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

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CLERK US DISTRICT COURT ALEXANDRIA, VIRGINIA

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

DEFENDANT'S OBJECTIONS AND SUGGESTED CHANGES TO GOVERNMENT'S PROPOSED PRELIMINARY JURY INSTRUCTIONS FOR PART ONE OF THE BIFURCATED PENALTY PHASE

The defendant, by counsel, notes his objections to the following preliminary instructions proposed by the Government for the reasons stated and proposes the listed changes:

Preliminary Instruction One: There is no cause to advise the jury as to the defendant's pleas on the non-capital counts; their mention in the preliminary instructions would be entirely gratuitous. This proceeding is only about Counts One, Three and Four. Consequently, the Court should eliminate the mention of those charges and conform the remainder of the paragraph.

The Court should eliminate the first full paragraph on page 5. There is no reason to instruct the jury on this point at this time.

The Court should amend the last paragraph on the page to say that "The Government has informed the Court that the "act" upon which it will rely is that . . . ." In addition, the last sentence of the paragraph should be eliminated. It is a Government theory of the case instruction which is inappropriate at this time. Moreover, it equates "not lying" with telling the truth. It thereby suggests that the defendant had an affirmative obligation to divulge information and that the jury can find the threshold finding based upon the defendant's withholding information which

was not responsive to any agent's questions. This is a complex and likely disputed legal issue which should not be resolved in these preliminary instructions.

Finally, the Government's burden of proof paragraph misstates the law. Since this is the penalty phase, the jury's failure to find the threshold factor unanimously is, in fact, a decision, and the standard jury instructions so state.[1] The Court should use the language proposed by the defendant.

Preliminary Instruction Two: The law cited by the Government does not support this instruction. In the only capital case cited by the Government, *Oregon v. Guzek*, ___ S.Ct. ___, 2006 WL 397856 at * 5 (Feb. 22, 2006), the Court merely held that the defendant had no Eighth Amendment right to introduce residual doubt evidence at the penalty phase. The decision had nothing whatever to do with the binding nature of facts contained in an indictment; there had been no guilty plea. Moreover, the Court specifically reaffirmed a defendant's right to introduce evidence as to his role in the offense at the sentencing phase. The fact that a defendant does not have a constitutional right to contest his guilt at the sentencing phase says nothing about whether a defendant who pleads guilty is bound at the sentencing phase by all of the facts contained in his indictment.

In *United States v. Broce*, 488 U.S. 563, 569 (1989), a non-capital case cited by the Government, the Court held that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements *necessary to sustain a binding final judgment of guilt and a lawful sentence*." (Emphasis added). The Government instruction would expand this rule to include

[1] The relevant portion of the instruction in *United States v. Jordan*, which the Government references, said: "To that end, you must decide whether or not the government has proven certain aggravating factors as to either or both defendants." See attached.

every allegation in the indictment, whether necessary to the judgment or not.

In *United States v. White*, 408 F.3d 399, 402-03 (8th Cir. 2005), the Court did hold that a guilty plea includes an admission to all the allegations in the indictment. In so doing, it noted that the Ninth Circuit and "some commentators" disagreed with this approach. *Id.* at 402 (citing *United States v. Cazares*, 121 F.3d 1241, 1246-67 (9th 1997)). The First Circuit also disagrees with the Eighth Circuit's broad rule. *See, e.g. United States v. Apher*, 174 F. 3d 934, 940 (1st Cir. 1999) ("A plea of guilty is the equivalent of admitting all *material* facts alleged in the charge") (emphasis added); *United States v. Ribera Ramos*, 856 F.2d 420, 423 (1st Cir. 1988) ("[A] defendant who pleads guilty may not later contest the factual and theoretical foundations of the indictment to which he has pled") (cited in *United States v. Tolson*, 988 F.2d 1494, 1500 (7th Cir. 1993)). And in *Tolson*, the Seventh Circuit stated that the Supreme Court and lower courts "have made it clear that a guilty plea is an admission of all the *elements* of a formal criminal charge." 988 F.2d at 1500 (emphasis added).

