
EXHIBIT “N”

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April 11, 2006

Hon. Thomas J. McAvoy
United States District Court
15 Henry Street
Binghamton, New York 13901

United States v. Yassin Aref
1:04-CR-402-001

Dear Judge McAvoy:

I am writing to request the Court to order the government to provide certain *Brady* material to the defense. On March 21, 2006 the government disclosed discovery material which included a heavily redacted FBI report regarding an alleged informant who is claimed to have told the FBI that he was approached by someone in October, 2001, who said Osama bin Laden had requested certain information, and to fax the information to two fax numbers in Syria, which were provided. At least one of the Syria numbers apparently belonged to the Damascus office of the IMK, which had hired Yassin Aref to do menial work while he was a refugee. The government had previously provided the Verizon phone records of Yassin Aref, and an examination of those records reveals that among many other calls there were thirteen calls, made between 11/21/99 to 10/29/01, to the IMK office in Damascus (one of the numbers in the FBI report).

Yassin Aref assures me that those thirteen calls, which the government is apparently claiming connect him to a terrorist organization, Ansar al Islam, (even though it was not founded until after the date of the last of the thirteen calls) are completely exculpatory. Mr. Aref says the conversations are personal in nature and do not in any way connect him to any alleged terrorist activity. Therefore the conversations themselves constitute *Brady* material, in that they rebut the government's implications regarding said calls. These innocent conversations are especially relevant, material and helpful to the defense if the government plans on introducing any evidence regarding the making of said calls in order to prove disposition to counter an entrapment defense.

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Under CIPA it is clear that relevant and material information helpful to the defense *must* be disclosed unless the government wishes to dismiss the case. See *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004).

Upon information and belief the government has in its possession tapes and transcripts of the actual conversations which constitute *Brady* material, and which were obtained illegally through the NSA warrantless surveillance program. The thirteen calls in question were made on 11/21/99, 11/23/99, 7/26/00, 9/4/00, 10/15/00, 9/24/00, 1/5/01, 2/26/01, 3/26/01, 4/15/01, 6/4/01, 8/9/01, and 10/29/01. The Verizon phone records, which show the exact times the calls were made, the length of each call, and the long distance carrier for each call, are attached, with the particular calls highlighted. I respectfully request that the Court direct the government to prove the tapes and transcripts of said conversations immediately as they constitute *Brady* material.

Respectfully,

KINDLON and SHANKS, P.C.

By: 
s/Terence L. Kindlon
Tkindlon@aol.com

cc: William C. Pericak, Esq.
Kevin A. Luibrand, Esq.
Yassin Aref

06/30/2006	<u>248</u>	Letter as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain requesting Acknowledgment of Receipt of Translations (Pericak, William) (Entered: 06/30/2006)
06/27/2006	<u>247</u>	RESPONSE in Opposition by USA as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain re <u>234</u> MOTION for Release from Custody (Pericak, William) (Entered: 06/27/2006)
06/23/2006	<u>246</u>	Proposed Voir Dire by USA as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain (Pericak, William) (Entered: 06/23/2006)
06/22/2006	<u>245</u>	Proposed Jury Instructions by Mohammed Mosharref Hossain (Luibrand, Kevin) (Entered: 06/22/2006)
06/22/2006	<u>244</u>	DISCOVERY DISCLOSURE STATEMENT as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain (Coombe, Elizabeth) (Entered: 06/22/2006)
06/22/2006	<u>243</u>	NOTICE of Intent to Use Evidence by Yassin Muhiddin Aref <i>Notice of Defendant's Intention to Disclose Classified Information</i> (Kindlon, Terence) (Entered: 06/22/2006)
06/21/2006	<u>242</u>	NOTICE of Intent to Use Evidence by Mohammed Mosharref Hossain <i>Notice of Defendant's Intention to Diclose Classified Information</i> (Luibrand, Kevin) (Entered: 06/21/2006)
06/16/2006	<u>241</u>	Proposed Voir Dire by Yassin Muhiddin Aref as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain (Kindlon, Terence) (Entered: 06/16/2006)
06/14/2006	<u>240</u>	NOTICE OF ATTORNEY APPEARANCE Elizabeth C. Coombe appearing for USA as Co-counsel with/for Attorney: Gregg N. Sofer, William C. Pericak & Gregory A. West (Coombe, Elizabeth) (Entered: 06/14/2006)
06/13/2006	<u>239</u>	ORDER denying as moot <u>227</u> Letter Request filed by Yassin Muhiddin Aref . Signed by Judge Thomas J. McAvoy on 6/12/06. (wjg,) (Entered: 06/13/2006)
06/13/2006		Text NOTICE OF response ddl ON MOTION as to Yassin Muhiddin Aref <u>234</u> MOTION for Release from Custody: Response by Government to Motion due by 6/27/2006 (cjm,) (Entered: 06/13/2006)
06/12/2006	<u>238</u>	STATUS REPORT Pursuant to Court's Order of June 7, 2006, three additional entries (redacted) from notebook by USA as to Yassin Muhiddin Aref, Mohammed Mosharref Hossain (Attachments: # <u>1</u> Affirmation certificate of service)(Pericak, William) (Entered: 06/12/2006)
06/12/2006	<u>237</u>	STATUS REPORT <i>Notice of Submission of Government's Ex Parte, In Camera, Under Seal Letter Response Regarding Defendant Aref's April 11, 2006 Letter Request for Discovery of Recorded Statements</i> by USA as to Yassin Muhiddin Aref (Attachments: # <u>1</u> Affidavit certificate of service)(Pericak, William) (Entered: 06/12/2006)

