UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, - vs - ALI SALEH KAHLAH AL-MARRI, a/k/a “Abdullakareem A. Almuslam,” Defendant.	Criminal No. 03-10044 ORAL ARGUMENT REQUESTED

DEFENDANT ALI SALEH KAHLAH AL-MARRI’S MEMORANDUM OF LAW IN SUPPORT OF PRETRIAL MOTIONS

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STATEMENT OF THE CASE

On December 12, 2002, defendant Ali Saleh Kahlah al-Marri was arrested by the FBI in Peoria, Illinois, at the direction of the U.S. Attorney's Office for the Southern District of New York, as a material witness in the government's investigation of the terrorist attacks of September 11, 2001. Thereafter, on January 28, 2002, the government formally arrested Mr. al-Marri on a criminal complaint, transported him to the Southern District of New York and, on February 6, 2002, charged him in a one-count indictment with possession of 15 or more unauthorized or counterfeit access devices, with intent to defraud, in violation of 18 U.S.C. § 1029(a)(3).

Almost one year later, on January 22, 2003, the government charged Mr. al-Marri in a second, six-count indictment with two counts of making a false statement to the FBI, in violation of 18 U.S.C. § 1001, three counts of making a false statement in a bank application, in violation of 18 U.S.C. § 1014, and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. § 1028(a)(7). The conduct charged in both indictments was alleged by the government to have taken place solely in the Central District of Illinois.

On March 28, 2003, Mr. al-Marri moved to consolidate the cases and, on April 22, 2003, he moved to dismiss the indictments on the ground that venue was improper in the Southern District of New York. On April 24, 2003, the Honorable Victor Marrero granted the

defendant's motion to consolidate the cases and, on May 12, 2003, dismissed the indictments for improper venue.

On or about May 16, 2003, a grand jury sitting in the Central District of Illinois returned a new indictment (attached as Exhibit A) alleging the same seven counts charged in the Southern District of New York:

Count 1: Use of False Identification, 18 U.S.C. § 1014

Count 2: False Bank Application, 18 U.S.C. § 1028(a)(7)

Count 3: False Bank Application, 18 U.S.C. § 1028(a)(7)

Count 4: False Bank Application, 18 U.S.C. § 1028(a)(7)

Count 5: False Statement to FBI, 18 U.S.C. § 1001(a)(1)

Count 6: False Statement to FBI, 18 U.S.C. § 1001(a)(1)

Count 7: Possession of Unauthorized Access Devices, 18 U.S.C. § 1029(a)(3)

Counts One through Four relate to three Illinois bank accounts that were opened during the summer of 2000 by "Abdullakareem A. Almuslam," for a company called "AAA Carpets." Specifically, the government alleges in those counts that, during that time period, the defendant was in the United States and used the name "Abdullakareem A. Almuslam," and a false social security number, to open three AAA Carpet bank accounts at three different Macomb, Illinois banks. Count Five alleges that, when first interviewed by the FBI on October 2, 2001, Mr. al-Marri "falsely informed agents of the FBI that, prior to September 10, 2001, the defendant had last been in the United States in 1991, when, in fact, the defendant had been in the United States in the summer of 2000."

Count Six alleges that, when interrogated by the FBI on December 11, 2001, Mr. al-Marri falsely informed agents of the FBI that he had not called an unspecified telephone number in the United Arab Emirates ("UAE") associated with Mustafa Ahmed al-Hawsawi when, the government alleges, he had in fact called that telephone number "several times."

Count Seven alleges that, on or about December 11, 2001, Mr. al-Marri possessed "in excess of 15 unauthorized and counterfeit credit card numbers on a piece of paper in his computer carrying case and in computer files in his laptop computer."

On May 29, 2003, Mr. al-Marri entered a plea of "not guilty" to the indictment. In accordance with Local Criminal Rule 12.1, Mr. al-Marri now moves for an Order: 1) severing Count Six from the indictment; 2) suppressing evidence seized from, and statements allegedly made by, Mr. al-Marri on December 11, 2001; 3) directing the government to provide the defense with a bill of particulars; and 4) compelling the government to provide specific discovery relating to fingerprint analyses performed by the FBI, which was requested by the defense in accordance with Local Criminal Rule 16.1. For the reasons set forth below, Mr. al-Marri's motions should be granted.

ARGUMENT

I. THE COURT SHOULD SEVER COUNT SIX AND ORDER THAT IT BE TRIED SEPARATELY.

Count Six of the indictment charges that, on December 11, 2001, Mr. al-Marri falsely informed an agent of the FBI that he had not called a telephone number in the United Arab Emirates which was associated with Mustafa Ahmed al-Hawsawi (who, according to published reports, is a high-ranking member of al-Qaeda and the alleged financier of the September 11, 2001 terrorist attacks), when in fact Mr. al-Marri had called that number "several times." This count is unrelated in time, place and substance from the other six counts in the indictment. Because a joint trial on Count Six would substantially prejudice Mr. al-Marri's constitutional right to receive a fair trial on the remaining counts of the indictment, Mr. al-Marri respectfully moves the Court to sever Count Six under Federal Rule of Criminal Procedure 14, and order that it be tried separately.

Rule 14 provides for the severance of offenses even in cases where joinder might otherwise be appropriate under Federal Rule of Criminal Procedure 8(a). United States v. Koen, 982 F.2d 1101, 1112 (7th Cir. 1992) (noting that, even when joinder under Rule 8 is proper, "Rule 14 authorizes the district court to grant a severance when it appears that a defendant's trial will be prejudiced by the joinder of either offenses or defendants"). Specifically, Rule 14 provides in relevant part as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses ... in an indictment ... or by such joinder for trial together, the court may order an election or separate trials of counts, ... or provide whatever other relief justice requires.

The purpose of Rule 14 is to protect the right of the criminally accused to a fair trial by authorizing the Court to sever offenses if the defendant will be substantially prejudiced by a joint trial. United States v. Rollins, 301 F.3d 511, 518 (7th Cir. 2002); United States v. Velasquez, 772 F.2d 1348, 1352 (7th Cir. 1985). "Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts," United States v. Moore, 115 F.3d 1348, 1362 (7th Cir. 1997) (quoting Zafiro v. United States, 506 U.S. 534, 541 (1993)), a duty the district courts "must not shirk." United States v. Coleman, 22 F.3d 126, 134 (7th Cir. 1994) (holding that district courts "should vigilantly monitor for developing unfairness and should not hesitate to order severance at any point after indictment if the risk of real prejudice grows too large to justify whatever efficiencies a joint trial does provide").

