IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, **Appellee,**	)	
v.	)	**Docket No. 06-4494**
ZACARIAS MOUSSAOUI, **Appellant.**	)	

Appellee's Opposition to Appellant's Motion for Partial Relief from the District Court's Protective Order

The United States, Appellee, respectfully opposes Appellant's Motion for Partial Relief from the Protective Order to Permit Zacarias Moussaoui to Have Unrestricted Access to Advice of Counsel. The motion — which seeks review of the district court's decision to preclude the Appellant himself, but not his counsel, from access to classified information — should be denied for two reasons. First, the motion is a procedurally flawed attempt to elicit a ruling from this Court on the merits of Appellant's direct appeal before the Government has had the appropriate time to respond to his opening brief. Second, the motion should be denied on the merits. As the relevant case law makes clear, the Sixth Amendment does not grant Moussaoui an absolute right to discuss with his counsel anything and everything he chooses, and given his status as a confessed and convicted *al Qaeda* member, it

certainly accommodates a restriction on his personal access to classified information. His rights are sufficiently protected by counsel's access to classified information, as they have been throughout this case, and he has no colorable claim of prejudice on appeal. Indeed, after enduring the bar on his personal access to classified information without objection through the previous appeals before this Court, his subsequent guilty plea and sentencing phase trial, and the filing of his opening brief in this direct appeal, Moussaoui's claim that he now needs direct access to classified information for the remainder of this appeal rings utterly hollow. Moreover, Moussaoui's repeated complaints about having no access to materials filed in this appeal, including his previously classified opening brief, are essentially moot, as those materials are now available in non-classified form. For these reasons, set forth in more detail below, the motion should be denied.

Background

1. The Protective Order

The indictment to which Moussaoui pleaded guilty charged him with participating in *al Qaeda*'s global terrorist conspiracy against the United States and its citizens that resulted in the attacks on September 11, 2001. At the outset of the case, the Government filed a motion for a protective order pursuant to, *inter alia*, Section 3 of the Classified Information Procedures Act ("CIPA"), Pub. L. No.

96-456, 94 Stat. 2025 (1980) (codified as 18 U.S.C. app. 3 §§ 1-16). See J.A. 78-89.[1] On January 22, 2002, the proposed order was adopted by the district court, without objection from the defense. J.A. 87, 93.

The protective order established procedures for those "individuals who receive access to classified national security information or documents in connection with this case," and applies "to all pre-trial, trial, post-trial, and appellate aspects concerning this case." J.A. 93. Significantly, the protective order provided that "[n]o defendant . . . shall have access to any classified information involved in this case[,]" absent extraordinary circumstances not present here, like the defendant having a demonstrable "need to know." J.A. 97. The protective order further provided that defense counsel who receive security clearances may access classified materials, but "shall not disclose such information or documents to the defendant without prior concurrence of counsel for the government, or, absent such concurrence, prior approval of the Court." J.A. 104. As was the case in the district court, the practical result of the protective order is that cleared appellate counsel may review certain classified material that they cannot share with Moussaoui, who has never had (and never will have) a

[1] Citations to "J.A." refer to the Joint Appendix filed in this appeal, while citations to "C.J.A." refer to the Classified Joint Appendix.

security clearance.

2. Moussaoui's Subsequent Challenge to the Protective Order

Nearly six months later, on June 7, 2002, Moussaoui filed a motion requesting personal access to classified information in contemplation of representing himself *pro se*. See J.A. 430-45. Thus, unlike his present appellate request, Moussaoui's June 2002 motion did not challenge the circumstance in which his counsel had access to classified information on his behalf. Instead, his request for access to classified materials was conditional on the granting of his request to proceed *pro se*. J.A. 432.[2] After the district court granted *pro se* status, Moussaoui made his own request for access to classified information. See J.A. 1067-68, 1079-82.

