UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES, Appellee,	
vs.	**FILED: November 27, 2007**
ZACARIAS MOUSSAOUI	No. 06-4494 Crim No. 01-455-A
Appellant.	***CLASSIFIED*** ***FILED UNDER SEAL THROUGH COURT SECURITY OFFICER***

APPELLANT'S CONTESTED MOTION FOR A LIMITED REMAND BASED ON THE GOVERNMENT'S DISCLOSURE OF INCORRECT DECLARATIONS, TESTIMONY, AND REPRESENTATIONS

Zacarias Moussaoui, by undersigned counsel, respectfully requests a temporary remand to the district court and a corresponding stay of the briefing schedule. A limited remand is necessary for the district court to address two independent, but important, recent disclosures by the Government.

First, by letter dated October 25, 2007 (the "October 25 Letter") (*see* Ex. A), the Government recently disclosed that sworn declarations by the Central Intelligence Agency ("CIA") and representations by counsel for the United States – filed or made to both this Court and the district court – were incorrect. Contrary to those declarations and representations, the Government has possessed, for several years, at least some videotapes or audiotapes of the interrogations of an al Qaeda operative who also was found to be a material witness in this case. This is a striking and potentially critical disclosure, and because it requires factual findings and conclusions thereon, this Court should temporarily remand the case.

Second, by letter dated November 9, 2007 ("November 9 Letter") (*see* Ex. B), the Government disclosed, apparently for the first time, a handful of electronic mails involving Carla Martin and Robert Cammaroto. At trial, the Government conceded that Martin, a lawyer for Transportation Safety Administration ("TSA"), had violated the district court's sequestration orders. The district court initially sanctioned the Government by barring testimony on the subject matter. Later, however, the court reconsidered its ruling and permitted the substitution of Cammaroto as a witness only after the Government submitted evidence, including the testimony of Cammaroto, to convince the district court that he was untainted by the violation. Permitting this substitution was critical to the Government because

without it, the Government conceded that it could not establish that Moussaoui was eligible for the death penalty. Now, the November 9 Letter and documents produced therewith appear to: (1) contradict Cammaroto's testimony and (2) show that Cammaroto was, in fact, tainted. Again, because the record requires factual development and legal conclusions before this Court can conduct its review, this Court should temporarily remand the case to the district court.

These inaccurate representations are not "harmless" as the Government claims. They bear directly on critical rulings by this Court and the district court, on the voluntariness of Moussaoui's guilty plea, and on the sentence that the district court imposed – issues Moussaoui intends to raise on appeal.

I. THE ISSUES DISCLOSED IN THE OCTOBER 25 LETTER REQUIRE A TEMPORARY REMAND.

A. PROCEDURAL HISTORY

Beginning in September 2002, Mr. Moussaoui, who by that point had been in solitary confinement for over one year, began what turned into a significant effort to exercise his Sixth Amendment right to compulsory process and to obtain access to certain witnesses who would exonerate him from the charges he was facing. Proceeding *pro se*, Moussaoui requested access to, among others, [redacted] an individual whose capture [redacted] generated widespread publicity at the time. *United States v. Moussaoui*, 382 F.3d 453, 458 (4th Cir. 2004) ("Moussaoui II").

For the next two-and-a-half years, the issue of Moussaoui's access to [redacted] critical witnesses who were in the custody of the

United States was a central issue in the district court, in this Court, and to Moussaoui. Indeed, this issue was so critical to Moussaoui that immediately after the Supreme Court of the United States denied issuance of a writ of certiorari to review this Court's ruling in *Moussaoui II*, 382 F.3d at 453, Moussaoui obviously became convinced he could not receive a fair trial and entered a plea of guilty.

This Court has been extensively briefed on the procedural history relating to the access to these detainees, and we do not repeat that history here. *See Moussaoui II*, 382 F.3d at 457. We instead highlight the various inquiries that were made into the existence of recordings and the import of those inquiries.

Following a series of rulings in which the district court ordered the Government to make the detainees available for deposition, on April 14, 2003, this Court ordered that (1) the Government be given the opportunity to propose substitution summaries of the detainees' interrogation statements, rather than provide access to the detainees themselves and (2) the district court review the summaries to determine whether they were reliable substitutes. *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018 (4th Cir. Apr. 14, 2003).

