

Zacarias Moussaoui, by undersigned counsel, respectfully submits this reply in support of a temporary remand to the District Court and a corresponding stay of the briefing schedule.¹

I. THIS COURT SHOULD TEMPORARILY REMAND THIS CASE TO THE DISTRICT COURT.

The October 25 Letter and November 9 Letter² certainly justify a temporary remand of this case to the District Court. The extraordinary disclosures in those letters require fact-finding and entry of legal conclusions before this Court can appropriately review the matter. In addition, after the filing of the Motion to Remand, the Government has made a number of disclosures – some to this Court and others publicly through the press – that substantiate the critical need for a temporary remand here.

For example, in its December 6, 2007, Response (“Response”) to the Motion to Remand, the Government made three striking new disclosures at page 16: (1) the Government³ had taped the interrogations of [REDACTED] (2) the Government had taped the interrogations of Abu Zubaydah; and (3) the Government has destroyed the tapes of the Zubaydah interrogations. As discussed

¹ The Government has indicated by Letter to this Court filed December 12, 2007, that it may have additional disclosures in the near future. Moussaoui, through undersigned counsel, respectfully reserves the right to either supplement this briefing, or to file a separate motion, if need be.

² The October 25, 2007 and November 9, 2007 letters are Exhibits A and B respectively to the original Motion to Remand.

³ It appears that the Central Intelligence Agency was responsible for the taping and destruction, but this is somewhat unclear at this point.

in Sections IB and IC below, (1) Moussaoui specifically sought access to [REDACTED] and Zubaydah in the District Court; (2) the District Court specifically concluded that [REDACTED] was a material witness; (3) the Government represented several times that it would produce discovery relating to [REDACTED] and Zubaydah and (4) [REDACTED] and Zubaydah were accordingly very important to Moussaoui's plea and sentencing processes.

The same day that the Government filed its Response, December 6, 2007, newspapers of record began publishing reports that the CIA destroyed "hundreds of hours" of videotapes of detainee interrogations, including videotapes relating to the interrogations of Zubaydah and another al Qaeda operative, Abd al-Rahim al-Nashiri. *See, e.g.*, Exhibits A, B & C. None of this information appeared in the Government's October 25 Letter. Since December 6th, the press has published hundreds of articles relating to the destruction of these tapes, and both the United States Senate and the United States House of Representatives are now investigating the matter.

In light of the new disclosures in the Government's Response and in the press reports that began appearing on December 6, 2007, a temporary remand is certainly justified. First, from a fair reading of the October 25 Letter, one would infer that: (1) the scope of the taping of detainee interrogations was very limited; (2) [REDACTED] and (3) there had not been any destruction of evidence. The more recent disclosures undermine each of these inferences. For example, the press reports relating to the recordings have made

clear that the taping took place on a much broader scale, and that the CIA itself conducted the recording. *See* Exhibits A, B, and C. In addition, press reports, confirmed by the CIA itself, indicate that the CIA destroyed “hundreds of hours” of videotapes around November 2005. *See* Exhibit B. Moreover, the Government disclosed neither the Zubaydah nor the al-Nashiri videotapes in the October 25 Letter, even though it appears that this information was widely known within the CIA by that time. *See* Exhibit A to Appellant’s Contested Motion for a Limited Remand.

In short, the manner in which these disclosures are occurring should itself persuade this Court to remand this matter temporarily. Although the Government indicated in the October 25 Letter that it was continuing to investigate this matter, it now appears that much more taping and destruction took place than is implied by the October 25 Letter. Moreover, the taping and destruction relates to witnesses that were material both to Moussaoui’s plea and the ultimate sentence he received. Without a complete record, the parties risk filing briefs that will not be accurate or useful, and this Court risks writing opinions that will be incorrect in light of the full factual record. The District Court thus should determine, in the first instance, what occurred with respect to the videotaping of the detainees, what destruction took place, when, why, and what effect each has on the plea and the sentence.

A temporary remand is thus necessary. To further understand why, we briefly highlight the importance of these [REDACTED] material witnesses whose tapes are at issue at this point.