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[2] Indeed, although Moussaoui claims in his opening brief that he and his counsel "repeatedly protested" defense counsel's "inability to share classified discovery with Moussaoui[,]" Aplt. Br. at 52, n.26, they made no such objection. All of Moussaoui's objections, whether *pro se*, or through counsel, were to: (1) the Special Administrative Measures ("SAM") — which he is not challenging in his motion — and (2) his inability to access classified information as a *pro se* defendant. See ibid. (citing: J.A. 130-65 (challenging SAM); J.A. 432-58 (requesting access to classified information if district court allows Moussaoui to proceed *pro se*); J.A. 865-901 (requesting district court before scheduled plea colloquy to advise Moussaoui, proceeding *pro se*, that stand-by defense counsel believed classified information not produced to him contained exculpatory evidence); C.J.A. 66-69 (supplementing same request); C.J.A. 147-66 (objecting because Moussaoui, proceeding *pro se*, had not been given access to classified information)).

The district court denied the *pro se* request for access to classified information, pointing to Moussaoui's "repeated prayers for the destruction of the United States and the American people, admission to being a member of *al Qaeda*, and pledged allegiance to Osama Bin Laden" as "strong evidence that the national security could be threatened if the defendant had access to classified information." United States v. Moussaoui, 2002 WL 1987964, at *1 (E.D.Va. Aug. 23, 2002). The district court found that Moussaoui's trial rights were sufficiently protected by stand-by counsel's review of classified discovery, their participation in CIPA proceedings, and the Government's continuing effort to declassify information designated by stand-by counsel. Ibid. For these reasons, the district court concluded that the Government's "interest in protecting its national security information outweigh[ed Moussaoui]'s desire to review the classified discovery." Ibid.

3. Additional Relevant Facts

On November 14, 2003, in light of Moussaoui's improper behavior, the district court stripped him of his *pro se* rights and reinstated stand-by counsel as counsel of record. J.A. 1378. Defense counsel represented Moussaoui for the next two and a half years, through his guilty plea and a bifurcated sentencing trial, at which a jury found him capital eligible but declined to impose the death penalty.

They also represented him — without ever complaining about the district court's protective order — throughout the previous interlocutory appeals in this Court, which culminated in the Court's opinion in United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004). At no point during these district court proceedings subsequent to the reinstatement of counsel, or the previous appellate proccedings, did Moussaoui seek relief from the protective order, for the purpose of gaining personal access to classified information or otherwise.

Appellate counsel for this direct appeal were appointed in June 2006. On January 17, 2008, Moussaoui filed his opening brief. The brief was filed in classified form but has since been re-filed in non-classified form. The same is true for numerous other formerly classified appellate filings, including the filings related to Moussaoui's Motion For Limited Remand, which are now available in non-classified form.[3]

Argument

Moussaoui now contends that the protective order's restriction on his personal access to classified information denies him effective assistance of

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[3] The only "tapes filing" that remains to be de-classified is the Government's last letter of disclosure, dated January 31, 2008. See Mot. at 3-4 (listing the relevant filings). Our understanding is that a redacted version of the last letter is forthcoming.

counsel on appeal. He claims that "consultation" with counsel regarding classified materials is now "critical" to "preparation of a reply and possibly through oral argument." Mot. at 5. Unburdened by specifics, he asserts that he must have access to classified materials and "advice of counsel thereon" to "make decisions about his appeal," "to communicate with his counsel in an unrestricted fashion" and "to assist counsel in investigating and harnessing the facts and . . . to argue the legal issues effectively." Mot. at 5-6.

The claims are without merit. First, these very assertions are the subject of Moussaoui's direct appeal and should be rejected here as a premature and a procedurally improper challenge to the protective order. Second, there is no basis for disturbing the district court's order, which was based on careful assessments of the information in question and the Appellant himself. The district court had broad discretion to bar Moussaoui from access to classified information and determine that Moussaoui's rights were adequately protected by counsel's access to such information. Nothing has changed in the appellate setting. It is a dubious proposition indeed to suggest, as Moussaoui does, that he needs access to classified information now, with only a reply brief and oral argument remaining, after he tackled significant trial court proceedings, like his guilty plea and sentencing trial, and appeared as appellee in two earlier appeals in this Court,

without complaining about lack of personal access to such materials. The only specific harms identified by Moussaoui relate to materials that are now almost entirely public. Accordingly, the motion should be denied.

