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

FILED WITH
COURT SECURITY OFFICER
DATE 1/23/03

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	*TOP SECRET CLASSIFIED*
	)	*FILING/UNDER SEAL*

STANDBY COUNSEL'S REPLY TO THE GOVERNMENT'S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENSE MOTIONS FOR PRETRIAL ACCESS AND FOR WRITS *AD TESTIFICANDUM* [redacted]

Standby counsel herewith file their reply to the Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs *Ad Testificandum* for [redacted]

I. PROCEDURAL HISTORY

The defense, either through Mr. Moussaoui or his standby counsel, has been seeking access [redacted]

This endeavor began [redacted] when the defense requested that the Government allow access [redacted][2] When this request was refused, the defense (collectively standby counsel and Mr. Moussaoui) filed motions seeking access

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[1] Pursuant to the Court's Order of October 3, 2002, on January 23, 2003, a copy of this pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to standby counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Mr. Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

[2] [redacted]

[redacted]

issue on [redacted]

Similarly, the defense sought access to [redacted]

[redacted] the government filed a motion requesting

[redacted]

[redacted][2]

On December 2, the government sought a further forty-five day postponement of consideration of the defense motions for access,[13] which the defense opposed on December 9 [redacted] 2002.[14] The Court granted the government's request by Order dated December 13, 2002.[15] In that Order, the Court found that the defense requests for access to the witnesses "require prompt resolution," and as such, directed the United States to "advise the Court as to its ultimate position regarding the defense motions for access [redacted] (the "witnesses") [redacted] [redacted] the government filed another request for a postponement, which the Court granted the [redacted]

On January 13, 2003, the government filed its Consolidated Response in

[redacted]

Opposition to Defense Motions for Pretrial Access and for Writs *Ad Testificandum* for [redacted] (the "Consolidated Response"), a sixty-nine (69) page brief which, while replete with legal arguments, did not directly answer the Court's question as to the "ultimate position" of the United States on the witness access issue. Moreover, in that response the government attached *ex parte* declarations concerning [redacted] the witnesses and requested an additional fourteen (14) days to address the issue of the attendance of the witnesses at trial.[19]

Thereafter, [redacted] standby counsel filed a motion seeking access to the government declarations attached to the Consolidated Response.[20] [redacted], the Court ordered the United States, [redacted] to provide standby counsel with the substance of any statements [redacted] that may constitute *Brady* material.[21] In response to that Order [redacted] the prosecution produced [redacted] "summaries [redacted]

Also on January 21, the Court entered a Protective Order finding that the [redacted] Summaries were acceptable for discovery purposes in lieu of [redacted]

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19 *See* Consolidated Response at 68, n.45.

20 *See* Standby Counsel's Motion to Disclose Declarations (filed Jan. 15, 2003).

[redacted]

[redacted] reports.[23] That Order limited production of the summaries to *Brady* material.[24] The Court also denied as moot standby counsel's motion seeking access to the declarations attached to the government's earlier pleadings.[25] The [redacted] Summaries provided by the government indicate that the witnesses possess information that is pure *Brady* material.[26]

II. SUMMARY OF THE ARGUMENT

Faced with the Court's determination that there was to be no further delay in answering the question of whether access to any of the witnesses at issue would be granted, a question which has essentially had this case on hold for months, the government stalls for more time to answer the question. It does this by filing a legal brief which it could have filed in the normal response time last fall when defense motions for access were filed, arguing that there is no legal basis for granting what the defense is requesting. By splitting the unsplittable—the concept that a defendant has the right to call witnesses on his own behalf, into separate issues of pretrial access and trial access—the government argues that there is no right to pretrial access and that the question of trial access can be put off until after the trial begins. We contend that the basic right to call witnesses on one's own behalf necessarily includes the right to try to

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[23] *See* Protective Order Under CIPA Section 4 by U.S. District Judge Leonie M. Brinkema at 2-3 (filed Jan. 21, 2003).

[24] *Id.* at 2.

[25] *See* Order by U.S. District Judge Leonie M. Brinkema (filed Jan. 21, 2003).

[26] *See, e.g.*, Protective Order Under CIPA Section 4 by U.S. District Judge Leonie M. Brinkema at 2 (filed Jan. 21, 2003) (stating that "[t]he Court . . . finds that some of the information sought to be protected [in the classified summaries] is discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963)").

talk to those witness before doing so without government interference. By contending otherwise, the government essentially seeks to seriously infringe upon the broader right.[27]

The government, having initiated this prosecution and then having proceeded to seek the death penalty, has taken a wholly unprecedented position in its effort to preclude the defendant from calling witnesses on his own behalf. Namely, the government contends that persons with material firsthand knowledge of the crimes alleged in the Indictment and who were indeed participants in that crime, [redacted] cannot be interviewed pretrial by cleared defense counsel and cannot be called as defense witnesses at trial for reasons of national security even though the government's own reports [redacted] highly exculpatory information as to Mr. Moussaoui.

There is no case that sanctions withholding witnesses [redacted] who have *Brady* information in a death penalty case. Instead, the government cobbles together an argument in its effort to do so based upon cases clearly distinguishable from, and which therefore do not come close to controlling, the situation currently before the Court.

The government's position is flawed for several reasons. First, when the government's *Brady* disclosures are considered in addition to standby counsel's earlier submissions, there exist overwhelming, non-speculative reasons in the record to

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[27] Of course, the witness can refuse, but that is the choice of the witness, not the government.

suggest that the witnesses have material testimony with regard to many of the matters alleged in the Indictment.

Second, the government's argument that access to the witnesses can be denied based upon the *Valenzuela-Bernal*[28] line of cases is misplaced. Those cases are "lost" evidence cases involving an alleged denial of access to a witness who disappeared or is otherwise not available. A defendant in such circumstances must show bad faith on the part of the government and that the testimony of the witness was sufficiently material to have likely changed the outcome at trial. However, the *Valenzuela-Bernal* line of cases are universally post-conviction cases where the Court is using a retrospectoscope to measure the impact of not having had access to a witness at a trial that has already occurred to determine whether there was reversible error. Those cases do not stand for the proposition that a trial judge may prospectively permit the government to withhold known and identifiable material witnesses possessing *Brady* information from the defense in the face of a defense request to call the witnesses to testify. Likewise, the government's argument based on a balancing test theory as in *United States v. Roviaro*, 353 U.S. 53 (1957), does not resolve the government's problem. Even under such a test, the witnesses here clearly were active participants in the crime who possess *Brady* information, and thus even *Roviaro* would require defense access.

Third, there is no precedent for denying a defendant facing the death penalty access to such witnesses. The government ignores the ramifications from the fact that

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[28] *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

this is a death penalty case. Concerns are not only for due process, but there are also Eighth Amendment considerations and statutory considerations which serve to assure that a defendant facing death has equal access to evidence and that the fact finding process is of higher reliability than the ordinary case. This includes relaxed rules of evidence and materiality in the penalty/mitigation phase. Whether some new rule might be born post September 11 with regard to defense access to witnesses who clearly possess *Brady* information, a death penalty case is not the place for its creation because death is different.[29]

Fourth, the Court has the power to issue the writs *ad testificandum* as requested and to direct the government to permit interview of the witnesses prior to their testimony. Nothing in the most recent *Hamdi* opinion[30] changes this. Fifth, the government must be required to face the choice of pursuing this capital litigation which it initiated or [redacted] it cannot be permitted to do both.

