IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	
	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE GOVERNMENT'S NOTICE OF INTENT TO SEEK A SENTENCE OF DEATH

The United States respectfully requests the Court to deny defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death for the following reasons:

Armed with more rhetoric than legal support, defendant seeks dismissal of the Government's Notice of Intent to Seek a Sentence of Death (hereinafter "Notice") by arguing that the Government cannot possibly prove one of the two "threshold findings" pled in the Notice. As demonstrated below, this argument is both premature and baseless. Recognizing the lack of merit in his first argument, defendant alternatively requests the Court to strike the first non-statutory aggravating factor from the Notice. Like his first argument, this claim also lacks merit.

I. ATTACK ON THE "THRESHOLD FINDINGS"

Under the Federal Death Penalty Act (hereinafter "FDPA"), for defendant Moussaoui to be eligible for the death penalty after he is convicted of one of the four death-eligible offenses (Counts One, Two, Three or Four), the jury must first find beyond a reasonable doubt that his conduct satisfies at least one of the four statutorily defined levels of culpability set forth in 18

U.S.C. § 3591(a)(2). This section provides as follows in relevant parts:

> (a) A defendant who has been found guilty of –
>
> * * *
>
> (2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 –
>
> (A) intentionally killed the victim;
>
> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.
>
> shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

18 U.S.C. § 3591(a)(2)(A)-(D). These subsections are referred to as "threshold findings" because they are not aggravating factors subject to weighing, but, instead, serve as "a preliminary qualification threshold." United States v. Webster, 162 F.3d 308, 355 (5th Cir. 1998); see also United States v. Minerd, 176 F. Supp.2d 424, 439 n.3 (W.D. Pa. 2001); United States v. Nguyen, 928 F. Supp. 1525, 1540 (D. Kan. 1996). In this case, the Government has filed notice that it intends to rely on subsections (C) and (D) to meet its burden under the statute.

Defendant seeks to deny the Government its constitutionally and statutorily mandated

opportunity to prove these threshold findings to the jury during the penalty phase by asking the Court to dismiss the Notice by arguing, in essence, that the Government cannot possibly meet its burden because the defendant was in custody at the time of the September 11 attacks. Other than reckless hyperbole that does nothing to advance his argument, defendant relies exclusively on the wording of the statute in support of this claim.[1] The analysis of defendant's claim must begin with the constitutional background of the threshold findings.

A. The Constitutional Background of the Threshold Findings

The threshold findings evolved from the Supreme Court's decisions in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Webster, 162 F.3d at 322, 355; United States v. Tipton, 90 F.3d 861, 897 (4th Cir. 1996) (discussing the parallel statute of 21 U.S.C. § 848(n)(1)); United States v. Flores, 63 F.3d 1342, 1370 (5th Cir. 1995) (same); United States v. Illera Plaza, 179 F. Supp.2d 464, 478 (E.D. Pa. 2001); United States v. Cooper, 91 F. Supp.2d 90, 97 (D.D.C. 2000). As United States District Judge Robert E. Payne noted in United States v. Friend, 92 F. Supp.2d 534 (E.D. Va. 2000):

> The FDPA, of course, was enacted against a substantial jurisprudential base of Supreme Court decisions respecting the requirements for a constitutionally acceptable death penalty statute. Congress was no doubt aware of that significant jurisprudential base when, in 1994, it enacted the FDPA. In any event, Congress is presumed to have been aware of those decisions.

Id. at 537-38. Indeed, the legislative history for this statute states that the threshold findings stem from the Supreme Court's holdings in Enmund and Tison. H.R. 103-466, 1994 WL

[1]In various places throughout his memorandum, defendant makes vitriolic comments such as "the government wants to execute someone so badly for the events of September 11 that, because no one else is available, it is willing to ignore the plain requirements of the law . . . ." (Defendant's Memorandum at 12). Such comments have no place in this Court.

107577 at "Background." Thus, it is imperative to review Enmund and Tison not only to ensure that a death sentence for this defendant would not offend the Eighth Amendment, but also to interpret the threshold findings set forth in the statute.

In Enmund, the Supreme Court reversed the death sentence of a defendant convicted under Florida's felony-murder rule where the defendant served as the "getaway" driver during an armed robbery of a dwelling. While the defendant remained outside with the car, his confederates murdered an elderly couple. Enmund, 458 U.S. at 783-84. There was no evidence that the defendant intended to kill anyone. Id. at 788 ("the record supported no more than the inference that [defendant] was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape"). The Supreme Court concluded that the death sentence violated the Eighth Amendment because the defendant neither took life, attempted to take life, nor intended to take life. Id. at 798. The Court wrote: "American criminal law has long considered a defendant's intention – and therefore his moral guilt – critical to the 'degree of [his] criminal culpability,' Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." Id. at 800. The Court concluded by stating that "[p]utting Enmund to death to avenge two killings that he did not commit and **had no intention of committing or causing** does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." Id. at 801 (emphasis added). Moreover, the threat of the death penalty will not "measurably deter one who does not kill and has no intention or purpose that life will be taken." Id. at 798-99.