At a subsequent hearing on May 7, 2003, the district court focused on the reliability of such substitutions and inquired about whether the interrogations had been recorded. During that hearing, the district court asked the Government whether [redacted] had been recorded by audio or video, and the Government offered to get the answer. Ex. C at 11-12. Later in the same hearing, the court stressed the importance of recordings in evaluating substitutions:

> THE COURT: The second question is whether these proceedings are being videotaped and/or recorded, whether there's a verbatim transcript of some kind of the questions and the answers. I mean, I think it's very important for the court to know how this is going about.

Id. at 12.

Two days later, on May 9, 2003, the Government submitted an *ex parte* declaration to provide assurance about the reliability of the written summaries as a substitute for witness access. The Government allowed that certain portions of the declaration could be shared with defense counsel – but not the defendant. Among the items disclosed to defense counsel was the following:

> Question: Whether [redacted] are being recorded in any format?
>
> Answer: No.

Ex. D.

Shortly thereafter, the court determined that the Government's proposed substitution [redacted] was not reliable because the court was unable to determine "whether the intelligence reports upon which it is based accurately reflect what [redacted] has said to interrogators." Ex. E at 8-9. Additionally, the court stated that "the interrogation sessions have not been videotaped or recorded in any other manner, leaving the Court unable to determine whether the intelligence reports accurately reflect [redacted] statements." *Id.*

On August 29, 2003, the district court ordered that the Government make [redacted] available for a Rule 15 deposition and further ordered that the Government propose substitutes by

September 5. *Moussaoui II*, 382 F.3d at 459. The Government produced the proposed substitutions, but refused to produce any of the witnesses for depositions, videotaped or otherwise. *Moussaoui II*, 382 F.3d at 459.

As this Court is aware, the district court ultimately struck the Notice of Intent to Seek the Death Penalty. On appeal, this Court affirmed the district court's finding that the enemy combatant witnesses could provide material, favorable testimony on Moussaoui's behalf, and agreed with the district court that the Government's proposed substitutions for the witnesses' deposition testimony were inadequate.[1] *Moussaoui II*, 382 F.3d at 456-57. However, the Court reversed the district court insofar as it held that it is not possible to craft adequate substitutions, and remanded with instructions for the district court and the parties to craft substitutions under certain guidelines. *Id.* at 457. The Court also vacated the order imposing sanctions on the Government (for failing to produce the enemy combatant witnesses). *Id.* Immediately after the Supreme Court declined to grant a writ of certiorari on this issue, Moussaoui pled guilty.

In subsequent hearings, the district court again focused on the reliability of written substitutes for access to the witnesses; for example, on April 28, 2005, the district court sought to establish a way in which to evaluate the substitutions'

[1] At oral argument, this Court also inquired about the reliability of the substitutes and about the availability of recordings, and the Government filed with this Court the same declarations filed with the district court. Ex. A at 4; *see also* Ex. F at 29, 32.

reliability, such as by comparing them to audio or video recordings of the interrogation sessions:

> I have trouble believing that [redacted] is not somehow recording or making permanent these debriefings. Local police departments routinely tape-record confessions. It's not unheard of, and I can't believe that it's not being done here, and I don't believe we have on this record a clear, definitive representation from all appropriate authorities that that does not exist.

Ex. G at 13. The court noted that, if recordings did in fact exist, "we have a whole new approach to how these witnesses might be presented to this jury." *Id.*

Highlighting the importance of any recordings to the court's determination of reliability, the court ordered the government to swear under penalty of perjury that no such recordings existed:

> **So I am going to require that the government do the equivalent of an all agencies check, which should be done in a Title III case. I want clear representations under the penalty of perjury from the appropriate officials - - and this has to include, I would assume, the CIA, the FBI, the Department of Defense, the NSA, and, frankly, any other government agency that might be involved in this kind of work - - that there have not been any video or audio recordings made of the interrogation of these witnesses by any United States or other governmental agencies during this process.**
>
> What I'm looking for, the intent behind this question is to be absolutely sure for purposes of this record that there does not exist someplace within the custody or control of the United States government or anybody acting at the government's direction, this includes independent contractors or consultants, some record, verbatim record of what these witnesses are saying. If that exists, we need to know about it.

Id. at 13-15 (emphasis added).

Shortly thereafter, on May 2, 2005, the district court issued an order requiring the government to submit written declarations "subject to penalty of perjury, from all agencies involved in the interrogation" of the detainee witnesses at issue, stating whether "any of the witnesses' interrogations were recorded by video or audio technology and whether written contemporaneous notes were take by any agency, or its contractors or consultants, during the interrogation of those witnesses." Ex. H at 2. The Government again responded with an *ex parte* filing on November 14, 2005, stating that the government did not have any videotapes of the interrogations [redacted] Ex. A at 4; Docket No. 1369.[2] The district court subsequently concluded, on the basis of the Government's representations, that the proposed substitutions would be adequate.