Sixth, the use of stipulations, summaries and/or substitutions in lieu of providing access to the witnesses is not a viable option given Mr. Moussaoui's *pro se* status. Finally, the question of access to these witnesses for pretrial interviews and for trial testimony should not be left for later because of the logistical problems that will no doubt be involved in obtaining their testimony. The issues of access to these witnesses

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[29] *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability .... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (Marshall, J., plurality opinion) (citations omitted).

[30] *Hamdi v. Rumsfeld*, __ F.3d __, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003).

needs to be addressed and concluded long before jury selection begins in May—not postponed, as the government suggests, until after trial begins in June.

III. RESPONSES TO SPECIFIC ARGUMENTS OF THE GOVERNMENT

A. The Materiality Of [redacted] Is Beyond Dispute

[redacted] the Court ordered the prosecution to provide standby counsel with the substance of any statements [redacted] that may constitute *Brady* material, by January 21, 2003.[31] In response to that Order, [redacted] the defense received [redacted] Summaries (through discovery)[32] which the government concedes contain *Brady* information. With this information, it can no longer be said that the defense request for access to the witnesses is speculative.

Although the discovery was provided to the defense as *Brady* in response to the Court's order, albeit [redacted] classified with certain information deleted under CIPA,[33] the information itself is the functional equivalent of FBI 302s in a bank robbery case reporting interviews in which bank tellers say that the defendant is not the bank robber. Because the FBI 302s are obviously *Brady*, they must be produced to the defense. The defense, however, does not seek to introduce the FBI 302s or their equivalent in

[31] [redacted]

[32] [redacted]

[33] In the Protective Order dated January 21, 2003, apparently drafted by the government, § 4 of CIPA, which permits the deletion of and/or substitution for classified information provided in discovery, is confused with § 6 of CIPA which addresses the substitution of classified information which would otherwise be disclosed at trial. The Court's determination that the [redacted] Summaries will "provide the defendant with substantially the same ability to make his defense [redacted] is, in essence, a § 6 determination, not a § 4 determination. No § 6 determination would be appropriate unless and until the defendant provides his § 5 notice of intent to disclose classified information and the government objects to that disclosure.

evidence, which, if classified, would require a CIPA § 5 notice and, if an objection were lodged, a CIPA § 6 hearing. Instead, the defense seeks to interview the witnesses and then use the compulsory process of the court to obtain the testimony of these witnesses for trial. It is hard to imagine that these witnesses, who have no access to classified information, would have anything to say at trial that would be classified.

The unquestionable existence of *Brady* material [redacted] of the witnesses compels the conclusion that access must be granted. As the Court well knows, *Brady* stands for the proposition that due process forbids the "suppression by the prosecution of evidence favorable to an accused [and that such suppression] warrants a new trial where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In the pretrial context, *Brady* requires the disclosure of information that "is likely to result in admissible evidence that would give the jury or court a more complete basis for judging guilt or punishment." *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1201 (C.D. Cal. 1999).[34] The process proposed by the government in this case suggests that pretrial denial of defense access to material witnesses with *Brady* information can be justified for reasons of national security. Standby counsel are aware of no case in which any court has approved the pretrial suppression of evidence necessary for a fair trial for that reason.

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[34] The *Sudikoff* court held that "the government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case." 36 F. Supp.2d at 1200. Although, as the *Sudikoff* court noted, *Brady* does not require disclosure solely to assist the defense's trial preparation, "[t]he government, where doubt exists as to the usefulness of evidence, should resolve such doubts in favor of full disclosure . . . ." *Id.* at 1201 (citation omitted).

1. The *Brady* Contained in the [redacted] Summary

In its Consolidated Response, the government states that it believes some of the statements [redacted], "if considered in isolation and separated from the complete context of the story [redacted] might arguably be deemed material to the defense." Consolidated Response at 52. It is, of course, the job of the jury - not the Department of Justice - to determine whether any statements made by any witness might be considered just in isolation or in a separate context. Here, unless the government is granted the right to act as prosecutor, jury and executioner, this evidence must be provided to the jury which will give that evidence whatever weight it deems appropriate. On balance, however, it is beyond cavil that the statements attributed to the government [redacted] would be admissible in and relevant to the issues in both phases of this capital case. These statements plainly exculpate Mr. Moussaoui from involvement in the conspiracy alleged in the Indictment. (See the Declaration of Standby Counsel, appended at Tab A, giving just one example of how this information is crucial to the overall defense theory.)

[redacted]

Whole Pages C470 to C475
have been redacted.

[redacted]

Given that the government seeks Mr. Moussaoui's death, evidence that relates to mitigators is plainly relevant and admissible.

[redacted]

This is consistent with Mr. Moussaoui's behavior at all times in this case. September 11 then occurred with Mr. Moussaoui residing in an American jail still ignorant of the plot, its targets and its participants. His failure to then talk to FBI interrogators, which the government says "caused death," really caused nothing of the sort. Further, his absence, it can be argued, had no impact upon the plan. This level of participation constitutes, as a matter of law, a "minor role," and evidence of such a role

may mean the difference between life and death in this case.

[redacted]

[redacted]

B. The Government's Reliance On *Valenzuela-Bernal*, *Roviaro*, And Related Cases To Support The Denial Of Pretrial Access To The Witnesses Is Misplaced

In its Consolidated Response, the government places great reliance upon the holding in *Valenzuela-Bernal*, 445 U.S. 858 (1982), to justify the denial of pretrial access to a potential defense witness. An examination of the facts in *Bernal*, as well as a review of the many authorities cited by the government, shows that the issue posed in this case is not addressed in *Bernal*.

In *Bernal*, the United States arrested the respondent, a citizen of Mexico, for illegally transporting five other Mexican aliens into the United States. *Id.* at 860. The five aliens were passengers in a car driven by respondent. *Id.* When the car approached the border checkpoint, Customs Agents noticed the five passengers lying down inside the car. *Id.* at 860-61. Rather than stop as directed, respondent sped off, eventually stopping and abandoning the car along with his passengers. *Id.* at 861. Respondent and three of the passengers were subsequently caught. *Id.*

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[43] *Id.*

After apprehension, respondent and the three caught passengers were questioned and based thereon, two of the passengers were immediately deported back to Mexico. *Id.* The other passenger was detained for use by the government at respondent's trial. *Id.* Thereafter, respondent was indicted and when he could not secure the appearance of the two deported passengers, he moved to dismiss the indictment claiming their deportation violated his Fifth Amendment right to a fair trial and his Sixth Amendment right to compulsory process of favorable witnesses. *Id. See also United States v. Valenzuela-Bernal*, 647 F.2d 72, 73 (9th Cir. 1981), *rev'd*, 458 U.S. 858 (1982).

The Supreme Court disagreed and affirmed respondent's conviction. The Court held that a constitutional violation "requires some showing that the evidence lost would be both material and favorable to the defense." 458 U.S. at 873. Further, "[a]s in other cases concerning the loss of material evidence," the Court stated, "sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 873-74.

Simply stated, the "lost" witnesses in *Valenzuela-Bernal* had been deported before the defendant had even been indicted and the court and the defense were compelled to address the due process deprivation caused by the pre-indictment loss of the witness within the framework of the trial. Here, by contrast, we know that these witnesses are available for trial, that Mr. Moussaoui knows who these witnesses are, that these witnesses possess *Brady* information, and that the government does not wish to allow defense access to them. Thus, the evidence the defense seeks has not

been lost - it is only being withheld. That distinction is critical here where the evidence is requested prior to trial and the defendant enjoys the presumption of innocence.

