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	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS THE DEATH NOTICE AND FOR OTHER RELIEF

Defendant Zacarias Moussaoui ("Moussaoui"), through counsel, files this memorandum in support of his motion to dismiss the death notice and for other relief.

FACTUAL BACKGROUND

On February 22, 2006, approximately two weeks before the start of the trial in this case, the Court entered an Order directing in part, that:

> Fed. R. Evid. 615 (Exclusion of Witnesses) be and is in effect for non-victim witnesses who may be called to testify in this proceeding. Such witnesses may not attend or otherwise follow trial proceedings (e.g., may not read transcripts) before being called to testify. This restriction does not apply to government summary witnesses Aaron Zebley and Jim Fitzgerald. Consistent with 18 U.S.C. § 3593(c), this restriction also does not apply to victim-witnesses, who may attend or follow any portion of the trial before testifying.

Order at 1 (dkt. no. 1599).

The sentencing trial commenced in this case on March 6, 2006. Today, March 13, 2006, at approximately 9:00 a.m. before the start of the day's proceedings, the Government informed the defense by letter, of a "possible violation of the sequestration order as it relates to FAA witnesses." The letter stated that the Government "learned that Carla Martin, an attorney for the Transportation Safety Administration, provided a copy of the transcript from the first day of trial to one of the witnesses from the FAA,

Lynn Osmus, [and that] over the weekend [the Government learned] that Ms. Martin sent e-mails with the transcript from the first day to the following potential witnesses." The letter then listed the names of Lynne Osmus, Claudio Manno, Lee Longmire, Pat McDonnell, Robert White, Matthew Kormann, and John Hawley.[1]

Trial proceedings commenced this morning at 9:30 a.m. with the Court addressing the issues raised in the March 13 letter. The Court stated "[i]n all the years I have been on the bench, I have never seen such an egregious violation of a court's rule on witnesses as [has just] occurred." Trial Tr. at 1002. The Court noted that "there are seven witnesses to whom improper communications were made." *Id.* at 1014. "[T]he other problem that occurred here is that in many cases, the e-mails were being sent by this attorney to more than one witness at a time; that is, they were addressed to one witness and copied to another . . . [leading] to . . . the very real potential that witnesses are rehearsed, coached, or, otherwise, that the truth-seeking concept of a proceeding is significantly eroded." *Id.* at 1015.

In assessing the impact of the sequestration violation on the defendant's fair trial rights, the Court additionally noted that "we already have a significant limitation on the cross-examination rights of the defendant through the use of stipulation substitutions for combatant witnesses," and the "additional problem in this record that on . . . Thursday, the following question was asked of the witness, "At any time from the time [the defendant] spoke to you on August 17 until September 11, did he ever call you up or take any outreach to you to say, hey, I lied, let me fix this?" *Id.* at 1015. With respect to

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[1] Osmus, Manno and Longmire are Government witnesses, and McDonnell, White, Kormann and Hawley are defense witnesses.

the latter error, the Court characterized it as "an inappropriate comment on a defendant's right to invoke his Fifth Amendment right to remain silent." *Id.* at 1016.

In assessing the potential harm to the defendant's fair trial rights for these "two very serious problems," the Court requested briefing from the parties[2] and stated "with this amount of mess in the record, it is very difficult for this case to go forward." *Id.* at 1016. The defendant wholeheartedly agrees with the Court's assessment, and herewith renews his motion to strike the death notice in this case, or in the alternative, to exclude the Government's FAA witnesses (Lynne Osmus, Claudio Manno, and Lee Longmire) from testifying in this case.

ARGUMENT

I. THE CUMULATIVE EFFECT OF THE VIOLATION OF DEFENDANT'S FIFTH, SIXTH, AND EIGHTH AMENDMENT RIGHTS MERITS STRIKING THE DEATH NOTICE OR, IN THE ALTERNATIVE, GRANTING OTHER RELIEF.

