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FILING

No. 04-8385

IN THE
SUPREME COURT OF THE UNITED STATES

ZACARIAS MOUSSAOUI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. Review By This Court Is Sought Against A Background That Is Neither Abstract Nor Speculative, And Is Necessary To Prevent Significant Adverse Consequences To The Public Interest And Judicial Economy.

The courts below characterized the issues raised here as "unprecedented" and "of grave significance." (Pet. App. 4a, 112a).[1] The Government argues that these issues ought to be addressed "in a concrete factual context" rather than in an "abstract and speculative background." Opp. 20. Therefore, it says, the Court should not entertain

[1] The Government attributes the phrase "grave significance" to Petitioner, suggesting it was a descriptor used by him to describe the nature of the error by the court of appeals, Opp. 20, when in fact that phrase was used by the Fourth Circuit itself to describe the issues posed by this case.

them now.[2] But, at this juncture in the case, there is a "factual context" that is concrete and is neither "abstract" nor "speculative." Accordingly, review should be granted now.

The factual context is concrete because the Government does not dispute findings of the courts below that the witnesses at issue have material, exculpatory testimony. Nor does the Government dispute that by denying the Petitioner the right to call these witnesses the court of appeals has recognized a heretofore unrecognized exception to the Sixth Amendment requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." The Government characterizes the court of appeals' decision as a determination that compulsory process rights can be set aside as part of finding "a workable balance . . . to a novel problem." Opp. 20. No doubt the Framers anticipated that the courts would face "novel problems," but to solve them, the Framers would not have countenanced evasion of the Constitution's explicit commands through an *ad hoc* "balancing" process. Indeed, it was to "solve" the "problem" of defense access to favorable witnesses within the reach of the court's process that the guarantee of the Compulsory Process Clause was enacted.

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[2] Unlike *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), cited by the Government as authority for denying review now as premature given the case's interlocutory posture, *see* Opp. 16, Petitioner's case is an "extraordinary case[ ] . . . involv[ing] . . . question[s] of public interest and general importance." 240 U.S. at 258. Moreover, unlike *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the court of appeals here did not "decline[ ] to rule on the 'specific remedial course'" to be followed by the district court. *Id.* Indeed, the court mapped out a specific course for the district court to follow and it is that course that is challenged here.

The novel problem here is the Government's pursuit of a capital prosecution while [redacted] witnesses [redacted] with material, exculpatory testimony that neither defense counsel, the courts, nor the jury will ever see or hear. [redacted] (Pet. App. 7a, 16a). It has refused to produce the witnesses upon order of the district court even for a video deposition despite the fact that they are fully amenable to that court's processes. (Pet. App. 10a-11a).

Thus, the "workable balance" the court of appeals created is that the Compulsory Process Clause can be sacrificed upon the good faith invocation of a governmental privilege, and the defense required to rely on substitutions for the testimony of witnesses

[redacted]

instead of enforcement of the district court's order, when a court determines that substitutes for the testimony of those witnesses will not materially disadvantage the defense. The substitutes here, as described in our Petition, are to be derived from summaries of "classified documents containing information from unnamed, unsworn Government agents purporting to report unsworn, incomplete, non-verbatim accounts of what Government agents say [the] defense witnesses have said [redacted]." Pet. 10. The Government does not disagree with this description.

Moreover, it is not "speculative" that no one but the Government will ever know what these witnesses in Petitioner's favor actually have to say. It is not "abstract" -- indeed it is a certainty -- that Petitioner, his counsel, the trial court, and the jury will know only what the Government elects to disclose. It is "concrete" that what the Government has chosen to say is incomplete and non-verbatim, and that the witnesses have never been questioned by anyone who had this case in mind, much less the particular needs of the defense. The Government, which is seeking to end a man's life, essentially says "trust us" and that a capital case should proceed on the strength of that promise. There is nothing more that this Court needs to know in order to understand the pernicious premise on which this case will necessarily be adjudicated unless this Court intervenes to decide the issues presented.

