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Marisso
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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/UNDER SEAL

STANDBY COUNSEL'S RESPONSE TO THE GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTIONS FOR ACCESS [redacted]

Standby counsel, on behalf of and in support of motions filed by Zacarias Moussaoui, herewith responds to the Government's Opposition to Defendant's Motions for Access [redacted] ("government's Opposition" or "Opposition").

INTRODUCTION

The government's attempt in its Opposition to refute the defense need for access [redacted] must fail principally because it deliberately ignores the fact that, regardless of the breadth with which the conspiracy charges are viewed, the most significant hurdle for the defense in this case is to refute the inference that Moussaoui was part of the September 11 operation or had any knowledge of it.

Moussaoui is charged only with conspiracy, not with murder or the completion of any substantive crime. But when the Indictment is combined with the Death Notice, Moussaoui is effectively charged with murdering more than 3000 people on September

11, 2001.[1] His alleged method of committing those murders is what he said, and what he did not say, during an interrogation by FBI agents following his arrest on immigration charges. Accordingly, the issue as to death will necessarily turn on what the jury believes was in Moussaoui's mind, i.e., what did he know on August 16, 2001 and what was his intent. The jury will be asked to decide life or death, and perhaps guilt or innocence, based upon the inferences it draws with regard to this issue from the evidence at trial.

Despite the government's view of the breadth of its conspiracy charges which it says includes "allegations of conduct independent of the September 11th attacks," Opposition at 8, some of which also resulted in death, the only deaths alleged in the indictment and the Death Notice are those that occurred on September 11. For the jury to determine that Moussaoui is death eligible, a jury will have to determine that he was a major participant in those deaths.[2] To resolve this issue, the Court, and possibly then a jury, will have to determine what Moussaoui knew at the time he was arrested by the FBI, find that he either provided false, or withheld, information with the intent to cause death, and then contrast what he falsely told or did not tell the FBI with everything the government knew prior to September 11. Following these tasks, the jury would then

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[1] The Death Notice in this case alleges that the defendant's actions "were intended to cause, and in fact did cause," the deaths on September 11. See Notice of Intent to Seek a Sentence of Death at 4 ¶ 6 (filed Mar. 28, 2002, dkt. no. 89).

[2] See discussion *infra* at section IV.C.

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have to speculate as to whether any information Moussaoui should have provided, but did not, would have prevented the events on September 11.[3]

Mr. Moussaoui contends that he knew nothing about the September 11 operation. It appears from [redacted] summaries [redacted] supports this proposition. The government, however, contends [redacted] potential testimony on this point is not exculpatory. It says the conspiracy charges are broad enough to convict Moussaoui "even if al Qaeda never intended to put Moussaoui on one of the four planes on September 11." Opposition at 8, because [redacted] squarely places Moussaoui in al Qaeda's war against the United States." *Id.* at 9. Of course, if being an al Qaeda member is all that is required to prove the charges, then the Court could have accepted Moussaoui's attempted guilty plea last year.

Whether the government's conspiracy charges are as broad as it contends, any evidence that moves Moussaoui out of an intended role in, or knowledge of, the specific operation on September 11 greatly diminishes the chance that a jury would, or could, impose a sentence of death. Such evidence can be nothing other than "core *Brady*."[4] It bears reminding that the factual issue in *Brady* was whether the prosecution could withhold evidence relevant to imposition of the death penalty in a case where the

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[3] This comparison between what the government knew and what Moussaoui might have added is why the defense should immediately be provided an unredacted copy of the December 2002 Report of the U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 (S. Rept. No. 107-351, H. Rept. No. 107-792). Standby counsel have requested the government to provide the defense an unredacted copy of this report; the government has refused.

[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

defendant admitted his involvement in the crime but claimed he was not a major participant in the death of the victim.

Simply stated, there is no better evidence to show Moussaoui's non-participation in the September 11 operation than to present the testimony [redacted] The combined effect of information in [redacted] summaries [redacted] Even if Moussaoui is somehow vicariously responsible for September 11 because he is a member of a broader conspiracy of which September 11 is but a part, his non-existent role in September 11 would make him constitutionally ineligible for the death penalty.

