

FILED WITH
COURT SECURITY OFFICER
[Signature]
DATE 7/23/2003

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

UNITED STATES OF AMERICA)

v.)

ZACARIAS MOUSSAOUI)

Criminal No. 01-455-A

~~TOP SECRET CLASSIFIED~~
~~FILING/UNDER SEAL~~

STANDBY COUNSEL'S MOTION FOR PRE-TRIAL ACCESS AND FOR WRITS AD
TESTIFICANDUM FOR [REDACTED]

Standby counsel, on behalf of and in support of motions filed by Zacarias
Moussaoui, and pursuant to Rule 16 of the Federal Rules of Criminal Procedure, *Brady*
v. Maryland, 373 U.S. 83 (1963), 18 U.S.C. § 3005, and the Fifth, Sixth and Eighth
Amendments to the United States Constitution, move this Court for an order requiring
the United States to allow the defense unmonitored pre-trial access to [REDACTED]

[REDACTED] and for writs *ad testificandum* directing the United States to

produce [REDACTED] at trial so that they may be called as defense

witnesses. [REDACTED] are material witnesses in this case who,

upon information and belief, [REDACTED]

[REDACTED] and to whom access is currently being denied.

INTRODUCTION

On January 31, 2003, the Court issued a written Order ruling on defense motions
for pre-trial access to, and to compel the trial appearances of, [REDACTED]

[REDACTED] On March 10, 2003, the Court more formally

explained its ruling in a Memorandum Opinion. That Opinion noted that in addition to these [redacted] witnesses, Moussaoui also had moved to compel the trial appearances [redacted]

[redacted] See Memorandum Opinion by United States District Judge Leonie M. Brinkema at 6, n.6 (filed Mar. 10, 2003, dkt. no. 785) ("March 10 Memorandum Opinion"). The Court declined to address these latter motions, however, noting that they "[raise] essentially the same legal issues currently before the Court of Appeals." *Id.* Accordingly, the Court stayed resolution of these latter motions "until the appellate process has run its course." *Id.*¹

As the Court noted in its March 10 Memorandum Opinion, [redacted]

