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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES,)
)
)
 Appellee,)
)
 vs.)
)
 ZACARIAS MOUSSAOUI)
)
)
 Appellant.)

FILED
FEB 06 2008
US Court of Appeals
4th Circuit

No. 06-4494
Crim No. 01-455-A

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AND
FILED UNDER SEAL**

**APPELLANT'S SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION TO REMAND AND
CONTESTED MOTION FOR ACCESS TO TAPE AND TRANSCRIPT**

In a letter dated December 18, 2007 ("December 18 Letter"), the Government made two new disclosures relating to the taping of witness interrogations. Based on those two disclosures, Zacarias Moussaoui, through undersigned counsel, respectfully submits this Supplemental Memorandum in support of the Contested Motion for a Limited Remand Based on the

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Government's Disclosure of Incorrect Declarations, Testimony, and Representations ("Motion to Remand").¹

In addition, the December 18 Letter disclosed that the Government currently possesses a videotape on which one detainee apparently confesses to a role in the attacks of September 11, 2001. The Government has not produced either the videotape or the transcript thereof to undersigned counsel. For the reasons set forth below, this Court should remand the case as requested and order production of the videotape and transcript.

DISCUSSION

I. The Existence of the Tape of the [REDACTED] Interrogation Justifies Remand.

Apparently through no fault of the prosecuting team, the Government has made a series of piecemeal disclosures – relating to the videotaping of certain detainees – over several weeks. Indeed, even in the December 18 Letter, the Government notes that it is still investigating the facts relating to the videotapes

¹ Appellant filed his Reply in support of the Motion to Remand on December 17, 2007. The next day, the Government filed the December 18 Letter. The Government does not object to the filing of this Supplemental Memorandum, and Appellant does not object to the Government filing a sur-reply relating to matters in this Supplemental Memorandum if the Government so chooses. Appellant reserves the right to respond further if necessary.

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and may further supplement its disclosures in the coming weeks. This context further validates the need for a temporary remand: The District Court is in the best place to see that the disclosures are complete and to determine the facts surrounding these disclosures in a fashion that this Court may review. To proceed with briefing a direct appeal without the facts or conclusions on these important issues disadvantages the parties and this Court.

Second, the disclosure that the Government has had, since [REDACTED] a videotape on which [REDACTED]

[REDACTED]

recording was made on [REDACTED] before Moussaoui's guilty plea. Moussaoui had long been accused of being [REDACTED]

[REDACTED]

[REDACTED] Despite the obvious significance of the recording and transcript, Moussaoui and his counsel do

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not appear to have received even a summary of [REDACTED] statements.²

The Government states in the December 18 Letter that this important disclosure does not justify a remand because (1) defense counsel did not request access to [REDACTED] and (2) the transcript of the videotape is consistent with the substitution admitted at trial. Neither of these circumstances should sway this Court from a limited remand. [REDACTED] had been long identified as a critical witness and the Government had been producing to defense counsel summaries of statements from [REDACTED] prior to Moussaoui's plea. The existence of a videotaped confession [REDACTED] [REDACTED] requires some review – including comparing the taped statements to precisely what defense counsel had and when – before dismissing it in the summary fashion suggested by the Government.

This Court should accordingly grant a limited remand for review of this disclosure and its effect on the plea and sentence.

² Because (1) the other evidence produced during prior proceedings is not clearly sourced or dated and (2) undersigned counsel have not had access to the videotape or transcript of this interrogation, it is unclear whether substitutes of this recording were previously produced.

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II. The Circumstances Surrounding the Government's Knowledge of the Existence and Destruction of the Zubaydah Recordings Requires Further Inquiry by the District Court.

The December 18 Letter also disclosed that an unidentified Assistant United States Attorney ("AUSA") knew about the existence and destruction of the tapes of Abu Zubaydah no later than February or March 2006. Moreover, in late February or early March 2006, the unidentified AUSA may have informed then-Assistant United States Attorney Robert Spencer, one of the Government prosecutors in this case, that the CIA made, and later destroyed, recordings of the interrogations of Zubaydah. The timing is important here because, as this Court will recall from prior briefing on this issue, the District Court was still considering whether to permit access to Zubaydah in late February 2006, *see* Exhibit R to Motion to Remand, and the death eligibility phase of Moussaoui's trial began in early March 2006.

We are reticent – based on the vague language in the December 18 Letter – to make any suggestions at this point about what happened and the consequences therefrom. Indeed, the District Court is in the best position to determine what actually happened and its relevance. The fact that any prosecutor in the same

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office knew about the existence and destruction of these tapes is surely important evidence. Moreover, among other things, the Government's disclosure gives rise to at least the following questions:

- Who else in the U.S. Attorney's Office knew about the existence and destruction of the tapes relating to Abu Zubaydah, and when did they know?
- Who potentially told Mr. Spencer about the recordings?
- When, precisely, did Mr. Spencer potentially find out about the recordings?
- Assuming Mr. Spencer learned of the recordings and their destruction, why was that not disclosed to the District Court at the time?
- Was anyone else in the office consulted in the decision to destroy any tapes?

In short, the December 18 Letter gives rise to many more questions than it resolves. Accordingly, this Court should grant a limited remand of this matter to the District Court for further inquiry.

III. The Government Should Produce the Tape and Transcript To Defense Counsel.

In the copy of the December 18 Letter produced to defense counsel, the Government does not attach either the tape or the transcript of the recording of the [REDACTED] interrogation of [REDACTED]. There is absolutely no justification for

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refusing to produce this to defense counsel. The transcript clearly contains highly relevant, exculpatory disclosures; defense counsel are cleared at the TS/SCI level; and there is plainly a "need to know" this information. Without access to this transcript, it is very difficult, if not impossible, for undersigned counsel to explain the importance of the particular statements made by [REDACTED]. For these reasons, this Court should order production of the tape and the transcript.

Pursuant to Local Rule 27(a), on December 21, 2007, undersigned counsel contacted David Novak, counsel for the Government, and requested access to the tape and transcript. Mr. Novak indicated that the Government would not provide such access.

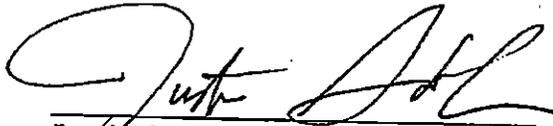
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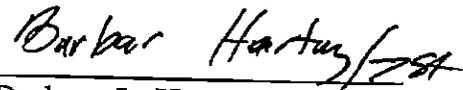
CONCLUSION

For the reasons set forth above, this Court should temporarily remand this matter to the District Court and should order that the Government produce the tape and transcript of the [REDACTED] interrogation of [REDACTED] to defense counsel.

Respectfully submitted,



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December 26, 2007

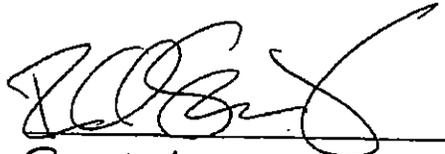
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CERTIFICATE OF SERVICE

I certify that on December 26, 2007, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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