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 OBJECTIONS TO
DEFENDANT'S PROPOSED JURY INSTRUCTIONS

The United States respectfully objects to the Defendant's Proposed Jury Instructions because the proposed instructions repeatedly misstate the law.[1]

Defendant's Proposed Instructions 15-16

1. The Act:

The defendant's proposed jury instructions 15-16 are little more than a back door motion to dismiss the death notice based on a semantic distinction that the defense could have raised years ago, but chose to spring on us all as closing arguments approach. Everyone in this case — the defense and the Court included — has known for years that the basis for the Government's theory in this penalty phase is the defendant's Statement of Facts, and that our case is premised

[1] As the Court noted last week, the jury instructions in this case are critical to proper resolution. We respectfully request, therefore, a recess between the time the Court issues its proposed instructions to the parties and the closing arguments. Both sides will need time to adjust argument to the instructions the Court will give to the jury. And, if the Court adopts anything close to the defendant's proposed instruction on what constitutes "an act," the United States will need time to consider its options. Accordingly, we respectfully request that the jury be sent home during the charging conference and called back on a date to be determined to hear argument.

on the defendant concealing the truth that he had an affirmative duty to disclose to Agent Samit after he waived his Fifth Amendment right to silence. There can be no mistake as to what our theory has been, and there should be no mistake as to what it is now: the defendant's act — whether called an act of lying, an act of deception, an act of concealment, or an act of withholding the truth — caused at least one death on September 11, 2001. By whatever name, it is an act — an affirmative, calculated, deliberate effort to prevent law enforcement from stopping an ongoing plot. And that act includes, for causation purposes, not only what the defendant did say, but the truths that he purposely concealed.

The Fourth Circuit has previously stated unequivocally that "the Government might still be able to establish Moussaoui's eligibility for the death penalty based on his failure to disclose whatever knowledge he did have." *United States v. Moussaoui*, 382 F.3d 453, 473 n.21 (4th Cir. 2004). This was no haphazard remark. Indeed, it was a recognition of the very theory that the defense now challenges — that the defendant's culpability revolves around his acts of concealment, necessarily including failing to disclose "whatever knowledge he did have." *Id.* (emphasis added).

In both briefing and in open court, as well as in its presentation of testimony during this penalty phase, the Government has repeatedly referred to the defendant's "act" for purposes of 18 U.S.C. § 3591(a)(2)(C) as encompassing his "lies," his "failure to tell the truth," his "concealment," or his "deception." *See, e.g.*, Aplt. Br. for the United States at 89 (asserting that Moussaoui "lied in a way that concealed the conspiracy and prevented discovery of the September 11 attacks"); 10/12/05 Tr. at 7-8 ("The lie is the act, but it encompasses what he

knew, and what he knew here as the foundation, Your Honor, is what he signed in the statement of facts on April 22 . . .").

The defense has challenged the Government's theory before — but on grounds that are the polar opposite of what they are saying now. On countless occasions, the defense argued that the defendant did not know enough about the plot to have provided the Government with the vital information it needed, even if the defendant would have told the agents the complete truth. Indeed, the defense slogan was that the Government knew more about the plot than the defendant. *See, e.g.*, Def. Motion for Separate Hearing, at 3 (Docket No. 1337) (acknowledging that the "'act' that could sustain the Government's claim would be the failure of Mr. Moussaoui to tell the authorities something that he knew that the Government did not already know[,]" while claiming that "[s]ubstantial evidence will be presented at trial that the United States Government knew more about Al Qaeda's plans to attack the United States than did Mr. Moussaoui"); Def. Bifurcation Reply Mem., at 9 (Docket No. 1347) ("it is important to remember . . . what the defendant has conclusively admitted, beyond the simple fact that he lied") (listing eight specific admissions). Now the defense is saying that what the defendant knew about the plot is utterly inconsequential. Based on the defendant's testimony today, we know that cannot be the case.