The Government cites other death penalty cases where this Court declined interlocutory review. Opp. 17. However, Petitioner's case is not only unlike those other cases, it is like no other case. Unlike the death penalty cases cited by the Government,

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Fell, *Quinones*, and *Acosta-Martinez*, in which the general rule for denying certiorari pre-trial was followed because there was no harm to the parties or the public in deferring review until after a final judgment, Moussaoui's case presents the potential for significant adverse consequences to both the public interest and judicial economy if it turns out that the Fourth Circuit's "solution to address a novel difficulty arising out of the war on terrorism," Opp. 20, is unconstitutional. One of these consequences is the declassification and disclosure of top secret information which would be unnecessary if this Court were to grant review now, reverse the court of appeals, and hold that Moussaoui's trial should proceed in accordance with the opinion of the district court. Another is the waste of time, effort and expense by the district court and the defense that will occur in continuing to deal with the secrecy surrounding this case pre-trial which would be eliminated by such an outcome. *See* Pet. 15-17.

The Government argues again that it is "entirely speculative" as to whether there will be public disclosure of classified information. Opp. 19. This argument ignores the obvious. It cannot reasonably be disputed that the district court knows the facts, comprehends why everything about the [redacted] summaries and the enemy combatant witnesses [redacted] is highly classified, understands why those witnesses are material to the defense, and appreciates the ramifications of proceeding as the court of appeals has directed. Accordingly, the district court was not speaking "speculatively," but from a unique position of prescience when, giving as a reason for staying proceedings

while this Petition is pursued, it would be forced to order disclosure of the very information we are all now endeavoring to protect.

The Government also asserts that whether classified information is disclosed is its concern alone. Opp. 19. However, unless the parties and the courts are all being asked to jump through national security hoops for no reason, the Government cannot seriously dispute that it would be preferable to determine whether it is necessary to disclose highly classified information before, rather than after, Petitioner's trial. Moreover, the Government's insistence that we wait until later to determine whether the procedures created by the court of appeals pass constitutional muster would be an indescribable imposition on judicial and defense resources. These burdens include the extensive lengths to which the parties and the courts must go to protect national security information and the lack of transparency attending the entire process, not only for the public, but for the defendant himself who, because the information is classified, has been and will be denied access to some of the most critical information in his case.

Preventing "extraordinary inconvenience . . . in the conduct of the cause" has long been established as a reason for granting interlocutory review. *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893). Additionally, interlocutory review is appropriate if the case presents issues "of peculiar gravity and general importance," such as the grave constitutional issues arising here out of the only criminal prosecution in connection with one of the most tragic events in our nation's history. *Id.* at 383. Finally, although Petitioner's trial has not yet occurred, whether to proceed in

accordance with the opinion of the district court or that of the court of appeals should be decided now not only because of the obvious "importance of the question presented," but also because resolution of that issue is "'fundamental to the further conduct of the case.'" *Land v. Dollar*, 330 U.S. 731, 734 & n.2 (1947) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting certiorari to review correctness of circuit court's order remanding case for trial)).

The Government does not dispute that the question presented here is of grave importance,[4] that its resolution is fundamental to the further conduct of the case, or that proceeding in accordance with the decision of the court of appeals will entail continued and extraordinary inconvenience. Instead, it argues against review now because the substantial task of crafting the substitutions has not yet occurred, their adequacy and admissibility have not yet been determined, and it is not even certain that Petitioner will decide to use them. Opp. 16, 18. These arguments do no more than obscure the issue squarely presented. Fundamentally, the problem is not with the content, admissibility, or use of the substitutions ultimately to be crafted. Rather, the problem is that the defense will be required to rely on written substitutions constructed from incomplete,

[4] In fact, while supporting the judgment of the court of appeals, the Government's opposition raises another constitutional issue of almost equal moment. The Government contends that the court of appeals, by recognizing the authority of Article III courts to intrude into military and intelligence matters in the exercise of their compulsory process powers, has authorized a violation of the separation of powers, effectively arguing that the court of appeals reached the right answer for the wrong reason. Opp. 26-30. This assertion actually provides an additional reason for granting review, for reversing the court of appeals on this preliminary issue would first require the Court to take Petitioner's case:

non-verbatim reports from anonymous [redacted] officials instead of material, exculpatory, "critical" testimony from the witnesses themselves. (Pet. App. 47a).

II. Review By This Court Is Necessary Because The Decision Below Conflicts With The Court's Precedents Enforcing The Fifth, Sixth And Eighth Amendments.

The Government's contention that the court of appeals' decision does not conflict with decisions of this Court also is without merit.

