IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
V.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO STANDBY COUNSEL'S MEMORANDUM REGARDING RULE 11 CONSIDERATIONS

On the eve of a scheduled guilty plea, and after three continuances of the deadline to file motions, standby counsel have filed several motions seeking to alter the traditional Rule 11 allocution, challenging the defendant's competence to plead guilty, and challenging the applicability of the death penalty in this case. For the reasons set forth herein, the motions should be denied.

I. The Court Need Not Deviate from the Standard Plea Allocution

Standby counsel assert that the Court's proposed colloquy in connection with the expected plea of the defendant is deficient. (Mem. at 1). As a general matter, standby counsel cite the "uncounseled" nature of the defendant's declaration of his intention to plead guilty, and standby counsel's own belief that there is not a factual basis for the plea. As indicated in our response to the Court's proposed colloquy, however, we believe the Court is prepared to conduct a careful and thorough colloquy of the defendant that will fully educate him of the rights he would be waiving by pleading guilty, as well as the consequences of a guilty plea to the Second Superseding Indictment in this case. Moreover, we firmly reject standby counsel's self-serving assertion regarding the factual basis for such a plea. Indeed, the evidence we are prepared to

offer at a trial, or a subsequent penalty phase proceeding, will overwhelmingly establish the defendant's guilt of every charge in the Indictment.

Beyond these general reservations, standby counsel claim that the Court should stray from its planned allocution because of the classified discovery materials, which the defendant has not seen, and because of standby counsel's qualms about the defendant's motives in wishing to admit his guilt. Neither concern, however, is cause for doubting the adequacy of the colloquy the Court plans to conduct at the schedule hearing.

A. Classified Discovery

Claiming that the Court has not ruled on standby counsel's motion to provide Moussaoui access to classified discovery, and asserting that they are "seeing documents that would be of benefit to the defense" (Mem. at 2), standby counsel ask this Court to depart from the standard Rule 11 allocution by advising the defendant of the existence of "exculpatory materials" that he has not seen.

There is no reason to deviate from the thorough inquiry the Court will conduct during Moussaoui's attempt to plead guilty. First, the defendant was made aware of his inability to see the classified materials in this case when he waived his right to counsel. See June 13 Tr. at 35. Thus, the defendant has long known that his status as a *pro se* defendant may deny him access to certain information. Having already voluntarily and knowingly acknowledged this fact, there is nothing else to say to the defendant, even if he does not know the specifics of the information standby counsel claim might "benefit" him. See United States v. Ruiz, 122 S. Ct. 2450, 2455 (2002) ("[t]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in*

general in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it.") (emphasis in original).

Second, the overwhelming majority of the discovery in this case is unclassified and has been available to the defendant for several months. Indeed, the Government has begun to produce, in compliance with the Court's order, hard copies of Rule 16 and arguably Brady material for the defendant. Thus, the defendant already has access to a substantial amount of information that may be useful to him.

Third, the Government submits that there is no core Brady material in the classified materials. Even standby counsel has characterized these materials only as being "of benefit to the defense." However, given that the Government (and apparently the defendant) is unaware of the trial strategy of standby counsel, we do not know what standby counsel mean by information that is "of benefit to the defense." See United States v. LaRouche Campaign, 695 F. Supp. 1290, 1296 (D. Mass. 1988) ("any determination as to whether the government had a Brady obligation of disclosure of information at any particular time depends on what was or reasonably should have been known to the appropriate government representative(s) *at that time*.") (emphasis in original). Therefore, standby counsel have failed to identify what the Court should advise the defendant of before he tenders his plea.

Finally, the right standby counsel purport to be protecting relates to the fairness of any *trial* of the defendant. See United States v. Coppa, 267 F.3d 132, 135 (2d Cir. 2001) ("Brady does not . . . require the prosecution to disclose *all* exculpatory and impeachment material; it need disclose only material 'that, if suppressed, would deprive the defendant of a fair trial.'") (quoting United States v. Bagley, 473 U.S. 667, 675 (1985)) (emphasis in original).

Thus, given that the "need for [affirmative defense] information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea," Ruiz, 122 S. Ct. at 2457 (emphasis in original), there is no violation of the defendant's due process rights by pleading guilty under the circumstances in this case, as long as the plea comports with Rule 11.

