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	)	

DEFENDANT'S MOTION TO AMEND COURT'S ORDER OF MARCH 17, 2006

As part of its Order (Docket #1686) granting in part the Government's Motion for Reconsideration of the Court's Order Striking All Aviation Evidence in this Case ("Motion for Reconsideration") (Docket # 1684), the Court has seemingly endorsed an expansion of the Government's theory of death eligibility, a theory which has transmogrified "the defendant's lies directly resulted in death" to "the defendant's failure to tell the truth to the FBI when interrogated directly resulting in death." *See* Order at 2 ("a government aviation witness may testify as to what the United States government 'could' have done to prevent the attacks, *had the defendant disclosed in August 2001 the facts that he admitted in pleading guilty*") (emphasis added). Given that the Government's theory of eligibility was not directly the subject of the Government's Motion for Reconsideration, and given its importance to the case, the defendant requests that the Court reconsider the language in its Order that allows government witnesses to base their testimony on the information Moussaoui admitted as part of his guilty plea. As explained below, not to do so would violate the defendant's constitutional rights to notice and indictment by a grand jury, and to due process, as well as the provisions of the FDPA.

I. THE GOVERNMENT'S THEORY OF THE CASE AND THE FAA WITNESSES.

As the defendant argued in his Opposition to the Government's Motion for Reconsideration, the evidence and legal construct which the Government proposes to elicit from its aviation witnesses comprises the heart and soul of its penalty phase case. In its Motion for Reconsideration, the Government stated that its case is predicated on proving what the FBI and the FAA could have done "if the defendant "had . . . told the truth." Motion for Reconsideration at 2; *see also id.* at 4 ("[n]ext, Lynne Osmus . . . would identify the security measures that could have been implemented in a security directive *had the defendant told the truth.*") (emphasis added); Tr. at 20 (Mr. Novak: Mr. Manno will "try to describe what if any security measures could have been implemented [by the FAA] had Mr. Moussaoui *told the truth*" (emphasis added)); *id*. at 20 (what "*would happen* had [the defendant] *told the truth*" (emphasis added)).[1] By allowing the Government to proceed in this fashion, the Court will violate the notice and indictment requirements of the Sixth Amendment to the United States Constitution and the defendant's Fifth Amendment rights to due process, and not to incriminate himself, as well as the Federal Death Penalty Act itself. Moreover, it will endorse abject speculation as to the content of a conversation between Agent Samit and Mr. Moussaoui which never took place.

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[1] Ms. Osmus seemingly took it one step further, referring to the issue presented as what the FAA would have done if the FAA knew "the information Mr. Moussaoui *knew* prior to 911." Tr. 17 (emphasis added).

II. THE COURT'S ORDER ALLOWING GOVERNMENT WITNESSES TO TESTIFY AS TO WHAT THE FAA COULD HAVE DONE IF MOUSSAOUI HAD TOLD THE TRUTH VIOLATES THE FIFTH AND SIXTH AMENDMENTS OF THE CONSTITUTION.

The Government alleged in the Special Findings[2] section of the Superseding Indictment all four of the threshold factors, tracing the statutory language. From the outset the Government explained that it relied only on subsection "C." In due time, the Government abandoned one of its two formulations of subsection "C" -- that "the conspiracy" itself constituted the "act" which directly resulted in the deaths on September 11. It now pursues only the theory that the "act" which caused the deaths was the defendant's lying to agents on August 17, 2001, a position which it has consistently repeated.

The fundamental flaw in the Government's theory is that, under the terms of the Special Findings section of the Superseding Indictment -- and consistent with the statute -- it must prove an "act" by the defendant which resulted in the deaths, not an omission or a failure to act. While lying is an "act," the *failure* to tell the truth is something quite different. Thus, the defendant's "telling the truth" or "telling what he knew" can constitute the "act" under subsection "C" and, thus, under the Indictment, only if it is somehow the inevitable consequence of "not lying" -- that they are somehow so inextricably bound that the one necessarily implicates the other. The Supreme Court, however, has specifically rejected that suggestion. *See Brogan v. United States*, 522 U.S. 398 (1998). Writing for the Court, Justice Scalia dismissed the notion of a so-

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[2] The Notice of Intent is identical to the extent that the Findings address the threshold and statutory aggravating factors.

called “cruel trilemma” because the subject of an interrogation always possesses, along with the options of (1) lying and (2) telling the truth, the third alternative of *remaining silent* and declining to implicate himself. *See id.* at 404. The decision not to lie, therefore, carries no corresponding requirement that the subject tell the truth, whether as a matter of logic or law.

Recognizing this, in the absence of lies from the defendant, Agent Samit would not have been entitled to,[3] and would not have obtained, the information Mr. Moussaoui admitted as part of his guilty plea. Rather, if Mr. Moussaoui had not lied, the agent simply would not have been in possession of the “lies.” Thus, while specific witnesses can testify as to how they were misled by Mr. Moussaoui’s lies and, if it were the case, how they misdirected the nation’s air passenger defenses as a result, they may not take the next step -- which they and the Government are plainly planning to do -- by testifying as to what actions they (or their agency) could (or would) have taken *had Moussaoui provided additional, truthful information* he was not obligated to give.

