IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	06 Cr. 442 (LAP) Filed via ECF
v.	The Hon. Loretta A. Preska
SYED HASHMI,	
Defendant.	

MOTION FOR DISCLOSURE AND REVIEW OF ALL FISA APPLICATIONS, REVIEW OF RULINGS MADE BY THE FISC, AND SUPPRESSION OF ALL FISA-DERIVED EVIDENCE

Defendant Syed Hashmi, through undersigned counsel, moves this Court to undertake a careful review of all applications for electronic surveillance of Mr. Hashmi conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as well as applications for such surveillance of any third-party target which intercepted Mr. Hashmi, and based upon that review, disclose the applications and orders to the defense, hold a hearing under *Franks v. Delaware* , 438 U .S. 154 (1978), and suppress all information and evidence obtained or derived from electronic surveillance and physical search purportedly authorized by the United States Foreign Intelligence Surveillance Court, including the fruits of any evidence developed from such surveillance or search.

I. FACTUAL BACKGROUND

Without providing formal notice pursuant to 50 U.S.C. § 1806(c), the government has made informal representations to the defense that certain potential evidence in the

government's custody was obtained pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq.

Mr. Hashmi is a United States citizen who is charged for acts allegedly occurring between January 2004 and May 2006. The defense does not know specifically what FISA-derived evidence the government intends to use and has never been provided with any applications, affidavits, or other papers that the government may have submitted to the Foreign Intelligence Surveillance Court (the "FISC") to support an order by the FISC authorizing any electronic surveillance and/or physical search(es). As a result, the defense does not know when the government made its application(s) to the FISC or what information might have been presented to the FISC in support of the application(s). Therefore, this statement of facts and the arguments which follow represent defense counsel's good faith attempt to raise the appropriate issues with the Court with the limited information available.

II. LEGAL ARGUMENT

A. The FISA Statutory Scheme

In the wake of the Watergate scandal and the Senate Church Committee Hearings concerning the U.S. government's sordid history of spying on American citizens, Congress passed FISA to provide a legal framework to regulate Executive Branch surveillance. As a compliment to Title III, which limited the Executive's power to conduct domestic surveillance, FISA "was enacted in 1978 to establish procedures for the use of electronic surveillance in gathering foreign intelligence information . . . . The Act was intended to strike a sound balance between the need for such surveillance and the protection of civil liberties." *In re Kevork*, 788 F.2d 566, 569 (9th Cir. 1986). FISA was

Congress' attempt to balance the "competing demands of the President's constitutional powers to gather intelligence deemed necessary to the security of the Nation, and the requirements of the Fourth Amendment." H.R. Rep. No. 95-1283, at 15.

FISA establishes procedures for surveillance of foreign intelligence targets whereby a federal officer acting through the Attorney General may obtain judicial approval for conducting electronic surveillance for foreign intelligence purposes. The FISA statute created a special court ("FISC") to which the Attorney General must apply for orders approving electronic surveillance of a foreign power, or an agent of a foreign power, for the purpose of obtaining foreign intelligence information. 50 U.S.C. §§ 1802(b), 1803, and 1804. With important exceptions not pertinent here, FISA requires judicial approval before the government engages in any electronic surveillance for foreign intelligence purposes. *U.S. v. Cavanagh,* 807 F.2d 787, 786 (9th Cir. 1987).

The statute requires that any application to the FISC be made under oath by a federal officer with the Attorney General's approval and contain certain information and certifications. Pursuant to §1804:

> Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include--
>
> **(1)** the identity of the Federal officer making the application;
> **(2)** the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;
> **(3)** the identity, if known, or a description of the target of the electronic surveillance;
> **(4)** a statement of the facts and circumstances relied upon by the applicant to justify his belief that--
>
> > **(A)** the target of the electronic surveillance is a foreign power or an agent of a foreign power; and
> > **(B)** each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;
(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;
(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate--