B. Alleged Misguided Motivation

Imposing their own conceptions of rational behavior, standby counsel assert that the defendant is motivated to plead guilty because of certain allegedly misguided assumptions. (Mem. at 2-3). For example, standby counsel claim that the defendant wants to plead guilty so he can "tell his story to the jury without being overridden by standby counsel . . . ." (Mem. at 2). Standby counsel also point to the defendant's comment at last week's conference that he wants to plead guilty and resolve, at a penalty hearing, the question of "how much" he is guilty. Based on these alleged misperceptions, standby counsel want the Court to deviate from the time honored Rule 11 allocution.

There is no basis in law for standby counsel's request. Instead, the request is an attempt to add an artificial barrier to the defendant's clear intent to plead guilty. Just last month, the Supreme Court reiterated that it "has found that the Constitution, in respect to a defendant's awareness of relevant circumstances does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." Ruiz, 122 S. Ct. at 2456. What motivates the defendant's plea is irrelevant as long as it is voluntarily and knowingly given, and is supported by a factual basis. Beyond that, questions about the wisdom of the plea, and more importantly whether or not standby counsel

agree with the defendant's decision or accept his motives, are of no legal consequence.[1]

Accordingly, standby counsel's request should be denied.

II. Standby Counsel's Challenge to Counts One, Three and Four Are Meritless

A. The Maximum Penalty for Count One is Death

Standby counsel incorrectly argue that Count 1 is not a death-eligible offense. Count 1 charges defendant with Conspiracy to Commit Acts of Terrorism Transcending National Boundaries in violation of 18 U.S.C. §§ 2332b(a)(2) & (c). Subsection (a)(2) states:

> (2) Treatment of threats, attempts and conspiracies. – Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

Subsection (c)(1) sets forth the following penalties for violations of the statute as follows:

> (A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;
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> (B) for kidnapping, by imprisonment for any term of years or for life;
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> (C) for maiming, by imprisonment for not more than 35 years;
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> (D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;
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> (E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

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[1] Moreover, we do not accept the implicit, and sometimes explicit, claim by standby counsel that the defendant's desire to concede guilt is irrational. Indeed, other defendants, ably assisted by experienced defense counsel, have opted to concede guilt and focus their energy on defeating the Government's request for a death sentence. For example, in last year's trial of four Bin Laden associates in the Southern District of New York, the defendant Khalfan Khamis Mohamed, through his counsel, conceded at trial his participation in the bombing of the American embassy in Dar es Salaam, Tanzania, and succeeded in avoiding a death sentence. (See also examples of such a strategy set forth below).

> (F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and
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> (G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

Standby counsel wrongly argue that subsection (F) limits the maximum punishment to life imprisonment, ignoring the more specific provision of subsection (A), which provides for the death penalty where death results. Indeed, subsection (A) specifically provides for the death penalty "if death results to any person from any other conduct prohibited by this section . . . ." (emphasis added). This subsection did not exempt conspiracy as a death-eligible offense, which it would have to do to avoid rendering conspiracy death-eligible..

Subsection (F) is designed for all conspiracies where death does not result and it calibrates the punishment based upon the underlying offense (i.e, the maximum punishment involving kidnapping would be life, maiming would be 35 years, and so forth). Subsection (F) does not specifically provide for the death penalty for conspiracies because it was already provided for in subsection (A). These subsections can, and should, be read in harmony. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (Court has a "duty to give effect, if possible, to every clause and word of a statute.") (citations omitted); United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217 (2001) ("statutory construction is a holistic endeavor") (citations omitted); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible all parts into a harmonious whole.") (citations omitted). Therefore, standby counsel's argument must fail.

B. The Maximum Penalty for Count Two is Death

Standby counsel next argue that one who conspires to commit aircraft piracy resulting in death (49 U.S.C. § 46502) cannot be sentenced to death. The statute provides in relevant parts as follows:

> (2) An individual committing or attempting or conspiring to commit aircraft piracy –
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> > (A) shall be imprisoned for at least 20 years; or
> >
> > (B) notwithstanding section 3559(b) of title 18, if the death of another individual results from the commission or attempt, shall be put to death or imprisoned for life.

Standby counsel wrongly believe that, because the word conspiracy does not appear in subsection (2)(B), defendant cannot receive the death penalty for this offense. This argument ignores the situation, as here, where a conspiracy includes the commission or attempted commission of the offense where death results, thus rendering the offense capital-eligible.