This procedural context set forth above makes clear several circumstances: (1) this Court and the district court inquired repeatedly and with specificity about the recording of the interrogations; (2) the Government made repeated representations, through sworn declarations and representations by counsel on this issue; and (3) the absence of recordings was a critical element of the rulings on the reliability of substitutions in lieu of access to the detainees.

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[2] While Mr. Moussaoui's counsel still have not been permitted to view the government's November 14, 2005 *ex parte* filing, the Government quoted the filing in the October 25 Letter, representing that in the filing, a CIA executive stated that the "U.S. Government does not have any video or audio tapes of the [redacted] (Ex. A at 4).

B. DISCUSSION

1. A Remand Is Necessary To Permit Findings of Fact and Conclusions of Law

This Court has made it clear that it will only ordinarily review matters that were first presented to the district court for ruling. This is especially true when the disclosure of a new circumstance requires some development of a factual record. *See United States v. Dyess*, 478 F.3d 224, 231 (4th Cir. 2007) ("In light of the new information, this court remanded the case to the district court, directing it to 'conduct such further proceedings as it may deem appropriate.'"); *United States v. Severson*, 3 F.3d 1005, 1013 (7th Cir. 1993) (remanding to district court for "furthering fact-finding" in light of potentially relevant evidence produced during appeal). While this Court may retain jurisdiction over the case during the remand, *see generally Dyess*, 478 F.3d at 231, the remand serves the vital function of allowing the district court to develop the record, make factual findings, and reach legal conclusions for this Court to review. *See Severson*, 3 F.3d at 1013.

In *Dyess*, for example, the Government disclosed new information about government witnesses ten days before oral argument in the direct appeal. 478 F.3d at 231. Apparently to ensure an appropriate record for appeal, this Court remanded the matter to the district court. *Id.* at 232. Likewise, in *United States v. Al-Timimi*, No. 05-4761 (4th Cir.), this Court recently remanded an appeal to the district court when information similar to that set forth in the October 25 Letter came to light.

Here, a remand is necessary for several reasons. ***First***, the October 25 Letter has raised a number of factual questions that require review and findings by the

district court. For example, the October 25 Letter fails to provide any adequate reassurances that there are not other recordings of pertinent detainee interrogations either in the Government's possession or in the possession of foreign governments but accessible to the United States. The letter also omits discussion of when the CIA obtained possession of the recordings, or the timing of the CIA's realization that it had access to these or other recordings. The letter also does not address whether there were any other [redacted]

These statements and others require factual development; among other things:

- The district court should be permitted to evaluate the diligence performed by the CIA before the signing and filing of the sworn declarations.[3]
- Inasmuch as the district court has only been provided with a transcript of the recordings, the district court should be permitted to hear the audiotape and view the videotapes to see if there is any effect on the determination of reliability.
- Insofar as the October 25 Letter is limited to [redacted] the district court should be permitted to determine whether the Government has other videotapes or audiotapes relating to the other detainees at issue.[4]

[3] We do not mean to suggest at this point that there was intentional misconduct by the Government; however, given the specificity of the requests from the district court, the attention paid to this issue, and the potential materiality of the error, it would be appropriate to determine how the error occurred.

[4] This is important because if [redacted] these recordings [redacted] might then give some indication of the reliability of the summaries for other detainees.

- Insofar as the October 25 Letter appears to be limited to what the CIA currently has,[5] the district court should be permitted to discover whether the Government had any other tapes and/or whether any other tapes earlier existed and if so, what the circumstances were under which those tapes ceased to be in the control of the Government.
- Insofar as the October 25 Letter does not indicate as much explicitly, the district court should be permitted to ascertain whether the interrogations were in fact videotaped or audiotaped more extensively even if the Government does not currently possess such evidence.
- The district court should be permitted to determine whether the Government has had actual and/or effective control of these and other recordings.

As discussed below, each of these, and other factual issues, would permit the district court to determine whether the Government's recent disclosure about incorrect declarations: (1) affected the knowing and voluntary nature of the plea; (2) affected the fairness of the proceedings below; (3) affected the conclusions about the reliability of the written substitutes; (4) affected the sentencing phase; or (5) otherwise affected the judgment. Once the record is complete on this issue, this Court will be in a position to review it.

