FILED WITH
COURT SECURITY OFFICER
Marissa
DATE 7/29/03

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

UNITED STATES OF AMERICA	)	UNDER SEAL
	)	
v.	)	Crim No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTIONS FOR ACCESS [redacted]

Introduction

The United States respectfully opposes defendant's motions for access [redacted] As set forth below, the Court should follow its earlier ruling regarding pre-trial access to such detainees. Further, defendant lacks a right to compel as trial witnesses [redacted] detained abroad in the war on terrorism, because enemy combatants seized and detained by the Executive overseas in the midst of an ongoing war are simply beyond the reach of any right that the Constitution gives to secure witnesses in defendant's favor. Second, as is explained below, [redacted] detainees at issue [redacted] in the Government's ongoing efforts to prevent further terrorist attacks and thus overwhelming national security reasons strongly militate against any access to [redacted] detainees. Finally, standby counsel largely fail to articulate the material, exculpatory, and admissible testimony that [redacted] detainees would purportedly give if

[1] The defendant demands [redacted] be called as trial witnesses. [redacted] Standby counsel demand unmonitored pretrial access [redacted] detainees and that a subpoena *ad testificandum* be issued for them.

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compelled to testify. But, even assuming that they possess such material testimony, any such evidence can and should be dealt with by substitutions.

Argument

1. Defendant Has No Right To Pre-trial Access

Standby counsel begin by seeking pretrial access [redacted] enemy combatants. In raising this request, standby counsel acknowledge that "the Court has previously denied the defense requests for pre-trial access [redacted] The attached *ex parte* affidavit demonstrate that [redacted] in similar circumstances; therefore, under the "law of the case" doctrine the Court should also deny access to [redacted] detainees. See United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999); United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993). Even if the Court refuses to apply the "law of the case" doctrine, standby counsel's request for pre-trial access [redacted] should be denied on the merits for the same reasons set forth in the Government's pleadings captioned Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs *Ad Testificandum* to Produce [redacted] for Testimony at Trial [redacted] and Government's Consolidated Response in Opposition to Defense Motions for Pretrial Access and for Writs *Ad Testificandum* [redacted] which are incorporated by reference herein. As the attached *ex parte* declaration demonstrates, these arguments are even more pronounced as applied [redacted]

2. The Defendant Has No Right to Compel His [redacted] Detained Abroad to Testify in His Behalf

For the reasons set forth in the Government's pleadings opposing access [redacted], and as set forth in the attached Government's pleadings to the Fourth Circuit, which all are incorporated by reference, the defendant has no constitutional right to compel the attendance and testimony [redacted] alien enemy combatants captured in the theater of war and detained abroad, in this case. This is because as enemy combatants captured and held overseas in wartime, the detainees are wholly beyond the reach of compulsory process, and foreclosing access to them cannot deny any constitutional right of the defendant. Because our argument is fully set forth in our earlier pleadings, we do not set it forth again here.

3. National Security Interests Outweigh the Defendant's Asserted Need for or Right to These Detainees

A. Overwhelming National Security Interests Militate Against any Access [redacted] Detainees

The national security concerns implicated by granting access [redacted] could not be more grave. First, and foremost, any testimony or access will critically undermine efforts [redacted] the Nation's efforts to prevent additional terrorist attacks. [redacted]

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[redacted]

Second, any access to the detainees would interrupt [redacted] If any access is granted, either pre-trial or trial, [redacted] will be subordinated to those identified by the defense or the Court, which focus on historical information that the detainees can provide about Moussaoui. Such insertion by the Court into military operations has been repeatedly rejected by the courts. See Hamdi v. Rumsfeld, 316 F.3d 450, 470 (4th Cir. 2003) ("Hamdi III") ("litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case."); Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002) ("Hamdi II") ("The federal courts have many strengths, but the conduct of combat operations has been left to others. The executive is best prepared to exercise the military judgement attending the capture of alleged combatants.") (internal citation omitted).

Third, any access will undermine [redacted]

Any ordered access will necessarily raise concerns about security and inevitably cast doubt on [redacted] since it will appear [redacted] officials'

decisions may be trumped, without warning, by courts back in the United States. As the Court in Johnson v. Eisentrager, 339 U.S. 763 (1950), warned, having judges countermand military decisions "would diminish the prestige of our commanders," particularly in the eyes of "wavering neutrals," who might come to see assurances of our officers as ineffective and unreliable. Id. at 779. See also American Insurance Association v. Garamendi, 123 S. Ct. 2374, 2586 (June 23, 2003) (noting that "the President has 'unique responsibility' for the conduct of 'foreign and military affairs'") (quoting Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993)); Hamdi v. Rumsfeld, 316 F.3d at 465 ("if deference to the executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain."); id. at 474 ("the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.").

