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

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

DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER STRIKING ALL AVIATION EVIDENCE IN THIS CASE

On March 14, 2006, after an approximately five hour evidentiary hearing, this Court found the cumulative errors in this capital prosecution were so numerous and serious, that it could not recall a single case "in the annals of criminal law" that was comparable. March 14, 2006 Tr. ("Tr.") 214. The government does not even quibble with the Court's characterization of the cumulative impact of this astounding series of self-inflicted errors.[1] Instead, the government seeks to absolve itself from the actions of its own employees despite agreeing that the errors were "flagrant,"[2] "egregious,"[3]

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[1] The government attempts to minimize Ms. Martin's involvement in this case, reducing her to virtually the status of a messenger. Motion at 5-6. As the government minimizes her role on the prosecutorial team, it is worth noting that Ms. Martin, at least, has worked with the prosecutorial team itself, as well as with the aviation witnesses in reference to this particular case. That is more evidence of direct involvement with the misconduct at issue here than the government will adduce about Mr. Moussaoui's involvement with the hijackers, yet it considers that connection sufficient to actually execute him.

[2] Government's Memorandum in Opposition to Defendant's Motion to Dismiss the Death Notice and/or Exclusion of Witnesses (filed Mar. 13, 2006, dkt. no. 1678) at 5.

[3] *Id.* at 2, 5.

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"inexcusably wrong,"[4] and "apparently criminal."[5] After vainly seeking to extricate itself from conduct that should result in witness tampering charges, the government asks the Court to reconsider its decision excluding tainted evidence in this most public of capital cases. The Court's ruling imposing sanctions was, without question, necessary to protect Mr. Moussaoui's right to a fair trial and to protect the integrity of the criminal justice system. Accordingly, the government's request for reconsideration should be denied.

THE COURT'S FINDINGS

Following the March 13, 2006 revelation of the violation of the Court's Sequestration Order, on March 14, 2006, the Court held an evidentiary hearing to determine the extent of the damage and the appropriate remedy. At that hearing, which began at 9:30 a.m. and ended at 3:35 p.m. (including breaks and the lunch recess), seven witnesses testified, one of whom, government attorney Carla Martin, requested time to consult with counsel and was not questioned further. In addition to considering the testimony, the Court also considered nine exhibits introduced by either the government or the defense.

Following the hearing, the Court found that, based on the evidence presented, a "significant number of errors" had occurred in the conduct of this capital prosecution. Tr. 213. Indeed, the errors were so serious that the Court stated, "I don't think in the

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[4] *Id.* at 2.

[5] Government's Motion for Reconsideration of the Court's Order Striking all Aviation Evidence in this Case (filed Mar. 15, 2006, dkt. no. 1684) (the "Motion") at 3.

annals of criminal law there has ever been a case with this many significant problems." Tr. 214.

First among these errors was the violation of the Court's rule on witnesses. The Court found that "the evidence is uncontroverted . . . [that] six witnesses, two for the government and four potential defense witnesses, were tainted in that the [government] attorney, Ms. Martin, communicated with them in clear violation of the Court's written order." Tr. 214. In noting the harm to the defense because of that violation, the Court stated "to the extent that witnesses might have been alerted to issues that they hadn't been thinking about, especially those government witnesses who might have been hostile, there clearly could be damage done to the defense's ability to make its case." Tr. 216.

The second error concerned the government's representation to the defense that none of the three FAA employees who were potential defense witnesses would "agree to meet with [the defense] for an interview before trial." Tr. 200-01. The Court found that, based on the evidence, this representation was a "bald-faced lie." Tr. 201. The Court found that Ms. Martin "[told] at least one witness that he could not speak with the defense and . . . clearly misrepresen[ed] to the prosecuting team that . . . two witnesses had explicitly said they would not agree to meet with defense counsel for an interview." Tr. 216.

The third error concerned the extensive taint Ms. Martin's false actions and representations had on the aviation portion of the government's case, including "the selection of evidence." Tr. 217. The Court found that Ms. Martin was "involved in a significant portion of [the government's] case," and that "[she] appears to have been the

key contact person between the prosecution team and the TSA-FAA component in terms of getting documents and that sort of thing." Tr. 201-02. The Court noted that Ms. Martin was "included on some of [the government's] pleadings to this Court [and she was] cc'd on some of the letters that [the government was] sending to the defense team." Tr. 202. The Court also questioned Ms. Martin's impact on the selection of evidence saying that "[i]t is simply in my view too riddled with problems." Tr. 217. As such, the Court concluded, "my problem is that [Ms. Martin's] involvement in that portion of this case in my view so taints anything that she might have touched, how could any rational trier of fact rely upon any representation made by her?" Tr. 202.

