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

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT
TO SEEK SENTENCE OF DEATH ON COUNTS 1 AND 2

The United States respectfully opposes the defendant's motion to strike the notice of intent to seek a death sentence on Counts 1 and 2 of the Second Superseding Indictment. For context, the Government's death notice encompasses the first four of the six counts to which the defendant pleaded guilty. The defendant's motion seeks to strike the notice only on Counts 1 and 2 — respectively, conspiracy to commit acts of terrorism transcending national boundaries and conspiracy to commit aircraft piracy. The defendant agrees, therefore, that the offenses to which he pleaded guilty in Counts 3 and 4 — conspiracy to destroy aircraft and conspiracy to use weapons of mass destruction — are death eligible, and that there should be a penalty hearing, at least on Counts 3 and 4.[1] The penalty hearing, however, should also include the offenses to which the defendant pleaded guilty in Counts 1 and 2 because, contrary to the defendant's

[1] We understand from defense counsel that this motion constitutes their only challenge to the death notice, and that they are no longer advancing the arguments contained in their previously filed motion to strike the death notice (Dkt. No. 117).

arguments, those offenses are also death eligible. Accordingly, for the reasons that follow, the defendant's motion to strike should be denied.

A. Count 1 is a Death-Eligible Offense

In pleading guilty to Count 1, the defendant admitted that he conspired to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) and (c). Subsection (a)(2) of that statute provides:

> (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).

(Emphasis in original). Subsection (c)(1) sets forth 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;
>
> (B) for kidnapping, by imprisonment for any term of years or for life;
>
> (C) for maiming, by imprisonment for not more than 35 years;
>
> (D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;
>
> (E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;
>
> (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
>
> (G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

The statute plainly states that a death sentence is the maximum penalty for any violation of Section 2332b that results in death. The Government has alleged that death resulted from the defendant's violation of Section 2332b. Therefore, Count 1 is death eligible.

The defense contends that the maximum penalty for Count 1 is set by subsection (c)(1)(F) — which provides for "any term of years" — because that subsection addresses conspiracies. Motion at 1-4. The defense is wrong. Subsection (c)(1)(F) says nothing about what happens when death results during the offense. That situation is addressed by subsection (c)(1)(A), which sets applicable maximums for when death results from any violation of the statute, whether it be a killing, kidnaping or conspiracy. That it is subsection (c)(1)(A), and not subsection (c)(1)(F), that applies to conspiracies resulting in death is made abundantly clear by the language of subsection (c)(1)(A), which provides for a maximum penalty of death, not just for a killing in violation of the statute, but also for instances where "death results . . . from any other conduct prohibited by this section." (Emphasis added). Such "other conduct" includes conspiracies resulting in death. Thus, the construct of the statute leaves no doubt that subsection (c)(1)(A) applies to conspiracies — like the one in Count 1 — resulting in death, and subsection (c)(1)(F) applies to all other conspiracies.

The defense claims that when the Government asserts that subsection (c)(1)(F) applies only to conspiracies that do not result in death we are reading language into subsection (c)(1)(F) that is not there. Motion at 3. The defense's claim is overly simplistic. It would be surplusage for subsection (c)(1)(F) to state that its term-of-years maximum applies only to conspiracies not resulting in death. The conclusion that subsection (c)(1)(F) is confined to conspiracies where death has not resulted unambiguously follows from other language in the statute — namely,

subsection (c)(1)(A)'s unmistakable applicability to killings and all instances where "death results . . . from any other conduct prohibited by this section." Of course, elementary statutory construction requires courts to read all subsections of a statute in conjunction with one another. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (courts have "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).

The defense's other contentions are also without merit. The defense says that subsection (c)(1)(F) should govern because it covers conspiracies more specifically than does subsection (c)(1)(A). Motion at 2-3. This argument is mere sleight of hand. What is involved here is not just a conspiracy, but a conspiracy resulting in death, and such an offense is specifically covered by subsection (c)(1)(A), as demonstrated above. In a similar vein, the defense contends that application of subsection (c)(1)(A) to conspirators "would render the specific language of (c)(1)(F) meaningless." Motion at 2. That is not true: subsection (a)(1)(A) applies to conspiracies resulting in death; subsection (a)(1)(F) applies to conspiracies not resulting in death. In addition, the defense pronounces that ambiguities in the statute must be resolved in the defendant's favor under the rule of lenity. Motion at 3. But reference to that doctrine has no place here, where the statute is unambiguous. Finally, the defense's citation to United States v. Gullett, 75 F.3d 941, 949-51 (4th Cir. 1996) — for its analysis of the meaning of the phrase "term of years" — is irrelevant here.

The defense arguments are all baseless. Count 1 is death eligible under the plain language of the Section 2332b. Accordingly, the defendant's motion to dismiss the notice on Count 1 should be denied.

B. Count 2 is a Death-Eligible Offense

The defense also contends that Count 2 is not death eligible, arguing that one who conspires to commit aircraft piracy resulting in death, in violation of 49 U.S.C. § 46502, cannot be sentenced to death. The argument has no merit. The offense to which the defendant pleaded guilty in Count 2 is death eligible under the plain language of the statute.

Section 46502(a)(2) provides, in relevant parts, as follows:

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

On its face, therefore, Section 46502 makes a death sentence the maximum penalty for any conspiracy to commit aircraft piracy the commission or attempted commission of which resulted in death. That is precisely the case here, where the defendant has pleaded guilty to a conspiracy to commit aircraft piracy the commission of which — that is, the carrying out of the conspiracy's objectives — resulted in death.

The defense argues that a death sentence is unavailable because the word conspiracy does not appear in subsection (a)(2)(B). The argument is specious. It is readily apparent that Congress omitted the word conspiracy from subsection (a)(2)(B) as a means of confining death

sentences only to those conspiracies that have been carried out to commission, or attempted commission, and that include, moreover, an act resulting in death during the commission or attempted commission. Conversely, the language of the statute makes clear that a death sentence is unavailable for conspiracies that are not carried out to commission or attempted commission, even if death results from some act in furtherance of the conspiracy. For example, under the statute, a defendant would not face a death sentence if his conduct involved no more than agreeing with others to commit air piracy, setting off in his or her car to buy explosives, and killing another motorist in a traffic accident en route to buy the explosives. Those facts, however, stand in stark contrast to the facts of this case, where in pleading guilty to Count 2, the defendant admitted that he conspired to kill Americans by committing air piracy and Americans were killed as the conspiracy's objectives were carried out to commission. Subsection (a)(2)(B) certainly encompasses the defendant's conduct.

Congress's intent to make the sentencing enhancement embodied in subsection (a)(2)(B) applicable to conspirators such as the defendant is apparent on the face of the statute. The Court should read the statute consistently with that intention. See Holloway v. United States, 526 U.S. 1, 9 (1999) (statute should be construed consistent with Congress's obvious intentions). The motion to strike the notice as to Count 2 should be denied.

* * * *

For the foregoing reasons, the offenses to which the defendant pleaded guilty in Counts 1 and 2 are both death eligible. Accordingly, the defendant's motion to strike the notice of intent to seek a death sentence on Counts 1 and 2 should be denied. As with Counts 3 and 4 — which,

again, the defendant agrees are death eligible — Counts 1 and 2 are ripe for a penalty phase hearing.

Respectfully submitted,

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Date: July _8__, 2005

CERTIFICATE OF SERVICE

I certify that on the 8th day of July 2005, two copies of the foregoing Government pleading was served, by facsimile and regular mail, on the following counsel:

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