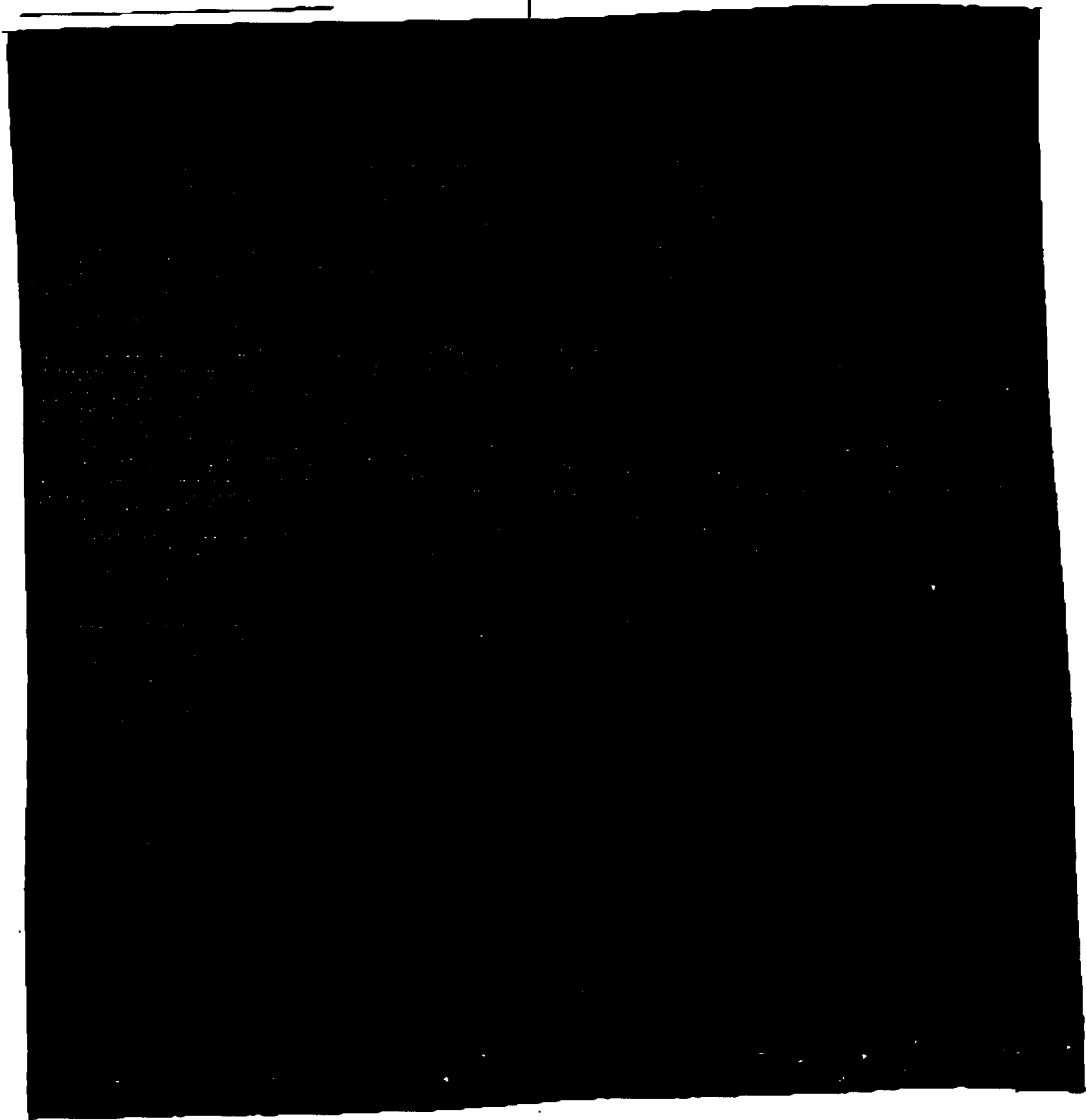
[redacted] Mr. Moussaoui moved

¹ See also Order by United States District Judge Leonie M. Brinkema [redacted] (staying resolution of Moussaoui's motion to compel the trial appearance [redacted] until the appellate process has run its course"); Order by United States District Judge Leonie M. Brinkema [redacted] (same for Moussaoui's motion to compel the trial appearance [redacted]).

to get access [REDACTED]

After the Court stayed resolution of these motions, standby counsel requested the government, by letter dated March 18, 2003, to produce any *Brady* information

[REDACTED] Mr. Moussaoui made a similar



request in a motion [REDACTED] The United States opposed these requests, arguing that the Court had stayed resolution of the motions for access [REDACTED]. By Order [REDACTED] the Court denied the defendant's motion, but ordered that "any statements [REDACTED] [that] constitute *Brady* material . . . must be promptly produced to the defense in compliance with the Government's continuing obligation to produce exculpatory evidence in its possession. [REDACTED]"

[REDACTED] standby counsel filed a classified motion to provide a status report [REDACTED]. In that motion, counsel stated that they had, as yet, received no [REDACTED] summaries [REDACTED].



[REDACTED]

[REDACTED] That motion was denied as moot [REDACTED] after the government filed with the Court and produced to counsel classified summaries [REDACTED].

[REDACTED] Additional classified summaries [REDACTED] were produced to standby counsel on July 15 and 22, 2003.

On June 26, 2003, the Court of Appeals dismissed the government's appeal of the district court's January 31, 2003 Order granting trial access [REDACTED] and the mandate was issued on June 30, 2003.¹² Then, [REDACTED] the district court

[REDACTED]

¹² See *United States v. Moussaoui*, ___ F.3d ___, 2003 WL 2146775, 2003 U.S. App. LEXIS 12854 (4th Cir. June 26, 2003). On July 1, 2003, the government filed (continued...)

directed the parties to file any submissions in support of, or in opposition to Moussaoui's motions for access [REDACTED] by July 14, 2003. [REDACTED] the government proposed a sequential briefing schedule pursuant to which standby counsel would file any pleading in support of Moussaoui's motions by July 23, 2003. [REDACTED] The Court adopted this schedule by Order dated July 11, 2003. [REDACTED] The instant pleading is in compliance with that order.

