilt phase of the trial.

Do you understand that?

THE DEFENDANT: So if I understand properly, I'm only waiving thing what have happened prior [to] the guilty plea regarding the guilt phase, but for the sentencing phase, I will, I will still have the ability to raise issue to the Supreme Court?

THE COURT: Well you - - people can't just jump to the Supreme Court. You still have legal issues that to the extent they relate to the penalty phase of the trial, you are not by pleading guilty giving up any of those issues.

THE DEFENDANT: That's what I'm saying.

THE COURT: That's what I'm saying, too.

Id.

The Government stood mute during this exchange. And despite being given an opportunity later to correct any misrepresentations, *see id.* at 24 (asking the Government if there was anything "that [the Court] may have omitted in this Rule 11 colloquy that you need to put on the record"), the Government did not protest any of the Court's assurances to Moussaoui, including the one that the witnesses' testimony "constitutes mitigating evidence" at the penalty phase. Nor did the Government offer any conditions or exceptions to those assurances, which formed an integral part of the factual and legal predicate for the Court's finding that the guilty plea was knowing and voluntary.

Under these circumstances, the Government has waived its right to now argue that the enemy combatant witnesses are not relevant to the sentencing phase of this case, particularly when it permitted Moussaoui to plead guilty to four capital (and two non-capital) charges based on factual representations that it now apparently says were inaccurate. Further, a ruling at this point that [redacted] are not relevant to the penalty phase, means that Moussaoui's guilty plea was not knowing and intelligent and, accordingly, he should be permitted the option to withdraw it and proceed to trial on his guilt.

In any event, the Court's assurances that the testimony of the enemy combatant witnesses remains relevant, if not "mitigating," to the penalty phase were entirely correct. As such, the Court should reject the invitation to reexamine its prior findings, all affirmed by the Fourth Circuit, that those witnesses could offer material, exculpatory evidence on Moussaoui's behalf at the sentencing phase of this case.

Factually, the death eligibility and mitigation issues in this case remain largely unchanged even after the acceptance of the guilty plea and the accompanying Statement of Facts signed by Moussaoui. The Government still must prove that something Moussaoui said or did directly resulted in the deaths of the victims, [redacted] Motion at 4-5. Even in combination with the Indictment, the Statement of Facts does not do that, since it identifies neither the "brothers" in paragraph 16 of the Statement, nor the "operation" in paragraphs 9 and 16, a point made clear by Moussaoui in his post-plea recitation to the Court. See April 22 Transcript at 28. While the Government may be able to argue to the jury that it can draw the inference that he was referring to the

September 11 plot, the defense is free to argue that such an inference should not be drawn and to demonstrate that he was not involved in, and had no knowledge of, the specific plans that led to the events of September 11, 2001. Thus, to satisfy its burden to prove that the information Moussaoui possessed could have been used to prevent those events – a burden which the government concedes it has – the Government must prove what that information was. The jury is free to believe that nothing in the Statement of Facts does that. Indeed, that is the purpose of the sentencing phase.[3]

As such, the "testimony" of the enemy combatant witnesses for the penalty phase remains as relevant and exculpatory as it was prior to the guilty plea. As detailed in Defendant's recent motion for access to other enemy combatant witnesses,[4] a jury could reasonably conclude that the testimony of the enemy combatant witnesses, including the additional ones listed in that motion, taken as a whole, indicates that Moussaoui had no knowledge of or direct involvement with the specific plot that culminated in the September 11 attacks, or that if involved, his role was only a minor one. Among other exculpatory inferences the jury could draw from that testimony, for example, is that Moussaoui was untrustworthy, unreliable and unqualified and, therefore, by design, uninvolved in and not aware of, the specific plot that led to the

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[3] The defense does not concede that the Second Superceding Indictment and the Statement of Facts are legally sufficient to support the inference that Moussaoui had knowledge of or was involved with the September 11 hijackers or their operation which occurred on September 11, 2001.

[4] *See* Defendant's Motion for Pre-Trial Access and for Writs *Ad Testificandum* for [redacted] (filed May 17, 2005, dkt. no. 1283).

deaths of the victims set forth in the Death Notice. The Court will recall that [redacted] Therefore, if the jury were to believe their testimony, they could reasonably conclude that there would have been no information that Moussaoui could have given to the FBI in August of 2001 that would have prevented the September 11 attacks and the resulting deaths.