1. Standard of Review

Moussaoui does not identify the applicable standard by which this Court should review the protective order. The Government submits that the district court is entitled to substantial deference. District court rulings under CIPA are typically reviewed for abuse of discretion. See United States v. Hammoud, 381 F.3d 316, 339 (4th Cir. 2004) (limitation of cross-examination rights). Moreover, as the Local Rules of this Court indicate, this Court applies an initial presumption in favor of a district court's decision on the nature of evidence when access to that information is in question. See, e.g., 4th Cir. Local R. 25(c)(1)(A) ("Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals."). Because Moussaoui first consented to the protective order, then failed to challenge the order's prohibition on discussing classified information with defense counsel, he has an extremely high burden to meet in showing why this Court should overturn the district court's order. Here, the district court made on-the-ground assessments of Moussaoui, and had a keen familiarity with the case, which it dealt with over

the course of several years. Moussaoui has not explained how any of the district court's factual findings were erroneous in this matter under any standard.

2. The Motion Argues the Merits of Moussaoui's Appeal

The motion seeks to pre-litigate the merits of Moussaoui's Sixth Amendment appellate claim. Moussaoui states as much in the motion itself. See, e.g., Mot. at 5 ("In short, for the reasons set forth in the Opening Brief, this Court should permit relief from the Protective Order . . . ."). Indeed, if the protective order actually burdened the attorney-client relationship to the extent that Moussaoui now suggests, he should have moved for modification of the order long before filing his opening brief — the most important aspect of his appeal. Instead, he waited until after filing his opening brief in what appears to be an attempt to elicit a ruling on the merits before the Government has its full opportunity to properly brief the issue.

In addition, the Motion simply ignores the Federal Rules of Appellate Procedure. No doubt aware that Fed. R. App. P. 27(a)(2)(A) requires a motion to "state with particularity . . . the legal argument necessary to support it[,]" and that Rule 27(d)(2) limits any such motion to 20 pages, Moussaoui attempts to sidestep both requirements by making his legal arguments through "incorporat[ing], without repeating" 36 pages of his opening brief, which he claims "set[] 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." Id. at 4 (relying on pp. 49-84 of the opening brief). Moussaoui's bald attempt to pre-litigate his appellate claims in a procedural motion while also ignoring the Federal Appellate Rules of Procedure is reason enough to deny his motion.

3. There Is No Reason to Disturb the Protective Order

In furtherance of CIPA's aim to "to protect classified information" from pretrial disclosure to the defense, United States v. Mejia, 448 F.3d 436, 455 (D.C. Cir. 2006), the statute grants courts broad authority to enter protective orders imposing reasonable restrictions likely to prevent unauthorized disclosure of classified information once it has been produced to the defense. See 18 U.S.C. app. 3 § 3. Such a restriction may be to limit the Government's production of classified discovery only to cleared defense counsel and preclude defense counsel from sharing the materials with the defendant, where disclosure to the defendant himself might raise national security concerns. See id.; S. Rep. 96-823 at 6 ("The details of each [protective] order are fashioned by the trial judge according to the circumstances of the particular case."). It is hard to imagine a defendant more worthy of such a restriction than Zacarias Moussaoui, a devout follower of Usama

Bin Laden, who by his own words throughout this case remained steadfastly committed to killing Americans and destroying America. The district court was thus fully justified in keeping classified information out of his hands, particularly where his trial rights were adequately preserved by his counsel's access to such materials. There is no reason for this Court to upset this procedure in the appellate context, nor does Moussaoui provide one.

The protective order at issue is hardly atypical. See, e.g., United States v. Chalmers, 2007 WL 591948, *2 (S.D.N.Y. 2007) (rejecting defendant's argument that protective order's provision restricting uncleared defendant's access to classified information to which his counsel had access violated his Fifth and Sixth Amendment rights); United States v. Bin Laden, 2001 WL 66393, *4 (S.D.N.Y. 2001) (rejecting *al Qaeda* defendants' claim that a protective order barring them from reviewing classified materials to which their counsel had access was a violation of their Fifth and Sixth Amendment rights, in light of "the Government's compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions"); United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994), vacated in part on other grounds, 899 F.Supp. 697 (D.D.C. 1995) (upholding protective order barring defense counsel from allowing terrorist defendant access to classified information).