Finally, any access, particularly for testimony, will lead to a host of other issues that will inevitably arise. For example, will the combatants be entitled to counsel, and can they assert Fifth Amendment rights? [redacted] are exposed to the death penalty in either the Article III courts or a military tribunal. Defense counsel will certainly ask them questions under oath that will implicate them in capital crimes, and it seems unlikely -- at least in the ordinary case -- that this Court would permit a witness under oath to answer such questions without counsel. Providing [redacted] a lawyer, of course, will likely end forever the possibility of securing vital intelligence from the combatants. Such issues demonstrate how disruptive access to the enemy combatants will be.

These concerns represent only a sample of the dire implications for national security that

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access [redacted] will cause. The attached, *ex parte* affidavit describes in far more detail the profound ramifications resulting from court-ordered access to these enemy combatants.

B. Materiality

Compared to the paramount national security interests threatened by access, the defense has failed to meet its burden of demonstrating the need for pre-trial or trial access [redacted] First, as the Court found [redacted] the provision of the classified summaries more than adequately vindicates whatever right the defense has to the information [redacted] See Kines v. Butterworth, 669 F.2d 6, 10 (1st Cir. 1981) (disclosure of informant's grand jury testimony and interview reports adequately alternative to access). Second, contrary to standby counsel's representations, much of what [redacted] actually implicates Moussaoui in the conspiracies charged in this case. Third, to the extent the Court finds that there are material and admissible statements that these detainees could provide at trial, before finally determining that some method of taking their testimony (e.g., by Rule 15 deposition) must be permitted, the Court should afford the Government an opportunity to avoid the disclosure of classified information to the defendant (and damage to National security) that such depositions would entail by permitting the Government an opportunity to suggest substitutions for those statements the Court has deemed material and admissible. See CIPA § 6(c).

The defendant bears a heavy burden of demonstrating materiality. See United States v. Blevins, 960 F.2d 1252, 1259 (4th Cir. 1992) ("this circuit has made clear that the onus is on the

defendant" to demonstrate that a witness has "material, exculpatory, non-cumulative evidence that is not otherwise available."). See also United States v. Mount, 896 F.2d 612, 621 (1st Cir. 1990) ("Before the absence of defense witnesses can be said to violate either the right to compulsory process or due process, the defendant must show that the testimony from the missing witnesses would have been relevant, material and favorable."). Indeed, as the Fourth Circuit has explained, in the standard CIPA context, "a district court may order disclosure only when the information is at least essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative." United States v. Smith, 780 F.2d 1102, 1110 (4th Cir. 1985) (internal citations and quotation marks omitted) (emphasis added). See also United States v. Zettl, 835 F.2d 1059, 1066 (4th Cir. 1987) (under CIPA procedures, district court must rule, *inter alia*, on whether evidence is merely cumulative or corroborative). "[T]he absence of cumulative testimony cannot, as a matter of law, result in actual prejudice." United States v. Comosona, 848 F.2d 1110, 1114 (10th Cir. 1988). Finally, to be material, the proffered testimony must be admissible. Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (disclosure of inadmissible polygraph results can have no direct effect on the outcome of the trial because respondent would not have been able to mention them); Taylor v. Illinois, 484 U.S. 400, 410 (1988) (accused has no "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence").

1. [redacted]

Before addressing standby counsel's particular claims [redacted] it bears emphasis that Moussaoui is not charged, as standby counsel and the defendant repeatedly have phrased it,

with "September 11." [redacted] Instead, Moussaoui is charged in six broad conspiracy counts that include as overt acts, *inter alia*, the preparation for and execution of the terrorist attacks of September 11. As the Court itself has held, these conspiracy counts properly include allegations of conduct independent of the September 11th attacks, such as, for example, the dissemination of *fatwahs* regarding attacks against American military personnel in Somalia (Count I, Overt Act 6), the use of training camps to prepare legions of al Qaeda adherents for the holy war Bin Laden declared against the United States (Count I, Overt Act 2), and *al Qaeda*'s efforts to obtain components of nuclear weapons (Count I, Overt Act 4). *See* Order 2/28/03 (denying defendant's motion to strike these overt acts as surplusage).