A. The Defendant's Fair Trial, Sixth, and Eighth Amendment Rights

Fundamental notions of due process guarantee to every criminal defendant the right to a fair trial. *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) ("[T]he Due Process Clause guarantees . . . fairness in a criminal trial."). This right does not just belong to the Defendant. Society and the criminal justice system as a whole have a stake in ensuring that verdicts and sentences are fair. The right to a fair trial has been described as "the most fundamental of all freedoms [that] must be maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Indeed, "the denial of [a fair trial] is

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[2] The Court also ordered the Government to produce to the defense the Government's ex parte letter to the Court informing it of the sequestration violation and the emails referenced therein.

repugnant to the conscience of a free people. [It is among those rights that] express those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' and are implied in the comprehensive concept of 'due process of law'." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring in part) (citations omitted).

It is for these reasons that the Government and the district court are independently and jointly responsible for ensuring that Moussaoui receives a fair trial, or more pointedly, that an unfair trial not be permitted to proceed. *See United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); *Wheat v. United States*, 486 U.S. 153, 160 (1988). Intimately connected to Moussaoui's fair trial rights, is his Sixth Amendment rights, which include the rights to confront the Government's witnesses and compel the testimony of favorable witnesses.

Since the death penalty is being sought in this case, principles of capital jurisprudence also must be considered. The most basic tenets of that jurisprudence are

that death is different, see, e.g., *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); that capital cases demand heightened reliability, *see Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) (plurality opinion), *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), and, consequently, special procedures attend both the guilt and penalty phases of the trial, *Beck*, 447 U.S. at 638, *Giarratano*, 492 U.S. at 8; and that the Defendant may not be restricted in the presentation of relevant, mitigating evidence, or in his ability to confront the evidence against him. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida,* 430 U.S. 349, 361 (1977). In addition, application of the Eighth Amendment must be informed by "the fundamental respect for humanity underlying the Eighth Amendment." *Woodson*, 428 U.S. at 304. Indeed, "'[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (citation omitted).

B. The Sequestration Order Was Violated In An Effort To Coach The Witnesses To Win A Death Penalty In This Case.

The Government suggested in remarks to the Court this morning, that Ms. Martin essentially misunderstood the arguments that the Government made in its opening statement. From that point of reference, the Government suggested that the witnesses were not coached or influenced because the government does not intend to make the arguments that she advanced. Thus, it was argued, the defense has suffered no prejudice as a result of the violation of the Court's order. This argument is baseless.

There is no equivocation in the opening statement about these matters. The Government's opening clearly states that the evidence in the case will be that "CAPPS would have been changed to look not for explosives but for small knives and box cutter, **and that would have prevented the terrorists from getting on the plane and getting on the plane with the weapons they used to turn the aircraft into weapons to kill Americans.**" Trial Tr. at 45, line 7 (emphasis added). The Government argued that it "**would have been a very straightforward effort for the FAA to keep those hijackers and to keep anyone with a knife or a box cutter off a plane.**" *Id.* at 45, line 18 (emphasis added). It argued that the FAA was not **"concerned about people taking over a plane with a primitive weapon."** *Id.* at 44, line 13 (emphasis added).

This Court cannot, based upon this record, find that Ms. Martin, as the Government essentially argues, has a delusional misconception about what the Government claimed it could prove. That is, that the attacks would never have occurred had Moussaoui not lied; that the FAA would have played "defense" by keeping the hijackers off of the planes with their box cutters and other primitive weapons. This is one portion of the causation issue that is central to this case. Evidence that it was merely possible that these efforts might have prevented death would plainly not support a death sentence.

The emails that Ms. Martin has sent are shocking in two respects. First, it is clear that she knew that what she was doing was incorrect - she even sought to avoid the paper trail that now exists by telling someone not to respond to her e-mail. *See* March 7, 2006 (6:32 pm) email to Lynne Osmus from Carla Martin. Ms. Martin has

been present for almost each and every hearing in this case including the most sensitive hearings. These e-mails disclose that she is intimately involved in the substitution process. She is, as a matter of fact and law, an attorney in this case and the Government, we now know, even attempted to invoke the work product doctrine in an effort to keep this critical information from the defense. Having invoked the privilege, the government certainly cannot claim that her conduct is not chargeable to the same government.