A. [REDACTED]

The October 25 Letter related solely to videotapes and audiotapes of the interrogations of [REDACTED] was unquestionably a witness with material, exculpatory information about Moussaoui, and critically, he had exculpatory information that was beyond the personal knowledge of Moussaoui.

See generally Exhibits F and G. In short, [REDACTED]

[REDACTED] *See* Exhibit F.⁴ [REDACTED]

[REDACTED] *See* Exhibit G. This information was critical because it

showed that those who were operationally in control of the September 11 attacks had no intention of using Moussaoui in those attacks. *See* Exhibit G. This is only one fashion in which [REDACTED] would have been able to provide material and exculpatory information.

⁴ We have marked the relevant portions of Exhibits F and G with brackets for the Court's convenience.

The October 25 Letter itself raises issues with respect to [REDACTED] that validate the need for a remand. For example, in that letter, the Government stated that it currently possesses [REDACTED] recordings of interrogations of [REDACTED] including a videotape of an [REDACTED] interrogation, lasting two hours and 47 minutes. The October 25 Letter also states that the [REDACTED] videotape contains "no mention of Moussaoui or any details of the September 11 plot." The Government repeated this representation in its Response to the Motion to Remand: "the [REDACTED] recordings do not contain any information about Moussaoui or the September 11 plot." Response at 13. However, in January 2003, the Government produced to defense counsel a substitution of [REDACTED] statements taken on [REDACTED]. See Exhibit F. During the interrogations that day, [REDACTED] apparently discussed a meeting he had with September 11th lead hijacker Mohammed Atta, including the information that "the targets had been confirmed, that a pilot had been assigned to each target, and that there would be no problem hitting each target." See Exhibit F.

The District Court is in the best position to determine why the intelligence summaries produced to defense counsel relating to the [REDACTED] interrogation contain discussions of the September 11 attacks, but the tapes currently in the possession of the CIA apparently do not. For example, did the CIA have access to the tapes containing discussions about September 11, or were other tapes destroyed? Without this factual information, it is difficult to assess the importance of the tapes and destruction. For a witness as critical as [REDACTED]

this is absolutely necessary under the circumstances.

Thus, the disclosures relating to [REDACTED] require a remand.

B. Abu Zubaydah

Abu Zubaydah is a witness to whom Moussaoui sought access in the District Court and about whom the Government agreed, including in the fall of 2005, to produce relevant discovery. *See* Exhibits D and E. As the Government correctly states in its Response, the District Court ruled that Moussaoui could not have access to Zubaydah. However, it is now clear that the District Court reached that conclusion without access to or knowledge of the existence of the videotapes of Zubaydah's interrogations. Moreover, Moussaoui's lawyers did not know about, or have access to, these videotapes when arguing that Zubaydah was a material witness. Press reports indicate that the taping of Zubaydah's interrogations took place in 2002 and that those tapes were destroyed in November 2005, *see* Exhibits A, B, and C, but tapes of those interrogations were never provided to the District Court or defense counsel. The District Court was thus forced to make its conclusion about access to Zubaydah without all of the evidence.

Even without access to videotapes, Moussaoui and his lawyers explained to the District Court that, among other things, Zubaydah was a material witness because he was a senior member of al Qaeda and would have been privy to details of who was to be involved in the September 11 attacks. *See* Exhibits D, E, and I.⁵ The intelligence summaries of Zubaydah's interrogations contain lengthy

⁵ Ex I was an *ex parte* filing, and we have thus filed that *ex parte* in this Court.

discussions of other plots that are important in this case. *See* Exhibit S (discussing plans to “rescue” the Sheik al-Rahman, the “Blind Sheik”). Under these circumstances, a temporary remand is necessary to determine the facts of the taping and destruction, and, if necessary, what effect these facts have on Moussaoui’s plea and sentence.

