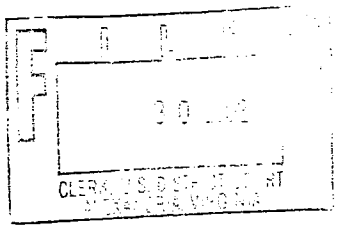
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



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

DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND POINTS AND AUTHORITIES IN SUPPORT THEREOF

On September 18, 2002, the Government notified standby counsel that it intends to use statements Zacarias Moussaoui allegedly made on August 27 and September 9, 2002 to Deputy U.S. Marshals ("DUSM") who were searching for and retrieving classified materials the Government had mistakenly produced to him.[1] Those statements were obtained in violation of the purpose of the Court's orders that permitted the DUSMs to undertake the search and seizure in the first place, and in contravention of *Miranda v. Arizona*, 384 U.S. 436 (1966). Accordingly all of the alleged statements should be suppressed.[2]

Facts

On August 22, 2002, the Government informed the Court that two documents containing classified material had been "inadvertently" produced in unclassified form to

[1] *See* letter from Robert A. Spencer to Frank W. Dunham, Jr. dated Sept. 18, 2002, appended at Tab 21. For ease of reference, all of the appended documents are arranged in chronological order.

[2] Because parts of the instant motion and some of the attachments are classified and/or contains facts that the Court Security Officer has indicated should not be given to Mr. Moussaoui, neither a copy of the motion nor the attachments have been provided to him. *Cf.* Order from U.S. District Judge Leonie M. Brinkema dated Aug. 22, 2002 at 1-2 (ruling that before filing motions, standby counsel "must provide a copy to the defendant for his review"); Order from U.S. District Judge Leonie M. Brinkema dated Sept. 26, 2002 (unsealing the correspondence, pleadings, and orders regarding the inadvertent production of classified materials).

Mr. Moussaoui.[3] The Government sought the Court's permission to send into the defendant's cell a "walled-off FBI team" to retrieve these documents (and the two computer disks on which they had been originally produced) and replace them with unclassified versions.[4] By letter dated August 23, 2002, the Court denied the Government's request questioning why "[i]f the documents are so sensitive . . . they were not initially classified."[5] The Court also noted that "there is a significant danger that any agents sent to Mr. Moussaoui's cell would have to rummage through all of his materials. That would risk serious intrusions into his pro se work product, which a 'walled-off' FBI team would not solve."[6] Instead, the Court proposed that it issue an order directing Mr. Moussaoui to return the documents to a Deputy U.S. Marshal, "who would collect the materials from him."[7]

By letter dated August 24, 2002, the Government accepted the Court's proposal and further explained that the two "inadvertently produced" documents "should have been classified" but were not at the time they were given to Mr. Moussaoui.[8] The

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[3] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Aug. 22, 2002 at 1, appended at Tab 1 ("We write seeking the Court's assistance in securing the return of two documents that contain classified information that were inadvertently produced to Mr. Moussaoui in discovery in this case.").

[4] *Id.* ("In addition, we want to have a walled-off FBI team enter Mr. Moussaoui's cell at the Alexandria Detention Center to retrieve the hard copy of the documents and the disks on which they were originally produced (and replace those disks with ones that do not contain the documents).").

[5] *See* letter to Robert A. Spencer from U.S. District Judge Leonie M. Brinkema dated Aug. 23, 2002 at 1, appended at Tab 2.

[6] *Id.*

[7] *Id.*

[8] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Aug. 24, 2002 at 1, appended at Tab 3.

Government "[c]andidly" admitted that "it was a mistake not to classify the documents originally."[9] The Government also informed the Court that the number of such mis-delivered documents had grown from two to [redacted] and the disks from two to [redacted] for a total [redacted] items, and requested that the Court's order include these additional classified documents and disks.[10] Accordingly, by order dated August 26, 2002, the Court directed Mr. Moussaoui "to return the documents and the compact disks . . . by turning them over to a Deputy U.S. Marshal," who, the Order stated, "is directed to serve this Order on the defendant . . . and to require him to produce, forthwith, to a Deputy U.S. Marshal the listed documents and CDs."[11]

Thus, on August 26, 2002, DUSMs went to Mr. Moussaoui's cell and at some point thereafter began searching for the pertinent materials.[12] (It is not altogether clear why the DUSMs undertook a search for the documents when the Court's Order merely authorized them "to serve [the] Order" and "require [Mr. Moussaoui] to produce" the materials.) The next day, August 27, 2002, Mr. Moussaoui filed a "Motion to Expulse the United State from the Arabian Discovery Cave," asking that the "2 day" search of his

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9 *Id.*

10 *Id.*

11 *See* Order from U.S. District Judge Leonie M. Brinkema dated Aug. 26, 2002 at 1-2, appended at Tab 4. Interestingly, one of the two mis-produced documents [redacted] referenced in Mr. Spencer's letter to the Court dated August 22, 2002 was not listed in the Court's August 26 Order.

