

## Alexandria Division

Crim. No. 01-455-A

## VOLUNTARILY EXERCISE SIXTH AMENDMENT RIGHTS

intelligent.<sup>1</sup> The Court's Order is consistent with settled law.

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While a mental health examination is, of course, not required in every case where a defendant seeks to proceed *pro se*, mental health can be a relevant consideration in determining whether a defendant's waiver of counsel is voluntary, knowing and intelligent. Indeed, the case law supports what the Court has ordered here. Those cases hold that the determination of whether a defendant's waiver of counsel is knowing, voluntary and intelligent includes a mental health component. For instance, in *Wilkins v. Bowersox*, 145 F.3d 1006 (8<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1094 (1999), the Eighth Circuit considered a habeas corpus petition of a state death-row inmate who claimed that his waiver of counsel and his guilty plea had not been made intelligently and voluntarily due to the defendant's multiple mental health problems. *Id.* at 1011.<sup>2</sup> The lower court had agreed with this contention, stating that "[m]ental illness is a factor the trial court must consider when ruling on the validity of a waiver [of counsel]." *Wilkins v. Bowersox*, 933 F. Supp. 1496, 1511 (W.D. Mo. 1996), *aff'd*, 145 F.3d 1006 (8<sup>th</sup> Cir. 1998).

On appeal before the Eighth Circuit, the state argued that the mental condition of the defendant was not relevant to the question of the voluntariness of the waiver unless there was some evidence of coercion. *Wilkins*, 145 F.3d at 1012. The Eighth Circuit rejected that argument saying:

In the waiver of counsel context, we have explained that a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver. Moreover, the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent, and voluntary.

*Id.* (citations omitted).

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<sup>2</sup> The defendant had previously been found competent to stand trial. *See Wilkins v. Bowersox*, 145 F.3d 1006, 1009 (8<sup>th</sup> Cir. 1998).

Likewise, in *United States v. Cash*, 47 F.3d 1083 (11<sup>th</sup> Cir. 1995), the Eleventh Circuit Court of Appeals stated that one of the factors that a trial court should consider in determining whether a waiver of counsel is knowing, voluntary and intelligent, is “the defendant’s age, educational background, and physical and *mental health*.” *Id.* at 1088 (emphasis added).<sup>3</sup> Finding that the defendant’s personality disorder, which caused him “to overestimate and overstate his abilities,” rendered questionable the district court’s finding that the waiver had been knowing, voluntary and intelligent, the Court of Appeals in *Cash* vacated the defendant’s conviction. *Cash*, 47 F.3d at 1090.

Myriad other cases similarly hold that the defendant’s mental health may be an important factor when considering a waiver of constitutional rights. *See, e.g., Shafer v. Bowersox*, 168 F. Supp.2d 1055, 1078-79 (E.D. Mo. 2001) (granting a writ of habeas corpus to a state inmate who had waived his right to counsel because the state court failed adequately to consider the accused’s mental health in assessing whether the waiver was knowing, intelligent, and voluntary); *Cooper v. Griffin*, 455 F.2d 1142, 1145 (5<sup>th</sup> Cir. 1972) (“The Supreme Court has repeatedly emphasized that mental deficiency, age, and lack of familiarity with the criminal process are important factors to be considered in determining whether there has been a waiver of constitutional rights.”) (citations omitted); *United States v. Dey*, 15 Fed. Appx. 419, 2001 WL 670098, \*\*1 (9<sup>th</sup> Cir. 2001) (unpublished opinion)<sup>4</sup> (stating that “[e]vidence of mental affliction

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<sup>3</sup> The other factors are: “(2) the extent of defendant’s contact with lawyers prior to trial; (3) the defendant’s knowledge of the nature of charges, possible defenses, and penalties; (4) the defendant’s understanding of rules of procedure, evidence, and courtroom decorum; (5) the defendant’s experience in criminal trials; (6) whether standby counsel was appointed and the extent to which that counsel aided the defendant; (7) any mistreatment or coercion of defendant; and (8) whether the defendant was trying to manipulate the events of the trial.” *Cash*, 47 F.3d at 1088-89.

<sup>4</sup> Pursuant to Local Rule 36(c) for the Fourth Circuit Court of Appeals, a copy of this opinion is attached as Exhibit 1. Due to technical difficulties, the Exhibits are not in PDF format but copies

... may be sufficient to show lack of voluntariness” in the entry of a guilty plea), *cert. denied*, \_\_\_ U.S. \_\_\_, 122 S. Ct. 286 (2001).

Here, there is ample support in the record compelling a mental health examination to assist in the determination of whether Mr. Moussaoui’s attempted waiver is voluntary, knowing and intelligent. For example, at the April 22 hearing, Mr. Moussaoui based his request to fire his lawyers and proceed *pro se* in part on his belief that his court appointed lawyers are in league with the government to kill him. *See* Tr. at 6. The government does not even respond to our contention that this belief of Mr. Moussaoui’s requires an inquiry into whether it is the product of a disturbed mental state. Further, Mr. Moussaoui also expressed a belief that the judge was not “an honest broker” but rather a “field general, entrusted with the mission to get this matter over quickly,” while later in the hearing requesting to waive jury and proceed with a trial before the same judge. *See* Tr. at 7-8, 59-60.<sup>5</sup> This hardly seems rational and raises further questions.