Second, it is equally shocking that the FAA lawyer is puzzled by some of the arguments made by the government and this is not because she misunderstands anything. It is the realization that the government has offered to prove some facts that the FAA attorney in the best position to know believes cannot be proven that sparks her crusade to coach witnesses and the government's prosecutors as to the best way to recover and still win the death penalty. ("Claudio- you need to read this transcript of the prosecutor's opening statements - it is all about the FAA and how it would have caught the hijackers and prevented 9/11. I believe there are more than a few errors here.") March 7, 2006 (3:06 pm) email to Claudio Manno from Carla Martin with a cc to Lynne Osmus. Martin goes on to say in another email:

> Lynne [Osmus] - let me put it this way: my friends Jeff Ellis and Chris Christenson, NY lawyers rep. UAL and AAL respectively in the 9/11 civilization, (and rep. Ed S. And Larry W. Here) all of us aviation lawyers, were stunned by the opening. The opening has created a credibility gap that the defense can drive a truck though. There is no way anyone could say that the carriers could have prevented all short bladed knives from going through-Dave MUST elicit that from you and the airline witnesses on direct, and not allow the defense to cut your credibility on cross, (just as they did yesterday with the FBI witness) by saying, "do you

> really believe, as the prosecution has stated, that all knives could have been found, when there are x-thousands of domestic flights daily in the US, that even how post 9/11 the screener detection rates are very law, and that's all it would have taken to prevent 9/11? That's all he would really need to say.

March 8, 2006 (11:52 am) email to Osmus from Martin.

Ms. Martin is plainly seeking to coach these witnesses and shape their testimony by reference to Agent Anticev's testimony. She is warning them that the defense will exploit certain areas of testimony. She elicits responses, such as from Ms. Osmus, who now knows to be prepared for questions about screening by responding that there was much more that would have been done. She acknowledges that much of the Government's case is simply unsupported by any evidence and that the hijackers could have used many weapons that were already and still are on planes. March 7, 2006 (6:32 pm) email to Osmus from Martin with a cc to Manno. She even suggests a different opening statement which obviously is a means to tell the witnesses what to do. The point is that now that these events have occurred, these witnesses cannot be considered untainted in any regard.

C. Violation Of The Court's Sequestration Order

Federal Rule of Evidence 615 provides that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Fed. R. Evid. 615. As acknowledged by the Advisory Committee, the rule "has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." *Id.* advisory committee notes. This Rule was extended by the Court's February 22, 2006

Order that indicated that the no witness, other than non-victim witnesses "may attend or otherwise follow trial proceedings" including the explicit example of prohibiting the reading of trial transcripts. "The aim of imposing 'the rule on witnesses,' as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 89 (1976) (citing Wigmore, Supra, s 1838; F. Wharton, Criminal Evidence s 405 (C. Torcia ed. 1972)); *see also United States v. Cropp*, 218 F.3d 310,363 (4th Cir. 1997). Indeed, the Supreme Court has stated that "[t]he judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony." *Geders v. United States*, 425 U.S. 80, 87 (1976).

Likewise, the Fourth Circuit has explained that: "The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court." *United States v. Leggett*, 326 F.2d 613, 613-14 (4th Cir. 1964); *accord Opus 3 Ltd. v. Heritage Park, Inc.*, 91 F.3d 625, 628 (4th Cir. 1996) ("The merit of such a rule has been recognized since at least biblical times."). "Scrupulous adherence to this rule is particularly necessary in those cases in which the outcome depends on the relative credibility of the parties' witnesses." *United States v. Farnham*, 791 F.2d 331, 335 (4th Cir. 1986).

1. A violation of the Sequestration Order has occurred

Providing a witness a daily copy of a trial transcript unquestionably violates Rule 615. *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981). In *Miller*, the defendants in a civil case provided daily transcripts of a witness' testimony to a proposed expert, and "[t]he district judge commented at trial that in the five years he had been on the bench he had never heard of allowing witnesses to read daily copy." *Id.* Moreover, "[w]hen discovered on the ninth day of trial, the court found this to be a clear and intentional violation of the sequestration order and refused to allow Professor Sullivan to testify." *Id.*

The Fifth Circuit upheld this ruling, explaining that "[t]he purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion." *Id.* (citing *Leggett*, 326 F.2d at 613). In fact, the court noted that allowing a witness to read a transcript of trial testimony may constitute an even graver violation of the rule than if the witness had simply heard the witness testify: "The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony." *Id.*