2. The Government's Suggestions of No Prejudice Are Premature and Without Merit

In the October 25 Letter, the Government asserts that Moussaoui was not prejudiced by the incorrect declarations and representations because (1) Moussaoui pled guilty and (2) the recordings contain no mention of Moussaoui or the

[5] The district court ultimately admitted at trial the substituted testimony of at least seven detainees, and the Government produced intelligence summaries of many more witnesses to the defense during discovery.

September 11 attacks. These assertions are misleading and should not dissuade this Court from ordering a temporary remand.

First, the district court, this Court, and Moussaoui each specifically relied on the representations and sworn statements by the Government regarding the absence of audiotapes and videotapes of witness interrogations; as such, the Government's bald assertion – that there can be no prejudice – is without merit. The absence of videotapes and audiotapes of the interrogations affected the knowing and voluntary nature of Moussaoui's plea. At the time Moussaoui entered the plea, there was no objective evidence to prove the reliability of the written substitutes, and there was – based on the absence of tapes – no way for Moussaoui to test or challenge any conclusions about reliability. These issues were at the forefront of Moussaoui's mind when he entered his plea, as is obvious from even the transcript of plea hearing. Ex. I at 30-31 (stating that guilty plea and continued opposition to the substitutions are meant to "preserve [his] chance in front of the Supreme Court to . . . raise the issue of substitution and to raise the issue of fair trial."). In this context, the district court should be permitted to determine whether the incorrect declarations and representations affected the knowing and voluntary nature of Moussaoui's plea.

Furthermore, this Court held in *Moussaoui II* that Moussaoui had a Sixth Amendment right to access to the witnesses at issue but that written summaries could be an adequate substitute for actual access. 382 F.3d at 456. A critical underpinning of this Court's ruling was its finding that the Government had an incentive to obtain truthful, reliable statements during interrogations and that

written summaries produced as a result of those interrogations therefore could be reliable substitutes for access to the witnesses or even for live or videotaped testimony. 382 F.3d at 478. In that vein, this Court and the district court specifically asked the Government whether there were tapes – either audio or video – of the "raw interviews" that could be compared to the written summaries so that there could be a finding of reliability or unreliability. The Government assured this Court and the district court, in sworn declarations and in representations outside the declarations, that there were no such recordings of the interrogations.

The district court ultimately relied on those representations, and on the other representations of the Government, in ruling that written substitutes could be reliable such that the witnesses did not have to be produced. There was, however, no way for the district court to test – even on a sample basis – those conclusions; nor could there be if the Government's assurances about the absence of recordings were correct. Having relied to its detriment on these representations, the district court should be permitted to determine whether its conclusions are undermined by the recent disclosures.

Second, in the October 25 Letter, the Government asserts that the newly discovered interrogation recordings have "no bearing on the Moussaoui prosecution" because "they neither mention Moussaoui nor discuss the September 11 plot." Ex. A at 3. This assertion is a red herring. Among other things, the district court and this Court asked for tapes not just because of the particular statements that appeared on the tapes, but also to be able to compare the "raw" interrogations to the "cables" and intelligence summaries that were

produced to the defense and determine whether the cables and summaries are ***reliable***. In other words, even if there were no statements about Moussaoui, the tapes would still be highly relevant to the issue of the reliability of the written substitutes. If the tapes showed, for example, that the witnesses were subject to torture or other coercive methods of interrogation, the district court or this Court may have reached a different conclusion about the adequacy of substitutions.

In addition, the Government's claim at trial was that Moussaoui involved in a conspiracy that was ***broader than, but inclusive of,*** the attacks on September 11; indeed, the Government explained as much in myriad pleadings. *See, e.g.*, Ex. J at 51-52 ("Moussaoui is not charged, as standby counsel and defendant have repeatedly phrased it, with September 11. Instead, Moussaoui is charged in six broad conspiracy counts that include as overt acts, *inter alia*, the preparation for and execution of the terrorist attacks of September 11. As the Court itself has held, these conspiracy counts properly include allegations of conduct independent of the September 11 attacks[.]"), at 57-58 ("To the extent [redacted] would corroborate each other in establishing that defendant was not a participant in the September 11 attacks, that testimony is not exculpatory as to the charges in the Indictment, because defendant is charged with participating in a broader conspiracy."); *see also id.* at 60, 76-77, 79-80; *see also* Ex. K at 37 ("While the

September 11 attacks lie at the core of the Indictment, the charged conspiracies are much broader than just those attacks.").[6]

Having taken this position, the Government cannot now claim that statements broader than the 9/11 attacks are irrelevant. For example, if [redacted] discussed operations or attacks to occur after 9/11, and Moussaoui is not mentioned, that discussion would be exculpatory as to Moussaoui, even under the Government's own theory. In this context, the matters discussed on the tapes – "national security matters unrelated to the Moussaoui prosecution" – are plainly relevant.