Five years later, the Supreme Court decided Tison after the defendants raised an Eighth

Amendment challenge grounded in Enmund. In Tison, the defendants were brothers, who, along with other members of their family, planned and effected the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. The defendants smuggled guns into the prison, and armed their father and another convicted murderer. As they fled from the jail, the defendants helped to abduct, detain, and rob a family of four, and then watched their father and the other inmate murder the members of that family with shotguns. Neither defendant made any effort to help the victims as their father murdered them. Tison, 481 U.S. at 139-41. The defendants complained that their death sentences offended the Eighth Amendment because they neither intended to kill the victims nor inflicted the fatal gunshot wounds. The Supreme Court rejected this argument and held that the Eighth Amendment is not offended by a death sentence for a defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life. Id. at 158. In so ruling, the Court wrote: "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." Id. at 156.

In considering this constitutional principle, however, the Tison court recognized that focusing solely on intent to kill did not fully capture the nuances of culpability. Id. at 157. The Supreme Court observed that a murder where a victim died after being tortured without care as to whether or not the victim lived could be more "dangerous and inhumane" than one where the murder specifically intended death. Id. With this consideration in mind, the Court refined its

culpability requirement as follows:

> [W]e hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when the conduct causes its natural, though also not inevitable, lethal result . . . [W]e simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.

Id. at 157-58.[2]

Following Tison, the Eighth Circuit in Fairchild v. Norris, 21 F.3d 799 (8th Cir. 1994), held that a defendant may be sentenced to death even if the defendant was not physically present at the time of the murder where the defendant's actions leading up to the murder were sufficient to demonstrate that he exhibited a reckless indifference to human life. Id. at 804. In Fairchild, the defendant and his accomplice followed the victim to her car, kidnaped her at gunpoint (the accomplice had the gun), and drove her to a deserted house. The defendant and his accomplice raped the victim, but the defendant left the house believing that his accomplice was going to leave the victim alive. The defendant, who was no longer in the house, went to the car and was rummaging through the victim's purse, when his accomplice shot the victim to death. Id. at 803. The Eighth Circuit ruled that the demands of Enmund and Tison had been met by the defendant's actions leading up to the murder. Id. at 803-05. See also Lesko v. Lehman, 925 F.2d 1527, 1551 (3d Cir. 1991) (Higginbotham, J.) (Enmund\Tison standard met by defendant's

[2]Notably, of the 38 states with statutes authorizing the death penalty, 33 of those states permit imposition of the death penalty upon someone other than the person who physically commits the murder.

actions leading up to murder despite his claim that he was merely present at the murder scene and did not know that his accomplice intended to kill the victim).

Moreover, and more important to this case, is the observation made by the Supreme Court in its final footnote to the Tison opinion. In that footnote, the Court suggested that some crimes could be so horrible, that participation and culpability factors could be affected by the crime itself: "Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude than any major participant necessarily exhibits reckless indifference to the value of human life." Tison, 481 U.S. at 158, fn.12.

B. A Death Sentence for Defendant would comply with the Eighth Amendment

The actions of any of the participants involved in the conspiracy to commit the attacks perpetrated on September 11 more than meet the criteria laid out in footnote 12 of Tison. Any one person willing or preparing to step on a plane, murder innocent passengers or crew to use the aircraft as a fully fueled bomb, and to do so knowing the planes would be used to destroy buildings with thousands of additional innocent people inside, has to be considered a major participant given the extent of planning such a crime must involve. Moreover, such a crime exhibits a reckless indifference to the value of human life in a way unimaginable before September 11, 2001. Footnote 12 of Tison, then, permits this court to infer culpability of this hijacker to such a level that the death penalty does not violate the Eighth Amendment when used as a punishment.

Applying Enmund and Tison to the present case compels the conclusion that the imposition of the death penalty upon defendant Moussaoui comports with the Eighth

Amendment.[3] The Government at trial will prove that defendant trained to kill in the al Qaeda terrorist camps in Afghanistan, traveled across the globe to the United States solely for the purpose of murder, trained as a pilot so he could join his confederates in their mission to kill as many Americans as possible, purchased weapons and tools for use during the hijackings\murders, lied to cover up the conspiracy at the time of his arrest to ensure that his collaborators could fulfill the mission, and then rejoiced in its success.

No question exists that defendant intended to kill, and his acts as an active member of the conspiracy demonstrate, at the very minimum, a reckless indifference to the value of human life. Indeed, defendant's actions far exceed those in Tison, because he actually trained to kill and, when prevented from carrying out his own role due to his arrest, he covered up the overall plot by lying to federal agents so that his cohorts could carry out the plan. Thus, the only question becomes whether the statute itself permits imposition of a death sentence.

C. The Defendant's Motion to Strike the Notice is Premature

Both case law and the statute demonstrate that defendant's attack upon the threshold findings at this stage of the prosecution is premature. In Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court held that the legislature may choose any point during the prosecution for a fact-finder to make the Enmund determination as long as there is a specific finding as to the

[3]Indeed, defendant has not even raised a constitutional challenge to the application of the death penalty to the defendant, apparently conceding that such a sentence would not offend the Eighth Amendment. Nor does defendant claim that the statute should be interpreted as he suggests in order to avoid constitutional problems.

culpability findings required by Enmund.[4] Cabana, 474 U.S. at 386-87; see also United States v. Paul, 217 F.3d 989, 997 fn. 4 (8th Cir. 2000), cert. denied, 122 S. Ct. 71 (2001) ("the intent element can be satisfied in a later stage of trial, such as the sentencing phase"). Congress decided in the FDPA to have the jury make the Enmund\Tison findings during the penalty phase after the Government has had the opportunity to put forward information it believes supports a sentence of death. 18 U.S.C. §§ 3591(a)(2), 3593.

