COURT SECURITY OFFICER
Meg Peltier
DATE
11-27-02

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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	)	*CLASSIFIED FILING/UNDER SEAL*

STANDBY COUNSEL'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S AND STANDBY COUNSEL'S MOTIONS FOR ACCESS [redacted] AND A WRIT *AD TESTIFICANDUM* TO PRODUCE [redacted] FOR TESTIMONY AT TRIAL[1]

Standby counsel, on behalf of Zacarias Moussaoui, herewith file their reply to the Government's Response to Defendant's and Standby Counsel's Motions for Access [redacted] and a Writ *Ad Testificandum* to Produce [redacted] for Testimony at Trial (the "Government's Response").[2]

INTRODUCTION

The defense, by way of introduction, will say what the government will not say in its Response: that the issue posed by these Motions is one of first impression. Standby counsel are not aware of any authority - either way - as to what actions the trial court must take when a defendant seeks access to and the right to call as a trial witness a [redacted] member of an enemy force." Response at

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[1] Pursuant to the Court's Order of October 3, 2002, on November 27, 2002, a copy of this pleading was provided to the Court Security Officer for submission to a designated classification specialist who will "portion-mark" the pleading and return it to standby counsel. A copy of this pleading will not be provided to Mr. Moussaoui until standby counsel receive confirmation from the classification specialist that they may do so.

[2] Standby counsel's and Mr. Moussaoui's motions for access to and for a writ *ad testificandum* for [redacted] are collectively referred to herein as the "Motions."

16.[3] This problem is exacerbated by the peculiar facts of this case where the conspiracy crimes that Mr. Moussaoui is charged with committing also are characterized by the government as acts of war. Response at 2.

The Government's Response claims that because the President's constitutional obligation to wage war brings his power to its "zenith," *see* Response at 22, Mr. Moussaoui's constitutional rights are reduced and can be overridden. We believe, however, that if there is any right or power that is at its "zenith," it is Mr. Moussaoui's constitutional right to mount a defense and call witnesses in a case where the government is seeking to take his life. Given that it is the government that has filed this case and is seeking the death penalty, the "balance of powers" tilts inexorably in favor of Mr. Moussaoui.

Moreover, the arguments set forth in the Government's Response rest upon several false assumptions. [redacted] We contend that this assertion is wholly immaterial to the resolution of the instant Motions.

[redacted]

Second, the government assumes that a defendant's constitutional right to defend himself in a capital case by thoroughly investigating the matter and then seeking to introduce admissible and material evidence at trial can be trumped by "national security" interests. However, the government fails to cite a single case where a capital defendant was denied access to a material witness [redacted] In particular, there are no citations to any capital cases that approve the discovery limitations suggested by the government in this case. (To the contrary, the Fourth Circuit Court of Appeals held in *United States v. Tipton*, 90 F. 3d 861, 879 (4th Cir. 1996), *cert. denied sub nom. Roane v. United States*, 520 U.S. 1253 (1997), that access to the witnesses in capital cases is specifically assured.)

Third, the government ignores the ramifications of the fact that this is a capital case. Those ramifications include the fact that the scope of the evidence that a capital defendant must be allowed to present is constitutionally broader than that required in a non-capital case. Finally, the government questions the relevance and materiality of the information that could be obtained from [redacted] The defense submits, however, that the obvious relevance of the information [redacted] cannot seriously be challenged. [redacted] As such, and for the reasons set forth below, the motions for access to and a writ *ad testificandum* for [redacted] should be granted.

