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 MEMORANDUM
IN OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS THE DEATH NOTICE AND/OR EXCLUSION OF WITNESSES

As directed by the Court, the United States respectfully submits this memorandum to address the defendant's motion to dismiss the death notice and/or exclude witnesses based upon the violation of the sequestration order by Carla Martin, Senior Trial Attorney for the Transportation Safety Administration, and the Government's question of Special Agent Samit regarding the defendant's failure to correct his lies at the time of interview. For the reasons that follow, the United States respectfully submits that, despite the violation of the sequestration order by Ms. Martin, dismissal of the death notice is unwarranted and less draconian remedial measures are available to cure any possible taint to the witnesses. Further, the question asked of Special Agent Samit was proper and, even if the Court were to find otherwise, the Court's sustaining the defense objection to the question along with the admonition given to the jurors cures any possible prejudice.

There is no sanction more severe than dismissal of the Government's case — or in this context, the death notice. Dismissal would be particularly inappropriate here, where there has been no suggestion of bad faith on the part of the prosecution team. The violation of the

sequestration order, while egregious, was the result of the inept actions of a TSA attorney and unforeseeable to the prosecution. We believe that that fact will be borne out at tomorrow's hearing, to the extent there is any question now. The objectionable question, as discussed below, was spontaneous, asked in the heat of intense direct examination, and was, in fact, not improper. In these circumstances, where there has been no prosecutorial bad faith and where remedies exist to preserve the defendant's fair-trial rights, dismissal of the death notice is simply too extreme a sanction and the public should not be deprived of its right to see this trial proceed to verdict.

A. Violation of the Sequestration Order

As discussed previously, the Court's sequestration order was egregiously violated in this case. The TSA attorney, Carla Martin, sent by e-mail to seven FAA witnesses electronic copies of the opening statements and the first day of testimony. Her e-mails called to the attention of these witnesses certain portions of the transcripts so as to better prepare the witnesses for questions by the defense. Three of the witnesses were identified as potential Government witnesses; four were identified by the defense. Ms. Martin's actions were inexcusably wrong and have affected this case. The actions, however, did not contaminate the witnesses' testimony to a degree that would require their exclusion from the case, much less an outright dismissal of the death notice.

We have found no published decision dismissing a case for violation of the sequestration rule — death penalty or otherwise. Rule 615 of the Federal Rules of Evidence governs sequestration orders. Under that rule, the appropriate range of sanctions run from exclusion of the testimony of the affected witnesses to disclosure of the issue to the opposing party combined with uninhibited cross-examination. Any sanction for a violation of sequestration must be

proportional to the severity of the offense. *United States v. Rhynes*, 218 F.3d 310, 321 (4th Cir. 2000); *Doyle v. Murray*, 938 F.2d 33, 34 (4th Cir. 1991) (noting that sanctions must be "fixed in proportion to the severity of a party's or lawyer's misconduct"). "The Supreme Court has long recognized that a trial court may employ one of three remedies when a sequestration order has been violated: sanction of the witness; instructions to the jury that they may consider the violation toward the issue of credibility; or exclusion of witness testimony." *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (citing *Holder v. United States*, 150 U.S. 91 (1893)).

The Fourth Circuit has explained that "[t]he remedy of exclusion is so severe that it is generally employed only when there has been a showing that a party or party's counsel caused the violation." *Id.* at 363 (citations omitted). The standard for exclusion generally requires a showing of some form of "connivance" or bad faith on the part of the party violating the sequestration rule, and actual prejudice to the other party. *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th Cir. 1981) (exclusion of testimony is "a serious sanction, appropriate only where the defendants have suffered actual prejudice, and there has been connivance by the witness and counsel to violate the [sequestration] rule").[1] Potential prejudice can readily be cured by permitting cross-examination on the issue of the witness's improperly

---

[1] "It is well-established that a violation of a sequestration order does not automatically bar a witness's testimony." *United States v. Green*, 305 F.3d 422, 428 (6th Cir. 2002). Rather, most courts agree that to justify exclusion of a witness there should be some indication that the witness violated the order "with the consent, connivance, procurement, or knowledge of the party seeking his testimony." *Id.* (quotations and citation omitted); *see also United States v. Solorio*, 337 F.3d 580 (6th Cir.2003), *cert. denied* 540 U.S. 1063 (2003) (holding that while a government witness may be proceeded against for contempt and his testimony is open to comment to jury by reason of his conduct, his violation of sequestration order did not warrant exclusion of witness's testimony as government had no knowledge of clandestine meeting between witnesses).

acquired knowledge. *See United States v. Friedman*, 854 F.2d 535, 568-69 (2d Cir. 1988) (affirming district court's refusal to exclude witnesses who had improperly read portions of the trial transcript before testifying as cooperating witnesses because, in part, the "government did not cause" the witnesses to read the transcripts and the "whole episode was revealed to the jury in defense counsel's attacks on the witnesses' credibility").