This distinction is neither technical nor esoteric. Rather, as Justice Scalia’s opinion for the Court in *Brogan* illustrates, it is the very underpinning of the Government’s constitutional power to criminalize the making of false statements to government officials. Thus, if Moussaoui’s imaginary 2001 *mea culpa* -- upon which the Government now relies for its theory of death eligibility -- is not a *necessary facet* of “not lying,” *a conclusion that is required by Brogan*, the constitutional right to notice (under both the Sixth Amendment and the Fifth Amendment’s Due Process Clause)

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[3] *See Edwards v. Arizona*, 451 U.S. 477 (1981).

and to indictment by grand jury precludes the switch the Government is trying to engineer. *See United States v. Pirro*, 212 F.3d 86, 93 (2nd Cir. 2000) (finding unconstitutional amendment of indictment where indictment tracked statutory language of a false statement, but did not include allegation of an "*omission* that amounted to a material falsehood") (emphasis added).

The Supreme Court resolved the relevant legal question at least forty-five years ago in *Stirone v. United States*, 361 U.S. 212 (1960), when it re-stated the rule "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Id*. at 217 (citations omitted). The Court reversed the conviction in that case specifically because, by its admission of evidence and charge to the jury, the trial court had constructively expanded the charge returned by the grand jury. *See id*. at 217-18. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same, creating "variation between pleading and proof" that was "neither trivial, useless, nor innocuous." *Id.*

> [T]hat variation . . . destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

Id. *See also Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a *charge that was never made*") (emphasis added); *United States v. Randall*, 171 F.3d 195, 205-10 (4th Cir. 1999) (reversing conviction where instructions, evidence and argument allow the jury to convict defendant based on predicate offense different than that alleged in indictment).

The allegation of death eligibility here is of no less constitutional significance than the allegations at issue in *Stirone* or *Cole*,[4] and neither the Government, by its evidence, argument or otherwise, nor the Court by its instructions or evidentiary rulings, may effectuate a constructive change to the allegation of the grand jury or the notice provided to the defendant. *See Stirone*, 361 U.S. at 217-19. Indeed, this principle is so fundamental that a constructive amendment effectuated by the instructions and the Government's evidence requires automatic reversal *even in the absence of an objection at trial*. *See Randall*, 171 F.3d at 210. The Court may not allow the new FAA witnesses to base their testimony on Mr. Moussaoui's *failure* to provide the information he revealed in connection with his plea, as opposed to any lies he may have told.

III. THE TESTIMONY OF THE FAA WITNESSES IS BASED ON SPECULATION ABOUT WHAT THE DEFENDANT WOULD HAVE SAID IF HE HAD NOT LIED.

The FAA witnesses may also not base their testimony on what Moussaoui "knew" or what he revealed at his guilty plea, because it would be abject speculation for the FAA witnesses to assume, or for the Government to ask the jury to "infer," that, in the absence of lies, Mr. Moussaoui, on August 17, 2001, would have volunteered the information contained in the Statement of Facts, in whole or in part, a statement drafted by the government for an entirely different purpose -- in support of his guilty plea. Mr. Samit has hypothesized what additional questions he would have asked, but neither he, nor we, nor the jury can ever know what Mr. Moussaoui would have said in response,

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[4] *See Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for crime *must be charged in an indictment*, submitted to a jury and proven beyond a reasonable doubt" (emphasis added)).

nor when in that fanciful dialogue between them, Mr. Moussaoui would have done exactly what he eventually did -- ask for an attorney, or, as the Court noted in *Brogan*, choose to remain silent. Thus, it is speculation at its worse to assume that Agent Samit would have elicited the information contained in the Statement of Facts or otherwise admitted as part of his guilty plea. Neither the Eighth Amendment's demand for heightened reliability, nor the FDPA's requirement for reliable information will tolerate such a process. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); 18 U.S.C. § 3593(c).

IV. THE GOVERNMENT'S THEORY IS INCONSISTENT WITH THE FDPA.

As the defendant noted in his Opposition, the Government's theory would require a judicial rewriting of the statute. 18 U.S.C. § 3591(a)(2)(C) does not provide for an "act" or "omission" as the basis for death eligibility; it only provides for an "act." The Government cannot rewrite the statute to fit its purposes, nor can it transform the *failure* to do something, i.e., the failure to tell the truth, into something it is not -- the actual "act" of lying, i.e., confessing or telling falsehoods. *See Pirro*, 212 F.3d at 93. The "rule of lenity" plainly precludes such a result. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004).

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the Court amend its Order of March 17, 2006 to preclude testimony by the FAA witnesses based upon the defendant's failure to tell the truth, including information he admitted in connection with his guilty plea.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 20th 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 22314.

/s/
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