The common thread of the six conspiracy counts is al Qaeda's ongoing war against the United States. Indeed, the Indictment alleges conduct that both precedes and post-dates the preparation for and execution of the September 11 attacks. Thus, even if al Qaeda never intended to put Moussaoui on one of the four planes on September 11, he would nonetheless be guilty of the charges specified in the Indictment if he otherwise participated in the broad conspiracies charged in the Indictment. See United States v. Burgos, 94 F.3d 849, 858-59 (4th Cir. 1996) (*en banc*) ("a defendant's participation in the conspiracy need not be explicit; it may be inferred from circumstantial evidence .... In addition to selling narcotics, that participation may assume a myriad of other forms, such as supplying firearms or purchasing money orders for coconspirators or permitting them to store narcotics and other contraband in one's home, or purchasing plane tickets for coconspirators.") (omitting citations and quotations); United States v. Bin Laden, 109 F. Supp. 2d 211, 217 (S.D.N.Y. 2000) (evidence of embassy bombings,

included as overt acts in conspiracy charges, relevant to conspiracy charges against defendants not alleged to have participated in embassy bombings). Moreover, he would be legally responsible for the mass murder committed by his co-conspirators. See United States v. Anjum, 961 F. Supp. 883, 889 (D. Md. 1997) ("[o]nce the conspiracy is in existence, the act and the statement of each member of the conspiracy is considered to be the act and statement of each member of the conspiracy, and each member of the conspiracy is therefore responsible for the acts and the statements of the other members of the conspiracy taken during the existence of the conspiracy, in furtherance of the conspiracy, just as if such person performed such act herself or himself.") (citing United States v. Chorman, 910 F.2d 102, 111 (4th Cir. 1990)).

Given these fundamental axioms of conspiracy law, it is clear [redacted] information, if believed by the jury, would alone convict Moussaoui of the conspiracy counts. [redacted] or that Moussaoui did not know every detail of the evolving plan to use airplanes to attack American targets. The bottom line is that the information [redacted] is entirely consistent with the charges, including all of the overt acts, alleged in the Indictment, and satisfies the elements the

Government would need to prove to convict Moussaoui.[2]

Notwithstanding this, standby counsel claim that they require [redacted] breaking down their claim to the categories identified by the Court as material to the defense in connection with the previous motion for access [redacted]

First, standby counsel claim [redacted] information is relevant to explain further [redacted] Morever, standby counsel suggest that the absence of any further contact [redacted] is proof that Moussaoui was not

[2] Standby counsel continue to base many of their materiality claims on the so-called "20th Hijacker" theory of the Government's case. Yet, as previously noted in other filings before this Court, the Government has never embraced that theory in any pleading, let alone any charging instrument, in this case. Instead, the "20th Hijacker" theory appears to be a creation of the media coverage of this case and the isolated statements of certain government officials in the immediate aftermath of the September 11th attacks, and long before the defendant was indicted. As such, it should have no bearing on this motion. See United States v. Purdy, 144 F.3d 241, 246 (2d Cir. 1998) ("The Government's theory of how many of the twenty-two purchase orders related to government contracts may have changed over the course of its investigation, but an earlier investigative theory is hardly the equivalent of a bill of particulars or other formal admission in an earlier trial. To bind the Government forever to a preliminary investigative theory to which it never formally committed would only discourage further investigation and thereby impede the truth-finding process."). [redacted]

part of September 11. Notably absent from standby counsel's dissertation, however,

Moreover, standby counsel's story begs the question of

In any event, none of this information would acquit Moussaoui

Second, standby counsel claim corroborates

thereby excluding Moussaoui from being an intended participant in those attacks.

Yet, if the only purpose of this testimony would be to

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corroborate [redacted] then standby counsel's claim [redacted] should be rejected as unnecessarily cumulative. See Barnes v. Thompson, 58 F.3d 971, 975 (4th Cir. 1995) (no Brady violation where suppressed information available from other sources); United States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990) (same); United States v. Edwards, 577 F.2d 883, 890 n.10 (5th Cir. 1978) ("We recognize that the testimony of Davis might have the cumulative effect of increasing the weight of the evidence, but, nevertheless, conclude that the absence of Davis did not sufficiently prejudice the defendant."). Moreover, as noted previously, even if Moussaoui was being saved for another hijacking attack against the U.S., that does nothing to remove him from the broad conspiracies charged in this case and therefore is not material and exculpatory. United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988) (single conspiracy exists where key actors, methods and goals overlap); United States v. Crockett, 813 F.2d 1310, 1317 (4th Cir. 1987) (same).