Substantial prejudice is present and, thus, a severance is warranted if information that may be relevant to one count will cause the jury "to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged[.]" Baker v. United States, 401 F.2d 958, 974 (D.C. Cir. 1968). See Coleman, 22 F.3d at 132 (observing that "jury inference of criminal disposition" is a main concern when considering whether

joint trial is appropriate). For example, in United States v. Lavin, 504 F. Supp. 1356, 1364 (N.D. Ill. 1981), the district court granted the defendants' motion to sever tax evasion counts from mail fraud, RICO, obstruction of justice, and perjury counts, even though they were, "in some respects, related," because of the danger that "evidence of the conspiratorial misfeance would spill over into the [jury's] consideration of the tax charges." Other courts, as well, have not hesitated to sever prejudicial counts of an indictment on this basis. See, e.g., United States v. Jones, 16 F.3d 487, 492-93 (2d Cir. 1994) (holding that defendant, who was tried jointly for being a felon in possession of a firearm and bank robbery, was deprived of his right to a fair trial because there was an "overwhelming probability" that, upon hearing the evidence necessary to support the firearm charge, the jury would use that evidence to convict defendant of bank robbery, despite the court's limiting instruction, in light of the devastating nature of the evidence); United States v. Dockery, 955 F.2d 50, 56 (D.C. Cir. 1992) (holding that district court abused its discretion by failing to sever counts, one of which presented a potential for significant prejudice); United States v. Foutz, 540 F.2d 733, 739 (4th Cir. 1976) (reversing convictions and remanding for separate trials because joint trial of two bank robbery counts provided a "strong likelihood" that the defendant was found guilty of second robbery merely because the jury concluded he was guilty of the first); United States v. Desantis, 802 F. Supp. 794, 802-03 (E.D.N.Y. 1992) (ordering severance of counts

because prejudice to defendant outweighed benefit to judicial economy of holding joint trial).

Here, Mr. al-Marri's right to a fair trial will be severely prejudiced to the point of being rendered meaningless if the Court does not sever Count Six from the remaining counts of the indictment, and allows the government to introduce, at a joint trial, evidence regarding al-Qaeda and the September 11, 2001 terrorist attacks in a prosecution on bank fraud, credit card fraud, and false statement counts which do not otherwise implicate those issues. Specifically, one can hardly overstate the traumatic effect on the country of those attacks, both in terms of the loss of innocent life and citizens' now ever-present concern for their future personal safety. Were the Court to permit the government to introduce such proofs in connection with Count Six of the indictment, the visceral reaction of jurors to the evidence and, hence, towards Mr. al-Marri, will be severe and obviously prejudicial. Such reactions should not be permitted to substantially prejudice, as they certainly would, Mr. al-Marri's right to a fair trial on the remaining counts of the indictment, which are unrelated in time, place and subject matter to the allegations in Count Six.

Indeed, even if the Court were to instruct the jury in a joint trial to disregard terrorism-related evidence presented by the government with respect to Count Six, while deliberating on the other six counts, expecting them to do so would demand that they "act with a measure of dispassion and exactitude well beyond moral capacities."

Jones, 16 F.3d at 493 (quoting United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985)). See also United States v. Papia, 560 F.2d 827, 837 (7th Cir. 1977) (observing that the ultimate question in ruling on a severance motion is whether, "under the circumstances of a particular case," a properly instructed jury can follow the court's limiting instructions"); United States v. Diaz-Munoz, 632 F.2d 1330, 1337 (5th Cir. 1980) (noting that a court's severance determination should consider whether, "as a practical matter" a jury would be able follow limiting instructions); cf. Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (noting presumption that jury will follow instruction to disregard inadmissible evidence, "unless there is an overwhelming possibility that the jury will be unable to follow the court's instructions ... and a strong likelihood that the effect of the evidence would be devastating to the defendant"). Under the unique circumstances of this case, severance of Count Six is warranted.

Of course, a separate trial on Count Six would impose some diseconomy upon the Court, as compared to a joint trial. See Rollins, 301 F.3d at 517 n.1 (7th Cir. 2002) (observing that Rule 8 should be construed "broadly to allow joinder to enhance the efficiency of the judicial system ... and to avoid expensive and duplicative trials, if judicial economy outweighs any prejudice to the defendant"); Coleman, 22 F.3d at 132 ("Judicial economy and convenience are the chief virtues of joint trials -- i.e., joinder often avoids expensive and duplicative multiple trials -- while

defendant embarrassment or confoundment in presenting separate defenses simultaneously, jury cumulation of evidence, and jury inference of criminal disposition are its main vices.”). Yet, depending on the jury’s verdict in a trial limited to Counts One through Five and Count Seven, and any sentence imposed by the Court, it may well be that the government would choose not to proceed with a second trial, particularly in light of the government’s expressed concerns regarding the disclosure of certain terrorism-related evidence. In any event, Count Six contains a discrete charge that could neatly be removed from the indictment and tried separately, without prejudicing the government in any significant way. Indeed, Count Six is concerned with a statement unrelated in time and substance to the events underlying Counts One through Four and Count Seven, and made several months after the statement at issue in Count Five, which itself (unlike Count Six) relates to the events alleged in Counts One through Four. None of these other counts contains any terrorist-related allegations. Indeed, the basis for the government’s having joined Count Six with the other counts in the first instance is slim at best, the only apparent connection being that both Count Five and Count Six allege violations of 18 U.S.C. § 1001 and, as such, are of the “same or similar character” under Rule 8(a). Cf. United States v. Chavis, 296 F.3d 450, 458-61 (6th Cir. 2002) (holding that joinder under Rule 8(a) was improper where no indication on the face of the indictment that counts were related); United States v. Halper, 590 F.2d 422, 429-30 (2d Cir.

1979) (observing that the "same or similar character" prong provides the weakest basis for joining cases and holding that joinder under Rule 8(a) was improper where connection between offenses was only speculative). Regardless, a separate trial of Count Six will ensure Mr. al-Marri's ability to obtain a fair trial on the remaining counts, while imposing only slightly, and perhaps not at all, on judicial economy.