The record also establishes that Mr. Moussaoui’s conditions of confinement have been harsh, including living isolated in a small, white, windowless concrete cell, with video monitoring and, until recently, a bright light shining twenty-four hours a day. As shown by Dr. Kupers’ declaration, many prisoners housed in isolation confinement who are prone to mental illness, tend to suffer psychiatric breakdowns under the strain. *See* Exhibit 2. Even without mental illness, life in solitary confinement can cause a decline in mental functioning or worse, exacerbate a pre-existing condition. This is why a history is so important

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will be substituted as soon as this can be resolved.

<sup>5</sup> In denying Court TV’s request to televise the proceedings, the Court itself noted that Mr. Moussaoui’s behavior at the arraignment—insisting on personally advising the Court that he would not respond to the charges against him—suggested that Mr. Moussaoui’s conduct may be both unorthodox and unpredictable. *See* Memorandum Opinion, January 18, 2002.

here. As such, the Court should proceed with caution, and direct that the psychiatric examination be a thorough examination that considers relevant background information, as well as past and current mental functioning. The Court should also consider the affidavit of Professor Richard J. Bonnie, Professor of Psychiatric Medicine and Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, attached hereto as Exhibit 3. Professor Bonnie stresses the problem with regard to cultural and religious difficulties that could play a significant part in the breakdown of the relationship with counsel. Professor Bonnie's recommendations regarding attempting to restore that relationship with the help of mental health professionals of similar cultural and religious background of the defendant should be undertaken as an initial step.<sup>6</sup>

In this regard, the government should not be permitted to stand on the position that the doctor appointed does not need to see relevant discovery material. The government's brief response barely addresses its discovery obligations save one reference to the classified information currently in the SCIF.<sup>7</sup> Given the importance of this examination, the defense was hopeful that the government would be responsive to the obvious need for full disclosure and accelerate discovery of any information that might be helpful here. To the contrary, the government elects to ignore this reasonable request. In doing so, the

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<sup>6</sup> Counsel is endeavoring to locate such mental health assistance, and notes that to date, none of the names suggested by either side meet those qualifications. Also attached are declarations from Dr. Stanley Brooks (Exhibit 4) (filed without the exhibits referenced within the declaration) and Dr. Karen Bronk Froming (Exhibit 5) setting forth issues to address and the parameters of a psychiatric examination in this context.

<sup>7</sup> Of course, pursuant to the terms of the Order regarding classified information, Mr. Moussaoui will not have access to any information in the SCIF. This fact gives rise to claims under the confrontation clause and must be considered when evaluating Mr. Moussaoui's waiver of his right to counsel.

government does not inform the court as to whether there is any information in its possession that relates in any way to the issue of whether Mr. Moussaoui suffers from any pre-existing mental condition. The government does not inform the court as to whether there is any information in its possession that would indicate that Mr. Moussaoui has ever displayed any symptoms of any paranoid condition or other conduct suggesting mental instability. Given the fact that the government has repeatedly promised that it would produce voluminous discovery to the defense, including approximately 144,000 302s, there would seem to be no prejudice in requiring early production under the circumstances. Accordingly, the Court should order the immediate production of any such information to insure that the psychiatric professional performing the examination of Mr. Moussaoui has access to all information that might be of assistance. Due process requires no less.

#### CONCLUSION

For the reasons stated, we respectfully request that the Court order the relief requested.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply to Government's Response to Motion to Set Guidelines to Be Used in Determining Defendant's Competency to Knowingly and Voluntarily Exercise Sixth Amendment Rights was served via hand delivery upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 26<sup>th</sup> day of April, 2002.

\_\_\_\_\_  
/S/

Frank W. Dunham, Jr.

**EXHIBIT 1**



This case was not selected for publication in the Federal Reporter

Not selected for publication in the Federal Reporter.

This opinion was not selected for publication in the Federal Reporter. Please use FIND to look at the applicable circuit court rule before citing this opinion. FI CTA9 Rule 36-3.

United States Court of Appeals,  
Ninth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Tricia Lee DEY, aka Tricia Lee Barker, Defendant-Appellant.  
No. 00-30281.  
D.C. No. CR-00-00063-BLW.  
Submitted June 11, 2001. [FN\*]

**[FN\*]** The panel unanimously finds this case suitable for decision without oral argument.  
Fed. R.App. P. 34(a)(2).

Decided June 14, 2001.

Defendant pled guilty in the United States District Court for the District of Idaho, B. Lynn Winmill, J., to offense and was sentenced. Defendant appealed. The Court of Appeals held that guilty plea was not rendered involuntary by defendant's mental state.

Affirmed.

#### West Headnotes

#### KeyCite Notes

◀ 110 Criminal Law

◀ 110XV Pleas

◀ 110k272 Plea of Guilty

◀ 110k273.1 Voluntary Character

◀ 110k273.1(4) k. Ascertainment by Court; Advising and Informing Accused. Most Cited Cases

Court had no reason to know that defendant suffered from mental or emotional instability due to depression, terminated pregnancy or dissolved marriage, and was not required to inquire into these issues for purposes of determining voluntariness of guilty plea, where neither defendant or her attorney raised them prior to appeal. Fed.Rules Cr.Proc.Rule 11(d), 18 U.S.C.A.