In short, the matters in the October 25 Letter require factual development and findings, and require entry of legal conclusions before this Court can review. This Court should accordingly temporarily remand this issue to the district court.

II. THE ISSUES DISCLOSED IN THE NOVEMBER 9, 2007 LETTER REQUIRE A TEMPORARY REMAND.

On November 13, 2007, undersigned counsel received a production from the Government containing three groups of electronic mails involving, among others, Robert Cammaroto and Carla Martin. *See* November 9 Letter (Ex. B). The

[6] The district court also acknowledged that the Government was prosecuting Mr. Moussaoui for a broader conspiracy. *See, e.g.*, Ex. L at 6-7 ("[T]he United States maintains that the charged conspiracies are not conspiracies to carry out the September 11 attacks. Instead, the United States has, at times, broadly characterized the underlying unlawful agreement as 'al Qaeda's conspiracy to attack the United States,' al Qaeda's 'war on the United States' in which its members would 'use virtually any means available to murder Americans en masse,' and 'a coordinated plan of attack upon the United States that included flying planes into American buildings.'").

Government apparently produced these documents because they contradict testimony and representations submitted and made by the Government at a sanctions hearing before the district court. Again, the matters raised in the November 9 Letter require factual development and entry of legal conclusions, and this Court should therefore temporarily remand this issue to the district court.

A. BACKGROUND

During the death eligibility phase of the sentencing trial, there was a well-publicized violation of the district court's sequestration order by Carla Martin, a TSA lawyer. In short, at the beginning of the trial, on February 16, 2006, the district court invoked Federal Rule of Evidence 615 – the so called "Rule on Witnesses" – and informed the lawyers involved in the case that non-victim potential witnesses could not follow trial proceedings or otherwise see the testimony of any witness. Ex. M at 13.[7] Over the following few weeks, it turned out Martin shared extensive information and trial testimony with TSA witnesses in an obvious attempt to coach those witnesses. *See* Ex. N.

The district court made its views of this violation well known: "In all the years I have been on the bench, I have never seen such an egregious violation of a court's rule on witnesses as occurred." Ex. O at 1002-03; *see also* Ex. P at 214 (Judge Brinkema: "I don't think in the annals of criminal law there has ever been a case with this many significant problems."); Ex. N (". . . [W]e view Ms. Martin's

[7] The court's subsequent written order stated that "[non-victim] witnesses may not attend or otherwise follow trial proceedings (*e.g.*, may not read transcripts) before being called to testify." Ex. Q.

conduct as reprehensible and we frankly cannot fathom why she engaged in such conduct."). After questioning the seven witnesses, the district court found that it could not "trust anything that Martin had anything to do with at this point," and it struck all aviation evidence. Ex. P at 216-17.

The Government then moved to reconsider and argued that it could not prove its case without an aviation witness. *See* Ex. R at 2, 20. The Government represented that it had a witness who "worked at the FAA during August 2001" and "had no contact with Ms. Martin during this prosecution." Ex. R at 21.[8] Based on these representations, the district court indicated that it would consider the substitution of a new, untainted aviation witness. *See* Ex. S at 11.

At a hearing on March 21, 2006, the Government designated Cammaroto, a TSA employee, as the substitute aviation witness. *See* Ex. T.[9] To establish that Cammaroto was untainted, the court permitted counsel to question Cammaroto about his familiarity with the trial and previous contacts with Martin. In preparation for the inquiry, the Government represented that "the *Jencks* and *Giglio* material for the witnesses will disclose any contact that the witnesses have had, if any, with Ms. Martin on this prosecution." Ex. W at 1. Cammaroto then

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[8] The defense protested in part that the inclusion of a new witness after the penalty phase began would violate federal law requiring three days' notice of witnesses before the start of a capital trial. Ex. U at 16-20, citing to 18 U.S.C. § 3432. The district court acknowledged that permitting the government to propose a new witness would constitute a "technical" violation of that rule, Ex. S at 6, but it nonetheless permitted the substitution.