ARGUMENT

I. The Fact That The Prosecutors Have Not Been Allowed Access [redacted] Is Immaterial To Resolution Of The Pending Motions

As noted, [redacted] refusing access to [redacted] to the parties is wholly immaterial to the resolution of these Motions. It is the President of the United States, acting through his Attorney General, who has authorized the filing and prosecution of this case. *See* 18 U.S.C. §§ 501, 503. Likewise, it is the President of the United States, acting through his Secretary of Defense, who has prosecuted the war effort in which "thousands of enemy combatants have been captured by American and allied forces, [redacted]" Response at 4. *See also id.* (noting that pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), Congress authorized the President to use "force . . . to prevent any future acts of . . . terrorism against the United States"). As a result, if access [redacted] is ordered, the President, though his agents at DOJ, must comply or face the consequences. *See United States v. Andolsheck*, 142 F.2d 503, 506 (2d Cir. 1944) (Hand, J.) (holding that with respect to relevant documents in the exclusive possession of the government, "[t]he government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully"); *United States v. Powell*, 156 F. Supp. 526, 530 (N.D. Cal. 1957) (holding that the United States must chose between issuance of passport clearance for defense counsel to travel to China and Korea to gather defense evidence and "discontinuance of the present prosecution").

[redacted] Mr. Moussaoui's constitutional right of access to [redacted] witness is not dependent upon the decision of the Executive Branch [redacted] to restrict prosecutorial access to that witness. *See United States v. Tipton*, 90 F.3d 861, 889 (4th Cir. 1996) (holding that with respect to witnesses in the protection of the government, "[defense] access is a matter of right]"), *cert. denied sub nom. Roane v. United States*, 520 U.S. 1253 (1997); *United States v. Walton*, 602 F.2d 1176, 1179 (4th Cir. 1979) (stating that "[a] witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness . . . ."); *see also Brady v. Maryland*, 373 U.S. 83 (1963) (the government must disclose to the defense favorable evidence where such evidence is material to either guilt or punishment).

Further, it is of little significance that the government believes, at this time, "that [redacted] will [not] be made available to the prosecution as a witness in this case." [redacted]

[redacted] This is fundamentally unfair and, despite the government's assertion otherwise,[7] this "secret trove" of evidence will be used "to gain a tactical advantage in this prosecution."[8] Response at 16.

II. There Is No Legal Support For The Government's Argument That The Interests Of "National Security" Can Prevent A Capital Defendant From Gaining Access To A Witness [redacted] Who Possesses Relevant And Material Evidence

The Sixth Amendment to the United States Constitution provides the accused in a criminal prosecution the right to offer the testimony of favorable witnesses and "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. *See also Taylor v. Illinois*, 484 U.S. 400, 409 (1988) ("The right to offer testimony is . . . grounded in the Sixth Amendment . . . ."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.").

The defendant's right to present witnesses in his own defense also is grounded in the Fifth Amendment's Due Process Clause as the right "is an essential attribute of

[redacted]

the adversary system itself." *Taylor v. Illinois*, 484 U.S. at 408. As the Supreme Court observed in *Washington v. Texas*,

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. 14, 19 (1967). This right extends to favorable evidence relevant not only to guilt/innocence, but also to evidence material to impeachment of government witnesses and punishment. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

There is, moreover, a statutory basis in a capital case for the defendant "to make any proof that he can produce by lawful witnesses, [and to] 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. [redacted]

The requirement that the defense be allowed access to and the right to call witnesses is especially important in conspiracy cases.[9] As the Supreme Court noted in *Dennis v. United States*,

> A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. Under these

[9] To the best of counsel's knowledge, this is the first case since that of Julius and Ethel Rosenberg that the government has sought the death penalty against a defendant based solely upon his status as a conspirator.

> circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

384 U.S. 855, 873 (1966) (citation omitted).[10]

As such, our Nation's laws and Constitution protect the presentation of a criminal defendant's case from unwarranted interference by the government, be it in the form of an evidentiary rule, prosecutorial misconduct, or an arbitrary ruling by the trial judge. *See Washington v. Texas*, 388 U.S. at 23 (declaring unconstitutional a state statute that prohibited co-participants in the same crime from testifying for one another); *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (declaring unconstitutional state evidentiary rules that were mechanistically applied to preclude exculpatory testimony); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (technical rule of evidence cannot be used to exclude mitigating evidence in penalty phase of capital case); *Bennett v. Scroggy*, 793 F.2d 772, 776-77 (6th Cir. 1986)(due process and Compulsory Process Clause violated when trial court refused to grant overnight continuance to allow defendant to secure a favorable witness that constituted his only defense); *United States v. Morrison*, 535