With the possible exception of the December 7, 1941 attack on Pearl Harbor, there has never been a greater act of treachery carried out on American soil by the enemies of freedom and democracy than the terrorist attacks of September 11, 2001. Certainly this is so in the public perception. Both are days that will rightfully live in infamy, and which have deeply scarred the American psyche. Yet, even those believed by the government to have been associated with such despicable acts are entitled to the protections afforded by the Constitution. Indeed, during the height of World War II, the Seventh Circuit reversed the treason convictions of Nazi sympathizers charged with lending aid and comfort to a saboteur of the German Reich on American soil, because the district court had failed to acknowledge the prejudice of a joint trial and declined to grant a severance:

> [I]t seems appropriate to emphasize that no principle is more firmly embodied in our system of jurisprudence than that a person shall not be deprived of life or liberty except upon a fair and impartial ascertainment of his guilt. Of the many rights guaranteed to the people of this Republic, there is none more sacred than that of trial by jury. Such right comprehends a fair determination free from passion or prejudice, of the issues involved. The right is all-inclusive; it embraces every class and

> type of person. Those for whom we have contempt or even hatred are equally entitled to its benefit. It will be a sad day for our system of government if the time should come when any person, whoever he may be, is deprived of this fundamental safeguard. No more important responsibility rests upon courts than its preservation unimpaired. How wasted is American blood now being spilled in all parts of the world if we at home are unwilling or unable to accord every person charged with a crime a trial in conformity with this constitutional requirement.

United States v. Haupt, 136 F.2d 661, 671 (7th Cir. 1943) (observing that the difficulties attendant to trying such a case "during a time of national crisis, is such as to greatly increase the obstacles to a fair determination of the issues presented. Such difficulties impose upon courts an increased responsibility commensurate with the increased difficulties."). In order to protect Mr. al-Marri's right to receive a fair trial on Counts One through Five and Count Seven of the indictment, this Court must, respectfully, sever Count Six and order that it be tried separately.

II. THE COURT SHOULD HOLD A HEARING TO DETERMINE WHETHER EVIDENCE SEIZED BY THE FBI WITHOUT A WARRANT ON DECEMBER 11, 2001, AND STATEMENTS MADE BY THE DEFENDANT ON THAT DATE, SHOULD BE SUPPRESSED.

At about 4:00 p.m., on December 11, 2001, FBI Special Agents Nicholas Zambeck and Robert Brown searched the al-Marri family residence and minivan without first obtaining a warrant, and seized various items, including two (2) videotapes, a laptop computer, a computer carrying case, and a GPS device. Thereafter, they frisked Mr. al-Marri, who had been fasting the entire day in observance of Ramadan, transported him to FBI headquarters, and interrogated him until approximately 10:00 p.m. in an increasingly adversarial fashion. Because the facts regarding the government's search and seizure, and its subsequent custodial interrogation of Mr. al-Marri, will when fully addressed establish that this conduct violated the defendant's Fourth, Fifth and Sixth Amendment rights, all evidence seized as a result of the search, and all statements alleged by the government to have been made by Mr. al-Marri, must be suppressed.

A. The FBI's Warrantless Search Of The Al-Marri Residence And Minivan Was Unconstitutional.

A warrantless search and seizure, like the one conducted by the FBI on December 11, 2001, is unreasonable per sé, and all the evidence seized during the search must be suppressed unless the government demonstrates that an exception to the Fourth Amendment's warrant requirement applies. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Payton v. New York, 445 U.S. 573, 586 (1980); Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S.

10 (1948). Mr. al-Marri here requests a hearing at which the government will be required to bear its burden of proving that an exception to the warrant requirement is, in fact, applicable. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Because such a hearing will reveal that no such exception applies, the Court should suppress items seized by the government, including files located on the hard drive of Mr. al-Marri's laptop computer.

First, it bears noting that Judge Marrero previously denied a motion to suppress filed on Mr. al-Marri's behalf by his original attorney, Richard M. Jasper, Esq., in connection with the first Southern District of New York indictment. See United States v. al-Marri, 230 F. Supp. 2d 535 (S.D.N.Y. 2002). Because that indictment was later dismissed by Judge Marrero, his suppression ruling was not a final order. See Di Bella v. United States, 369 U.S. 121, 131 (1962) (holding that denial of a pretrial motion to suppress is not a final order); Cogen v. United States, 278 U.S. 221, 226-27 (1929) (Brandeis, J.) (same); In re 949 Erie Street, 824 F.2d 538, 540 (7th Cir. 1987) (same); United States v. Dorfman, 690 F.2d 1217, 1222 (7th Cir. 1982) (same); United States v. Mock, 604 F.2d 336, 339 (5th Cir. 1979) (same). For that reason, among others, Judge Marrero's findings may not be afforded preclusive effect by this Court. See Ashe v. Swenson, 397 U.S. 436, 443 (1970) (holding that finding of fact may be afforded preclusive effect only "once [it has] been determined by a valid and final judgment"); United States v. Harvey, 243 F. Supp. 2d 359, 263-63 (D.V.I. 2003) (allowing government to

relitigate suppression issue following Speedy Trial Act dismissal because original suppression ruling was not a final order); United States v. Phillips, 59 F. Supp. 2d 1178, 1188 (D. Utah 1999) (same) (holding that defendant could not be precluded from relitigating suppression issue that was decided in case that ultimately was dismissed prior to final judgment).

Second, the government has previously asserted that Mr. al-Marri consented to the searches and seizures undertaken by the FBI on December 11, 201. Mr. al-Marri denies that he so consented and, in contrast to the proceeding before Judge Marrero, may well testify regarding the events in question. However, even if the Court ultimately were to conclude that Mr. al-Marri did consent, Mr. al-Marri further denies that this consent encompassed the type of invasive search of his laptop computer actually conducted by the FBI. In this regard, the Court is required to apply differing legal standards when considering the scope of any such consent:

1) With respect to allegedly incriminatory computer files discovered by the government on Mr. al-Marri's laptop computer that had not been deleted, i.e., "active" files, the scope of a defendant's consent is properly evaluated under the constitutional standard applied to unlocked containers: "Would the typical reasonable person [conducting the search] have understood" the grant of consent to include the unlocked containers? Florida v. Jimeno, 500 U.S. 248, 252 (1991). See United States v. Runyan, 275 F.3d 449, 458 (5th Cir. 2001) (applying constitutional standard for closed but

unlocked containers to computer disks); United States v. Barth, 26 F. Supp. 2d 929, 936 (W.D. Tex. 1998) (finding that Fourth Amendment protection of closed computer files and hard drives is similar to protection afforded closed containers and closed personal effects).