\*420 Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, District Judge, Presiding.

Before B. FLETCHER, BRUNETTI, and FISHER, Circuit Judges.

## MEMORANDUM [FN\*\*]

**FN\*\*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**\*\*1** Dey contends that her plea resulted from extreme stress, and was therefore involuntary. She argues further that the court would have recognized the involuntary character of the plea if it had made a more searching inquiry into her state of mind and reasons for pleading guilty. If Dey is correct that her plea was not knowing and voluntary, the waiver contained in her plea agreement would be similarly invalid. See United States v. Nguyen, 235 F.3d 1179, 1182 (9th Cir.2000) ("The sole test of a waiver's validity is whether it was made knowingly and voluntarily."). We must therefore look beyond the mere presence of the waiver, and determine whether the record contains evidence that Dey's plea was involuntary.

Under Fed.R.Crim.P. 32(e), a defendant may seek to withdraw a guilty plea for "any fair and just reason" at any point before imposition of sentence. Lack of voluntariness, in violation of Fed.R.Crim.P. 11(d), would be one such reason. See United States v. Rios-Ortiz, 830 F.2d 1067, 1070 (9th Cir.1987). Evidence of mental affliction, moreover, may be sufficient to show lack of voluntariness. United States v. Christensen, 18 F.3d 822, 826 (9th Cir.1994). However, Dey made no such motion.

Instead, she raises her mental state as an issue for the first time on appeal, arguing that the district court made an insufficient inquiry into her reasons for pleading guilty. The record belies this contention, particularly given that neither Dey nor her attorney raised the issue of her depression, terminated pregnancy and dissolved marriage, or the effect of these stressors on her decision to plead guilty. The court complied with Rule 11(d)'s requirement that it ensure a defendant's guilty plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed.R.Crim.P. 11(d). Nothing in the record leads us to believe the district court had reason to suspect Dey suffered from mental or emotional instability. **\*421** Christensen, 18 F.3d at 826. No more searching inquiry was necessary.

AFFIRMED.

C.A.9 (Idaho),2001.

U.S. v. Dey

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**EXHIBIT 2**

## DECLARATION OF DR. TERRY A. KUPERS

1. I am Terry A. Kupers, M.D., M.S.P. I am a Diplomate of the American Board of Psychiatry & Neurology (Psychiatry, 1974, for life). I am a Professor in the Graduate School of Psychology of the Wright Institute in Berkeley and maintain a clinical practice in Oakland, California. I recently finished a one-year term as President of the East Bay Psychiatric Association, I am a Fellow of the American Psychiatric Association, I am Co-Chair of the Committee on the Mentally Ill Behind Bars of the American Association of Community Psychiatrists, and I am a Fellow of the American Orthopsychiatric Association. I am on the staff of the Alta Bates Medical Center in Berkeley, and serve as consultant to several public mental health agencies.
2. I received a B.A. in Psychology from Stanford University in 1964, with Distinction; an M.D. from UCLA School of Medicine in 1968 where I was elected to Alpha Omega Alpha Honor Society; I have been licensed to practice medicine in the State of California since 1968; I completed Internship at Kings County Hospital/ Downstate Medical Center in Brooklyn in 1969; I completed residency training in Psychiatry at UCLA NPI, with a year elective at Tavistock Institute in London, in 1972; I did a fellowship in Social and Community Psychiatry (including Forensic Psychiatry) at UCLA NPI from 1972 to 1974; and I received a Masters Degree in Social Psychiatry from UCLA at the conclusion of that fellowship. Between 1974 and 1977 I was an Assistant Professor in the Department of Psychiatry and Co-Director of the Psychiatry Resident Training Program of the Charles Drew Postgraduate Medical School in Los Angeles, and I was a staff psychiatrist and Co-Director of the Outpatient Clinic at Martin Luther

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King, Jr. Hospital. From 1977 to 1981 I was staff psychiatrist and Co-Director of the Partial Hospital Program at the Richmond Community Mental Health Center (Contra Costa County Mental Health Services). I have conducted a private practice of psychiatry since 1974, and have been on the faculty of The Wright Institute since 1981.

3. I have written four books, including: *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It* (Jossey-Bass, 1999); *Revisioning Men's Lives: Gender, Intimacy and Power* (Guilford Press, 1993); and *Public Therapy: The Practice of Psychotherapy in the Public Mental Health Clinic* (Free Press, 1981). I am a co-editor of *Prison Masculinities* (Temple University Press, 2001). I have written over two dozen articles, including "The Mental Health Crisis Behind Bars," *Harvard Mental Health Letter*, July, 2000; "The SHU Syndrome and Community Mental Health," *The Community Psychiatrist*, Summer, 1998; "Trauma and Its Sequelae in Male Prisoners," *American Journal of Orthopsychiatry*, 66,2,1996, pp. 189-196; "Jail and Prison Rape," *TIE-Lines*, February, 1995; and "Contact Between the Bars: A Rationale for Consultation in Prisons," *Urban Health*, Vol. 5, No. 1, February, 1976. I wrote a book chapter, "Psychotherapy with Men in Prison," in *A New Handbook of Counseling & Psychotherapy Approaches for Men*, eds. Gary Brooks and Glenn Good, (Jossey-Bass, 2001). And I am on the editorial advisory board for *Juvenile Correctional Mental Health Report*.