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v. Watson, 599 F.2d 1149 (2nd Cir. 1979) (witness was already in the Witness Protection Program); *Okonkwo v. Lacy*, 104 F.3d 21 (2nd Cir. 1997) (undercover agent); *United States v. Lucas*, 932 F.2d 1210 (8th Cir. 1991)(undercover detective); *Ayala v. Speckard*, 131 F.3d 62 (2nd Cir. 1997) (undercover officers).

Additionally, in *Varella*, supra, the first case cited by the government, the court ordered that the two informants be produced for defense counsel to interview, and those interviews did occur. There was also a hearing therein where evidence was received showing how the informants were at high risk. No such offer of interviews by defense counsel has been made herein, nor has there been any showing of any particular threats. Therefore, the Court should rule that the government must provide the names and specific qualifications of the translators, and that they must testify using their real names and without being disguised.

The prejudice to Mr. Aref and Mr. Hossain inherent in such measures cannot be underestimated, and this is especially unjust when, in contrast to some of the cases cited by the prosecution, the defendants herein (and including anyone connected with the defendants) have done nothing whatsoever to threaten the translators.

The Fourteen Phone Calls

The defense renews herein its prior opposition to any evidence being submitted regarding any phone calls by Mr. Aref to the IMK Office in Damascus. Mr. Aref previously requested, as *Brady* material, the transcripts of said conversations, which the defense believes were illegally recorded by the NSA. (In that regard, it is noted that yesterday the District Court for the Eastern District of Michigan ruled that said NSA program is illegal and unconstitutional, and granted a Permanent Injunction against it on behalf of the many plaintiffs in that case.)

This Court ruled, in a secret order, that any such information regarding the transcripts of said phone conversations was classified. *There was never any claim that the government did not possess said transcripts, nor was there any claim that said material did not constitute Brady material.* It is clear that *Brady* material may not be kept from the defense simply because it is classified. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Now that the government has indicated that it does wish to introduce evidence regarding the fourteen phone calls, the defense renews herein the request for the transcripts or, in the alternative, for a ruling that the prosecution is precluded from making any mention of the calls at trial.

Dated: August 18, 2006.

/s/Terence L. Kindlon

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United States District Court,
N.D. New York.
UNITED STATES of America,
v.
Yassin Muhiddin AREF and Mohammed Mosharref Hossain, Defendants.

No. 04-CR-402.
July 6, 2006.

Terence L. Kindlon, Kindlon, Shanks Law Firm, Kevin A. Luibrand, Tobin, Dempf Law Firm, Albany, NY, for Defendants.

Gregg N. Sofer, U.S. Department of Justice, Counter-Terrorism Section, Washington, DC, Gregory A. West, Office of the United States Attorney, Syracuse, NY, William C. Pericak, Elizabeth C. Coombe, Office of United States Attorney, Albany, NY, for Plaintiff.

DECISION AND ORDER

THOMAS J. McAVOY, Senior District Judge.

*1 On April 11, 2006, Defendant Aref filed a supplemental motion seeking specific *Brady* material. *See* April 11, 2006 ltr. motion [dkt. # 227] ("Supplemental Motion"). On June 9, 2006, the Government responded to the Supplemental Motion by filing the "Government's Ex Parte, In Camera, Under Seal Letter Response Regarding Defendant Aref's April 11, 2006 Letter Request for Discovery of Recorded Statements." *See* June 12, 2006 Gov't Notice of Submission [dkt. # 237]. The Government

