~~TOP SECRET//HUMINT//ORCON/NOFORN//MR~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. ZACARIAS MOUSSAOUI, Appellant.	)	Docket No. 06-4494

Appellee's Response in Opposition to Appellant's Motion for a Limited Remand Based on the Government's Disclosure of Incorrect Declarations, Testimony, and Representations

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The United States, Appellee, respectfully opposes Appellant's Motion for a Limited Remand. Moussaoui claims that two recent disclosures by the Government — one about an error in CIA declarations filed in this case and the other about e-mails involving a witness in the penalty phase — "require[] factual development and legal conclusions before this Court can conduct its review." App. Mot. at 2. Those disclosures, however, have no impact on any cognizable issue that Moussaoui may properly raise in this appeal in light of his guilty plea, and the jury's refusal to sentence him to death. A remand to the district court is therefore unwarranted, and it would only cause unnecessary delay in this appeal.

Relevant Procedural History

As the Court knows, this case involved significant pretrial litigation on Moussaoui's access to enemy combatant witnesses, which the Court ultimately resolved in *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). When the district court initially confronted the issue, it ordered the Government to make [redacted] available for a deposition. The Government appealed, and this Court ordered the district court to consider the use of substitutions. *United States v. Moussaoui*, 2003 WL 1889018 (4th Cir. 2003). On remand, the district court ordered the Government to determine, *inter alia*, whether interrogations of [redacted] were recorded. Def. Ex. C at 11-13. On May 9, 2003, the

Government filed an *ex parte* declaration from the CIA stating that the interrogations of [redacted] were not recorded. The district court also granted the Government's accompanying CIPA § 4 motion, allowing the Government to disclose to the defense a substitution for the contents of the *ex parte* declaration, which stated:

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

Def. Ex. D. Thereafter, the district court rejected the Government's proposed substitutions for [redacted] finding them to be unreliable, incomplete and inaccurate. Def. Ex. E at 6-13. One of the reasons the district court cited as a basis for rejecting the substitutions was that the interviews of [redacted] had not been recorded, "leaving the Court unable to determine whether the intelligence reports accurately reflect[ed] [redacted] statements." *Id.* at 9.

On appeal again, this Court reversed the district court "insofar as it held that it is not possible to craft adequate substitutions," *Moussaoui*, 382 F.3d at 457, and determined that substitutions could be crafted under certain guidelines for the [redacted] enemy combatant witnesses then at issue: [redacted] *Id.* at 477-80. Addressing

the district court's complaint that it could not determine whether the interviews of the enemy combatants were reliable or accurate because they were not recorded, this Court found that:

> those who are conducting the interrogation of the witnesses have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives. These considerations provide sufficient indicia of reliability to alleviate the concerns of the district court.

Id. at 478 (classified version).

When the case returned to the district court, Moussaoui indicated that he wanted to plead guilty to all of the charges in the indictment. Before accepting his guilty plea, the district court met *ex parte* with Moussaoui and one of his attorneys on April 20, 2005. *See* Gov. Ex. B. The district court found him to be competent and noted that he was going to be pleading guilty against the advice of his counsel. Gov. Ex. B at 20-22, 27. Moussaoui also acknowledged that he understood that pleading guilty would eliminate his ability to raise constitutional challenges that arose before his guilty plea. Gov. Ex. B at 19.

On April 22, 2005, Moussaoui pleaded guilty to all of the charges in the indictment without the benefit of a plea agreement with the Government, and thereby exposed himself to a death sentence. During the Rule 11 colloquy,

Moussaoui again acknowledged that he understood that he waived any legal challenges, including his claims of access to the enemy combatant witnesses, which occurred before his guilty plea. Gov. Ex. I at 15-17, 27.

After accepting Moussaoui's guilty plea, the district court ordered the Government to disclose various information about the interrogation of the enemy combatant witnesses, including whether interrogations were recorded. Def. Ex. H at 1-2. At the Government's request, the district court reconsidered most of that order, but still directed the Government to "confirm or deny that it has video or audio tapes of these interrogations." Gov. Ex. C at 4.[1] The Government then provided a Declaration from the CIA dated November 14, 2005, in which it stated that the "U.S. Government does not have any video or audio tapes of the interrogations of [redacted] *See* 11/14/05 Declaration (Docket No. 1369) at 3.