Were the government to stipulate that Moussaoui was not intended to be a participant in the September 11 operation and that he knew nothing about it, thus effectively removing the death penalty from this case, the calculus with regard to whether the testimony [redacted] is material and exculpatory might come out differently. But as long as the government continues to keep open a potential trial theory that would allow a jury to conclude that Moussaoui was to have been a part of the September 11 operation, or had some knowledge of it, the defendant must be allowed to prove facts and circumstances that tend to show that he was not intended to be nor ever was a part of that operation, and that he had no knowledge of it.

ARGUMENT

I. PRE-TRIAL ACCESS

Standby counsel understand that the Court has ruled adversely to the defense on pre-trial access with respect to what we assume is a similarly situated witness and

do not anticipate a different ruling [redacted] Standby counsel simply seek to preserve our point that we have asked for this access and to emphasize that denial of such access should result in [redacted] summaries, [redacted] being viewed and construed in a light most favorable to the defendant when attempting to determine "whether the defense has made a plausible showing that [the witnesses] could offer testimony that would be favorable to Moussaoui." March 10 Memorandum Opinion at 16.

II. COMPULSORY PROCESS

The government relies on the "law of the case" doctrine to support its argument that pre-trial access [redacted] should be denied. Opposition at 2. In turn, standby counsel rely on that same doctrine to establish Moussaoui's right to compel access [redacted] for purposes of obtaining their trial testimony, whether pursuant to Rule 15 or in person. See March 10 Memorandum Opinion *passim*.

[redacted]

III. THE GOVERNMENT'S INVITATION TO THE COURT TO WEIGH NATIONAL SECURITY INTERESTS INVITES THE COURT INTO A SEPARATION OF POWERS THICKET

In its Opposition, the government outlines the national security concerns which it states "[o]utweigh [Moussaoui's] [a]sserted [n]eed for or [access] to [redacted]" Opposition at 3. Actually, Article III Courts are not well suited to weigh the gravity of particular national security concerns against the fair trial needs of a defendant in any case, much less a death penalty case. Such an exercise would involve the Court in second guessing the weight of particular national security concerns, a matter that should be left to the Executive Branch. *See Hamdi v. Rumsfeld*, 296 F.3d 278, 281 (4th Cir. 2002) ("*Hamdi II*") (stating that "the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs"). The Court, as it did previously, need only determine whether there has been a "plausible showing" that [redacted] witnesses would be able to provide favorable testimony on the defendant's behalf. March 10 Memorandum Opinion at 12 n.12, 16. The gravity of national security concerns is for the Executive, not this Court, to weigh in deciding how to proceed, i.e., whether to produce the witnesses if ordered to do so.

[redacted]

IV. MATERIALITY

The government attempts to reargue the requirements for a showing of materiality. *See* Opposition at 6-7. The governing principles here on this issue have already been established by the Court, see March 10 Memorandum Opinion at 12-19, and constitute the law of the case.

[redacted] It cannot be seriously questioned [redacted] can provide material and favorable testimony for the defense in this case. Further, it cannot be seriously questioned that his testimony is necessary for any fair resolution of this case if the trial is to be search for the truth. Nothing in the government's Opposition disproves this.

The government says that "Moussaoui is not charged . . . with 'September 11.'" Opposition at 7-8. If the government were to stipulate that Moussaoui was not intended to be a participant in, and had no knowledge of, the September 11 operation, as we have said *supra*, evaluation of the defendant's need for these witnesses might come out differently. However, the fact that the government construes its conspiracy charges as broader than September 11 does not alter the fact that the events of September 11 are the gravamen of the offenses. Indeed, *any* reading of the charges and the Death Notice make clear that September 11 is at the heart of what is charged. In order to avoid the death penalty, and to have any chance of establishing his innocence altogether, Moussaoui must first extricate himself completely from any notion that he knew of the September 11 plan or was intended to be a participant in it. The fact that there may be other theories under which he might still be found guilty of the

conspiracies charged (given the breadth the government would like to read into its Indictment), and the fact [redacted] expected testimony may provide support for one of these other theories, does not diminish his value to the defense. As was stated above, standby counsel's paramount objective in defending this case is to show that Moussaoui was not part of, and had no knowledge of, the September 11 operation.