Third, standby counsel claim [redacted] is necessary to explain the reasons why Moussaoui was not in contact with the other hijackers. [redacted] can be established by other evidence, thus obviating the need to call [redacted] See United States v. Harley, 682 F.2d 1018, 1020 (D.C. Cir. 1982) (proper for the

court to consider whether there are "adequate alternative means" for the defendant to prove "the same point").

Fourth, standby counsel contend [redacted] is necessary to establish the existence of a [redacted]. Such statements, however, are not exculpatory for the guilt phase. Indeed, as noted above, they establish Moussaoui's participation in the conspiracies charged in the Indictment. [redacted]

Fifth, standby counsel argue [redacted] a witness to rebut the Government's claim that Moussaoui's lies to investigators after his August 2001 arrest did not result in the deaths of thousands of individuals on September 11. [redacted] This claim is specious as it assumes that Moussaoui would had to have been aware of all the details of the September 11th plot to have his lies result in mass murder. It also rests on a misrepresentation of Moussaoui's lies to investigators, and the Government's theory about the impact of those lies on the ability of the Government to prevent the hijacking attacks from occurring. For example, standby counsel actually suggest that Moussaoui's statement that he came to the United States to learn to fly was technically accurate. [redacted] Yet, as described

below, Moussaoui's lies were far more extensive and pernicious than standby counsel portray because they demonstrate that Moussaoui concealed his role in an al Qaeda plot to fly hijacked airplanes into buildings in the United States, instead of being the harmless words of a student or tourist. Thus, if Moussaoui had been forthcoming with those details [redacted] his truthful statements would have allowed government officials to prevent Moussaoui's cohorts from carrying out their deadly attacks on September 11. As such, it is clear [redacted] testimony is not necessary to Moussaoui's defense.

ii. [redacted]

Standby counsel go to significant effort to establish [redacted] who had significant involvement in the 9/11 attacks as outlined in the indictment. Thus, standby counsel give a synopsis of the summaries [redacted] produced to the defense under CIPA § 4, [redacted] it is insufficient to meet the defense burden of showing how [redacted] testimony would be exculpatory and admissible. Therefore, the defense has no right to call him as a witness.

First, [redacted]

[redacted]

is simply not exculpatory. See United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions."; United States v. Kennedy, 819 F. Supp. 1510, 1519 (D. Colo. 1993) ("Brady requires the production of material information which is 'favorable to the accused,' that is, exculpatory information, not information which is merely 'not inculpatory' and might therefore form the groundwork for some argument for the defendant.").

[redacted] Further, even if such evidence is deemed exculpatory, [redacted] can be proven by means other than his testimony. [redacted]

Standby counsel's claim [redacted] is a material and exculpatory witness boils down to one claim: [redacted]

[redacted]

[redacted] First, this statement is inadmissible hearsay, [redacted] Accordingly, it will not be admissible in the guilt phase of the trial. Moreover, even if admitted in the penalty phase, this statement loses much of its apparent exculpatory nature. [redacted] Finally, even assuming for purposes of this pleading, however, that this one statement [redacted] is exculpatory and admissible in the penalty phase, the defense can make this argument to the jury based on evidence (already produced) [redacted] Or, we suggest, as noted below, that this information be provided to the jury by substitution rather than testimony.

[redacted]

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Standby counsel's suggestion that [redacted]

Finally, the defense suggestion that [redacted] Second, even if such a fact was assumed to be exculpatory, it could be proven through airline records and would not require the testimony [redacted]

Impact of the Death Penalty

Standby counsel advance two additional reasons related to defendant's capital-eligibility as grounds for needing the testimony [redacted] First, standby counsel argue that "[t]he expected testimony [redacted] is certainly exculpatory to the extent that [redacted] do not face or receive a death sentence . . . ." [redacted] This statement is simply not

true. [redacted] face potential death sentences in either the Article III courts or a military tribunal. See The President's Military Order of November 13, 2001, 66 Fed. Reg. 57833, Sec. 4(a); Department of Defense Military Commission Order N. 1, March 21, 2002, Sec. 6G. Therefore, the "equally culpable" mitigator set forth in 18 U.S.C. § 3592(a)(4) does not apply [redacted] Cf. United States v. Bin Laden, 156 F. Supp.2d 359, 370 (S.D.N.Y. 2001) (equally culpable mitigator applied to co-defendants captured in Europe where extradition agreements precluded death penalty); United States v. Beckford, 962 F. Supp. 804, 815 (E.D. Va. 1997) (equally culpable mitigator applied to co-conspirators not charged with capital-eligible offenses).