Finally, in *United States v. Gilliam*, 987 F.2d 1009 (4th Cir. 1993), the Fourth Circuit held that, for sentencing purposes in a non-capital case, a defendant who pled guilty *was not* bound by an allegation in the indictment as to the amount of cocaine distributed by the conspiracy, since it did not specify the amount attributable to him. *Id.* at 1013-14. In addition, however, the Court stated only that the Government *may* meet its burden of proof as to a sentencing factor by relying on a specific allegation in the indictment, following an adequate Rule 11 colloquy. *Id.* at 1013. The Court noted that an allegation that was not contested by the defendant in his plea would be "sufficient" to establish the fact, *see id.*, n. 3, not that it conclusively established that fact. *Gilliam* does not stand for the proposition that the defendant is

bound by an allegation in the indictment which is not specifically addressed in the plea colloquy, or that he could not introduce contrary evidence at the sentencing hearing, which is the point of the Government's instruction.

The rule sought by the Government is particularly inappropriate in this case, since the defendant was not advised at his Rule 11 colloquy that all the factual allegations in the indictment would be binding on him, and the Government did not request that he be so advised. In would be particularly inappropriate for the Court to hold Moussaoui to all these allegations without confronting him with that aspect of his guilty plea, when the Government now must prove facts which are the functional equivalents of offense elements. Due process will not tolerate that. Notably, the defendant is not aware of, and the Government has not cited, any case which has held that the defendant, at the sentencing phase of a capital case, is conclusively bound by all the allegations in his indictment if he pleads guilty.

Preliminary Instruction Four: The reference to "sense of justice" is inappropriate at this stage of the proceedings. The jurors should be guided by reason, the facts and the law, and not by bias. The instruction should be amended to say that. The sense of justice reference may be appropriate for the second phase, when the jury must actually make the decision about what penalty to impose, but it is not appropriate now. The defendant has amended the instruction accordingly

Preliminary Instruction Six: The phrase "about our national security" should be struck from the first sentence and the word "certain" should be added before "information." There is no reason to tell the jury why redactions have been made and it suggests to them that all the redactions hide highly sensitive information when, in fact, that is often a dubious proposition.

ZACARIAS MOUSSAOUI

By ______ /s/ ______
Counsel

Gerald T. Zerkin
Senior Assistant Federal Public Defender
Kenneth P. Troccoli
Anne M. Chapman
Assistant Federal Public Defenders
Eastern District of Virginia
1650 King Street, Suite 500
Alexandria, VA 22314
(703) 600-0800

Edward B. MacMahon, Jr., Esq.
107 East Washington Street
P.O. Box 903
Middleburg, VA 20117
(540) 687-3902

Alan H. Yamamoto, Esq.
643 South Washington Street
Alexandria, VA 22314
(703) 684-4700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA by delivering it to them by hand.

______ /s/ ______
Gerald T. Zerkin

CAPITAL INSTRUCTION NO. AA

Introduction to Phase One and Two

Members of the jury, you have unanimously found defendants PETER ROBERT JORDAN and ARTHUR LORENZO GORDON guilty of Murder while Engaged in Drug Trafficking as charged in Count One of the Second Superseding Indictment.

Because you have found the defendants guilty of this capital crime, you must now determine whether death is the appropriate sentence for this offense. Your conclusion that a defendant be sentenced to death or not will be binding on the Court and I will sentence each defendant according to your conclusion.

The penalty phase of the trial is itself divided into two parts. The purpose of the first part is to determine whether one or both of the defendants are eligible for the death penalty. To that end, you must decide whether or not the government has proven certain aggravating factors as to either or both defendants. In the second part, for any defendant as to whom you unanimously find those aggravating factors beyond a reasonable doubt, you must determine, after hearing additional evidence and argument of counsel, whether death is the appropriate punishment. Therefore, during your deliberations in the first part of the penalty phase you should not be considering or discussing whether death is the appropriate punishment.

ATTACHMENT

I again stress the importance of your giving careful and thorough consideration to all the evidence you have received and will receive during this phase of the case.