Congress has essentially divided the punishment for conspiracy into two subsets: that include acts during the commission or attempted commission of the offense which result in death and those with acts where death did not result from the commission or attempted commission of aircraft piracy. By requiring the death to result from the commission or attempted commission of the offense; instead of simply saying that death resulted from the conspiracy, Congress has limited the death penalty only to those conspiracies where the death directly results from the commission or attempt commission of the crime.

In this case, the victims of the aircraft piracy did, indeed, die as a result of the commission of the aircraft piracy, as required by subsection (2)(B). The commission of the

aircraft piracy occurred during, and from acts in furtherance of that conspiracy, thereby rendering defendant eligible for death. A reasonable reading of the statute can conclude that Congress amended subsection (2) in 1996 to add the language "or conspiring" so that conspirators, such as the defendant, face the sentencing enhancements set forth therein. Notably, if the statute is not read in this manner, there is no maximum penalty, because the only sentencing provision would be subsection (2)(A), which provides that the defendant "shall be imprisoned for at least 20 years . . . ." (emphasis added). If Congress did not intend to expose a conspirator to death where the conspiracy resulted in the death of a victim during the commission or attempted commission of the offense, Congress would have set forth a statutory maximum for conspiracy offenses.[2] See Jones v. United States, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'") (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)); Holloway v. United States, 526 U.S. 1, 9 (1999) (statute should be construed consistent with Congress' obvious intentions). Therefore, standby counsel's argument that Count 2 is not a death-eligible offense should be denied.[3]

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[2] The only reported decision regarding this section that the Government has found resulted in the affirming of a life sentence for an attempted aircraft piracy that did not result in death. United States v. Calloway, 116 F.3d 1129 (6th Cir. 1997) (affirming life sentence for attempted aircraft piracy where death did not result).

[3] Since the Government has had less than 24 hours to respond to standby counsel's last minute, untimely argument, the Government would welcome the opportunity to further brief this issue if the Court questions the Government's position. In the interim, the Government respectfully suggests that, for purposes of the Rule 11 colloquy, the defendant should be advised that the maximum penalty for Count 2 is death, and that the mandatory minimum is twenty years' imprisonment.

C. Count Four Charges an Offense

Standby counsel also argue that Count 4 does not charge an offense, on the theory that a hijacked airplane full of jet fuel cannot be a "weapon of mass destruction" when crashed into a building full of people. A careful reading of the Second Superseding Indictment shows that this argument has no merit. Count 4 charges that the defendant and others "unlawfully, wilfully and knowingly combined, conspired, confederated and agreed to use weapons of mass destruction, namely, airplanes intended for use as missiles, bombs and similar devices, and other weapons of mass destruction, . . ." (page 27). Weapons of mass destruction are defined in 18 U.S.C. § 2332a(c)(2) and include:

> (A) any destructive device as defined in section 921 of this title;
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> (B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;
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> (C) any weapon involving a disease organism; or
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> (D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.

Thus, in less technical terms, weapons of mass destruction include 'destructive devices,' chemical weapons, biological weapons, and nuclear or radiological weapons.

First, the weapons of mass destruction which the indictment alleges defendant and others conspired to use are not limited to hijacked aircraft. Paragraph 7 of Count 1, incorporated in Count 4, alleges that Usama Bin Laden and *al Qaeda* sponsored, managed and/or financially supported training camps in Afghanistan, which camps were used to instruct members and associates of *al Qaeda* and others "in the use of firearms, explosives, chemical weapons, and

other weapons of mass destruction." That paragraph further alleges that in addition to providing training in the use of various weapons, these camps were used "to conduct operational planning against United States targets around the world and experiments in the use of chemical and biological weapons." Overt act 4, also incorporated in Count 4, charges that at various times from at least as early as 1992, Usama Bin Laden, and others known and unknown, "made efforts to obtain the components of nuclear weapons." Thus the Second Superseding Indictment clearly alleges use or attempted use of weapons of mass destruction other than the hijacked aircraft. Should defendant admit to these facts in his plea colloquy,[4] or should the Government prove them at trial, there would be no occasion to consider standby counsel's argument.