12 *See* Incident Report by DUSM Barry S. Boright dated Aug. 29, 2002 at 1, appended at Tab 8 (stating that on August 28 (later corrected to August 27), 2002, "DUSMs Boright, Carter, Reed, and Gilbert went to the Alexandria Jail to search boxes of documents and Moussaoui's cell for the documents in the court order").

cell be ended.[13] In his motion, Mr. Moussaoui indicated that during the search, he had been "den[ied] access to my work zone" and his boxes of documents had been turned "upside down."[14] The Court responded to this motion by ordering the search for the documents to end by 5:00 p.m. on August 28, 2002.[15]

On August 29, 2002, the Government again wrote to the Court, this time requesting permission to seize all of the hard copy FBI 302 reports that it had produced to Mr. Moussaoui.[16] The primary reasons for this request, which even the Government admitted the Court "will likely greet . . . with reluctance," were two-fold. First, the DUSMs had been unable to recover two [redacted] inadvertently produced documents[17] and the Government wanted to replace Mr. Moussaoui's complete set of 302s with a re-printed set. Second, the Government had discovered that there was even more unspecified classified material among the 302s in Mr. Moussaoui's cell that had been mistakenly produced to him.[18] The Court responded to this request by

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[13] *See* "Motion to Expulse the United State from the Arabian Discovery Cave" at 1-2 (filed Aug. 27, 2002), appended at Tab 5. Mr. Moussaoui appears to have known exactly why the search was being undertaken. *See id.* at 1 (stating "[f]or two days now [Judge] Leonie Brinkema send me her SS (Secret Searcher) to recover secret document sent to me by the FBI by 'MISTAKE'").

[14] *Id.* at 1.

[15] *See* Order from U.S. District Judge Leonie M. Brinkema dated Aug. 28, 2002 at 1-2, appended at Tab 6.

[16] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Aug. 29, 2002 at 1, appended at Tab 7.

[17] All of the CDs were recovered. *See* Order from U.S. District Judge Leonie M. Brinkema dated Sept. 6, 2002 at 2, appended at Tab 11.

[18] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Aug. 29, 2002 at 2, appended at Tab 7 ("[I]t appears from an ongoing review of 302s produced as unclassified documents to the defendant in this case that there are additional 302s that may contain classified information.").

instructing the Government to provide the Court with a complete list of the mis-produced documents by September 3, 2002.[19]

On September 5, 2002, the Government provided the Court with a list of [redacted] documents that it had mistakenly produced to Mr. Moussaoui and requesting additional permission to have these documents "removed from the defendant and returned to the United States."[20] [redacted] these documents were in addition to those listed on the Court's Order of August 26, 2002, bringing the total number of mis-delivered documents to [redacted][21] In a separate letter dated the same day, the Government additionally requested that Mr. Moussaoui be denied any access to his discovery material saying that even if the situation was one "of our own making," Mr. Moussaoui's access to the material was "illegal and dangerous."[22]

The Court granted the Government's requests by an Order dated September 6, 2002.[23] In that Order, the Court reiterated that it had rejected the use of an FBI "walled-

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[19] *See* Order by U.S. District Judge Leonie M. Brinkema dated Sept. 6, 2002 at 2, appended at Tab 11 ("Through the Court Security Officer, the United States was instructed to provide [the Court] with a complete and final list of the documents at issue by September 3, 2002.").

[20] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Sept. 5, 2002 at 1, appended at Tab 10.

[21] The total [redacted] was arrived at by adding the [redacted] new documents to the [redacted] that were on the Court's August 26, 2002 Order. (The two documents that were included on the Court's August 26, 2002 Order and also listed on the Government's September 5, 2002 list are: [redacted] *See also* Order by U.S. District Judge Leonie M. Brinkema dated Sept. 6, 2002 at 3, appended at Tab 11 (stating that the total number of documents inadvertently produced to Mr. Moussaoui is [redacted]

[22] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Sept. 5, 2002 at 1-2, appended at Tab 9 (asking the Court to "order the United States Marshal to prevent the defendant from having access to the discovery materials until the Court has ruled finally on the issue").