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[10] In this case, the evidence, [redacted] is literally and figuratively waiting to be unlocked so that Mr. Moussaoui can present this evidence in his defense. And, the Supreme Court's admonition about conspiracy cases is embraced by the Indictment in this case, which is the best evidence of the materiality and relevance [redacted] However, these are matters for [redacted] and provide no basis for denying the Motions. *See United States v. Walton*, 602 F.2d 1176, 1180 (4th Cir. 1979) (stating that "[t]he better procedure" for allowing defense access to [redacted] witnesses "is to allow the defense counsel to hear *directly* from the witness whether he would be willing to talk to the defense attorney") (emphasis added).

F.2d 223, 227-28 (3d Cir. 1976) (finding a Sixth Amendment violation where government conduct forced a defense witness to refuse to testify).

Even the President when exercising his constitutionally bestowed foreign affairs power[11] is constrained by other provisions of the Constitution. As the Supreme Court noted in *United States v. Curtiss-Wright Export Corp.*, "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. 304, 319-20 (1936).

The government's argument that "[a] defendant's right to compulsory process can be limited by 'countervailing public interests'"[12] is thus overstated under the facts of the instant case. Reduced to its essence, this argument says that the Chief Executive, through his Department of Justice, simply can ignore constitutional requirements (including due process and the rights to confrontation and compulsory process) under the right set of circumstances.[13] The argument, in effect, creates loopholes in the

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[11] *See Ex Parte Quirin*, 317 U.S. 1, 25-26 (1942) (stating that "Congress and the President, like the courts, possess no power not derived from the Constitution").

[12] *See* Response at 25.

[13] Such power was once vested in the King of England and then abandoned entirely by the Founding Fathers. As the Court recalled in *Washington v. Texas*, 388 U.S. 14, 19-20 (1967):

> Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Constitution that are so large that they vitiate the constitutional obligations that spawned them. It transforms the Constitution from a true restraint on governmental power to a mere set of aspirations.

Hence, the government's argument is extremely dangerous for it erodes the primary reason for the creation of our Constitution. As the Supreme Court pronounced some 135 years ago,

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false . . . .

Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). Of similar sentiment is *I.N.S. v. Chadha*, where Chief Justice Burger wrote:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

462 U.S. 919, 959 (1983) (citation omitted). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (warrantless seizure of private property cannot be sustained based on the President's military power as Commander in Chief of the Armed Forces); *United States v. Robel*, 389 U.S. 258, 264 (1967) (declaring unconstitutional the Subversive Activities Control Act as violative of the First Amendment and observing

that "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties – the freedom of association – which makes the defense of the Nation worthwhile"); *United States v. United States District Court*, 407 U.S. 297, 320 (1972) (holding unconstitutional warrantless electronic surveillance in domestic security matters and recognizing that "the constitutional basis of the President's domestic security role . . . must be exercised in a manner compatible with the Fourth Amendment"); *United States v. Reynolds*, 345 U.S. 1, 12 (1952) ("The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense").

These cases highlight the system of checks and balances that form the basis for our constitutional form of government. Thus, while the President has the constitutionally based power to wage war when war has been declared by Congress,[14] he does not have the power, even in the midst of a war, to avoid, by secreting relevant and material evidence, his constitutional and statutory obligations to see that justice is served in a capital criminal prosecution. Indeed, the government can point to no authority for the proposition that the individual rights granted under the Constitution to a defendant may be subject to any checks and balances that would allow the President, based on his power to wage war, to initiate a capital criminal prosecution and then secrete and withhold material evidence from the defendant in that case.

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[14] *See Ex Parte Quirin*, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared . . . .").