Second, hijacked aircraft filled with jet fuel can – and do when used as alleged in the Second Superseding Indictment ("airplanes intended for use as missiles, bombs, and similar devices") – constitute "destructive devices" as defined in 18 U.S.C. § 921(a)(4), and thus weapons of mass destruction under 18 U.S.C. § 2332a(c)(2)(A). Section 921(a)(4) defines a "destructive device" as, among other things,

> (A) any explosive, incendiary, or poison gas–
> (i) bomb,
> (ii) grenade,
> (iii) rocket having a propellant charge of more than four ounces,
> (iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
> (v) mine, or
> (vi) device similar to any of the devices described in the preceding clauses;
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> * * * * *; and

[4] See paragraphs 3 and 5 of the Government's Statement of Facts.

> (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.
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> The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; . . . .

As standby counsel argue, the statute provides that the term destructive device "shall not include any device which is neither designed nor redesigned for use as a weapon." However, an object may be converted to a destructive device by the "design or intent" of the user. See United States v. Oba, 448 F.2d 892, 894 (9th Cir. 1971). By fatally removing the pilots, installing themselves as pilots, and directing the hijacked aircraft into occupied buildings (or attempting to do so), defendant's coconspirators "redesigned" the hijacked aircraft and transformed them into destructive devices. In essence, they created giant Molotov cocktails which they hurled at the towers of the World Trade Center and the Pentagon. Molotov cocktails constitute destructive devices. United States v. Simmons, 83 F.3d 686, 687 (4th Cir. 1996) (holding that a Molotov cocktail constituted a destructive device, under parallel definition of 'destructive device' in 26 U.S.C. § 5845(f),[5] even if defendant did not possess a match or other means to ignite it). As the Fourth Circuit stated in Simmons, "courts have uniformly held that a fully-assembled Molotov cocktail – defined as a device comprising a bottle, gasoline, and a rag – constitutes an 'incendiary . . . bomb' or 'similar device' under section 5845(f)." Simmons, 83 F.3d at 687 (citing numerous cases of varieties of Molotov cocktails and improvised incendiary

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[5] See United States v. Lussier, 128 F.3d 1312, 1314 n.3 (9th Cir. 1997) (language in § 5845(f) "virtually identical"); United States v. Morningstar, 456 F.2d 278, 280 n.3, 281 n.4 (4th Cir. 1972) ("essentially similar definition").

devices). Here, the aircraft were, in essence, nothing other than fully-assembled containers of jet fuel with lit fuses that exploded on impact. They were destructive devices under section 941(a)(4), and thus weapons of mass destruction. And they were so used.[6]

To the extent standby counsel are arguing that because the hijacked aircraft were commercial products, not weapons, they cannot be 'destructive devices,' their argument must fail. Commercial explosive materials which are not in their ordinary design or use weapons may become 'destructive devices' when used with criminal intent. For example, commercial black powder or dynamite, which are not designed as weapons but as commercial products, are 'destructive devices' within the meaning of the statute, depending on their intended uses. See United States v. Morningstar, 456 F.2d at 281. In Morningstar, the Fourth Circuit held that under subparagraph (3) of § 5845(f) (equivalent to subparagraph (C) of § 921(a)(4)), Congress provided, by the language, a "combination of parts . . . intended for use in converting any device into a destructive device . . . ," that the use for which these materials are intended determines whether they fall within the statute. 456 F.2d at 280. The aircraft with the hijackers in control were "combination[s] of parts . . . intended for use in converting any device into a destructive device . . . ." Section 921(a)(4)(C). Here, the manner in which the co-conspirators used the ordinary commercial airlines, as weapons, brings them within the scope of subparagraph (C), and thus within the definition of 'destructive devices.' Subparagraph (C) applies not only to unassembled parts, but to the assembled whole as well, where the intent to use the assemblage as a weapon is present. See United States v. Lussier, 128 F.3d at 1315 n.4 ("when the device at

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[6] Also, there is evidence that the hijackers told the passengers that they possessed a bomb on board the hijacked aircraft.

issue has a legitimate social purpose, i.e., was 'neither designed nor redesigned for use as a weapon,' it is considered a destructive device only if, pursuant to subsection (C), it has been 'converted' into a destructive device by the possessor's 'design' or 'intent' to use it as a weapon;" in which case the subsection applies to an assembled whole). Thus the fact that the hijacked aircraft were whole assemblages of commercial parts not designed as weapons is not dispositive, given the obvious intent of the conspirators to use them as weapons.

Therefore, Count 4 of the Second Superseding Indictment alleges an offense.