2. The remedies for violation of a Sequestration Order

In *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (citing *Holder v. United States*, 150 U.S. 91 (1893)),[3] the Fourth Circuit noted that "a trial court may employ one of three remedies when a sequestration order has been violated": (1) sanction of the witness; (2) instructing the jury that it may consider the violation in regards to the issue of credibility; and (3) exclusion of the witness' testimony. The Supreme Court also has recognized that dismissal is an appropriate remedy in certain circumstances. *Id.*

a. Dismissal

Relying in large part on the Supreme Court's opinion in *Holder*, the Fourth Circuit has identified only three possible sanctions as a result of the violation of a sequestration order. Nonetheless, the Third Circuit has noted that in the civil context, dismissal of a complaint may be appropriate "in a most egregious situation," *Pickel v. United States*, 746 F.2d 176, 182 (3rd Cir. 1984), and the Fifth Circuit has stated that district courts have the discretion to order a mistrial. *United States v. Womack*, 654 F.2d 1034, 1040 (5th Cir. 1981) ("The determination whether to declare a mistrial or to order a new trial for violation of Rule 615 is a matter within the trial court's sound

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[3] In *Holder* the Supreme Court acknowledged that trial courts enjoy broad discretion as to sanctions for violation of an exclusion order, but also stated:

> If a witness disobeys order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although *the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.*

150 U.S. at 92 (emphasis added).

discretion."); *accord* 29 Wright & Miller, *Federal Practice & Proc.*, § 6246 (2005) ("Imposition of [serious sanctions such as a mistrial] may be appropriate where the prejudice associated with violation of the exclusion order cannot otherwise be mitigated by permitting attack on the witness' credibility or where the violation was procured with the connivance of a party."). *See also United States v. Jimenez*, 780 F.2d 975, 978 (11th Cir. 1986). Although dismissal is a drastic remedy, it is employed where the prejudice associated with the violation of the exclusion order cannot otherwise be cured.

On March 7, Tuesday afternoon, Martin received the transcripts of the government and defense openings from the law firm representing various government witnesses from the airlines. She immediately sent the transcripts to Claudio Manno and Lynne Osmus, the government's FAA witnesses who were expected to provide the evidence supporting the second half of the government's argument that the FAA would have prevented the attacks if Moussaoui had not lied.

Martin not only sent the transcripts but in an e-mail to the witnesses expressed her concern about errors in the government's opening regarding the FAA and "how it could have caught the hijackers and prevented 9/11." Martin then sent an e-mail to Osmus and Manno pointing out "some the highlights that she is not happy about" with quotes from the openings by the parties. A few minutes later, Martin sends Osmus and Manno another e-mail discussing errors in agent Anticev's testimony regarding the FAA's knowledge of planes flying into buildings and how it should be corrected and further that the government's trial attorneys need to go over the testimony with them.

The e-mails Martin sent to Osmus on March 7 at 6:32 p.m. and on March 8 at 11:52 a.m. demonstrate that Martin knew exactly what she was doing and that she immediately realized that there were problems in the government's opening regarding the actions that the FAA would have taken. Martin intended to coach the witnesses to make sure that their testimony provided support for the government theory of the case. Martin clearly realized that what she was doing was unethical and improper because she told Osmus not to respond to the e-mail. Realizing that not only keeping knives off the planes was an essential part of the government's case but also keeping the hijackers off of the plane was essential, Martin stressed to Osmus the importance of testifying about the "multilayered system of aviation security" which would have "thwarted the attacks." There is no question that Martin understood the import of the error of the government's opening statement and sought a means to correct it by coaching Osmus, who was the government's FAA witness on the countermeasures that the FAA would have ordered the airlines to institute to prevent the attacks of 9/11.

When Osmus replies the next morning that 100 percent gate screening could not be accomplished in the short term, Martin e-mails Osmus that the aviation lawyers were stunned by the opening and that it created a credibility gap that the defense can drive a truck through. Martin then goes on to tell Osmus what must be elicited from Osmus and the other airline witnesses on direct to prevent the defense from cutting the witnesses credibility on cross-examination. The emphasis being the "multilayered system of aviation security."

