

FEDERAL PUBLIC DEFENDER
Western District of Washington

May 10, 2016

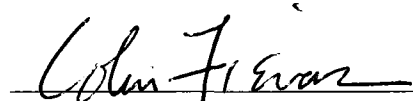
The Hon. Robert J. Bryan
U.S. District Court
1717 Pacific Avenue, Courtroom "A"
Tacoma, WA 98402

RE: *United States v. Michaud*; CR15-5351 RJB
Letter of Supplemental Authority

Your Honor,

The enclosed decision (*Chekkouri v. Obama*) is submitted as supplemental authority for the May 12, 2016, hearing in the above captioned matter.

Respectfully submitted,



Colin Fieman
Assistant Federal Public Defender

Enclosure:

Chekkouri v. Obama
2016 WL 393178 (D.D.C February 1, 2016)

cc: Matthew Hampton
Assistant United States Attorney
1201 Pacific Ave., Suite 700
Tacoma, WA 98402

Chekkouri v. Obama, --- F.Supp.3d ---- (2016)

2016 WL 393178

2016 WL 393178
Only the Westlaw citation is currently available.
United States District Court,
District of Columbia.

Younous Chekkouri, Petitioner,
v.
Barack H. Obama, et al., Respondents.

Civil Action No. 05-0329 (PLF)

Signed February 1, 2016

Synopsis

Background: Following petitioner’s release to Moroccan authorities, where he was detained pending a decision on whether to file charges against him, government submitted an ex parte, in camera supplemental notice. Petitioner moved for limited disclosure of filing.

[Holding:] The District Court, Paul L. Friedman, J., held that government’s asserted need for confidentiality with regard to its ex parte filing in petitioner’s action against government did not outweigh strong presumption against ex parte submissions, for purposes of limited disclosure to petitioner’s counsel.

Motion granted.

West Headnotes (3)

^[1] **Federal Civil Procedure**
Ex parte communications

Ex parte submissions generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them.

Cases that cite this headnote

^[2] **Federal Civil Procedure**
Ex parte communications
Privileged Communications and Confidentiality

Classified information; state secrets; military secrets

Exceptions to general rule that ex parte submissions are generally disfavored include circumstances where: (1) materials are submitted for inspection to the court because a party seeks to prevent their use in litigation; (2) the government has made a demonstration of compelling national security concerns; or (3) such ex parte review is specifically contemplated by statute.

Cases that cite this headnote

^[3] **Privileged Communications and Confidentiality**
Classified information; state secrets; military secrets

Government’s asserted need for confidentiality with regard to its ex parte filing in petitioner’s action against government did not outweigh strong presumption against ex parte submissions, for purposes of limited disclosure to petitioner’s counsel in action brought by petitioner who had been released by government to Moroccan authorities, who detained him pending a decision on whether to file charges against him; submission was unclassified, a protective order prohibited petitioner’s counsel from releasing the filing or any information contained therein to the public, the Moroccan government or courts, or even to petitioner, and petitioner’s counsel possessed security clearances and had previously accessed protected information in the case.

Cases that cite this headnote

Attorneys and Law Firms

Chekkouri v. Obama, --- F.Supp.3d ---- (2016)

2016 WL 393178

Ahmed Ghappour, Cori Crider, Tara L. Murray, Reprieve, London, UK, Eric Leslie Lewis, Lewis Baach PLLC, George Brent Mickum, IV, Hollingsworth LLP, Washington, DC, Jan K. Kitchel, Cable Huston LLP, Portland, OR, Joseph A. Pace, Reprieve, New York, NY, for Petitioner.