III. Moussaoui Need Only Plead Guilty to Each Conspiracy Count as Charged

Standby counsel assert that to be found guilty of all the counts in the Indictment, the defendant must admit to an agreement "to commit the acts which occurred on 9/11." (Mem. at 5). Thus, according to standby counsel, if the defendant simply admits "that he is a member of al Queda [sic], but is contending that he did not enter 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 [sic] plots." (Mem. at 5). Thus, in standby counsel's view, 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." (Mem. at 5).

Standby counsel's claim fails because it undersells what Moussaoui may admit to at the plea, while it oversells what he must admit to in order for the Court to find a factual basis for the plea. As to what Moussaoui intends to say at the plea, we will not know the extent of his admitted conduct until the Court has the opportunity conduct a proper colloquy with the defendant. Thus, the defendant's statements last week regarding his admitted membership in *al*

Qaeda, while perhaps not sufficient to support a judgment of conviction for all the counts in the Indictment, may not be all that the defendant is prepared to say at his plea. For example, he may say that he joined *al Qaeda* and pledged *bayat* to Bin Laden, *and* that he agreed with others to commit terrorist acts against American targets, including American government officials, and that he agreed that either he or others in the conspiracy would attack (using an explosive or incendiary device) these targets in the United States. Such a plea would convict the defendant of at least four counts (1, 4, 5 and 6). This would be so even if the defendant did not admit to participating, or planning to participate, in the attack of September 11.

Ironically, standby counsel claim support for their argument in the jury charge the Government proposed in United States v. Bin Laden, 98 Cr. 1023 (LBS), which counsel rightly note involved an "indictment very similar to the one here." (Mem. at 7). According to standby counsel, 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."[7] Thus, the argument goes, because "[a]n admission of membership of al Queda [sic] was not enough in that case," it should not be so here. (Mem. at 7).

The argument, however, is factually and legally flawed. First, the conspiracies

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[7] In Bin Laden, Count One charges the defendants with conspiracy to murder United States Nationals abroad, in violation of 18 U.S.C. § 2332(b). Here, Count One charges defendant with conspiracy to commit acts of terrorism transcending national boundaries. However, both indictments charge conspiracies to use weapons of mass destruction (18 U.S.C. § 2332a), to murder United States government employees (18 U.S.C. § 1117), and to destroy property (18 U.S.C. § 844(n)). Moreover, both indictments contain virtually identical background sections and several common overt acts. Thus, contrary to the characterization of standby counsel, the "gravamen" of both indictments is the declared war of Usama Bin Laden and the members/associates of his group, *al Qaeda*, against the United States.

charged in Counts One, Four, Five and Six are not conspiracies to carry out the attack of September 11. On the contrary, the conspiracies involve plots that include, as overt acts, the attack of September 11, but also include other overt acts not directly connected to the attack of September 11. Indeed, all of these counts allege that the conspiracies began in 1989 and involve conduct that pre-dated the planning for the attack of September 11. For example, all of these conspiracies allege as overt acts efforts to obtain nuclear weapons and the issuance of *fatwahs* to kill Americans. (Overt Acts 4-9).

Second, if the defendant admits to membership in *al Qaeda*, to receiving training at *al Qaeda* camps, and admits to being involved in a plot to take over and damage aircraft that would carry United States citizens, or would be used to damage United States property, even if it involved a plan other than the one carried out on September 11, the defendant could be found guilty of all six counts.

Third, the charges and the jury instruction in the Bin Laden case actually support the Government's view. Even assuming, as standby counsel suggest, that the "gravamen" of the conspiracy counts in the Bin Laden case was the bombings of the U.S. embassies in East Africa (just as they assume the "gravamen" of the Indictment in this case is the attack of September 11), it is clear that the embassy bombings were not essential elements in the comparable conspiracy counts in the Bin Laden case. Indeed, the several broad conspiracy counts in the Bin Laden Indictment mirrored many of the allegations in the counts of this indictment regarding *al Qaeda*'s efforts to obtain nuclear weapons and its calls for the murder of Americans, both civilian and military. Yet, while mere membership in *al Qaeda* was not sufficient to convict the defendants in that case, as it is not here, participation in the embassy bombings was not required

either (as participation in the attack of September 11 is not here). For example, Wadih el Hage was convicted of all the conspiracy counts in the Bin Laden case even though the Government never alleged that he participated in the embassy attacks. Similarly, in this case, Moussaoui could be found guilty even if he did not participate in the attack of September 11, as long as he otherwise agreed to further the objectives of the conspiracies charged in the Indictment. See Government's Request to Charge, United States v. Bin Laden, at 41 ("[t]he defendant need not have been fully informed as to all of the details, or the scope of the conspiracy to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives . . . . All that is required is that the Government prove, beyond a reasonable doubt, that the defendant you are considering participated in the conspiracy with knowledge of some of its unlawful purposes and with the intention of furthering those unlawful purposes.").[8]