Thereafter, the district court conducted a bifurcated penalty phase hearing that began with jury selection on February 6, 2006. The first phase addressed whether the Government could establish the threshold factor set forth in 18 U.S.C. § 3591(a)(2)(C), which would render Moussaoui eligible for a death sentence.

[1] At the time of the order, three enemy combatant witnesses had been found to have material testimony, which Moussaoui was entitled to present to the jury: [redacted] *Moussaoui*, 382 F.3d at 473-74.

During this phase, the Government learned that an attorney for the Transportation Security Administration (TSA), Carla Martin, had violated the district court's sequestration order by sending a series of e-mails — including one with the transcript from the first day of the trial — to witnesses from the TSA and the Federal Aviation Administration (FAA), including Lynne Osmus and Claudio Manno.

The Government promptly notified the district court and defense counsel of the violation by letter on March 13, 2006. Def. Ex. N. The district court conducted an evidentiary hearing on March 14, 2006, and, thereafter, struck all of the Government's evidence involving the TSA and FAA. The district court reconsidered on March 17, 2006, and permitted the Government to offer an aviation witness not tainted by Martin's conduct. The district court conducted a "taint" hearing on March 21, 2006, and, after hearing the testimony of Robert Cammaroto, it found him to be untainted. Gov. Ex. D.

The penalty phase reconvened, and Moussaoui testified during both parts, stating that he was to fly a fifth plane into the White House as part of the attack on September 11, 2001. *See* Gov. Ex. E, *passim*, F at 3690-93. The jury found that the Government proved the threshold factor beyond a reasonable doubt, but it ultimately declined to impose a death sentence during the second phase.

On May 4, 2006, the day after the jury's verdict, the district court sentenced Moussaoui to life imprisonment. On May 8, 2006, Moussaoui moved to withdraw his guilty plea, saying that, in light of the jury's verdict, he now believed that he could receive a fair trial from an American jury. Gov. Ex. G. The district court denied the motion that same day. Gov. Ex. H. Moussaoui then appealed.

Argument

I. The Disclosures Have No Impact on Any Cognizable Issue

This Court has remanded cases to the district court pursuant to Fed. R. App. P. 10(e) only where the factual inquiry could have an impact on the resolution of issues before the Court. *Compare, e.g., United States v. Dyess*, 478 F.3d 224, 242 (4th Cir. 2007) (remand for determination of the impact of agent's misconduct on sentencing calculation), *with United States v. Maynard*, 77 Fed. Appx. 183, 2003 WL 22310778, at **3-4 (4th Cir. 2003) (unpublished) (rejecting request for remand based on newly discovered evidence because "at most" it merely impeached Government witness and was cumulative of other evidence at trial). Here, the issues on which Moussaoui bases his request for a remand — the two recent Government disclosures — do not have any bearing on the issues before this Court. His complaints about errors in the original CIA declarations address constitutional claims that he unequivocally waived as to his guilt when he pleaded

guilty, and which became moot as to his sentencing hearing after the jury declined to sentence him to death. Moreover, the e-mail exchange between Martin and Cammaroto, at worst, constitutes after-discovered evidence that merely impeaches Cammaroto. That issue is also moot because the jury refused to impose a death sentence. Consequently, an evidentiary hearing to develop facts for these issues would have no bearing on this appeal.

A defendant's challenge to a guilty plea conviction "is ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989). The limited confines of the challenge reflect the grave nature of pleading guilty, as the Supreme Court has made clear:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, *he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.*

Tollett v. Henderson, 411 U.S. 258, 267 (1973) (emphasis added); *see also United States v. Willis*, 992 F.2d 489, 490 (4th Cir. 1993) (a knowing and voluntary guilty plea "constitutes a waiver of all nonjurisdictional defects"). In this case, both before and during the Rule 11 colloquy, Moussaoui acknowledged that he understood his guilty plea precluded him from raising any constitutional

challenges to his guilt. Gov. Ex. B at 19; Gov. Ex. I at 15-17, 27.