2) With respect to "deleted" files, i.e., files that had been deleted by the user prior to the date of the government's seizure, and which were then retrieved and restored by FBI, the Court must evaluate the scope of a defendant's consent under the constitutional standard applied to locked containers: Whether the defendant gave specific consent to open the locked container. Trulock v. Freeh, 275 F.3d 391, 403 (4th Cir. 2001) (holding that password protected computer files are analogous to a locked footlocker); United States v. Basinski, 226 F.3d 829, 838 (7th Cir. 2000) (holding that defendant retained interest in locked briefcase he gave to friend for safeguarding pending instructions to destroy it); United States v. Rodriguez, 888 F.2d 519, 523-24 (7th Cir. 1989) (holding that general consent to search closet did not encompass consent to search briefcase and filebox inside). Indeed, the United States Supreme Court has noted that opening a locked container based upon only a general consent to search is "very likely unreasonable" for purposes of the Fourth Amendment. Jimeno, 500 U.S. at 251-52; see also United States v. Buitrago Pelaez, 961 F. Supp. 64, 68 (S.D.N.Y. 1997) (holding that general consent did not encompass permission to search locked safe); United States v. Garcia Hernandez, 955 F. Supp. 1361, 1373 (D. Utah 1996) (holding that general consent did not encompass

duct-taped package); United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990) (holding that general consent to search did not permit slashing open a spare tire in trunk of car); Cross v. Florida, 560 So.2d 228, 230 (Fla. 1990) (holding that consent to search bag did not include opening locked containers inside).

The reason that a search of a locked container is subject to more stringent constitutional scrutiny is that, by taking the affirmative step of placing an object or information in a locked container, a person has "manifested an expectation of privacy that the contents would remain free from public examination." United States v. Dien, 609 F.2d 1038, 1045 (2d Cir. 1979) (taping boxes closed was affirmative step that demonstrated heightened expectation of privacy). See also United States v. Markland, 635 F.2d 174, 177 (2d Cir. 1980) (holding that even containers not normally used to store private items, such as a "Schlitz" cooler bag, may demonstrate an expectation of privacy if the owner takes "some additional positive step objectively signaling to others an expectation that the privacy of the container's contents will be respected."). When an individual takes the affirmative step of deleting files from his computer, he demonstrates the very same expectation that the contents of those files would not be subject to examination by others. Hence, for purposes of the Fourth Amendment, the government's warrantless search of a computer for, and seizure of, deleted files is properly assessed under the more stringent standard applicable to locked containers.

Here, Special Agent Nicholas Zambeck testified at the suppression hearing held before Judge Marrero that he asked to "take a look" at Mr. al-Marri's computer, and that Mr. al-Marri consented. Whether Special Agent Zambeck's request to "take a look" at the computer satisfies the heightened standard for unlocked containers, let alone locked containers, is particularly questionable with respect to the deleted files on Mr. al-Marri's computer. See United States v. Snow, 44 F.3d 133, 135-36 (2d Cir. 1995) (noting that even the use by the police of the word "search," which implies "something more than a superficial, external examination," when seeking consent, does not necessarily justify a search of locked containers); United States v. Garcia, 897 F.2d 1413, 1416, 1419-20 (7th Cir. 1990) (holding that consent in response to request to "look" inside truck did not justify opening up door panels); Rodriguez, 888 F.2d at 523 (holding that general consent to enter storage area did not justify search of briefcase and filebox; question is not whether defendant explicitly "limited" her consent to a specific area but, rather, whether she in fact consented to the scope of search actually undertaken); Luxenberg v. Florida, 384 So.2d 742, 743-44 (Fla. App. 1980) (holding that consent to open and search box did not encompass opening sealed bag inside); Moorehead v. Florida, 378 So.2d 123, 124 (Fla. App. 1980) (holding that defendant who handed pool cue to officer in response to officer's request to admire it did not authorize the officer to unscrew the pool cue into two pieces); Washington v. Cuzick, 585 P.2d 485, 486, 505-06 (Wash. Ct. App. 1978)

(holding that defendant's consent in response to request to "look in the car" did not encompass opening suitcase).

In sum, the Court should hold an evidentiary hearing to determine the circumstances under which the government's search took place. Thereafter, applying the standards set forth above, the Court should suppress all evidence seized by the government as a result of its unconstitutional search of Mr. al-Marri's residence, automobile, and laptop computer.

B. The FBI's Custodial Interrogation Of Mr. Al-Marri On December 11, 2001 Was Unconstitutional.

At approximately 4:00 p.m., on December 11, 2001, FBI Special Agents Nicholas Zambeck and Robert Brown transported Mr. al-Marri from his residence to FBI Headquarters for the purpose of questioning him regarding new incriminatory information learned by the FBI after October 2, 2002, the date on which the FBI first visited the al-Marri residence. Mr. al-Marri, who was fasting in observance of Ramadan, asked whether he would be permitted to return home to break the fast with his family, and was reassured that he probably would. In fact, Mr. al-Marri was frisked for weapons, transported to FBI headquarters, and interrogated in an increasingly adversarial manner, without food, until 10:00 p.m. What may have started out as voluntary questioning ultimately progressed to a custodial interrogation which, in the absence of the warnings required by the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), violated Mr. al-Marri's rights under the Fifth and Sixth Amendments. Accordingly, any statements alleged to have been made by

Mr. al-Marri as a result of such custodial interrogation must be suppressed.

In Miranda, the Supreme Court held that statements by a criminal defendant stemming from a custodial interrogation may not be used by the government in a criminal proceeding unless procedural safeguards guarantee that the accused has been informed of, and voluntarily and knowingly waived, the constitutional privileges of the Fifth and Sixth Amendments. 384 U.S. at 444-45. The Court said:

> By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. The Supreme Court has made clear that the administration of Miranda-type warnings are constitutionally mandated prior to the commencement of any custodial interrogation. Dickerson v. United States, 530 U.S. 428, 444 (2000) (Rehnquist, C.J.) ("[W]e conclude that Miranda announced a constitutional rule....").