Accordingly, while this court is required to give great deference to the war powers vested in the Executive Branch, the instant Motions raise an entirely different question than that posed in the cases of *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (*see* Response at 25) and *Ex Parte Quirin*, 317 U.S. 1 (1942). Here, we have a capital prosecution authorized and initiated by the President of the United States. In *Hamdi* and *Quirin*, in contrast, the individual petitioners were the moving parties and the United States was the respondent. The scope of constitutional protections, and whether they can be trumped for national security reasons, is a completely different question where, as here, the United States has initiated the litigation. In such a context, the United States must choose between its national security interests and its desire to proceed with the litigation it started. It cannot have its proverbial cake and eat it too. As one federal district court plainly stated:

> So the United States has its choice. It can choose to adhere to its policy of non-issuance of [passports for defense counsel to travel to China and Korea to gather defense evidence]. Or it can decide that it is more important to prosecute this criminal case. If the former be its choice, it will mean a discontinuance of the present prosecution.

United States v. Powell, 156 F. Supp. 526, 530 (N.D. Cal. 1957) (ordering the United States to validate defense counsel's passport within thirty days or suffer dismissal of the indictment). *Cf. United States v. Andolsheck*, 142 F.2d 503, 506 (2d Cir. 1944) (Hand, J.).

Likewise, none of the many other cases cited by the government in support of its "compelling national security interests," *see* Response at 25-32, support the notion that interests of national security can trump the due process and Sixth Amendment rights of

a capital defendant. Even *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982), upon which the government heavily relies, is of no avail. Indeed in that case, in which a Vietnamese ambassador/potential defense witness was recalled back to Vietnam at the request of the U.S. Government, the government, and implicitly the court, acknowledged the defendants' right to speak with the ambassador before the latter left the country. *See id.* at 929 (noting that after the defendants advised the court that they wanted to speak with the witness, "[t]he government . . . agreed to a court order enjoining it for a period of ten days from taking action to expel the [witness] from the United States").

Similarly, *Haig v. Agee*, 453 U.S. 280 (1981) merely held that the Passport Act was a legitimate basis to revoke a citizen's qualified right to hold a U.S. passport and that the respondent's due process rights were not violated under the facts of that case. Here, of course, there is no Congressional act authorizing the government to deny access [redacted] and further, the qualified "'right'" of international travel at issue in *Haig*, *see* 453 U.S. at 307, is not nearly as compelling as the due process and Sixth and Eighth Amendment rights of Mr. Moussaoui.

Finally, defense access [redacted] should not depend on establishing that the government has acted in "bad faith." *See* Response at 1 (arguing that the Motions should be denied as "[t]here has been no showing of bad faith by the Government regarding [redacted]. Bad faith is simply inapplicable to this case and the government's attempt to graft this requirement onto a simple motion for access to evidence should be rejected.

All of the bad faith, and for that matter "prejudice," cases cited by the government arise in the post-trial context when the appellate court is looking backward to determine whether a presumptively valid conviction should be reversed. Here, the request is being made well in advance of trial so the Court has the ability to weigh this request and determine whether Mr. Moussaoui can make the requisite showing that [redacted] possesses some information that may be helpful to the defense. That is, for purposes of invoking the government's duty to make pre-trial disclosures, "the defendant[ ] need only establish a 'substantial basis for claiming' that a mitigating factor will apply at the penalty phase, in order to invoke the Government's obligation under *Brady* and its progeny to produce any evidence which is material to that mitigating factor.'" *United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (Payne, J.) (interpreting the government's discovery obligations in a pre-trial setting). *See also id.* at 816 ("'[I]f the subject matter of such a request is material, or indeed, *if a substantial basis for claiming materiality exists*, it is reasonable to require the prosecutor to respond . . . ") (emphasis in original) (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)).[15]

III. The Government Ignores The Ramifications From The Fact That This Is A Capital Case

The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Consequently, the scope of the evidence that a capital defendant