The defense has already conceded that lying constitutes an act for the purposes of 18 U.S.C. § 3591(a)(2)(C). *See e.g.*, Def. Motion to Amend Court's Order of March 17, 2006, at 3 (Docket No. 1694) (stating that the Government "must prove an 'act' by the defendant" but arguing that "[w]hile lying is an 'act,' the *failure* to tell the truth is something quite different"). And yet, in order to confuse the issues and disavow the Statement of Facts he signed, the defense

now attempts to drum up distinctions between lying and failing to tell the truth that simply do not apply to this case, all in an effort to create Fifth Amendment issues where none exist.

Of course, a defendant always has a Fifth Amendment right to remain silent. But there are no Fifth Amendment concerns in this case because the defendant waived that right. What the defendant asks the Court to ignore is the time-tested principle that once a defendant waives his right to remain silent and elects to speak to the police, the defendant has an affirmative duty to tell the truth. The Fifth Amendment privilege against self-incrimination only affords an individual being questioned by agents of the United States Government two options: to remain silent or answer the questions honestly. *See Brogan v. United States*, 522 U.S. 398, 404-05 (1998) (rejecting the concept of a "'cruel trilemma' of admitting guilt, remaining silent, or falsely denying guilt"); *Bryson v. United States*, 396 U.S. 64, 72 (1969) ("A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."). In other words, under no circumstances does the Fifth Amendment confer a privilege to lie. *United States v. Apfelbaum*, 445 U.S. 115, 117 (1980) ("[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely."). Consequently, if a defendant chooses to waive his Fifth Amendment right to silence and speaks, as the defendant did here, he has an affirmative responsibility to tell the truth. Again, none of this was lost on the Fourth Circuit, which recognized that the defendant's act of concealment — both the actual false statements and the truths that made those statements false — would be the centerpiece of this case. *Moussaoui*, 382 F.3d at 473 n.21 ("the Government might still be able to establish Moussaoui's eligibility for the death penalty based on his failure to disclose whatever knowledge he did have").

Without a Fifth Amendment problem, therefore, the Government has throughout this case referred to lies, withholding the truth, concealment, deception, covering up, etc., as essentially the same thing. That is, they are all part and parcel of the same scheme to conceal the conspiracy and to allow the defendant's *al Qaeda* "brothers" to move forward with their plot to hijack commercial planes and fly them into prominent American buildings. Moreover, the Government has hardly tip-toed around the fact that it would present the Statement of Facts as its central piece of evidence in showing what steps could have been taken to stop the 9-11 plot had the defendant told the truth after waiving his Fifth Amendment right to silence. In short, while the Government has employed different terms, perhaps interchangeably, at different times for the defendant's act and the components thereof, there has never been any ambiguity about the Government's theory and approach to this case. Thus, for the defendant now to invite the Court to join him in semantical hairsplitting[2] while claiming "unfair surprise" and alleging that the Government has somehow amended the death notice simply strains credulity.

More important, for the purposes of the Federal Death Penalty Act (FDPA), as the Fourth Circuit has already recognized, the defendant's act of concealing — including his failure to tell the truth — constitutes an act under 18 U.S.C. § 3591(a)(2)(C). The FDPA provides that a defendant is eligible for the death penalty if the jury finds, beyond a reasonable doubt, that the defendant "intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act[.]" 18 U.S.C. §

---

[2] *See e.g.*, Def. Proposed Instruction No. 15 ("[T]he Government's claim that Defendant's lies directly resulted in the deaths of one or more victims on September 11 . . . is not a claim that the Government could have prevented a death if the Defendant had told the truth.").

3591(a)(2)(C). There is no dispute that, as a matter of law, instances of concealment like lying, deceiving, and covering up, can constitute an "act" and can be criminally punished. *See* 18 U.S.C. § 1001; *Brogan*, 522 U.S. at 402 (holding that even a simple "no," when false, is enough to impose criminal liability under 18 U.S.C. § 1001 and rejecting the argument that the statute encompasses "only those falsehoods that pervert governmental functions"); *United States v. Admon*, 940 F.2d 1121, 1125 (8th Cir. 1991) (lie to police officers constitutes overt act in furtherance of unlawful activity in violation of the Travel Act).