14. I have testified in over twenty criminal and civil proceedings in state and federal courts as an expert on jail and prison conditions, their effects on prisoners, and the quality of mental health services. I have served as consultant regarding prison conditions and the quality of correctional mental health care

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to the U.S. Dept. of Justice, Civil Rights Division; Human Rights Watch and Amnesty International. I consulted with Amnesty International during their investigations and compilation of the report, "Not Part of My Sentence: Violations of the Human Rights of Women in Custody" (1998).

5. Human beings require social interaction and productive activities to establish and sustain a sense of identity, self-worth, and well-being, as well as to maintain a grasp on reality. In the absence of social interactions, unrealistic ruminations and beliefs cannot be tested in conversation and interaction with others, so they build up inside and are transformed into unfocused and irrational thoughts. Disorganized behaviors emerge. Internal impulses linked with anger, fear and other strong emotions grow to overwhelming proportions. This is why psychiatrists around the country have been cautioning citizens against isolating themselves, and recommending they go on with their usual activities, in the wake of the tragic September 11th attacks on the Pentagon and World Trade Center and the October 7th outbreak of war.

15. In sensory deprivation experiments conducted in the 1960's, subjects were immersed in water at body temperature in total darkness and their hearing was blocked. Eventually even the sanest subject began to experience hallucinations and delusions. While it took approximately six hours for the most stable subjects to begin hallucinating, subjects with less ego strength began hallucinating within minutes. Supermaximum Security Units and other isolated confinement units in prisons are designed to foster isolation and idleness. Sensory deprivation is not total - there is the intermittent slamming of doors and loud yelling - but this kind of noise does not constitute meaningful human communication.

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7. Prisoners in isolated confinement are locked alone in their windowless cells all but a few hours per week. The environment is totally controlled by the staff, meaning that the prisoners have almost no control of their daily living. Officers bring their food trays, turn the water in their cells on and off, permit them to go to the exercise cell or shower, etc. Officers give orders, refuse many of the prisoners' requests, and sometimes use force against the prisoners. Anxiety and anger mount in the prisoners. The almost total lack of social interaction and meaningful activities means the prisoner has little or no opportunity to test the reality of his worst fears, nor direct the emotional intensity provoked by the harsh environment into productive activities.

8. Prisoners do what they can to cope. Many pace relentlessly, as if this non-productive action will relieve the emotional tension. Those who can read books and write letters do so, but at times, prisoners are not permitted to have books.

9. Under these extreme conditions, symptoms begin to emerge. For example, the walls may seem to be moving in on the prisoner. He may begin to suffer from panic attacks wherein he cannot breathe and thinks his heart is beating so fast he is going to die. He may find himself disobeying an order or inexplicably screaming at an officer, when really all he wants is for the officer to stop and interact with him a little longer than it takes for a food tray to be slid through the slot in his solid metal cell door. It is in this context of near-total isolation and idleness that symptoms of what we call the SHU Syndrome ("SHU" is an acronym for Security Housing Unit, the name by which many supermaximum security units are known) emerge in previously healthy prisoners. In less healthy ones, there is psychosis, mania or compulsive acts of self-abuse or suicide.

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10. It has been known for as long as solitary confinement has been practiced that human beings suffer a great deal of pain and mental deterioration when they remain in isolated confinement for a significant length of time. Thus, in 1890, the U.S. Supreme Court found that: "A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community" (In re Medley, 134 U.S. 160, 168 [1890]).

11. Sheilagh Hudgins and Gilles Cote performed a research evaluation of penitentiary inmates in a Supermaxim Security Housing Unit and discovered that 29% suffered from severe mental disorders, notably schizophrenia. ("The Mental Health of Penitentiary Inmates in Isolation," Canadian Journal of Criminology, 177-182, April, 1991.) 12. Psychiatrist Stuart Grassian examined a large number of prisoners during their stay in segregated, near-solitary confinement units and concluded that these units, like the sensory deprivation environments that were studied by psychologists in the 1960's, often induce psychosis, especially in prisoners who have histories of mental illness or a predisposition to psychiatric breakdown. Even prisoners who do not become frankly psychotic frequently report a number of serious psychiatric symptoms, including but not limited to:

a. Massive free-floating anxiety ;b. Hyper-responsiveness to external stimuli, including a startle response ;c. Perceptual distortions and hallucinations in multiple spheres (auditory, visual, olfactory); d. Derealization experiences; e. Difficulty with concentration and memory; f. Acute confusional states, at times

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associated with dissociative features, mutism, and subsequent partial amnesia for those events; g. The emergence of primitive, ego-dystonic aggressive fantasies ;h. Ideas of reference (paranoia) and persecutory ideation, at times reaching delusional proportions; i. Motor excitement, often associated with sudden, violent destructive or self-mutilatory outbursts; and j. Rapid reduction of symptoms upon termination of isolation. (Stuart Grassian, "Psychopathological Effects of Solitary Confinement," American Journal of Psychiatry, 140:1450-1454, 1983.)