In *Broce*, the Supreme Court held that the defendant's guilty plea precluded him from raising a double jeopardy challenge to his conviction. 488 U.S. at 565. The defendants asserted that they were not advised of, and did not consider, their ability to raise a double jeopardy challenge to the charges before they pleaded guilty, but the Court held that "conscious waiver is [not] necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required . . . . Relinquishment derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." *Id.* at 573-74.

More recently, the Supreme Court has held that the Constitution does not require the Government to disclose impeachment information about its witnesses before a defendant's guilty plea. *United States v. Ruiz*, 536 U.S. 622 (2002). In doing so, the Court made clear that "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees." *Id.* at 628-29. The Court went on to reject the notion that the failure to disclose impeachment information undermines the voluntariness of a guilty plea, finding that "impeachment information is special in relation to the *fairness of*

a trial, not in respect to whether a plea is *voluntary* ('knowing,' 'intelligent,' and 'sufficiently aware')." *Id.* at 629 (emphasis in original). The Court explained that "the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *Id.* at 630.

To the extent that Moussaoui seeks a remand to develop a record for his compulsory process claim or the effect that the Cammaroto e-mails had on the capital penalty phase, those issues are now moot in light of the jury's refusal to sentence him to death. This Court recently explained that "[s]imply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the out-come." *Incumaa v. Ozmint*, __ F.3d __, 2007 WL 3133132, at *4 (4th Cir. Oct. 29, 2007) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). In an opinion written by Chief Judge Williams, the Court explained: "Because the requirement of a continuing case or controversy stems from the Constitution, it may not be ignored for convenience's sake." *Incumaa*, at *3; *see also id.* at *7 ("the Constitution forbids [the Court] from pontificating about abstractions in the law or merely giving advice about the potential legal

deficiencies of a law or policy when no ongoing controversy exists with respect to that law or policy."). Like *Incumaa*, any ruling in favor of Moussaoui by the Court with regard to the capital penalty phase "would have no practical impact," because Moussaoui did not receive a death sentence. *Id* at *4.[2] Moussaoui's request for a remand constitutes nothing more than an overture for a meaningless factual inquiry into issues that can afford him no relief — exactly the type of expedition that Chief Judge Williams cautioned against in *Incumaa*.[3]

II. The Errors in the CIA Declarations Have No Impact on the Voluntariness of Moussaoui's Guilty Plea

As set forth above, the only attack that Moussaoui may levy on his guilty plea is whether it was knowing and voluntary. The Government's disclosure on October 25, 2007, explaining that it learned that previous declarations submitted by the CIA contained an error because the CIA had in its possession [redacted]

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[2] *See also LeCroy v. Secretary, Florida Dept. of Corrections*, 421 F.3d 1237, 1268 (11th Cir. 2005) ("Because the defendant's death sentence has been vacated, we dismiss as moot his § 2254 petition to the extent it challenges his death sentence."); *Hyman v. Aiken*, 824 F.2d 1405, 1412 (4th Cir. 1987) (noting that, in an earlier opinion, the Court's vacating of death sentence rendered challenges to counsel's effectiveness at sentencing hearing moot).

[3] Moussaoui states that any errors that occurred during the penalty phase are not moot because he intends to "request a re-sentencing, before the district court, with the proper sentencing options available (i.e., life imprisonment or a term of years)." Mot. at 19. We fail to see what this request has to do with Moussaoui's death penalty eligibility and what may have occurred during the capital penalty phase.

recordings [redacted] has no bearing on the voluntariness of Moussaoui's guilty plea. A remand, therefore, would be unproductive.

"When a defendant enters a plea of guilty and later seeks to withdraw it, the defendant bears the burden of demonstrating that withdrawal should be granted . . . . In [a post-sentence challenge to a guilty plea], a district court only abuses its discretion in denying withdrawal if the underlying plea proceedings 'were marred by a fundamental defect that inherently resulted in a complete miscarriage of justice, or in omissions inconsistent with rudimentary demands of fair procedure.'" *Dyess*, 478 F.3d at 237 (quoting *United States v. Ubakanma*, 215 F.3d 421, 425 (4th Cir. 2000)). The Court examines several factors in determining whether a defendant should have been permitted to withdraw his guilty plea.[4] A central focus of the Court's inquiry is whether the Rule 11 guilty plea colloquy was properly conducted by the district court. *United States v. Bowman*, 348 F.3d 408, 414 (4th Cir. 2003).