Thus, standby counsel's effort to re-draft the Indictment and to impose the novel requirement that the defendant name all the other 19 hijackers is baseless. The counts properly track the language in the applicable statutes, and there is no basis to alter what Congress deemed to be illegal. Moreover, there is no reason to force the defendant to admit to the identities of his some of his co-conspirators (*i.e.,* the hijackers).[9] Indeed, Moussaoui already has identified

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[8] In the actual charge to the jury, Judge Sand never told the jury that it had to find that the defendants participated in the embassy bombings in order for them to be guilty of the broad conspiracy charges in that case. Instead, participation in the embassy attacks was only a necessary element in the conspiracy and substantive charges that explicitly related to the respective bombings.

[9] The absurdity of the requirement is apparent on a number of levels. For example, given the extensive use of aliases by *al Qaeda*, it is possible that Moussaoui would know the

Usama Bin Laden, one of the named co-conspirators in the Indictment, as one of his co-conspirators. No more is required.[10] Therefore, standby counsel's efforts to trump the defendant's will should be swiftly rejected.

IV. There is No Evidence of a Change in Defendant's Competence

Standby counsel once again assert that the defendant is not competent, relying almost exclusively on the defendant's pleadings as evidence of mental disease or defect. This argument should be rejected. On June 13, 2002, the Court ruled that the defendant was competent, following an evaluation by an independent court-appointed psychiatrist. On July 22, the Court in an Order noted that since June 13, there is no evidence to suggest a change in the defendant's competency. The pleadings filed by defendant between June 14 and July 15, although confrontational and exposing the defendant's fanaticism, do not establish that the defendant is incompetent or support a need for further psychiatric examination.

Standby counsel base their assertion on the opinion of defense psychologists who rely on "new information," that is, information available since June 13, 2002, when the Court determined that the defendant was competent to act *pro se*. Standby counsel summarize this new information as "the opportunity to observe Mr. Moussaoui in court on three occasions," "information about recent and contemporaneous observations and communications with Mr. Moussaoui," and 82 pleadings filed by the defendant. The in-court observations presumably

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identities of some of his co-conspirators only by their alias. Thus, that Moussaoui might not know the true names of his co-conspirators should not nullify an otherwise valid guilty plea.

[10] In Bin Laden, Judge Sand instructed the jury that "[t]o become a member of the conspiracy, the defendant in question need not have known the identities of each and every other member, nor need he have been apprised of all of their activities."

refer to the *two* instances on which the defendant has been in court since June 13 (re-arraignment on June 25, 2002, and again on July 18, 2002). The "information about recent and contemporaneous observations" apparently refers to three interviews that one of the defense psychologists conducted of the defendant's mother after she visited her son. The 82 defendants' pleadings are attached to the defense psychologists' report and are in the record.[11]

Aside from the opportunity to talk with the defendant's mother after she visited with her son and the *al Qaeda* handbook cited by the defense psychologists, all the new information relied on by the defense is available to the Court. First, the Court has been able to observe the defendant during each of his court appearances. The Court will again have an unrivaled ability to observe the defendant during the plea colloquy scheduled for July 25, 2002. The Court's observations of the defendant during the colloquy alone are sufficient for the Court to reach a determination on competency. See, e.g, United States v. West, 877 F.2d 281, 285 n. 1 (4th Cir. 1989) ("The district court, having observed and talked with [the defendant] at numerous prior hearings, found no reasonable cause to believe he was unfit to stand trial . . . Such a determination is within the trial court's discretion . . . ."); Streetman v. Lynaugh, 835 F.2d 1521, 1526 n. 13 (5th Cir. 1988) (court may rely on its own questioning of the defendant and weigh the defendant's "clarity, responsiveness, coherence, and corresponding demeanor" in determining competency); Beck v. Angelone, 261 F.3d 377, 388 (4th Cir.) (defendant found to be competent based on plea colloquy), cert. denied, 122 S. Ct. 417 (2001).