In *United States v. McMahon*, 104 F.3d 638, 640-42 (4th 1997), the Fourth Circuit affirmed a district court's finding that a witness was in criminal contempt for violating a sequestration order under Rule 615, as well as its imposition of a sentence of thirty days imprisonment. The witness (who was the father of the defendant), after having been instructed to leave the courtroom under the district court's sequestration order, sent his secretary into the courtroom to take notes and bring him transcripts of the daily proceedings. The district court did not exclude the witness's testimony because the defendant — the actual party in the case — had not directed or aided any violation of the sequestration order. Instead, as a remedy for the witness's violation, the district court allowed the government to cross-examine the witness as to his secretary's activities. *Id.* at 640–41. In addition, later on, the court found the witness in criminal contempt. *Id.* at 642.

Here, as in the cases cited above, there is no need to exclude the witnesses in question, much less dismiss the death notice. The defendant's fair-trial rights will adequately be preserved by revelation to the defense of the facts and circumstances of the violation — which the Court has already ordered and which will be even further fleshed out at tomorrow's hearing — and cross-examination (or direct examination, in the case of witnesses called by the defense). We anticipate that the hearing will establish that at least one witness, Lynn Osmus, was not

influenced in any way by Ms. Martin's communication to her. We expect Ms. Osmus to testify that she notified the prosecution upon reading Ms. Martin's e-mail, and did not read the attached trial transcript. Ms. Osmus's e-mail response to Ms. Martin has been disclosed to the defense under the Jencks Act. In addition, we expect that only two witnesses — one a potential Government witness (Claudio Manno) and a potential defense witness (Matthew Kormann) — will testify that they read the portions of the transcript that were sent to them by Ms. Martin.

The Government reiterates that Ms. Martin's conduct was a flagrant violation of the sequestration rule. Egregious as it may have been, however, the prosecution team was uninvolved in the transgression and, while we are dismayed that it occurred, it is a violation that can be remedied. Whatever effect Ms. Martin's e-mails had on the witnesses can be brought out by the defense during their examinations of the witnesses. There is no basis to dismiss the death notice and there is no reason to strike witnesses.

B. The Question Addressed to Special Agent Samit

The defense has moved for a mistrial based upon a question the Government asked Special Agent Harry Samit during direct examination on March 9, 2006. The question followed Special Agent Samit's testimony that the defendant knowingly waived his *Miranda* rights, his administrative immigration rights, and his consular notification rights. N.T. 866-69. Thereafter, the defendant told Special Agent Samit and his partner a series of lies. N.T. 873-909. The interview stopped when the defendant "asked to speak to an immigration lawyer." N.T. 909; see also N.T. 922 ("we continued the questioning until he invoked his right to counsel . . ."). Later during the testimony, the following sequence occurred:

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?

> Mr. MacMahon: Your Honor, I object to that. He invoked his right to counsel.
>
> The Court: I'm sustaining that objection. Mr. Novak, that was not proper.
>
> Mr. Novak: All right.
>
> The Court: The jury should disregard the question.

(N.T. 952-53). Notably, the witness never answered the question and this question was isolated in nature. *Id.*

Defense counsel initially objected on Sixth Amendment grounds, arguing that the defendant had "invoked his right to counsel." Although the Court sustained the objection, the question did not offend the Sixth Amendment because the defendant had not yet been charged with an offense; instead, he was merely detained for being an overstayer, which is not a criminal offense. Moreover, even if he was detained for a criminal immigration offense, the case law is clear that Sixth Amendment is "offense specific." *Texas v. Cobb*, 532 U.S. 162, 162 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) ('The Sixth Amendment right . . . is offense specific. It . . . does not attach until a prosecution is commenced . . ."); *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (invocation of right to counsel does not attach for other uncharged offenses); *United States v. Kidd*, 12 F.3d 30, 32-33 (4th Cir. 1993) (citing *McNeil* and *Moulton*, "the Sixth Amendment . . . is offense-specific"). Thus, the Government's question did not offend the Sixth Amendment.

