

FILED
FEB 06 2008
US Court of Appeals
4th Circuit

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

<hr/>)	
UNITED STATES,)	
)	
	Appellee,)	
vs.)	No. 06-4494
)	Crim No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	
)	
	Appellant.)	
<hr/>)	

**APPELLANT’S CONTESTED MOTION FOR
PARTIAL RELIEF FROM THE PROTECTIVE ORDER TO
PERMIT ZACARIAS MOUSSAOUI TO HAVE
UNRESTRICTED ACCESS TO ADVICE OF COUNSEL**

Appellant Zacarias Moussaoui, through undersigned counsel, respectfully moves the Court for partial relief from the protective order entered by the district court. Relief is necessary in order (1) to permit unrestricted discussions between undersigned counsel and Mr. Moussaoui and (2) for Mr. Moussaoui to have effective assistance of counsel on direct appeal.

INTRODUCTION

On January 22, 2002, the district court issued a protective order (“Protective Order”) that sets forth the procedures for handling classified information pursuant to the Classified Information Procedures Act (or “CIPA”).

JA92-108.¹ The Protective Order governs “all pre-trial, trial, post-trial, and *appellate aspects concerning this case.*”² JA93 (¶ 3) (emphasis added). The Protective Order bars counsel from disclosing certain information to anyone, including Mr. Moussaoui, without prior approval of either the Government or, after notice and an opportunity to respond by the Government, of the Court.

JA101-04 (¶ 18).³

On June 1 and June 29, 2006, respectively, this Court appointed Barbara L. Hartung and Justin S. Antonipillai as counsel for the direct appeal. Neither counsel had any prior involvement in the case. Because undersigned counsel have been restricted by the Protective Order from discussing certain materials with Mr. Moussaoui, undersigned counsel prepared the Opening Brief –

¹ Citations to “JA” refer to the Joint Appendices filed with the Opening Brief.

² There has been no separate order entered by this Court covering the appeal or appellate counsel.

³ The Protective Order restricts access to classified information to individuals holding a government security clearance – no one else, including Mr. Moussaoui, may gain such access without approval of the court or the Government. JA97 (¶ 11a). The Protective Order further provides that, even should the court deem it necessary that Mr. Moussaoui review certain classified information, the Government has a right to notice and to be heard before defense counsel may discuss such information with him. JA103 (¶ 18f). Indeed, the Protective Order authorizes the Government to forbid Mr. Moussaoui’s counsel from sharing such information with him regardless of the need. JA103 (¶ 18f). The Protective Order explicitly warns that disclosure of classified information in any manner not consistent with its terms “may constitute violations of United States criminal

filed January 17, 2008 – without the full participation of Mr. Moussaoui. As of the date of this filing, the Opening Brief remains under seal, and there has been no redacted version made publicly available to share with Mr. Moussaoui.

As this Court is also aware, the Government has made a number of other revelations in a series of filings and letters dated on and after October 25, 2007. These filings and letters – and the responses of Mr. Moussaoui – include the following (collectively referred to as the “Tapes Filings”):

1. October 25, 2007, letter from the Government to this Court (JA5629A-29E);
2. Appellants’ Contested Motion for Limited Remand (filed Nov. 27, 2007) (Dkt. 107);
3. Appellee’s Response in Opposition to Contested Motion for Limited Remand (filed Dec. 6, 2007) (Dkt. 110);
4. Appellant’s Reply in Support of Contested Motion for Limited Remand (filed Dec. 17, 2007) (Dkt. 117);
5. December 18, 2007, letter from the Government to this Court (not docketed in this Court);
6. Appellant’s Supplemental Memorandum in Support of Contested Motion for Limited Remand (filed Dec. 26, 2007) (Dkt. 119);

7. Appellee's Supplemental Response to Appellant's Contested Motion for Limited Remand (filed Dec. 28, 2007) (Dkt. 118); and
8. January 31, 2008, letter from the Government to this Court (not docketed in this Court).

As of the date of this filing, each of the Tapes Filings remains under seal, and there have been no redacted versions made publicly available to share with Mr. Moussaoui. Because undersigned counsel have not been able to show Mr. Moussaoui *any version of the as-filed Opening Brief or the Tapes Filings* – some of which have been *on file for over two months* – there has been a significant deterioration in the trust and communication between counsel and client.

DISCUSSION

I. This Court Should Grant Relief from the Protective Order to Permit Unrestricted Communications with Counsel.

The Opening Brief sets forth at length the terms of the Protective Order, and why portions of that Protective Order unconstitutionally prevented Mr. Moussaoui from receiving effective assistance of counsel prior to this appeal. *See, e.g.,* Opening Br. at 49-84 (citing, *inter alia, Geders v. United States*, 425 U.S. 80 (1976)). We incorporate, without repeating, those arguments here. Because the Protective Order also applies to the “appellate aspects of this case,”

undersigned counsel respectfully object to the restrictions on communications during the direct appeal and hereby request relief from the Protective Order to permit unrestricted communication with Mr. Moussaoui.