In an e-mail on Wednesday morning, Martin informed Manno that she is having Matt, presumably Matt Kormann an FAA defense witness, conduct a search of various

documents to support the FAA's position on flying planes into buildings which she will review with Manno. Martin then discusses trial strategy with Manno regarding how to blunt various areas of questioning that the defense was expected to raise which might affect Manno's credibility. Clearly, the issues Martin raises, the Phoenix memo and the CIA briefing on "Islamic Fundamentalist learns to Fly" was information known to various government agencies, but not the FAA, prior to 9/11. Martin tells Manno how to respond to those areas to prevent the defense from exploiting the FAA's lack of knowledge.

After the e-mails with Manno, Martin then e-mailed Patrick McDonnell, a former FAA employee who is listed as a defense witness. Martin sent him portions of the opening statements of the parties indicating that there are big gaps that the defense can exploit and that he and the other FAA witnesses and the airline industry witnesses "will have their work cut out for them."

There is no way to un-ring the bell. The FAA witnesses have been tainted and no matter how much they contend that they can be truthful, they have been coached concerning the defects in the government's case and how to overcome those defects. Whether the witnesses would have testified concerning a multilayered system of aviation security which would have been ordered by the FAA as security countermeasures would have been implemented in a timely fashion by the airlines and whether those measures would have prevented 9/11 can no longer be determined. The witnesses have been instructed to testify in that fashion. The only alternative would be for them to testify that the countermeasures would not have been sufficient. That

testimony would result in a finding adverse to the proffered substance of the FAA witnesses' testimony.

Here, both government and defense witnesses were tainted in a deliberate attempt to influence the testimony by an attorney for the government. Although the three prosecutors are not at fault here, it is clear that Ms. Martin is a government attorney "working on the case" and that her conduct should be attributed to the government as a party.[4] This testimony is the key to the government's case in chief and Moussoaui's ability to respond to it. The violations here have infected the process in such a way as to render a cure other than dismissal as meaningless. This is especially true where other violations, pursuant to the Fifth Amendment, combine to threaten any possibility that Mr. Moussaoui will receive a fair trial in the context of a death penalty case where heightened reliability is otherwise required. For these reasons, dismissal is the appropriate sanction for the violations of the Court's February 22, 2006 Order.[5]

b. Exclusion of witnesses

The Fourth Circuit has held that "[t]he question of the exclusion of the testimony of the offending witness . . . depends upon the particular circumstances and lies within the sound discretion of the trial court." *United States v. Leggett*, 326 F.2d 613, 613-14 (4th Cir. 1964). Nonetheless, "[t]he remedy of exclusion is so severe that it is generally

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[4] This is affirmed by the letter of David Novak on March 13, 2006 indicating that Ms. Martin is an attorney working on the Prosecution team.

[5] Alternatively, if the Court concludes that dismissal is not the appropriate sanction, the exclusion of all government FAA witnesses tainted by Ms. Martin's actions is the only appropriate alternative remedy.

employed only when there has been a showing that a party or a party's counsel caused the violation." *Cropp*, 127 F.3d at 363.

The Seventh Circuit has held where a witness who has violated the rule is closely identified with counsel or a party, exclusion is an appropriate remedy, holding that "to prevent a witness who has violated the rule from testifying is a natural sanction for violation, especially where as here the witness is closely identified with the party or his counsel." *Rowan v. Owens*, 752 F.2d 1186, 1191 (7th Cir. 1984). *See also United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir. 1983); *and United States v. Calhoun*, 510 F.2d 861, 869 (7th Cir. 1975). Exclusion of a witness has also been found to be an appropriate sanction where no government collusion is present in the violation of the Rule by the First Circuit. *United States v. Magana*, 127 F.3d 1, 6 (1st Cir. 1997) (allowing exclusion of testimony for inadvertent violation by prosecutor).

In *Miller*, the Fifth Circuit held that excluding the witness who received copies of another witness's testimony was "reasonable for a violation of Rule 615." 650 F.2d at 1373; *see also United States v. Rhynes*, 218 F.3d 310, 325 (4th Cir. 2000) (Wilkins, J., concurring) (citing *Miller* for proposition that exclusion is appropriate for a "clear and intentional" violation of sequestration order); *accord United States v. Passarelli*, No. 90-5202, 1991 U.S. App. LEXIS 12754, at *7 (4th Cir. June 19, 1991) (citing *United States v. Gibson*, 675 F.2d 825, 836 (6th Cir. 1982)) ("'Particular circumstances' justifying exclusion are indications that the witness 'remained in court with the 'consent, connivance, procurement or knowledge' of the party seeking his testimony.")).

c. Contempt

"It has long been established that a judge may find a person who violates a sequestration order in contempt of court." *United States v. McMahon*, 104 F.3d 638, 642 (4th Cir. 1997).

d. Jury instructions

The Fourth Circuit noted in *Cropp* that the jury may be instructed that a violation of an exclusion order may be considered in evaluating a witness's credibility. 127 F.3d at 363.