Further, defense access to the witnesses should not depend on establishing that the government has acted in "bad faith." The issue of "good faith" versus "bad faith" is simply inapplicable to this case because the evidence here cannot be said to be "lost." This distinction was addressed in *United States v. Hsin-Yung*, 97 F. Supp.2d 24 (D.D.C. 2000). In that case, unlike the instant case, the witnesses were deported and made unavailable before the defendant was indicted or had the opportunity to request that the witnesses be retained for trial.[44] The district court noted that the holding in *Valenzuela-Bernal* allows the government to promptly deport witnesses "upon its 'good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.'" *Id.* at 30 (quoting *Valenzuela-Bernal*, 458 U.S. at 873). No case cited by the government, including *Bernal*, holds that proof of bad faith is required before the government can be compelled to produce relevant and material evidence that is still in its possession, i.e., not "lost."

All of the other "good faith" cases cited in the government's Consolidated Response similarly address the propriety of guilty verdicts obtained when a defendant has complained that some official act - usually deportation - has deprived him or her of a witness. These cases consider the question of good faith *after* the evidence has been "lost" or otherwise made unavailable and often in the context of a motion to

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[44] The witnesses at issue in *Yung* were over 200 Chinese nationals who aboard a boat on which aliens were allegedly being smuggled into the United States by the defendants. *See* 97 F. Supp.2d 24, 30.

dismiss the indictment, thereby sanctioning the government for losing or making the evidence unavailable. This standard is not applicable when the defendant seeks pretrial access to material witnesses who are still available.

Illustrative of this distinction is *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000), *cert. denied*, 531 U.S. 1026 (2000), where the alien witnesses were initially held in the United States to allow the defense to interview them and then subsequently deported upon the authority of the district court.[45] The good faith of the government's actions was an issue in that case only because the evidence was "lost." As the court explained,

> [T]he [Supreme] Court [has held] that, when the Government has evidence that it knows to be exculpatory, it must disclose that evidence to the defendant. That situation is different, the [Supreme] Court [has] held, from one in which the Government loses or destroys evidence that it does not know to be exculpatory. With respect to lost or destroyed evidence, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

Chaparro-Alcantara, 226 F.3d 616, 623 (citations omitted).

Likewise, the other cases cited by the government are distinguishable as involving determinations of "bad faith" in situations where the evidence has been "lost" or otherwise made unavailable. *See United States v. Pena-Gutti*errez, 222 F. 3d 1080, 1086 (9th Cir. 2000) (witness was deported before the defense had requested access and even before the decision to prosecute had been made), *cert. denied*, 531 U.S. 1057 (2000); *United States v. Iribe-Perez*, 129 F.3d 1167, 1174 (10th Cir. 1997) (witness was allowed to voluntarily leave the country a week before the defendant was even

[45] The witnesses were thirteen undocumented Mexican nationals who were allegedly being transported illegally by the defendants. *See* 226 F.2d 616, 618.

arrested); *United States v. Armenta*, 69 F.3d 304, 307 (9th Cir. 1995) ("lost" evidence case where the witness was deported because of the negligence of the government); *United States v. Dring*, 930 F.2d 687, 689 (9th Cir. 1991) (potential witnesses were deported before the indictment was returned and before they were even interviewed by the government), *cert. denied*, 506 U.S. 836 (1992); *Buie v. Sullivan*, 923 F.2d 10, 12-13 (2nd Cir. 1990) (no showing of lost evidence where a witness refused to testify as a result of his arrest on the same charges); *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988) (witnesses deported only after evidence was preserved pursuant to 18 U.S.C. § 3144), *cert. denied*, 490 U.S. 1020 (1989); *United States v. Rouse*, 111 F.3d 561, 566 (8th Cir.) (evidence was unavailable to the defense solely because the defense never sought access to it), *cert. denied*, 522 U.S. 905 (1997); *United States v. Truong Dinh Hung*, 629 F.2d 908, 929-30 (4th Cir. 1980) (no proof of bad faith where witness/ambassador was expelled from the United States before the defense interviewed him).[46]

The government moves from the lost evidence line of cases to the *Roviaro*-type balancing test set forth in *Roviaro v. United States*, 353 U.S. 53 (1957), for withholding confidential informants; but that case does not help the government here. First, as a practical matter, it is not altogether clear that the balancing test utilized in *Roviaro* applies to the witnesses given that they are not government informants. *See id.* at 54-55 (stating that the issue before the Court was "whether the United States District Court

[46] Interestingly, at the urging of U.S. District Judge Albert V. Bryan, Jr., the government in *Truong Dinh Hung* agreed to a court order enjoining it for a limited period of time from taking action to expel the witness so as to allow the defense an opportunity to speak to the witness. *See* 629 F.2d 908, 929.

committed reversible error when it allowed the Government to refuse to disclose the identity of an undercover employee" who might be a material witness in the case). Moreover, these witnesses, to the extent they should be treated as informants, would not be shielded from production at trial (much less identification) under the *Roviaro* test.[47] That test states when an informant plays "a crucial role in the alleged criminal transaction" disclosure and production at trial is required to ensure a fair trial. *United States v. Diaz*, 655 F.2d 580, 587 (5th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *accord United States v. Jiles*, 658 F.2d 194, 196-97 (3d Cir. 1981) (stating that in cases "in which the informant played an active and crucial role in the events underlying the defendant's potential criminal liability . . . disclosure and production of the informant will in all likelihood be required to ensure a fair trial"), *cert. denied*, 455 U.S. 923 (1982).

In this case, given the exceptionally broad nature of the allegations in the Second Superseding Indictment, there can be no disputing the fact that these witnesses, [redacted] were active participants in and/or played crucial roles in the offenses charged. While the government and the defense may disagree about the specific roles each of these witnesses played in the conspiracy, there is no gainsaying the fact that all of them were [redacted]

Roviaro thus would not countenance secreting these witness from the defense,

[47] The Supreme Court in *Roviaro* held that "[w]here the disclosure of an informer's identity, or of the contents of his communications, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61.

particularly where it is clear that they possess *Brady* information, as the informant in *Roviaro* did. *See Roviaro*, 353 U.S. at 58 (stating that the informant, who was alleged to have engaged in a drug sale with the Roviaro, "denied that he knew or had ever seen [Roviaro]"). This conclusion does not change even when the government's national security interests, significant as they are, are added into the calculus. *See United States v. Fernandez*, 913 F.2d 148, 157 (4th Cir. 1990) (stating that "a finding that particular classified information is necessary to the defense is enough to defeat the contrary interest in protecting national security") (citing *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985)).

The government's arguments also neglect to consider that the witness access issue before the Court is arising in a *pretrial setting*. As the court noted in *United States v. Sudikoff*, 36 F. Supp.2d 1196, 1199 (C.D. Cal. 1999),

> [The post-trial] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material. . . . This analysis obviously cannot be applied by a trial court facing a pretrial discovery request.

Id. at 1198-99. *See also United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) ("[A]t this pre-trial stage, the defendants 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 . . . to produce any evidence which is material to that mitigating factor.") (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976). *See also United States v. Peitz*, 2002 WL 226865 (N.D. Ill. 2002) (adopting the *Sudikoff* test) (unpublished opinion); *United States v. Glover*, 1995 WL 151823 (N.D. Ill. 1995) (same)

(unpublished opinion).

