IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	**)**	
	)	**UNDER SEAL**
v.	**)**	
	)	**Criminal No. 01-455-A**
ZACARIAS MOUSSAOUI	**)**	

MEMORANDUM REGARDING RULE 11 CONSIDERATIONS

INTRODUCTION

A Rule 11 hearing on Mr. Moussaoui's proffered plea of guilty has been scheduled for Thursday, July 25, 2002. The Court has urged comment on a proposed colloquy. We believe the circumstances of defendant's uncounseled attempt to enter a plea must be addressed with even more caution than the Court's usual very careful Rule 11 inquiry and the Court's actions heretofore are consistent with such an approach. It is justified even the more so because if this were a counseled plea and undersigned counsel were asked whether their investigation had determined that there was a factual basis for the plea, counsel would have to answer in the negative.[1]

In Part I of this Memorandum, we provide additional comments and questions for the plea colloquy. We respectfully submit, however, that before taking the plea, the Court should endeavor to reduce as many "unknowns" to "knowns," even if this means postponing it. In this regard, in Parts II and III, we suggest that the Court should first make a more definitive assessment of defendant's competency given new information available to defense experts and also rule on all outstanding death penalty issues so that any plea colloquy can reflect the Court's ultimate determinations on these issues.

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[1] We are still in the process of reviewing the voluminous discovery and so there are many facts of which we are unaware and many dots which we have perhaps not yet connected.

I. ADDITIONAL COMMENTS AND QUESTIONS FOR THE PLEA COLLOQUY

A. Exculpatory Evidence Not Seen by Defendant

Still outstanding before the Court is the motion made by standby counsel while still counsel of record to grant Mr. Moussaoui access to classified discovery. In its ongoing review of that material, counsel are seeing numerous documents that would be of benefit to the defense. Before pleading guilty, Mr. Moussaoui should be advised that there is exculpatory evidence which has not been provided to him and that his plea of guilty may mean that he might never have the benefit of such information to use to contest his guilt.

B. Clearing Up Potential Misguided Motivations for the Plea

1. Mr. Moussaoui has suggested that one motivation for his plea is tactical in that he believes a guilty plea will assure that he will be able to tell his story to the jury without being overridden by standby counsel, replaced by standby counsel, or gagged during the trial so as not to inflame the jury. (July 18, 2002 Tr. at 26.) He needs to be clearly advised either informationally or through inquiry as follows:

> Mr. Moussaoui, you previously gave as a reason for pleading guilty your fear that you might not be able to tell your story, that you might be gagged so as to inflame the jury, or that you might be replaced as counsel by standby counsel. Do you understand that whether or not you are gagged or even removed from the courtroom is something totally within your control and it does not depend on whether you plead guilty or not guilty?

If you cannot control yourself in the Courtroom, you could be gagged or removed. Whether you have entered a plea of guilty or a plea of not guilty has no bearing on that. Do you understand this?

Further, you could be removed, as I warned you last time, from your role as your own counsel for failure to follow the Court's instructions. I would not do it lightly, but you need to know that whether you plead guilty or not guilty has nothing to do with whether you may continue to function as your own counsel. The possibility equally remains that you could be removed as your own counsel if you do not conduct yourself appropriately. Do you understand this?

2. Mr. Moussaoui has also said that he believes that after a guilty plea there will be a trial to show "the extent of his guilt." He said, "I am guilty. Now, the question is how much." (July 18, 2002 Tr. at 29.) He seems to believe that the government will have to "prove [he's] guilty to the extent that they pretend I'm guilty during the penalty phase" and that at the penalty phase he will finally be able to tell about his so-called "FBI Coverup." Accordingly, Mr. Moussaoui needs to be clearly advised that the penalty phase is not about guilt or innocence—guilt will have been fully established by his plea. We suggest the following:

Do you understand that if your plea is accepted, there will be no trial to determine the extent of your guilt. Your plea of guilty establishes your complete guilt to any offense as to which you enter a plea. There will be a penalty phase where the issues will be whether the government can

prove the aggravating factor(s) essential to imposition of the death penalty and to hear any mitigation evidence you might wish to offer. You need to be advised that your contention of FBI surveillance of yourself and the 19 hijackers may or may not be relevant to the penalty phase. Even if relevant to guilt issues, that would not necessarily make it relevant in a penalty trial.