D. Violation Of The Defendant's Fifth Amendment Right To Counsel And To Remain Silent

As the Court noted today, the above issues come on the heels of another significant problem caused by the government's commenting upon the defendant's invocation of his right to counsel and to remain silent. The defense sees these two problems as interrelated and insurmountable from a Constitutional perspective which together require that the Death Notice be dismissed. Even viewed in isolation, the events of last Thursday, by themselves, require at a minimum that the Court, having denied the Motion for a Mistrial, provide certain remedies, including a curative instruction in the form set forth below.

In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), the Supreme Court held that, even where the defendant testifies, the prosecution may not use the defendant's invocation of his right to remain silent to impeach him. In so doing, the Court stated, "while it is true that the *Miranda* warnings contain no express assurance that silence *will carry no penalty*, such assurance is implicit to any person who receives the warnings." *Id.*

(emphasis added). Here, the penalty the government sought to impose for Moussaoui's invocation of his rights was a far greater penalty than to seek to undermine his credibility - plainly stated, they seek his death. And, they seek that result in the most improper of manners by suggesting to the jury, both by the form of the question and the answer that Mr. Novak expected to obtain, that the silence that followed his invocation of his right to counsel should be considered as evidence that he intended to and did directly cause the deaths that occurred on September 11 by remaining silent.

There is nothing ambiguous about the rule in *Doyle*. Yet the exchange between counsel for the government and the witness, Harry Samit, demonstrated a predetermined intention to elicit the fact of Mr. Moussaoui's continued silence in the time period between when he invoked his rights and September 11, 2001.

> Q. And let me ask you this: During this time period where you're making all these efforts to get the search warrant that doesn't come until September 11, where is Mr. Moussaoui at this time?
>
> A. He's in the Sherburn County jail.
>
> Q. And at any time from the time he spoke to you on August 17 until September 11, did he ever call you up or make any outreach to you to say hey, I lied, let me fix this.

Trial Tr. at 952-53. Given the clarity of the rule in *Doyle*, counsel's actual attempt to defend his question as proper, the lack of spontaneity in delivering the question on direct-examination, while using a legal pad (nor surprisingly for such a lengthy examination) and the theatrics of the entire presentation, the defense respectfully

disagrees with the Court's initial conclusion that the violation was not premeditated.[6] Moreover, as defense counsel pointed out in connection with their mistrial motion, the violation went to the very heart of the death penalty eligibility phase in the most emotional capital case in the country's history.

The Court will not find cases that provide close guidance, since this is simply not a circumstance that has occurred before. What is clear, however, is that the Court's sustaining of the defense objection is inadequate to cure the violation. The fact is that there is no case in which a defendant has been found eligible for the death penalty based upon his failure to disclose the criminal plot, be it by a lie or his mere silence.

Standing on its own, the government's violation of the defendant's right to remain silent demands a sanction that will actually tend to provide that cure. Under the unique theory of this case, it is too easy to confuse "lies" with failing to tell the truth. Throughout this litigation and most notably in the testimony of Mr. Samit, the government attempted to blur this distinction. The fact is that the government is not entitled to rely on the what it could have done if Moussaoui had told the "truth," since it was not entitled to any information at all from Moussaoui, as it has often acknowledged. Rather, it is only entitled to rely on what it could have done if he had not lied. By confronting Agent Samit (and others) with the Statement of Facts, and asking what they

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[6] The following morning, defense counsel delivered a letter to Mr. Novak demanding that he preserve that portion of his notes for his examination of Mr. Samit, as well as any notes of the latter. The defendant would now request that the Court direct Mr. Novak to produce those notes *in camera* so that the Court can determine if they are relevant to resolving the question of the wilfulness of the government's conduct. If the Court determines that they are relevant, it should provide them to the defense under seal.

could or would have done if they had received that information from Mr. Moussaoui, the government has wrongfully attempted to convert the question of eligibility into "whether the victims died as a direct result of Moussaoui's failure to tell the truth in response to his interrogators?"