Defendant's efforts to dismiss the Notice based upon his challenge to the Government's ability to sustain its evidentiary burden as to the threshold findings misunderstand the role of the Notice and are premature. As defendant stated in his Motion to Amend Briefing Schedule as to Government's Notice of Intent to Seek a Sentence of Death, the Notice "is, in essence a charging document, equivalent to an indictment." Motion at 1. Under § 3593(a), the principal function of the Notice is to advise the defendant and the Court of the grounds upon which the Government will rely during the penalty phase as justification for a sentence of death. The Notice also serves to channel "the sentencer's discretion by 'clear and objective standards' that provide specific and detailed guidance and make rationally reviewable the death sentencing process." United States v. McVeigh, 944 F. Supp. 1478, 1488 (D. Col. 1996) (citations omitted). For the Notice to survive, it need only allege the aggravating factors, both statutory and non-statutory, upon which the Government intends to rely upon at the time of sentencing. United States v. Edelin, 134 F. Supp.2d 59, 72 (D.D.C. 2001) (addressing 21 U.S.C. § 848(h), which parallels the FDPA). The notice is not a "notice of specific evidence . . . The Government is not required to provide

---

[4]Tison was decided the year after Cabana, so the Court in Cabana only spoke in terms of Enmund.

specific evidence in its notice of intent." United States v. Battle, 173 F.3d 1343, 1347 (11th Cir. 1999).

One district court recently denied a motion to strike the threshold findings and questioned whether the Notice even needs to allege the threshold findings:

> [I]t does not appear that the FDPA requires the government to include allegations regarding the § 3591(a)(2) factors at all. Section 3591 does state that in order to return a death sentence, the jury must find that the defendant possessed one of the listed states 'at the hearing under section 3593' – that is, at the sentencing hearing. However, § 3593(a), which requires the government to produce NOIs [Notices of Intent], does not specifically require that NOIs list the § 3591(a)(2) factor or factors the government intends to prove.

United States v. Illera Plaza, 179 F. Supp.2d 464, 476 (E.D. Pa. 2001).[5]

To meet the requirements of § 3593, the Government need only set forth in its notice the aggravating factors upon which the Government will rely during the penalty phase. This we have done. Now is simply not the time procedurally for defendant to advance a challenge to the sufficiency of the Government's evidence as it relates to the penalty phase. Instead, such a motion should be made in the form of a Rule 29 motion at the conclusion of the Government's case-in-chief in the penalty phase, at the conclusion of the penalty phase, or after the jury renders a death verdict. To grant the defendant's motion at this stage of the proceedings would serve only to deny the Government the opportunity to prove that this defendant merits the death penalty and subvert the statutory mechanism set forth by Congress.

D. The Attack on the Threshold Findings

Even if the Court reviews the merits of defendant's claim, it must fail because the defendant's actions support the threshold findings set forth in both subsections (C) and (D). Specifically, the Notice alleges:

[5]Similarly, § 3591(a)(2) requires the jury to find that the defendant was not less than 18 years of age at the time of the offense, but § 3593 does not require such an allegation in the Notice.

> 1. The defendant, ZACARIAS MOUSSAOUI, intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victims died as a direct result of the act. Section 3591(a)(2)(C).
>
> 2. The defendant, ZACARIAS MOUSSAOUI, intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victims died as a direct result of the act. Section 3591(a)(2)(D).

We now address the requirements of each of these subsections.

The "C Finding"– 3591(a)(2)(C):

A straightforward reading of the statute demonstrates that defendant's behavior fits best with the "C finding." Essentially, there are three sub-parts to the "C finding," which require proof that the defendant (1) intentionally participated in an act, (2) contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and (3) the victim died as a direct result of the act. We discuss below each of these elements.

1. "Intentionally Participated in an Act"

Either defendant's participation in the conspiracy or his lying to federal agents on August 16-17, 2001, to cover up the September 11 plot establish the first element of the "C finding." We will begin with defendant's participation in the charged conspiracies.[6]

---

[6]The legislative history of the FDPA provides no assistance regarding the definition of "act" in this statute. Black's Law Dictionary defines a criminal "act" as the "[e]xternal manifestation of one's will which is prerequisite to criminal responsibility. There can be no crime without some act, affirmative or negative. An omission or failure to act may constitute an act for purpose of criminal law." Black's Law Dictionary 25 (6th ed. 1990).

a. Participation in the Conspiracy as the "Act"

Throughout defendant's memorandum, he depends solely on a statutory construction argument that participation in a conspiracy cannot be the "act" because the statute (§ 3591(a)(2)) speaks first in terms of an "offense" and then in terms of an "act."[7] While we agree generally with defendant's recitation of the rules of statutory construction, a fatal flaw exists in his argument. Although the terms "offense" and "act" are certainly different terms, the difference does not necessarily mean that they are mutually exclusive in all instances. This is particularly true with inchoate crimes such as conspiracy. A review of the law of conspiracy demonstrates this point.

For conspiracy crimes, "the criminal agreement itself is the *actus reus* and has been so viewed since Regina v. Bass, 11 Mod. 55, 88 Eng. Rep. 881, 882 (K.B.1705)." United States v. Shabani, 513 U.S. 10, 16 (1994). Where, as is the case for the capital-eligible counts here, the relevant statute itself criminalizes the act of conspiring and engrafts no additional requirement of further acts to the conspiring, it is the common law understanding of conspiracy that applies. Id. at 13. "[T]he common law understanding of conspiracy 'does not make the doing of any act other than the act of conspiring a condition of liability.'" Id. at 13-14 (quoting Nash v. United States, 229 U.S. 373, 378 (1913)); see Salinas v. United States, 522 U.S. 52, 65 (1997) ("It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself").

