

FILED WITH
COURT SECURITY OFFICER
12/20/07 *J. Campbell*
DATE

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

UNITED STATES,)	
)	
)	
Appellee,)	
)	
vs.)	Docket No. 06-4494
)	
)	
ZACARIAS MOUSSAOUI)	
)	
)	
Appellant.)	
_____)	

**APPELLEE’S SUPPLEMENTAL RESPONSE TO
APPELLANT’S MOTION FOR LIMITED REMAND
AND APPELLEE’S OPPOSITION TO APPELLANT’S
MOTION FOR ACCESS TO TAPE AND TRANSCRIPT**

The United States, Appellee, respectfully submits this Supplemental Response to Appellant’s Motion for Limited Remand. Further, we respectfully oppose Appellant’s Motion for Access to Tape and Transcript.¹

¹ As Appellant states in his Supplemental Memorandum, we consented to his filing a Supplemental Memorandum following our most recent factual disclosure, dated December 18, 2007, to ensure that he had a full and fair opportunity to present his arguments in light of all the facts. Appellant likewise consented to our filing a Supplemental Response so that we had an adequate opportunity to address the merits of his arguments. Consequently, we respectfully

~~Derived from: Appellant’s 12/12/07 Motion~~

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I. Appellant's Motion for Limited Remand

At issue in this case are three separate and distinct categories of enemy combatant witnesses ("ECWs"). The first category consists of the [REDACTED] detainees addressed in the CIA declarations at issue: [REDACTED]

[REDACTED] The second category is constituted by [REDACTED] additional ECWs that the District Court found to possess relevant, material information to the penalty phase *after* Moussaoui pleaded guilty: [REDACTED]

[REDACTED] The last category includes the two ECWs for whom the CIA apparently destroyed recordings — Abu Zubaydah and Abd al-Rahim al-Nashiri — neither of whom the district court ever found material to Moussaoui's defense, and the latter of whom Moussaoui never even sought access. Throughout his Motion for Limited Remand and subsequent replies, Moussaoui has conflated these three categories of witnesses, mainly to leave the impression that a remand is necessary to sort out confusing factual

request that the Court accept this Supplemental Response. Further, after receiving our most recent letter, Appellant raised for the first time his Motion for Access to Tape and Transcript, and we respond to that Motion herein.

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questions. A proper analysis of each distinct category, however, demonstrates that there is no confusion, and certainly no basis for a remand to the district court.

A. [REDACTED]

The CIA declarations that contained the errors in this case were limited to [REDACTED] enemy combatant witnesses: [REDACTED]. The declarations were limited to those [REDACTED] because the district court in both its initial order dated May 7, 2003, and its order granting reconsideration on November 3, 2005, limited its question regarding recordings to only these [REDACTED] detainees.² Of the [REDACTED] our investigation has uncovered recordings only for [REDACTED] the three recordings described in our letter dated October 25, 2007. The transcripts of the three recordings contain no information about the September 11 plot or Moussaoui, and therefore provide no basis for the remand sought by Moussaoui.³

The existence of these three recordings has no impact on Moussaoui's guilty

² See Appellant's Motion for Limited Remand, Exs. C, D, and E, and Appellee's Response in Opposition to Motion for Limited Remand, Ex. C.

³ Moussaoui mistakenly concluded in his initial Reply that [REDACTED] discussed the September 11 plot in the videotaped interrogation session [REDACTED]. He is mistaken because he incorrectly assumed that a report of an interrogation bearing the date of [REDACTED] (see Exhibit F to Moussaoui's reply) memorialized an interrogation that took place on that day. In fact, the report cited by Moussaoui actually memorializes an interrogation that took place on [REDACTED] which is not relevant for these purposes.

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plea. See Government's Response in Opposition to Appellant's Motion for Limited Remand at 6-14 (citing *United States v. Ruiz*, 536 U.S. 622, 628-30 (2002); *United States v. Broce*, 488 U.S. 563, 565-74 (1989); *Tollett v. Henderson*, 411 U.S. 258, 267; *United States v. Willis*, 922 F.2d 489, 490 (4th Cir. 1993)).

Nor is there any conceivable prejudice with respect to the penalty phase, given the jury's decision not to impose a death sentence. *Id.* at 9-10 (citing *Incumaa v. Ozmint*, 507 F.3d 281, 285-89 (4th Cir. 2007)).