It is indisputable that the questioning of Mr. al-Marri by Special Agents Zambeck and Brown on December 11, 2001 constituted an "interrogation" for purposes of Miranda. See Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (holding that the Miranda safeguards come into play whenever someone is subject to direct questioning by the police, as well as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect"); United States v. Westbrook, 125 F.3d

996, 1005 (7th Cir. 1997) (same). The only question, then, is whether the interrogation was custodial in nature.

As the Supreme Court made clear in Miranda itself, "custody" in the Miranda sense does not require a formal arrest, nor does it require physical restraint in a police station or the application of handcuffs. See Michigan v. Summers, 452 U.S. 692, 693, 696 (1981) (holding that defendant was not free to leave while police were searching his home, even though he was not formally under arrest when the search took place); United States v. Scheets, 188 F.3d 829, 841-43 (7th Cir. 1999) ("We acknowledge that even if a suspect is not formally arrested, an encounter with police may ripen into a de facto arrest if the encounter continues too long or becomes too intrusive."). Rather, a detainee is "in custody" when, in light of the actions of the interrogating officers and the surrounding circumstances, an objective reasonable person would not have believed himself free to leave. Stansbury v. California, 511 U.S. 318 (1994) ("the initial determination of custody depends on the objective circumstances of the interrogation"); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation"); Florida v. Royer, 460 U.S. 491, 501-02 (1983) (holding that defendant was in custody where police confiscated his plane ticket and driver's license, told him he was suspected of criminal activity, and asked him to accompany them without indicating that he was free to leave); United States v. Madoch, 149 F.3d 596, 600-01 (7th Cir. 1998)

(holding that defendant was "in custody" for Miranda purposes during an interrogation in her own home, during which she served coffee to federal agents and tended to her children); United States v. Salyers, 160 F.3d 1152, 1159 (7th Cir. 1998) (holding that an individual is considered "in custody" when his freedom of movement is restrained to the degree comparable to a formal arrest; an individual is not in custody if a reasonable person would have believed he was free to leave); see also United States v. Hanson, 237 F.3d 961, 964-65 (8th Cir. 2001) (holding that defendant was "in custody" because he was taken to the police station under false pretenses and questioned by two federal agents in a room with the doors closed); Tankleff v. Senkowski, 135 F.3d 235, 243-44 (2d Cir. 1998) (holding that defendant was "in custody" because he was interrogated over a period of several hours and repeatedly informed by the police that they did not believe his statement); Illinois v. Holveck, 565 N.E.2d 919, 923-24 (Ill. 1991) (defendant who was stopped by police, and whose driver's license was confiscated, reasonably could have felt compelled to follow police to station, and was not free to leave). The Seventh Circuit has listed several factors to guide a trial court's determination of whether a suspect was "in custody" at the time of questioning:

(1) whether the encounter occurred in a public place;

(2) whether the suspect consented to speak with the officers;

(3) whether the officers informed the suspect that he was not under arrest and was free to leave;

(4) whether the suspect was moved to another area;

(5) whether there was a threatening presence of several officers and a display of weapons or physical force;

(6) whether the officers deprived the suspect of a means of departure; and

(7) whether the officer's tone of voice was such that his requests would likely be obeyed.

Scheets, 188 F.3d at 841-43; United States v. Wyatt, 179 F.3d 532, 535 (7th Cir. 1999). In addition, the Supreme Court has held that the defendant's awareness of his status as a suspect is relevant for assessing whether an objective reasonable person would have believed himself free to leave. See Stansbury, 511 U.S. at 325 (when a detainee's status as a suspect is "conveyed, by word or deed, to the individual being questioned," that status is relevant to the extent it "would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action'").

Although there might be some dispute as to whether Mr. al-Marri initially consented to the interview (factor 2), but see, e.g., Hanson, 237 F.3d at 964 (holding that defendant was in custody when he agreed to leave "familiarity of his home" to go to police station under false pretenses and, thus, did not voluntarily acquiesce to police questioning), the other seven factors each militates in favor of a finding that, ultimately, he was "in custody" on the night of December 11, 2001. Specifically, the evidence will show that: 1) the encounter occurred in FBI headquarters, not a public place; 2) the

officers did not inform the defendant that he was free to leave and, in fact, he was not allowed to leave until 10:00 p.m., despite the fact that he had been fasting all day and had requested to eat dinner with his family; 3) the defendant was moved to an area by himself; 4) the defendant was confronted by multiple FBI agents, who were armed; 5) the defendant did not have an independent means of departure; 6) Special Agent Zambeck's tone was confrontational; and 7) the defendant was made aware that he was a suspect and he was explicitly threatened with criminal charges and incarceration. See Sprosty v. Buchler, 79 F.3d 635, 641 (7th Cir. 1996) (holding that defendant was "in custody" where circumstances were such that a reasonable person might "succumb to police pressure") (citing cases). Under the totality of these circumstances, combined with the fact that the defendant, a man of Middle Eastern descent, was being questioned in the aftermath of the September 11, 2001 terrorist attacks, it is clear that a reasonable person in the defendant's position would not have believed that he was free to leave until actually allowed to do so by the FBI.

At the very least, an evidentiary hearing is warranted to determine all of the relevant circumstances surrounding the FBI's interrogation of Mr. al-Marri on December 11, 2001. See, e.g., Madoch, 149 F.3d at 601 (holding that district court committed plain error by refusing to hold an evidentiary hearing to resolve the question of whether the defendant was "in custody"); United States v. Oliver, 142 F. Supp. 2d 1047, 1052 (N.D. Ill. 2001) (ordering an

evidentiary hearing to determine whether, based on the manner and length of the interrogation, the defendant was in custody and entitled to Miranda warnings). As indicated, such a hearing will establish that an objective reasonable person in Mr. al-Marri's position would not have felt at liberty to terminate the interrogation and to leave on December 11, 2001, as proved to be the case a day later when he refused to comply with the FBI's demands and, thereafter, was detained at FBI headquarters for over four hours and ultimately arrested as a material witness. Accordingly, the Court should conclude that the government did in fact violate Mr. al-Marri's constitutional rights, and that any statements alleged to have been made by Mr. al-Marri on December 11, 2001 must be suppressed.