These orders are undoubtedly on solid legal footing, as the Supreme Court has repeatedly held that the Sixth Amendment endures restrictions on attorney-defendant communication in limited circumstances. See Perry v. Leeke, 488 U.S. 272, 284-85 (1989) (concluding that trial court's order that defendant not consult with his attorney during short recess was permissible); Morris v. Slappy, 461 U.S. 1, 11 (1983) ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel."). Instead, the right to counsel may, in appropriate circumstances, give way to other important interests that outweigh it. See Morgan v. Bennett, 204 F.3d 360, 365 (2d Cir. 2000) ("[T]he court may not properly restrict the attorney's ability to advise the defendant unless the defendant's right to receive such advice is outweighed by some other important interest.") (emphasis added). In Morgan, the Second Circuit approved a district court order precluding defense counsel from informing the defendant that a certain cooperating witness was testifying the next day, because the order's purpose — to protect the witness from intimidation by the defendant — outweighed the defendant's right to consult with counsel. Id. at 367.

This Court, and others, have reached similar conclusions. See, e.g., United States v. Truong Dinh Hung, 667 F.2d 1105, 1107 (4th Cir. 1981) (finding no

violation of the Sixth Amendment right to counsel where defense counsel, but not the defendants, were allowed to examine documents to assist the court in making Jencks Act determinations); United States v. Herrero, 893 F.2d 1512, 1526-27 (7th Cir. 1990) (finding no infringement of defendant's right to effective assistance of counsel where the court prohibited defense counsel from revealing the name of the confidential informant to the defendant); United States v. Anderson, 509 F.2d 724, 730 (9th Cir. 1974) (permitting defense counsel, but not defendant, access to *in camera* hearing).[4]

Moussaoui does not provide another case where a terrorism defendant was granted access to classified information, much less one charged with participating in *al Qaeda*'s global conspiracy to kill Americans. On the contrary, the district court's decision to preclude Moussaoui from access to classified materials

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[4] Ignoring these cases, Moussaoui relies (Mot. at 4) principally upon Geders v. United States, 425 U.S. 80 (1976), which held that a defendant was unconstitutionally denied the effective assistance of counsel when he was ordered by the trial judge not to confer with counsel about anything during a seventeen-hour recess between defendant's direct and cross-examination. The narrow holding in Geders, however, is inapposite to this case, as it does not hold — as Moussaoui essentially argues — that his right to confer with counsel is absolute. Instead, the Supreme Court in Geders balanced the countervailing interests and merely concluded that an order "prevent[ing the defendant] from consulting his attorney during a 17-hour overnight recess, when an accused would normally confer with counsel," was too great a restriction in light of the interest (i.e., preventing witness coaching) that the trial court sought to protect. 425 U.S. at 91.

comports with what other federal courts have decided in terrorism cases. See, e.g., United States v. Holy Land Found. for Relief and Dev., 2007 WL 628059, at *2 (N.D. Tex. Feb. 27, 2007) (rejecting constitutional challenges to CIPA in case where defendants were precluded from access to classified discovery because of their alleged connections to organizations associated with *Hamas*); United States v. Paracha, 2006 WL 12768, at *4 (S.D.N.Y. Jan. 3, 2006) (referencing CIPA protective order precluding defendant charged with providing material support to *al Qaeda* from access to classified information); United States v. Ressam, 221 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002) (discussing court's various CIPA protective orders precluding access to classified information by defendant who planned to attack Los Angeles International Airport).

Nor has Moussaoui offered a viable reason to disturb the protective order's carefully considered bar against the defendant personally accessing classified materials, a prohibition to which the district court adhered even when Moussaoui was *pro se*. See Moussaoui, 2002 WL 1987964, at *1 (concluding that the Government's "interest in protecting its national security information outweigh[ed Moussaoui]'s desire to review the classified discovery"). Although Moussoaui's counsel claim that their ability to prepare the appeal is made more difficult by their inability to confer with Moussaoui about classified information, such a claim is

unavailing for at least two reasons. First, Moussaoui's contentions are dubious given the late juncture at which they are raised. Throughout the most important district court proceedings -- the guilty plea and sentencing trial — and in the previous appellate proceedings, defense counsel did not once complain about being hampered in their ability to defend Moussaoui because of his lack of access to classified materials. This, coupled with the timing of the instant motion — more than a year and a half after appellate counsel were appointed, and three weeks after the opening brief was filed — belies Moussaoui's contention that personal access to classified materials is now necessary, as "consultation with Mr. Moussaoui will be critical to ensure that his interests have been fully represented." Mot. at 5.