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[4] As set forth in *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991), when determining whether a defendant should have been permitted to withdraw his guilty plea, a court considers: (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion; (4) whether the defendant has had close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the Government; and, (6) whether it will inconvenience the court and waste judicial resources. *Ubakanma*, 215 F.3d at 424.

The Court applies a strong presumption that the guilty plea is final and binding if the Rule 11 colloquy was properly conducted. *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992); *see also Bowman*, 348 F.3d at 417 (the Rule 11 colloquy is not "a procedural game in which pieces are moved and manipulated to achieve a result that can beat the system").[5] A defendant may in limited circumstances be able to overcome the presumption that his plea was involuntary if can show "that some egregiously impermissible conduct . . . antedated the entry of his plea." *Ferrara v. United States*, 456 F.3d 278, 290 (1st Cir. 2006) (citing *Brady v. United States*, 397 U.S. 742, 755 (1970)). But he must specifically show that "the misconduct influenced his decision to plead guilty." *Id.*; *see also Brady*, 397 U.S. at 755 (explaining that the misconduct must "induce" the decision).

Nevertheless, a defendant does not "automatically get an evidentiary hearing as a matter of right whenever he seeks to withdraw his guilty plea." *Moore*, 931 F.2d at 248. Instead, the defendant must demonstrate that the evidentiary hearing affects his ability to withdraw his guilty plea. *See United States v. Avellino*, 136 F.3d 249, 260 (2d Cir. 1998) (defendant was not entitled to

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[5] When we reach the briefing stage on the merits, we will of course detail the reasons that the district court properly denied Moussaoui's motion to withdrawal his guilty plea. For the purposes of this motion, however, it suffices to say that Moussaoui has not explained how the errors in the CIA's declarations have any bearing on the factors used to evaluate motions to withdraw guilty pleas.

evidentiary hearing on motion to withdraw guilty plea based on evidence that government's key witness had perjured himself because the evidence was in no way material to defendant's decision to plead guilty); *United States v. Faris*, 388 F.3d 452, 458 (4th Cir. 2004) (rejecting al Qaeda defendant's request for evidentiary hearing on motion to withdraw guilty plea based on inconsistencies between the defendant's Statement of Facts and a FBI-302). Here, a remand to the district court will not result in the discovery of any facts that could have any bearing on his ability to withdraw his guilty plea. Indeed, Moussaoui freely admitted his guilt, testified twice during the penalty phase that he was to fly a fifth plane into the White House as part of the September 11 plot, and only moved to withdraw his guilty plea after the jury spared his life.

Furthermore, the existence of the recordings [redacted] did not prejudice Moussaoui in the district court. As explained above, the lack of recordings served as one of the reasons that the district court rejected the use of the original substitutions. Moreover, as the transcripts that we have produced for the Court demonstrate, the recordings do not contain any information about Moussaoui or the September 11 plot, let alone any "egregiously impermissible

conduct."[6] Thus, Moussaoui was denied neither the ability to advance his challenge to the substitutions, nor any *Brady* material.[7]

Moussaoui nonetheless argues that the district court should conduct an evidentiary hearing on six points. Mot. at 9-10. None of the proposed areas of inquiry, however, have any relevance to the voluntariness of the defendant's guilty plea. Thus, unlike the situation in *Dyess* where an evidentiary hearing was necessary to determine the impact of the agent's misconduct on the calculation of the defendant's sentencing, Moussaoui seeks a factual inquiry about issues that have no bearing on his appeal.

With regard to his first request, the events leading up to the CIA's errors have nothing to do with whether the district court erred by denying the defendant's

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[6] Moussaoui's contention that the substance of the recordings is irrelevant also lacks merit. The Government never asserted that the intelligence reporting pertaining to the interrogations of the enemy combatant witnesses were verbatim recitations of their interviews. Instead, we emphasized, and this Court agreed, that the intelligence community had every incentive to accurately record any information of value for consumption by national security agencies. *See Moussaoui*, 382 F.3d at 478.