Now you may have a basis for trying to introduce such evidence in the penalty phase—I am not going to rule on that now—but it would not be admissible in the penalty phase for purposes of demonstrating guilt or innocence—that will have already been determined by your plea of guilty. Do you understand this?

C. Arguments We Would Raise If We Were Counsel As to Counts 1, 3 and 4

1. Count 1 Does Not Authorize Death as a Penalty

Count 1 charges a violation of 18 U.S.C. §§ 2332b(a)(2) and 2332(b). Section 2332b(a)(2) addresses persons who attempt to conspire to commit the offenses in paragraph (a) (1) of the statute. The punishment for attempting or conspiring to commit an offense in (a)(1) is specifically set forth in the statute as "a term of years." *See* U.S.C. § 2332(c)(1)(F). The statute does not authorize death for conspiracies and attempts. A person who was a conspirator, but actually undertook an act which caused death, has to be prosecuted as a principal to be eligible for a death sentence under this statute.

2. Count 2 Does Not Authorize Death as a Penalty

Count 2 alleges a *conspiracy* to commit air piracy in violation of Title 49, United States Code, §§ 46502(a)(1)(A) and (a)(2)(B). Mr. Moussaoui is not charged with *committing* or *attempting* to commit air piracy. The penalty provision of (a)(3)(B) provides for the death penalty only when the defendant is guilty of "commission or attempt." Section(a)(2)(B) does not provide for the death penalty when the only allegation is conspiracy.

3. Count 4 Does Not Charge An Offense

Count 4 charges Mr. Moussaoui with using airplanes as a weapon of mass destruction in violation of 18 U.S.C. § 2332(a)a. Section 2332(c) provides the definitions for this section. In pertinent part, §2332(c) refers to 18 U.S.C. § 921 and adopts the definitions there set forth of "destructive device." Section 921(a)(4)(c) makes it clear that an airplane is not a destructive device. ("The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon.") The government's attempt to circumvent this explicit statutory language by describing how the airplanes were used does not change the fact that they were never "designed" nor "redesigned" for use as a weapon.

D. The Court must Determine Whether Mr. Moussaoui Is Pleading Guilty to the Conspiracies Alleged in the Indictment or Some Other Conspiracy for Which There Are No Charges Pending

It is the position of standby counsel that the conspiracies charged in the Indictment include a knowing agreement to commit the acts which occurred on 9/11. If Mr. Moussaoui is admitting that he is a member of al Queda, but is contending that he did not enter into an agreement which involved the attacks on 9/11, he is not pleading guilty to the conspiracies alleged in the Indictment even if he was enmeshed in other al Queda plots. He might be admitting his participation in a separate but uncharged conspiracy, but not the conspiracies related to 9/11 which are the conspiracies he is charged with. The Court may want

to carefully inquire to be sure Mr. Moussaoui recognizes the often subtle distinction between single and multiple conspiracies and that the conspiracy he wants to plead guilty to must be the conspiracy charged in this Indictment.