III. THE COURT SHOULD DIRECT THE GOVERNMENT TO PROVIDE THE DEFENDANT WITH A BILL OF PARTICULARS CLARIFYING SPECIFIC ASPECTS OF THE INDICTMENT.

By letter dated June 11, 2003, defense counsel asked the government to provide the following information in order to cure discrete deficiencies and ambiguities in the indictment:

Count 2-4: Identify the specific "action" by the named financial institution the government alleges Mr. al-Marri had a purpose to influence by providing a false name and Social Security number.

Count 6: Identify the specific UAE telephone number that Mr. al-Marri is alleged to have falsely denied calling.

Identify the "several times" on which it is alleged that Mr. al-Marri had previously called the UAE telephone number.

Count 7: Identify those locations outside the Central District of Illinois, denominated as "elsewhere" in the indictment, in which the government alleges Mr. al-Marri possessed unauthorized and counterfeit access devices.

Identify the specific credit card numbers alleged by the government to have been possessed by Mr. al-Marri that the government claims are unauthorized and counterfeit access devices.

The government has not yet provided the defense with the information requested. Accordingly, the defendant now moves the Court to order the government to provide a bill of particulars clarifying these matters.

Where the definition of an offense includes "general terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the

species, it must descend to particulars." Russell v. United States, 369 U.S. 749, 765 (1967). Under Federal Rule of Criminal Procedure 7(f), a court may direct the government to provide an accused with a bill of particulars when necessary to clarify vague allegations contained in the charging instrument. The function of a bill of particulars is to supplement an indictment by providing a criminal defendant with information about the details of the government's charges, thereby enabling him to adequately prepare his defense, to avoid unfair surprise at trial, and to protect himself against a second prosecution for an inadequately described offense. United States v. Roman, 728 F.2d 846, 856 (7th Cir. 1984). See also United States v. Canino, 949 F.2d 928, 949 (7th Cir. 1991) ("The standard is whether the government's indictment sufficiently apprises the defendant of the charges to enable him to prepare for trial."); United States v. Kendall, 665 F.2d 126, 134 (7th Cir. 1981) (holding that a court may order a bill of particulars if the indictment fails to provide sufficient notice of the charges to allow the defendant to prepare for trial). Although a defendant is not entitled to wholesale discovery of the government's case, if a defendant seeks legitimate information, his request for a bill of particulars may not be denied merely because providing the information would divulge certain details of the government's evidence. Canino, 949 F.2d at 949 (explaining that "a bill of particulars is not required when information necessary for a defendant's defense can be obtained through 'some other satisfactory form,'" but that "[t]he defendant

needs to know what the government intends to prove") (internal citation omitted). In this regard, the granting of bills of particulars is particularly appropriate given that Rule 7(f) was specifically amended "to encourage a more liberal attitude by courts towards bills of particulars." Fed. R. Crim. P. 7(f) Advisory Committee's Note; United States v. Hedman, 458 F. Supp. 1384, 1385 (N.D. Ill. 1978) ("In exercising that discretion, the judge must remember that the governing Rule 7(f) ... was altered to encourage a more liberal attitude by the courts toward bills of particular"). See also United States v. Bortnovsky, 820 F.2d 572, 575 (2d Cir. 1987) (holding that district court erred in refusing to grant bill of particulars which was vital to defendants' understanding of charges against them and to the preparation of a defense); United States v. Davidoff, 845 F.2d 1151, 1154 (2d Cir. 1988) (reversing conviction where the government failed to provide defendant with particulars of charged offense); United States v. Bailey, 689 F. Supp. 1463, 1473-74 (N.D. Ill. 1987) (granting bill of particulars so defendant would not "waste valuable time and money preparing for a defense to a number of different methods of proof available to the government"); Hedman, 458 F. Supp. at 1386 (granting bill of particulars where information would "substantially assist the defendants in preparing their defense").

The information requested on behalf of Mr. al-Marri is critical to the preparation of his defense. First, Counts Two through Four, which allege violations of 18 U.S.C. § 1014, require the government

to prove that the defendant made a false statement "for the purpose of influencing the action" of a federally insure bank. The indictment fails to identify, however, which specific action the defendant is alleged by the government to have intended to influence. So that Mr. al-Marri can respond to the specific conduct the government claims to have been unlawful, it properly should be ordered identify the "action" by the three banks listed in the indictment that the defendant is alleged to have intended to influence, within the meaning of 18 U.S.C. § 1014. See United States v. Finley, 705 F. Supp. 1272, 1278 (N.D. Ill. 1988) (ordering the government to provide information including how the defendant committed alleged offense); United States v. Daniels, 159 F. Supp. 2d 1285, 1297-98 (D. Kan. 2001) (ordering the government to provide bill of particulars clarifying manner in which offense was committed); United States v. Blau, 913 F. Supp. 218, 222 (S.D.N.Y. 1996) (same); Bailey, 689 F. Supp. at 1473-74 (ordering the government to provide bill of particulars clarifying vague allegations and theory of prosecution's charges).

Second, Count Six of the indictment alleges that Mr. al-Marri falsely denied calling a UAE telephone number associated with Mustafa Ahmed al-Hawsawi, which he in fact called "several times." The indictment fails, however, to identify the telephone number at issue or the several times on which Mr. al-Marri is alleged to have called it. It is only fair that one charged with making a false statement be informed of the details underlying the falsity of the statement.

See, e.g., United States v. Trie, 21 F. Supp. 2d 7, 22 (D.D.C. 1998) (ordering the government to provide particulars regarding alleged false statement); United States v. Rogers, 617 F. Supp. 1024, 1028-29 (D. Colo. 1985) (holding that general allegations of false statements are not sufficient). Similarly, where as here a defendant is charged with having falsely denied calling a telephone number that he is alleged to have called "several times," the government properly should be ordered to disclose to the defense the specific telephone number the defendant is alleged to have denied calling, and to identify the specific occasions on which the defendant is alleged to have called that number. See United States v. Vasquez-Ruiz, 136 F. Supp. 2d 941, 943-44 (N.D. Ill. 2001) (granting bill of particulars stating "certain basic matters: the identity of the patient-victims of the alleged offenses, the records claimed to include false entries, and any allegedly fraudulent bills to insurers. The defense should not be left to its own devices and a sifting of the voluminous materials that have been provided in order to divine the particulars of these critical allegations, which have not yet been disclosed.") (citing Davidoff and Bortnovsky).