represented that the material contained in its response to Aref's Supplemental Motion was classified information impacting the national security of this Country. *See* CIPA § 1 (defining "classified information" as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security); Exec. Order No. 12,958 § 1.3(a)(1)-(3), 60 Fed.Reg. 19,825, 19,826 (Apr. 17, 1995); 28 C.F.R. § 17.21; *see also United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir.1984)("[T]he government ... may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), *rev'd on other grounds on reh'g*, 780 F.2d 1102 (4th Cir.1985) (*en banc*); *United States v. Musa*, 833 F.Supp. 752, 755 (E.D.Mo.1993)("The determination whether to designate information as classified is a matter committed to the executive branch."). The Government also presented 2 proposed Orders, one that contained information deemed classified by the Government ("classified Order") and one that did not ("non-classified Order"). The materials were submitted *ex parte* and reviewed *in camera*, and the Court determined to sign the proposed Orders. The non-classified Order was filed with the Clerk and posted on the public docket. *See* June 12, 2006 Order [dkt. # 239].

With regard to the materials submitted on June 9, 2006 that contained classified information (including the proposed classified Order that the Court signed), the Court finds that the Government's interest in protecting the national security and preventing the dissemination of classified information outweighs the defendants' and/or the public's right of access to these materials. *See Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606-07 (1982)(First Amendment right of access to court proceedings and documents may be curtailed in favor of a compelling Governmental interest provided that the limitation on access is "narrowly tailored to serve that interest."); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984)("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)(common law right of access may be outweighed by important competing interests); *see also Haig v. Agee*, 453 U.S. 280, 307 (1981)("[N]o governmental interest is more compelling than the security of the Nation."); *Snepp v. United States*, 444 U.S. 507, 509, n. 3 (1980)(*per curiam*)("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."); *United States v. Moussaoui*, 65 Fed. Appx. 881, 887, 2003 WL 21076836, at *3 (4th Cir. May 13, 2003)(unpublished decision) ("[T]here can be no doubt that the Government's interest in protecting the security of classified information is a compelling one.") (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988)); *United States v. Al-Arian*, 267 F.Supp.2d 1258, 1266-67 (M.D.Fla.2003)("This Court cannot think of a more compelling or substantial interest that the United States possesses than protection of classified information."). The Court further finds that because the materials submitted on June 9, 2006, including the proposed classified Order that the Court signed, were so limited in scope and so interrelated with classified information, the filing of redacted materials or a redacted classified Order that did not divulge classified information would be impossible. No less reasonable alternative to closure and sealing will protect the Government's interest in preventing the unauthorized dissemination of this information, and this sealing order is drawn as narrowly as possible under the circumstances.

*2 On April 20, 2006, the Government presented the Court with a "Classified Letter" that constituted an update of materials previously submitted in relation to the Government's motion for a protective order pursuant to the Classified Information Procedures Act ("CIPA") § 4 and Federal Rule of Criminal Procedure 16(d)(1). *See Notice of Submission of Classified Letter* [dkt. # 230]. The Government represented that all of the material contained in the April 20, 2006 Classified Letter was classified information impacting the national security of this Country. The Classified Letter was submitted *ex parte* and reviewed *in camera*. As indicated in the Court's June 7, 2006 Decision and Order, the Court disagreed with the Government's argument and determined that the Government had to disclose the names from the "Rawah Notebook" that had been declassified. *See* 6/7/06 Dec. & Ord. at pp. 3-4, 17-18 [dkt. # 235]. The Government has complied with the Court's order. *See Status Report* [dkt. # 238].

With regard to the materials submitted on April 20, 2006, and in light of the Government's representation that the materials were classified, the Court finds that the Government's interest in protecting the national security and preventing the dissemination of classified information outweighs the defendants' and/or the public's right of access to these materials. *See Globe Newspaper Co.*, 457 U.S. at 606-07; *Press-Enterprise Co.*, 464 U.S. at 510; *Nixon*, 435 U.S. at 598; *Haig*, 453 U.S. at 307; *Snepp*, 444 U.S. at 509, n. 3; *United States v. Moussaoui*, 65 Fed. Appx. at 887, 2003 WL 21076836, at *3; *United States v. Al-Arian*, 267 F.Supp.2d at 1266-67. The Court further finds that because the materials submitted on April 20, 2006 were so limited in scope and so interrelated with classified information, the filing of redacted materials or a redacted Classified Letter that did not divulge classified information would be impossible. No less reasonable alternative to closure and sealing will protect the Government's interest in preventing the unauthorized dissemination of this information, and this sealing order is drawn as narrowly as possible under the circumstances.

Therefore, the above referenced materials are and shall remain sealed until further order of this Court, and are placed in the custody of the Court Security Officer for appropriate storage. **IT IS SO ORDERED.**

N.D.N.Y.,2006.

U.S. v. Aref

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