A. Compulsory Process Clause

The Government first argues that the *Roviaro*, *Jencks*, *Reynolds* line of cases does not require dismissal when the Government refuses to comply with a court order to produce evidence in its sole possession that is favorable to a defendant. Opp. 21. As a threshold matter, Petitioner's argument is not, as the Government contends, that these cases "stand for the proposition that when the Compulsory Process Clause is violated, the only permissible sanction . . . is dismissal of the indictment." Opp. 21. Rather, Petitioner's argument is that dismissal of the factual issues or charges to which the exculpatory evidence relates (including, if necessary, dismissal of the indictment) is required. *See* Pet. 17. This is the precise sanction that the district court below imposed, mimicking the actions of the *Roviaro* Court itself, which mandated the dismissal of Court] of the indictment for the Government's failure to supply to the defendant material information that he was entitled to receive. *See* 353 U.S. 53, 65 n.15.

More importantly, these cases *do* hold that dismissal of factual issues or charges is a required, not a permissive sanction. As just noted, this fact is best borne out by the

actions of the *Roviaro* Court, which "required" dismissal of Count 1 of the indictment in that case. *Id.*; *see also id.* at 61 (requiring dismissal of Count 2). Indeed, even the dissent in *Roviaro* accepted the Court's holding as mandating, not permitting, dismissal. *See id.* at 67 ("Of course where enforcement of a non-disclosure policy deprives an accused of a fair trial it must either be relaxed or the prosecution *must* be foregone.") (Clark, J., dissenting) (emphasis added). The Court's subsequent decision in *Jencks* used the same mandatory language. *See* 353 U.S. 657, 672 (1957) ("We hold that the criminal action *must* be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce [the material evidence].") (emphasis added).

In support of its argument that *Roviaro* does not mandate dismissal, the Government relies on language in the opinion eschewing a fixed rule in favor of a balancing approach. Opp. 21-22. That part of the opinion, however, deals with when disclosure is justified, not what sanction is required once, as is the case here, disclosure is found to be proper. *See* 353 U.S. at 61-62. The court of appeals recognized this difference. *See* (Pet. App. 56a-57a) (utilizing a balancing test before holding that the Government must choose to comply with the district court's orders or "suffer a sanction").[5]

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[5] The Government also relies on *United States v. Morrison*, 449 U.S. 361, 364 (1981), for the proposition that dismissal "is not an automatic requirement whenever a Sixth Amendment right is breached." Opp. 26. *Morrison*, however, addressed the remedies for cases involving a violation of the right to counsel, *see* 449 U.S. at 364, where prejudice is required and sometimes presumed. A Counsel Clause violation can be remedied with a re-trial. In contrast, when dealing with withheld exculpatory evidence, a retrial will not, in the absence of full disclosure of the evidence, cure the violation. The

The Government next claims that the *Roviaro* Court's rejection of a substitute for the witness' testimony implies that the Court would have approved the use of one had a constitutionally acceptable substitute been available. Opp. 22. This claim, besides being purely speculative, is belied by the *Roviaro* Court's actions: ordering the *dismissal* of both counts of the indictment rather than remanding with instructions to allow the Government an opportunity to provide such a substitute. *See* 353 U.S. at 61, 65 n.15, 66. The claim also is belied by the Court's pertinent cases before and after *Roviaro*, all of which have either not acknowledged or not tolerated the use of a substitute in a criminal case for withheld exculpatory information.[6] *See* Pet. 23. In any event, for the reasons articulated in the Petition, the substitutes sanctioned in Petitioner's case are constitutionally infirm even assuming that the use of a substitute is permissible under the facts of our case.[7] *See* Pet. *passim*.

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only constitutionally adequate remedy for such a violation is dismissal of the factual issues or charges to which the exculpatory evidence relates. *See* Pet. 17-25.

[6] Similarly, the Government speculatively assumes that the decisions in *Jencks*, *Reynolds*, *Andolschek*, *Beekman*, *Coplon*, and *Burr*, none of which acknowledge the use of a substitute in a criminal case for withheld evidence, would not have held as they did had a substitute like the one sanctioned below been available. Opp. 23-25.