As a result of these "significant errors," the Court concluded that "at least a portion of the government's case has been significantly eroded." Tr. 216-17. Rather than strike the death notice, however, which was the relief requested by the defense, the Court concluded that the appropriate sanction was to "strike out of the case that portion of the case that . . . has been irremediably contaminated by the misconduct of this attorney." Tr. 217. As such, the Court "remov[ed] from this case any and all witnesses and evidence dealing whatsoever with the . . . aviation component of this case." Tr. 217. Specifically, in its Order filed after the hearing, the Court directed that "the government is precluded from introducing aviation related evidence, including witness testimony and exhibits." Order (filed Mar. 14, 2006, dkt. no. 1681).

ARGUMENT

Motions to reconsider are not favored. Absent a need to accommodate an intervening change in controlling law, to account for new evidence not previously available, or to correct a clear error of law, a court should not be asked to reconsider a

ruling previously made. *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997) (Cacheris, C.J.), *modified*, 166 F.3d 667, 679 (4th Cir. 1999) (holding that a motion for reconsideration based on additional evidence may be denied unless the moving party provides "a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the [underlying] motion"), *rev'd on other grounds*, 530 U.S. 428 (2000); *see also id.* at 1024 ("A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court 'rethink what the Court ha[s] already thought through – rightly or wrongly.'") (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (Warriner, J.)).

Here, the government does not suggest a change in law or provide a legitimate reason for its failure to advance arguments which were available to it at the time it briefed and orally argued against Defendant's Motion to Dismiss the Death Notice and for Other Relief. Nor does the government suggest that the Court committed an error of law. Instead, the Government merely says, in effect, that the Court should have exercised its discretion differently. This failure in itself is reason enough to reject the Motion. *See Dickerson*, 971 F. Supp. at 1024 (finding such a failure "fatal" to a motion to reconsider), *aff'd*, 166 F.3d 667, 680 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000). Moreover, irrespective of this failure, each of the government's arguments are without merit.

I. SUBSTANTIAL PREJUDICE TO THE DEFENDANT EXISTS ON THIS RECORD FROM THE GOVERNMENT'S MISCONDUCT.

The Court obviously has broad discretion to control the conduct of this capital prosecution. As the government itself noted with respect to the sanction imposed for

the significant errors extant in this record, "the Court has discretion to do whatever the Court wants here. I think that's clear." Tr. 204. Indeed, the Court of Appeals has noted that "we have found no precedent in which we have overturned the decision of a district judge to exclude a [witness for a party] when the violation was plainly the fault of [that party] or [that party's] counsel." *United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997). This is precisely the situation presented here.

The reason the Court's discretion is broad is because of the Court's obligation to ensure a fair capital sentencing proceeding for Mr. Moussaoui. This obligation extends beyond this individual defendant, however, to the criminal justice system as a whole, which has a stake in ensuring that verdicts and sentences are fair. *See United States v. Nixon*, 418 U.S. 683, 709 (1974) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). These concerns are especially paramount in a capital prosecution where heightened reliability attends both the guilt and penalty phases of the trial.

Given the Court's broad discretion and the interests at stake here, it would have been entirely appropriate for the Court to presume prejudice to Mr. Moussaoui on this record. Indeed, in an analogous situation involving a district court's erroneous refusal to sequester a government witness under Rule 615, the Court of Appeals stated:

> We reject the government's suggestion that the technical violation of Rule 615 lacks consequence because the defendant cannot prove prejudice. Instead, we understand the mandatory, unambiguous language of the rule to reflect the drafters' recognition that any defendant in [the defendant's] position would find it almost impossible to sustain the burden

> of proving the negative inference that the second agent's testimony would have been different had he been sequestered. A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts.

United States v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986); *see also United States v. Harris*, 39 F.3d 1262, 1268 (4th Cir. 1994) (restating the rule in *Farnham* in a case where two prospective government witnesses discussed their testimony with another government witness who had already testified);[6] *cf. United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir. 1986) (requiring a finding of "probable prejudice" to justify exclusion of a witness for violating the rule on witnesses).

In reversing the conviction in *Farnham*, the Court of Appeals re-stated the purpose of Rule 615: "the sequestration of witnesses effectively discourages and exposes fabrication, inaccuracy, and collusion." 791 F.2d at 335; *accord United States v. Rhynes*, 218 F.3d 310, 317 (4th Cir. 2000) ("We have properly recognized the purpose and spirit underlying witness sequestration: it is 'designed to discourage and expose fabrication, inaccuracy, and collusion'."). "Scrupulous adherence to [Rule 615]," the Fourth Circuit also has stated, "is particularly necessary in those cases in which the out-come depends on the relative credibility of the parties' witnesses." *Id.* These same concerns properly motivated the Court here. Tr. 218 (stating that "serious sanctions" were necessary, otherwise, "[i]t would literally turn our criminal justice system on its head").