The government, relying on *Pinkerton*[6] type vicarious liability of co-conspirators, asserts that even if Moussaoui was not a part of and had no knowledge of the September 11 operation, he would still be guilty of it "if he otherwise participated in the broad conspiracies charged in the Indictment." Opposition at 8. But if Moussaoui's culpability for September 11 is determined on the basis of vicarious liability for acts of co-conspirators who caused death, and of which Moussaoui was totally unaware, he would clearly not be viewed as a major participant in those deaths and therefore would not be death eligible.

There is no question that, after exculpating Moussaoui from the September 11 operation, [redacted] ". . places Moussaoui in al Qaeda's war against the United States." Opposition at 9. However, Moussaoui's pro se ramblings in his voluminous pleadings from his Alexandria cave and his various statements in open court have already established the fact that he is a member of al Qaeda and is at war with the United States. Therefore, [redacted] testimony on this point does no harm whatsoever to Moussaoui's current legal position and does not alter the fact that the

[6] *Pinkerton v. United States*, 328 U.S. 640 (1946).

balance [redacted] testimony with regard to the September 11 operation is highly exculpatory.

[redacted]

The government complains that standby counsel continue to base materiality claims "on the so-called '20th Hijacker' theory of the Government's case." Opposition at 10, n.2, a theory that the government says, it "has never embraced . . . in any pleading . . . in this case." *Id.* Instead, the government says this theory "appears to be a creation of . . . isolated statements of certain government officials." *Id.* It is significant that these "certain government officials" do not include officials like the Secretary of Agriculture or the head of the Environmental Protection Agency. These officials were the President of the United States, the Vice President, an Assistant Attorney General, the Director of the FBI, a Deputy Assistant Director of the FBI for Counter Terrorism, and the Director of Homeland Security[redacted]

[redacted]

Further, while the government may not have explicitly "embraced" the 20th Hijacker theory in its pleadings, it has never rejected this theory either.[6] Accordingly, the defense must be prepared to meet it. Unless the government were to stipulate that Moussaoui was never intended to be a participant in one of the four September 11 hijackings, the defense must prepare to meet and defeat this prospective theory because, even if not explicitly embraced by the government, it is a simplistic and well-advertised approach to the evidence that a jury could easily adopt, just as "certain government officials" did.

The government argues that there are inconsistencies [redacted] summaries [redacted] Standby counsel do not read the summaries the same way. [redacted]

[6] The government is certainly not required to select and disclose its specific prosecutive theory in advance of trial, i.e., what evidence it will introduce and what it will argue to the jury that the evidence proves. Its options in this regard usually remain open until closing argument. However, there is nothing to prohibit the government from disclosing what its prosecutive theory is and what it is not so that pre-trial decisions concerning relevancy and materiality of defense evidence with national security implications can be made with more precision. Indeed, because the government has chosen to not so limit itself, the defense must be prepared to meet all reasonably conceivable theories of guilt. Similarly, pre-trial decisions regarding materiality and relevancy of defense evidence must be judged against all possible theories of guilt. e.g., a fifth plane into the White House.

[redacted]

The government argues that statements [redacted] are not exculpatory for the guilt phase. Opposition at 13. This contention is debatable and no reason to deny access [redacted]

While exculpatory in this regard, the statements are not sufficiently detailed to incriminate him in any plan [redacted]

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[redacted]

The government further argues, [redacted] statements that Moussaoui was to be a participant [redacted] are not exculpatory for the penalty phase "because [redacted] was still part of the same conspiracy and because the defendant still told material lies, which concealed the conspiracy and directly led to the murders on September 11, 2001." Opposition at 13. Again, this contention is debatable and presents no basis to deny access to the witness. [redacted] Further, as set forth above, these statements do not state or imply what Moussaoui's state of mind was concerning the [redacted] attack. [redacted] certainly reduces the likelihood that a jury would find that Moussaoui made statements to the FBI with knowledge of the September 11 operation, and therefore with the intent to permit the September 11 operation to go forward and cause death.