(A) that the certifying official deems the information sought to be foreign intelligence information;
(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;
(C) that such information cannot reasonably be obtained by normal investigative techniques;
(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and
(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and
(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;
(9) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;
(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter; and
(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

50 U.S.C. §1804 (2004).

Furthermore, §1805(a)(5) provides "that no United States person may be considered a foreign power solely upon the basis of activities protected by the first amendment." Any "aggrieved person" is entitled under FISA to move to suppress

evidence obtained or derived from electronic surveillance on the grounds that "the information was unlawfully acquired" or "the surveillance was not made in conformity with an order of authorization or approval." 50 U.S.C. § 1806(e)(1)(2). FISA defines "aggrieved person" as "a person who is the target of electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k).

B. All FISA-Derived Evidence Should Be Suppressed

The FISA-derived evidence should be suppressed for the following reasons:

- The Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801, *et seq.* is unconstitutional on its face because it violates the Fourth Amendment of the United States Constitution;

- The Foreign Intelligence Surveillance Act is unconstitutional as applied to Mr. Hashmi under the circumstances of this case because the connection between Mr. Hashmi's alleged conduct from January 2004 through May 2006 and any exigency presented by an ongoing foreign intelligence investigation was too attenuated;

- The FISC application papers fail to demonstrate that a "significant purpose" of the searches and surveillance was to obtain "foreign intelligence information;"

- The FISC application papers fail to demonstrate probable cause to believe that Mr. Hashmi was a "foreign power" or an "agent of a foreign power;"

- The FISC application papers fail to demonstrate probable cause to believe that any electronic information concerning or modes of electronic transmission used by Mr. Hashmi were owned, used or possessed by a "foreign power" or an "agent of a foreign power;"

- The FISC application papers fail to demonstrate probable cause to believe that anything to which Mr. Hashmi had a privacy interest and was subjected to electronic surveillance was being used or was about to be used by a "foreign power" or an "agent of a foreign power;"

- The certifications submitted as part of the FISC application papers were "clearly erroneous" within the meaning of 50 U.S.C. §§ 1805(a)(5) and 1824(a)(5); and

- The FISC application papers contain false statements, recklessly made, in violation of *Franks* v, *Delaware,* 438 U.S. 154 (1978).

1. The Foreign Intelligence Surveillance Act Is Unconstitutional

Congress enacted FISA in an effort to provide some legal framework for government surveillance activities conducted within the United States for foreign intelligence purposes. Pub. L. 95- 511, October 25, 1978, 92 Stat 1783. As originally enacted, FISA allowed a federal officer to obtain an order from a judge of the specially created FISC authorizing electronic surveillance or searches targeting "a foreign power" or "an agent of a foreign power" "for the purpose of obtaining foreign intelligence information." The 2001 Patriot Act amendment of FISA permitted the issuance of such orders where "a significant purpose" of the order was to obtain "foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B) and 50 U.S.C. § 1823(a)(7)(B) as amended by Pub.L 107-56, Title II, § 218, October 26,2001. *See also In re All Matters Submitted to the Foreign Intelligence Surveillance Court,* 218 F. Supp.2d 611 (F.I.S.C. 2002), reversed in part, *In re Sealed Case,* 310 F.3d 717 (FISA Court of Review 2003).

Before the decision in *In re Sealed Case,* several Circuit Court cases had recognized an exception to the Fourth Amendment warrant requirement where domestic surveillance was conducted "primarily" for the purpose of gathering foreign intelligence. *U.S.* v, *Truong Dinh Hung,* 629 F.2d 908, 912-916 (4th Cir. *1980); U.S.* v, *Brown,* 484 F.2d 418, 426 (5th Cir. 1973); *U.S.* v. *Butenko,* 494 F.2d 593 (3d Cir. 1974); *U.S.* v. *Buck,* 658 F.2d 871 (9th Cir. 1977). *See also U.S. v. Duggan,* 743 F.2d 59, 78 (2d Cir. 1984)(affirming the denial of a motion to suppress, but only upon the express finding that

the purpose of the surveillance was foreign intelligence gathering and was not "directed towards criminal investigation or the institution of a criminal prosecution"). These cases support the proposition that the traditional Fourth Amendment warrant requirements may be relaxed where investigations are undertaken for foreign intelligence purposes if, but only if, the primary purpose of the investigation is to gather foreign intelligence information and not to gather evidence to mount a criminal prosecution.