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[6] In *Harris*, the Court of Appeals applied the harmless error rule to violations of Rule 615, *see* 39 F.3d at 1268, which is the same rule the Court applied in the instant case. *See* Tr. 213.

Irrespective of whether prejudice should be presumed, the government's claim that there is no actual prejudice shown by this record is baseless, particularly given the government's concession that the six witnesses have been "unfortunately infected" by the violation of the Sequestration Order. Tr. 204. Ms. Martin's e-mails are, as the Court properly noted, plainly efforts to coach government witnesses and to shape their testimony. And, Ms. Martin has succeeded in her effort regardless of the self-serving testimony of government officials. Those witnesses are obviously better prepared now that they have been alerted to the areas of inquiry that they simply were not previously prepared to address and can shape their testimony accordingly. In is opening statement to the jury, the government promised the jury that had Moussaoui not lied, all knives and hijackers would have been kept off of planes. These were bold promises, so bold that one of the government attorneys working on the case decided to warn the FAA witnesses that they needed to conform their testimony to these arguments. She told them to be careful not to get tripped up and sent along examples of what had happened to Agent Anticev, who was the first witness for the government.

In obvious contradiction of the "no prejudice" claim, Ms. Osmus even admitted that she got the message. "Got your message and agree we need to be careful in describing how these measures would have impacted the attack, and will be prepared. I don't support including 100 percent gate screening . . . couldn't be done in shortterm, which is why CAPPS was used to identify who would get gate screening." GX 3. Her testimony, that she intended to say that she was already prepared, Tr. 42, is simply incredible and the Court was entirely proper to presume taint. No matter what Ms.

Osmus stated in open court, the fact is that she "got the message" and the meaning of that phrase is obvious on its face.

In addition, the hearing in this matter also disclosed that most of the testimony proffered by these witnesses was the direct result of the coaching suggested by Ms. Martin and not in the manner portrayed in the government's Motion. The Court will certainly remember litigation regarding the testimony of one of the government's FBI summary/expert witnesses.[7] That witness was the only witness proffered by the government who was permitted to provide "summary" evidence as to what the government "could" have done had Moussaoui not lied. The Court carefully reviewed that motion and determined that this witness could testify as to what the FBI "could" have done. The motion was granted in part and it was decreed that the witness was prohibited from providing speculative testimony as to what "would" have been done.

The defense has never received any notice, as it received for the above witness, that either Ms. Osmus or Mr. Manno was to provide the same type of "summary" testimony that we have now learned was in the offing. Therefore, the Court's ruling excludes evidence that is not only tainted by Ms. Martin's tampering, it is also irrelevant and misleading, consistent with the Court's prior orders. Now, having been coached by Ms. Martin,[8] these witnesses plan to offer the same kind of speculative testimony that this Court barred upon proper notice. Thus, we now learn that Ms. Osmus was

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[7] The name of this witness has been withheld as the matter was litigated under seal.

[8] Contrary to the government's repeated assertions that Ms. Martin was a liason or other unrelated attorney, Ms. Osmus accurately described her as an attorney "working with Mr. Novak to help put the case together." Tr. 39.

prepared to testify that it was "very likely" that the attacks would have been prevented by the efforts that the FAA "would" have undertaken armed with Moussaoui's statement of facts. Tr. 44; *see also id.* at 43 ("It would certainly have had an impact on the ability of the attackers to do what they did on 9/11".) This testimony is plainly shaped by Ms. Martin's actions and is now tailored to meet the expectations set down in the government's opening and to refute the Defendant's arguments to the contrary.

Mr. Manno's testimony is similarly speculative and tainted. Mr. Manno is now aware of areas of inquiry that he was not prepared to testify about only because a government lawyer coached him.

> Q. Because of what she told you, you know that the defense is going to inquire of you about government knowledge about planes flying into buildings, right?
>
> A. Yes.

Tr. 73.

Mr. Manno admitted that he was not prepared to discuss the Phoenix memorandum at this trial until prompted by Ms. Martin. Tr. 80. Ms. Martin told him to be prepared to testify that "the FAA was not clued in to what was going on." Tr. 82. We learned that Ms. Osmus and Mr. Manno were prepared together to provide their testimony in a manner that could contravene the Court's order and was designed to insure that the stories meshed. Tr. 84. As such, the Court was entirely proper to find that the testimony of Mr. Manno was tainted as well. The fact that these witnesses have testified about some of these matters at a prior time or in a prior forum does not mean that they have not been aided by Ms. Martin's alerts. After Ms. Martin's review of Agent Anticev's testimony, she began to endeavor to see that his mistakes did not recur.