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[11] Not included in the material supplied by the defense are the "French academic records for Zacarias Moussaoui," and the "French Social Services, Child Welfare, and Children's Court records" noted in the defense psychologists' report. We request that these items be supplied to the Government.

Second, the Court is well familiar with the defendant's pleadings. The defendant's pleadings are combative, repetitive, and evince a fanatic hatred of the United States. And, although, as the Court has noted, they show a misunderstanding of the American legal system, they do not show that the defendant is mentally incompetent. Again, the defendant is an extremist fanatic, steeped in hatred for the system that has captured and is prosecuting him, and he is a poor advocate for himself. But, he understands the proceedings against him and is assisting in, indeed conducting, his own defense.

In short, as the Court noted in its Order entered July 22, there is no new evidence that supports a claim that the defendant has become mentally incompetent since June 13, 2002.

Indeed, the defendant continues to pursue a rational course in several salient respects. First, as standby counsel concede, the defendant has ceased to file cumulative pleadings since he was warned not to do so by the Court on July 18, 2002. This shows that the defendant understands the Court's order and the consequences that would flow from disobeying it. The defendant's actions since July 18 vitiate standby counsel's reliance on the defendant's repetitive (or "perseverative") behavior as evidence of his incompetence (despite the defense psychologists' prediction that such behavior will recur).

Second, in declaring his intent to plead guilty in the guilt phase of the case so that he can contest the penalty phase, the defendant is pursuing a rational and not infrequently pursued legal strategy. Far from showing mental incompetence, conceding guilt in a capital case to fight the death penalty is a strategy recommended and pursued by experienced defense counsel.

Indeed, Congress envisioned this circumstance when they promulgated the Federal Death Penalty Act. See 18 U.S.C. § 3593(b)(2)(A) (penalty phase "before a jury impaneled for the purpose of the hearing if . . . the defendant was convicted upon a plea of guilty"). In the short time that the Government has had to research this issue, we have found four federally charged defendants, who pled guilty to a capital-eligible offense and then faced a penalty phase. In this District, defendant Todd Moore pled guilty in criminal case number 2:93CR162 (E.D. Va.) to murder in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e)(1)(A) and then faced a penalty phase before United States District Judge Raymond Jackson. See Exhibit A.[12] Judge Jackson sentenced Moore to life imprisonment. See United States v. Moore, 81 F.3d 152, 1996 WL 128371 (4th Cir. 1996) (table). On October 25, 2001, defendant Keith Nelson pled guilty in criminal case number 99-00303-01-CR-W-2 in the Western District of Missouri to the capital-eligible offense of murder during a kidnaping violation of 18 U.S.C. § 1201. See Exhibits B and C.[13] After an eight-day penalty phase conducted pursuant to 18 U.S.C. § 3593(b)(2)(A), a jury sentenced Nelson to death. See Exhibit D.[14] Similarly, David Hammer pled guilty in the midst of trial to the capital-eligible offense of murder in violation of 18 U.S.C. § 1111 and was then sentenced to death by a jury after a penalty phase conducted pursuant to 18 U.S.C. § 3593(b)(2)(A). United States v. Hammer, 25 F.

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[12] Exhibit A is the plea agreement for Todd Moore in case number 2:93CR162 (E.D.Va.).

[13] Exhibit B is the plea agreement for Keith Nelson and Exhibit C is the transcript of the Rule 11 hearing.

[14] Exhibit D is the docket report for United States v. Nelson, criminal case number 99-00303-01-CR-W-2 (W.D. Mo.).

Supp.2d 518, 520 (M.D. Pa. 1998). Additionally, Tiffany Pennington pled guilty in the Western District of Kentucky to the capital-eligible offense of robbery resulting in death in violation of 18 U.S.C. § 2113(e) and awaits a penalty phase hearing pursuant to 18 U.S.C. § 3593(b)(2)(A). See Exhibit E. [15] Finally, such guilty pleas are not uncommon in state death penalty prosecutions. See, e.g., St. Pierre v. Walls, __ F.3d __, 2002 WL 1610796 at *12-14 (7th Cir. July 23, 2002) (upholding voluntariness of guilty plea that exposed defendant to death sentence); Fields v. Gibson, 277 F.3d 1203, 1212-17 (10th Cir. 2002) (upholding voluntariness of guilty plea that exposed defendant to death sentence and rejecting claim of ineffective assistance of counsel, who recommended guilty plea); Braun v. Ward, 190 F.3d 1181, 1188-90 (10th Cir. 1999) (same as to *nolo contendere* plea); Truesdale v. Moore, 142 F.3d 749, 754 (4th Cir. 1998) (counsel's strategy to avoid gruesome nature of crime after guilty plea not ineffective).

