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

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No. 01-455-A |
| | ) | Judge Leonie M. Brinkema |
| ZACARIAS MOUSSAOUI | ) | |

**MOTION TO STRIKE NOTICE OF INTENT TO SEEK SENTENCE OF DEATH AS TO COUNTS 1 AND 2 AND MEMORANDUM IN SUPPORT THEREOF**

Defendant Zacarias Moussaoui, through counsel, respectfully moves to: (A) strike the government's Notice of Intent to Seek Sentence of Death as to Counts 1 and 2 on the grounds that those counts do not allege crimes for which the penalty of death is authorized.[1]

ARGUMENT

Count 1

Count 1 alleges a violation of 18 U.S.C. §§ 2332b(a)(2) and (c). Specifically, Mr. Moussaoui is charged with *conspiracy* to commit acts of terrorism transcending national boundaries. Punishment for that offense, however, is limited to "a term of years," which plainly does not include a sentence of death.

Section 2332b(a)(2) specifically addresses the penalties applicable to persons

[1] To the extent that the arguments herein have been raised before, *see* Memorandum Regarding Rule 11 Considerations (filed July 24, 2002, dkt. no. 356); Government's Response to Standby Counsel's Memorandum Regarding Rule 11 Considerations (filed July 25, 2002, dkt. no. 360) (the "Government's Response"); and Transcript of July 25, 2002 Plea Hearing (filed July 26, 2002, dkt. no. 363), Defendant seeks leave to raise them again given that the Court previously did not receive the benefit of a full briefing on the issues raised, and at the time they were initially raised, then standby counsel did not have the right to file pretrial motions in this case. *See* Order at 1 (filed Aug. 22, 2002, dkt. no. 447) (granting standby counsel leave to file pretrial motions).

convicted of threats to commit, or attempts or conspiracies to commit any offense under subsection (a)(1). Just as subsection (a)(1) states as to principals, (a)(2) states that such persons "shall be punished under subsection (c)." In turn, subsection (c) specifically provides the penalties for persons convicted of such conspiracies:

> [F]or 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.

18 U.S.C. § 2332b(c)(1)(F) (emphasis added).

While subsection (c)(1)(A) provides for a penalty of death "for a killing, or if death results to any person from any other conduct," application of that subsection to conspirators would render the specific language of (c)(1)(F) meaningless. "It is, of course, an elementary canon of statutory construction that the specific provision controls the general." *United States v. John*, 935 F.2d 644, 647 (4th Cir. 1991). Thus, it is plain that the language in subsection (c)(1)(F) governs here, since it provides the penalties specifically applicable to conspirators. It was Congress' intent that principals in a completed terrorist act resulting in death be punished by death, life imprisonment or a term of years pursuant to (c)(1)(A), and that conspirators be punished pursuant to (c)(1)(F).

The government has previously argued, *see* Government's Response at 6, that subsection (c)(1)(A) applies to conspirators because it is the more specific subsection and, therefore, the death penalty is available under Count 1. While the general legal principle upon which the government relies is a correct one - that a specific statute triumphs over a general one - the government is incorrect when it asserts that (c)(1)(A) is the more specific. Under its theory, (c)(1)(A) is the more specific because it

references the range of punishment applicable "for a killing, or if death results." However, the government's argument ignores the fact that (c)(1)(F) is the more specific, for it and only it specifically refers to the range of punishment for persons convicted of "attempting or conspiring to commit an offense."

Further, the government's interpretation of subsection (c)(1)(F) - that it is "designed for all conspiracies where death does not result," s*ee* Government's Response at 6 - reads language into that subsection that is just not there. What is there, is the very clear language that "for attempting or conspiring to commit an offense," the penalty shall be "any term of years."

To the extent there is an ambiguity in the statute, that ambiguity must be resolved in Mr. Moussaoui's favor under the rule of lenity. Where, "after considering traditional interpretative factors," a court is "left . . . uncertain as to Congress' intent," the rule of lenity requires that a criminal statute "'be construed in favor of the accused.'" *Castillo v. United States*, 530 U.S. 120, 131 (2000) (*quoting Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (*citing United States v. Granderson*, 511 U.S. 39, 54 (1994); *United States v. Bass*, 404 U.S. 336, 347 (1971)). In *Castillo,* the severity of the increased sentence that would apply under the government's proposed interpretation was recognized as a factor weighing heavily against its adoption. *See* 530 U.S. at 131. That factor weighs far more heavily against the government here, since the difference is not measured in terms of years in prison, as was the case in *Castillo,* but literally in terms of life and death.

The maximum penalty for persons convicted of conspiracy to violate 18 U.S.C. § 2332b is a "term of years." That phrase precludes the death penalty. Indeed, as the

Fourth Circuit has made clear in another context, it even precludes a sentence of life imprisonment. *See United States v. Gullett*, 75 F.3d 941, 949-51 (4th Cir.), *cert. denied*, 519 U.S. 847 (1996). Thus, the death penalty is not available under Count 1 and the Notice of Intent should be struck as to that Count.