With respect to Ms. Martin, the Court was quite kind to the government in its findings in this matter as the key witness who could have testified as to motive, intent and opportunity was not produced. Because Ms. Martin was not available to testify, there is a hole, "big enough to drive a truck through," in the government's argument. Were this a trial within a trial, which it essentially is, the defense would be entitled to a missing witness instruction and thus the relief the Court has granted. The Court's ruling excluding essentially everything that Ms. Martin has touched is supported by the fact that we will never know what she did, why she did it, and who else may have been aware of her efforts.

For example, one e-mail is addressed to a Legal Assistant, Maia Sellinger, in a law firm in New York. That firm represents two other witnesses who are listed on the government's witness list. They are Ed Soliday and Larry Wansley who are described as "having their work cut out for them." If that is the case, Ms. Martin's head's up has certainly made that task much easier and in a manner that prejudices the defense. Finally, there are persons who have received and perhaps read these e-mails who have not even been identified. The March 7, 2006, e-mail, GX 5, was copied to Stefanie Stauffer. The Court does not know on this record who that person is and what impact her receipt of these e-mails may have had on this trial. The reason that the government cannot answer these questions is that one member of the team of government attorneys has not provided any answers. That absence alone is sufficient to support the Court's sanctions order.

The legal issues posed by Ms. Martin's apparently criminal conduct continue to grow as more parties learn of her actions. For example, attached hereto is a letter to

the Honorable Alvin K. Hellerstein, United States District Judge for the Southern District of New York who is apparently presiding over one of the civil cases against the airlines arising from the September 11 attacks. That letter discloses that the position taken by the airlines in that litigation in which the United States government has intervened, is in "stark contrast" to that advanced by the government to seek Moussaoui's death. This too raises substantial due process concerns in addition to those raised by Ms. Martin's role in collecting information from her "friends" in the airline legal defense business especially since we now know that she is fully aware that the government and the airlines are taking a completely different position in one case to save money, while taking another to execute a defendant. We have not received any of these documents, have no way of knowing how and if the airline employees that are listed as government witnesses have been coached either by their counsel or Ms. Martin. As such, the Court was entirely proper to find that the integrity of the justice system as whole has been compromised. What we learned today only shows that the virus is spreading.

II. THE SANCTION IMPOSED BY THE COURT WAS ENTIRELY APPROPRIATE GIVEN THE SIGNIFICANT GOVERNMENTAL ERRORS THAT HAVE OCCURRED IN THIS CAPITAL CASE.

The Court's sanction of striking the aviation component of the case was an appropriate sanction given the blatant misconduct of Carla Martin which "irremediably contaminated" that portion of the government's case. That sanction was appropriate not only because Martin was an integral part of the prosecution team,[9] representing the

[9] Ms. Martin was named in pleadings as one of the government's attorneys working on this case. See DX 1. She also was present for many of the hearings in this case, including CIPA hearings.

FAA witnesses on behalf of the government, but because her flagrant violations were knowing, deliberate and with the intent to subvert the defendant's constitutional right to a fair trial in violation of the Fifth, Sixth and Eighth Amendments.

The government contends that the sanction is "grossly punitive, penalizing the Government beyond what is necessary to ensure that the defendant receives a fair trial" and cites *United States v. Gonzales*, 164 F.3d 1285 (10th Cir. 1999), in support of its argument for a less onerous sanction. Motion at 3. But, if anything, *Gonzales* supports the Court's sanction of striking the aviation component of the government's case.

Gonzales arose as a pretrial discovery issue and not on the question of "tainted" testimony arising during an ongoing capital terrorism trial. The issue involved in *Gonzales* was the repeated violations of the district court's pretrial discovery orders by the government's attorneys and law enforcement agents. The court of appeals found that the "government's conduct [of denying court-ordered access to the defense of the government's witness] was the product of flagrant bad faith and that defendants' ability to prepare for trial was prejudiced by the government's obstruction of access to the subject witness." 164 F.3d at 1292. The court of appeals determined that the witness' potential trial testimony was not "tainted" by the government's discovery violations and that the violations could be cured by a continuance for the defense to interview the witness. *Id.* at 1293.

Gonzales cites Taylor *v. Illinois*, 484 U.S. 400 (1988), which provides further support for the Court's sanction for the blatant misconduct in this case. In *Taylor*, state law required witness lists to be provided to the opposing party. After the government finished its case-in-chief, the defense moved to amend its witness list to add two

additional witnesses that it was attempting to locate. Later voir dire of one of the witnesses revealed that defense counsel had visited one of the witnesses at his home the week before trial and had made a gross misrepresentation to the court concerning the witness' testimony. The trial court found that the defense had committed a "blatant violation of the rules, a willful violation of the rules" and ordered that the witness could not testify at trial. *Id.* at 405.

