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September 22, 2009

Patricia S. Conner, Clerk
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

Re: *United States v. Zacarias Moussaoui*
Case No. 06-4494 (Argument Scheduled for September 25, 2009)

Dear Ms. Conner:

We respectfully submit this letter pursuant to Federal Rule of Appellate Procedure 28(j) and Local Rule 28(e).

As appellant argued in his opening brief (Br. 118-25) and before the Court last January (Open Session Tr. 8-10, 14-15, 23-25, 63-64, Jan. 26, 2009), the violation of Mr. Moussaoui's rights under *Brady v. Maryland*, 373 U.S. 83 (1963), requires vacatur of his plea. We write because after the January 2009 argument, the Fifth Circuit held that "a guilty plea precludes the defendant from asserting a *Brady* violation." *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009).

For several reasons, the Fifth Circuit's decision should not sway this Court's consideration of Mr. Moussaoui's Fifth Amendment claims. First, *Conroy*'s holding is contrary to the weight of federal authority. Six Circuits have held that "even a guilty plea that was [otherwise] 'knowing' and 'voluntary' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988); *see also Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994); *Ferrara v. United States*, 456 F.3d 278, 290-97 (1st Cir. 2006) (concluding that *Brady* violation along with other circumstances required vacatur of plea); *Campbell v. Marshall*, 769 F.2d 314, 317-24 (6th Cir. 1985) (concluding there is no *per se* bar on collateral

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attack of a guilty plea based on an alleged violation of *Brady* but denying relief); *White v. United States*, 858 F.2d 416, 421-24 (8th Cir. 1988) (same).

Second, *Conroy*'s analysis is inconsistent with the Supreme Court's reasoning in *United States v. Ruiz*, 536 U.S. 622 (2002). As the Seventh Circuit noted in discussing *Ruiz*, "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003).

Respectfully submitted,

Justin S. Antonipillai
Counsel for Mr. Moussaoui

Cc: Barbara L. Hartung, Esq.
Attached Service List

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/ s / Robert A. Schwartz