Moreover, the law is well established that acts of concealment necessarily include within the offense the lies specifically intended to deceive and the concomitant failure to tell the truth. This concept is as old as the common law itself, and is illustrated by laws criminalizing the concealment or "misprision" of felonies. *See* Gabriel D.M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 699–700 (2003) (explaining that misprision has deep roots in the common law dating back to at least the late fifteenth century); *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972) ("Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities."). The modern codification criminalizing misprision is Section 4 of Title 18 of the United States Code, which provides that "[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprision]." 18 U.S.C. § 4. Significantly, the modern *act* of misprision is comprised of *both* concealment and a failure to make known the truth, and as such it does not violate the Fifth Amendment prohibition against self-incrimination. *See United States v. Pittman*, 527 F.2d 444 (4th Cir. 1975) (rejecting defendant's Fifth

Amendment challenge to 18 U.S.C. § 4 where she was convicted of misprision of felony because of her untruthful statement — made after she waived her right to silence — which was intended to conceal her husband's participation in a bank robbery). More important for this case is the simple fact that criminalizing the act of concealing, even verbal concealing (*i.e.*, lying to deceive) makes little sense without reference to what is concealed, which, in the case of lies, is the truth withheld.

For similar reasons, courts have routinely found that a defendant's concealment may serve as an overt act in furtherance of a conspiracy. *See United States v. Jake*, 281 F.3d 123, 132-33 (3d Cir. 2002); *United States v. Evans*, 272 F.3d 1069, 1088 (8th Cir. 2001); *United States v. Bullis*, 77 F.3d 1553, 1563-64 (7th Cir. 1996). This is so because the act of concealing serves the conspiracy by allowing it to continue in furtherance of its criminal objectives. In that context, the import of a lie is not just what was said, but what was not said — the information concealed — in response to law enforcement questioning. *Bullis*, 77 F.3d at 1563; *Blumenthal v. United States*, 332 U.S. 539, 557 (1947) ("Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime.").

That the scope of the concealment is determined by reference to both the lie and the concomitant truth withheld is further illustrated in the criminal fraud context. In a recent criminal fraud case, the Fourth Circuit explained that fraud "includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent the other party from acquiring material information." *United States v. Gray*, 405 F.3d 227, 235 (2005) (quoting *United States v. Coloton*, 231 F.3d 890, 898 (4th Cir. 2000)). In *Gray*, the defendant was convicted of mail fraud and wire fraud for her role in collecting insurance proceeds following the

deaths of the insureds whom she had murdered. During the police investigation, the defendant "did not remain silent . . . falsely denied any involvement in the murder, falsely denied owning a gun, . . . and even offered a false alibi." *Id.* at 236. When the defendant submitted her claims for the life insurance, "she made no mention of her involvement in the murder and did not correct any of the false information she had earlier given to the police." *Id.* Even though the truth would have incriminated the defendant, the court found that her failure to divulge the truth was all a part of the act of concealment constituting the fraud. The court explained that simple nondisclosure generally is not sufficient to constitute fraud, but "'mere silence is quite different from concealment[.]" *Id.* (quoting *Stewart v. Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388 (1888)).

As with the misprision, conspiracy, and fraud cases, the defendant's concealment in this case necessarily includes within the scope of the "act" both his lies, which were specifically intended to deceive, as well as the concomitant failure to tell the truth. The facts surrounding the defendant's waiver of his right to silence and his subsequent concealment are not in dispute. The FBI and INS agents first interviewed defendant on August 16, 2001, after his arrest for immigration violations. During this initial interview, defendant repeatedly lied by telling the agents that he sought the flight training purely for personal enjoyment and, upon completion of the training, he intended to engage in sightseeing in New York City and Washington, D.C. When interviewed for the second time on August 17, 2001, the agents asked the defendant which terrorist group he was with and for the details of his plot. In response, defendant lied and reiterated that he merely sought flight training for personal enjoyment. Of course, because he sought the training to participate in the 9-11 plot to kill Americans, none of this was true. Both the defendant's testimony and the Statement of Facts erases any doubt about the purposes of his

deception; he has admitted that "[a]fter his arrest, [he] lied to federal agents *to allow* his al Qaeda 'brothers' to go forward with the operation to fly planes into American buildings." Statement of Facts, at ¶ 16 (emphasis added). In other words, his lies were purposefully calculated to deceive and conceal the truth he had an affirmative duty to disclose once he waived his Fifth Amendment right to silence and began speaking.