Unlike the case at bar, in which the government is seeking less drastic sanctions, it was the defense in *Taylor* that argued that a less drastic sanction was available, contending that a continuance or mistrial to provide time for further investigation could be granted. In addition, the defense argued that further violations could be deterred by sanctions against the defendant or counsel. Although the party was different, the analysis of the Supreme Court was the same as the analysis of this Court. The Supreme Court held that:

> [i]t may be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and harm the adversary process.

Id. at 413.

This Court was similarly concerned about not going forward with a death case that had so many violations of standard, well-established principles of law. As the Supreme Court has stated:

> The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must be weighed in the balance.

Id. at 414-5.

Regarding the government's contention that a voir dire would protect the rights of the defendant, Motion at 17, the Supreme Court addressed this issue in *Taylor* and stated:

> More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant. . . . Regardless of whether prejucide to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful conduct in which the severest sanction is appropriate.

Id. at 657.

Similar flagrant violations of a court's sequestration order have resulted in the exclusion of witnesses by other federal courts. *See United States v. Blasco*, 702 F.2d 1315 (11th Cir. 1983). In *Blasco*, at both a suppression hearing and at trial, an Assistant United States Attorney violated the court's sequestration rule in a manner that the court characterized as "contemptuous." *Id.* at 1326. The court of appeals referred to the three sanctions expressed in *Holder* in finding that the district court's exclusion of further testimony of the witnesses was appropriate because the defense suffered actual prejudice and there had been connivance by the witness or counsel to violate the rule. *Id.* at 1327 (citation omitted.)

Taylor v. United States, 388 F.2d 786 (9th Cir. 1967), another case cited by the government, also is completely inapplicable. In *Taylor*, the government called a witness, who was the alleged victim of the interstate transportation in violation of the Mann Act. The witness invoked her Fifth Amendment rights on the witness stand. The government then requested that the witness remain in the courtroom so she could be

identified by subsequent government witnesses. The court permitted it and the defense did not object. After the conclusion of the government's case, the defense indicated that it wished to call the witness and the government objected, contending that calling the witness was in violation of the court's sequestration order. The court agreed and denied the defense permission to call her. The court of appeals found that the rule had not been intentionally disobeyed by the defense since the witness was in the courtroom at the request of the government and that there was no indication on the record that the defense expected the witness to retract her Fifth Amendment privilege or would call her as a witness. Since the violation of the sequestration order was apparently unwitting, the court of appeals found that the district court judge abused his discretion in refusing to permit the witness to testify. The fact pattern of the *Taylor* case is nothing like the facts involved in this case and the *Taylor* case is therefore completely inapplicable.

Also inapplicable are *United States v. Hastings*, 126 F.3d 310 (4th Cir. 1997) and *Geders v. United States*, 425 U.S. 80 (1976), two other cases cited by the government. The issues raised in those cases are simply inapposite to the case at bar.

III. ALLOWING THE GOVERNMENT TO ADD A NEW UNNAMED WITNESS WOULD CONTRAVENE 18 U.S.C. § 3432 AND VIOLATE DUE PROCESS AND THE EIGHTH AMENDMENT.

This Court ordered the government to produce a witness list to the defense on March 6, 2005. *See* dkt. no. 1280. The Court, in its Order, cited 18 U.S.C. § 3432, which requires production of a witness list three days in advance of trial in all capital cases. The government now proposes to violate this Court's order and this safeguard, mandatorily construed, to remedy the errors created by its own misconduct. The government asks this Court to permit an unnamed "untainted witness" to put on the

"narrow 'no-fly' list portion of our aviation case." Motion at 4, 21. This proposal would violate Section 3432, due process and the Eighth Amendment.

In capital cases, which have heightened procedural protections for a defendant, the government must produce a witness list to the defendant at least three days before the commencement of trial pursuant to 18 U.S.C. § 3432. This statute has extended this right to defendants in certain cases *since 1790* and provides in relevant part that "[a] person charged with . . . capital offense shall at least three entire days before commencement of trial be furnished with . . . a list . . . of the witnesses to be produced on the trial for proving the indictment."[10] 18 U.S.C. § 3432. The Supreme Court has held that this ancient and unexceptional backbone of capital jurisprudence in the federal courts is mandatory. *See United States v. Logan,* 144 U.S. 263, 304 ((1892). "The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense." *Id.* The Fourth Circuit has concurred, noting that "[p]rovision for this capital list is mandatory, and failure to provide it in a capital case is ordinarily reversible error." *United States v. Hall*, 410 F.2d 653,660 (4th Cir. 1969);[11] *see also*

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[10] Of course, as a result of intervening events that need not be discussed again here, the Indictment, both legally and actually, now includes, at a minimum, the threshold and statutory aggravating factors. The statute, thus, applies entirely to this phase of the case and the government has never suggested otherwise.