13. This constellation of symptoms in prisoners who have been confined for a significant period in punitive segregation or supermaximum security units has been unofficially termed "The SHU Syndrome." While this syndrome has not yet been granted official recognition as a diagnostic category in the Diagnostic and Statistical Manual of the American Psychiatric, it is widely recognized by correctional medical and mental health professionals as an omnipresent hazard of supermaximum security confinement with very serious sequelae.

14. There is social science and clinical research establishing the existence in isolated confinement units of a "Vicious Cycle" of worsening hostility and misunderstanding between staff and prisoners. This is not to downplay the fact that rule violations do occur in such units, and an appropriate and fair disciplinary system must be maintained. But when human beings are deprived of the freedom to control their movements, their activities, the temperature in their cells, the noise level, and other aspects of their environment, and in addition are denied social contact and all means to express themselves in a constructive manner; then it is quite expectable that they (or any reasonable human being) will resort to increasingly desperate acts to achieve some degree of control of their situation and to restore some modicum of self-respect. The prisoners are driven to small acts of resistance, which in turn are likely to be

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perceived by officers as disrespectful or rule-breaking, and the officers become increasingly punitive or even abusive toward the identified "troublemaker(s)."

15. A significant proportion of prisoners housed in isolated confinement units who are prone to mental illness tend to suffer psychiatric breakdowns under the strain. In my tours of isolated confinement units in many states I have discovered as many as one half of the inhabitants to be suffering from a serious psychiatric disorder requiring immediate treatment. Prisoners who are prone to violence tend to have difficulty controlling their rage, and prisoners prone to suicide tend to become suicidal when kept in segregation for significant lengths of time. Almost all prisoners confined in this kind of setting develop symptoms of emotional strain and breakdown over time. Some merely experience severe anxiety and compensate by cleaning their cells or pacing repetitively, some become depressed and suicidal, some become paranoid and withdraw into a numb, isolated state. There are many different reaction patterns, but over time the harsh conditions and extreme isolation and idleness take their toll.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 25<sup>th</sup> day of April, 2002.

  
Dr. Terry A. Kupers

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**EXHIBIT 3**

THE HONORABLE LEONIE BRINKEMA, JUDGE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA  
VIRGINIA

RE: UNITED STATES V. ZACARIAS MOUSSAOUI

Comes now Richard J. Bonnie, this 26 day of April, 2002, who swears and declares as follows:

1. I am Richard J. Bonnie, the John S. Battle Professor of Law, Professor of Psychiatric Medicine and Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia.
2. The Institute of Law Psychiatry and Public Policy has operated an active Forensic Psychiatry Clinic for more than 30 years. The Clinic has conducted many hundreds of assessments of defendants' competence to stand trial (competence to proceed in criminal adjudication) and the Institute faculty trains mental health professionals to conduct such assessments, under contract with the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services and the Office of the Attorney General of Virginia.
3. I have written extensively on the assessment of competence to proceed in criminal adjudication (to which I will refer as adjudicative competence) and was one of the architects of a multi-year, multi-million dollar research project on adjudicative competence sponsored and funded by the John D. and Catherine T. MacArthur Foundation from 1988-1996. My articles on competence assessment include "The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*", 47 *Miami Law Review* 536 (1993). A book on the MacArthur Project is in press: N.G. Poythress, R.J. Bonnie, J. Monahan, R. Otto and S.K. Hoge, *Adjudicative Competence: The MacArthur Studies*, New York: Plenum (in press, 2002).
4. This affidavit is being submitted by fax from Edinburgh, Scotland where I am advising the Scottish Law Commission on reform of Scottish Law on "Fitness to Plead," the doctrinal equivalent of competence for adjudication in the United States.
5. I am submitting this affidavit to the Court at the request of counsel for the defendant Zacarias Moussaoui for the purpose of advising the Court on the necessary features of an adequate competence assessment in a case of this kind. I have read the transcript of the proceedings on April 23 at which the defendant stated his desire to dismiss his

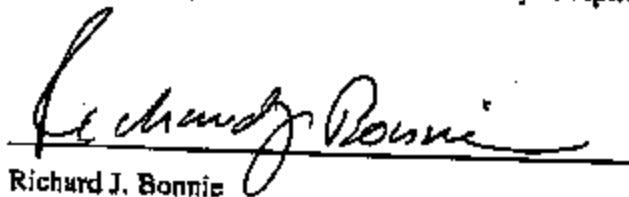
counsel and proceed *pro se* and at which the Court stated its intention to order a competence assessment. I have also had two conversations with counsel for Mr. Moussaoui regarding their interactions with him over the course of their representation.