For example, the Opening Brief sets forth a number of items that are covered by the Protective Order and that should have been shared with Mr. Moussaoui. *See, e.g.*, Opening Br. at 59-77. As the case proceeds through preparation of a reply and possibly through oral argument, consultation with Mr. Moussaoui will be critical to ensure that his interests have been fully represented. For the same reasons, this Court should permit disclosure of the Tapes Filings to Mr. Moussaoui. These filings make reference to events and information about which Mr. Moussaoui could have information or guidance to assist counsel in investigation of the matters and preparation of arguments in this direct appeal.

In short, for the reasons set forth in the Opening Brief, this Court should permit relief from the Protective Order as it applies to appellate counsel in order to avoid a Sixth Amendment deprivation of effective assistance of counsel on direct appeal. *See United States v. Peak*, 992 F.2d 39, 41 (4th Cir. 1993) (“[T]he Sixth Amendment right to counsel extends to the direct appeal . . .”) (citing *Douglas v. California*, 372 U.S. 353 (1963)). *First*, Mr. Moussaoui should have

access to this information and advice of counsel thereon in order to be able to knowingly and intelligently make decisions about his appeal. *Second*, Mr. Moussaoui needs to be able to communicate with his counsel in an unrestricted fashion in order to assist counsel in investigating and harnessing the facts and being able to argue the legal issues effectively. *Third*, counsel can represent that the inability to communicate openly with Mr. Moussaoui is causing a serious deterioration in the attorney-client relationship; this deterioration is exacerbated because there are no public versions of the Opening Brief and Tapes Filings currently available for counsel to share with the client.

At bottom, appellate counsel need the requested limited relief from the Protective Order to ensure that Mr. Moussaoui receives the advice of counsel to which he is entitled under the Sixth Amendment of the Constitution. As argued in the Opening Brief, Mr. Moussaoui has a constitutional right to unfettered access to the advice of counsel, and this right cannot be set aside, even in part, based on the classification of evidence by the Government. That is the effect, however, of the Protective Order. Indeed, as Mr. Moussaoui argued in the Opening Brief, the strictures placed on Mr. Moussaoui's counsel regarding what information they can discuss with him improperly renders Mr. Moussaoui's constitutional right to counsel a secondary consideration to protection of the

Government's classified information. Moreover, the Government's right to notice of the classified information appellate counsel seeks to share with Mr. Moussaoui undermines the attorney-client privilege and attorney work product protections vital to effective representation.

In the alternative, and without waiving the request set forth above, this Court should at least order that complete, unredacted versions of the Opening Brief (with supporting materials) and Tapes Filings (with supporting materials) be made available to Mr. Moussaoui for review. Mr. Moussaoui is serving consecutive life sentences in solitary confinement at the United States Penitentiary Administrative Maximum Facility in Florence, Colorado. Facing this kind of a sentence, Mr. Moussaoui should have full access to these important briefs in order to participate and aid in the preparation of his direct appeal. Moreover, concerns about sensitive information being disclosed beyond Mr. Moussaoui should be allayed by his conditions of confinement, which bar Mr. Moussaoui from ever having meaningful contact with others.

Pursuant to Local Rule 27(a), undersigned counsel has informed counsel for the United States, Assistant United States Attorney David J. Novak, about the filing of this Motion. The Government will not consent to the relief sought herein.

CONCLUSION

For the reasons set forth above, the Court should grant Mr. Moussaoui's request for limited relief from the Protective Order.

Respectfully submitted,



Justin S. Antonipillai
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Phone: (202) 942-5066
Fax: (202) 942-5999



Barbara L. Hartung
700 East Main Street
Suite 1600
Richmond, Virginia 23219
Phone: (804) 353-4999
Fax: (804) 353-5299

Counsel for Zacarias Moussaoui

February 5, 2008

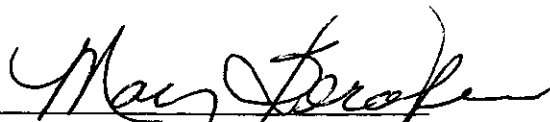
CERTIFICATE OF FILING AND MAILING

I hereby certify that on this 5th day of February, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via UPS Overnight Priority, the required copies of the foregoing **Appellant's Contested Motion for Partial Relief from the Protective Order to Permit Zacarias Moussaoui to Have Unrestricted Access to Advice of Counsel** and mailed copies of the same via UPS Overnight Priority, this same date from Richmond, Virginia to persons listed below.

The necessary filing and service was performed in accordance with the instructions given me by counsel in this case.

COUNSEL SERVED:

David J. Novak
David Raskin
Assistant U.S. Attorneys
Office of the United States Attorney
Main Street Centre, 18th Floor
600 East Main Street
Richmond, Virginia 23219
Counsel for Appellee



Lantagne Legal Printing, Inc.
801 East Main Street, Suite 100
Richmond, Virginia 23219-2472
(804) 644-0477