Nonetheless, the defendant attempts, incredibly, to have the Court instruct the jury that it "must assume" that had the defendant not lied and made false statements, "he would have asserted his constitutional right to say nothing at all." Def. Proposed Instruction No. 16. According to the instruction:

> The practical significance of this is that in measuring the effect of Mr. Moussaoui's false statements to the FBI, you may not compare what the government did (and failed to do) after he made those statements with what the government would have done had the Defendant told the FBI everything he knew. Rather, you must compare what the government did (and did not do) after hearing his false statements with what the government would have done if he had simply asserted his Fifth Amendment right not to incriminate himself, and had said nothing.

Id. First of all, it certainly cannot be the case that the jury must assume that the defendant would have invoked his right to silence if he had not lied in the first place. Indeed, asking the jury to assume what the defendant *would* have done is simply asking the jury to speculate in exactly the manner that this Court has taken great pains to forbid in this case. More important, this charge lacks any factual basis because the defendant did in fact waive his Fifth Amendment right to silence and did lie in an attempt to conceal the plot that was moving forward without him. As previously explained, the defendant's act of concealment, which was specifically intended to deceive, necessarily includes within the "act" the lies, as well as the concomitant failure to tell

the truth. Consequently, in evaluating the defendant's concealment, the jury must consider the truth withheld as part of the act and whether that act resulted in at least one death on September 11, 2001. Thus, as the Fourth Circuit intimated, and as the Government offered in its Proposed Jury Instructions for Part One of the Bifurcated Penalty Phase, the jury should be instructed that when considering the import of the defendant's lies, the jury should consider not only what he said, but also the information that he tried to conceal.

2. Directly Resulting Death

Similarly, that portion of defendant's proposed instruction 16 defining "direct result" lacks any legal support. Specifically, defendant asks the Court to charge the jury: "If the death would have occurred by the action of some other force regardless of the act of the defendant, then no direct link has been established." Def. Proposed Instruction No. 16. This also misstates the law. The courts have repeatedly rejected defenses based upon other intervening causes of death. *See United States v. Riggi*, 117 Fed. Appx. 142, 144 (2d Cir. 2004) (unpublished) (rejecting defendant's "intervening cause" argument where there was no dispute that his acts played a role in the death of the victim); *United States v. Swallow*, 109 F.3d 656, 659-60 (10th Cir. 1997) (murderer may not argue that the failure of rescue squad to save victim of gunshot wounds constituted an intervening cause). The appropriate instruction is that offered by the Government in our proposed instruction 14.

Defendant's Proposed Instruction No. 12

In his proposed instruction 12, defendant essentially asks the Court to rewrite the *mens rea* requirement of the threshold factor.[3] The statute requires the Government to prove that the defendant acted "contemplating that the life *of a person* would be taken or intending that lethal force would be used in connection with *a person* . . . ." 18 U.S.C. 3591(a)(2)(C) (emphasis added). Contrary to the statute, defendant asks the Court to charge the jury wrongly:

> To prove this factor, the prosecution must prove that the defendant deliberately acted with a conscious desire that the victim be killed or that lethal force be employed against the victim, which in turn caused the victim's death.
>
> To satisfy this element of the offense, the Government must prove beyond a reasonable doubt that the Defendant's intent related specifically to the victims who died on September 11, 2001. That does not mean, however, that the Defendant had to know the identities of those victims.

Def. Proposed Instruction No. 12. Defendant, of course, fails to cite any authority for this contorted view of the statute.