[23] *See* Order by U.S. District Judge Leonie M. Brinkema dated Sept. 6, 2002, appended at Tab 11. Permission to deny Mr. Moussaoui access to this discovery material was actually granted before September 6, 2002. *See id.* at 3 ("T]he Court granted the request by orally instructing the United States

off" team because such an approach would have constituted "an unreasonable intrusion into the defendant's work product."[24] However, given the "significant national security interests" at stake, the Order directed the Marshal and Court Security Officers to "retrieve from the Alexandria City Adult Detention Center any boxes containing FBI 302s or any FBI 302s outside of the boxes," and thereafter search that material and retrieve the remaining mis-delivered classified documents.[25] Once those documents were located, the Court said, the remaining unclassified discovery was to be returned to Mr. Moussaoui with a list of what had been removed.[26] Finally, the Court ordered that the search for the mistakenly delivered documents had to be completed within four days, by 5:00 p.m. on September 10, 2002.[27] In the meantime, Mr. Moussaoui was denied access to the seized material.[28]

Marshal to bar the defendant from reviewing hard copies of the discovery provided to him.").

[24] *Id.* at 1.

[25] *Id.* at 3.

[26] *Id.* at 4. In a subsequent order dated September 10, 2002, the Government was granted permission to replace all of the FBI 302s that had been seized from Mr. Moussaoui's cell and replace them with a new unclassified set of 302s. *See* Order from U.S. District Judge Leonie M. Brinkema dated Sept. 10, 2002 at 1-2, appended at Tab 17. In that Order, the Court directed the Government, by September 17, 2002, to provide Mr. Moussaoui with the documents in an "organize[d]," "index[ed]," and "clear and intelligible manner." *Id.* at 2.

[27] *See* Order from U.S. District Judge Leonie M. Brinkema dated Sept. 6, 2002 at 4, appended at Tab 11.

[28] The Court also issued two other orders dated September 6 and September 9, 2002 ordering the Court Security Officer to take from Mr. Moussaoui [redacted] additional computer discs. *See* Orders by U.S. District Judge Leonie M. Brinkema dated Sept 6 and 9, 2002, appended at Tabs 12 and 13, respectively. These orders were in response to written requests by the Government on September 5 and September 9 to have the Court Security Officer retrieve CDs that contained some of the [redacted] documents listed on the Government's September 5, 2002 letter.

Then, on September 9, 2002, the Government announced that while the DUSMs were performing their court-ordered tasks, they had engaged in a conversation with Mr. Moussaoui, memorialized that conversation, and given a written report of it to the prosecutors.[29] That report states, *inter alia*, that DUSMs Boright and Carter, while "execut[ing] a court order,"[30] on August 28, 2002 (later corrected to August 27, 2002), initiated a conversation with Mr. Moussaoui during the search of his cell by asking him "how he got along with the Deputies at the jail."[31] Mr. Moussaoui answered this question and then he was asked a second question by DUSM Boright, specifically, "what he [Moussaoui] thought of Deputy Overstreet," who was standing nearby.[32] Mr. Moussaoui answered that question and "than [sic] began to talk" about various topics, including the reasons for terrorism in the United States, airline security and bomb-making.[33] According to the August 28 Incident Report, Mr. Moussaoui went on conversing for the approximately thirty minutes that DUSMs Boright and Carter were in his cell.[34] At several points during this conversation, DUSM Boright asked Mr.

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[29] *See* letter, with attachment, to Zacarias Moussaoui from Kenneth M. Karas dated Sept. 9, 2002 at 1, appended at Tab 14.

[30] That order was the Court's August 26, 2002 order, appended at Tab 4, for Mr. Moussaoui to return the [redacted] classified documents and the [redacted] associated CDs.

[31] *See* Incident Report by DUSM Barry Boright dated Aug. 29, 2002 (hereafter "Aug. 29 Incident Report") at 1, appended at Tab 8. According to the report, some or all of the conversation was overheard by DUSMs Reed and Gilbert, and Deputy Sheriff Overstreet. *Id.* at 1-2.

[32] *Id.* at 1.

[33] *Id.*

[34] *Id.* at 2.

Moussaoui to clarify "what he meant" and Mr. Moussaoui responded.[35] Likewise, DUSM Boright responded to several questions asked of him by Mr. Moussaoui. At no time before or during the conversation was Mr. Moussaoui advised of his *Miranda* rights.

The day after being informed that statements of Mr. Moussaoui were being passed on to the prosecutors, standby counsel wrote to the Court expressing their concern, stating that "[a]nything learned as a result of retrieving national security information from Mr. Moussaoui's cell should have been understood as being behind a 'firewall' separating those sent to retrieve the material from the prosecution team."[36] Counsel asked the Court to confirm that "any information learned during the search of Mr. Moussaoui's cell for national security information [not] be communicated to prosecutors or otherwise used against him in any way."[37]

Two days later, on September 12, 2002, the prosecutors announced that another memorialized statement by Mr. Moussaoui had been given to them by the same DUSMs who had executed the earlier search.[38] That statement was made on September 9, 2002 to DUSMs Boright and Carter during the search of Mr. Moussaoui's

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[35] According to the Aug. 28 Incident Report, Mr. Moussaoui was asked at least three times to explain the meaning of some statement he had made.