[7] The Government asserts that the test the court of appeals adopts for determining the propriety of a substitution is the "substantially the same ability" test articulated in CIPA § 6(c). Opp. 22. This assertion is simply not true. The test the court adopts is whether the substitution will "materially disadvantage the defendant." Pet. 10 (citing Pet. App. 59a). That said, the court of appeals (and the Government, *see* Opp. 13, 22, 26) does rely on CIPA by analogy in support of the court's substitution process. That approach is misguided given that the court also says that the common law - which either has not acknowledged or has not tolerated such a process in a criminal case - governs the case, not CIPA. *See* Pet. 10 n.8. It also is misguided because unlike the procedures under

B. Jury-Trial Guarantee

The Government disputes Petitioner's argument that the decision below conflicts with the Court's precedents, exemplified by *Blakely* and *Crawford*, that juries, not judges, should determine the reliability of trial evidence. Specifically, the Government claims that the facts of *Blakely* are distinguishable. Opp. 31-32. However, Petitioner cites *Blakely* not for its facts, but for the aforementioned legal principle, a principle which predates *Blakely* and *Crawford*. *See* Pet. 25-26 (citing *Washington v. Texas*, 388 U.S. 14, 21-22 (1967), *Rosen v. United States*, 245 U.S. 467, 471 (1918), and Blackstone's *Commentaries*).

The Government further claims that *Crawford* is distinguishable because the Confrontation Clause is not implicated in this case as it is the defendant who, under the Fourth Circuit's ruling, will be the proponent of the inculpatory portions of the substitutions. Opp. 30-31. This claim, as a factual matter, is simply wrong. *See* (Pet. App. 68a, 72a) (stating that it is the *Government* which must seek to admit the inculpatory portions, if any, under the rule of completeness). The fact that Moussaoui will be the proponent of the *exculpatory* portions under the Fourth Circuit's approach, does not negate the Confrontation Clause problems with the admission of any inculpatory portions. *See Chambers v. Mississippi*, 410 U.S. 284, 297-98 (1973) (finding inculpatory

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CIPA § 6, neither Petitioner's counsel nor the district court will have access to what is being substituted for: the testimony of the witnesses. That is, whether the test is "substantially the same" or "materially disadvantaged," neither test can be applied unless the parties and the district court know exactly what a proposed substitute is to be substituted for.

statements offered by the government during cross-examination just as adverse to the defendant as if they had been offered in the government's case-in-chief).

C. Counsel Clause

The Government also disputes Petitioner's argument that the decision below conflicts with the Court's decisions enforcing a defendant's right to effective counsel. Opp. 32. The Government first asserts that Petitioner did not raise this argument in the court of appeals, Opp. 32-33, a fallacious assertion as it would require Petitioner, as the appellee, to be clairvoyant and predict what the court of appeals' decision would be. More significantly, the Government is wrong as a factual matter because Petitioner did raise the Counsel Clause argument below in a timely and appropriate manner.[8]

Moreover, Petitioner's Counsel Clause argument is not, as the Government mischaracterizes it, that "a pretrial ruling on an evidentiary issue [is] a 'critical stage' of the litigation," Opp. 34, but rather that the *investigatory phase* of the litigation is a critical stage, a proposition that is supported by the Court's own pronouncements. *See*, e.g., *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (describing the investigatory phase as "perhaps the most critical period" of a criminal case); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) ("'The lawyer also has a substantial and important role to perform in

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[8] *See* Appellee's Petition for Panel Rehearing or Rehearing En Banc at 14 (4th Cir., filed May 6, 2004) (raising Counsel Clause challenge to substitution process adopted in the court's April 22, 2004 decision); Appellee's Reply to Response of the United States in Opposition to Appellee's Petition for Rehearing or Rehearing En Banc at 17-19 (4th Cir., filed May 24, 2004) (same, citing *United States v. Cronic*, 466 U.S. 648 (1984)); Appellee's Petition for Panel Rehearing or Rehearing En Banc at 14 n.8 (4th Cir., filed Sept. 27, 2004) (same, but with respect to the court's September 13, 2004 decision).

raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions'") (citation omitted); *see also* Pet. 31. In any event, Petitioner's Counsel Clause argument extends beyond the investigatory phase and to the other circumstances *Cronic* identifies for presuming prejudice. *See* Pet. 30-32.[9]