[7]A fair reading of § 3591(a)(2) demonstrates that the term "offense" appears in this subsection merely to segregate the requirements of that subsection from the requirements pertaining to treason and espionage, which are set forth in the previous subsection (§ 3591(a)(1)).

Legal evaluation of participation in conspiracy derives from longstanding judicial and legislative recognition of the specialized manner in which the enforcement goals of deterrence and retribution can be achieved against a hidden and complex crime. As early as 1915, and in language eerily relevant to al Qaeda, which compartmentalizes knowledge among members while simultaneously training them for the most horrendous acts, the Supreme Court noted that the subversive and premeditated nature of conspiracy renders it especially dangerous:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

United States v. Rabinowich, 238 U.S. 78, 88 (1915).

Within this context, courts readily recognize the obvious: The division of labor within, and the ongoing nature of, a criminal conspiracy requires that participants become responsible for each other's acts, whether or not they even knew about them. As early as 1910, Justice Oliver Wendell Holmes noted that the joining of a conspiracy is an initiating act, but that participation does not end with enlisting:

> It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it . . . [t]he contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes [and] . . . an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

United States v. Kissel, 218 U.S. 601, 607-08 (1910). The secrecy surrounding a conspiracy,

especially a "broad schem[e] calling for the aid of many members," also calls for liability among its members:

> Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Blumenthal v. United States, 332 U.S. 539, 557 (1947).

In short, defendant can be held liable for the events of September 11 under a conspiracy charge because:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense . . . The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other . . . If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas v. United States, 522 U.S. at 63-64 (citations omitted). Moreover, he is responsible, even though he was in jail, because nearly a century ago the Supreme Court recognized that "a person may be guilty of conspiring although incapable of committing the objective offense."[8] United States v. Rabinowich, 238 U.S. 78, 86 (1915); see also United States v. Salameh, 152

[8] This co-conspirator liability does not eliminate a need to evaluate defendant's own conduct. As argued below, defendant has implicated himself amply. The Government merely mentions these factors to the extent they highlight the enforcement concerns caused by conspiracies.

F.3d 88, 150-54 (2d Cir. 1998) (upholding conspiracy conviction for 1993 bombing of World Trade Center even though defendant had been imprisoned for six months at the time of the bombing).

No doubt exists that the conspiracies charged in this case amount to criminal "offenses" specifically contemplated by the FDPA. More importantly, the September 11 attacks constitute a conspiracy of the size, scope and nefarious nature that conspiracy law is designed to protect against. The level of destruction attained that day could only have been readily accomplished by a criminal act as powerful as a conspiracy. To allow defendant to evade the death penalty because his personal acts in furtherance of the conspiracy did not more obviously contribute to the dire events of September 11, 2001, would allow him to benefit from the sheer magnitude of the crime, thereby contravening federal precedent nearly a century old.

While defendant asserts that the Government improperly meshes the notions of "offense" and "act" in seeking to apply the provisions of this section, he also provides the rationale why this is not true. "A conspiracy is a distinct crime from the overt acts that support it." United States v. Ambers, 85 F.3d. 173, 177-78 (4th Cir. 1996) (citing United States v. Felix, 503 U.S. 378, 389-92 (1992)). This is true, in part, because "[c]onspiracy is an inchoate offense," Iannelli v. United States, 420 U.S. 770, 777 (1975), and is an offense which continues beyond its beginning spark. See United States v. Shabani, 513 U.S. 10, 16 (1994); see also Defendant's Memorandum at 9.

The plain language of the four statutes at issue here provides another reason the Government properly relies on the conspiracy as the "intentional act" for § 3591(a)(2)(C). None of the four conspiracies charged requires, in the statutes themselves, that an overt act be proved,

even though they concomitantly provide for a possible death sentence. Growing from the common law principle that the agreement in criminal activity is the actus reus of conspiracy, an overt act is not required of many conspiracy statutes, though not all.[9] Thus, case law coupled with the plain language of the statutes charged demonstrates the conspiracies alleged can be proven without any overt acts, meaning that Congressional use of the word "act" in the FDPA can readily apply to a conspiracy, despite the use of "offense" earlier in the subsection of the statute.

Indeed, the plain language of the FDPA, upon which defendant's entire Motion to Strike relies, includes a mitigating factor which, by its existence, suggests that even a co-conspirator can be eligible for the death penalty. Section 3592(a)(3) sets forth the following mitigating factor:

> (3) Minor participation. – The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

First, this mitigating factor refers to participating in an "offense" and not an "act," which diminishes defendant's argument that the FDPA relies solely on "acts" to make one death eligible. Second, and more important, the existence of this mitigating factor demonstrates that

---

[9] See, e.g., Salinas, 522 U.S. at 63 ("There is no requirement of some overt act or specific act in the [RICO, 18 U.S.C. 1962(d)] statute before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.'(citing 18 U.S.C. 371)"); Shabani, 513 U.S. at 15 ("In order to establish a violation of 21 U.S.C. 846, the government need not prove the commission of any overt acts in furtherance of the conspiracy"); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("And it is likewise well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring.").

Congress envisioned capital liability for conspirators. See United States v. Gooding, 67 F.3d 297, 1995 WL 538690 at **6 (4th Cir. 1995) (unpublished)[10] (mitigating factor in 21 U.S.C. § 848(m)(3) regarding the role of the defendant in the offense (which is identical to the mitigating factor in § 3592(a)(3)) demonstrates "that Congress contemplated that aiders and abettors might face death . . . ."). This statutory mitigating factor must be read consistent with subsection (C).