[36] *See* letter to the Honorable Leonie M. Brinkema from Frank W. Dunham, Jr. dated Sept. 10, 2002 at 1, appended at Tab 15.

[37] *Id.*

[38] *See* letter, with attachment, to Zacarias Moussaoui from Kenneth M. Karas dated Sept. 12, 2002 at 1, appended at Tab 19.

cell pursuant to the Court's Order of September 6, 2002.[39] The September 10, 2002 Incident Report memorializing the statement, like the August 29 Incident Report, indicates that DUSMs Boright and Carter had a "conversation" with Mr. Moussaoui.[40] That conversation began when the deputies told Mr. Moussaoui that they needed to search his cell for documents, and it continued while Mr. Moussaoui observed the progress of the search.[41] Again, at no point before or during this conversation was Mr. Moussaoui advised of his *Miranda* rights.

On September 13, 2002, in response to standby counsel's letter to the Court regarding the taking of the first statement, the Court ordered the Government to inform the defense whether it intended to use at trial any of the statements made by Mr. Moussaoui.[42] The Government responded on September 18, 2002, saying that the "suppression issue" would need to be litigated unless the defense accepted its suggested resolution of the matter, to wit:

> The Government will not use the defendant's statements on August 27 and September 9, 2002 to Deputy Boright and others in its case-in-chief during the guilt phase of the trial; we reserve the right to use the statements in cross-examining the defendant (should he testify), in our rebuttal case should such evidence be relevant in rebuttal, and in any penalty phase (should there be such a phase).[43]

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[39] That order directed the seizure of all FBI 302s produced to Mr. Moussaoui. *See* Order dated Sept. 6, 2002 at 3, appended at Tab 11.

[40] *See* Incident Report by DUSM Barry S. Boright dated Sept. 10, 2002 (hereafter "Sept. 10 Incident Report") at 1, appended at Tab 18.

[41] *Id.*

[42] *See* Order from U.S. District Court Judge Leonie M. Brinkema dated Sept. 13, 2002 at 1, appended at Tab 20.

[43] *See* letter to Frank W. Dunham from Robert S. Spencer dated Sept. 18, 2002 at 2, appended at Tab 21.

The instant motion represents our rejection of the Government's proposed resolution.[44]

Argument

I. Admission Of Mr. Moussaoui's Statements Would Contravene The Purpose Of The Court's Orders And The Demands Of Due Process

Suppression of Mr. Moussaoui's August 27 and September 9 statements is necessary to effectuate one of the primary purposes of the Court's orders:[45] to minimize both the harm to the defendant as a result of the Government's mistaken production, and the possibility that the Government could reap a benefit from a problem of its own creation. From the beginning, the Court has attempted to promote this purpose by taking the following steps:

- Refusing to allow FBI agents, whose agency is responsible for the criminal investigation of the defendant, to participate in the search and retrieval of the mis-produced material;[46]
- Preventing the general "rummaging" of Mr. Moussaoui's materials;[47]
- Protecting the defendant's work product;[48]

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[44] Mr. Moussaoui has not indicated to standby counsel his position with respect to the Government's proposed resolution.

[45] The other purpose of the Court's orders, of course, was to safeguard national security interests. The Court effectuated this purpose by directing the return and/or retrieval of the classified material, ordering the defendant not to read the classified documents, and barring the defendant access to the hard copies of the discovery produced to him. *See* Orders dated Aug. 26, 2002 at 1-2 and Sept. 6, 2002 at 3-4, appended at Tabs 4 and 11, respectively.

[46] *See* letter to Robert A. Spencer from U.S. District Judge Leonie M. Brinkema dated Aug. 23, 2002 at 1, appended at Tab 2.

[47] *Id.*

[48] *Id. See also* Order dated Sept. 6, 2002 at 1, appended at Tab 11 (stating that the prosecutor's initial recovery approach represented "an unreasonable intrusion into the defendant's work product").

- Initially limiting the authority of the DUSMs to serving the Court's Order and accepting receipt from Mr. Moussaoui of the mistakenly produced material;[49]
- Imposing time limits on the authority to search and seize materials in the defendant's cell;[50]
- Requiring the Government to re-produce to the defendant a copy of the seized compact disks without the classified documents;[51]
- Initially denying the Government's request to repossess all of the FBI 302s in the defendant's possession and replace them with a re-printed set without the classified documents;[52]
- Instructing that the re-printed, non-classified, set of FBI 302s be provided to Mr. Moussaoui in an organized, indexed, and "clear and intelligible manner;"[53]
- Directing that the Government give the defendant a list of the documents removed from his cell;[54]

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[49] *See* Order dated Aug. 26, 2002 at 1-2, appended at Tab 4.