Finally, the government builds a strawman just to tear down. It puts in our mouths an argument we never made: "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." Opposition at 13. To the contrary, our argument is that Moussaoui did not know any of the details of the September 11 plot, and that, therefore, any lies he may have told could not have been told with intent to cause death. [redacted]

In sum, the government, in a case principally about September 11, wants to withhold a witness [redacted]

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[redacted] To allow the government to do so, particularly in a death penalty case, is constitutionally impermissible.

[redacted] Standby counsel have asserted five specific areas, in addition to those concerning death eligibility and Moussaoui's minor role, about which [redacted] offer testimony that would be favorable to Moussaoui. The government specifically addresses four of these areas in contending that the defense has not established [redacted] material exculpatory testimony on Moussaoui's behalf.

First, the government maintains that the fact that [redacted] but not Moussaoui, is merely "not inculpatory" evidence, not evidence that is explicitly exculpatory. Opposition at 14-15. Citing *United States v. Scarpa*, 897 F.2d 63 (2d Cir. 1990) and *United States v. Kennedy*, 819 F. Supp. 1510 (D. Colo. 1993), the government claims that Moussaoui's innocence may not be established though such

[redacted]

"not inculpatory" evidence or through "'proof of the absence of criminal acts on specific occasions.'" Opposition at 15.

The government's cryptic definition of "exculpatory" evidence, however, has been explicitly rejected by the Fourth Circuit. In *Patler v. Slayton*, 503 F.2d 472 (4th Cir. 1974), the defendant, who had been found guilty of murder by a Virginia Circuit Court, argued in a federal habeas petition that the failure to timely release the results of scientific tests by the FBI on physical evidence violated his rights under *Brady*. *Id.* 478.[10] The results were not released to the defense until immediately after the physical evidence was introduced into evidence by the prosecution. *Id.* In denying relief, the district court judge noted that the evidence was not exculpatory to the defense, but rather "neutral," because "on its face [it] neither implicate[d] nor exculpate[d] the [defendant]." *Patler*, 353 F. Supp. at 388. On appeal, the Fourth Circuit agreed with this characterization of the evidence, but stated that:

> [S]uch a characterization often has little meaning: evidence such as this may, because of its neutrality, tend to be favorable to the accused. While it does not by any means establish his absence from the scene of the crime, it does demonstrate that a number of factors which *could* link the defendant to the crime do not.

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[10] The physical evidence consisted of clothing and the murder weapon, all found near the crime scene. Test were performed on these items, for instance, analyses of soil and tar found on a pair of shoes, hair and fiber searches of the clothing, and fingerprinting of the murder weapon (a pistol). None of the results of these tests linked the defendant to the crime, e.g., no fingerprints were found on the pistol and the soil samples found on the shoes did not match any of the samples taken along the escape route used by the perpetrator. *Patler v. Slayton*, 353 F. Supp. 375, 387-88 (E.D. Va. 1973), *aff'd*, 503 F.2d 472 (4th Cir. 1974).

Paller, 503 F.2d at 479 (emphasis in original).[11]

The Fourth Circuit's definition of "favorable evidence" to include "neutral" facts that merely establish the absence of incriminating facts, wholly undercuts the government's argument [redacted] to the extent they are merely "not inculpatory," are not exculpatory to Moussaoui.[12]

Second, the government maintains [redacted]

[11] The court then went on to hold that it need not decide whether the evidence was "favorable" under *Brady*, because, assuming it was, the Commonwealth had complied with its obligation to turn the evidence over. 503 F.2d at 479.

[12] Law Professors Wayne LaFave, Jerold Israel and Nancy King have similarly stated,

> Courts sometimes have been troubled by the question of whether evidence that does not point directly to the defendant's innocence nevertheless is "favorable to the accused." Most agree that evidence can be favorable even though it does no more than demonstrate that "a number of factors which could link the defendant to the crime do not."

5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, CRIMINAL PROCEDURE 483-84 (2d ed. 1999) (citations omitted).