[7] *Cf. Ferrara*, 456 F.3d at 290-97, where the First Circuit found that the Government committed prosecutorial misconduct by failing to disclose a witness's recantation of his statement that incriminated the defendant in a murder case, and that absent the prosecutorial misconduct, there was a reasonable probability that the petitioner would not have pleaded guilty. This case in no way resembles the scenario in *Ferrara*. There is no egregious misconduct on the part of the Government since we did not even learn about the tapes until September of this year. Second, as we have explained, the tapes have no bearing on Moussaoui or the September 11 attacks, and provide no basis even for speculating that they could have prevented Moussaoui from pleading guilty, let alone justifying a remand for an evidentiary hearing.

motion to withdraw his guilty plea. Again, the issue before the Court in this appeal is the voluntariness of the defendant's guilty plea, not the quality of the CIA's work.

Moussaoui's second request — that the district court view the recordings — likewise has no relationship to the defendant's guilty plea. We have already supplied both this Court and the district court with the transcripts for the recordings. Moreover, this Court can view and/or listen to the recordings, as can the district court. Should the Court want to view and/or listen to the recordings, we will certainly supply the Court with the recordings. In any event, the recordings themselves have no legal nexus to the defendant's guilty plea.[8]

The remainder of Moussaoui's proposed areas of inquiry address the existence of recordings for the six other enemy combatant witnesses. We have already stated in our letter dated October 25, 2007, that the investigation has uncovered no additional recordings of [redacted]. Furthermore, we have asked the relevant agencies to determine whether recordings exist for the other enemy combatant witnesses at issue in this prosecution [redacted]

[8] Moussaoui suggests that the recordings may depict "torture or other coercive methods of interrogation." Mot. at 13. To the contrary, the videotapes show [redacted] sitting in a chair answering questions.

[redacted] To date, we have been informed that no other tapes exist or did exist in the past for [redacted] We have been informed that one videotape was made for [redacted] but it was recorded [redacted] was interrogated about the September 11 plot.[9] Although the existence of the recordings has no bearing on the merits of this appeal, the Government will promptly disclose to the defense the existence of any recordings pertaining to the [redacted] detainees at issue in this case if we learn of any such recordings.[10]

While the errors in the CIA declarations may provide fodder for the defense to criticize the Government, they do not provide a basis for remand for an evidentiary hearing in the posture of this case. This Court should reject the defendant's overture to engage in a diversionary exploration of the events

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[9] As of this writing, we have been unable to verify whether the recording still exists, and conclusively determine that it was the only recording made. We continue to investigate and if we learn of any additional, relevant facts, we will make appropriate disclosures, as we did regarding th[redacted] recordings.

During our investigation that followed our learning of the existence of the[redacted] recordings, we also learned that, at one time, recordings did exist for enemy combatant Abu Zubaydah. The district court ruled on January 31, 2003, however, that Zubaydah lacked material evidence, so he was no longer at issue when the district court raised the issue of recordings for the first time on May 7, 2003. We understand that — for reasons unrelated to this case — the CIA destroyed the recordings involving Zubaydah in 2005.

[10] To be clear, the prosecution team did not learn of the existence of *any* recordings until September 13, 2007.

surrounding the mistakes when such needless digression would afford the defendant no support for any issue that could offer him relief.

III. The Cammaroto E-Mails Relate Solely to the Penalty Trial and They Do Not Provide a Basis for Vacating Moussaoui's Guilty Plea

Moussaoui's demand for an evidentiary hearing to explore inconsequential e-mails between Cammaroto and Martin should also be rejected. The e-mails consist of three "threads," of which only the last can arguably be said to be inconsistent with Cammaroto's testimony during a taint hearing on March 21, 2007.

Moussaoui simply misunderstands the communication in the first two e-mail threads. The first thread in January 2006 involves Cammaroto answering a question posed by Martin about the airline security level in effect on September 11, 2001. The answer to the question was ultimately found by Martin in a document. Although Lynne Osmus initiated the e-mail exchange, her e-mail on January 19, 2006, at 1:27 p.m., was sent to Martin with a copy to two others. Martin then forwarded the e-mail to Cammaroto, and the e-mail exchange was then between Martin and Cammaroto with others, including Osmus, being copied. Nothing about this e-mail exchange is inconsistent with Cammaroto's testimony.