In *United States* v. *United States District Court (Keith),* 407 U.S. 297 (1972), the U.S. Supreme Court approached but did not decide the issue of the applicability of the Fourth Amendment warrant requirement to national security investigations involving foreign powers or their agents. In *Keith,* defendants who were suspected of involvement in the bombing of a CIA office were subjected to electronic surveillance upon the authorization of the Attorney General without prior judicial approval. The U.S. Supreme Court held that such surveillance violated the Fourth Amendment and rejected the government's contentions that national security investigations are too subtle and complex for judicial evaluation and that prior judicial approval will fracture the secrecy essential to official intelligence gathering. 407 U.S. at 318-321. Although *Keith* did involve a national security investigation, no foreign element was implicated and the Supreme Court expressly left open the question of the Fourth Amendment's limitations on national security investigations involving the activities of foreign powers or their agents. 407 U.S. at 321-322.

The 2001 amendment of FISA and the FISA Court of Review decision in *In re Sealed Case* bring back into focus the constitutional question of how the traditional warrant requirements of the Fourth Amendment apply to government investigations

undertaken wholly or in part for foreign intelligence purposes. In *In re Sealed Case,* the Court of Review upheld the Fourth Amendment constitutionality of FISA and rejected the historic dichotomy that had grown between intelligence gathering and law enforcement. The Court of Review determined that the primary purpose test as enunciated by *Truong* and its progeny was never constitutionally required and that the Patriot Act's disavowal of that standard (by substituting the primary purpose test with the "significant purpose" language) passed constitutional muster. 310 F.3d at 742-746. More recently, however, FISA as amended has come under constitutional scrutiny again and found to be lacking. *Mayfield v.United States,* 504 F. Supp.2d 1023 (D. Ore. 2007)

In *Mayfield,* the court granted declaratory relief that the Foreign Intelligence Surveillance Act, as amended by the Patriot Act, is unconstitutional. The *Mayfield* case was originally filed as a civil rights action seeking compensatory damages for unlawful arrest and imprisonment and unlawful searches and seizures. The compensatory damages claims were settled between the parties and the allegations of an Amended Complaint seeking declaratory relief were decided by the Court on summary judgment motions. In ruling for the plaintiff, the Court in *Mayfield* determined that FISA is unconstitutional because it now permits the Executive Branch to conduct electronic surveillance and searches of American citizens without satisfying the traditional probable cause and warrant requirements of the Fourth Amendment. In particular, the Court held that FISA violated the Fourth Amendment for the following reasons:

- FISA orders may be issued without a showing that a crime has been or is being committed;
- With respect to the nexus to criminality required by the definition of "agent of a foreign power," the government need not show probable cause as to each and every element of the crime involved or about to be involved;

- When the FISC reviews a FISA application, the government satisfies most FISA requirements simply by certifying that the requirements are met;

- The statute directs that the reviewing court is not to scrutinize statements contained in the governments certifications submitted with a FISA application but must defer to such certifications unless they are "clearly erroneous;"

- FISA procedures allow the government to avoid traditional Fourth Amendment judicial oversight when it obtains search and surveillance orders;

- FISA allows the government to retain and use the collected information in criminal cases without providing any meaningful opportunity for the target of the investigation to challenge the validity of a FISA order;

- FISA notice provisions are impermissibly broad, allowing the government to conduct searches and electronic surveillance without notifying the target of such intrusions within a reasonable period of time after the government activity has occurred and, except in instances where criminal prosecutions follow and the government gives notice of its intention to use FISA derived evidence, no notice is ever given to the targets of such intrusions;

- FISA does not require any showing of "particularity" in the traditional Fourth Amendment sense, allowing the government to search or conduct electronic surveillance at its broad discretion, something akin to a "general warrant;" and

- FISA authorizes electronic surveillance terms up to 120 days which violates Fourth Amendment duration requirements for criminal investigations.