The point of distinguishing the government's cases is to show the Court the lengths to which the government has gone to avoid the simple proposition posed by these motions. The defendant is requesting access to witnesses that he expects to call in his defense. Such witnesses are not the property of the government nor of the defendant. *United States v. Walton*, 602 F.2d 1176, 1179-80 (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, although in the end the witness may refuse to be interviewed"). In sum, the government fails to cite a single case where a capital defendant was denied access to a material witness [redacted][48]

C. In The Weighing Process, The Government Again Ignores The Ramifications From The Fact That This Is A Capital Case

The need for the defense to have access to the witnesses is strengthened

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[48] The government also cites *United States v. Walton*, 602 F.2d 1176 (4th Cir. 1979) and *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996) for the proposition that pretrial interviews are unnecessary and that access can be delayed until trial. See Consolidated Response at 38. In *Walton*, the witness for whom access was sought was the "chief government witness" and the Fourth Circuit found that although it was error for the district court to deny pretrial access, that error was harmless because the defense had access to full reports of what that witness would say on the stand and thus had the opportunity to prepare for cross-examination. See 602 F.2d at 1180. *See also id.* ("We would not be inclined to make a finding of harmless error were it not so obvious that the appellant was fully appraised of the details of [the witness'] testimony."). That situation does not exist here as the government has disavowed any intention to call these witnesses at trial and the information provided to defense counsel about these witnesses, [redacted] nevertheless indicates that they clearly possess *Brady* information.

In *Tipton*, access to the government's witnesses was granted to the attorneys for the defense immediately prior to their testimony at trial. 90 F.3d at 889. The defense in that case was unable, according to the Fourth Circuit, to prove how they were prejudiced by their late access to the witnesses. *Id.* Here, of course, the defense does not ask for access to government witnesses; rather, the defense seeks access to defense witnesses who have *Brady* information about the charges in this case. Further, for the reasons discussed above, last minute access like that granted in *Tipton* is simply not a feasible way to proceed in a case such as this one.

dramatically by the fact that this is a capital prosecution. In *Murray v. Giarratano*, 492 U.S. 1 (1989), the Supreme Court noted that "additional safeguards [are] imposed by the Eighth Amendment at the trial stage of a capital case." *Id.* at 10 (plurality opinion). *See also id.* at 8-9 ("The finality of the death penalty requires 'a greater degree of reliability' when it is imposed.") (citation omitted). This is true not only as to the sentencing phase of a capital trial, but also to the guilt/innocence phase. See *id.* ("We have recognized on more than one occasion that the Constitution places special constraints on the procedures used *to convict an accused of a capital offense* and sentence him to death.") (emphasis added) (citing *Beck v. Alabama*, 447 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).[49]

As the Court explained in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Constitution requires a reliability in capital cases that has no parallel in non-capital cases.

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment, than imprisonment for a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

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[49] *See also Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.") (citation omitted);id. at 638 ("To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the *guilt determination* [in a capital case].") (emphasis added).

Id. at 305. Consequently, decisions in *non-capital* cases are of limited use in *capital cases* in determining when a defendant's fundamental due process right to evidence, including the right to interview witnesses, may be limited based upon a government claim of competing interests.

In the Consolidated Response the government cites only three capital cases, none of which control, or even provide much guidance for, the situation presented here. In *United States v. Tipton*, 90 F.3d 861 (1996), *cert. denied*, 520 U.S. 1253 (1997), the Fourth Circuit rejected a challenge to the procedures adopted by the trial court to protect government witnesses, but, in so doing, it clearly did not endorse those procedures. The trial court had allowed the government not to disclose pretrial the addresses of witnesses in the Witness Protection Program, although it required that they be made available for defense interviews before they testified. It also had rejected the defendant's objection to the prosecutor advising the witnesses that it was their own choice whether or not they met with defense counsel. *Id.* at 889. However, the trial court had "admonished the prosecution that the defense was to have a *meaningful opportunity* to seek interviews." *Id.* (emphasis added).

In rejecting the defense challenge on appeal, the Court of Appeals in *Tipton* unsurprisingly found that the defense was not entitled to compel an interview over the objection of the witness and that defense counsel had actually been given the opportunity to meet with all the witnesses during the trial. See *id.* As to the government's refusal to provide the addresses, the Fourth Circuit found a violation of 18 U.S.C. § 3432 "that may not have been curable, as the district court sought to do by

drawing on the 'spirit' of the Witness Protection Program." *Id.* (citation omitted). However, the Court found no "prejudicial error," since, on appeal, the defendants had been unable to show any "particularized prejudice" "from any impairment or interference with the right." *Id.* (citation omitted). Thus, *Tipton* stands only for the proposition that, *on appeal*, a capital defendant must demonstrate actual prejudice to obtain relief from a violation of the rule requiring the pretrial disclosure of addresses. That decision does not, as the government implies, endorse the proposition that the government may be excused from its obligations to provide a "meaningful opportunity" to conduct interviews of all government witnesses. *Id.* at 889. *Cf.* Consolidated Response at 38, n.27 (stating that *Tipton* "[upholds] the denial of pretrial access to witnesses in a capital case"). In any event, we are not here dealing with a government witness; we are seeking to interview and obtain testimony from defense witnesses.

The other two capital cases cited by the government are also inapposite to the question of pretrial access. *See United States v. Edelin*, 128 F. Supp. 2d 23 (D.D.C. 2001); *United States v. Heatley*, 994 F. Supp. 483, 489 (S.D.N.Y. 1998). In *Edelin*, the first of these cases, the court held that because defendants posed a specific threat to *government witnesses* and because the government had disclosed all evidence unless it threatened the safety of a witness,[50] the defendants were not entitled to disclosure of confidential informant identities, early disclosure of witness names, or pretrial disclosure of statements of individuals who were not to be called as witnesses. *Edelin*, 128 F.

[50] The indictment in *Edelin* included charges related to violence against potential witnesses and the court made a specific pretrial finding of danger to witnesses based on government proffers of known attempts by defendant to interfere with the judicial process, including a contract to murder a potential witness. *Id.* at 29-30.

Supp.2d at 31. The court found that "[t]he dangerousness of the defendants, their access to other individuals who are willing to act on their behalf, and their willingness to approach potential witnesses in this case in order to alter or prevent damaging testimony all indicate that the defendants should not be provided with the information they seek in the discovery motions and the requests for witness and informant names." *Id.*

There is no corollary here. First, the defense is not requesting disclosure of the names of government witness or confidential informant identities. The defense knows who the witnesses are and they are not confidential informants. The defense is requesting access to witnesses with material information [redacted] Second, there is no showing, or even attempt to show that Mr. Moussaoui poses a threat to [redacted] witnesses. *Edelin* stands only for the proposition that a defendant who poses a specific danger to *government witnesses* will not receive pretrial access to witness identities or access to non-testifying witness statements other than *Brady* material. *Edelin* does not stand for the notion that the government can properly secrete material witnesses in a capital case who have *Brady* information.

United States v. Heatley also is inapposite. In *Heatley* the court used the *Roviaro* test to conclude that there had not been a showing of materiality[51] and so denied the defendants' motion to disclose informants, cooperators and witnesses.