D. Due Process Clause

In defense of a unique scheme which effectively relieves the Government of its obligation to search for exculpatory information in the possession of its agents, and its agents of any responsibility for failing to produce it, *see Kyles v. Whitley*, 514 U.S. 419, 437 (1995), the Government insists that Petitioner has no enforceable right to obtain exculpatory information until he is convicted and can prove prejudice from the suppression of the material evidence. Opp. 36. In so doing, the Government fails to appreciate the distinction between "a true *Brady* violation," for which "prejudice must have ensued," *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), and a systemic violation based upon the Government's failure or refusal to search for evidence "favorable to the accused." *Id.* The latter falls within the scope of *Brady* even in the absence of a post-trial

[9] Citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 115 (2003), the Government also claims that Petitioner's Counsel Clause argument is just a recast Compulsory Process argument. Opp. 33. *Sattazahn*, however, addressed whether the "'open-ended'" concept of due process provided greater protection than the more specific Double Jeopardy Clause of which it was a part. 537 U.S. at 116 (citation omitted). Here, of course, we are dealing not with the "open-ended" Due Process Clause, but with two specific Sixth Amendment clauses, neither of which is subsumed within the other.

showing of prejudice. *See id.* (citing exculpatory character of evidence and prejudice from its suppression as distinct elements of *Brady* violation).[10]

That a "true violation" cannot be found prior to trial does not mean that the courts must countenance a systemic violation of *Brady*. Under the Government's theory, trial courts would be powerless to address a prosecutor's pre-trial *refusal* to search for *Brady* material. Plainly, the courts have a duty to enforce due process rights, even prior to trial, when the Government cannot or will not meets its due process obligations. Here, however, the court of appeals has actually created a procedure which sanctions a systemic violation of the Fifth Amendment. Moreover, waiting until after trial to litigate Petitioner's due process rights would be futile, since he will never know what exculpatory information was sought or left on the "cutting room floor" [redacted] disinterested in his defense, prepared their reports. *See* Pet. 35-37.

E. Eighth Amendment

Despite what the Government implies, *see* Opp. 37-38, the Federal Death Penalty Act's ("FDPA") abandonment of the Rules of Evidence does not impose a lesser demand for reliability in the information that is admissible at a capital sentencing proceeding. *See United States v. Fell*, 360 F.3d 135, 145-46 (2d Cir.) (stating that the FDPA "'does not impair the reliability or relevance of information'") (quoting *United States v. Jones*, 132 F.3d 232, 242 (5th Cir. 1998)), *cert. denied*, 125 S. Ct. 369 (2004). Not only do

[10] Indeed, while this Court ultimately rejected Strickler's *Brady* claim because the suppression of the evidence was not prejudicial, it nevertheless found that the suppressed evidence was "exculpatory." 527 U.S. at 296; *see also id.* at 282 n.21.

constitutional protections still apply, but "the presumption of admissibility of relevant evidence *is actually narrower under the FDPA* than under the FRE." *Id.* at 145 (emphasis added). Under the FDPA, "heightened reliability" is promoted by expanding the *scope* of admissible information, *id.* at 143-44, not by admitting *unreliable* information.

Further, the Government's reliance on *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002), *see* Opp. 38, is misplaced. The *Ortiz* court found *videotaped testimony* an adequate substitute for the live testimony of foreign witnesses. 315 F.3d at 904. Ortiz received what Petitioner has been refused – access to the witnesses, the opportunity to develop and focus their testimony, and the right to visually and orally present that evidence to the jury from the witnesses themselves. *Id. Ortiz* only demonstrates the inadequacy of the Fourth Circuit's "remedy" here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 22nd day of February, 2005.

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CERTIFICATE OF SERVICE

I, Kenneth P. Troccoli, a member of the Bar of this Court, do certify that on this 22nd day of February, 2005, as required by Supreme Court Rule 29.5, I have served a copy of the enclosed classified REPLY BRIEF FOR PETITIONER on each party to the above proceeding or that party's counsel, and on every other person required to be served, by placing same in the custody of Court Security Officer Christine Gunning, who forthwith will hand-deliver the documents to them. The names and addresses of those served are as follows:

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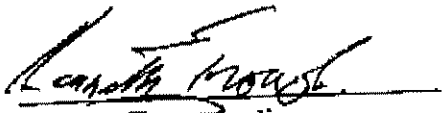

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