

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

UNITED STATES OF AMERICA            )  
  )  
  )           Crim. No. 01-455-A  
  )  
v.    )  
  )  
ZACARIAS MOUSSAOUI                 )

**REPLY TO GOVERNMENT’S RESPONSE TO MOTION  
FOR EARLY PRODUCTION OF GOVERNMENT’S WITNESS LIST AND TO SET  
DISCOVERY DEADLINES AND MEMORANDUM IN SUPPORT THEREOF**

Standby counsel hereby reply to the Government’s response to Standby Counsel’s Motion for Early Production of Government’s Witness List and to Set Discovery Deadlines and Memorandum in Support Thereof. Standby counsel request, for the reasons set forth in our initial pleading and as set forth herein, that the Court enter an order setting the deadlines originally requested.

**ARGUMENT**

Jury selection is set to begin in this case on May 27, 2003, with the jury to be sworn and opening statements beginning on June 30, 2003. The Government suggests pretrial discovery deadlines be calculated not from the May 27 date for jury selection but from June 30, 2003. Standby counsel object on the grounds that Mr. Moussaoui, who is acting *pro se*, will be fully engaged in the jury selection process during the month the Court has set aside for the procedure. It is unfair and disingenuous for the Government to characterize its proposed deadlines as pretrial when it is in fact proposing deadlines which do not include jury selection as part of the trial process. Given that Mr. Moussaoui is representing himself, that he has been overwhelmed by the Government’s production of thousands of pages of materials which

are largely redacted, that he has been in solitary confinement under extremely restrictive conditions, and is working alone as his own counsel, this seems like yet another attempt by the Government to take unfair advantage of a *pro se* Defendant.

I. Early Production Of Government's Witness List

The Government proposes that only 15 days before trial is adequate time for a witness list given their "unprecedented" production of documents. Indeed, it is the "unprecedented" production of documents in this case that requires the additional time. This is especially true where the first names and other identifying information have been largely redacted, impeding any efficient effort to organize and assimilate the data once the names of the witnesses are known. Because Mr. Moussaoui is acting as his own counsel, the volume and redacted nature of the materials require that he have the Government's witness list sixty (60) days prior to jury selection in order to adequately prepare.

This Court ordered the Government to produce its witness list twenty-nine (29) days prior to trial in *United States v. Wills*. See, e.g., *United States v. Wills*, No. 99-396-A (E.D. Va. filed July, 31 2001) (Brinkema, J.). Mr. Moussaoui's case is far more complex (the Government has designated 35,168 documents as Rule 16 or *Brady*) and the volume of documents and witnesses far exceeds that in *Wills*. Fifteen days is simply not enough time for this *pro se* Defendant to review what is anticipated to be a very extensive witness list and prepare for trial.

The request set forth herein is a matter fully within the Court's discretion. See *United States v. Fletcher*, 74 F.3d 49, 54 (4th Cir.) *cert. denied*, 519 U.S. 857 (1996).

The Government has not indicated that any prejudice whatsoever will inure to the Government or to the witnesses by production of such a list sixty (60) days before jury selection. Yet the risk to Mr. Moussaoui if he is given inadequate time to prepare is potentially fatal. Further, providing Mr. Moussaoui adequate time to prepare outside of court should prevent delays that might otherwise arise during trial if Mr. Moussaoui is not fully prepared, thus inconveniencing court personnel and jurors. In order to give Mr. Moussaoui adequate time to meaningfully use the witness list provided to him, the undersigned respectfully request that the Court order the Government to provide its list of witnesses, with addresses to include country of residence, no later than sixty (60) days before commencement of jury selection.