Apparently realizing that no Sixth Amendment violation occurred, the defense turned to

the Fifth Amendment to support their mistrial motion. N.T. 990. Relying on *Doyle v. Ohio*, 426 U.S. 610 (1976), the defense argued that the Government may not comment upon the defendant's invocation of his Fifth Amendment rights. The Court in *Doyle* ruled that a violation of the Fifth Amendment occurs if the defendant invokes his right to remain silent at the time of his arrest and his silence is used then to impeach the defendant when he testifies. *Id.* at 619.

This case is far from *Doyle*. Unlike *Doyle* where the defendant relied on his ability to remain to silent, Moussaoui waived his right to remain to silent. N.T. 866-69. He then interviewed with the agents for two days and repeatedly lied to the interviewing agents. *Doyle* does not serve to protect those lies. Indeed, the case law is clear that a defendant may never opt for lying to interviewing agents. *Brogan v. United States*, 522 U.S. 398, 402 (1998).

Further, the defendant never properly invoked his Fifth Amendment rights. His interview stopped when the defendant "asked to speak to an immigration lawyer." N.T. 909; *see also* N.T. 922 ("we continued the questioning until he invoked his right to counsel . . ."). At no time did the defendant indicate that he wished to remain silent, nor did he indicate that he would not answer additional questions regarding terrorism, offenses for which he had not yet been charged. For this reason alone, the defendant never repudiated the waiver of his Fifth Amendment rights. *See United States v. Charley*, 396 F.3d 1074, 1082 (9th Cir. 2005) (request for counsel during tribal court arraignment did not constitute invocation of Fifth Amendment rights).

Moreover, even if the Court construes the defendant's request for an "immigration lawyer" as invocation of his Fifth Amendment rights, the question did not address custodial interrogation. Fifth Amendment rights are "in one respect narrower than the interest protected by the Sixth Amendment guarantee "because it relates only to custodial interrogation" and in

another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the 'adversarial relationship' produced by a pending prosecution has yet arisen." *McNeil*, 503 U.S. at 178. Even if the defendant invoked his Fifth Amendment rights, that invocation merely prohibited further custodial interrogation, it did not preclude the defendant from voluntarily initiating contact with the agents to correct his lies. The question at issue never addressed custodial interrogation; instead, it asked simply whether the defendant voluntarily sought out to change answers made after waiving his *Miranda* rights. As such the question did not offend the Fifth Amendment. *See Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (statements are inadmissible if the Government approaches and reinitiates interrogation after the suspect has invoked his right to counsel, but further interchanges are permissible "if the accused himself initiates further communication, exchanges, or conversations with the police"). Thus, under *Edwards*, the defendant was free to approach the Government and tell the truth — correcting his lies. The Government, therefore, had a good faith basis for asking whether Moussaoui ever availed himself of that opportunity or, instead, merely allowed the Government to operate under the grievous misimpression that the defendant had fostered in his post-*Miranda* statements.

Indeed, the Supreme Court's ruling in *Anderson v. Charles*, 447 U.S. 404 (1980) (per curiam) supports the Government's question. The Court in *Anderson* made clear that *Doyle* does not apply when a defendant waives his right to remain silent. *Id.* at 406. Indeed, the Court refused to apply *Doyle* to impeachment of a defendant with questions about why the defendant did not tell the same story at any previous time, even after speaking with counsel. *Id.*

Finally, even if the question was improper, the Court sustained the objection and admonished the jury to disregard the question. The Court in *Greer v. Miller*, 483 U.S. 756

(1987) held that a single question by a prosecutor addressed to the defendant concerning his post-arrest silence did not constitute error under *Doyle v. Ohio*, because the trial court immediately sustained an objection to the question and the trial court advised the jury to disregard the question. Moreover, the Supreme Court has repeatedly recognized that jurors are presumed to have followed a trial court's instructions. *See Jones v. United States*, 527 U.S. 373 (1999); *Shannon v. United States*, 512 U.S. 573, 585 (1994); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Thus, even if the question was improper, the Court's ruling cured any prejudice.

Conclusion

For the foregoing reasons, the Government respectfully submits that the death notice should not be dismissed and that none of the FAA witnesses should be excluded.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
David J. Novak
David Raskin
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I certify that on March 13, 2006, a copy of the foregoing Government pleading was served, by hand, on the following counsel:

Gerald T. Zerkin, Esquire
Kenneth P. Troccoli, Esquire
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street
Suite 500
Alexandria, Virginia 22314

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118

Alan H. Yamamoto, Esquire
643 S. Washington Street
Alexandria, Virginia 22314

/s/
David Novak
Assistant United States Attorney