ARGUMENT

In order for the defense to be entitled to the trial testimony [REDACTED]

[REDACTED] the defense "must make a plausible showing that [their] testimony would be both material and favorable to [the] defense." March 10 Memorandum Opinion at 12. n.12 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); *id.* at 16

¹² (...continued)

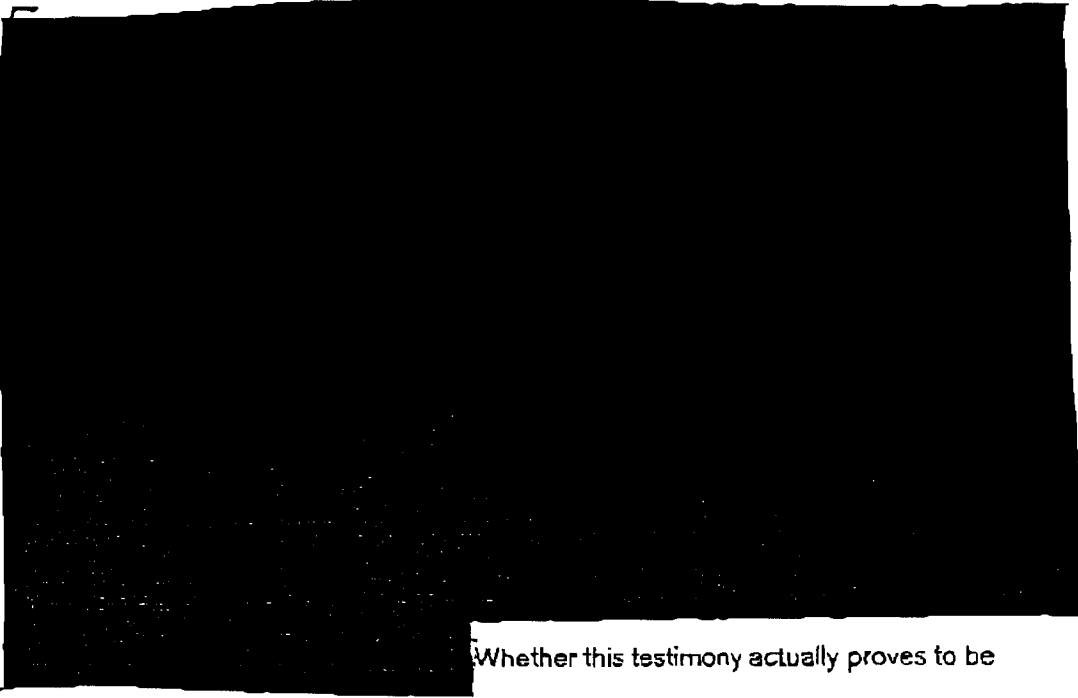
a motion with the Court of Appeals to recall the mandate. See Motion to Recall the Mandate (4th Cir., No. 03-4162, filed July 1, 2003). The Court of Appeals denied that motion on July 3, 2003. See Order (4th Cir., No. 03-4162, filed July 3, 2003). On July 10, 2003, the government filed (1) an Emergency Motion to Reconsider Denial of Motion to Recall the Mandate, (2) a Petition for Panel Rehearing or Rehearing En Banc, and (3) a Motion to Expedite Consideration of the Government's Petition for Panel Rehearing or Rehearing En Banc, all of which standby counsel opposed. On July 14, 2003, the Court of Appeals denied the first and second and granted the third of these motions. See Order (4th Cir., No. 03-4162, filed July 14, 2003); *United States v. Moussaoui*, ___ F.3d ___, 2003 WL 21649917, 2003 U.S. App. LEXIS 14073 (4th Cir. July 14, 2003).

(stating that the issue is "whether the defense has made a plausible showing that [the witness] could offer testimony that would be favorable to Moussaoui").¹⁶ This test is clearly satisfied with respect to [REDACTED] the expected testimony [REDACTED]

In general, [REDACTED] testimony projected from the summaries and other classified and unclassified documents, is exculpatory because of his intimate involvement in the September 11 plot as a named co-conspirator [REDACTED] [REDACTED] without mention of Moussaoui, suggesting that Moussaoui was not a part of the plot

[REDACTED] testimony, projected from the summaries and press reports, is exculpatory because it eliminates Moussaoui from any role in the September 11 plot. This projected testimony is a double-edged sword for Moussaoui because it puts him

¹⁶ Although this test focuses on trial access, standby counsel also seek pre-trial access [REDACTED]. We recognize, however, that the Court has previously denied the defense requests for pre-trial access [REDACTED]. Mindful of that ruling, counsel will not restate the legal arguments in favor of pre-trial access to defense witnesses, which have been the subject of extensive briefing by the defense. See Motion for Access to Material Witness, [REDACTED] and for a Writ Ad Testificandum Directing the United States to Produce [REDACTED] for Testimony at Trial [REDACTED]. Motion and Memorandum in Support of Motion for Access to Material Witness, [REDACTED] and for a Writ Ad Testificandum Directing the United States to Produce [REDACTED] for Testimony at Trial [REDACTED]; Motion in Support of Defendant's Pro Se Motion for Access to [REDACTED]; 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 [REDACTED]. 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]. These arguments, however, including those made at oral arguments before the Court, are incorporated and re-asserted herein.