Moreover, defendant apparently intends to fight a death sentence by arguing that he was less culpable than others involved in the heinous crimes committed on September 11. See 7/18/02 Tr. 26 ("But it will ensure me to save my life, because the jury will be, will be able to evaluate how much responsibility I have in this."). Such a strategy is well-established in the federal criminal justice system. See 18 U.S.C. § 3592(a)(3) (mitigating factor for minor participation); U.S.S.G. § 3B1.2 (sentencing reduction based on mitigating role in offense).

Such a strategy not only shows that the defendant is mentally competent, it would likely pass the test for effective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984). The defendant has elected to pursue a rational strategy, as is his right.

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[15] Exhibit E is a Memorandum Opinion and Order issued by the Court on June 6, 2002, in United States v. Pennington, criminal case number 3:01-CR-35-R (W.D. Ken.).

In sum, the evidence in the record since the Court's June 13 determination that the defendant is competent not only fails to show that he has become mentally incompetent, it supports the conclusion that he continues to be competent. The defendant clearly exceeds the standard of understanding the nature and consequences of the proceedings against him and assisting properly in his defense. 18 U.S.C. § 4241(a). There is no reason to delay the July 25 hearing for further mental evaluation.

V. The Court Should Not Conduct a Separate Colloquy of Defendant on Aggravating Factors

The Government agrees with the Court's position in its July 23rd letter that it should not conduct a separate colloquy of the defendant on the threshold findings and statutory aggravating factors set forth in the "Notice of Special Findings" in the Second Superseding Indictment. We have fully set forth our position regarding this issue in our "Opposition to Standby Counsel's Supplemental Memorandum in Support of Motion to Dismiss Government's Notice of Intent to Seek a Sentence of Death" and we will not reiterate it here, except with one comment. Standby counsel continues to misunderstand the import of Ring by repeatedly wanting to label the threshold findings and statutory aggravating factors as "elements." As made clear by the Court in Ring, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative . . . ." Ring v. Arizona, 122 S. Ct. 2428, 2431 (2002) (citing Apprendi v. New Jersey, 530 U.S. 466, 492 (2000)). The Jones\Apprendi\Ring trilogy instead speak to substance; namely, ensuring the existence of safeguards as to "the formality of notice, the identity of the factfinder, and the burden of proof." Jones v. United States, 526 U.S. 227, 243 n. 6 (1999). The Second Superseding Indictment provided defendant adequate notice,

as required by the Indictment Clause. The Court should leave the decision-making regarding the existence of the threshold findings and statutory aggravating factors to the jury, as the Federal Death Penalty Act requires. See 18 U.S.C. § 3593(b). At this stage, the Court should simply inform the defendant that, as to Counts One, Two, Three, and Four, he faces a potential sentence of death if he pleads guilty to any of those offenses. Cf. United States v. Henry, 282 F.3d 242, 253 (3d Cir. 2002) ("Having concluded that there was an Apprendi violation . . . we are presented with the novel issue of the proper remedy in such a case [where the defendant pleaded guilty to the general crime.] . . . . We see no reason why a jury cannot be convened for the sole purpose of deciding the facts that will determine sentence."); United States v. General, 278 F.3d 389, 393 (4th Cir.) (guilty plea to drug offenses voluntary even though no mention of drug quantity during Rule 11 colloquy), cert. denied, 122 S. Ct. 2643 (2002). Therefore, standby counsel's efforts to delay the Rule 11 hearing should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 25, 2002, a copy of the attached Government's Response to Standby Counsel's Memorandum Regarding Rule 11 Considerations was sent by hand delivery, via the United States Marshal's Service to:

Zacarias Moussaoui
Alexandria Detention Center
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Alexandria, Virginia 22314

I further certify that on July 25, 2002, a copy of the attached Government's Response to Standby Counsel's Memorandum Regarding Rule 11 Considerations was sent by facsimile and regular mail to:

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