At the arraignment on the Second Superseding Indictment, Mr. Moussaoui admitted that he was a member of al Queda. (Transcript of Hearing on July 18, 2002, p. 26-27.) He stated that he had pledged "bayat" to Osama Bin Laden. (*Id.* at 27.) He stated that he was a participant in an ongoing conspiracy "who have started around 1995 . . . who intend to commit a terrorist act." (*Id.* at 9-10, 12.) Though he admitted that he had knowledge about 9/11, (*id.* at 26), he has never admitted that he was involved in a conspiracy knowing that an object of the conspiracy was the attack on 9/11 or, more importantly, that with knowledge of the plan, he agreed to its undertaking. Mr. Moussaoui, indeed, seems to think he will have an opportunity to contest this in the "penalty phase," a misguided belief of which Mr. Moussaoui needs to be completely disabused. All members of al Queda are simply not prosecutable for the events of 9/11. Only those who have knowledge of the plan and who have agreed to undertake it can be guilty of the charges in the instant Indictment. Indeed, taking Mr. Moussaoui's statements on July 18, 2002 as true, Mr. Moussaoui admitted only that he is a material witness, and not a co-conspirator, to the crimes committed on 9/11.[2] Mr. Moussaoui, therefore, may be attempting to plead guilty to a charge that has not been returned by the grand jury—that is, a separate conspiracy different from the conspiracy that caused the deaths on 9/11. This distinction is critical as the conspiracy that Mr. Moussaoui has identified in Court

[2] As the Court knows, "material witness" was Mr. Moussaoui's status until he was indicted by a grand jury in Alexandria, Virginia on December 11, 2001.

is not only by definition inchoate so that Mr. Moussaoui could not be death eligible for his role in that conspiracy, he has not been charged with such a conspiracy.

Accordingly, in taking the defendant's plea, this Court should be mindful of the extensive and diverse scope of the allegations in the Indictment in comparison to the actions and agreements actually entered into by Mr. Moussaoui. An indictment very similar to the one here was prosecuted in the United States District Court for the Southern District of New York in the case styled as *United States v. Osama Bin Laden*, 98 Cr. 1023. The gravamen of the conspiracy alleged in that case was the conspiracy to bomb embassies in Tanzania and Kenya, just as the gravamen here is the planning and execution of the attacks on 9/11. An admission of membership in al Queda was not enough in that case and should not be sufficient here. With knowledge of the plan (although not all details), there must be agreement to participate in it.[3]

Accordingly, to avoid possible confusion as to just what Mr. Moussaoui thinks he is pleading guilty to, and to be sure that he is pleading guilty to an agreement to participate in 9/11, we suggest the following minor changes to the colloquy proposed by the Court's July 23, 2002 letter to Mr. Moussaoui:

1. Second paragraph of Part 8, line 6, after "of serious bodily injury to other persons by . . . ," delete "destroying and damaging" and insert "using airplanes to destroy and damage."

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[3] Judge Sand, presented with a similar legal question in the Embassy Bombing trial, *i.e.*, could mere membership in al Queda with general knowledge of its overall philosophies and goals render a defendant responsible for the deaths that occurred at the United States Embassies in Tanzania and Kenya given the fact that al Queda is dedicated, as an organization, to killing Americans wherever they can be found? (Overt Act 9.) Attached to this memorandum as Exhibit A are pages 18-21 of the Government's proposed charge (Government's Proposed Jury Charge in *United States v. Osama Bin Laden*, pp. 18-20 (emphasis added)) wherein the government properly adopted the position that mere membership in al Queda was insufficient to bear the burden of proving involvement in the conspiracy. Judge Sand then gave almost the exact charge requested by the government. (*See* Exhibit B, attached hereto, Jury Charge, *United States v. Osama Bin Laden*, pp. 41-43 (emphasis added).)

2. In plain language, after explaining the various conspiracy charges, we suggest that the Court explain to Mr. Moussaoui that the government has basically alleged an unlawful agreement, a conspiracy, which resulted in the death and destruction of 9/11. The government names, among others, as his alleged co-conspirators:

Mohamed Atta	Marwin al-Shehhi	Hani Hanjour
Abdul Aziz	Fayed Ahmed	Salem al-Hamzi
Wal al–Shehri	Ahmed al-Ghamdi	Majed Moqed
Waleed al-Shehri	Mohand al-Shehh	Ziad Jarrah
Satam al-Suqami	Kalid al-Middar	Ahmed al-Haznawi
Ramzi Bin al-Shibh	Nawal al-Hamzi	Saeed al-Ghamdi
		Ahmed al-Nami

Then the Court might inquire, "Were you in a conspiracy with some or all of the men I have named to cause the death and destruction to Americans which occurred on 9/11?