Notably, Congress wrote subsection (C) to be far broader than subsection (D), which requires proof that the defendant "intentionally and specifically engaged in an act of violence . . . ." Subsection (C) merely requires that the defendant "intentionally participated in an act." The difference between "participation" and "specifically engaged in" alone suggests that subsection (C) is not limited to those who physically participate in the violence.

Even more striking, Congressional enactment or amendment of the four statutes at issue occurred either at the same time as or after the enactment of the Section 3591 language in the Federal Death Penalty Act establishing the threshold intent or culpability findings.[11] Pub. L.

---

[10]The unpublished opinion in Gooding is attached as Exhibit A.

[11] For example, 18 U.S.C. § 2332a, Use of Certain Weapons of Mass Destruction, including the language extending eligibility for the death penalty to conspirators, was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, which also included in the Federal Death Penalty Act. See also Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 725, 110 Stat. 1214 (1996) (inserting in paragraph (a)(2): ", and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce").

Section 2332b, including the language extending eligibility for the death penalty to conspirators, was added to Title 18 in 1996 as part of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub.L. No. 104-132 § 702, 110 Stat. 1214 (1996). The Aircraft Piracy, 49 U.S.C. 46502, and Destruction of Aircraft or Aircraft Facilities statutes, 18 U.S.C. 32, were also amended by the AEDPA in 1996 to include conspiring among the acts punishable by death. PL 104-132 § 723, 110 Stat. 1214 (1996) ("Section 46502 (a)(2) of title 49, United States Code, is amended by inserting 'or conspiring' after 'attempting'" and Section 32(a)(7) of title

No. 103-322 § 6002(a), 108 Stat. 1959 (1994). The laws governing this case interrelate in a scheme that Congress clearly intended to be read as a whole. When reviewing the application of such laws, a court "must construe the statute in the context of the entire statutory scheme, and avoid rendering statutory provisions ambiguous, extraneous, or redundant; [courts] favor the more reasonable result; and we avoid construing statutes contrary to the clear intent of the entire statutory scheme." In re McLean Square Assoc., G.P., 201 B.R. 436, 442 (E.D. Va. 1996); see also FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (court must review a particular statutory provision in context of entire statutory scheme).

Given that Congress specifically enacted or amended statutes so that a conspiratorial role could make a participant death eligible, it simply cannot be the case, as defendant contends, that when the "offense" under section 3591 is conspiracy, the threshold factor Congress enacted in tandem with those statutes somehow renders the death penalty unavailable. Such an inconsistent reading plainly thwarts the congressional intent expressed in four separate laws. See United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994) (noting that a court must first confirm whether the "statutory scheme is coherent and consistent."). Neither this nor any other court should read these statutes together as having Congress authorize the death penalty for a crime in four laws, but then precluding its application for that same crime in a fifth. See Patten v. United States, 116 F.3d 1029, 1033-35 (4th Cir. 1997) (strong presumption that subsequent legislation does not repeal existing law in the absence of irreconcilable conflict and clear legislative intent to the contrary).

18, United States Code, is amended by inserting "or conspires" after "attempts").

Because defendant's challenge to the Notice would require this court to rule that the FDPA abrogated provisions in not one but four statutes in which Congress knew the FDPA would apply, his contention founders at its start. It simply defies reason to suppose that Congress would expressly include the death penalty among the punishments available for these conspiracy offenses resulting in death but intend that the death penalty be eliminated as a possible punishment by an unwarranted narrow understanding of the statutory intent factors. If the act encompassed by the (C) factor was construed to be that constituting the illegal object of the conspiracy rather than the conspiracy itself, then Congress' designation of the death penalty as a possible punishment for these conspiracy offenses would be rendered a nullity and the only individuals who could face the death penalty would be those who could otherwise face the death penalty as principal actors. Congress clearly would not have authorized the death penalty in the substantive statute for conspirators, then precluded its application in the sentencing statute.

Importantly, in the case most analogous to the current prosecution, the district court in the prosecution of Terry Nichols in the Oklahoma City bombing case directly addressed this issue. In the Nichols prosecution, the jury convicted Nichols of participating in a Conspiracy to Use Weapons of Mass Destruction and Involuntary Manslaughter but acquitted on all other counts.[12] After the verdict in the guilt phase, Nichols moved to dismiss the death notice and preclude the penalty phase by arguing that, as a matter of law, the jury could not find a "gateway factor" (threshold finding) to exist. Although United States District Judge Richard Matsch did not issue a written opinion, at a hearing on December 24, 1997, Judge Matsch rejected Nichols's

[12]Of course, only the conspiracy conviction carried a possible penalty of death. See 18 U.S.C. § 1112 (the maximum penalty for involuntary manslaughter is 6 years imprisonment).

claims and allowed the penalty phase to proceed with the jury considering subsections (C) and (D) as "gateway factors."[13] See Exhibit B at 3-34. Although the jury ultimately declined to impose the death penalty, Judge Matsch's decision supports the proposition that participation in a conspiracy can constitute an act under both subsections (C) and (D). See also United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000), cert. denied, 122 S. Ct. 71 (2001) (one who aids and abets another in a killing qualifies under subsection (C) for eligibility for the death penalty if the defendant has knowledge of the intended killing and performs some act that aids the killer). Thus, a conspiracy clearly constitutes an "act" for purposes of the "C finding."