Further, there is no information of which defense counsel are aware that Moussaoui knew the identities or locations of any of the September 11 pilots or muscle, information which would have been key to the FBI detaining them before September 11, 2001. In contrast, the FBI knew that Khalid al-Mihdhar and Nawaf al-Hazmi were al-Qaeda members living in the U.S. and made no effort to locate, much less arrest, them. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 355-56 (2004) (hereafter "*9/11 Report*"). Moreover, the title of President Bush's August 6, 2001, Presidential Daily Brief was "Bin Laden Determined to Strike in US." *9/11 Report* at 261. Thus, a jury could reasonably conclude that Moussaoui's knowledge, whatever it was, including his admissions in the Statement of Facts, would not have prevented the deaths on September 11, and would merely have confirmed information that was already known at the highest levels of government.

Equally unavailing is the Government's argument that [redacted]

[redacted] Motion at 5. First, Moussaoui plainly does not want counsel to argue for minor role only because he wants them to argue he had no role in the September 11 plot, a point he made clear at his plea hearing. See April 22 Transcript at 28-29. He also made this desire plain in his pleading filed on May 3, 2005. See "20th Hijacker Ineffective Assistance of Defence Counsel" at 2 (filed May 3, 2005, dkt. no. 1277) ("May 3 Pleading"). Of course, the testimony of the witnesses is no less relevant to a defense that he had no role than it is to a mitigation argument that he had only a "minor" one.

More fundamentally, however, the Government has cited no authority that actually stands for the fundamental legal proposition upon which its argument is predicated – that Moussaoui's desires as to the presentation of mitigation and minor role evidence are binding on defense counsel. In two of the four cases cited by the Government, *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002), and *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), the defendant was proceeding *pro se* and decided not to introduce any mitigation evidence. In each case, the court determined that such strategy decisions were within the defendant's prerogatives *as a pro se defendant*. *See Davis*, 285 F.3d at 384-85; *Silagy*, 905 F.2d at 1007-08. In the third case, *Singleton v. Lockhart*, 962 F.2d 1315 (8th Cir. 1992), the court merely held that, where counsel does acquiesce in a defendant's desire not to introduce mitigation, counsel cannot then be deemed ineffective if the defendant's waiver of the right to introduce such evidence was knowing and voluntary. *Id.* at 1321-23. Finally, in the fourth case, *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), the Court, in footnote four, cited no principle of law, but merely noted that the petitioner had chosen not to put on mitigation, a decision in

which trial counsel had acquiesced.

Thus, the cases cited by the Government lend *no support* to the proposition that a defendant proceeding *with counsel* may dictate strategic decisions. To the contrary, while the client may define the goals of the litigation, which Moussaoui plainly did in Court – to "fight every inch against the death penalty" and litigate, if necessary, that issue all the way to the Supreme Court, *see* April 22 Transcript at 26; *see also* May 3 Pleading at 3 – it is for counsel to make the strategic decisions concerning how to achieve that goal. *Virginia Rules of Professional Conduct*, Rule 1.2(a); *see also Florida v. Nixon*, __ U.S. __, 125 S. Ct. 551, 560 (2004) ("[A]n attorney has authority to manage most aspects of the defense without obtaining his client's approval.") (citation omitted).[5]

Likewise, while Moussaoui might be able to prevent stipulations, his instructions concerning substitutions are not binding on counsel or on the Court. (And, of course, to the extent they are based on a belief that substitutions will preclude or damage an

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[5] Also troubling is that the Government's arguments provide the springboard for its attempt to interfere in the attorney-client relationship between Moussaoui and his counsel, particularly the internal decision-making process of the defense. Put bluntly, it is none of the Government's business if or when counsel resolve any disagreements as to strategy they may or may not have with the Defendant. What matters is that it is counsel's unequivocal intention to seek to use all the information available to them to defeat death eligibility and to prove mitigating factors, including, if appropriate, minor role in the offense, as well as the defense that Moussaoui's knowledge and conduct were not constitutionally significant enough to justify death. See *Enmund v. Florida*, 458 U.S. 782 (1982). That information necessarily will include the material that the Court and the Fourth Circuit have already found to be exculpatory as well as full and complete jury instructions as to the [redacted] All of this information ordinarily would be elicited during direct in-court examinations of the witnesses at issue and should similarly be included in the instructions given by the Court.