Third, Count Seven alleges that the defendant possessed unauthorized access devices in the Central District of Illinois and "elsewhere." Mr. al-Marri is entitled to know those other places -- denominated as "elsewhere" in the indictment -- where he is alleged by the government to have possessed unauthorized access devices. Nowhere in the indictment does the government identify where

"elsewhere" might be for purposes of the conduct with which Mr. al-Marri has been charged, and which he must therefore defend against. Under similar circumstances, courts have not hesitated to direct the government to disclose precisely such information when requested by the defense. See, e.g., United States v. Hickey, 16 F. Supp. 2d 223, 245 (E.D.N.Y. 1998) (directing the government to provide a bill of particulars regarding allegation that offense took place within the district and "elsewhere"); United States v. Lonzo, 793 F. Supp. 57, 59 (N.D.N.Y. 1992) (same); United States v. Gatto, 746 F. Supp. 432, 457 (D.N.J. 1990) (same), rev'd on other grounds, 924 F.2d 491 (3d Cir. 1991); United States v. Castellano, 610 F. Supp. 1359, 1389 (S.D.N.Y. 1985) (same).

It may be that the unlawful acts charged by the government are limited to Central District of Illinois, as suggested by the specific factual allegations in the indictment. In that event, the term "elsewhere" should be stricken as surplusage under Federal Rule of Criminal Procedure 7(d). See Gatto, 746 F. Supp. at 457-58 (striking term "elsewhere" from indictment); see also United States v. Marshall, 985 F.2d 901, 905 (7th Cir. 1993) (noting that "surplusage may be stricken from the indictment if the court finds the language to be immaterial, irrelevant, or prejudicial."). If, however, the government intends to prove that alleged conduct occurred "elsewhere," that is, in some other geographic location, the government properly should be directed to disclose such locations to the defendant.

Finally, Count Seven alleges that Mr. al-Marri possessed 15 or more unauthorized and counterfeit access devices. In discovery, however, the U.S. Attorney's Office for the Southern District of New York provided the defense with hundreds, perhaps thousands, of apparent credit card numbers allegedly retrieved from Mr. al-Marri's computer and laptop carry case, without any indication as to which it intends to prove are counterfeit, unauthorized, or simply not at issue. Mr. al-Marri has a right to know specifically which of these apparent credit card numbers are alleged by the government to constitute unauthorized or counterfeit access devices within the meaning of 18 U.S.C. § 1029(e). See Bortnovsky, 820 F.2d at 574-75 (reversing conviction for submission of false burglary loss insurance claims where district court erroneously denied defendant's request for bill of particulars identifying, from among the 4,000 documents supplied by the government, the fraudulent documents and burglaries against which defendant was to defend); Hedman, 458 F. Supp. at 1386 (granting bill of particulars where requested information would assist the defendant in preparing his defense).

Each of the deficiencies in the indictment listed above is properly cured by way of a bill of particulars. Mr. al-Marri does not seek evidentiary details of the government's case, but rather discrete information which will allow him to understand the discovery provided by the government to date, and which is essential to prepare his defense, to avoid surprise at trial, and to interpose a plea of double jeopardy, if necessary, in the future. See United States v.

Tanner, 279 F. Supp. 457, 473-74 (N.D. Ill. 1967) (granting bills of particulars on ground that "a defendant is not entitled to know all the evidence that government intends to produce," but is entitled to understand "the theory of the government's case"). Accordingly, if the information requested is not otherwise forthcoming from the government, Mr. al-Marri respectfully requests that the Court order the government to provide answers to the inquiries set forth above in the form of a bill of particulars.

IV. THE COURT SHOULD ORDER THE GOVERNMENT TO PROVIDE THE DEFENSE WITH REQUESTED DISCOVERY RELATING TO THE FBI'S FINGERPRINT ANALYSES.

By letter dated June 2, 2003 (attached as Exhibit B), the defense asked the government to disclose certain information underlying FBI Laboratory Reports dated March 19, 2002, October 8, 2002, and October 10, 2002, in order to fully assess the validity of the government's conclusions and, if necessary, secure its own analysis of the fingerprint evidence relied upon by the government.[1] Specifically, defense counsel requested the following documents and information:

1. All annual proficiency tests taken by James L. Rettberg III, and those of every other individual involved in the analysis or treatment of Mr. al-Marri's fingerprints and/or the latent prints described above;

   This request includes, but is not limited to, the packets of fingerprints that comprised each annual proficiency test, all false positive and false negative conclusions reached by an examinee during any of the annual proficiency tests, and the outcome of the review, if any, of the false positive or negative conclusions;

2. A curriculum vitae for James L. Rettberg III, and that of every other individual involved in the analysis of Mr. al-Marri's fingerprints and the latent prints described above;

   This request includes, but is not limited to, the educational background of each individual, the date on which the individual completed the FBI's in-house training program, and the individual's score on the certifying examination which is administered at the

[1] The discovery provided by the U.S. Attorney's Office for the Southern District of New York did not contain any other expert reports, and the government has not indicated that it intends to rely upon any other expert testimony.

conclusion of that training program and all recertifying exams; and

3. All documents regarding the latent prints described above. This request includes, but is not limited to, actual photographs of the latent prints, as opposed to the copies previously supplied, which appear to be based on copies of actual photographs that were scanned into a computer and which are inadequate. Further, this request includes all documents and other information regarding treatment method used (*e.g.*, ninhydrin) with respect to the latent prints, as well as the identity of the individual(s) who did the treatment, the facility at which the treatment was done, and the individual(s) who did the labeling and photography of the latent prints.

4. All documents regarding Mr. al-Marri's fingerprints described above. This request includes, but is not limited to, actual photographs of the fingerprints, as opposed to the copies previously supplied which appear to be based on copies of actual photographs that were scanned into a computer.