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[51] Materiality, under *Roviaro*, is anything that is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . ." *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

Heatley, 994 F. Supp at 489. The court also made a specific finding that disclosure would place the individuals in substantial and immediate risk by defendant.[52] *Id.* While holding that pretrial disclosure of a witness list was not required based on a finding of defendant's dangerousness to the witnesses, the court reserved a decision on whether the government would be required to disclose the identities of informants or cooperators it would not call at trial and on whether the witness list would need to be disclosed later under § 3432. *Id.*

The government's proposed solution to the death penalty concerns voiced by standby counsel, namely that it stipulate to Mr. Moussaoui's lesser culpability as compared to other September 11 co-conspirators (see Consolidated Response at 42-43), is plainly inadequate. First, it fails to address the mitigating circumstance that is likely to be the most important in this case, namely, that Mr. Moussaoui's participation, if any, in the events that led to the deaths of the victims in this case was relatively minor and caused death to no one.[53] This mitigator involves a fundamentally subjective judgment by a jury that can not readily be reduced to a simple stipulation, but rather requires a detailed investigation and presentation of evidence.[54]

Related to this mitigating factor, but even more critical, is the *constitutional* issue

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[52] The defendants in *Heatley*, like those in *Edelin*, were charged with crimes including intentional killings of potential witnesses. 994 F. Supp. at 487.

[53] This is distinct from the equally culpable co-defendant mitigating circumstance to which the government has offered to stipulate. See Consolidated Response at 42, n.32.

[54] Assuming Mr. Moussaoui consents, standby counsel would accept a stipulation with regard to this aspect of the case that no act Mr. Moussaoui committed resulted in the deaths of the victims, and that to the extent he played any role in the offense, it was a minor one. The government has not offered such a stipulation. Additional stipulations would be needed with regard to other aspects of the case before the need for [redacted] testimony could be obviated altogether.

of whether the extent of Mr. Moussaoui's involvement in the underlying felonies provides a sufficient basis for the death penalty. See *Tison v. Arizona*, 481 U.S.137 (1987). The government has not even suggested how, or if, this could be resolved by stipulation, without the benefit of defense access to the witnesses [redacted]

In *Tison*, the Supreme Court declared that the *minimum* constitutional (Eighth Amendment) basis for death eligibility could be established by proof that a defendant was a "major participant" in the underlying felony, if that felony "carr[ies] a grave risk of death . . . ." *Tison*, 481 U.S. at 157-58 (emphasis added). The distinction between major participation and participation of a lesser extent, however, is often subtle, *cf. Tison* and *Enmund v. Florida*, 458 U.S. 782 (1982), and thus does not readily lend itself to stipulation. There is, of course, much room between "major" and "minor" participation, all of which inures to the benefit of the defendant. The difference between the two means that even witnesses who implicate Mr. Moussaoui in the charged offenses could be of benefit to him in demonstrating that his participation was not "substantial." See *Tison*, 458 U.S. at 158. Mr. Moussaoui, therefore, has not only a Fifth and Sixth Amendment right to access to the witnesses, but an Eighth Amendment right as well.

Finally, it is clear that whatever limited right the government has to withhold evidence is constrained by the defendant's constitutional rights. See *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990). In a capital case, that includes all the rights outlined above, including Mr. Moussaoui's Eighth Amendment right to

"heightened reliability" at both phases of his trial, and his statutory right in a capital case to call witnesses on his own behalf under 18 U.S.C. § 3005. Further, since this request is being considered pretrial, he his entitled to any such evidence "which might reasonably be considered favorable" as to the question of guilt or the question of punishment. Most notably in relation to the witnesses at issue, it must include any evidence which might demonstrate to a jury that Mr. Moussaoui's participation in the alleged offenses was something less than "major," irrespective of whether other more culpable individuals will receive the death penalty for their participation in the same offenses.

D. The Court Has The Power To Allow Access To And Compel The Attendance Of The Witnesses[55]

In an argument that the government concedes is "novel," *see* Consolidated Response at 66, the prosecution argues that as "enemy combatants," [redacted] are beyond the reach of compulsory process and that denying access to them will not infringe upon any of Mr. Moussaoui's constitutional rights. *Id.* at 60. This argument is patently wrong and should be rejected.

As a preliminary matter, it is worth repeating that it is the Executive Branch that has invoked the jurisdiction of this Court when it indicted Mr. Moussaoui. This crucial fact distinguishes this case from others, like the *Hamdi* cases,[56] where the government has not voluntarily assumed the prosecutorial burden of ensuring a fair trial. In the

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[55] Given the constraints of time limiting a more thorough analysis of the government's arguments, standby counsel reserve the right to supplement their arguments made in this section.

[56] *Hamdi v. Rumsfeld*, __ F.3d __, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

latter cases, the separation of powers provided a limitation on the courts' powers since it was the petitioners, not the government, who were invoking the jurisdiction of the courts. Here, the witnesses [redacted] are not attempting to contest the legality [redacted] to invoke the jurisdiction of this Court. Rather the defendant, who is on trial for his life, is seeking access to material witnesses who can testify to facts that may ultimately save him from the death penalty. The cases relied on by the government in which petitioners are seeking the jurisdiction of the federal courts to review the legality of their detentions, are, therefore, inapposite. Jurisdiction already exists here by virtue of the actions of the Executive.

Further, the cases cited by the government are either not on point or offer limited support for the government's argument that the Court lacks the power to compel the production of the witnesses. One group of cases cited by the government involve potential defense witnesses located outside of the United States. [redacted] Thus, all them were beyond the subpoena power of the court.[57]

The other group of cases cited by the government are cases of aliens outside of the United States who were seeking access to the United States judicial system in order to challenge the legality of their confinement.[58] The courts in those cases uniformly

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[57] *See United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988)(witnesses were in Belize); *United States v. Ismaili*, 828 F.2d 153 (3rd Cir. 1987)(witnesses were in Morocco, Syria and Saudi Arabia); *United States v. Korogodsky*, 4 F. Supp.2d 262 (S.D.N.Y. 1998)(witnesses were in Russia).

[58] *See Johnson v. Eisentrager*, 339 U.S. 763 (1950)(petitioners, Germans captured in China during WW II and tried by an American military commission for violations of the laws of war and transferred to Germany to serve their sentence, were challenging their conviction and imprisonment.); *Rasul v. Bush*, 215 F. Supp.2d 55 (D.D.C. 2002)(petitioners captured in Pakistan and Afghanistan and detained as enemy combatants at the U. S. Naval Base at Guantanamo Bay, Cuba were challenging the legality of their confinement.).

found that the aliens could not challenge their confinement through a writ of habeas corpus. Conversely, the legality [redacted] is not at issue here as the Court already has jurisdiction over Mr. Moussaoui's prosecution.

Further, to the extent the government asserts that the court's power to issue a writ *ad testificandum* is limited because the Great Writ (habeas corpus) has territorial limits, courts have found habeas corpus jurisdiction so long as the federal government had custody or control over the body of the petitioner.

For example, in *Ex Parte Hayes*, 414 U.S. 1327 (1973), a United States Army private stationed in Germany sought relief in the Supreme Court against his commanding officer in Germany, the Chief of Personnel Actions, and the Secretary of the Army in Washington, D.C. Justice Douglas determined that the matter should be heard in a District of Columbia court where two of the respondents in the chain of command, the Chief of Personnel Actions and the Secretary of the Army, were located. Similarly, in *Hirota v. MacArthur*, 338 U.S. 197 (1948), Justice Douglas in his concurring opinion pointed out that when the United States has custody of an individual, compulsory process may be served through an appropriate officer of the Unites States government.