504 F. Supp.2d at 1030-1043. Mr. Hashmi adopts all of the constitutional arguments advanced by the plaintiff in *Mayfield* and adopts the Court's holding in support of his argument that FISA, as amended by the Patriot Act, is unconstitutional. Because the authorizing statute is unconstitutional, all evidence seized pursuant to FISC orders, and the fruits of all evidence derived from such orders, should be suppressed *Cf. U.S. v Mubayyid,* 521 F. Supp.2d 125 (D. Mass. 2007)(upholding constitutionality of FISA).

2. FISA Is Unconstitutional As Applied To Mr. Hashmi Under The Circumstances Of This Case

Mr. Hashmi raises an as applied constitutional challenge to FISA pursuant to the First, Fourth, and Fifth Amendments. Mr. Hashmi is a United States citizen who has never been a member of al Qaeda and has never been an agent of a foreign power. At the time any FISA applications were submitted to the FISC, the government did not have probable cause to believe that Mr. Hashmi was involved or acting on behalf of a foreign power, much less involved in criminal activity. Any government surveillance of Mr. Hashmi should have been conducted pursuant to Title III. Because the defense is not privy to any information concerning the avenues by which the government obtained electronic information concerning Mr. Hashmi, the defense requests the opportunity to supplement this motion if and when any further information is disclosed by the government.

3. The FISC Application Papers Fail To Demonstrate That A "Significant Purpose" Of The Searches And Surveillance Was To Obtain "Foreign Intelligence Information"

Even if FISA is constitutional, the government still must satisfy all of the statutory requirements before the FISA investigative procedures may be invoked. For the same reasons stated above with respect to the constitutionality of FISA as applied to Mr. Hashmi in the particular circumstances of this case, the FISC application papers could not have demonstrated that a "significant purpose" of the searches and surveillance was to obtain "foreign intelligence information" and not evidence for a domestic criminal prosecution. 50 U.S.C. §§ 1804(a)(7)(8) and 1823(a)(7)(8).

Although the Patriot Act amendments to FISA may have diluted the primary purpose test to the lesser standard of "a significant purpose," a purpose based statutory standard still exists. The Court of Review commented upon the FISC's role in evaluating

the government's foreign intelligence purpose certification in light of the Patriot Act amendment:

> If the certification of the application's purpose articulates a broader objective than criminal prosecution - such as stopping an ongoing conspiracy - and includes other non-prosecutorial responses, the government meets the statutory test. Of course, if the court concluded that the government's sole objective was merely to gain evidence of past criminal conduct - even foreign intelligence crimes - to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied.

310 F.3d at 735.

At the time the search and surveillance applications were made, there simply was no evidence that the FISC orders were needed to investigate or to stop an ongoing foreign agency conspiracy involving Mr. Hashmi. Upon review, this Court may very well find that the government's true objective was to gain evidence of past criminal conduct.

The Court should order the government to disclose the FISA applications, affidavits, certifications, opinions, and related materials to the defense to allow the defense to provide input to the Court regarding the very crucial determination as to whether foreign intelligence or a criminal investigation was the government's primary purpose in conducting the surveillance. For if it was a criminal investigation, then all of the evidence derived from the surveillance of Mr. Hashmi pursuant to FISA applications should be suppressed for the government’s failure to seek appropriate authority under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 99 2510-2520 (1982), rather than under FISA.

4. The FISC Application Papers Fail To Demonstrate Probable Cause To Believe That Mr. Hashmi Was A "Foreign Power" Or An "Agent Of A Foreign Power"

This Court must initially determine, with respect to each application for electronic surveillance of Mr. Hashmi or of any relevant third-party target, whether the application established a reasonable, particularized ground for belief that Mr. Hashmi or the third-party target fell within a definition of an agent of a foreign power. 50 U.S.C. §§ 1805(a)(3)(A), 1801(b)(2)(C)(E).