6. Under the legal criteria developed in *Dusky v. United States*, 362 U.S. 902 (1960) and *Godinez v. Moran*, 509 U.S. 389 (1993), assessments of competence to proceed, including competence to waive representation by counsel, must address, *inter alia*, whether the defendant has a "rational understanding" of the nature of the proceedings against him, including the role of counsel, whether he has a "rational understanding" of the nature and consequences of the decisions that he is required or chooses to make, whether he has the capacity for logical thinking (in consulting with counsel or making his own decisions), whether he has the capacity to cooperate with counsel, and whether he has the capacity to make *stable* choices about significant matters in the conduct of the defense, including whether it is in his own interests to waive representation by counsel and to represent himself.
7. Under the standards of practice generally accepted within the field of forensic psychiatry and forensic psychology, assessment of adjudicative competence (including competence to waive representation by counsel) is a highly contextualized determination that must take into account the facts and circumstances of the particular case. In the present case, this would include the nature of the offenses charged, the impact of cultural and religious influences on the defendant's relationship with counsel and on his decision-making, and the ways in which psychopathological influences may be masked by and intertwined with religious and cultural influences. The assessment must address, *inter alia*, the defendant's capacity to trust and cooperate with counsel in his own defence, (as differentiated from a rational decision not to trust counsel and cooperate with them).
8. In a case of this type, an adequate competence assessment must include extensive interviews with the defendant's attorneys regarding their interactions with the defendant, and their observations regarding his conduct, beliefs and mental and emotional problems. Given the critical importance of sorting out the relationship between possible psychopathology and religious and cultural influences on the defendant's interactions with counsel and on his decision-making, an adequate competence assessment should also include (a) consultation with (or participation of) a mental health professional with an understanding of Islam and Islamic culture as

well as (b) investigation of the defendant's own background, previous history and experience. It is not possible to base such an assessment solely on a mental status examination, psychological testing and a few hours of interviewing the defendant; collateral information is essential.

9. According to the transcript of the proceedings on April 22, 2002, at which the defendant sought to dismiss counsel and proceed *pro se*, he expressed deep distrust of counsel despite what I understood to have been extensive, ongoing efforts by counsel to establish trust and to maintain the relationship in the face of daily tensions and conflicts regarding the conduct of the defense. Client autonomy struggles of this type are often influenced by psychopathological factors, and counsel faced with this problem often need the assistance of mental health experts to help maintain the attorney-client relationship and/or to help restore the relationship when it has deteriorated.
10. Accordingly, I would respectfully recommend to the Court that efforts be undertaken to help re-establish a functional attorney-client relationship before a definitive decision is made regarding the defendant's request to waive counsel and defend himself. These efforts should include consultation with one or more mental health professionals with appropriate training and experience, including, if feasible, an understanding of Islam and Islamic culture. Ideally such restorative efforts could be undertaken prior to the assessment of the defendant's competence; if, however, the Court decides to order the competence assessment immediately, the examiners should also be asked to assess the possibility of restoring the attorney-client relationship, whether or not the defendant is ultimately found to be competent to proceed to adjudication and to waive representation by counsel. At the very least, I recommend that the Court authorize the undertaking of such restorative efforts before it rules on the defendant's *Faretta* request (and on whether he has made a voluntary and intelligent waiver of his right to counsel).

Respectfully submitted this 26<sup>th</sup> day of April by fax from Edinburgh, Scotland.



Richard J. Bonnie

**EXHIBIT 4**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

United States of America

Vs.

Zacarias Moussaoui

Criminal No.  
01-455-A

AFFIDAVIT OF SIDNEY C. BROOKS, M.D.

Here comes now Sidney C. Brooks, M.D., a physician duly licensed in the states of Virginia, Maryland, and the District of Columbia to practice medicine with Board Certification's in Psychiatry, Forensic Examination and Forensic Medicine, with professional qualifications to provide services and testimony before this Honorable Court as set forth herein in 'Sidney C. Brooks, M.D. Curriculum Vita' attached herewith (Exhibit A), and with particular qualifications and knowledge to provide examination, opinion, and testimony concerning mental competency before this Honorable Court as set forth herein in 'Mental Competency: An Evolving Concept In Medicine Psychiatry, Psychology and Law (February 1, 1997)', attached herewith (Exhibit B). Sidney C. Brooks, M.D. herein and herewith further represents and attests that he is greater than eighteen years in age and has never been convicted of a felony or crime of moral turpitude.

At the request of Defendant Zacarias Moussaoui's Counsel Frank W. Dunham, Jr., as detailed in Counsel's letter to Sidney C. Brooks, M.D. of this date April 25, 2002, attached herewith (Exhibit C), and as further detailed in 'Defendant's Motion to Set Guidelines To Be Used in Determining Defendant's Competency to Knowingly and Voluntarily Exercise Sixth Amendment Rights' and in 'Memorandum in Support of Motion to Set Guidelines to be Used in Determining Defendant's Competency to Knowingly and Voluntarily Exercise Sixth Amendment Rights', both dated April 24, 2002, I Sidney C. Brooks, M.D. herein and herewith respond as follows:

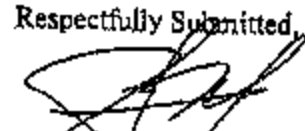
1. The Court's order that a 'competency examination be conducted to determine whether the defendant, Mr. Moussaoui, is competent to knowingly and voluntarily exercise his right under the Sixth Amendment to waive assistance of counsel and represent himself requires complex and careful assessment of the Defendant's mental status and mental history as may be relevant to the Defendant's current and present state of mind;
2. The competency determination of the Defendant's current and present state of mind would also require mental historical information to assess the durability and stability of the Defendant's current and present state of mind, as is