[9] The government initially designated two new witnesses, but only called one for an inquiry into possible taint. Ex. T; Ex. V at 5.

testified that he had not spoken with Carla Martin after "early February of this year" and nothing about his "contact with Ms. Martin and [his] knowledge of her that would skew [his] testimony in this case. Ex. V at 23-24.

Cammaroto also testified that he knew two of the tainted witnesses – Lynne Osmus and Claudio Manno – but had not spoken with them about their testimony, Ex. V at 25, nor had he emailed the witnesses "recently." Ex. V at 26. He stated that he had not spoken with Osmus in "at least a year," and had not spoken with Manno in eight months. Ex. V at 25. Upon cross-examination, Cammaroto further testified that his last email with Martin was on February 22, 2006 – ***before opening statements and before trial testimony began*** – and that he was not the primary recipient of that email but was simply copied on an email to someone else. *See* Ex. V at 26.

As a result of Cammaroto's responses during the taint inquiry, the district court permitted the government to call Cammaroto as a substitute aviation witness. Ex. V at 41 ("I do find that this witness does not appear to have any taint and therefore will grant the government's motion to . . . allow him to testify."). And, because Cammaroto claimed to have had no contact with Martin or any other taint, the defense never cross-examined him before the jury on his contacts with Martin or other the "taint" issues.

B. DISCUSSION

Under the circumstances, the district court should review the disclosures, and make findings of fact and conclusions thereon. The November 9 Letter contains three e-mail "threads." The first email thread, dated January 19-20, 2006,

appears to contradict Cammaroto's testimony about the absence of contacts with Manno and Osmus, and his lack of contact about trial issues. The second email thread, dated February 27, 2006, is important because the TSA employees, including Cammaroto, appear to be specifically discussing prospective trial testimony, and Cammaroto weighs in with comments on the trial itself. Ex. B at 4. This February 27 thread also appears to contradict Cammaroto's testimony about his last contact with Martin – which he testified occurred on February 22, 2006 – and appears to contradict Cammaroto's testimony about prospective trial testimony.

The third email thread occurred on March 9-10, 2006 – after opening statements, after testimony had occurred, and only a few days before the Government disclosed the sequestration order violation to the district court. In the March 9 email thread, Martin emailed Cammaroto and another government official to ask them to "look over this list of terms, for possible use by the jury." Ex. B at 6. Cammaroto responded by suggesting several corrections to the list of terms. *See* Ex. B at 6. Again, this thread appears to show Cammaroto's consultation on matters to be presented to the jury, and, in what surely would have been important to the district court, the e-mail thread occurred ***after*** the trial began.

The district court needs to review these circumstances to determine whether additional relief is required. First, the district court plainly relied on the testimony of Cammaroto and representations of the Government before permitting Cammaroto's substitution. Moreover, had Cammaroto (or another aviation witness) not been substituted, the Government conceded that there would be

insufficient evidence to find Moussaoui eligible for the death penalty. Thus, the death eligibility phase would have ended before the defense put on a case. Second, Cammaroto's testimony and the related representations arose during ***a sanctions hearing*** before the district court. At a minimum, that court should be permitted to consider, in the first instance, the effect of materially incorrect testimony in that context.

Finally, the Government is sure to argue that, because Moussaoui did not receive a death sentence, any issues arising from the incorrect testimony and representations are moot. On the contrary, the district court incorrectly ruled – even prior to Moussaoui's plea – that Moussaoui's sentencing options were limited to life imprisonment or the death penalty and did not include the option of a term of years short of life imprisonment. On direct appeal, Moussaoui expects to request a re-sentencing, before the district court, with the proper sentencing options available (*i.e.*, life imprisonment or ***a term of years***). In this context, district court's rulings – based on Cammaroto's incorrect testimony and the Government's incorrect representations – that led directly to the finding of death eligibility, are highly relevant and certainly not moot.

For each of these reasons, this Court should temporarily remand this case for the district court to consider the November 9 Letter.

CONCLUSION

For the reasons set forth above, Moussaoui respectfully requests that this Court temporarily remand this case to the district court to consider the recent Government disclosures and correspondingly stay the briefing schedule.

Respectfully submitted,

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LOCAL RULE 27(a) CERTIFICATION

On November 21, 2007, undersigned counsel informed counsel for the Government, David Novak, of the intended filing of this motion. The Government indicated that it intended to file a response in opposition to this Motion.

Respectfully submitted,

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