b. Defendant's Lies on August 16 and 17 Constitute an "Act"

Not only does the participation in the conspiracy constitute an "act" for purposes of § 3591(a)(2), so too does defendant's lies to federal agents on August 16 and 17, 2001. FBI and INS agents first interviewed defendant on August 16, 2001, after his arrest for immigration violations. During this initial interview, defendant lied by telling the agents that he sought the flight training purely for personal enjoyment and, upon completion of the training, he intended to engage in sightseeing in New York City and Washington, D.C. When interviewed for the second time on August 17, 2001, defendant denied that he was an extremist intent on using his aviation training in furtherance of a terrorist goal and, instead, reiterated that he merely sought flight training for personal enjoyment. Of course, because he sought the training to participate in the plot, none of this was true.

Clearly, lying constitutes an "act." See United States v. Jake, 281 F.3d 123, 132-33 (3d

[13]A copy of the transcript is attached as Exhibit B.

Cir. 2002); United States v. Evans, 272 F.3d 1069, 1088 (8th Cir. 2001), cert. denied Evans v. United States, – S. Ct. –, 2002 WL 491888 (2002); United States v. Admon, 940 F.2d 1121, 1125 (8th Cir. 1991); United States v. bin Laden, 2001 WL 1160604 at *1 (S.D.N.Y. 2001). As such, defendant's act of lying establishes the first element of subsection (C).

Of course, defendant committed several overt acts in furtherance of the charged conspiracies which would also qualify as an "act" under subsection (C), and his act of lying must be viewed in the context of his other acts. In his Motion to Strike the Notice, defendant attempts to minimize the enormity of his actions, and this offense, literally marginalizing what he did to further the conspiracy. See Defendant's Memorandum at 3, fn. 3. Defendant implies that it is of no consequence that he was "present" at an al Qaeda training camp (overt act 14), attended flight schools in Oklahoma and Minnesota (overt acts 46, 72), purchased flight deck videos for commercial aircraft (overt act 56), received funding from Ramzi Bin al-Shibh (overt act 67), bought two knives (overt act 68), and made false statements to federal agents (overt act 74).

Such minimization cannot withstand review of the events of September 11, 2001. When one places defendant's actions within the plot of a conspiracy by al Qaeda members and associates (some of whom had visited the same flight school in Oklahoma), who hijacked four commercial airliners after gaining control by stabbing and killing passengers with knives smuggled aboard, defendant's discrete actions rightly take on a more sinister tone.[14]

---

[14] In an odd contention related to minimizing his conduct, defendant seems to claim that his culpability is lessened by the fact that he "was a terrible student pilot" who could not have passed on information about how to fly planes to his confederates. Defendant's Memorandum at 12, fn.10. While it seems to go without saying, we note that one need not be a "Top Gun" to intentionally crash a plane during a murderous act of terrorism.

This attempt to separate defendant's actions from the conspiracy that they furthered should fail not just because it misrepresents the facts of the case, but also because the effect of doing so illustrates exactly why courts have developed co-conspirator liability. "Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish," Callanan v. United States, 364 U.S. 587, 593 (1961). That his 19 primary confederates accomplished their conspiratorial goal even though defendant was jailed and could not board one of the flights bears out the legal precept that organizations involving many can accomplish greater destruction and damage than any one actor can do alone. Moreover, by contemplating co-conspirator liability, conspiracy statutes deliberately pierce the shield of secrecy conspiracies construct, and behind which Moussaoui hides when functionally saying, "all I did was take some flight lessons and buy some knives."

Each of these other overt acts underscore the significance of defendant's lies to the success of the September plot. Although the other overt acts committed by defendant may not have directly contributed to the murder of the more than three thousand victims, defendant's lies most certainly did.

2. "Contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person other than one of the participants in the offense"

To satisfy the requirements of the (C) factor, the Government will also need to prove that the defendant acted while "contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense . . . ." The evidence readily establishes that defendant trained to be one of the pilot-

hijackers to participate in the attacks; therefore, it cannot be doubted that defendant joined the conspiracy contemplating that the life of a person would be taken or that lethal force would be used.

3. The Victim Died as a Direct Result of the Act

Last, the Government must prove that "the victim died as a direct result of the act." Defendant misreads this language to require that defendant's participation directly resulted in the death when, instead, the language makes clear that the "victim died as a direct result of the act." Thus, where the conspiracy is the act, defendant's own participation in the conspiracy need not be the cause of death, but, rather, the deaths need result from the conspiracy, which obviously occurred in this case.

The thousands of victims in this case also died as a direct result of defendant's lies on August 16 and 17. "Direct result" in this context means that defendant's conduct had to be a substantial factor in the deaths of the victims. See United States v. Ryan, 41 F.3d 361, 367 (8th Cir. 1994) (*en banc*) (upholding jury instruction in prosecution for violating 18 U.S.C. § 844(i) defining "direct or proximate result" to be a substantial factor in the deaths, meaning that the defendant's conduct had "such an effect in producing the deaths as to lead a reasonable person to regard his conduct as a cause of the deaths."). When questioned by federal agents about his actions, defendant affirmatively lied about his criminal activity, serving to further the conspiracy by maintaining a veil of secrecy which bought enough time for his 19 confederates to complete the crime. By lying to the agents regarding his reasons for being in the United States and taking

flight lessons, he personally ensured that the planned attacks would be carried out.[15] Had defendant truthfully disclosed the existence of the conspiracy to federal agents, instead of lying, thousands of deaths would have been prevented. Indeed, that such a bold conspiracy persisted beyond defendant's arrest bespeaks the utter confidence the other 19 hijackers had that defendant would fulfill his final responsibility as a coconspirator: that of enshrouding the existence of the conspiracy with his lies, so that the others could complete his, and their, joint terrorist plans.[16]