Other federal courts are in accord with the Fourth Circuit's definition of what is "favorable evidence." *See, e.g., Jones v. Jago*, 575 F.2d 1164, 1166-67 (6th Cir.) (holding that a potential witness' statement that did not make any reference to the defendant was *Brady* evidence as to defendant's involvement in the crime where the witness "was in a position to have knowledge concerning the involvement or non-involvement of [the defendant]"), *cert. denied*, 439 U.S. 883 (1978); *United States v. Furlett*, 1991 U.S. Dist. LEXIS 17220 at *5, 1991 WL 255512 at *2 (N.D. Ill. 1991) (unpublished opinion) (ordering production of statements of witnesses who did not identify defendants provided those witnesses where in a position to know and would likely have mentioned defendants).

[redacted]

The problem with this argument is its underlying assumption that the government's inculpatory interpretation [redacted] is the *only* interpretation. Of course, as this Court has already noted, "[t]he ultimate determination as to the value of [the witness'] testimony is for the *jury*, rather than the prosecution, to make in the context of the other evidence introduced at trial." March 10 Memorandum Opinion at 19 (emphasis added). The jury could reasonably believe, as the defense maintains, [redacted] effectively excludes Moussaoui from the September 11 plot. Indeed, this interpretation is much more likely considering [redacted] Moussaoui was not chosen for that role, suggesting that he was not slated to be one of the September 11 hijackers.

The government derides this theory of the defense as "rank speculation." Opposition at 16, n.7. Of course, because the government refuses to allow the defense to interview plainly material witnesses [redacted] the defense

[redacted]

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can only postulate from the summaries [redacted] This problem highlights the due process concern caused by the government's refusal to allow the defense to interview its proposed witnesses.

Alternatively, the government argues that [redacted] testimony on this point is inadmissible hearsay in the guilt phase of the trial[14] [redacted] Opposition at 16. Such an objection is fundamentally unfair as it is the government that is denying the defense pre-trial access [redacted] - access that would provide the defense with an opportunity to determine whether information could be elicited in a form that would not violate the hearsay rule. [redacted] Accordingly, parsing these summaries in order to mechanically apply the rules of evidence to them in this pre-trial context is an exercise in futility. Neither of the two cases relied upon by the government for the proposition that the proffered testimony must be admissible, require an admissibility determination when ruling on a pre-trial motion for access [redacted][15] Questions of admissibility will be

[14] The government acknowledges that in the penalty phase of this case, a hearsay objection to the evidence would not be sustainable. Opposition at 16. [redacted]

[15] The government relies on *Wood v. Bartholomew*, 516 U.S. 1 (1995) and *Taylor v. Illinois*, 484 U.S. 400 (1988). *See* Opposition at 7. The former case discusses the standard to overturn a presumptively valid conviction, not the standard for

(continued...)

addressed at the time of the Rule 15 deposition. [redacted]

[redacted][17]

Finally, the government's hearsay objection [redacted] bolsters the importance of granting access [redacted] The government should not be permitted to claim on the

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[16] (...continued)
production of exculpatory evidence pre-trial. The latter case merely states the uncontested axiom that a defendant "does not have an unfettered right to offer [inadmissible] testimony." 484 U.S. at 410. Accordingly, these cases are either inapposite or not controlling.

[17] Similarly, the government's argument, sprinkled throughout its Opposition, that access to the witnesses should be denied because their expected testimony is cumulative of other evidence, is misplaced. In seeking to have the Court reject the testimony [redacted] as "cumulative," the government cites three cases. *See* Opposition at 12. All of these cases are post-conviction cases and only one, *Edwards*, discusses cumulative evidence. None of these cases support the proposition that the trial court can, pre-trial, deny access to a witness because that testimony may be cumulative. Objections to cumulative evidence can and will be addressed by the Court at the time the witnesses testify, when the actual testimony can be weighed against other evidence, if any, in the case. Of course, even at that juncture, the Court is not *required* to deny admission of evidence that is cumulative, particularly where, as here, the evidentiary weight of that evidence far exceeds that of the other evidence in the case. *See* Fed. R. Evid. 403 (stating that "evidence *may* be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of . . . *needless presentation* of cumulative evidence") (emphasis added); *see also United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985) (en banc) (stating that *merely* cumulative evidence should not be disclosed under CIPA).