Whether this testimony actually proves to be exculpatory could turn on the Court's determination as to the scope of the charged conspiracies after hearing the testimony.

Moreover, no portion of the statements [redacted] undermine the previous findings that this Court has made regarding the exculpatory nature of [redacted] statements. To the contrary, [redacted] "speculation" that the government believes showed his testimony to be inculpatory, is expressly shown to be entirely speculative.

I. THE MATERIALITY OF [redacted]

The case for materiality of the testimony [redacted] is obvious and almost does not need support from the [redacted] summaries.¹⁷ [redacted]

¹⁷ The government has previously conceded that these summaries can be (continued...)

[REDACTED]

As this Court has already observed, "[t]here can't be any question . . . [that] [REDACTED] [is] critical to this case. [REDACTED] Indeed, [REDACTED] testimony is likely to be even more critical to the defense than that of [REDACTED] especially [REDACTED] in understanding what went on on September 11 and Moussaoui's role vis-a-vis those events. [REDACTED]

[REDACTED]

¹⁷ (...continued)

used to establish materiality. [REDACTED]

[REDACTED] ("We haven't quarreled with their use of the summaries as trying to explain why it is they think he's [REDACTED] going to provide material testimony.") (statement of AUSA Kenneth Karas); see also *id.* ("[W]e don't have any problems with the reliability of these [REDACTED] statements [in the [REDACTED] summaries], and we don't have any problems with the defense using the summaries . . .") (statement of AUSA Kenneth Karas).

[REDACTED]

[REDACTED] When [REDACTED] potential testimony is combined with that of [REDACTED] and the other evidence in the case, it becomes clear that this is not just a matter of one terrorist conveniently exculpating another. Instead, the interlocking nature of the statements [REDACTED] [REDACTED] compels the conclusion that whatever it was that Moussaoui was up to prior to his arrest, it was not September 11. To make this case to a jury, the defense needs all of the pieces to the puzzle. [REDACTED]

In its March 10 Memorandum Opinion, the Court summarized the "significant showing that [REDACTED] would be able to provide material, favorable testimony on the defendant's behalf - both as to guilt and potential punishment" in six (6) specific areas. [REDACTED] [REDACTED] provides additional and crucial information in each of those areas which interlocks with, and significantly enhances or clarifies, [REDACTED] information, giving it contextual integrity:

[REDACTED]



Pages 11-19 Redacted



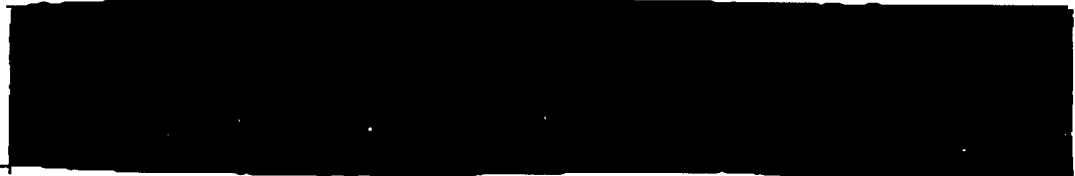
The government acknowledges that al-Qaeda used compartmentalization so that no one knew more than they needed to know until it was time to know it:

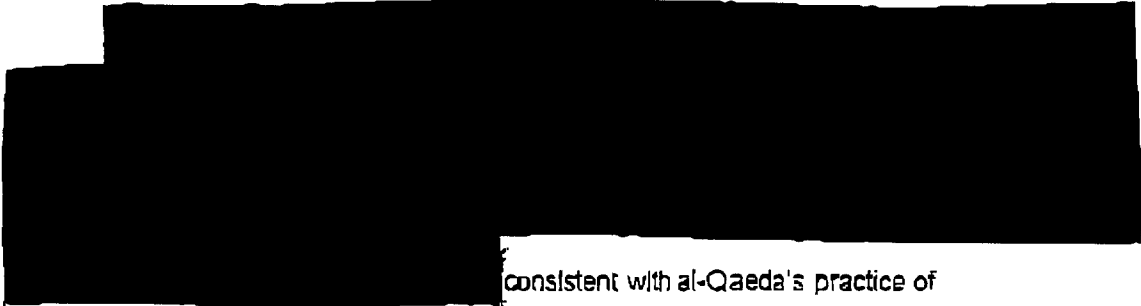
[T]he compartmentalization point that Mr. Dunham makes is exactly how al Qaeda operated in this case