In sum, there is simply is no question that defendant's participation in the conspiracy and\or his acts of lying satisfy the demands of subsection (C). This conclusion stems from the facial reading of the statute, application of the rules of statutory construction, and viewing the statute in the context of its jurisprudential ancestry. Thus, defendant's attack on subsection (C)

---

[15] In raising the fact that defendant lied to federal agents, the United States does not implicate Moussaoui's Fifth Amendment privilege against self incrimination. The Fifth Amendment privilege against self incrimination affords an individual being questioned by entities of the United States Government two options: to remain silent or answer the questions honestly. Brogan v. United States, 522 U.S. 398, 404-05 (1998); Bryson v. United States, 396 U.S. 64, 72 (1969). The Fifth Amendment does not confer a privilege to lie. Id. See also 18 U.S.C. § 1001 (federal offense for lying to federal agents).

[16] Defendant's arrest did not terminate his involvement in the conspiracy and, when the conspiracy achieved its objective, he became eligible for the death penalty just as if he had personally killed each of the thousands of victims. United States v. West, 877 F.2d 281, 289 n.4 (4th Cir. 1989) (and cases cited therein). "A defendant's membership in a conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action. Withdrawal must be shown by evidence that the defendant acted to defeat or disavow the purposes of the conspiracy." Id.

No evidence exists that defendant took any affirmative steps whatever to withdraw from the conspiracy. Defendant maintained membership in the conspiracy by lying about its existence long enough for it to be completed. Moreover, defendant continues to loudly proclaim his continuing adherence to some of the very same al Qaeda objectives outlined as Overt Acts in this Indictment when announcing his desire for the "destruction of the United States" and the return of various lands to Muslims. See April 22, 2002 transcript at 10.

must be denied.

The "D Finding"—3591(a)(2)(D):

The (D) finding requires the jury to find that the defendant "intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act." 18 U.S.C. § 3591(a)(2)(D). Defendant's participation in the conspiracy again makes him eligible for the death penalty under subsection (D).[17]

Because there can be little question that the defendant "intentionally and specifically engaged" in the conspiracy, the question becomes whether the conspiracy constitutes an "act of violence." Although there is no direct authority defining an "act of violence" in the context of Title 18 capital sentencing, the extensive case law interpreting "crime of violence," as that term is used in the context of Sentencing Guideline provisions, is instructive and appropriately extends to the capital sentencing context here.

Within the context of Section 4B1.1 of the Sentencing Guidelines, which provides for an enhanced sentence for career offenders, a prior "crime of violence" includes any offense that by its nature, "present[s] a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2). Where the nature of the offense is not clear from the fact of conviction and the definition of the prior offense, it is permissible to look beyond the ambiguity and to examine the facts contained in the charging document and jury instructions. United States v. Pierce, 278

[17]Defendant's lies do not constitute an "act of violence"; therefore, the Government does not advance these lies as the "act" necessary for subsection (D).

F.3d 282, 286 (4th Cir. 2002); United States v. Kirksey, 138 F.3d 120, 124 (4th Cir. 1998) (citing United States v. Taylor, 495 U.S. 575, 600-602 (1990)). Additionally, 18 U.S.C. § 16 defines a "crime of violence" as:

> (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Given what the conspiracies intended to and did accomplish, each of the four conspiracy offenses charged clearly constitute a "crime of violence." Because a conspiracy constitutes an "act" as previously discussed, the "act of violence" requirement is satisfied. Therefore, the "D finding" is established, because, in light of the preceding discussion, there can be no doubt that the remaining elements of the "D finding" are also met.

Significantly, subsection (D) is a direct result of Tison and closely resembles its holding, which defendant acknowledges in his memorandum. See Tison, 481 U.S. at 157-58. There can be no greater guide to interpretation of subsection (D) than application of Tison to the current facts. As previously discussed, when that is done, there is no question that defendant's conduct meets that required by subsection (D), particularly in light of the Supreme Court's comment in footnote 12 of Tison. Therefore, defendant's challenge to subsection (D) must also fail.

II. The Attack on the First Non-Statutory Aggravating Factor

Defendant next moves to strike the first non-statutory aggravating factor. Unlike defendant's attack upon the threshold findings, this claim raises a purely legal question about the constitutional propriety of a specific aggravating factor and, therefore, is properly reviewable at

this time. His argument completely misses the mark.

Congress has provided that the Government may identify non-statutory aggravating factors, particularly tailored for the defendant, as a basis for a death sentence. 18 U.S.C. § 3593(a). In doing so, Congress recognized that it could not envision every conceivable aggravating factor that could possibly serve as a reason to include a defendant in that narrow class of persons for whom the death penalty should be imposed. The non-statutory aggravating factors serve to individualize the sentencing determination. See United States v. Kaczynski, 1997 WL 716487 at * 4 (E.D. Cal. 1997); United States v. Spivey, 958 F. Supp. 1523, 1531-32 (D. N. M. 1997); United States v. Pitera, 795 F. Supp. 546, 560 (E.D.N.Y. 1992). The Supreme Court has repeatedly stressed that "[t]he primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." Clemons v. Mississippi, 494 U.S. 738, 748 (1990); see also Zant v. Stephens, 462 U.S. 862, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime"); Jurek v. Texas, 428 U.S. 262, 276 (1976) (it is "essential" that the jury "have before it all possible relevant information about the individual whose fate it must determine"); Gregg v. Georgia, 428 U.S. 153, 189-90 fn. 38 (1976) ("in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence"). Indeed, the use of non-statutory aggravating factors by the Government in the selection process is encouraged because it serves the need for individualized sentencing by providing the sentencer with all available information about the individual defendant. United States v. Frank, 8 F.