> If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers. He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation to which an official of this Nation owes a higher obligation than he owes to us.

> But it should be noted that the chain of command from the United States to the Supreme Commander is unbroken. It is he who has custody of petitioners. It is through that chain of command that the writ of *habeas corpus* can reach the Supreme Commander.

338 U.S. at 204, 07 (Douglas, J., concurring). *See also Word v. North Carolina*, 406 F.2d 352, 359 (4th Cir. 1969) (determining that the language "within their respective jurisdictions" in 28 U.S.C. § 2241 meant that if the court had personal jurisdiction of a proper custodian and the capacity to enforce its orders, physical presence of the petitioner was not invariably a jurisdictional prerequisite); *Kinnell v. Warner*, 356 F. Supp. 779 (D. Hi. 1973) (finding jurisdiction over a sailor onboard a U.S. aircraft carrier located in the South China Sea given that the commander of the Pacific Fleet was located within the court's territorial limits and had authority to control the petitioner's whereabouts); *Ex Parte Mitsuye Endo*, 323 U.S. 283 (1944) (stating "we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner").[59]

Moreover, the government is erroneous in its contention that the territorial constraints contained in 28 U.S.C. § 2241 for the issuance of the Great Writ are also applicable to a writ of *ad testificandum*. A number of federal courts including the Fourth

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[59] The Supreme Court in *Endo* went on to quote the Michigan Supreme Court decision in *In the Matter of Samuel W. Jackson*, 15 Mich 417, 439-440 (1867).

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent.

323 U.S.283, 306.

Circuit have ruled that the writ of *ad testificandum* is not confined to the same territorial limitations as the Great Writ, but can be applied extraterritorially. See *Carbo v. United States*, 364 U.S. 611, 618 (1961) (holding that the territorial limitation of 28 U.S.C. § 2241 applies only to the Great Writ); *Muhammad v. Warden*, 849 F. 2d 107, 114 (4th Cir. 1988) (finding that the Supreme Court's analysis in *Carbo v. United States* applied equally to a writ *ad testificandum* and that such a writ could be issued extraterritorially). *Accord ITEL Capital Corp. v. Dennis Mining Supply and Equip.*, 651 F. 2d 405, 406-07 (5th Cir. 1981); *Stone v. Morris*, 546 F.2d 730, 737 (7th Cir. 1976); *Greene v. Prunty*, 938 F. Supp. 637, 638 (S.D. Cal. 1996); *Atkins v. New York*, 856 F. Supp. 755, 758-59 (E.D.N.Y. 1994).[60]

In sum the government is wrong to contend that the Court is without power to issue a writ *ad testificandum* [redacted] The service of the writ is to be made upon the appropriate officer in the Executive Branch [redacted][61]

Citing *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950), the government also

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[60] The government also cites to *United States v. Padilla*, 869 F.2d 372, 377 (8th Cir. 1989) and *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950) for the proposition that a subpoena "cannot issue to an alien outside the United States." Consolidated Response at 62, n.40. However, the court in *Padilla* specifically noted that had the alien witness "had information which might have exculpated [the defendant], the government's failure to produce him in these circumstances would be grounds for reversal." *Id.* at 377. Here, of course, the witnesses possess *Brady* information, so *Padilla* actually supports access in this case. Similarly, *Gillars* is distinguishable as the witnesses in that case were available and testified on behalf of the defendant. 182 F.2d at 978. Thus the court there did not need to reach the constitutional question regarding the issuance of the subpoenas. *Id.*

[61] The Court has additional authority to issue the writ of *habeas corpus ad testificandum* through the All Writs Act, 28 U.S.C. § 1651, the principles set forth in Fed. R. Crim. P. 17 and the provisions of 18 U.S.C. § 3005. See *United States v. Hayman*, 342 U.S. 205 (1952); *Harris v. Nelson*, 394 U.S. 286 (1969); *United States v. Garmany*, 762 F.2d 929 (11th Cir. 1985); *United States v. Gotti*, 784 F. Supp. 1011 (E.D.N.Y. 1992).

contends that producing the witnesses will unnecessarily tax the military [redacted] Consolidated Response at 62. This concern is unfounded. Obviously, if these witnesses are to testify in this case, the government will no doubt request that this be done by video-conference [redacted] as was done in the case of the deposition of Faiz Bafana [redacted] and that is why a decision on access to these witnesses needs to be made now. In the days of *Eisentrager*, of course, there was no such thing as video-conferencing.

The government's concern that allowing access to the witnesses would hamper the field commander by "divert[ing] his efforts and attention from the military offensive abroad to a legal defensive at home," *see* Consolidated Response at 62, also is misplaced. The "field commander" will not be required to divert his efforts and attention from the military offensive to any "legal defensive at home" as the witnesses are not the petitioners before the Court and are not involved in any legal action involving their detention or the ongoing military effort. [redacted]

[redacted]

Finally, the government's reliance on the recent Fourth Circuit decisions in the *Hamdi* matter[63] is completely misplaced. Hamdi was captured in Afghanistan where he was designated as an enemy combatant and taken to the United States Naval Base in Guantanamo Bay, Cuba. Upon determining that Hamdi was a United States citizen, the government transferred him to the United States Navy Brig in Norfolk, Virginia. The Fourth Circuit limited its examination of Hamdi's detention to whether the government's averments in its affidavit that Hamdi was an enemy combatant were sufficient to justify his detention. Once the court of appeals determined that the affidavit was sufficient, no further inquiry into Hamdi's detention was necessary because to go further would intrude upon the separation of powers and involve the court in the second guessing of combat personnel in a theater of military operations who made the initial decision to detain him.

Here, of course, there is no concern that the judiciary would be stepping outside its role because it was the Executive who brought this case to the judiciary in the first place and it involves no second guessing of the Executive's determination [redacted] Their status will remain unchanged in that regard even if the defense is granted access to them.

[redacted]

[63] *Hamdi v. Rumsfeld*, __ F.3d __, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).

E. The Government Must Face The "Hobson's Choice" Of Allowing Access Or Dismissing The Charges

In its Consolidated Response, the government complains about the "Hobson's Choice" standby counsel are forcing it to make, saying that such a choice would "hamstring" the Executive by forcing the government to chose "between altering conduct in a distant war zone contrary to best military judgment or potentially risking the viability of a prosecution at home." Consolidated Response at 1, 15-16. Relying on *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), the government thus takes issue with standby counsel's argument, based on *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944) and similar cases,[64] that "the United States must choose between its national security interests and its desire to proceed with the litigation it started." Standby Counsel's [redacted] Reply at 12.

As will be shown, *Valenzuela-Bernal* does not undermine the *Andolschek* line of cases, and, indeed, *Bernal* is not even applicable in the instant context. Accordingly, the government must squarely face its so-called "Hobson's Choice" and choose between pursuing the death penalty case against Mr. Moussaoui or continuing to refuse defense access [redacted]

[64] *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (holding 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 (N.D. Cal. 1957) (ordering the United States within thirty days to validate defense counsel's passport so that he could gather defense evidence or suffer dismissal of the indictment). *See also United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948); *Johnson v. Reno*, 92 F. Supp.2d 993 (N.D. Cal. 2000); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556 (S.D.N.Y.), *aff'd*, 158 F.2d 853 (2d Cir. 1946).