[redacted]

must be allowed to present is constitutionally broader than that required in a non-capital case. *Id.* at 604-05. As such, the determination of relevance and materiality will involve additional issues including, necessarily, the factual issues raised in support of defenses set forth in the Federal Death Penalty Act. In a capital case, the defendant is entitled to put on mitigating evidence, the scope of which is broad and cannot be limited by ordinary relevancy or evidentiary considerations. *See id.* at 604-07 (striking down, under Eighth Amendment, statutory limitation on scope of mitigation); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (technical rules of evidence cannot be used to exclude reliable mitigating evidence in penalty phase of capital case).

A. The defendant is entitled to information that might support potential mitigating factors

While the mitigating evidence may not be limited to those factors identified in the Federal Death Penalty Act, 18 U.S.C. § 3592, at a minimum, evidence that would support any of the statutory mitigators is relevant and admissible, and thus discoverable, in this case. Three of these mitigators are plainly at issue in this case. First, there is a question whether Mr. Moussaoui had an "impaired capacity" pursuant to 18 U.S.C. § 3592 (a) (1) or a "mental or emotional disturbance" pursuant to 18 U.S.C. § 3592(a)(6). Second, there is clear evidence that there are equally culpable defendants who will not be punished by death. *See* 18 U.S.C. § 3592 (a) (4). And third, if Mr. Moussaoui was involved in the September 11 conspiracy at all, he was at worst a minor participant in the offense.[16] *See* 18 U.S.C. § 3592 (a)(3).

[16] [redacted]

As set forth below, [redacted] can provide information as to all of these mitigators. Hence, it remains the ethical obligation of standby counsel to pursue access [redacted] As was noted in the Oklahoma City bombing case,

> Preparation for the defense of those accused of criminal conduct roughly parallels the government's pre-charge investigation. . . . Defense counsel must go well beyond such discovery [as is provided for in Fed. R. Crim. P. 16]. The advocate for the accused has both an ethical obligation and a constitutional duty to conduct a thorough factual investigation and legal analysis. In capital cases, that duty includes preparation for a possible penalty phase of trial. Inadequate defense investigation, including the failure to investigate all plausible lines of defense, constitutes ineffective representation requiring reversal of a conviction on constitutional grounds.

United States v. McVeigh, 918 F. Supp. 1452, 1459 (W.D. Ok. 1996) (citations omitted).

That the government may not believe that any of these mitigators can be proved should not limit the court's inquiry, as it is the jury that has the ultimate responsibility of deciding the sufficiency of the proof. For the purposes of invoking the government's duty to make pre-trial disclosures, "the defendant[ ] need only establish a 'substantial basis for claiming' that a mitigating factor will apply at the penalty phase, in order to invoke the Government's obligation under *Brady* and its progeny to produce any evidence which is material to that mitigating factor.'" *United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997)(Payne, J.).

In *Beckford*, the government sought to limit the defendants from obtaining pretrial discovery relevant to the statutory mitigators. The court, per Judge Robert Payne, rebuffed that effort finding, *inter alia*, that the defendants could obtain discovery

[redacted]

regarding the actions of unindicted co-conspirators who were not facing death. 962 F. Supp. at 814. Judge Payne found that the scope of the government's obligations with respect to "relative culpability" was defined by the meaning of four phrases within the relevant mitigating evidence statute: "defendant or defendants," "in the crime," "will not be punished by death" and "equally culpable."[17]

With respect to "defendant or defendants," Judge Payne held that that phrase in the relative culpability section of the statute "is not limited solely to indicted defendants, but pertains to uncharged co-conspirators as well." 962 F. Supp. at 812. While recognizing the dearth of authority directly on point, the court found that the interchangeability of such terms as "co-defendant," "co-conspirator" and "accomplice" "strongly supports the proposition that the phrase 'defendant or defendants' incorporates uncharged co-conspirators or accomplices." *Id.* at 814. Moreover, the court found support for a broader interpretation of this provision in the decisions of courts in various states with an equal culpability mitigating factor, and in the illogic of resting application of such a factor on the government's charging decisions.[18] *Id.* at