Standby counsel next argue that the testimony [redacted] help establish that defendant is not constitutionally or statutorily eligible for the death penalty. This argument fails, however, because, even if their statements are taken in the light most favorable to the defense, they still establish that defendant was an active participant in a coordinated plan of attack upon the United States that included flying planes into American buildings, [redacted] Defendant's *mens rea* clearly (and admittedly) consisted of an intent to kill which far exceeds that demanded by the Supreme Court's decisions in Tison v. Arizona, 481 US 137 (1987), and Enmund v. Florida, 458 US 782 (1982).

As to the gateway factors set forth in 18 U.S.C. § 3591(a)(2), the Government has tendered two different theories to support the gateway factors in § 3591(a)(2)(C) & (D), neither of which would be affected by [redacted] defense. [redacted]

[redacted] First, the Government identified the "act" for purposes of both subsections (C) and (D) as the defendant's participation in the conspiracy. Even if defendant trained to serve as a pilot/hijacker [redacted] attack upon American buildings, his participation was still in furtherance of the conspiracy which directly resulted in death, so this argument does not change.

Second, the Government argued that defendant's lies when interviewed on August 16 and 17, 2001, constituted the "act" for purposes of subsection (C). FBI and INS agents first interviewed defendant on August 16, 2001, after his arrest for immigration violations. During this initial interview, defendant lied by telling the agents that he sought the flight training purely for personal enjoyment and, upon completion of the training, he intended to engage in sightseeing in New York City and Washington, D.C. When interviewed for the second time on August 17, 2001, defendant denied that he was an extremist intent on using his aviation training in furtherance of a terrorist goal and, instead, reiterated that he merely sought flight training for personal enjoyment. Viewing [redacted] in the light most favorable to the defense, at the very minimum, defendant should have said truthfully (if he were not trying to conceal the murderous conspiracy): (1) "I am a member of al Qaeda and I have sworn bayat to Usama bin Laden;" (2) "I was sent to the United States to take flight training to fly a plane into a building in the U.S.;" (3) "Usama bin Laden personally approved my participation in the attack;"

[redacted]

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(6) "Other members of al Qaeda will assist me in the attack even though I don't know who they are [redacted] None of these points changes the legal analysis set forth in the Government's Response [redacted][8]

Substitutions

If the Court finds that [redacted] would provide material, exculpatory, admissible, non-cumulative evidence, the Government may be able to propose appropriate substitutions pursuant to CIPA § 6(c)(1) for the specific evidence identified by the Court. The Government understands that the Court previously rejected substitutions [redacted] Nonetheless, the Government respectfully requests 10 days from any findings of materiality to tender the proposed substitutions.[9]

[8] Since the Court has not yet ruled on standby counsel's various motions seeking to dismiss the death notice, the Government would welcome an opportunity to further brief the defendant's capital eligibility if the Court so desires.

[9] CIPA allows for proposed substitutions under § 6(c)(1) only after a hearing pursuant to § 6(a)(1) and a finding by the Court as to "use, relevance, or admissibility of classified information." CIPA § 6(a)(1).

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Conclusion

For the foregoing reasons, and the reasons set forth in earlier Government pleadings, the defense motions should be denied.

Respectfully Submitted,

Paul J. McNulty
United States Attorney

By: /s/

Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant United States Attorneys

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CERTIFICATE OF SERVICE

I certify that on July 29, 2003, a copy of the foregoing Government's pleading (without a copy of the *ex parte* submissions) was provided to the Court Security Officer for service upon:

Frank Dunham, Jr., Esq.
Office of the Federal Public Defender
1650 King Street
Suite 500
Alexandria, Virginia 22314
Facsimile: (703) 600-0880

Alan H. Yamamoto, Esq.
108 N. Alfred St., 1st Floor
Alexandria, Va. 22314-3032
Facsimile: (703) 684-9700

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
Middleburg, VA 20118

/s/
Robert A. Spencer
Assistant U.S. Attorney