As has been noted previously, *Valenzuela-Bernal* is a "lost" evidence case.[65] Simply put, the issue confronting the Supreme Court in *Valenzuela-Bernal* was whether the *irreversible past actions* of the government in the context of that case amounted to a constitutional violation. That problem is entirely different from the one facing this Court, where the government's conduct is ongoing and still remediable. It is the difference between a driver looking at an automobile accident in the rear-view mirror as opposed to the driver seeing the accident unfold from the view of the front windshield. In the former situation, the collision has already occurred and there is nothing that can be done about it; in the latter, the accident is occurring and corrective action can still be taken.

This crucial difference explains why *Valenzuela-Bernal* is inapplicable to the witness access issue currently before the Court. Rather, the holdings of the *Andolschek* line of cases – the rationale of which 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," *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (summarizing the rationale of the *Andolschek* line of cases and distinguishing the government's obligation in civil cases from criminal cases where national security information is involved) – are much more on point.

United States v. Powell, 156 F. Supp. 526 (N.D. Cal. 1957), is illustrative. In that

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[65] *See* Part III.B *supra*. *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (referring three times to the fact that the evidence in *Bernal* was "lost").

case, defense counsel sought passport clearance from the U.S. State Department to travel to Communist China and Korea to interview witnesses and gather documents necessary for trial. *Id.* at 527-28. The State Department refused. *Id.* The district court, noting that it was "within the power of the United States to make possible the obtaining of [the] evidence,"[66] and that the Court has the duty to assure a fair trial, ordered the government to issue the passport or face dismissal of the indictment. *Id.* at 534-35. As the court stated,

> The United States has commenced and is prosecuting this criminal proceeding against the defendants. . . The defendants have the constitutional right to present evidence [to contradict the charges]. They can, at least, have the opportunity to try to obtain this evidence, if the United States issues [passport clearance to defense counsel] . . . . So, the United States has its choice. It can choose to adhere to its policy of non-issuance of such passports. 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.

156 F. Supp. 526, 530.

Similarly, in *Jencks v. United States*, 353 U.S. 657 (1957), the government, relying on confidentiality rules, refused to produce to defense counsel reports prepared by two FBI informants that related to events as to which the informants testified at trial. *Id.* at 665-66. Quoting extensively from *Andolschek*, the Supreme Court reversed the conviction of the defendant and directed the district court to order the government to produce the reports. *Id.* at 671-72. The Court's words are apropos to the current situation.

> It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession.

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[66] 156 F. Supp. 526, 531.

> But this Court has noticed, in *United States v. Reynolds*, 345 U.S. 1 [(1953)], the holdings of the Court of Appeals for the Second Circuit [citing *inter alia* to *Andolschek*] that, in criminal causes ". . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. 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. . . ."

353 U.S. 657, 670-71 (citations omitted).

Other courts have held similarly. *See United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (overruling the government's objection to releasing confidential government records to the defense, stating that "the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defence"), *cert. denied*, 342 U.S. 920 (1952)[67]; *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946) (ordering, over objection, the production to the defense of confidential government records, and noting that "when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege"); *United States v. Grayson*, 166 F.2d 863, 870 (2d

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[67] The court in *Coplon* also observed:

> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.

United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952).

Cir. 1948) (holding that the prosecution cannot rely on a confidentiality privilege to deny defense access to government records that bear upon the charges and that the indictment by the government "put the prosecution and the [effected government agency] collectively to a choice, either not to suppress all the evidence within their control which bore upon the charges, or to let the offenses go unpunished"); *Johnson v. Reno*, 92 F. Supp.2d 993, 994-95 (N.D. Cal. 2000) (ordering the production to a defendant of material in the possession of the ATF, DEA and FBI, and citing *Andolschek* as support therefor); *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 560-61 (S.D.N.Y.) (holding in a habeas corpus proceeding, that as the government had taken the action of detaining the petitioner, it was deemed to have abandoned its privilege to withhold confidential records from the petitioner that the district court had ordered produced because of their relevancy), *aff'd*, 158 F.2d 853 (2d Cir. 1946).[68]

The government thus is wrong when it asserts that it cannot be forced to choose between competing Executive Branch responsibilities. See Consolidated Response at 15-16.[69] *Andolschek*, *Jencks* and similar cases make clear that when the government,

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[68] See also *Kawaguchi v. Acheson*, 184 F.2d 310, 311 (9th Cir. 1950) (finding error with district court's refusal to grant a trial continuance to plaintiff where the sole reason for the continuance was the government/defendant's refusal to allow the plaintiff to enter the United States to attend the trial, and stating, "where the availability for trial of the principal witness for the party having the burden of proof is controlled exclusively on the administrative level by that party's adversary, our concept of due process dictates that such a cause be not heard upon its merits while that barrier, constituting the sole reason for the complainant's unavailability for trial, obtains by reason of appellee's failure to act in accordance with the provisions of the statute").

[69] "[T]he very point of *Valenzuela-Bernal* was to protect the functioning of an Executive Branch that has myriad responsibilities and to ensure that, when it acts in good faith to carry out one of its multiple duties, it could not be charged with a constitutional violation and would not be constantly hamstrung by the sort of Hobson's choice standby counsel would like to impose." Consolidated Response at 15-16.

because of some competing interest, chooses to withhold from the defense evidence that the court feels should be produced, the government must choose between the competing interests and either produce the evidence or dismiss the prosecution.[70] The holding in *Valenzuela-Bernal* does not undermine this principle because in that case the government had already lost possession of the evidence before the defendant had even sought access to it and therefore, there was no longer a "choice" for the government to make.[71]

Hence, while it is true that *Valenzuela-Bernal* recognizes the government's "dilemma" when faced with competing responsibilities,[72] the government overstates its case when it says that "[a]t bottom, *Valenzuela-Bernal* recognizes that the Government must fulfill a variety of obligations simultaneously and that when good faith fulfillment of those obligations, such as the enforcement of the immigration laws, precludes a defendant's access to witnesses, even at trial, due process does not require the dismissal of the prosecution." Consolidated Response at 16, n.8. *Bernal* does not relieve the government from its due process obligation, as articulated by the

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[70] This principle also is reflected in CIPA § 6(e)(2), to wit, that dismissal of the indictment, *inter alia*, is appropriate "[w]henever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information" which the court believes is necessary to the defense.

[71] For the same reason, the government's reliance on *Hamdi v. Rumsfeld*, ___ F.3d ___, 2003 WL 60109, 2003 U.S. App. LEXIS 198 (4th Cir. 2003) also is misplaced. In that case, the government had not initiated a criminal prosecution against Hamdi, so it was not saddled with the due process obligations of ensuring a fair trial. The Fourth Circuit specifically noted this fact. *See id.* at 2003 WL 60109, *17 ("As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime."). *See also id.* at *15 (noting that "we are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers").

[72] See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 865-66 (1982); Government's Consolidated Response at 16.

Andolschek line of cases, from choosing between competing duties when it is still within the government's power to so choose, i.e, when the evidence is still available and not beyond control of the government. Indeed, the Supreme Court specifically stated in *Jencks* that the government cannot avoid this choice, difficult as it may be.

> The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.