[50] *See* Orders dated Aug. 28, 2002 (imposing time limit of 5:00 p.m., Aug. 28, 2002) and Sept. 6, 2002 at 4 (time limit of 5:00 p.m., Sept. 10, 2002), appended at Tabs 6 and 11, respectively.

[51] *See* Order dated Aug. 26, 2002 at 1-2, appended at Tab 4.

[52] *See* letter to the Honorable Leonie M. Brinkema from Robert A. Spencer dated Aug. 29, 2002 at 1 (making the request to confiscate all the 302s), and Sept. 6, 2002 Order at 4 (denying the request and ordering the return of the non-classified 302s), appended at Tabs 7 and 11, respectively. Eventually, all of the 302s were ordered seized and re-printed copies given to Mr. Moussaoui by September 17, 2002. *See* Order dated Sept. 10, 2002, appended at Tab 17.

[53] *See* Order dated Sept. 10, 2002 at 2, appended at Tab 17.

[54] *See* Order dated Sept. 6, 2002 at 4, appended at Tab 11.

- Ordering the Government promptly to advise Mr. Moussaoui and standby counsel of its intention to use the statements allegedly heard by the DUSMs on August 27 and September 9;[55] and
- Preserving Mr. Moussaoui's appellate rights by placing all of the confiscated material under seal as part of the permanent record of the case.[56]

The Government, on the other hand, is seeking the Court's imprimatur of two steps that are in direct conflict with the above purpose. First, the Government is indirectly asking the Court to sanction the conduct of the DUSMs, who not only engaged in substantive conversations with Mr. Moussaoui about his state of mind, motives, and views about issues relevant to the prosecution, but also memorialized and shared those conversations with Mr. Moussaoui's prosecutors. Nowhere, in any of the Court's many orders and rulings on this matter, is there any authority for the DUSMs' actions. Indeed, as noted, those actions undermine the Court's many efforts to minimize the harm to Mr. Moussaoui and prevent the Government from reaping a windfall from its own negligence.

From the beginning, when the DUSMs' authority extended merely to "serv[ing] [the] Order on the defendant . . . and . . . requir[ing] him to produce [the material],"[57] to the end, when the DUSMs were directed to "retrieve . . . any FBI 302s" and "[bar Mr.

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[55] *See* Order dated Sept. 13, 2002 at 1, appended at Tab 20.

[56] *See* Orders dated Sept. 6, 2002 at 4, and Sept. 10, 2002 at 2, appended at Tabs 11 and 17, respectively.

[57] *See* Order dated Aug. 26, 2002 at 1-2, appended at Tab 4.

Moussaoui's] access to the hard copies of the discovery,"[58] the Court carefully circumscribed the Marshals' authority, only expanding it when justified by need. The DUSMs are very good at following instructions and not exceeding the scope of their authority. When confronted with a situation, such as that facing them on August 27 and September 9, they should have sought guidance from the Court before unilaterally memorializing Mr. Moussaoui's statements and passing them on to the very prosecutors who are seeking his death. In short, the DUSMs were there to search, not converse. By doing more than that, they overstepped their authority.[59]

Second, the Government is seeking permission to use in court against Mr. Moussaoui his alleged statements of August 27 and September 9. This request is even more objectionable than the conduct of the DUSMs, and should be rejected outright.

As a preliminary matter, it is important to note that the Government has continuously admitted that this entire national security fiasco was a product of its own "mistakes" and "inadvertence;" not the fault of Mr. Moussaoui, standby counsel, or the Court. Yet, what the Government admits in one breath, it takes away with the other; for seeking the admission of the statements is tantamount to punishing Mr. Moussaoui for the Government's sins. Conversely, admission of the statements would reward Governmental misconduct and allow the prosecution to take advantage of a problem of its own creation. Admission also would place the Government in a better position than it was in before the material was produced, which would be inconsistent with the many

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[58] *See* Order dated Sept. 6, 2002 at 3, appended at Tab 11.

[59] Standby counsel are not suggesting that the DUSMs acted in bad faith. The harm to Mr. Moussaoui is the same, however, whether the DUSMs' motives were good or ill intentioned.

steps that the Court has taken to safeguard the defendant's interests.