While a "no" answer or equivocation need not scuttle the plea entirely at that point, it would certainly establish the need for closer interrogation of the defendant as to just what he thinks he is admitting by his plea of guilty.

II. ADDITIONAL NEW INFORMATION REQUIRES A THOROUGH CURRENT EVALUATION OF MR. MOUSSAOUI'S COMPETENCE TO WAIVE COUNSEL AND TO PLEAD GUILTY

We recognize that on June 13, 2002, this Court determined that Mr. Moussaoui was competent to waive his right to counsel and to proceed *pro se*. This determination was made after Mr. Moussaoui was seen by a court-appointed expert who concluded in essence that he did not appear to suffer from a major mental disease or defect, and that his beliefs and positions appeared consistent with his political position and supported by his subculture. Defense mental health experts cautioned to the contrary, saw

signs of mental illness as a basis for Mr. Moussaoui's decision making, and recommended a more thorough evaluation. Since that time, these mental health experts have had the opportunity to observe Mr. Moussaoui in court on three occasions for an approximate three hours, to receive information about recent and contemporaneous observations and communications with Mr. Moussaoui described in their reports, and to review some eighty-two (82) *pro se* "pleadings," replete with rich descriptions of his decision making process, that he has filed since that date. Based on this new information, they are now able to opine that Mr. Moussaoui does indeed suffer from a mental illness, has been exhibiting a marked deterioration in his mental state since he was permitted to proceed *pro se*, and have significantly increased concerns about his current competence. *See* Report of Drs. Amador and Stejskal, attached as Exhibit C.

According to Drs. Amador and Stejskal, Mr. Moussaoui's mental state—since June 13, 2002—has been characterized by paranoia, persecutory and grandiose delusions, delusions of reference, perseverative and illogical thinking, poor impulse control, emotional instability, and impaired judgment. These symptoms and impairments exist along with what could be attributed to subculture. However, they exceed what could reasonably be attributed to cultural, or sub-cultural, factors alone and have undermined specific abilities that are directly relevant to Mr. Moussaoui's capacity to function reasonably or rationally, either *pro se* or with the benefit of counsel, in the proceedings against him. Consequently, we join Drs. Amador and Stejskal in recommending a complete evaluation of Mr. Moussaoui be undertaken before the Court determines to proceed with a Rule 11 colloquy, and/or to proceed with this case at all. Such an examination will allow the Court to have the benefit of a full and proper clinical assessment of Mr. Moussaoui's current mental state and competence before it allows him to take the practically

irreversible step of pleading guilty to capital charges, or the self destructive step of continuing to proceed *pro se*.

We recognize that the Court considers Mr. Moussaoui's writings to be confrontational and not an indication of incompetence, but urge the Court to consider them in the light of further evaluation by mental health professionals. While there are multiple examples of the fact that Mr. Moussaoui's writings reflect his delusional thinking, the central delusion that is driving Mr. Moussaoui's decision making (by his own account) is his fear that his court appointed counsel are in a conspiracy to kill him (a conspiracy the Court has apparently joined).[4] This belief, which the Court knows to be untrue, could well be founded in a sub-culture that mistrusts Americans, but the extent to which it has apparently driven Mr. Moussaoui's behavior renders it more than culturally based.[5] In one month, Mr. Moussaoui has gone from declaring that his court appointed lawyers have withheld the information that would result in dismissal of the charges [*see* Tr. June 13, 2002 , p. 45], and that once freed of the restraints of having such counsel, he would be able to "make immediately a motion" that will result in his release [Tr. June 13, 2002, p. 35] to declaring that he is "al Queda" and desires to plead guilty [*see* Tr. July 18, 2002, p. 26]. It was not until after the Court suggested to Mr. Moussaoui that he could lose his *pro se* status if he continued to file his repetitive motions, and called upon stand by counsel to comment on a discovery issue, that Mr. Moussaoui abruptly reversed his course and demanded to plead guilty to the charges "to save his life." If this fixed false belief—whether

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[4] For example, Mr. Moussaoui's behavior is not driven by his belief that a fan, supposedly left as a gift on his car, was bugged by the FBI and used to surveil his activities. This belief may or may not be a delusion. Meanwhile his belief that his court appointed lawyers will kill him is driving his behavior.

