

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

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

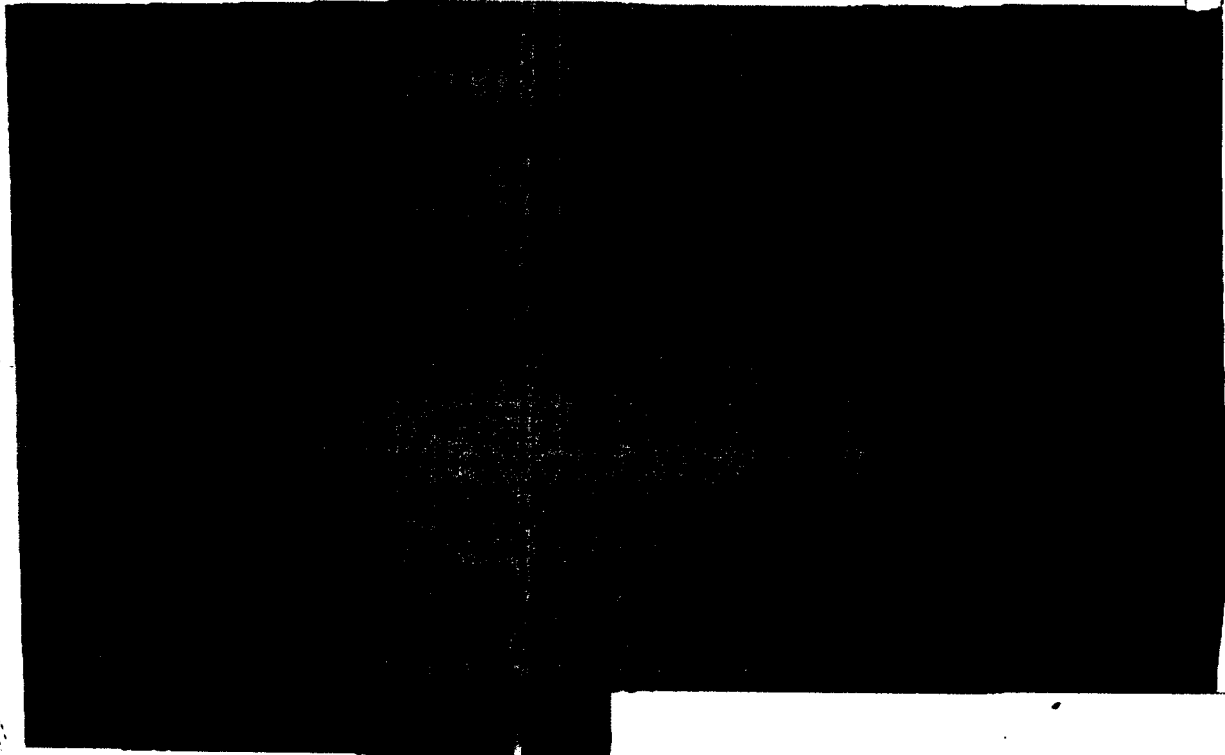
MEMORANDUM IN SUPPORT OF MOTION FOR ACCESS TO MATERIAL  
WITNESS [REDACTED] AND FOR A WRIT AD TESTIFICANDUM DIRECTING  
THE UNITED STATES TO PRODUCE [REDACTED] FOR TESTIMONY AT TRIAL

INTRODUCTION

Standby counsel have moved for pre-trial access [REDACTED] and for the Court to issue a writ *ad testificandum* to the United States to assure [REDACTED] is available for testimony at trial. This Motion is in support of Mr. Moussaoui's [REDACTED]

[REDACTED] Based on the combination of publicly available information, information that is classified, and information from Mr. Moussaoui [REDACTED] has testimony which is material to Mr. Moussaoui's defense. The government has refused to grant the defense access [REDACTED]. The defense is entitled to access to this witness for purposes of pre-trial interview and then for testimony at trial.