- relevant to his ability to sustain competency, or his likelihood of remaining incompetent; whichever is apparent;
3. The Defendant's request to represent himself requires particular attention to the examination of the Defendant's higher cognitive functions, including the Defendant's thought processes, reality sense, abstraction abilities, decisional abilities, ability to process information, weigh complex alternatives, and plan and organize information in his defense, as relevant predicate functions to the competency determination;
  4. The competency determination would include an assessment of the Defendant's ability to exhibit appropriate courtroom behavior and to cooperate with the Court and the Prosecution in the judicial courtroom procedures, and to present himself appropriately before a Jury.
  5. A complete psychiatric history and mental status exam is required in order to reach a competency determination; as requested;
  6. Supplemental psychological testing may be necessary in determining the Defendant's competency, as requested;
  7. The psychiatric examiner should have access to all relevant materials and documents as the examiner determines, as relevant and necessary, to assess the defendant's state of mind as a predicate to the determination of the Defendant's competency.
  8. The psychiatric examiner should provide a thorough and detailed report, as provided for at law, providing an unambiguous set of facts and findings upon which the Court can rule as to the requirements and form in competency as the Court has requested.

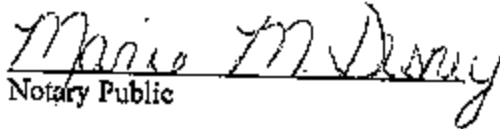
Further Affiant Sayeth Naught.

Respectfully Submitted,

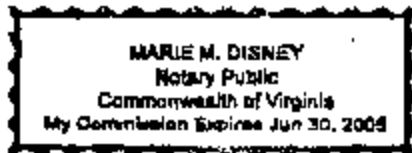
  
Sidney C. Brooks, M.D.

Certificate of Service

I, Sidney C. Brooks, M.D. President PFPSS, Inc. 600 Cameron Street, Suite 111, Alexandria, Virginia 22314 do hereby represent that four (4) copies in the original were mailed to Defendant's Counsel Frank W. Dunham, Jr. Federal Public Defender, Eastern District of Virginia, 1650 King Street, Suite 500, Alexandria, Virginia 22314 and by facsimile to 703-600-0800.

  
Notary Public

4/25/02  
Date



**EXHIBIT 5**

**DECLARATION OF KAREN BRONK FROMING, Ph.D.**

I, KAREN BRONK FROMING, Ph.D., declare as follows:

1. I am a clinical psychologist licensed to practice in the State of California. I also have a Certificate of Professional Qualification granted by the Association of State and Provincial Psychology Boards which facilitates my license reciprocity in other states. I have licensure or registration pending in Idaho, Arizona, Nevada, Alabama, and Missouri. I specialize in clinical psychology, neuropsychology and neuropsychological assessment. I have received training in this speciality in accordance with the standards of the American Psychological Association (APA), Division 40. I am a member in good standing of the APA, and its subspecialty divisions of clinical neuropsychology and Psychology and Law. I am board certified and credentialed by the American Board of Professional Psychology - American Board of Clinical Neuropsychology, having passed their written, work sample and oral examinations. I am also a member of the National Register of Health Service Providers in Psychology. In addition, I served as an oral commissioner for the Board of Psychology in the State of California licensing examination for psychologists. I have recently been appointed as an Expert Reviewer of Ethics in Neuropsychology for the Board of Psychology and the Department of Consumer Affairs under the auspices of the Attorney General of California.
2. I am a member of the International Neuropsychological Society, the National Academy of Neuropsychology, American Psychological Association and its subspecialty Divisions 40 and 41 (Clinical Neuropsychology and Psychology and Law). I am the former chair of the Education Committee of the Northern California Neuropsychology Forum, a position I held in 1993-1994

and in 1990-1991, and a past president (1991-1992) of that organization as well.

3. In 1979, I received my B.A. degree in psychology from the University of Florida.

Shortly after graduation, I received training in neuropsychological assessment at the Shands Teaching Hospital and J. Hillis Miller Center Psychological Clinic. As a trained neuropsychological technician, I administered and scored neuropsychological tests and provided neuropsychological services to over 300 patients.

4. In 1984, I received my M.S. in psychology from the University of Florida. From 1986 through 1987, following two years at Shands Teaching Hospital, I completed my pre-doctoral internship training at the San Francisco Veteran's Administration Center. In 1988, I successfully defended my dissertation and received a Ph.D. in psychology from the University of Florida. I was awarded a post-doctoral fellowship in neuropsychology in the Department of Clinical and Health Psychology at the University of Florida and received advanced training in behavioral neurology, behavioral brain syndromes, neuroanatomy, neurophysiology, memory disorders, and aphasiology or language disorders. I have received advanced training in Forensic Psychology from the American Board of Professional Psychology-Forensic Psychology division.

5. My past positions included the following duties: Director, Behavioral Medicine Unit, in the Division of General Internal Medicine at the University of California-San Francisco School of Medicine; Staff Psychologist III and Triage Coordinator; Consulting Neuropsychologist with the Langley Porter Psychiatric Institute's Psychological Assessment Unit; Assistant Clinical Professor of Medicine and Psychiatry at the University of California-San Francisco; and Adjunct Faculty Member at the Pacific Graduate School of Psychology.