Seeking permission to use Mr. Moussaoui's statements also is inconsistent with the Government's initial proposal to use a "walled-off FBI team" to retrieve the mis-produced material.[60] That proposal would have meant that the search and retrieval team would have been separate from and had absolutely no contact with the lawyers prosecuting Mr. Moussaoui. Thus, any information learned while fixing the Government's national security snafu would not have enured to the Government's benefit or the defendant's detriment. Indeed, it was in part because of the Government's asserted good faith to safeguard Mr. Moussaoui's interests that standby counsel did not object to the suggested retrieval procedures or the ones later implemented by the Court. As standby counsel asserted in its September 10 letter, "[a]nything learned as a result of retrieving national security information from Mr. Moussaoui's cell should have been understood as being behind a 'firewall' separating those sent to retrieve the material from the prosecution team. Otherwise, the government's colossal foul-up with regard to its own secrets produces a windfall opportunity to gain information for its case."[61]

In a post hoc rationalization, the Government responds to the above by claiming that a "walled-off" team is not truly walled-off; but rather, like splayed fingers covering the eyes, can let things seep through. *See* letter to Frank W. Dunham, Jr. from Robert A. Spencer dated Sept. 18, 2002 at 1 (asserting that the "wall" only "prevent[s] the

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[60] *See* note 4 *supra*.

[61] *See* letter to the Honorable Leonie M. Brinkema from Frank W. Dunham, Jr. dated Sept. 10, 2002 at 1, appended at Tab 15.

United States from intruding on the defendant's trial strategy, work product, or privileged communication").[62] This rationalization is meritless and should be summarily rejected. "Walled-off" means just what it implies, that nothing can pass from one side to the other. Moreover, had the Government bothered to share this recent interpretation of "walled-off" with Mr. Moussaoui and standby counsel *before* his cell was invaded, standby counsel, at a minimum, would have taken steps to ensure that Mr. Moussaoui was fully protected. At the time, of course, it was the Government's neck in the noose, so the prosecution was willing to be conciliatory. Now, after receiving an unexpected windfall from its own negligence, the Government hypocritically changes course, claiming that even a walled-off team would not have prevented the prosecutors from learning of and using Mr. Moussaoui's statements.

Also without merit is the Government's suggestion that the Court rejected the prosecution's request for a walled-off FBI team because such protection was either unnecessary or unwarranted. *See id.* at 1, n.2 ("It also bears mention that the Court rejected the Government's suggestion of using a walled-off FBI team and did not provide for a walled-off team from the Marshals Service."). The Court rejected the walled-off approach not because it was unnecessary, but because it did not offer *enough* protection. This was made plain in the Court's August 23, 2002 letter to the Government in which the Court proposed that, rather than have a walled-off FBI team enter Mr. Moussaoui's cell, the Court merely order him to return the classified

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[62] This letter is appended at Tab 21.

material.[63] The walled-off approach, the Court said, "[would pose] a significant danger that any agents sent to Mr. Moussaoui's cell would have to rummage through all of his materials . . . risk[ing] serious intrusions into his pro se work product, which a 'walled-off' FBI team would not solve."[64] Thus, if a walled off team did not offer enough protection, then certainly the Court should not countenance an interpretation of its rulings that results in diminished protection for the defendant.

Not only is complete suppression of Mr. Moussaoui's statements necessary to effectuate the Court's orders, but it is also necessary to satisfy the demands of due process; demands that seek to preserve a sense of fair play and fundamental fairness. Indeed, the primary reason for the exclusionary rule is to ensure that the Government does not profit from its own misconduct. As the Supreme Court observed in *Nix v. Williams*, "[t]he core rationale" for the exclusionary rule is "to deter police from violations of constitutional and statutory protections . . . [and thus ensure that] the prosecution is not . . . put in a better position than it would have been in if no illegality had transpired."[65] *See also Silverthorne v. United States*, 251 U.S. 385, 392 (1920) (stating that with respect to documents obtained by an invalid subpoena, "the knowledge gained by the Government's own wrong cannot be used by it in the way proposed"); *Zap v. United States*, 328 U.S. 624, 630 (1946) (noting that exclusion of evidence obtained as

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[63] *See* letter to Robert A. Spencer from U.S. District Judge Leonie M. Brinkema dated Aug. 23, 2002 at 1, appended at Tab 2.

[64] *Id.*

[65] *Nix v. Williams*, 467 U.S. 431, 442-43 (1984) (also stating that the "fruit of the poisonous tree" doctrine, which forms the basis for the exclusionary rule, has been applied to Fourth, Fifth, and Sixth Amendment violations).

a result of an unlawful search and seizure "is suppressed on the theory that the government may not profit from its own wrongdoing"), *judgment vacated*, 330 U.S. 800 (1947); *Gelbard v. United States*, 408 U.S. 41, 63 (1972) (stating that the proposition of *Silverthorne* and its progeny is "to withhold from the Government any further rewards of its 'dirty business'") (Douglas, J. concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting)); *Brown v. Illinois*, 422 U.S. 590 (1975) (holding that the Government cannot use a statement obtained after an illegal arrest, even if the *Miranda* warnings preceded the statement, unless the Government can show that the statement was not obtained by exploitation of the unlawful arrest).