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[17] *See* 962 F. Supp. at 812. The relevant statute in *Beckford* was 21 U.S.C. § 848(m)(8) dealing with drug enterprises. That statute is identical to the "equally culpable defendants" section of the Federal Death Penalty Act, 18 U.S.C. § 3592(a)(4). Judge Payne's analysis thus is equally applicable to the FDPA. Moreover, *Beckford* is the definitive decision on this issue. *See United States v. Regan*, 221 F. Supp.2d 659, 660 (E.D. Va. 2002) (Lee, J.); *United States v. Perez*, 222 F. Supp.2d 164, 2002 WL 31095261 at *168-69 (D. Conn., Aug. 2, 2002); *United States v. Feliciano*, 998 F.Supp 166, 169 (D. Conn. 1998); *United States v. Simoy*, 50 M.J. 1, 3 (C.A.A.F. 1998).

[18] For this reason, a contrary result also would violate the Eighth Amendment's prohibition against arbitrariness in capital sentencing proceedings. *See e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (prohibition against mitigating evidence in a capital sentencing violates Eighth Amendment) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 536, 608 (1978) (same with respect to limiting "relevant mitigating factors").

813-14. Thus, in this case, the "equally culpable defendants" mitigating factor under 18 U.S.C. § 3592(a)(4) is not limited to persons charged in relation to the crime.

With respect to the phrase "in the crime," the *Beckford* court found that it did not include the underlying drug conspiracy, but only the charged murders in furtherance of that conspiracy. 962 F. Supp. at 814-15. Thus, a participant in the drug conspiracy who was not implicated in a charged homicide could not be an equally culpable party under the relative culpability factor. This was because "the four crimes defined in [the relevant death penalty statute] are *the only crimes* for which a defendant can be death-eligible . . . and are thus the only crimes for which there can be a mitigating factor."[19] *Id.* at 814 (emphasis in original).

In contrast, in the instant case, all but two of the six conspiracy offenses with which Mr. Moussaoui are charged *are* potential capital crimes, at least according to the government's definition of those offenses. He is alleged to be a conspirator as to each. Thus, if Mr. Moussaoui is death eligible for those offenses, other indicted and unindicted conspirators for those same crimes also would be death eligible.

Next, Judge Payne found that for, purposes of discovery, the phrase "will not be punished by death" included within the ambit of the relative culpability mitigating factor unindicted, potential defendants, who had not yet been capitally charged by the government as of the time of the defendants' *Brady* motion. Thus, this mitigating factor applied to three persons pre-trial, one of whom had been criminally charged, but not

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[19] Those four crimes were: (1) intentional murder in furtherance of a continuing criminal enterprise; (2) intentional murder in furtherance of a drug trafficking offense punishable under 21 U.S.C. § 841(b)(1)(A); (3) intentional murder by one engaging in a drug offense punishable under 21 U.S.C. § 960(b)(1); and (4) intentional killing of any Federal, State, or local law enforcement officer during the commission of a felony. *Beckford*, 962 F. Supp. at 814.

with capital murder, "and will thus not be punished by death," and two of whom had not been indicted at all. *See id.* at 812, 814, 815. (As to these latter two defendants, the court did not know what the government's ultimate charging decision would be.)

