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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION
TO RECONSIDER COURT'S ORDER PERMITTING THE GOVERNMENT
TO WITHHOLD PLACES OF ABODE OF PROSPECTIVE WITNESSES

The United States respectfully opposes the defendant's motion for reconsideration of the Court's oral Order of June 25, 2002, regarding pre-trial identification of Government witnesses. The June 25 Order limited the disclosure requirement to witnesses' names and countries of origin, rather than anything more specific, because the Court found this case to be an extraordinary one at which witnesses could be at risk. Nonetheless, in seeking reconsideration, the defense asks that witnesses not only be identified in advance of trial, but that they be more precisely identified by street address and telephone number. The request should be rejected. The highly personal identifying information sought by the defense will put witnesses further at risk. Nothing has happened since the Court originally decided this issue to make this case a safer one in which to testify. On the contrary, the defendant has pleaded guilty to all counts, confirming all the allegations regarding his membership in al Qaeda and participation in terrorist plots to kill Americans. That defense counsel are now back in the case is of little significance, given the

magnitude of the risk to witnesses and the history of leaks to the media in this case. Accordingly, for the reasons that follow, the Court should deny the motion for reconsideration.

Title 18, United States Code, Section 3432 covers pretrial disclosure of witnesses and potential jurors to defendants in capital cases. The standard requirement is that three days before trial the Government must disclose names and places of abode. Id. However, no information at all needs to be disclosed if a court finds by a preponderance of evidence that the disclosure might jeopardize the life or safety of witnesses or potential jurors. Id.

In this case, the Court has ordered a completely anonymous jury under Section 3432. In addition, by its June 25 Order the Court limited disclosure of witnesses to names and countries of origin, stating:

> I do find that this is an extraordinary case, that the charges involved in the indictment are extremely serious and suggest that there could be risk to witnesses in this case.
>
> I have already indicated we will be using an anonymous jury because of the nature of the case, and I think this ruling is consistent with that approach to this case.

6/25/02 Tr. at 30-31. Of course, the Court could have absolved the Government of any disclosure obligation regarding witnesses, for the same reasons it ordered an anonymous jury. But the Court required a sealed witness list from the Government, identifying witnesses' names and country of origin, though not their place of abode.

The defense acknowledges that motions to reconsider are disfavored, yet asks the Court to reconsider without providing a meritorious justification. In fact, the only significant change in circumstance since the Court's original ruling is that the defendant pleaded guilty, a fact not even mentioned by the defense. By his guilty plea, the defendant admitted that he is a member of al

Qaeda, that he trained to kill Americans, and that he traveled across the globe as part of a plot to kill Americans by flying planes into American buildings. Moreover, the defendant admitted that he "managed an al Qaeda guesthouse in Kandahar," which was "a position of high respect with al Qaeda," and that he "communicated directly with Bin Laden and Abu Hafs al Masri." Statement of Facts at 2. Thus, the allegations are no longer just allegations; the defendant is now an admitted high-level member of al Qaeda, dedicated to the murder of Americans. The defendant's admissions provide additional justification for the June 25 order. See, e.g., United States v. Lee, 374 F.3d 637, 651-52 (8th Cir. 2004) (upholding ruling that Government did not have to provide witness list in prosecution of member of white supremacist organization); United States v. Edelin, 128 F. Supp. 2d 23, 31-32 (D.D.C. 2001) (ruling that the Government need not provide a witness list in prosecution of violent drug organization).

In addition, since June 25, 2002, the defendant has filed numerous pro se pleadings in which he has threatened to kill Government officials, his own lawyers, and Your Honor. In his guilty plea — which was open to the public — the defendant pronounced to the world that he "will fight every inch against the death penalty." 4/22/05 Tr. at 26. It is entirely conceivable that these very public pronouncements reached the defendant's confederates. The chance that confederates might rally to the defendant's aid in dangerous ways is too great a risk to take, a conclusion made clear by the June 25 order.

Disregarding the present circumstances, the defense not only asks the Court to reverse itself, but also requests the unprecedented — and, we submit, outrageous — step of ordering the Government to furnish telephone numbers for its witnesses. The heart of the defense's claim is that there is no security concern because it is now defense counsel, and not the defendant himself,

who will receive the information in the first instance. The contention is meritless. First, the Court based its order not just on the defendant's public statements about Americans, but also on the nature of this case. As the Court explained, "the charges involved in the indictment are extremely serious and suggest that there could be risk to witnesses in this case." 6/25/02 Tr. at 30. As noted, the defendant has now pleaded guilty to those allegations, so the risk that existed before can only be viewed now as more significant.