Count 2

In Count 2, Mr. Moussaoui is charged with *conspiracy* to commit aircraft piracy in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B). While the commission of or the attempted commission of aircraft piracy is punishable by death under the terms of the statute, conspiracy to commit such acts only is punishable by a maximum penalty of a term of years in prison.

Subsection (a)(2) provides in relevant part:

> 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.

49 U.S.C. § 46502(a)(2) (emphasis added). By this language, Congress plainly distinguishes between actual commissions of an offense and attempts to do so, on the one hand, and conspiracies to do so on the other. Although, subsection (a)(2)(A) refers to all three crimes - commissions, attempts and conspiracies - and provides for a twenty year term of imprisonment as the minimum punishment, subsection (a)(2)(B) refers only to *commissions* and *attempts*, and provides for a sentence of death or life imprisonment if death results. Thus, while persons who commit aircraft piracy, or attempt to commit aircraft piracy, or even conspire to commit aircraft piracy, are subject to the twenty year

minimum sentence set forth in subsection (a)(2)(A) if no death results, only the former two categories of offenders, those who commit and those who attempt to commit aircraft piracy, are subject to the greater punishments – death or life imprisonment – set forth in (a)(2)(B).

The government has attempted to avoid this straightforward result with a convoluted argument that makes little sense. *See* Government's Response at 7-8. Most notably, the government does not explain how a death could result from a conspiracy in the absence of at least an "attempt" to commit the offense,[2] such that Congress would have perceived the need to protect against the possibility that a defendant could face the enhanced punishments in (a)(2)(B) where there had not even been an attempt to commit the offense.

In setting forth its "reasonable reading of the statute," *see* Government's Response at 8, the government perhaps unwittingly concedes the ultimate error of its position. The best that it can do is insist that its reading "*can conclude* that Congress [amended the statute] to add the language 'or conspiring' so that conspirators, such as the defendant, face the sentencing enhancements set forth therein." *Id*. (emphasis added). Of course, if that is simply one of the plausible readings of the statute, the government's more onerous reading must fail under the rule of lenity.

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[2] *See* Government's Response at 7 ("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[ed] commission of the crime.").

The flaw that the government sees in Defendant's reading of the statute - that it would omit a maximum punishment for an offense - ignores the fact that its interpretation would not cure that flaw, for even under its interpretation there would be no maximum punishment provided in the statute where *no death results*, and no maximum term of years provided if it does.

The government cites one case interpreting the penalty provisions of the statute, *United States v. Calloway*, 116 F.3d 1129 (6th Cir.), *cert. denied*, 522 U.S. 925 (1997). Although the Court in *Calloway* did note, without discussion, that the district judge "made it clear that she thought the appropriate sentence" for the offense was life imprisonment, *id*. at 1136, and although it did affirm the sentence, *id.*, it did not explain how it reached that result. Nor does the government suggest how the *Calloway* Court could have reached that result in the face of plain language stating that the punishment of life imprisonment applies "if the death of another individual results," and, as was the case there, no death had resulted. Notably, however, defendant Calloway did not challenge the availability of a life sentence for the reasons Defendant advances herein. In any event, it is beyond dispute that, in the Fourth Circuit at least, a life sentence is not available where the punishment for an offense is defined solely in terms of a term of years. *See United States v. Gullett*, 75 F.3d 941, 949-51 (4th Cir.), *cert. denied*, 519 U.S. 847 (1996).[3]

The simple fact is that the government's interpretation does nothing to solve the flaw it sees in Defendant's interpretation, while at the same time favoring a convoluted

[3] Moreover, in *Gullett*, the Fourth Circuit identified some statutes that do not provide a maximum term of years. *See* 75 F.3d at 950-51.

and speculative theory of Congressional intent for the plain and straightforward reading advanced by the defense. That even the government finds itself unable to assert that its interpretation is the only reasonable reading of the statute demonstrates best that its interpretation is doomed under the rule of lenity, especially where the punishment of death is at issue.

## CONCLUSION

For the foregoing reasons, Defendant respectfully moves the Court to strike the death penalty as to Counts 1 and 2..

Respectfully submitted,

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CERTIFICATE OF SERVICE[4]

I HEREBY CERTIFY that on this 24th day of June, 2005, a true copy of the foregoing Motion to Strike Notice of Intent to Seek Sentence of Death as to Counts 1and 2 and Memorandum in Support Thereof 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 22314, by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and by FACSIMILE upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0097 (AUSA Raskin).

/s/
Gerald T. Zerkin

[4] Pursuant to the Court's order of October 3, 2002 (dkt. no. 594), the aforementioned pleading was presented to the CSO for a classification review before filing. That review determined that the pleading is not classified. A copy of this pleading was not provided to Mr. Moussaoui until after completion of the classification review.