appeal to the Supreme Court, Moussaoui's preferences in this regard are, as the Court pointed out to him on April 22, legally misguided.) Consequently, [redacted] remain as relevant to the death phase now as they were prior to Moussaoui's guilty plea, and there is no valid reason for this Court to review those findings at this untimely date.

II. THE MAY 2 ORDER DOES NOT CONTRAVENE, BUT RATHER IMPLEMENTS, THE MANDATE OF THE COURT OF APPEALS.

The Government next argues that the Court's May 2 Order [redacted] and [redacted] the mandate of the Court of Appeals because the Order [redacted] and [redacted] Motion at 2, 9-10. Both of these arguments are without merit.

The Court of Appeals certainly found that the enemy combatant statements "were obtained under circumstances that support a conclusion that the statements are reliable." Class. Slip Op. 60. However, nothing in the May 2 Order undercuts that finding in any way. That the statements may be "reliable," does not mean that the jury will find that they are truthful and it is highly doubtful that the Government will concede at trial that they are. As the Court of Appeals recognized, it is the jury's province to decide whether the combatants' statements are *believable* and, if so, how much weight to give to them. *See id.* at 60 n.31 ("We emphasize that we have never held, nor do we now hold, that the witnesses' statements are in fact truthful, and the jury should not be so instructed.") (emphasis in original). In its May 2 Order, the District Court, like the Court of Appeals, recognized the difference between on the one hand, whether the

statements were obtained under circumstances designed to elicit truthful and accurate information, and on the other hand, whether the jury will accept those statements as true and believable.

To counter the expected argument that the witnesses' exculpatory statements are not believable, the defense intends to argue that those statements were obtained under circumstances that would naturally lead to the expression of inculpatory statements. That these exculpatory statements were elicited under such circumstances bolsters their veracity, not merely their reliability, making the details of those circumstances critical to the Defendant's presentation of his case. [redacted] Classified Transcript of Hearing held on April 28, 2005 at 18 (filed May 6, 2005, dkt. no. 1281) (hereafter "April 28 Transcript"). As such, the May 2 Order faithfully implements the mandate from the Court of Appeals.

As for the Government's assertion that the Court should wait until later to address disclosure of [redacted] it is entirely within the Court's discretion in controlling its docket to order disclosure at this time. Jury selection is set to begin on January 9, 2006 according to a schedule to which the Government agreed. Between now and then, there is an incredible amount of work to be done both by the parties and the Court, including such time-consuming tasks as briefing and resolution of whether defense access should be granted to other enemy combatant witnesses, briefing and resolution of motions related to striking of the Death Notice and the gathering and admission of

mental health evidence, and briefing and hearings under CIPA regarding the relevance and admissibility of classified documents and any substitutions for those documents.

In addition to those tasks, of course, is the crafting of substitutions for the enemy combatant witnesses, a process that all agree will take months to complete.[6] [redacted] Fourth, the defense must determine precisely what language from the summaries to include in each substitution, including any additional information [redacted] Fifth, the Government may propose language from the summaries to add to the substitutions pursuant to the rule of completeness. Sixth, the Court will then compile the substitutes, which likely will necessitate further briefings and/or hearings. Finally, the Court must draft, with input from the parties, the jury instructions regarding the substitutions.

[6] It bears reminding that the question of access to the enemy combatant witnesses and the process of crafting substitutions for their testimony (including the jury instructions to go with them) are not matters to be resolved under CIPA. See *United States v. Moussaoui*, 333 F.3d 509, 514-15 (4th Cir. 2003); Class. Slip Op. 41 n.20, 69-70.