[11] The Fourth Circuit has likewise strictly construed other statutes protecting the rights of capital defendants literally and mandatorily. *See United States v. Boone*, 245 F.3d 352, 358 (4th Cir. 2001) (vacating conviction and remanding for retrial, finding 18 U.S.C. § 3005 provides an absolute statutory right to two attorneys in cases where the death penalty may be imposed without any showing of prejudice).

United States v. Crowell, 442 F.2d 346, 347-48 (5th Cir.1971) (reversing and remanding on the grounds that the district court's failure to exact compliance with § 3432 would be plain error).

Certain narrow exceptions apply which are not present here. For example, when the government is not aware of a witness prior to trial, through no fault of its own, or a new witness becomes necessary because of unexpected developments at trial, a court may permit a witness, not on the original witness list, to testify. *Logan,* 144 U.S. at 304. However, counsel "has found no case where a court allowed the government to call a witness not on the witness list when the failure was due to a lesser showing, such as excusable negligence [by the government]." *United States v. Fernandez*, 172 F. Supp. 2d 1265, 1278 (C.D. C.A. 2001). And it surely would be a perversion of this bedrock procedural safeguard for the Court to permit flexibility in order for the government to recover from the consequences of its own misconduct.

In addition, one of the purposes of Section 3432 is to "avoid surprise to the defendant and to allow his counsel adequate time to investigate and prepare for examination of the witnesses offered by the Government." *United States v. Gregory*, 266 F. Supp. 484, 487 (D.D.C. 1967). Here, one of the Court's rationales for striking the evidence that the government now seeks to introduce in violation of this safeguard in capital cases was precisely the Defense's inability to prepare and investigate the case as a result of Ms. Martin's obstruction of due process. To remedy the wrong of the government by further violating the protections afforded to capital defendants would be to turn the rule, as well as the Court's ruling, on its head. As the district court in *Fernandez* stated, "[s]ection 3432 is not a forgiving statute. Because of the societal

interest in ensuring that the death penalty is imposed only as a result of the most reliable and fair procedures our system can offer, § 3432 does not excuse sloppiness or negligence on the part of the government." 172 F. Supp. 2d at 1280.

Furthermore, the government has not indicated how it could possibly locate an "untainted" witness. While it might be true that an employee from August 2001 at the FAA may be familiar with the case and not with Ms. Martin, such a witness would have now been exposed to the media, opening statements, government and defense theories and now, the very issues about which they would ultimately be testifying. The existence of such a person is difficult, if not impossible to imagine and assurances that there is a rock at the FAA under which that person has been found should be greeted with the skepticism it plainly deserves. Due process and the heightened reliability applicable under the Eighth Amendment[12] demand more than a reshuffling of the witness deck in the middle of a capital trial. No heretofore unnoticed witness would have been admonished to comply with the Court's February 22, 2006 Order to not follow the case, including the reading of transcripts. Given the press coverage of this case, there simply are no possible witnesses untainted by failure to comply with the Court's Order, even though they may have managed to avoid Ms. Martin's improper witness coaching.

Finally, the government's suggestion that it can substitute a new witness for those previously designated demonstrates the impropriety of the very evidence it wishes to adduce from the aviation witnesses. If the witnesses are fungible, as the government proposes, they cannot be testifying as to actions they personally could have taken in

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[12] *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); and *Murray v. Giarratano*, 492 U.S. 1, 8-9 (1989) (plurality opinion).

response to Moussaoui's hypothetical confession, but what the agency as a whole would have done. Such testimony would be entirely speculative and conclusory, and it would be as plainly improper as the originally proposed testimony of the aforementioned FBI summary/expert witness. In short, the government proposes not to substitute a fact witness for the excluded fact witness(es), but an expert, or a summary witness, or a prognosticator, for a supposed fact witness. Thus, this is not a simple exchange of the stand-in for the lead, as the government suggests, but a rewriting of the government's script, against which the defendant must defend his life. The government should not be given an end-run around its creation of a record "simply too riddled with problems," Tr. 217, by creating yet a further violation of the rights afforded a capital defendant by law no matter how much public interest there may be in this trial.

IV. WITH ITS FAA WITNESSES, THE GOVERNMENT IS ATTEMPTING TO CONFLATE MOUSSAOUI'S "LIES" WITH HIS FAILURE TO TELL THE TRUTH.