Second, and more significantly, Moussaoui does not specifically identify any new harm that he will endure on appeal. He offers only conjecture. *See* Mot. at 6 (might be able to assist appellate counsel in "making decisions about his appeal"); id. at 5 ("could have information or guidance to assist counsel in investigation of the matters and preparation of arguments in this direct appeal").[5]

[5] Besides his broad request to be able to discuss (and thus essentially have access to) all classified information in this case, Moussaoui points only to his opening brief and the recent "Tapes Filings" from his Motion for Limited Remand (which this Court denied on January 16, 2008) as specific examples of classified information that he needs. As noted above, consistent with other important filings

This, of course, falls far short of justifying a departure from the common-sense and universally applied rule against granting sworn terrorists access to national secrets. See, e.g. United States v. Bin Laden, 2001 WL 66393, at *4 (S.D.N.Y. Jan 25, 2001) (rejecting *al Qaeda* defendant's non-specific reasons for why he should have access to classified materials, as "this hypothetical benefit" was insufficient basis upon which to find CIPA unconstitutional).

Moussaoui simply fails to recognize the Government's strong interest in preventing disclosure of classified information to appellants who, like himself, represent a threat to national security. See Central Intelligence Agency v. Sims, 471 U.S. 159, 175 (1985) ("The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); Snepp v. United States, 444 U.S. 507, 514-515 (1980) (stating that unauthorized disclosures might cause irreparable harm to the Government and that it may be practically impossible to seek redress against the

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in the district court and the previous appeals in this Court, the documents have now been filed in non-classified form, and Moussaoui is now free to discuss these materials with his defense counsel.

disclosing party).[6] As one court observed, it is "practically impossible to remedy the damage of an unauthorized disclosure ex post." United States v. Bin Laden, 58 F.Supp.2d 113, 121 (S.D.N.Y. 1999).[7] Indeed, it is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation. Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964).

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[6] Information is classified when the Government reasonably believes that its disclosure would cause some sort of harm to national security. For example, "Top Secret" information is information, "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security[,]" Exec. Order No. 12958 § 1.1(a)(1), while "Secret" information is information, "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." Id. § 1.1(a)(2). Even "Confidential" information is information, "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Id. § 1.1(a)(3).

[7] This concept of irreparable harm makes it impossible for the Government to risk permitting Moussaoui access to classified materials even where, as he points out (Mot. at 7), concerns about him disseminating secret information are "allayed by his conditions of confinement, which bar [him] from ever having meaningful contact with others." Moussaoui's prison restrictions are not absolute and are subject to subversion and human error, either of which could have catastrophic consequences. There are also a myriad of other less-obvious potential harms, such as the adverse perception that invariably would arise if foreign allies learned that the United States was sharing secrets with known terrorists. See Sims, 471 U.S. at 175 ("If potentially valuable intelligence sources come to think that the Agency will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the Agency in the first place."); Snepp, 444 U.S. at 512-513 & nn.7-8 (1980) (noting that unless the Government has adequate mechanisms to prevent unauthorized disclosures, potential sources of classified information may be unwilling to provide such information to the intelligence-gathering community).

There is no reason to think that Moussaoui can be entrusted with national secrets. Allowing him access to the classified materials would certainly pose a risk to national security. Under these circumstances, this Court should not disturb the protective order, which acknowledged the risks associated with granting Moussaoui access to classified materials and recognized that Moussaoui's rights would be adequately protected by counsel's access to such materials.

Conclusion

For the foregoing reasons, Appellant's Motion for Partial Relief from the Protective Order to Permit Zacarias Moussaoui to Have Unrestricted Access to Advice of Counsel should be denied.

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Certificate of Service

The undersigned hereby certifies that on the 19th day of February, 2008, a copy of the Appellee's Response was faxed and mailed to the following attorneys for the Appellant:

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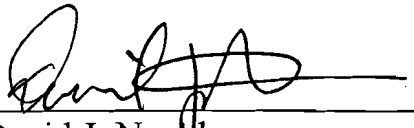
By: 

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