[redacted]

The substitution-creation process is thus very labor-intensive and time-consuming. (As an example, the Government needed thirty days just to respond to the Court's May 2 Order. April 28 Transcript at 19.) It is thus prudent for the Court to begin this process as soon as possible and concurrently implement as many steps of the process as it can in order to meet the agreed-upon trial schedule. Indeed, it is not the Court that is frustrating the Fourth Circuit's attempt to [redacted] Motion at 9-10, but the Government, which is, once again, resisting efforts of the District Court [redacted] April 28 Transcript at 18.

That portion of the May 2 Order directing [redacted] is a perfect example of tasks that should be completed in parallel with others on the Court's list. First, [redacted] take time to complete, as the instant Motion demonstrates. More important, in order to decide what substitutions to propose (or even whether to propose them at all), the defense needs to know how those substitutions will be presented to the jury. A statement made [redacted] Before proposing that statement for inclusion in a substitution, Counsel need to know what [redacted] were and how the jury may be instructed regarding them.

Finally, it is a fool's errand to attempt to stipulate [redacted]

[redacted]

[redacted] See Motion at 8. Moussaoui, of course, has stated that he will not agree to any stipulations pertaining to the substitutions. May 3 Pleading at 3. Moreover, even if Moussaoui was open to the possibility of substitutions, it would not be in his interest to stipulate to factual matters that have never been disclosed to his counsel or the Court. Defense counsel and the Court should not be asked, much less forced, to craft a jury instruction out of thin air when they are unable to verify the accuracy or completeness of the factual information proposed for inclusion in the instruction.

III. REQUIRING DISCLOSURE OF THE CIPA SECTION 4 FILINGS IS NOT UNWARRANTED, BUT IS NECESSARY TO IMPLEMENT THE MANDATE OF THE COURT OF APPEALS.

Lastly, the Government asks the Court to reconsider those aspects of the May 2 Order dealing with the disclosure of the Government's CIPA § 4 filings. Motion at 10. Those aspects, the Government asserts, are [redacted] and [redacted] *Id.*

The second of these assertions has been refuted above and, accordingly, should be rejected. The first assertion is merely a repeat of an argument the Government made before, *see* Motion at 10 (admitting that this argument was "argued in [the Government's] opposition"), and likewise, should be rejected.

At bottom, the Government's complaint about the Court's decision to reevaluate its prior Section 4 orders mischaracterizes the reason for and obvious benefit of such a reevaluation. The Court of Appeals has assigned the District Court the arduous task of compiling substitutions as a replacement for critical exculpatory testimony in a highly-

publicized death penalty case. In order to promote the accuracy and completeness of those substitutions, the District Court needs the informed input of counsel for both sides. As the Court explained:

> THE COURT: When the Court was first reviewing [the CIPA § 4] material, it was not with the goal or the prospect of, of those reports or summaries becoming a substitution for actual witness testimony. It was more in the guise of looking at it as discovery material, which I think is quite different.
>
> Given the unique job which the Fourth Circuit has given me, which is to oversee the structuring of this substituted testimony, I am not comfortable doing that without the full involvement of defense counsel in the fashioning of proposed substitutions, and I don't find that the defense counsel can give me a completely informed view of those substitutions without having seen the exact same material that the Court and the prosecution has seen, and therefore, as I indicated earlier, when I warned you-all that I was staying everything because I felt once we unstayed it, there were some serious implications to the discovery process in this case, I am going to grant the defendant's motion for reevaluation of those orders.

April 26 Transcript at 20.

Thus, the directives in May 2 Order dealing with the CIPA § 4 filings are necessary in order for the District Court to craft the most accurate possible substitutions, which, in turn, is necessary in order to satisfy Moussaoui's constitutional rights and to effectively implement the Fourth Circuit's mandate. As such, the reevaluation ordered by the Court will enhance the reliability and completeness of any proposed substitutions and does not violate the mandate of the Court of Appeals or contravene standing CIPA precedent.

CONCLUSION

For the foregoing reasons, and any others adduced at a hearing on the Motion, the Defendant respectfully requests that the Government's Motion For Reconsideration

of the Court's Order of May 2, 2005, Establishing, *Inter Alia*, Procedures for Implementing the Mandate of the Court of Appeals be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer on this 23rd day of May 2005.[9]

/S/
Kenneth P. Troccoli

[9] Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to defense counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Moussaoui until counsel receive confirmation from the CSO and/or classification specialist that they may do so.