By letter dated June 4, 2003 (attached as Exhibit C), the government agreed to provide Mr. Rettberg's curriculum vitae, as well as photographs of the latent fingerprints and Mr. al-Marri's fingerprints, but stated that it was not obligated to provide the balance of the material requested. Thus, the government has declined to provide: (1) information regarding the training and qualifications of the government's fingerprint expert; (2) information regarding the training and qualifications of all other individuals who were involved in the government's analysis of the defendant's fingerprints and latent prints at issue; and (3) information regarding the chemical method used during the analysis of the latent prints that the government claims belong to the defendant.

Federal Rule of Criminal Procedure 16(a)(1)(G) obligates the government to produce all of the discovery requested by the defendant. That Rule states in pertinent part:

> At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial .... The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Under this rule, as the Seventh Circuit has noted, "cases involving technical or scientific evidence may require greater disclosure, including written and oral reports, tests, investigations, and any other information that may be recognized as a legitimate basis" for an expert opinion. United States v. Jackson, 51 F.3d 646, 651 (7th Cir. 1995).

Here, the outstanding discovery implicates "technical or scientific evidence," as well as information upon which a fingerprint expert's opinion is based, and which, therefore, bears directly on the qualifications of the government's expert and the validity of his analysis of the prints at issue. In fact, the government has in the past relied on precisely the type of documents sought by the defense to support the validity of its own experts' opinions. For example, in United States v. Llera Plaza, 188 F. Supp. 2d 549 (E.D. Pa. 2002), the government relied on annual proficiency tests, sample fingerprints used during those tests, false positive and false negative conclusions reached by examinees during the annual

proficiency tests, the outcome of the review the conclusions, information regarding experts' completion of the FBI's in-house training program, including scores on certifying examinations and recertifying exams, to argue that the conclusions of its fingerprint analysts satisfied Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). See also United States v. Havaard, 260 F.3d 597, 598-99 (7th Cir. 2001) (discussing the government's presentation of testimony regarding error rates, the use of peer review and varying methodology to assert that fingerprints satisfy Daubert). Similarly, the type of chemical treatment used by the government, which was requested by the defense but which the government has refused to disclose, is inextricably intertwined with the basis for any expert's opinion, has been produced in the past by the government, and should be produced in this case so the defendant has a full and fair opportunity to meet the government's proofs. See United States v. Yoon, 128 F.3d 515, 526-27 (7th Cir. 1997) (holding that the government complied with the predecessor to Rule 16(a)(1)(G) by providing, in addition to other information, the methodology employed by its expert); United States v. Mehta, 236 F. Supp. 2d 150, 153 (D. Mass. 2002) (noting that the government had, in an effort to satisfy its obligations under the predecessor to Rule 16(a)(1)(G), disclosed the "method" used to arrive at its conclusions); see also United States v. Baker, 650 F.2d 936, 937 (8th Cir. 1981) (noting the chemical process used during the government's fingerprint analysis); United States v. Arce, 633 F.2d 689, 693 (5th Cir. 1981) (same);

United States v. Berry, 599 F.2d 267, 269 (8th Cir. 1979) (same); United States v. Gocke, 507 F.2d 820, 822 (8th Cir. 1974) (same). Thus, because the outstanding discovery bears directly on the qualifications of the government's expert and the bases for his opinions, the government is obligated to provide the outstanding discovery regarding Mr. Rettberg, as well as others at the FBI involved in the analysis of the proffered fingerprint evidence, under Rule 16(a)(1)(G). See Fed. R. Crim. P. 16, 1993 Amendment Advisory Committee Notes (stating that the "opinions of other experts" must be disclosed under 16(a)(1)(G) under the circumstances presented here).

The items requested by the defense are also properly discoverable under Rule 16(a)(1)(F). That provision requires the government to provide the defense access to:

> any scientific test or experiment if:
>
> (i) the item is within the government's possession, custody, or control;
>
> (ii) the attorney for the government knows--or through due diligence could know--that the item exists; and
>
> (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

The federal courts of appeals have consistently granted defendants' requests for a broad range of scientific tests and experiments under this Rule. See, e.g., United States v. Salameh, 152 F.3d 88, 129-30 (2d Cir. 1998) (DNA analysis); United States v. Williams, 995 F.2d 258 (5th Cir. 1993) (records of victim's counseling); United States v. Polan, 979 F.2d 1280, 1285 (3d Cir. 1992) (witnesses' psychiatric

records); United States v. Antone, 981 F.2d 1059, 1061 (9th Cir. 1992) (victim's psychiatric records); United States v. Melucci, 888 F.2d 200, 203 (1st Cir. 1989) (handwriting analysis); United States v. DiCarlantonio, 870 F.2d 1058, 1062-63 (6th Cir. 1989) (records of examination by locksmith); United States v. Wicker, 848 F.2d 1059, 1061 (10th Cir. 1988) (scientific analysis of drugs).

The items requested by the defense fall within the broad scope of this rule, as well. Indeed, it is undisputed that the requested materials are "within the government's possession, custody, or control[,]" and that the "government knows--or through due diligence could know--that the item exists." Moreover, given that the government intends to call its own fingerprint expert, whom the defendant has a constitutional right to cross-examine in a meaningful manner, the requested materials are plainly "material to preparing the defense," and obtainable only from the government itself. See United States v. O'Shea, 450 F.2d 298, 300-01 (5th Cir. 1971) (noting that enlargements of palm prints were discoverable upon proper request by the defense); United States v. Kaminsky, 275 F. Supp. 365, 368 (S.D.N.Y. 1967) (holding defendant entitled to fingerprint analysis performed by any expert); United States v. Lewis, 266 F. Supp. 897, 899 (S.D.N.Y. 1967) (holding defendant entitled to chemical analysis of material located in a still).

In sum, the government is required under Rule 16 to produce the fingerprint-related discovery requested by the defense. Accordingly,

the Court should compel the government to disclose the requested items immediately.

CONCLUSION

For the reasons set forth above, defendant Ali Saleh Kahlah al-Marri respectfully submits that the Court should enter an Order: 1) severing Count Six from the indictment; 2) suppressing evidence seized from, and statements allegedly made by, Mr. al-Marri on December 11, 2001; 3) directing the government to provide the defense with a bill of particulars; and 4) compelling the government to provide the defense with discovery relating to fingerprint analyses performed by the FBI.

Respectfully submitted,

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Dated: June 18, 2003