The statute includes an additional restriction for a "United States person," prohibiting a finding of probable cause for such a target if based solely upon First Amendment activities. *See* 50 U.S.C. § 1801(h)(4)(defining "United States person" as a U.S. citizen or permanent resident). In regard to the probable cause determination, the statute states "that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment . . . ." 50 U.S.C. § 1805(a)(3). Accordingly, if the target participated in First Amendment activities such as expressing support, urging others to express support, gathering information, distributing information, raising money for political causes, or donating money for political causes, these activities cannot serve as a basis for probable cause.

Mr. Hashmi has reason to believe that he was intercepted pursuant to FISA. Therefore, the Court's probable cause determination must focus on FISA applications for wiretapping Mr. Hashmi as well as any relevant third-party targets, taking special care to ensure that First Amendment protections are accorded all "United States persons."

Mr. Hashmi cannot address any details of any of the FISA applications in this case because he and his counsel have not seen those applications. Under §1806(f), when an aggrieved person files a motion to suppress FISA wiretaps and "the Attorney General

files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States," the Court may review the FISA wiretap applications and related materials *in camera* and *ex parte*, to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. The statute, however, does contemplate disclosure of these materials under certain circumstances. The Court may "disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.*

Without having an opportunity to review the applications at issue, Mr. Hashmi can only speculate as to whether the allegations asserting that he, or any relevant third-party target, was an "agent of a foreign power" were sufficient under the statute. Pursuant to 50 U.S.C. §1801(b)(2)(C), an "agent of a foreign power" is "any person . . . who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore, for or on behalf of a foreign power." Thus, there must be probable cause showing that defendant or the relevant third-party target knowingly engaged in some type of international terrorism

Mr. Hashmi requests that the Court order the government to produce all FISA-related applications, affidavits, certifications, and opinions to the Court for review by both the Court and the defense. Production of this material is necessary to allow Mr. Hashmi an opportunity to show that the requisite probable cause with respect to the issue of knowledge was lacking and that with respect to any third-party target who was a "United States person" the alleged "activities" fell within the protection of the First

Amendment and, thus, could not be used as a basis for probable cause. Disclosure would also give Mr. Hashmi an opportunity to show procedural irregularities. Finally, disclosure is necessary so that the defense can assist the Court in making an accurate determination of the legality of the surveillance and whether proper applications were presented to the FISC.

5. The Certifications Submitted As Part Of The FISC Applications Were "Clearly Erroneous" Within The Meaning Of 50 U.S.C. §§ 1804(a)(5) and 824(a)(5)

Although the scope of judicial oversight with respect to the issuance of FISA orders is more limited than that of a the traditional "neutral and detached magistrate" (which is one of the constitutional infirmities with the statute), the FISC and the District Court when deciding motions to suppress need not accept the governments application certifications blindly. Where the target of a FISA order is a U.S. citizen, the courts must review the government certifications to determine if they are "clearly erroneous." For the reasons stated above and for the reasons stated below with respect to potential *Franks* violations, the certifications submitted by the government in support of the FISC applications were "clearly erroneous."

In addition, the Court should ensure that the FISA applications contain all of the certifications required under §1804(a)(7). As the Ninth Circuit has declared in the Title III context: "The procedural steps provided in the Act require 'strict adherence"' and "'utmost scrutiny must be exercised to determine whether wiretap orders conform to [the statutory requirement]."' *U.S. v. Blackmon,* 273 F.3d 1204, 1207 (9th Cir. 2001)(quoting *U.S. v. Kalustian,* 529 F .2d 585, 588, 589 (9th Cir. 1975)).