The testimony of the government's FAA witnesses demonstrates that errors permeate their entire presentation and, thus, the government's entire case. Their proposed testimony and PowerPoint presentations are fundamentally flawed as a matter of law. These errors are not entirely surprising, since, at least in part, they are consistent with the testimony the government attempted to elicit through Agent Samit, culminating in the question which the Court properly struck. Indeed, in its Motion, the government has stated unabashedly that its case is predicated on proving what the FBI and the FAA could have done "if the defendant "had . . . told the truth." Motion at 2; *see also id.* at 4 ("Next, Lynne Osmus . . . would identify the security measures that could

have been implemented in a security directive *had the defendant told the truth.*") (emphasis added). Plainly put, the government is intent on presenting, through its aviation witnesses, a case which is inconsistent with its Notice of Intent to Seek the Death Penalty and numerous pleadings on the subject, and inconsistent with the defendant's constitutional rights to remain silent and not to incriminate himself.

Moreover, it appears that the FAA intends to do exactly what the Court has ruled it may not do in a directly related context -- state what a federal agency would have done under hypothetical circumstances. According to Lynne Osmus, the very focus of her presentation is "the kind of measures [the FAA] would have implemented had we known about the information Mr. Moussaoui *knew* prior to 911." Tr. 17. (emphasis added). Again, according to Ms. Osmus, her presentation will include what "*would happen* had [the defendant] *told the truth*." Tr. 20 (emphasis added). Finally, Claudio Manno concurred with Mr. Novak that, in his testimony, he will "try to describe what if any security measures could have been implemented [by the FAA] had Mr. Moussaoui *told the truth*." Tr. 3 (emphasis added). Indeed, the fact that counsel himself stated the proposition to Mr. Manno eliminates any question as to the government's entire theory of the case; it is not attempting to prove that Mr. Moussaoui's lies resulted in the deaths of 911, but that his failure to tell the truth did.

The government alleged in its Notice of Intent and thereafter, that the "act" upon which it relies is the defendant's lies, not his failure to tell the truth, nor what he "knew." The government was wise in opting for that formulation, for it would have been hard-pressed to argue that the failure to tell the truth was an "act." Indeed, it would require a judicial rewriting of the statute. 18 U.S.C. § 3591(a)(2(C) does not provide for an "act"

or "omission" as the basis for death eligibility. It only provides for an "act." The government cannot rewrite the statute to fit its purposes, nor can it transform an omission into something it is not -- the supposed "act" of failing to tell the truth.[13] *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (stating that "rule of lenity" requires interpretation of criminal statute in defendant's favor).

While an incarcerated defendant may not lie to authorities, he certainly is not required to tell the truth, for he is not required to say anything. See, e.g., Edwards v. Arizona, 451 U.S. 477 (1981). The one is not simply the flip side of the other, as the government would have it. Thus, in the absence of the defendant's lies, Agent Samit was not entitled to, and would not have possessed, the Statement of Facts or some other rendition of the "truth." Rather, if Mr. Moussaoui had not lied, the agent simply would not have been in possession of the "lies." Thus, while specific witnesses may present testimony as to how they were misled by Mr. Moussaoui's lies and, consequently, how they let down or misdirected our air passenger defenses, they may not take the next step -- where they and the government are plainly headed -- to testify what actions they (or their agency) would have taken had he provided additional, truthful information he was not obligated to give.

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[13] Moreover, it would be an extraordinary proposition -- and like the Court, the defense is unaware of any such case -- to execute a defendant for an omission, including his failure to take the affirmative step of telling the truth. But that is precisely what the government is now attempting to do by conflating the act of "lying" with the act of not confessing or telling the truth; that is what the government has attempted to do through the testimony of Mr. Samit, and apparently intends to continue doing through the testimony of the FAA witnesses.

Moreover, it would be abject speculation for the witnesses to assume, or for the government to ask the jury to "infer," that, in the absence of lies, Mr. Moussaoui, on August 16 and 17, 2001, would have volunteered the information contained in the Statement of Facts, in whole or in part, a statement drafted by the government for an entirely different purpose -- in support of his guilty plea. Mr. Samit has obviously hypothesized what additional questions he would have asked, but neither he, nor we, nor the jury can ever know what Mr. Moussaoui would have said in response, nor when in that hypothetical dialogue Mr. Moussaoui would have done exactly what he eventually did -- ask for an attorney. Thus, it is speculation at its worse to assume that Agent Samit would have elicited the information contained in the Statement of Facts or in any other version of the "truth." And that speculation is only compounded by the aviation witnesses' testimony as to what they or their colleagues would have done in response to that hypothetical information. It should go without saying that speculation as to a defendant's moral culpability, even for a crime as horrible as 911, may not provide the basis for execution.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the government's Motion for Reconsideration of the Court's Order Striking All Aviation Evidence in this Case Motion be denied.