⁴⁷ January 30 Transcript at 16. The compartmentalized system Mr. Karas says Mr. Dunham accurately described was outlined by the latter prior to Mr. Karas' endorsement:

[T]he United States government has what they call compartmentalized information, which is the top secret-most stuff that the government has and it's only people that have an absolute need to know that get the access to the compartmentalized information, provided they have the highest clearance, we believe we could show at this trial that al Qaeda had their own compartmentalized system, that the top people in al Qaeda are well aware of this, and that they frequently send people out, these people that are willing to do whatever they tell them to do, with only part or little knowledge of what the ultimate plan might be, that somebody might be asked to get a passport or to send a Western Union wire without knowing anything about what is -- it's connected to.





consistent with al-Qaeda's practice of

compartmentalization, Moussaoui would have been told nothing about the September 11 plan. It follows then that given the probable limited state of Moussaoui's knowledge concerning September 11, a jury would have to speculate as to whether truthful answers during his interrogation by FBI agents would have changed the outcome of September 11, or even whether any of his actual answers were false.⁴⁵

It also raises the question of whether Moussaoui had any reason to believe that any true answers he may have given during the FBI interrogation would have aided in the concealment of a post-September 11 plot about which he essentially knew nothing.



⁴⁵ For example, when asked why he came to the United States, Moussaoui responds that he was here to learn how to fly. The government suggests this answer is false.





Pages 22-37 Redacted



III. MATERIALITY AND MINOR ROLE/DEATH ELIGIBILITY

The Federal Death Penalty Act, 18 U.S.C. §§ 3591-3598, allows Moussaoui to establish that his role in the offenses, if any, was minor when compared to the participation of others, and that other, equally (or more) culpable coconspirators, [REDACTED] will not be punished by death. See 18 U.S.C. § 3592 (a)(3), (a)(4). The expected testimony [REDACTED] is certainly exculpatory to the extent that [REDACTED] do not face or receive a death sentence, [REDACTED]

More importantly, and as described in previous defense filings, [REDACTED]

[REDACTED] testimony is critical to show that Moussaoui is not even constitutionally eligible for the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982). Moreover, to the extent [REDACTED] establish that Moussaoui was not part of the September 11 plot, but was part of some other un-executed conspiracy in which no deaths actually occurred, their testimony would make Moussaoui statutorily ineligible for the death penalty. See 18 U.S.C. § 3591 (a)(2) (requiring the death of the victim as a threshold factor under the Federal Death Penalty Act).⁶⁸

CONCLUSION

For the foregoing reasons, and any others adduced at a hearing on this motion, standby counsel respectfully request that the Court grant this motion and require the

⁶⁸ Death of the victim also is a specific requirement of each of the four capital counts of the Indictment.

government to allow the defense unmonitored pre-trial access to [REDACTED]

[REDACTED] and for writs *ad testificandum* directing the United States to produce [REDACTED] material witnesses at trial so that they may be called by the defense. If this case is indeed a "quest for the truth,"⁷⁰ then all witnesses with critical knowledge of the case should be brought forward.

ZACARIAS MOUSSAOUI

By Standby Counsel

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⁷⁰

March 10 Memorandum Opinion at 23.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Motion for Pre-Trial 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 of same to the Court Security Officer on this 23rd day of July 2003.⁷¹

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Kenneth P. Troccoli

71 Pursuant to the Court's Order [REDACTED] on the date that the instant pleading was filed, a copy of the 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 Moussaoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

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

UNITED STATES OF AMERICA)

v.)

ZACARIAS MOUSSAOUI)

Criminal No. 01-455-A

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ATTACHMENTS TO STANDBY COUNSEL'S MOTION FOR PRE-TRIAL ACCESS
AND FOR WRITS AD TESTIFICANDUM FOR

Tab 1

Tab 2

Tab 3

Tab 4

Tab 5

Tab 6

Tab 7

Tab 8





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Pages 42-87 Redacted

(Tabs 1-8)