Supp.2d 253, 264-66 (S.D.N.Y. 1998). Of course, the non-statutory aggravating factor "must reasonably justify the imposition of a more severe sentence on the defendant compared to others who have been found guilty of murder." United States v. Friend, 92 F. Supp. 2d 534, 543 (E.D. Va. 2000) (citing Zant v. Stephens, 462 U.S. at 877).

With these principles in mind, defendant assails the first non-statutory factor based on a complete misreading of the factor, which states:

> 1. On or about February 23, 2001, defendant, ZACARIAS MOUSSAOUI, a French citizen, entered the United States, where he then enjoyed the educational opportunities available in a free society, for the purpose of gaining specialized knowledge in flying an aircraft in order to kill as many American citizens as possible.

From this factor, defendant extrapolates that the factor argues that the defendant should be put to death because he is a French citizen and, therefore, imposition of this factor would violate his First Amendment rights. This argument is both legally and factually flawed.

Defendant's argument relies upon the Supreme Court's decision in Dawson v. Delaware, 503 U.S. 159 (1992). In Dawson, the prosecution introduced a stipulation during the penalty phase that the defendant was a member of the Aryan Brotherhood, a white racist prison gang, and that members of the Aryan Brotherhood existed in the Delaware state prison system. The stipulation failed to speak of any criminal acts committed by the Aryan Brotherhood in the prison system. Id. at 166. For this reason, the Supreme Court found that the defendant's First Amendment rights had been violated because he was being punished solely for his abstract beliefs, instead of his actions. Id. at 167. At the same time, however, the Court made clear that, if the defendant's affiliation had a relationship with his actions, then the affiliation would be

admissible during sentencing. Id.; see also Barclay v. Florida, 463 U.S. 939, 949 (1983); Kapadia v. Tally, 229 F.3d 641, 647-48 (7th Cir. 2000); Fuller v. Johnson, 114 F.3d 491, 498 (5th Cir. 1997); Boyle v. Johnson, 93 F.3d 180, 184-85 (5th Cir. 1996). Moreover, the Supreme Court in Wisconsin v. Mitchell, 508 U.S. 476 (1993), limited its holding in Dawson when it upheld a penalty enhancement in a state statute which was based on the defendant's selection of the victim on account of the victim's race, again drawing the distinction between thoughts and actions.

Contrary to defendant's rhetoric, this factor does not "invoke Moussaoui's French citizenship against him and . . . politicize the death penalty determination process." Defendant's Memorandum at 14. Instead, a plain reading of the factor reveals that it focuses upon defendant's actions, namely that defendant entered the United States purely for the purpose of engaging in criminal activity, specifically the murdering of American citizens, and, to accomplish this, sought specialized training. Clearly, entering the United States for the purpose of engaging in criminal conduct constitutes an aggravating circumstance. Cf. 18 U.S.C. § 1952(a)(2) (criminal offense for anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . commit any crime of violence to further any unlawful activity . . . ."). Moreover, the Sentencing Guidelines authorize a sentencing enhancement for the use of a specialized skill during the commission of an offense. U.S.S.G. § 3B1.3 ("Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots . . . ."). Finally, this specialized skill was available to defendant only because the United States is a "free society" – one which defendant despises and hopes to destroy. See April

22, 2002 transcript at 10-11. Thus, this factor both justifies a more severe sentence while also distinguishing defendant from other murderers. Consequently, this factor should not be stricken.[18]

[18]Defendant's reliance in his memorandum on Zadvydas v. Davis, 121 S. Ct. 2491, 2500-01 (2001), Wong Wing v. United States, 163 U.S. 228, 238 (1896), and Yick Wo v. United States, 118 U.S. 356, 369 (1886) is completely misplaced since these cases merely stand for the proposition that an alien is entitled to constitutional protection, including the Due Process Clause, which the Government does not dispute.

Conclusion

For the foregoing reasons, the defendant's Motion to Strike the Government's Notice of Intent to Seek a Sentence of Death should be denied.

Respectfully submitted,

PAUL J. McNULTY
UNITED STATES ATTORNEY

By: _____
David J. Novak
Robert A. Spencer
Kenneth M. Karas
Assistant United States Attorneys

Certificate of Service

The undersigned hereby certifies that on the ___ day of May, 2002, a copy of the Government's Response was hand-delivered to the following attorneys for the defendant:

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118
(540) 687-3902
fax: (540) 687-6366

Frank W. Dunham, Jr., Esquire
Judy Clarke, Esquire
Public Defender's Office
Eastern District of Virginia
1650 King Street
Alexandria, Virginia 22314
(703) 600-0808
Fax: (703) 600-0880

Gerald Zerkin, Esquire
Assistant Public Defender
One Capital Square
Eleventh Floor
830 East Main Street
Richmond, Virginia 23219
(804) 565-0880
fax: (804) 648-5033

_____
David Novak
Assistant United States Attorney