So too, the Government should not be permitted to profit from its own negligence, particularly where, as here, it also would result in significant harm to a defendant who did not cause or contribute to the problem. Nor should the Court allow itself to be tainted by the Government's conduct by sanctioning the use of Mr. Moussaoui's statements under the circumstances of this case. *See Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting) ("[N]o distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

Accordingly, given that the purpose of the Court's rulings was to permit the Government to retrieve mis-delivered materials not gather evidence to aid in the prosecution, the Court should prohibit the prosecution from using Mr. Moussaoui's

August 27 and September 9 statements for any trial purpose whatsoever, whether in its case-in-chief, in rebuttal/cross-examination, or in the penalty phase. Further, just as Mr. Moussaoui was ordered to return documents that should not have been in his possession, so too should the prosecution be directed to return to the Court all copies of the August 29 and September 10 Incident Reports memorializing Mr. Moussaoui's statements. Finally, the DUSMs and the Deputy Sheriffs should be prohibited from sharing with any person the substance of Mr. Moussaoui's statements unless the Court allows otherwise.

II. Admission Of Mr. Moussaoui's Statements Would Violate *Miranda v. Arizona* And The Fifth Amendment

The purpose of the *Miranda* warnings is to counteract the "inherently compelling pressures [in a custodial interrogation that] work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[66] Supplementing these "inherent" pressures were more overt influences, such as physical brutality, trickery, and incommunicado interrogation, that the Supreme Court wanted to eliminate.[67] All of these pressures and influences undermine the "voluntariness" that the Fifth Amendment requires of statements in a criminal case.[68]

Thus, the *Miranda* rights are "constitutionally based" safeguards to protect the

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[66] *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

[67] *See id.* at 446 (brutality), 455 (trickery), 445-47 (incommunicado interrogation).

[68] *See id.* at 460 ("[T]he privilege [against compelled self-incrimination under the Fifth Amendment] is fulfilled only when the person is guaranteed the right to 'remain silent unless he chooses to speak in the unfettered exercise of his own will.'") (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).

Fifth Amendment.[69] The rights must be read to the accused before questioning begins, and be "afforded to him throughout the interrogation."[70] Further, the Government has the burden of establishing compliance with *Miranda*.[71]

The *Miranda* warnings are required only when the accused is subject to "police interrogation while in custody."[72] "Interrogation" means "express questioning or its functional equivalent."[73] Thus, interrogation includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the [defendant]."[74] "Custody" means "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[75] Key to custody is whether the accused is under formal arrest or "otherwise deprived of his freedom of action in any significant way."[76]

Moreover, a defendant may waive his *Miranda* rights, but only after they have

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[69] *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 2334 (2000) (holding that *Miranda* is "constitutionally based").

[70] *Miranda*, 384 U.S. at 479.

[71] *Id.* at 444, 475, 479; *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986) (prosecution bears burden of proving a valid waiver of *Miranda* rights by a preponderance of the evidence).

[72] *Miranda*, 384 U.S. at 477.

[73] *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

[74] *Id.* at 301.

[75] *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

[76] *Miranda*, 384 U.S. at 477. *See also Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect who voluntarily acceded to police questioning at the police station and who was told that he was not under arrest, was not in custody since he was not under arrest or otherwise formally detained).

been read to him.[77] Any waiver must be knowing, intelligent, and voluntary.[78] Finally, statements obtained in contravention of *Miranda* are inadmissible in the Government's case-in-chief.[79] Thus, for example, the prosecution cannot make its case with statements that are the result of an incorrect recitation of rights, a failure to abide by the rights, or a failure to read the rights. The prosecution can, however, use such statements in rebuttal to impeach the defendant's credibility if the defendant's in-court testimony differs from those statements.[80]

In the instant case, the question is not whether Mr. Moussaoui was in custody, for clearly he was, but whether he was subject to interrogation. We submit that given Mr. Moussaoui's environment, belief system, unpredictable personality, *pro se* status, and presence during the searches, the DUSMs should have known that their conduct on August 27 and September 9 was reasonably likely to elicit a response from the defendant that would be incriminating[81] or otherwise harmful to his interests.

First and foremost is Mr. Moussaoui's environment. He has been held in solitary confinement in Alexandria for over nine months under some of the most restrictive conditions ever to be imposed on a pre-trial detainee. His cell is cramped and segregated away from the other units, he is not allowed contact with any other inmates,

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77 *Miranda*, 384 U.S. at 479.

78 *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

79 *Miranda*, 384 U.S. at 444.

80 *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975).

81 An "incriminating response" is "any response-whether inculpatory or exculpatory-that the *prosecution* may seek to introduce at trial." *Rhode Island v. Innis*, 446 U.S. 291, 301, n.5 (1980) (emphasis in original).

he has very limited recreational time, he has not had any non-legal visits (except infrequent ones with his mother), and he is foreclosed, in any meaningful way from practicing his religion. Any inmate confined under these conditions will inexorably want to engage in conversation with whomever enters his cell. Thus, it is not surprising, indeed it is inevitable, that Mr. Moussaoui conversed with the DUSMs.