In addition, the Court should examine two certifications with particular care: (1) that the information sought is "the type of foreign intelligence information designated;" and (2) that the information "cannot reasonably be obtained by normal investigative techniques." *See* 50 U.S.C. §1804(a)(7)(E). Particularly if the target of surveillance is a "United States person," these two certifications must be measured by the "clearly erroneous" standard. *See* 50 U.S.C. § 1805(a)(5). As the Ninth Circuit has observed concerning the similar provision in Title III, 18 U.S.C. § 2518(1)(e), "the necessity requirement 'exists in order to limit the use of wiretaps, which are highly intrusive.'" *Blackmon,* 273 F. 3d at 1207 *(quoting U.S. v. Bennett,* 219 F .3d 1117, 1121 (9th Cir. 2000)(internal quotation omitted)). The necessity requirement "ensure[s] that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the [information sought]." *Id.*

Finally, the Court should carefully examine the dates, in sequence, of all FISA orders in this case to determine whether there were any lapses of time during which surveillance continued. The statutory scheme contemplates a seamless web: when a FISA order expires, if the government wishes to continue the surveillance, the expiring order must be replaced by an extension order, which, in turn, may be obtained only on the basis of a proper FISA application. *See* 50 U.S.C. §1805(e)(1)(2). Electronic surveillance that continues to run past the expiration date of the FISA order that originally authorized it is just as unauthorized as surveillance that is initiated without any FISA order at all. Should the Court order the government to disclose the FISA orders in this case as requested by the defense, the defense will be able to assist the Court in matching up all of the FISA orders by date.

6. The FISC Applications Contain False Statements, Recklessly Made, In Violation of *Franks v. Delaware,* 438 U.S. 154 (1978)

Franks v. Delaware, 438 U .S. 154 (1978), sets forth the criteria under which the target of a search may obtain an evidentiary hearing concerning the veracity of the information contained in a search warrant affidavit. "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Id.* at 156-57.

Franks establishes a similar standard for suppression following the hearing: "In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156; *see U.S. v. Duggan,* 743 F.2d 59, 77 n.6 (2d Cir. 1984)(suggesting that *Franks* applies to FISA applications under Fourth and Fifth Amendments); *see also U.S. v. Hammond,* 351 F .3d 765, 770-71 (6th Cir. 2003)(applying *Franks* principles).

The *Franks* principles apply to omissions as well as to false statements. *See, e.g., U.S. v. Ferguson,* 758 F.2d 843, 848 (2d Cir. 1985). Omissions will trigger suppression under *Franks* if they are deliberate or reckless and if the search warrant affidavit, with omitted material added, would not have established probable cause.

Without the opportunity to review the FISA applications, Mr. Hashmi, of course, cannot point to or identify any specific false statements or material omissions in those applications. Because the entire FISA process is shrouded in secrecy, the defense can not make a more particularized preliminary *Franks* showing. The Court should not penalize the defense by denying a *Franks* hearing because the defense is not being able to set forth facts that are solely under the purview of the government.

Even without a more particularized showing at this point, the Court should note that the government has a history of submitting FISA applications with intentionally or recklessly false statements or materials omissions. On more than seventy-five known occasions, the government has confessed error relating to "misstatements and omissions of material facts" that it had made in its FISA applications. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court,* 218 F. Supp. 2d 611, 620-621 (F.I.S.C. 2002), abrogated on other grounds, *In re Sealed* Case, *supra.* Thus, although the defense does not know whether any of the FISA applications in this case are among those that the DOJ has identified as containing false statements, there is no assurance that they are not.

Disclosure is necessary so that this Court can conduct a *Franks* hearing at which Mr. Hashmi will have the opportunity to prove that the affiants before the FISA court intentionally or recklessly made materially false statements and omitted material information from the FISA applications.

CONCLUSION

WHEREFORE, Mr. Hashmi respectfully requests that this Honorable Court undertake a careful review of the FISA applications, affidavits, certifications, orders, and other related material in this case, and based upon that review, disclose the applications and related materials to the defense, hold a *Franks v. Delaware* hearing, and suppress all FISA-derived evidence concerning Mr. Hashmi.

Dated: January 8, 2009
New York, New York

Respectfully Submitted,

____/S/____________

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