

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

: SEALED AFFIRMATION
: AND APPLICATION

- v. -

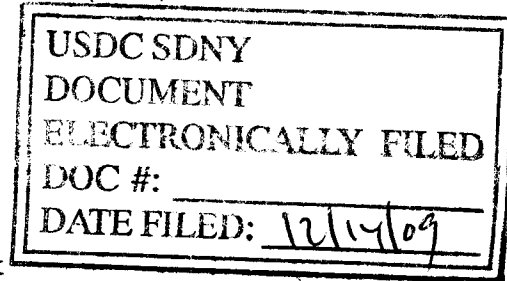
:

KHALID SHEIKH MOHAMMED,
WALID BIN ATTASH,
RAMZI BIN AL-SHIBH,
ALI ABDUL AZIZ ALI, and
MUSTAFA AL-HAWSAWI,

: (S14) 93 Cr. 180 (KTD)

Defendants.

:



-----x

ADAM S. HICKEY hereby affirms, under penalty of perjury and pursuant to Title 28, United States Code, Section 1746, as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, and I am familiar with this matter. By this affirmation, the Government applies for an order of the Court directing that the above-captioned superseding indictment (the "Superseding Indictment") be filed under seal and that no entry relating to the filing of the Superseding Indictment be made in the public docket of this case until such time that the Superseding Indictment be unsealed.

2. On December 14, 2009, contemporaneous with this application, a grand jury in this District returned the Superseding Indictment, which charges the above-named five defendants with various federal crimes. All five defendants are currently in

military custody. They may not be transferred to the United States until, among other things, 45 days after required notification based on certain submissions to Congress. See, e.g., National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009).

3. For security reasons, the United States Marshals Service would prefer to transfer the defendants to this District without advance notice either to the defendants themselves or to the public of the date they will be moved. Further, I understand from my familiarity with the evidence in this case and my conversations with those having custody of the defendants that potentially admissible evidence concerning the charged offenses is contained within the cells of at least some of the defendants.

4. A public announcement that the defendants have been indicted may lead them to believe they will be moved exactly 45 days from today. Regardless of whether that turns out to be the case, knowledge of the specific date the Superseding Indictment was returned may lead the defendants to coordinate with each other in ways that undermine both their security and the security of others. In addition, notice that new charges have been filed against the defendants may lead them to destroy evidence they now possess.

5. Because of both security concerns and the potential for the defendants to destroy evidence, and for other reasons, the Government respectfully requests that the Superseding Indictment be

filed under seal. See Fed. R. Crim. P. 6(e)(4). The Second Circuit has held that a magistrate judge may order an indictment sealed in furtherance of any proper prosecutorial objective, even where defendants are already in custody. See United States v. Srulowitz, 819 F.2d 37 (2d Cir. 1987) (to locate the defendant and to secure the cooperation of a witness); United States v. Southland, 760 F.2d 1366, 1379-81 (2d Cir. 1985) (where unsealing the indictment would have made it more difficult for the Government to obtain truthful testimony of an immunized witness). "Where the prosecution can demonstrate that the decision to keep an indictment secret is informed by the exercise of sound discretion in the public interest," Srulowitz, 819 F.2d at 40, sealing will be appropriate.

6. In addition, the Government further requests that no entry be made in the docket reflecting the filing of the Superseding Indictment. Absent Court order, a notation that a "sealed document" has been placed in the vault will be made. Such a notation in the docket sheet of this case, which has been largely inactive for some time, would be an obvious indication of recent activity and would defeat the purpose of sealing the Superseding Indictment. The Second Circuit has recognized that even docketing applications to seal materials can be prejudicial, and in such cases the applications themselves and related notes to the docket may be sealed. See United States v. Alcantara, 396 F.3d 189, 200

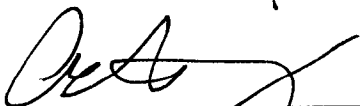
n.8 (2d Cir. 2005). Delaying the notation that a sealed document has been filed in this case is equivalent to making a sealed entry in the docket sheet. Along the same lines, the Government respectfully requests that this Application and the accompanying order be filed under seal as well.

7. The Superseding Indictment will not be kept sealed indefinitely, however. No later than the defendants' first appearance in this District (and potentially earlier than that), the Government will move to unseal the Superseding Indictment, at which point it will be docketed publicly.

8. Accordingly, the Government respectfully requests that the Superseding Indictment be filed under seal and that no notation be made in the docket of this case relating to the Superseding Indictment, until further order of the Court.

9. No prior request for the relief set forth herein has been made.

Dated: New York, New York
December 14, 2009



ADAM S. HICKEY
Assistant United States Attorney
Southern District of New York
(212) 637-1039