The Government also requests that the Court order the Defendant to file a witness list on the same date as the Government. We believe the determination of who will be called as a defense witness is logically a reaction in most instances to names on the government list. Accordingly it would seem appropriate to require the Defendant to submit his anticipated witness list after receipt of the Government's list.<sup>1</sup>

As for standby counsel, we cannot provide a witness list. Such decisions must be made by Mr. Moussaoui as counsel of record and for us to do so could prejudice Mr. Moussaoui should we identify as a witness someone he would just as soon have the Government ignore. See *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

[Mr. Moussaoui has the right] “to conduct his defense as he sees fit, to ‘present his case in his own way’ . . . [and] ‘to control the organization and content of his own defense, to

---

<sup>1</sup> We would recommend permitting Mr. Moussaoui forty-five (45) days to provide his list after receipt of the Government's list.

make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

*McKaskle v. Wiggins*, 465 U.S. at 177. Standby counsel, however, will turn over to Mr. Moussaoui a recommended list of defense witnesses that standby counsel would use if standby counsel were counsel of record thirty (30) days after receipt of the Government's witness list so that Mr. Moussaoui would have the benefit of standby counsels' thoughts in preparing his own list.<sup>2</sup>

II. Early Production Of Summary Expert Reports, Jencks Act, Giglio, and 404(b) Materials

The same arguments for the early production of the Government's witness list apply with equal force to the production of the Government's summaries of its trial experts under Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure, and material pursuant to the *Jencks Act* (18 U.S.C. § 3500) (witness statements), *Giglio v. United States*, 405 U.S. 150 (1972) (impeachment material), and Rule 404(b) (other crimes, wrongs, or acts). Production of this material will be meaningless unless provided to Mr. Moussaoui far enough in advance of trial for him to make use of it.

A. Expert Witnesses

The Government proposes that it will disclose to the Defendant pursuant to Fed.

---

<sup>2</sup> Standby counsel make a distinction between being prepared to try the case as required by the Court and making disclosures to the Government which are in effect representations about what the case would look like if standby counsel were counsel of record. Providing the latter information to the Government would impermissibly disclose defense work product material given the status of standby counsel and Mr. Moussaoui. Obviously if standby counsel become counsel of record, thereby eliminating any potential work product material disclosure and conflict with Mr. Moussaoui's intended defense, we would certainly fully comply with all discovery notification requirements.

R. Crim. P. 16(a)(1)(E) a summary (including the experts' opinions and the bases for those opinions) of any testimony from its proposed experts on April 28, 2003, which is thirty (30) calendar days before jury selection<sup>3</sup>. For the reasons mentioned above, this is insufficient time for Mr. Moussaoui to prepare. The Court should order the Government to produce these materials at least sixty (60) days prior to jury selection.

The Government requests defense production of Rule 16(b)(1)(C) materials on the same date. Standby counsel is not counsel of record and so cannot provide "summary of testimony that the defendant intends to use ... as evidence at trial ... ." Fed. Rule Crim. P. 16(b)(1)(C). Further, decisions as to what experts the defense intends to use is, again, a reaction to Government disclosures. Standby counsel propose that they be required to turn over to Mr. Moussaoui the disclosure standby counsel would have provided to the Government under 16(b)(1)(C) were standby counsel counsel of record forty-five (45) days prior to jury selection. Then Mr. Moussaoui should be given fifteen (15) days to review that material before providing his own counter discovery to the Government in this regard.

B. *Jencks* and *Giglio*

Standby counsel requested the production of *Jencks* Act and *Giglio* materials for the witnesses who will testify in the Government's case in chief sixty (60) calendar days prior to trial. The Government responds that they will produce *Jencks* Act materials on the day of jury selection, May 27, 2003, if the defense concurrently produces materials

---

<sup>3</sup> The Government characterizes this date as "more than 60 days before trial," again failing to count the time set aside by the Court for jury selection as part of the trial process.

under Rule 26.2.

Disclosure to Mr. Moussaoui on the day of jury selection of *Jencks* material is insufficient time for him to review the material and be expected to proceed with cross examinations during trial without delay of the proceedings to review materials. Further, it is farcical for the Government to suggest that its concurrent disclosure of *Jencks* material with Rule 26.2 disclosures by Mr. Moussaoui on the day of jury selection will “ensure that the playing field is even” and is in the interest of pursuing “the goal of avoiding surprise to either side.” (Government Response page 4 and 5.) Mr. Moussaoui is a lone man for whom English is a second language and for whom reading and comprehending material in English takes more time than your average federal prosecutor or defense counsel. Further, he will be fully engaged in the jury selection process at the time the Government proposes to disclose *Jencks* material and he will need significant time to review what are expected to be voluminous materials. Standby counsel respectfully request that the Government turn over such materials at least sixty days (60) prior to jury selection.