C. [REDACTED]

[REDACTED] *See* Ex I, attachment E, p.2. After the District Court reviewed the summaries of statements by [REDACTED] the District Court believed he had critically important information and viewed him to be so important that he was in the same category as [REDACTED]

[REDACTED] *See* Ex. H. Indeed, the District Court held that but for the Fourth Circuit’s decision in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), it would have ordered that Moussaoui have direct access to [REDACTED] *See* Ex. H. In short, [REDACTED] was a very important witness to Moussaoui’s case, and the existence of tapes of his interrogations certainly would have affected Moussaoui’s plea and sentence.

The Government’s Response itself raises factual issues about the taping of [REDACTED] interrogations that validate the need for a temporary remand. The Response contends that a tape of [REDACTED] interrogation was made in [REDACTED] [REDACTED] was interrogated about the September 11 plot.”

Response at 16. However, on even a quick review of the record, contrary to the Government's representation that is quoted above, there are in fact summaries of [REDACTED] interrogations that occurred *before* [REDACTED] during which [REDACTED] [REDACTED] discussed his lack of involvement in the "attacks on the US." *See* Exhibit I. It is unclear what was covered on the tapes, when the taping occurred, or whether the tapes were destroyed, but each of these issues should be reviewed by a finder of fact. As such, [REDACTED] clearly was a critical witness in the District Court proceedings, and a limited remand is necessary to determine the facts surrounding the taping of his interrogations and the possible destruction of those tapes.

In short, Moussaoui sought access to each of these witnesses, who were important to his case, and the Government represented to the District Court and defense counsel that all relevant evidence relating to these witnesses had been or would be produced. Now, it appears that the District Court and this Court decided issues relating to these witnesses without access to the tapes or knowledge of their existence, even though the Government had been asked specific questions about the taping of interrogations. Moussaoui asks for very limited relief in this Motion: merely that the case be temporarily remanded for determination of what happened here and why. That limited relief is certainly justified here.

II. THIS COURT SHOULD REJECT THE GOVERNMENT'S ARGUMENTS AGAINST REMAND.

A. The Existence And Destruction of Videotapes of Interrogations of Materials Witnesses Is Not Moot.

The Government's main argument against temporary remand is that the existence or destruction of the video and audio tapes is moot in light of Moussaoui's plea. Not so.

Even the Government admits that Moussaoui may raise challenges to the plea itself, including whether the plea was entered knowingly, voluntarily, and with the benefit of advice of counsel. Response at 7. The disclosure that the interrogations of [REDACTED] and Zubaydah had been taped and that some tapes had been destroyed is directly relevant to the validity of Moussaoui's plea, and whether Moussaoui's plea was knowing, voluntary, and counseled.

It bears noting that the summaries produced to defense counsel were intended to be a substitute for actual access to the witnesses; as such, the process here was *sui generis* and resulted in discovery obligations for the Government that included, but were broader than other typical disclosure obligations.⁶ In other words, the intent of these productions was to afford Moussaoui with reliable information he would have received if he had been able to interview or depose the enemy combatants. Moreover, at the time of his plea, Moussaoui made clear that the enemy combatant and substitutes issue was very important to his decision to

⁶ See *United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004) (noting that the purpose of the substitution was to put Moussaoui "in the position he would be in if the classified information (here the depositions of the witnesses) were available to him"); *id.* at 482.

plead guilty, *see* Motion to Remand at 11; consequently, the existence and/or destruction of tapes would have affected the plea. Moreover, the District Court held that the witness statements were important to the sentencing process; *see* Ex. O, and as noted below, sentencing issues in this case are still important in this appeal. [REDACTED] for instance, testified at trial through the substitutions, and the tapes of his statements would also plainly have been discoverable under the Jencks Act, 18 U.S.C. § 3500, or on other typical bases. As such, a remand is necessary for the District Court to determine the facts relating to the tapes and the effect on the plea and sentence here.