[5] Indeed the defendants charged in the Embassy Bombing case all proceeded to trial with American lawyers. Other "al Queda" detainees have at least sought the assistance of American lawyers.

delusion or subcultural belief—that court appointed stand by counsel with the aid of the Court will kill him—has driven his decision to plead guilty, the decision is coerced, and involuntary.

In the interests of our system of justice, and in the interests of Zacarias Moussaoui— al Queda or not—this Court must determine what is at the root of his decision making, whether or not his decisions are made with a rational understanding of the proceedings, and whether he is truly competent to proceed at this time. Given the professional opinion that Mr. Moussaoui indeed suffers from a serious mental illness characterized by paranoia, thought disorder and delusions, mere "correct" answers to a colloquy are insufficient to permit the self destructive course Mr. Moussaoui has taken. Given the new evidence, deemed highly significant by mental health professionals which we are not, we are compelled to seek a thorough evaluation of competence before Mr. Moussaoui may plead guilty. This matter begs for more than the two hours of examination by Dr. Patterson which Mr. Moussaoui thoroughly controlled.

III. THE AGGRAVATING FACTORS ARE ESSENTIAL ELEMENTS OF A CAPITAL OFFENSE AND, THEREFORE, MUST BE INCLUDED IN THE PLEA COLLOQUY

The defendant has indicated his intention to plead guilty. To accept the plea, the Court must determine that it is knowing and voluntary. Consequently, it is elementary that the defendant must know the elements of the crimes to which he would plead guilty and the possible punishments he faces. At this point in the proceedings, that is anything but clear.

The defendant has previously filed a Motion to Dismiss Notice of Intention to Seek Sentence of Death. In addition, standby counsel have filed a Supplemental Memorandum in support of that motion, in light of the Supreme Court's decisions in *Ring v. Arizona*, 122 S.Ct. 2428 (2002) and *Harris v. United States*, 122 S.Ct. 2406 (2002), and before them, *Jones v. United States*, 526 U.S. 227 (1999) and

Apprendi v. New Jersey, 530 U.S. 466 (2000). The government has responded to both the motion and the Supplemental Memorandum. The defense has been given until August 12, 2002 to file a reply to the government's response. We hope the Court will want to give serious consideration to all of the submissions and have oral argument before deciding them.

Simply put, a guilty plea by Mr. Moussaoui could not possibly be knowing and voluntary until the Court resolves the pending motions unless the Court has already resolved them and intends to include explanation of its resolution in the colloquy. In the Second Superseding Indictment, which was issued following the filing of standby counsel's memorandum, the government has included a section, denoted "Notice of Special Findings," the likes of which was previously unknown in Anglo-American grand jury jurisprudence. In that section, the grand jury set forth the statutory aggravating factors that had previously been contained in the government's Notice of Intent.

The new Indictment is subject to a number of interpretations. It is unclear whether the grand jury intended these as (1) elements of the four supposed capital offense in the Indictment (Counts 1-4) as to which the defendant must plead, (2) four new capital offenses, or (3) a substitute for the notice requirements contained in the FDPA. See 18 U.S.C. § 3593(a). Given the holdings in *Ring* and *Harris* that aggravating factors (in death penalty cases) or other facts which make a defendant eligible for a greater punishment than that to which he would otherwise be subject are "elements" of a "greater offense," it would appear that the factors alleged in the Notice of Special Findings should be treated as elements of greater offenses, *i.e.*, as four death eligible capital murder conspiracies. Of course, if that is the case, this Court must determine, before accepting a plea of guilty, whether the government constitutionally and statutorily may create a greater death eligible offense in this fashion. If the Court determines that it may do so, then, of course, it

must incorporate these new elements of the offense in its reading of the charge to the defendant, and determine the voluntariness of his plea based on all the elements of these "greater offenses," even if they are set forth in the Notice.