The status of defendant's representation does not alter this analysis. That defense counsel would receive the addresses and telephone numbers does not eliminate the threat to the witnesses. The defendant's case has received ample media attention, much of which is nearly instantaneous because of the internet. The press accounts, unfortunately, have on many occasions included leaks of non-public information. We do not mean to challenge the integrity of defense counsel, but the existence of past leaks is now an omnipresent consideration in this case, which requires an abundance of caution when it comes to witness safety. The June 25 Order is a proper exercise of that caution.

The defendant's citations to United States v. Lentz and United States v. Wills are of little avail.[1] Without diminishing the severity of the crimes committed by the defendants in those cases, neither defendant was a member of an international terrorist organization dedicated to the killing of innocent Americans. And neither of them had pleaded guilty at the time the witness

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[1] The defense claims that these cases are good examples of cases where the Court disclosed to the defendant only the names of the Government's witnesses while requiring the Government to provide defense counsel with the addresses and telephone numbers of its witnesses. In fact, the Court in Wills did *not* order the disclosure of the witnesses' addresses and telephone numbers. Instead, the Court ordered that standby counsel receive only "the county or city of residence" for the witness. Wills Order at 2.

list issue arose. Thus, any comparison between this case and the prosecutions of Lentz and Wills is simply meaningless.

The defense's request actually goes beyond what the statute normally requires. Section 3432 does not require the Government to provide the street address and telephone number for each witness. All the statute requires in the normal case is place of abode. The place of abode means the county or township of residence for the witness, not his or her street address. United States v. Insurgents of Pa., 2 U.S. (2 Dall.) 335, 342 (1795); United States v. Walker, 910 F. Supp. 837, 861 (N.D.N.Y. 1995). See also United States v. Wills, Criminal Number 99-396-A, Order dated July 31, 2001 at 2 (E.D. Va. 2001) (Government need only provide county or city of residence); but see United States v. Sampson, 335 F. Supp.2d 166, 176 (D. Mass. 2004) (requiring production of home addresses of agents). Defendant brazenly states: "It is equally true, however, that the Court has the authority to order the disclosure of additional information, including the home address and telephone number of the Government's witnesses." Motion at 6-7. Defendant, however, conspicuously fails to provide any authority for this statement.

In any event, defendant's contentions regarding the necessity of obtaining witness addresses and telephones do not hold water. The purpose of Section 3432 is "to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense." United States v. Nguyen, 928 F. Supp. 1525, 1551 (D. Kan. 1996) (quoting United States v. Chandler, 996 F.2d 1073, 1098 n.6 (11th Cir. 1993)). In this case, the Government has already produced an unprecedented amount of discovery, which the defense team — which includes an army of lawyers and investigators — has worked on for more than three years. Additionally, defense counsel have received the reports from the 9/11 Commission and the Office of Inspector

General from the Department of Justice which, as a practical matter, have served as a virtual roadmap for preparing the defense. The defense's claims of need for the addresses and telephone numbers pales in comparison to the prospective danger to the witnesses that disclosure would entail. See United States v. Edelin, 128 F. Supp. 2d at 31 (discovery provided defense counsel with sufficient ability to "effectively challenge the credibility of the government's witnesses and secure the defendant's right to a fair trial").

Finally, it bears remembering that in 1994 Congress amended 18 U.S.C. § 3432 to add the exception at the same time that Congress either passed the statutes for which the defendant has been convicted or amended existing statutes to authorize death as a penalty. By doing so, Congress understood that terrorism cases, such as the current prosecution, represent a unique danger to witnesses and, therefore, Congress authorized courts to withhold the names and places of abode of potential witnesses upon a proper showing by the Government. In this case, where the defendant has pleaded guilty and admitted his role as a high-level member of al Qaeda, the preponderance of the evidence standard set forth in Section 3432 for limiting disclosure is certainly met. There is no reason for the Court to reverse its earlier ruling and gamble with the

safety of the Government's witnesses.

Accordingly, the defendant's motion for reconsideration should be denied.

Respectfully submitted,

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By: /s/

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Date: September 2, 2005

CERTIFICATE OF SERVICE

I certify that on the 2d day of September, 2005, two copies of the foregoing Government pleading was served, by facsimile and regular mail, on the following counsel:

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