Moreover, bad faith destruction of “potentially useful” evidence by the Government is a violation of Due Process. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988); *Lovitt v. True*, 403 F.3d 171, 186 (4th Cir. 2005); *cf.* *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (“[T]he bad faith manipulation of evidence on the part of the police cannot be countenanced.”). Counsel for the Government have made absolutely clear that they did not know about the taping prior to September 13, 2007 (Response at 16 n.10);⁷ however, the Government is responsible for the actions of the CIA here as well. *United States v. Perdomo*, 929 F.2d 967, 971 (3d Cir. 1991) (holding that *Brady* requires prosecutor to turn over

⁷ One statement in the October 25 Letter does raise an issue for the District Court in this regard: “The transcript of the audio tape previously existed and was contained within an intelligence cable.” *See* October 25 Letter at 3 and 3 n.4. The Government alone had access to the intelligence cables, which were not produced to defense counsel or the defendant. This raises the issue of whether diligence could have uncovered in the intelligence cables the existence or destruction of the tapes and whether there are similar indications in other intelligence cables.

information if it “is in the possession of some arm of the state”); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (*Brady* obligation extends not only to evidence in the prosecutor’s possession, given that the prosecutor is also required “to learn of any favorable evidence known to others acting on the government’s behalf” and to produce that evidence as well); *see also Monroe v. Angelone*, 323 F.3d 286, (4th Cir. 2003) (quoting *Kyles*).⁸ Moreover, under these circumstances – in which (1) the CIA and prosecutors worked closely throughout the prior proceedings; (2) the District Court specifically asked the CIA (and other agencies) about recordings many times; and (3) the Government was repeatedly asked to produce raw information about the interrogations from the CIA – it would be appropriate to hold the Government responsible for the actions of the CIA. *See United States v. Bin Laden*, 397 F. Supp. 2d 465, 481 (S.D.N.Y. 2005) (finding actions of Marshalls Service in withholding tapes of witness were imputed to the prosecution team).

The Southern District of New York considered a similar issue in *United States v. Bin Laden*, 2005 WL 287404 (S.D.N.Y. Feb. 7, 2005) (Ex. J) and *Bin Laden*, 397 F. Supp. 2d at 465, cases that actually relate to the trial of Wadih El-Hage and other al Qaeda terrorists. Following a trial and sentencing, counsel for the government disclosed that it had videotapes of the interviews of the

⁸ *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992) (remanding case “[b]ecause the government failed to check pertinent [police] files”); *Jean v. Collins*, 221 F.3d 656, 668 (4th Cir. 2000) (explaining that the *Kyles* rule addresses “the pragmatic question of how to keep the State from evading its *Brady* obligation”).

government's first trial witness, Jamal al-Fadl, but failed to disclose them prior to trial. 2005 WL 287404, at *7. El-Hage then moved for a new trial based on this new information. *Id.* at 8. The Southern District of New York made clear that the conduct of the marshals, who recorded the interviews and failed to turn over the tapes, would "presumptively be attributed to the prosecution team." *Id.* at 9. The District Court explained at length that this new evidence could be the basis for a new trial, but that it needed more information relating to the tapes, including the circumstances of the taping and the manner in which the tapes were discovered. *Id.* at 9. The District Court stressed that potential bad faith on the part of the Government was a critical factor in determining whether a new trial was appropriate. *Id.* at 9. Ultimately, the district court held a number of evidentiary hearings before it could ascertain the facts surrounding the recordings, and while the district court concluded that a new trial was not warranted, the procedural steps taken before reaching that conclusion permitted a full review by the Second Circuit. *See* 397 F. Supp. 2d at 518-19.

Remand is thus appropriate for the District Court to determine, among other things, whether the destruction in this case took place in bad faith and what evidence was on the tapes. For example, the press is reporting that the CIA destroyed the videotapes of Abu Zubaydah in *November 2005*. *See* Exhibit K. In the Moussaoui case, that was precisely the time period when the District Court was considering motions relating to Zubaydah and requesting that the Government make representations about the taping of detainee interrogations. Here is a rough

[REDACTED] and Zubaydah. The District Court stated: "Now, in terms of your wanting access to these other [REDACTED] witnesses, you're going to have to make a specific showing to me of what noncumulative information each of these witnesses would have that you don't already get from [REDACTED] all right? . . . once I have seen what specific additional information these [REDACTED] might be able to provide to the defense, then I can more realistically evaluate whether there's a need to engage in this balancing act." Exhibit P.