It is also possible that the grand jury has actually created four new death-eligible capital counts, even if that is not what it intended. After all, while the Indictment does not incorporate the allegations contained in the Notice into Counts 1-4, it does incorporate *all* the allegations of Counts 1-4, which would include the four charges alleged in those counts, into the Notice. Thus, the literal effect of the Second Superseding Indictment, containing the aggravating facts set forth in the Notice as well as the elements of Counts 1-4, is to actually create a new set of charges altogether, *i.e.*, Counts 7-10 although unnumbered. We recognize that the Court has rejected this notion in its letter of July 23—but we urge the Court to wait until the *Ring* issue is fully briefed and argued before reaching a conclusion that the statutory aggravating factors are not an element of the offense that must be proven before a defendant may be found guilty of a death eligible offense.

The government contends in its *Opposition to Standby Counsel's Supplemental Memorandum at 14 n.6* that (1) it has created no new offenses, even while it admits that the aggravating factors included in the Notice section of the Indictment "establish[] that Counts One, Two, Three and Four are capital eligible," *id. at 8*, elements that were not in the offenses originally charged, and that (2) the Court should not address the aggravating factors during the plea colloquy. Instead, the government argues, "the Court should leave the issue for the jury to decide during a penalty phase . . . ." (*id*. at 14 n. 6). That could only be true, however, if the allegations contained in the Notice are not elements of the offenses charged. If they are elements, then surely the defendant must be confronted with, and must plead to them. Contrary to the

assertion of the government, these are elements which must be incorporated into the plea. The government's position is entirely inconsistent with *Ring* and *Harris*.

The government's argument completely unhinges the results in those cases from their constitutional moorings. While the actual holding in *Ring* is that a defendant is entitled to a jury trial as to factors which establish death eligibility, the basis for that holding is that Arizona's aggravating factors in its death penalty scheme were elements of the capital eligible offense. The Supreme Court explained in both *Ring* and *Harris* that facts which increase the maximum penalty faced by the defendant create a new, "greater offense." Indeed, in *Harris*, 122 S.Ct. at 2414-19, the Court noted *repeatedly* that any fact which increases the maximum possible penalty above that authorized by the findings implicit in the jury's verdict of guilt has historically been, and is still, *an element of the offense*. *See* id. at 2419 ("Read together, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)] and *Apprendi* mean that those facts setting the outer limits of a sentence and of the judicial power to impose it *are elements of the crime for constitutional analysis*") (emphasis added); *Harris*, 122 S.Ct. at 2418 (*quoting Apprendi*, 530 U.S. at 483, no. 10) ("'The judge's role in sentencing is constrained at its outer limits by the facts alleged in the Indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense'"); *Harris*, 112 S.Ct. at 2416 (the principle "by which history determined what facts were elements . . . defined elements as 'fact[s] legally essential to the punishment to be inflicted'") (*quoting United States v. Reese*, 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)).

It is simply impossible to argue after *Ring* and *Harris* that the facts alleged in the government's Notice of Special Factors are not elements of the offense, since, as surely the government must concede,

they "are facts that expose [this] defendant to a punishment greater than that otherwise legally prescribed . . .," *i.e.*, the death penalty.[6] Since the facts alleged in the Notice of Special Findings are unquestionably elements of the offense, and since the government itself concedes that it was compelled by *Ring* and *Harris* to indict the defendant as to those findings, the government's argument that they need not be part of the plea is inexplicable simply because the government chooses to include them in a never-heard-of-before section of the Indictment. If the aggravating factors are not elements of the offense, the grand jury has no business investigating or finding them, since the authority of the grand jury is limited to determining "if there is probable cause to believe that a crime has been committed . . . ," *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) and "whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-33 (1974). If the aggravating factors are not a part of a criminal charge, they have no place in the Indictment.