The defendant proposes the following remedies for the government's *Doyle* violation:

(1) Strike from Gov't Ex. 1 (the Statement of Facts) those portions which address "the planes operation" or his brother's going forward with the plot (a statement which the Court has recognized is inherently ambiguous);

(2) Strike those portions of Agent Samit's testimony in which he was asked about those portions of the Statement of Facts and what he would have done had Mr. Moussaoui told him those "truthful" statements; and

(3) provide the attached curative instruction to the jury at this time.

Although these steps will not cure the damage, they will take a substantial step towards remedying the Government's flagrant violation of the defendant's Fifth and Eight Amendment rights.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that his motion to strike the death notice or in the alternative for other relief be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 13th day of March 2006, 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.

/s/
Kenneth P. Troccoli

DEFENDANT'S PROPOSED CURATIVE INSTRUCTION

You will recall that on Thursday, counsel for the government asked the witness, Harry Samit, whether the defendant, Mr. Moussaoui, ever contacted the FBI after his interrogation to correct his misstatements. Because the Fifth Amendment to the Constitution of the United States gave Mr. Moussaoui the right to remain silent, I sustained his counsel's objection, and instructed you to disregard the question. Since then, I have decided that the importance of this issue requires that I give you an additional instruction. As you know, the government's primary contention in this proceeding is that Mr. Moussaoui lied to the FBI after he was arrested in Minnesota in August of 2001, and that those lies constitute "acts" that directly resulted in the deaths of September 11. In evaluating this contention, however, you must keep in mind that under the Fifth Amendment to our Constitution, a criminal suspect like Mr. Moussaoui has the right to refuse to incriminate himself, and may simply remain silent in the face of government questioning. Moreover, if a suspect decides to give up his right to remain silent and answer questions, he has the right to stop answering questions and to resume his silence whenever he wishes. Because the right to remain silent is an important constitutional right, no one may be punished for exercising it. That is why I sustained defense counsel's objection to Mr. Novak's question on Thursday, and why I am telling you in the strongest possible terms that you must not regard Mr. Moussaoui's decision to stop talking to the FBI as a crime, or as any part of the government's case against him. In that connection, there is something else to keep in mind about the government's contention that Mr. Moussaoui should be deemed eligible for the death penalty because his false statements to the FBI directly resulted in the death and destruction that occurred on September 11. No individual who is in custody has the right to lie to the government in response to questioning. But the government also does not have a right to truthful answers, because any suspect in custody has the right to provide no answers at all. Rather, the government's only right is not to be lied to. Therefore, in deciding what, if anything, resulted from any false statements that Mr. Moussaoui may have made, you may not simply assume that Mr. Moussaoui would have told the truth and incriminated himself had he not made false statements to the FBI. Rather, you must assume (unless the government can prove otherwise) that he would have done what he eventually did--namely, that he would have asserted his constitutional right to say nothing at all. The practical significance of this is that in measuring the effect of Mr. Moussaoui's false statements to the FBI, you may not compare what the government did (and failed to do) after he made those statements with what the government would have done had Mr. Moussaoui told the FBI everything he knew. Rather, you must compare what the government did (and did not do) after hearing his false statements with what the government would have done if he had simply asserted his Fifth Amendment right not to incriminate himself, and had said nothing. Under no circumstances may you treat Mr. Moussaoui's failure to affirmatively incriminate himself as any part of the government's case against him. If you find, moreover, that the government was no worse off after hearing his lies than it would have been had he refused to say anything, then you must conclude that his false statements did not "directly cause" the death of any person. I had not intended to explain all of this to you until the time came for you to deliberate on the factual issue now before you. However, the government's improper question to Mr. Samit last Thursday has persuaded me of the need to explain Mr. Moussaoui's right against self-incrimination to you now, rather than

waiting until the end of the case. In listening to the remainder of the testimony in this matter, you are to keep in mind the limits of the government's right to demand responses to its questions as I have now explained them to you.