The second thread in February 2006 references the use of Security

Directives, a composite Security Directive that the Government considered using at trial, and other documents that were at issue for use at trial. As a security officer at TSA, Cammaroto was involved in the declassification process of documents for use at trial, and the e-mail thread pertains to his comments on the propriety of the use of these documents from his security officer perspective.[11] Cammaroto testified to his role in this process during the taint hearing. *See* Gov. Ex. D at 23, 27-29. The second thread of e-mails is therefore not inconsistent with Cammaroto's testimony.

The third thread contains the only information arguably inconsistent with Cammaroto's testimony during the taint hearing, because he testified that the last e-mail contact that he could recall having with Martin was "about February 22." Gov. Ex. D at 26. The third thread reveals that, on March 10, 2006, Cammaroto responded to an e-mail sent by Martin that asked Cammaroto and another person to review a Glossary of Aviation Terms that the district court had suggested

[11] During the last e-mail in this thread on February 27, 2006, Cammaroto merely commented about who actually had a role in the security directive process, distinguishing the responsibilities held by prospective witnesses Claudio Manno and Lynne Osmus. That comment did not address the evidence; instead, it contained his suggestion that Osmus was in a better position to testify about Security Directives, because she supervised him at the time that they were promulgated.

creating for use by the jury.[12] At worst then, Cammaroto erred when he failed to recall an inconsequential March 10, 2006, e-mail exchange with Martin.

Moussaoui nonetheless demands a remand for an evidentiary hearing based on Cammaroto's failure to recall this trivial e-mail. The Court should reject this request for two reasons. First, because Cammaroto's testimony was offered by the Government during the penalty phase in support of its effort to secure a death sentence, the point is now moot. *See Incumaa, supra*. Second, even assuming that Cammaroto's failure to recall the March 10 e-mail was inconsistent with his testimony, it constitutes after-discovered evidence that merely could have been used to impeach Cammaroto.

This Court has repeatedly stated that an after-discovered evidence claim cannot succeed if the evidence consists merely of impeachment evidence. *See United States v. Lofton*, 233 F.3d 313, 318 (4th Cir. 2000); *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995); *United States v. Custis*, 988 F.2d 1355, 1359

[12] Moussaoui tries to exaggerate the importance of this e-mail by saying that "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." Motion at 18 (emphasis in original). The use of the proposed Glossary of Aviation Terms was suggested by the district court to both parties in order to aid the jury in understanding the numerous aviation terms that were referenced during the trial. The Glossary was not a piece of evidence and, had Martin not violated the sequestration order, it would have been reviewed by both sides and then tendered to the jury by agreement. Martin was merely asking Cammaroto to serve as a proofreader. The suggestion by the defense that something more sinister was afoot is a stretch, to say the least.

(4th Cir. 1993). Indeed, in *United States v. Maynard*, 77 Fed. Appx. 183, 2003 WL 22310778, at **4 (4th Cir. 2003), the Court rejected a request for a remand to consider after-discovered evidence that impeached a Government witness. *See also United States v. Henry*, 482 F.3d 27, 33 (1st Cir. 2007) (rejecting remand for evidentiary hearing based on after-discovered evidence that impeached informant who made drug buys); *United States v. Lucca*, 377 F.3d 927, 932-33 (8th Cir. 2004) (rejecting remand for *Franks* hearing based on after-discovered evidence that undermined the credibility of affiant for search warrant). Consequently, unlike *Dyess*, an evidentiary hearing could not produce evidence that would support a claim that could provide Moussaoui any relief.

Conclusion

For the foregoing reasons, Appellee respectfully submits that Moussaoui's Motion for Limited Remand should be denied.

Respectfully submitted,

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Dated: December 6, 2007

Certificate of Service

The undersigned hereby certifies that on the 6th day of December, 2007, a copy of the Appellee's Response was provided to the Court Security Officer for delivery to the following attorneys for the Moussaoui:

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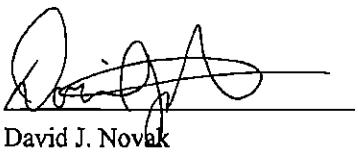
By: 
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