Jonathan S. Needle, Rodney Patton, Ronald James Wiltsie, Terry Marcus Henry, Timothy Andrew Johnson, Alexander Kenneth Haas, Andrew I. Warden, David Hugh White, Julia A. Berman, Kathryn Celia Davis, Kristina Ann Wolfe, Patrick D. Davis, Robert J. Prince, Stephen McCoy Elliott, U.S. Department of Justice,

MEMORANDUM OPINION AND ORDER

PAUL L. FRIEDMAN, United States District Court

*1 On September 17, 2015, the government notified the Court that it had released petitioner Younous Chekkouri and transferred him to the control of the Government of Morocco. Since that time, petitioner has been detained in Morocco pending a decision by Moroccan authorities on whether to file charges against petitioner. On December 10, 2015, the government submitted an ex parte, in camera Supplemental Notice, which it also has designated as protected information under the Protective Order in this case [Dkt. No. 107]. Petitioner has objected to this submission as improper and has filed a motion seeking limited disclosure of this filing to his counsel, which the government opposes. After careful consideration of the parties' papers and the relevant legal authorities, the Court grants petitioner's motion for disclosure of the government's ex parte filing.

^[1] ^[2] Ex parte submissions "generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires a reasonable opportunity to know the claims of the opposing party and to meet them." U.S. v. Microsoft Corp., 56 F.3d 1448, (D.C.Cir.1995) (quoting In re Paradyne Corp., 803 F.2d 604, 612 (11th Cir.1986)). Exceptions to this general rule "are both few and tightly contained." Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C.Cir.1986); see also United States v. Libby, 429 F.Supp.2d 18, 21 (D.D.C.2006) ("[C]ourts routinely express their disfavor with ex parte proceedings and permits such proceedings only in the rarest of circumstances."). These include circumstances where: (1) materials are submitted for inspection to the Court because a party seeks to prevent their use in

litigation; (2) the government has made "a demonstration of compelling national security concerns"; or (3) such ex parte review is specifically contemplated by statute. Abourezk v. Reagan, 785 F.2d at 1061; see also Clifford v. United States, 136 F.3d 144, 149 (D.C.Cir.1998) ("[N]ot all ex parte communications must be disclosed, particularly when there is a countervailing need for confidentiality.").

^[3] The government asserts that disclosure of its ex parte submission, although unclassified, would harm "significant Government interests" and that the submission therefore falls within the second exception described in Abourezk. Opp. at 3. Although the Court appreciates that the filing was voluntary and intended to provide the Court with as much information as possible, it is unpersuaded that the government's need for confidentiality in this instance outweighs the strong presumption against ex parte submissions.¹ The government has not demonstrated a "compelling national security concern" sufficient to justify protecting the information from limited disclosure to petitioner's counsel. As the government has recognized, see Opp. at 6 n.3, the Protective Order in this case prohibits petitioner's counsel from releasing the filing, or any information contained therein, to the public, the Moroccan government or courts, or even to petitioner's own client because the government has designated the ex parte filing as protected. See Protective Order ¶¶ 34-35 [Dkt. No. 107] ("Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following: a. petitioner's counsel, ... and b. the Court and its support personnel."). Petitioner's counsel also possess security clearances and previously have accessed protected information in this case under the same restrictions. The Court therefore is satisfied that disclosure of this protected information will cause no significant harm to the government's interests. Petitioner's counsel are admonished that the information has been designated as protected by the government and therefore is subject to the Protective Order in this case and protected from disclosure.

*2 For the foregoing reasons, it is hereby

ORDERED that petitioner's motion to compel disclosure of the government's ex parte, in camera submission [Dkt. No. 407] is GRANTED. The government is directed to disclose the submission to petitioner's counsel on or before February 3, 2016.

SO ORDERED.

All Citations

Chekkouri v. Obama, --- F.Supp.3d ---- (2016)

2016 WL 393178

--- F.Supp.3d ----, 2016 WL 393178

Footnotes

- 1 Because the filing is unclassified, the Court need not consider whether the information is material to petitioner's case. See Al Odah v. United States, 559 F.3d 539, 547 (D.C.Cir.2009) (“[A]lthough a finding of materiality is a prerequisite to ordering disclosure of classified information, it is not a prerequisite to ordering disclosure of an unclassified substitution.”).

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