B. [REDACTED]

The second category is constituted by the [REDACTED] ECWs that the district court found to possess material information *after* Moussaoui pleaded guilty: [REDACTED]
[REDACTED] Of the [REDACTED] to our knowledge, [REDACTED] is the only one for whom there are videotapes. Again, however, there is no conceivable prejudice to Moussaoui.

First, there is no exculpatory information from the [REDACTED] interrogation session in question. Moussaoui's suggestions about [REDACTED]
[REDACTED] are meaningless. Moussaoui was never charged with [REDACTED]
[REDACTED] nor has the prosecution ever argued that *al Qaeda*

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intended him to be. Moussaoui's precise role, of course, was not relevant to his guilty plea. And, at the sentencing phase, Moussaoui testified that he was to pilot a fifth plane into the White House. [REDACTED]

[REDACTED] did nothing to undercut this theory, and actually supported it.⁴

Moussaoui's guilty plea is in no way undermined by this non-exculpatory recording of [REDACTED] even though it was made before the plea. There is no *Brady* — [REDACTED] neither mentions Moussaoui, nor admits to any meaningful foreknowledge of the September 11 plot. Moussaoui did not even seek access to [REDACTED] until after he pleaded guilty, and therefore even if the recording contained some sort of *Brady*, Moussaoui waived his right to it.

Nor can Moussaoui reasonably claim prejudice with respect to the penalty phase (for which he did seek access to [REDACTED] in light of the jury's favorable verdict to him. Even so, the information on the videotape is entirely cumulative of discovery concerning [REDACTED] that Moussaoui received well in advance of the penalty phase trial, as well as the substitution for [REDACTED] testimony that was ultimately admitted into evidence.

[REDACTED]

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C. Abu Zubaydah and al-Nashiri

The third category of ECWs covers the two enemy combatant witnesses — Abu Zubaydah and al-Nashiri — for whom the CIA apparently destroyed recordings. Al-Nashiri was simply never at issue in this case. Regarding Abu Zubaydah, the defense made two demands for his testimony and on both occasions the district court found that he lacked any material evidence. The district court denied the demand for Zubaydah's testimony before Moussaoui pleaded guilty, and denied a request for reconsideration during the penalty phase. These conclusions were firmly grounded in the district court's review of the reporting of Zubaydah's interrogations. The fact that videotapes once existed does not alter the substance of those interrogations, or the fact that Zubaydah had nothing material to say about Moussaoui, and certainly nothing that could possibly undercut Moussaoui's extensive admissions during his guilty plea and the penalty phase. There is simply no basis for Moussaoui to complain, and no conceivable reason to have the district court delve into this matter again.

Moussaoui implies that former AUSA Robert A. Spencer was "consulted" regarding destruction of Zubaydah videotapes. *See* Supplemental Reply, at 6

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(asking whether “anyone *else* in the office was consulted in the decision to destroy any tapes”; emphasis added). This is simply wrong. At the most, Mr. Spencer was told about the destruction of Zubaydah’s tapes months after it occurred. More fundamentally, whatever Mr. Spencer’s knowledge may have been at the time (he does not recall the relevant conversation) it certainly is of no consequence for these purposes, given Zubaydah’s immateriality to the case and the absence of any prejudice to Moussaoui.

II. Appellee’s Opposition to Motion for Access to Tape and Transcript

Appellant concludes by asking the Court to order the Government to provide him with a copy of the tape and transcript for the recording of [REDACTED]. Defense counsel lacks a “need to know” for this videotape and transcript. The interview addresses other matters not relevant to this case. Moreover, the trial is long over and anything possibly relevant is cumulative of other discovery he received. Courts routinely review materials *in camera* to determine whether they are discoverable. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987); *United States v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996); *Love v. Johnson*, 57 F.3d 1305, 1313 (4th Cir. 1995). Again, a comparison between the information in

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the transcript about [REDACTED] prospective role in the September 11 plot and the information contained in the substitution read to the jury demonstrates that Moussaoui was not denied access to any information that was material to his defense.

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Conclusion

For the foregoing reasons, the Government respectfully requests the Court to deny Appellant's Motion for Limited Remand and Appellant's Motion for Access to Tape and Transcript.

Respectfully submitted,

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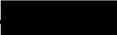
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Dated: December 28, 2007

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Certificate of Service

The undersigned hereby certifies that on the 28th day of December, 2007, a copy of Appellee's Supplemental Response was provided to the Court Security Officer for delivery to the following attorneys for Moussaoui:

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