The actual *mens rea* requirement is that the defendant directed his intentions to *a person*, not to the specific victims that died. "The best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction." *United States v. Paul*, 217 F.3d 989, 997 (8th Cir. 2000) (addressing § 3591(a)(2)(C)). Moreover, this subsection is designed to ensure compliance with the Supreme Court's decisions in *Enmund v. Florida*, 458 U.S. 82 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). *Paul*, 217 F.3d at 997 n.4; *Webster*, 162 F.3d at 322, 355. "The gist of these cases is that before a death sentence may be recommended, the

---

[3] Defendant wrongly refers to the threshold finding as an aggravating factor. Under the Federal Death Penalty Act, the threshold findings are not aggravating factors because they are not subject to weighing. *United States v. Webster*, 162 F.2d 308, 355 (5th Cir. 1998); 18 U.S.C. § 3593(c). Only those factors set forth in 18 U.S.C. § 3592 constitute "aggravating factors."

Eighth Amendment requires that the defendant, for example, killed, inflicted serious bodily injury resulting in death, or participated in a felony with reckless disregard for human life in death. The FDPA meets this requirement in § 3591, by limiting even the possibility of a death sentence to those defendants with sufficient culpability." *Webster*, 162 F.3d at 322.

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

Subsection (C), therefore, does not require proof that the defendant directed his intent at a specific victim as the defense has asked the Court to charge the jury. Like the defendants in Tison who never contemplated the death of a specific person, the threshold factor instead merely

requires proof that the defendant acted with such intent directed at any person. The Court, therefore, should reject the defendant's proposed instruction 12 and, instead, charge the jury as set forth in the Government's proposed instruction 13.

Defendant's Proposed Instruction 13

Defendant next asks the Court to undercut the Statement of Facts that the defendant signed as part of his guilty plea by asking the Court to instruct the jury: "In assessing the import of the Statement of Facts, you may consider that the Statement of Facts was drafted by the Government and you may construe any ambiguities you find in the Statement of Facts against the government." Def. Instruction No. 13. Again, defendant cites no authority for the proposed instruction.

That the Government initially drafted the Statement of Facts is of no import. The defendant reviewed the Statement of Facts many times, made a change before signing the document, orally adopted the Statement of Facts during the Rule 11 colloquy, and then signed the document. Federal Rule of Criminal Procedure 11(b)(3) requires the Court to "determine that there is a factual basis for the [guilty] plea" before accepting the plea. If the Court had any questions about the propriety of the Statement of Facts, the Court should not have accepted the defendant's guilty plea. Because the Court accepted the defendant's guilty plea, he is now bound by his admissions made in the Statement of Facts. *See Oregon v. Guzek*, 126 S. Ct. 1226, 1230-31 (Feb. 22, 2006) (defendant may not attack his guilt during capital sentencing phase); *United States v. Boce*, 488 U.S. 563, 569 (1989) (guilty plea is a "binding, final judgment of guilt"); *United States v. White*, 408 F.3d 399, 402-03 (8th Cir. 2005) (defendant who pleads guilty is bound to all allegations in indictment unless he specifically objects to specific facts); *United*

States v. Gilliam, 987 F.2d 1009, 1013-14 (4th Cir. 1993) (same). The defendant himself recognized this: "I understand that these statements of fact is there to stay and I cannot go back and say no." 4/22/05 Tr. at 20. Consequently, the Court should instruct the jury as the Government proposed in its proposed instruction 4.

Defendant's Special Verdict Form

Finally, the Government objects to defendant's proposed Special Verdict Form. There is simply no reason to break down this factor into four questions for the jury. Again, defendant cites no authority for doing so and such a proposal is completely inconsistent with the verdict forms used for every other criminal case.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: /s/
Robert A. Spencer
David J. Novak
David Raskin
Assistant United States Attorneys
Kevin R. Gingras
Special Assistant United States Attorney

Date: March 28, 2006

CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2006, a copy of the foregoing Government pleading was served, by hand, on the following counsel:

Gerald T. Zerkin, Esquire
Kenneth P. Troccoli, Esquire
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street
Suite 500
Alexandria, Virginia 22314

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118

Alan H. Yamamoto, Esquire
643 S. Washington Street
Alexandria, Virginia 22314

/s/
Robert A. Spencer
Assistant United States Attorney