Only counsel of record can comply with an order for pretrial disclosure of Rule 26.2 material as such disclosure requires a determination of what witnesses will be testifying at trial. Standby counsel respectfully suggests that an appropriate deadline for disclosure of this material by Mr. Moussaoui to the Government is two weeks before the beginning of the defense case in chief. However, standby counsel will agree to provide Mr. Moussaoui its recommendations regarding Rule 26.2 two weeks prior to whatever disclosure date is ultimately imposed on Mr. Moussaoui.

As to *Giglio* information, the Government suggests that such information should

be provided concurrent with its witness list. Again, Defendant has requested such information sixty (60) days before commencement of jury selection in order to give Mr. Moussaoui adequate time to prepare. Production of both the witness list and *Giglio* materials sixty (60) days prior to jury selection is the minimum amount of time needed for Mr. Moussaoui to prepare to try this case.

C. 404(b)

Although the Government claims that they have no objection to the defense request that it shall provide notice to Mr. Moussaoui of the Rule 404(b) evidence sixty (60) calendar days before trial, it proposes a date of April 28, 2003 which is a month before jury selection begins and is insufficient time for Mr. Moussaoui to prepare.<sup>4</sup> For the reasons outlined above, standby counsel respectfully request that the Government be ordered to turn over 404(b) evidence sixty (60) days before commencement of jury selection.

III. Government's Request for Discovery

The Government complains that it has not yet received discovery under Fed. R. Crim P. 16(b)(1) and Fed. R. Crim. P. 12.1, 12.2 and 12.3 from the Defendant.

First, Mr. Moussaoui's discovery obligation under Fed. R. Crim. P. 16(b)(1) is only initiated upon compliance with his request under 16(a)(1) by the Government. While the Government has produced voluminous redacted evidence, it has failed to notify Mr. Moussaoui or the Court of its completion of production and compliance with this rule. Standby counsel will agree to produce to Mr. Moussaoui the discovery

---

<sup>4</sup> As described above, the Government asserts that April 28, 2003 is two months before the trial date, again failing to include jury selection as part of the trial process.

standby counsel would produce to the Government under this rule if we were counsel of record thirty (30) days after the Government advises the Court that it has completed its required disclosure obligations under Rule 16(a)(1)(C) and (D) and after any litigation has concluded regarding same.

Secondly, as explained above, standby counsel cannot make disclosure under Rule 12.1, 12.2, or 12.3. This information can only be provided by Mr. Moussaoui as counsel of record because this information relates to his intention to present certain defenses.

### **CONCLUSION**

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel, on behalf of *pro se* Defendant Zacarias Moussaoui, move this Court to order the Government to provide to the Defendant, at least sixty (60) days before the commencement of jury selection, a list of the names and addresses to include country of residence, of all of its non-expert and expert witnesses, and its summary expert reports, *Jencks Act*, *Giglio*, and Federal Rule of Evidence 404(b) materials.

Respectfully submitted,

ZACARIAS MOUSSAOUI  
By Standby Counsel



/S/

Frank W. Dunham, Jr.  
Federal Public Defender  
Gerald T. Zerkin  
Senior Assistant Federal Public Defender  
Kenneth P. Troccoli  
Anne M. Chapman  
Assistant Federal Public Defenders  
Eastern District of Virginia  
1650 King Street, Suite 500  
Alexandria, VA 22314  
(703) 600-0800

/S/

Edward B. MacMahon, Jr.  
107 East Washington Street  
P.O. Box 903  
Middleburg, VA 20117  
(540) 687-3902

/S/

Alan Yamamoto  
108 North Alfred Street  
First Floor  
Alexandria, VA 22314  
(703) 684-4700

/S/

Judy Clarke  
Federal Defenders of  
San Diego, Inc.  
255 Broadway, Suite 900  
San Diego, CA 92101  
(703) 600-0855

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Government's Response to Standby Counsel's Motion for Early Production of Government's Witness List and to Set Discovery Deadlines and Memorandum in Support Thereof was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and UPON APPROVAL FROM THE COURT SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this \_\_ day of November 2002.

/S/

Anne M. Chapman