6. In connection with my duties at the University of California-San Francisco School of

Medicine, I was responsible for accepting, evaluating and assigning for treatment patients suffering from organic and/or psychiatric complaints. The department for which I was responsible handles several thousand patient visits per year. I established the first neuropsychological assessment subspecialty service within our department.

7. I am currently in private practice in San Francisco, California. I have continued faculty appointments in the Department of Psychiatry at the University of California-San Francisco. I continue to teach both at the Langley Porter Psychiatric Institute and at San Francisco General Hospital. I am also conducting multi-site research on emotional processing and have recently received a grant to continue this research from the National Academy of Neuropsychology.

8. I have been asked by the attorneys for Zacarias Moussaoui to delineate the necessary aspects of a competency examination to determine if their client is capable of knowingly waiving his current counsel and either representing himself or obtaining new counsel.

9. In every competency examination the standard is for the client to make their decision in a reasoned and knowing way. To quote one of the standard texts in forensic mental health assessment, Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers (2<sup>nd</sup> edition; Melton, Petrila, Poythress, and Slobogin):

"The decision that is most likely to have an adverse effect on a defendant's ability to achieve a fair trial is the waiver of the right to trial counsel. Because this decision deprives the defendant of a legally trained advocate, it will seldom, if ever, be in a defendant's best interests."

10. Because this case, in particular, has not only national and international attention, it is imperative to follow standards of practice that are current and rigorous. Prior generations of mental health analyses of competency have ranged from the standard clinical interview taking

anywhere from one to several hours, to standardized questions that reflect the client's knowledge of the actors in the courtroom drama and the reasons for these actors (e.g. Competency Screening Test, Competency Assessment Instrument, and others), there are numerous shortcomings to these brief knowledge based structured tests. Specifically, they do not address anything but knowledge or the first prong of the test of competency. They do not address in any fashion, the reasoning capacity of the client nor do they take into account the cultural issues that may impact the person's presentation to the mental health or legal professional.

11. This case superficially appears to involve a client who has firm religious and ideological differences from the majority of the individuals who are charged with transacting the trial. However, care must be taken when a defendant is so culturally different, is foreign born, and whose beliefs are unfamiliar. It is often the case that ideologically extreme individuals are mentally disordered, gravitate to extremist groups, and that fact is hidden from view by the verbal ramblings that are mistaken for a 'simple' cultural, religious, or language difference. In contrast, there may be no mental disorder present but that fact has not been carefully extracted by a knowledgeable mental health professional who has observed the client over time, has endeavored to study the frame of reference of the client or is already quite familiar with that frame of reference, in order to disentangle the valid beliefs from the client's discourse.

12. It has been my experience when working with Islamic or Buddhist clients, that the background information I gather about the belief system, is integral to interviewing the client and gathering information from him/her, challenging beliefs or reasoning that may be unfounded, and ascertaining the ability of a person to have the capacity to engage in the process.

13. This case is unique in a variety of ways which warrant spending the time and effort to

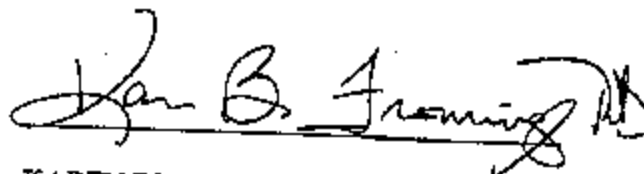
gather the crucial cultural data. In doing this cultural analysis, it is important to obtain collateral information particularly from individuals who have known the client in a variety of capacities. Obviously, members of his cohort of alleged terrorists, may have similar beliefs. However, it is important to ascertain if any of his circle consider his ideas extreme, unfounded, or frankly bizarre. In addition, his parents may have a markedly different view, as well as other family members. People who have observed him in the recent as well as distant past will also yield clues to changes in cognitive or psychiatric functioning. In this manner, one can triangulate on diagnostic information while still bearing in mind the biases of the sources of information.

12. In addition, to the strong emphasis on the cultural context of Mr. Moussaoui, the current standard competence tool, takes into account the client's reasoning capabilities. This tool is the MacArthur Competence Assessment Tool (1999). It is far superior to previous standardized measures and is the state of the art in analyzing the client's capacities to appreciate the decisions he/she is making. In general, the client is presented with hypothetical information and a series of questions regarding how one would proceed, what information is most important in making decisions, what facts are important to relay to one's attorney, and then specific questions regarding the defendant's case, are asked. However, all this is meaningless without a thorough understanding of the cultural factors which provide the backdrop to the client's perceptions.

13. If it is at all possible to obtain a Muslim mental health professional to conduct this evaluation or to assist in the evaluation, it would be preferable. There must be some way for the court, the lawyers, and the mental health professionals to determine if Mr. Moussaoui is expressing deeply felt and accurate religious beliefs or psychiatrically based, hyper-religiosity and delusions.



The foregoing is true and correct, and executed under penalty of perjury under the laws of the State of California and of the United States on this 25<sup>th</sup> day of April, 2002.

A handwritten signature in black ink, appearing to read "Karen B. Froming". The signature is written in a cursive, flowing style with a large initial "K" and "B".

KAREN BRONK FROMING, Ph.D.