[redacted]

one hand [redacted] exculpatory information is inadmissible hearsay, and on the other assert [redacted] are not exculpatory witnesses. Indeed, if [redacted] are allowed to testify [redacted] any hearsay problem disappears since the government would be able to cross-examine each of them, and the interlocking nature of the testimony would be highly corroborative.

The government's third argument is that [redacted]

[redacted]

In any event, the government's argument here as well as its fourth argument [redacted] suffers from the same malady that afflicts its second argument *supra*, namely, that the government's interpretation of this evidence is not the *only* interpretation, and that a jury could reasonably believe that the defense's interpretation of this evidence is more credible than the government's. The defense must be allowed to present its interpretation to the jury, and can do so only through the testimony [redacted]

[redacted]

C. MATERIALITY AND MINOR ROLE/DEATH ELIGIBILITY

Independent of the implications of the government's national security concerns or the requirements of the Fifth and Sixth Amendments, the Eighth Amendment dictates that Moussaoui have access to the testimony [redacted] As standby counsel have demonstrated repeatedly during this litigation, the Eighth Amendment requires a "greater degree of reliability" in a capital prosecution, and, consequently, imposes "additional safeguards" on the process. *Murray v. Giarratano*, 492 U.S. 1, 8, 10 (1989) (plurality opinion) (citation omitted); *see also Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("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"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the

[redacted]

appropriate punishment in a specific case."). "The same reasoning must apply to rules that diminish the reliability of the *guilt determination* [in a capital case]." *Beck*, 447 U.S. at 638 (emphasis added). *See also Gfarratano*, 492 U.S. at 8 ("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)).

As standby counsel also have previously argued, there exists in this case a very real *constitutional* question of whether the extent of Moussaoui's involvement in the underlying felonies provides a sufficient basis for the death penalty. *See Tison v. Arizona*, 481 U.S.137 (1987). 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." *Id.* at 157-58 (emphasis added). The distinction between major participation and participation of a lesser character, however, is often subtle, compare *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. Moreover, it 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*, 481 U.S. at 158. Plainly, where, as here, a witness could provide testimony which would make the defendant *constitutionally ineligible* for the death penalty, the

government may not, consistent with the Eighth Amendment, continue to pursue that penalty while denying access to the evidence.

Moreover, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Supreme Court held that Florida's capital procedure of allowing the sentencing judge in a capital case to consider a secret presentence report in determining the defendant's sentence violated due process. Concurring in the judgment, Justice White found that the procedure violated the Eighth Amendment. In doing so, he relied upon the plurality opinion in *Woodson*:

> "We believe that in *capital cases* the fundamental respect for humanity underlying the *Eighth Amendment* . . . requires consideration of the character and record of the individual offender and *the circumstances of the particular offense* as a *constitutionally indispensable part of the process of inflicting the penalty of death.*"

Id. at 363 (White, J., concurring) (emphasis added) (citations omitted). As this requirement is "constitutionally indispensable," the government may not withhold from the defendant access to testimony as to "the circumstances of the particular offense," which would, at a minimum, mitigate in favor of a life sentence, and, at best, could render him constitutionally ineligible for the death penalty. That, of course, is precisely the type of evidence which would be elicited [redacted] [redacted]

CONCLUSION

For the foregoing reasons, and any others adduced at a hearing on this matter, standby counsel respectfully request that the Court grant the motions filed by Moussaoui and standby counsel and require the government to allow the defense

unmonitored pre-trial access [redacted]

[redacted] and for writs *ad testificandum* [redacted]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Standby Counsel's Response to the Government's Opposition to Defendant's Motions for Access [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 Court Security Officer Michael Macisso on this 1st day of August 2003.[21]

/s/
Kenneth P. Troccoli

[21] Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), 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 Mousseoui until standby counsel receive confirmation from the CSO and/or classification specialist that they may do so.

Pages 25 to 36 Redacted