Jencks v. United States, 353 U.S. 657, 672 (1957).[73]

F. The Use Of Stipulations, Summaries And/Or Substitutions In Lieu Of Providing Access [redacted] Is Not A Viable Option

The government argues that many of the issues posed by this dispute can be resolved through the CIPA process by which stipulations can be agreed upon by standby counsel and summaries or substitutions can be used in lieu of granting actual access to the witnesses. *See* Consolidated Response at 37. This process, however,

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[73] Further, despite what the government contends, *see* Consolidated Response at 16, n.8, the fact that Justice Brennan writing in dissent in *Valenzuela-Bernal* cites *Andolschek* in support of his argument does not undercut standby counsel's position. First, it is just pure speculation to conclude that the majority in *Bernal* intended to overrule the *Andolschek* line of cases, not only because the majority never refers to those cases, including *Andolschek*, but also because *Andolschek* has been cited approvingly by the Supreme Court on at least four occasions. *See Dennis v. United States*, 384 U.S. 855, 873, 874 n.20 (1966) (citing *Andolschek* with approval and noting that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact"); *Jencks v. United States*, 353 U.S. 657, 671 (1957) (quoting *Andolschek* approvingly (and extensively) for the proposition that "it is unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense"); *United States v. Roviaro*, 353 U.S. 53, 60-61 (1957) (citing with approval *Andolschek* for the principle that "the trial court may require disclosure [of an informant's identity or the contents of his communication] and, if the Government withholds the information, dismiss the action" where the disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause"); *United States v. Reynolds*, 345 U.S. 1, 12 (1953) (citing *Andolschek* as stating the "rationale of the criminal cases" that have held that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free"). Second, for the reasons previously stated, the *Andolschek* line of cases is inapplicable to and clearly distinguishable from the "lost" evidence situation, like that in *Bernal*, as the problem of the lost evidence is no longer rectifiable.

will not work for the simple reason that Mr. Moussaoui is *pro se* and as such, has a Sixth Amendment right to conduct his own defense. As the Supreme Court stated,

> [T]he *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984).

As such, standby counsel cannot stipulate to anything in this case for doing so would constitute making a "significant tactical decision" or "speak[ing] instead of the defendant on [a] matter of importance." *Id.* In sum, stipulations agreed to by standby counsel could fundamentally undermine Mr. Moussaoui's right to represent himself if he were held to them. Standby counsel could, of course, enter into stipulations that would come into play only if standby counsel were elevated to the role of trial counsel. Further, standby counsel can make recommendations to Mr. Moussaoui as to stipulations.

Moreover, given that Mr. Moussaoui does not have a security clearance, and standby counsel lack authority to share classified information with him, standby counsel cannot determine how, if at all, Mr. Moussaoui intends to use any of the classified information in the SCIF either to prepare his defense or at trial.[74] For the same reason, standby counsel have no factual or legal basis to assist the Court in determining whether any summaries or substitutes proposed by the government "will provide the

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[74] Standby counsel have made six CIPA § 5 filings. Many documents that Mr. Moussaoui may have designated had he had the opportunity to review the world of classified material were undoubtedly omitted by standby counsel.

defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6 (c) (1). We can do this only with regard to the defense standby counsel would present were we thrust into the role of trial counsel.

The bottom line is that CIPA §§ 5 and 6 envision an adversarial process involving the participation of the defense. In this case, the defense is Mr. Moussaoui, not standby counsel. If the Court is to consider stipulations, summaries or substitutions, Mr. Moussaoui must be directly involved. He never knowingly or intelligently waived his right to participate in such a process, or, for that matter, to see and receive the evidence in this case, particularly evidence that, like the [redacted] Summaries, is clearly exculpatory.[75] Therefore, the government's proposed procedure of using stipulations, summaries or substitutions should be rejected.

G. Consideration Of The Question Of Defense Access [redacted] Should Not Be Postponed

The government suggests that the ultimate decision on the issue of access need not be made now and indeed could be postponed until some later time during trial. *See* Consolidated Response at 38-39, 66-68. Notwithstanding what appeared to be a very

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[75] This Court noted at the *Faretta* hearing on June 13, 2002 that "nothing is written in stone in this case, and there's going to be a reasonable balancing done as to the discovery in this case." Transcript of June 13, 2002 Hearing at 17. As part of the *Faretta* colloquy, the Court did advise Mr. Moussaoui that "there will be clearly information that is covered by both CIPA, which would be national security types of information, as well as sensitive airport information that could be relevant to your defense to which you will not be able to get access," to which Mr. Moussaoui responded that he understood. *Id.* at 35. The Court wanted Mr. Moussaoui to know of the difficulties of proceeding *pro se*, and Mr. Moussaoui responded that if he could represent himself, he "would be able to immediately make a motion" that would result in his release. *Id.* at 35, 59. Mr. Moussaoui's unreasonable belief that he would be able to immediately make a motion and in "ten minutes, say–five minutes, two minutes, okay, to say a very simple thing why the government will be compelled to withdraw the case today," combined with his repeated subsequent requests for access to classified information, indicate that he did not appreciate that the *Faretta* waiver was meant to include a waiver of the right to receive or review evidence.

generous trial continuance last September, an order granting defense access to the witnesses today would be but the start of a long and complicated process before access could be realized, a process which threatens to make even the lengthy continuance inadequate. It is abundantly clear that the prosecutors in this case are not in control of their own destiny on the witness access issue [redacted] One problem in the Consolidated Response is that it never answers the question of whether access would be granted if it were ordered, much less where, how, when, and under what circumstances that would occur. Standby counsel thought these were the questions the Court wanted answered now. An order directing that access be granted would force an answer to these questions. Depending upon the answer, the case would either end or a new process would be started, commencing with a negotiation to establish the terms and conditions under which access and testimony will occur.

The latter alternative threatens to be a lengthy process that may well take us between now and the trial date to complete.[76] This is why a decision on access should not be further postponed. While we never cease to be amazed, standby counsel cannot fathom that an order granting the defense access to the witnesses will result in them being placed, as Mr. Moussaoui would say, on a "747, first class, no alcohol, no smoking, no women" so as to arrive in Alexandria at any time in the near future. [redacted]

[76] By trial date, we mean commencement of jury selection on May 27, 2003.

[redacted]

And, like Faiz Bafana, ultimately there will be a proposal that the testimony be taken by video [redacted] and while the defense would prefer a live witness on the stand at trial, if the Court rules that the national security concerns dictate that the testimony be taken for use at trial by deposition, we will have to address all of the logistical problems involved with that decision.[78] It is instructive to note that it took seven (7) months between the time the prosecution first interviewed Bafana and the time that the deposition was taken. While that perhaps could have been shortened, we are dealing here with unknown logistical contingencies that we can only begin to unravel if we start the process now.

We urge the Court, for the reasons set forth above, to order now that the defense be given access to the witnesses for pretrial interviews and that the witnesses be made available for the purpose of giving trial testimony. We respectfully suggest that if the Court is inclined to grant such an order, that it then give the government

[redacted]

[78] By making these statements, standby counsel do not waive Mr. Moussaoui's constitutional right to insist that the witnesses appear in person at trial.

fourteen (14) days to advise whether it will comply with the order and, if it intends to comply, what procedures the government proposes to satisfy the court's order.

IV. CONCLUSION

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Reply to the Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs Ad Testificandum for [redacted] 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 23rd day of January 2003.

/s/

Kenneth P. Troccoli

ATTACHMENT A

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	)	*TOP SECRET CLASSIFIED*
	)	*FILING/EX PARTE AND UNDER SEAL*

DECLARATION OF STANDBY COUNSEL IN SUPPORT OF THEIR REPLY TO THE GOVERNMENT'S CONSOLIDATED RESPONSE

Attachment B has been redacted.

Pages C514 to C541