- On November 29, 2005, Pursuant to Protective Orders (Exhibit Q), the Government produced additional discovery on Zubaydah, including intelligence summaries. Nowhere in these productions did the Government produce the tapes or disclose the existence of the tapes.
- On December 7, 2005, in response to the Court's request on November 14, 2005, defense counsel filed an *ex parte* supplemental pleading describing the non-cumulative, exculpatory evidence possessed by Zubaydah and others. *See* Exhibit I. Once again, defense counsel had no information at the time about the existence or destruction of tapes.
- On February 28, 2006, the Court denied the motion for reconsideration filed by defense counsel with regard to Zubaydah. Exhibit R. The Court agreed with the Government that "the defendant ha[d] not offered sufficient reasons to justify reconsideration of [the] earlier decision denying access to this witness." *Id.*

The destruction of the Abu Zubaydah videotapes took place at precisely the time that (1) Judge Brinkema was considering a motion for access to Zubaydah by Moussaoui's lawyers; (2) the Government was representing that it would be producing all discovery related to Zubaydah; and (3) Judge Brinkema was asking that the Government "confirm or deny that it has video or audio tapes of these interrogations" of other detainees. Obviously, destruction of the videotapes in this context raises red flags, to say the least, but the District Court should investigate this matter in the first instance. As noted above, there are similar issues with respect to [REDACTED] that require a remand to the District Court.

B. The Sentencing Issues Are Not Moot

The evidence produced by the Government relating to Robert Cammaroto is certainly relevant. The Government's primary argument against a limited remand on this issue is that all issues in the sentencing are moot because Moussaoui did not receive a death sentence. This is not correct.

Prior to Moussaoui's plea, the District Court incorrectly concluded that at least one of the charges to which Moussaoui pled only permitted a sentence of either death or life imprisonment. In truth, each of the charges also had an option of a term of years. When the jury concluded that Moussaoui was death eligible, the District Court thus felt it was without discretion to impose anything except a life sentence if the jury did not actually recommend a sentence of death. Thus, when the jury did not recommend imposition of the death sentence, the judge automatically imposed a life sentence.

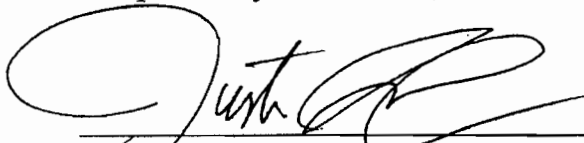
As noted in the Motion to Remand, if Cammaroto or another aviation evidence witness had not been substituted, the Government conceded that it could not submit the death eligibility issue to the jury. As a result, the judge would have conducted the sentencing, with the discretion to impose either life sentences or a term of years. Moreover, without the finding that Moussaoui directly caused a death, the pre-sentence reports could have recommended a term of years. Thus, Cammaroto's substitution *did* affect the sentence Moussaoui received, and this issue cannot, as a matter of law, be moot.

Further, the evidence relating to Cammaroto is troubling. Cammaroto and the Government made specific representations to the District Court in order to permit substitution, and more importantly, because Cammaroto claimed to be untainted, defense counsel did not cross-examine him about the taint issues, and the District Court did not instruct the jury about taint. Given that this issue arises from an issue that was so important to the District Court, a limited remand is appropriate.

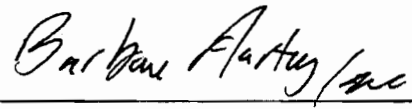
CONCLUSION

For the reasons set forth above, Moussaoui respectfully requests that this Court temporarily remand this case to the District Court for consideration of the recent Government disclosures and correspondingly stay the briefing schedule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on December 17, 2007, a copy of the foregoing pleading, with the exception of Exhibit I (which was filed *ex parte* and under seal) was served on the Court Security Officer for distribution to the following counsel:

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A handwritten signature in cursive script, reading "Danielle M. Stanton". The signature is written in black ink and is enclosed within a thin, hand-drawn oval border.