1. [REDACTED] a top al-Qaeda official who has been captured [REDACTED]



2. The government refuses to grant access [redacted] or produce him for trial.

The defense requested access [redacted]

[redacted] There has been no formal response to this letter, but the defense was orally advised to the effect that it is the unequivocal position of the government that no circumstance exists under which [redacted] will be made available to the defense for pretrial interview regardless of whether he has information relevant to the case. Our understanding is that this also means no videotaped deposition and no trial testimony.

3. [redacted] has evidence material and favorable to the defense. Attached hereto [redacted] is a classified, *ex parte*, underseal submission which contains both classified information concerning [redacted] and Mr. Moussaoui's proffer with regard to why [redacted] can be expected to provide exculpatory testimony at trial.



4. Mr. Moussaoui or standby counsel acting for him are entitled to access [REDACTED]

[REDACTED] The government must be compelled to allow the defense access [REDACTED]

makes clear that [REDACTED]

[REDACTED] and that his testimony will support the contention that Mr. Moussaoui is not 9/11.

Access [REDACTED] is especially required in this capital case where, by statute, Mr. Moussaoui is entitled to "make any proof, by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution." 18 U.S.C. § 3005. We view this statute as essentially mandating a level playing field of equal access to witnesses in a capital case. [REDACTED]

[REDACTED] the government is obligated to provide access to these witnesses. *United States v. Tipton*, 90 F.3d 861,888 (4th Cir. 1996). A defendant is entitled to access to any prospective witness even if the witness ultimately refuses to be interviewed. See *United States v. Walton*, 602 F.2d 1178, 1179-1180 (4th Cir. 1979). When witnesses are "secluded" by the United States, it is the duty of the trial court to ensure that the defense has access. *Id.* at 1180.

No provision of the law allows the United States to create a secret trove of witnesses that it can conceal from a capital defendant when the evidence possessed by those witnesses is material to the defense. To the contrary, the Sixth Amendment guarantees the right to access to the relevant and material evidence possessed by these witnesses because the evidence sought is plainly material and favorable to his defense. See *Washington v. Texas*, 388 U.S. 14, 16 (1967) (violation of compulsory process clause of Sixth Amendment when defendant arbitrarily deprived of testimony that would have been relevant and material to his defense); see also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-873 (1982) (due process violation if government deports witness where defense shows

that favorable and material evidence was lost); and, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution").

The sum of these holdings then, is that if the defendant can identify witnesses that are material to the defense, the court should order access to those witnesses so that their testimony can be discovered and produced for the jury. Otherwise, the court would be allowing the prosecutors to secrete evidence that is favorable to the accused. The government may not [REDACTED] deny access to evidence to a defendant. If a witness [REDACTED] has evidence that is material to the defense, the government cannot interfere with the ability of a defendant to interview that witness and/or to call that witness on behalf of the defense at trial.

5. The court must act to assure that Mr. Moussaoui has the benefit of [REDACTED] testimony at trial. The reasons set forth above in support of our request for access [REDACTED] are even more forceful when it comes to securing [REDACTED] testimony for trial since that is the ultimate goal of securing access to him in the first place. Since this is a death case, 18 U.S.C. § 3005 suggests that Mr. Moussaoui is entitled to a writ to obtain the live testimony of this witness.

#### CONCLUSION

This is a capital case. The defendant seeks the testimony of a witness [REDACTED]. [REDACTED] The witness is situated such that he should have direct knowledge of the crime charged in this case, the government has refused a defense request for access to the

**All Attachments Remain Classified**

witness, and the witness has information material to the defense. It is respectfully submitted that the Court must do all in its power, because death is different, to assure that the defendant or his standby counsel gain access to this witness for pre-trial interview and that the defense then be allowed to secure the testimony of this witness for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Memorandum in Support of Motion for Access to Material Witness [REDACTED] and for a Writ *Ad Testificandum* Directing the United States to Produce [REDACTED] for Testimony at Trial was served upon AUSA Robert Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314, by facsimile, and also by placing a copy BY HAND in the box designated "U.S. Attorney" in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia; and, by first class mail upon Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, Virginia 22314, on this 18<sup>th</sup> day of September, 2002.

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Frank W. Dunham, Jr.