The government's reliance on *United States v. Cotton*, 122 S.Ct. 1781 (2002), is simply misplaced. In arguing that *Cotton* endorses the proposition that all that is required is a jury verdict, the government conveniently ignores the determinative fact that Cotton had not objected at trial to the omission of drug quantity from the Indictment[7]. Thus, the significance of *Cotton* is simply that a jury verdict supported by overwhelming evidence cures an *Apprendi*-type defect in the Indictment if the defendant does not object to it. In no sense does it support the extraordinary proposition advanced by the government, and now by the Court, that the Court may deliberately omit such a fact from the offense when it secures

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[6] Indeed, the government concedes that the allegations contained in the Notice portion of the Indictment are necessary to "establish[] that Counts One, Two, Three and Four are capital-eligible [offenses]." *Government's Opposition at 8.*

[7] *Cotton* is thus a plain error case.

a plea from the defendant, a fact which is actually contained in the Indictment. If this were a correct proposition, a court could deliberately obtain a guilty plea to, for example, an Indictment charging first degree murder by omitting from its colloquy with the defendant any mention of the elements in the Indictment which raise the offense from second to first degree, and then punish him for the greater offense. Just stating the proposition demonstrates its absurdity. Indeed, the government itself notes that drug quantities that raise the maximum punishment are now typically included in federal Indictments, but it does not even suggest that in such cases it would be appropriate for the court to omit from the plea reference to the drug quantity alleged in the Indictment that is necessary to establish the greater offense or that drug quantity should be the subject of a trial or other proceeding separate and apart from the plea. *See Government's Opposition at 8.*

The government's strategy is transparent: do not include the aggravating factors in the capital counts lest it concede that it has thereby created new, greater offenses, with whatever legal implications that may have, or to which Mr. Moussaoui may refuse to plead. That, however, does not change the fact that the allegations in the Notice increase the maximum punishment to death and are, therefore, under the plain language of *Ring* and *Harris*, "elements of the offense." The government's position that the allegations in the Notice need not be incorporated into Mr. Moussaoui's plea could only be correct if those allegations were unnecessary to establish his guilt of a death eligible offense. Of course, that is plainly not the case. Indeed, if it were, there would have been no reason for the government to seek a new Indictment.

Counsel do not here belabor the reasons the FDPA is unconstitutional, both substantively and procedurally, after *Ring* and *Harris*, since they have done so in detail in their Supplemental Memorandum and will reply to the government's response by the date set. Suffice it to say that, unlike in the

circumstances of drug cases, for example, upon which the government relies, the FDPA provides a detailed, integrated scheme applicable to capital cases which is not consistent with *Ring* and *Harris* in many aspects and which can not be fixed by the government's invention of a Notice of Special Findings section in a capital Indictment.[8]

In short, in connection with Mr. Moussaoui's plea, we respectfully submit that the Court should first resolve the issues raised in the *Defendant's Motion to Dismiss Notice of Intent to Seek Penalty of Death and Standby Counsel's Supplemental Memorandum in Support Thereof* and then, if the death penalty is still in the case at all, determine whether the aggravating factors are elements of the offense and what the implications of that might be before endeavoring to take a plea from Mr. Moussaoui.

CONCLUSION

For the reasons set forth herein, we request that the Court resolve the death penalty issues and any competency issues before trying to accept a plea from the defendant. If the Court is not inclined to proceed in this manner, we respectfully request that the issues raised in Part I hereof be given consideration for whatever effect they might have upon the process of taking a plea.

Respectfully submitted,

STAND-BY COUNSEL

[8] Not surprisingly, the government does not suggest that any of the post-*Apprendi* drug cases upon which it relies involved such special sentencing schemes, like the FDPA.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Regarding Rule 11 Considerations was served via hand delivery upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 and via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 24th day of July, 2002.

/S/
Frank W. Dunham, Jr.