Second, Mr. Moussaoui has a very strong belief system that is confrontational and provocative. His dislike for the United States and its form of government is well known. As such, he is not likely to pass up an opportunity to engage in conversation with a visiting DUSM who not only is a government agent, but also an arm of the Court. Thus, it is no mere "coincidence" that Mr. Moussaoui made statements to the agents searching his cell.[82]

Third, Mr. Moussaoui has an unpredictable personality. He is apt to say almost anything. (This character trait was amply demonstrated in court on April 22, 2002 when, during a non-contentious motions hearing, he, without warning, demanded to represent himself; and on July 18, 2002 when, during a routine reading of the Second Superceding Indictment, he announced that he wanted to enter a guilty plea.) Further, given his well-known dislike for the United States, whatever he says to a DUSM is likely to be full of anger and therefore harmful to his own interests. Thus, there is no such thing as an innocuous or casual conversation with Mr. Moussaoui and the DUSMs did know or should have known this.

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[82] *See* letter to Frank W. Dunham, Jr. from Robert A. Spencer dated Sept. 18, 2002 at 2, appended at Tab 21 (stating that "[i]t was mere coincidence that the defendant volunteered . . . statements during the search for the documents").

Fourth, Mr. Moussaoui's *pro se* status made him particularly vulnerable to the DUSMs. Because he is *pro se*, standby counsel could not insist on being present during the searches of his cell, leaving Mr. Moussaoui, with all of his failings, completely alone to deal with whatever arose during his contacts with the Marshals. In many ways, Mr. Moussaoui was a "sitting duck" who could be exploited without hindrance.

Finally, Mr. Moussaoui's presence during the searches of his cell exacerbated the likelihood that he would make some kind of self-inculpatory comment. According to the two Incident Reports, Mr. Moussaoui remained inside of his cell, observing the searches as they took place.[83] There is no indication that he was given the option of vacating his cell during the searches so that he did not have to witness the DUSMs going through his work product, disrupting the organization of his materials, invading his environment, and basically leaving his cell in disarray. It is no wonder that Mr. Moussaoui could not refrain from making statements to the agents.

To claim, as the Government may, that the DUSMs were unaware of some or all of the above factors is not credible. Some of the DUSMs involved in the searches, most notably DUSM Boright, have been Mr. Moussaoui's handlers for some time. They have escorted him to court and back again, remained present in court and observed his interactions with Judge Brinkema, and, no doubt, leaned a good deal about his environment, beliefs, and unpredictable personality. Moreover, they certainly were aware of Mr. Moussaoui's *pro se* status and the fact that he was present during the

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[83] *See* Aug. 29 Incident Report at 2, appended at Tab 8 ("Moussaoui was present the entire time [that the agents were in his cell]."); Sept. 10 Incident Report at 1, appended at Tab 18 (stating that Deputy Boright "was sitting two feet on the left of Moussaoui, who was sitting on his bed").

searches of his cell. Given this knowledge, DUSM Boright, and at least some of the other DUSMs involved with the searches, should have known that any attempt at a conversation with Mr. Moussaoui was "reasonably likely to elicit an incriminating response" from the defendant. *See Innis*, 446 U.S. at 302, n.8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect."). In this regard, it also is important to remember that it was the DUSMs, not Mr. Moussaoui, who initiated the conversation on August 27, 2002.[84]

That the DUSMs did not intend to elicit an incriminating response from Mr. Moussaoui, assuming that is true, is of no moment because, as the Supreme Court has noted, the "functional equivalent" aspect of the *Innis* test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police."[85] Thus, in *Pennsylvania v. Muniz*, the Court rejected the argument that interrogation was lacking "merely because the questions [proffered by the police] were not intended to elicit information for investigatory purposes."[86]

For the foregoing reasons, Mr. Moussaoui's alleged statements on August 27 and September 9 were the product of custodial interrogation and thus they should be

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[84] *See* Aug. 29 Incident Report at 1, appended at Tab 8 (stating that the conversation was initiated when "Moussaoui was asked how he got along with the Deputies at the jail").

[85] *Innis*, 446 U.S. at 301.

[86] *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion).

suppressed absent proof that Mr. Moussaoui was read and validly waived his *Miranda* rights.

Conclusion

Accordingly, for the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel move this Court to suppress all of the defendant's statements he allegedly made to federal agents on August 27 and September 9, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Suppress Statements and Points and Authorities in Support Thereof, with attachments, was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand on this 30th day of September 2002.

/s/

Kenneth P. Troccoli

TABs 1-21 Redacted

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