Finally, with respect to the phrase "equally culpable," while the *Beckford* court noted that the concept of equal culpability "carries with it the notions of equal blameworthiness or equal participation 'in the crime,'" the court refused to create a precise definition for this phrase or determine which of the defendants fit that definition. *See* 962 F. Supp. at 816. Rather, the court stated emphatically that it is the *jury* that makes that determination. *See id.* Consequently, the court rejected the argument that "it is up to the Government, as opposed to the jury, to assess the relative culpability of the defendants," *id.*, and the suggestion that the government is entitled to make the decision as to whether the defendant is "entitled to *Brady* discovery as to [the relative culpability] mitigating factor." *Id.*

B. The defendant is entitled to the disclosure of information that could undermine the government's case for death eligibility

Not only can the concept of equal culpability establish a statutory mitigating factor, it might well preclude death eligibility altogether, since the constitution requires that, to be death eligible, a defendant must *both* be a major participant in the felony and evidence a reckless indifference to human life. *See Tison v. Arizona*, 481 U.S. 137, 158 (1986). While those two requirements may overlap, they are, in fact, distinct. *See id.* & n.12. It should simply be beyond question that, consistent with due process and the Eighth Amendment, the government may not seek to execute a defendant while, at the same time, refusing to allow him access to a witness that could help establish that

he is not even death eligible. *See Chambers v. Mississippi*, 410 U.S. 284 (1973) (overturning murder conviction based on trial court's reliance on state's "voucher" and hearsay rules to prevent defendant from impeaching witness he had called, either through cross-examination or through other witnesses). Indeed, "[f]ew rights are more fundamental than that of an accused to present witness in his own defense."[20] *Id.* at 302.

IV. The Information [redacted] Is Relevant And Material[21]

The government has elected not to share with standby counsel any of the information [redacted] As such, standby counsel can establish the relevance and materiality of his testimony only by reference

[redacted]

20 [redacted]

The government has previously conceded that it is relying on 18 U.S.C. § 3591(a)(C) to establish Mr. Moussaoui's death eligibility; that is that he "intentionally participated in an act, contemplating that the life of a person would be taken . . . and the victim died as a direct result of the act." The government has identified only the conspiracy itself as the qualifying "act." Under *Tison*, however, Mr. Moussaoui can be death eligible, consistent with *constitutional* standards, only if he was a "major participant" in the underlying conspiracy, regardless of his mental state. It goes without saying that Mr. Moussaoui cannot be deemed a major participant under [redacted] his truly marginal role.

21 [redacted]

to the discovery, other materials that have thus far been received from the government, public sources of information, and from the statements of Mr. Moussaoui.[22]

[redacted]

[22] This Reply includes only limited information from Mr. Moussaoui, who, as the court is aware, is his own pro se counsel and currently has no meaningful contact with standby counsel.

WHOLE PAGES 22-30 HAVE BEEN REDACTED

[redacted]

CONCLUSION

Standby counsel have complained before about the limited nature of the government's view of its discovery and *Brady* obligations in this case. It is submitted that if [redacted]

Furthermore, any alleged lack of knowledge as to the planning and execution of the September 11 attacks [redacted] shows to the jury that Mr. Moussaoui played but a minor role in the offense if the jury believes that Mr. Moussaoui was taking orders [redacted] Moreover, the government's concerns that Mr. Moussaoui and other al

Qaeda defendants will abuse the legal system [redacted] are overblown. This court retains the right to oversee the trial process and can thus address these requests on a case by case basis.

In its Response, the government does not say [redacted] Instead, the government says that Mr. Moussaoui and his counsel cannot get access to him or call him as a trial witness in this case, and that the defense should take the government's word [redacted] is not helpful to Mr. Moussaoui's defense.[45] Mr. Moussaoui and standby counsel are not seeking access [redacted] as part of some fishing expedition; we simply want access [redacted] to investigate the case and mount an effective defense.

Accordingly, for the foregoing reasons and any others adduced at a hearing on this issue, defendant's and standby counsel's motions for access to and a writ *ad testificandum* for [redacted] should be granted.

ZACARIAS MOUSSAOUI

By Standby Counsel

45 [redacted]

Attachments Remain Classified

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Reply to Government's Response to Defendant's and Standby Counsel's Motions for Access [redacted] and a Writ *Ad Testificandum* to Produce [redacted] for Testimony at Trial 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-delivering a copy to the Court Security Officer on this 27th day of November 2002.

/s/
Kenneth P. Troccoli