Respectfully Submitted,

Zacarias Moussaoui
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 16th day of March 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314.

/s/
Kenneth P. Troccoli

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March 15, 2006

By Hand

Hon. Alvin K. Hellerstein
United States District Judge
500 Pearl Street
New York, New York 10007

Re: ***In re September 11 Property Damage and Business Loss Litigation*, No. 21 MC 101 (AKH)**

Dear Judge Hellerstein:

We write to call to the Court's attention facts that have just surfaced that raise serious questions about what appears to be an incestuous and inappropriate relationship between Intervenor Transportation Security Administration (the "TSA") and certain of the Aviation Defendants. The Property Damage and Business Loss Plaintiffs are gravely concerned about the impact that this relationship may be having on discovery in the September 11 Actions.

Documents made public in the last few days in connection with the sentencing trial of Zacarias Moussaoui reveal attempts by counsel to certain of the Aviation Defendants in the September 11 Actions to shape the government's case in *United States v. Moussaoui* — through the TSA — in a manner that will assist them in the defense of the September 11 Actions. Counsel for United and American Airlines contacted the TSA to express major concerns with the prosecution's opening statement in *Moussaoui*, clearly because it laid them open to civil liability in the September 11 Actions. TSA was so responsive to these concerns that a TSA attorney attempted to coach government witnesses and to alter their prospective testimony — in violation of a Court order and in a manner that the Government itself has described as "reprehensible."

Specifically, in its opening statement on March 6, 2006, the Government took the position that the hijackings were *completely preventable* and that gate security measures *could have been implemented* to prevent the 9/11 hijackers from boarding the planes had security been on the look out for short bladed knives and boxcutters. (This stands in stark

contrast to the position that has been repeatedly articulated by counsel to the Aviation Defendants in the September 11 Actions.) Given the devastating significance of this admission to the September 11 Actions, counsel to the Aviation Defendants took action — they contacted the TSA.

The attached emails reveal that on March 7, 2006, counsel to American Airlines forwarded a copy of the Government's opening statement to United's counsel, who in turn forwarded a copy to an attorney for the TSA. The TSA lawyer then forwarded the transcripts and sent multiple emails to Government witnesses in a clear effort to shape their testimony in a manner that would be beneficial to the Aviation Defendants in the September 11 Actions. One such email to a Government witness on March 8 recounts the TSA lawyer's communications with her "friends" — counsel to United and American in this case — and coaches the witness as to certain testimony that "MUST" be elicited from her and other witnesses at trial:

> Lynne-let me put it this way: my friends Jeff Ellis and Chris Christenson, NY lawyers rep. UAL and AAL respectively in the 9/11 civil litigation, (and rep. Ed S. and Larry W. here) all of us aviation lawyers, were stunned by the opening. The opening has created a credibility gap that the defense can drive a truck through. There is no way anyone could say that the carriers could have prevented all short bladed knives from going through--Dave MUST elicit that from you and the airline witnesses on direct....

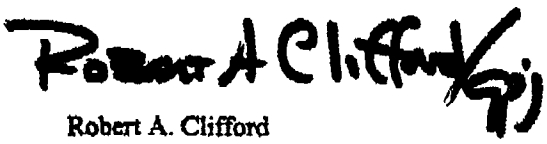
See Exhibit A at 10 (emphasis added).

These developments reveal far more than appearance of impropriety. The TSA is the administrative body charged with adjudicating the critical Sensitive Security Information ("SSI") issues in the September 11 Actions. These developments cast doubt on the impartiality of TSA in each and every matter concerning the SSI issues in this litigation. Given the importance of TSA's role in the September 11 Actions, evidence of defense counsel having *ex parte* communications with a TSA lawyer, resulting in the coaching of witnesses and the shaping of testimony in this manner, is deeply disturbing.

We request the opportunity to take immediate discovery into all communications between counsel for United and American Airlines and the TSA. We are not, through this discovery, seeking access to SSI. But it is imperative that the Plaintiffs have the opportunity to determine the extent of Defendants' influence with the TSA and potentially over the SSI

determinations, to inquire into the mutual back-scratching relationship that appears to exist between the Defendants and the TSA, and to ascertain the extent to which that may have affected discovery before Your Honor. We request a hearing at the Court's earliest convenience to address the matters discussed in this letter.

Respectfully submitted,



Robert A. Clifford

Gregory P. Joseph

cc: All Liaison Counsel
TSA Counsel

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