RECORD NO. 06-4494

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ZACARIAS MOUSSAOUI,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
The Honorable Leonie M. Brinkema, United States District Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS. . . . . i-viii

TABLE OF AUTHORITIES. . . . . ix-xx

JURISDICTIONAL STATEMENT. 1

STATEMENT OF THE ISSUES. 1

STATEMENT OF THE CASE. 2

STATEMENT OF THE FACTS. 4

I. INTRODUCTION. 4

II. THE OFFENSE CONDUCT 5

A. Usama Bin Laden And Al Qaeda. 5

B. The Planes Operation. 7

1. Prospective Pilots Are Selected And Travel to the United States. 7

2. Moussaoui Is Selected And Seeks Flight Training In Malaysia. 9

3. Pilot Hijackers Receive Overseas Money Transfers And Take Flight Training. 11

4. Al Qaeda Sends Another Hijacker Pilot To The United States. 12

5. Al Qaeda Sends Moussaoui To The United States. . . . 13

6. Moussaoui Aborts Flight Training And Inquires About Jet Simulator Training. 15

7. Non-Pilot Hijackers Arrive In The United States. 16

8. Al Qaeda Sends Moussaoui Additional Funds And He Readies For The Operation.. 18

9. Al Qaeda Tries To Send An Additional Hijacker. 20

10. Moussaoui Travels To Minnesota For Simulator Training. 20

11. Moussaoui Is Arrested And Lies To Conceal The Operation. 23

12. The Hijackers Buy Airline Tickets And Make Final Preparations. 26

13. September 11, 2001. 26

C. Moussaoui's Testimony. 28

1. Moussaoui In Afghanistan And Malaysia. 29

2. Moussaoui In The United States. 33

III. PROCEDURAL HISTORY 35

A. Moussaoui Is Found Competent And Proceeds *Pro Se*. 36

B. Moussaoui's 2002 Attempt To Plead Guilty. 40

C. Revocation of Moussaoui's Right to Proceed *Pro Se* 46

D. The Guilty Plea.. 48

1. Moussaoui Indicates He Wants To Plead. 48

2. The Statement Of Facts. 49

3. The Pre-Plea *Ex Parte* Proceeding.. 51

4. The Public Rule 11 Proceeding 54

E. The Sentencing Proceedings. 58

SUMMARY OF ARGUMENT.. 60

ARGUMENT.. 64

I. MOUSSAOUI'S GUILTY PLEA WAS VALID AND NEED NOT BE DISTURBED 64

A. The District Court Did Not Plainly Err In Accepting Moussaoui's Knowing And Voluntary Guilty Plea.. 65

1. Standard Of Review.. 65

2. Applicable Law. 67

3. Discussion. 70

a. Conspiracy Law And The Indictment. 70

b. Moussaoui Received The Indictment And Discussed It With Counsel And The District Court.. 73

c. Moussaoui Carefully Reviewed And Signed The Statement Of Facts. 77

d. The District Court Complied With Rule 11 At The Guilty Plea Hearing, Again Informing Moussaoui Of The Charges In The Indictment.. 79

e. Moussaoui's Post-Plea Comments Do Not Affect The Validity Of His Guilty Plea.. 82

f. The District Court Properly Advised Moussaoui Of The Possible Penalties. 90

g. Any Alleged Defects In The Plea Do Not Constitute "Plain Error".. 91

B. The District Court Correctly Found No "Reasonable Cause" To Hold A Competency Hearing Before Taking Moussaoui's Plea. 92

1. Standard of Review. 93

2. Applicable Law. 93

3. Discussion. 95

II. MOUSSAOUI'S CONSTITUTIONAL CLAIMS ARE BARRED BY HIS GUILTY PLEA AND ARE WITHOUT MERIT. 102

A. The Constitutional Claims Are Barred By Moussaoui's Knowing And Voluntary Guilty Plea.. 103

B. In Any Event, Moussaoui's Fifth And Sixth Amendment Claims Fail On The Merits.. 111

1. CIPA.. 113

2. Relevant District Court Proceedings. 116

a. The Initial Appearance And Arraignment.. . . . 116

b. The District Court's Protective Order. 117

c. First Pretrial Conference. 118

d. The Motion For Moussaoui's Personal Access To Classified Material, If Allowed To Proceed *Pro Se*. 119

e. The *Faretta* Hearing. 120

f. The *Pro Se* Motions Regarding Mr. Freeman. . 122

g. The Absence Of Additional Willing Standby Counsel. 124

h. The Government's Discovery. 126

i. The *Pro Se* Motions For Personal Access To Classified Discovery. 128

j. The Aborted Guilty Plea. 129

k. Moussaoui's Motion For Access To Enemy Combatant Witnesses.. 130

l. The Defendant's Refusal To Attend CIPA Hearings. 131

m. No Further Challenge To The Protective Order. 132

n. Resolution Of The Appeal And Moussaoui's Guilty Plea. 133

3. Discussion. 134

a. Standard Of Review.. 134

b. There Was No CIPA-Related Error. 134

c. There Was No Constitutional Error.. 140

i. There Was No Deprivation Of The Right To Counsel.. 140

ii. There Was No Deprivation Of The Right To Be Present.. 145

iii. There Was No Due Process Violation.. . 149

(a) Moussaoui Did Not Have A Constitutional Right Personally To Obtain Material Exculpatory Information Before Pleading Guilty Because A Conviction Pursuant To A Guilty Plea Rests On The Defendant's Own Admissions, Not The Government's Evidence. 150

(b) Moussaoui Knew The Substance Of The Alleged Exculpatory Material, Despite Restrictions On His Access To It. 156

(c) Moussaoui Would Have Had CIPA Substitutes For Any Exculpatory Information Had He Gone To Trial. 160

(d) The Plea Was Not Rendered "Uncounselled" Because The Information At Issue Was Not Disclosed To Moussaoui.. 161

(e) The Government's Post-Guilty Plea Disclosures Regarding Interrogation Recordings Are Irrelevant To An Assessment Of

The Propriety Of Moussaoui's Guilty Plea.. 163

iv. There Was No Violation Of The Right To Self-Representation. 169

v. There Were No Choice Of Counsel Violations.. 173

III. MOUSSAOUI'S SENTENCING CLAIM IS BASELESS. 180

A. The Sentencing Proceedings. 181

1. The Jury Proceedings Under The FDPA. 181

2. The District Court's Sentencing Hearing. 186

B. Standard Of Review. 188

C. Discussion. 188

1. Moussaoui's Life Sentence Was Not Dictated By Either The Jury's Finding That He Was Death Eligible Or 18 U.S.C. § 3594.. 188

2. The Invited Error Doctrine Bars Any Claim That The Jury's Decision Not To Impose The Death Penalty Incorrectly Bound The District Court To Impose Life In Prison On Counts One, Three And Four. 192

3. Moussaoui Has Waived Any Challenge To His Sentence On Counts One, Three And Four By Agreeing At The Sentencing Hearing That Life Imprisonment Was A "Proper Sentence".. 195

4. Moussaoui Cannot Argue That His Waivers Resulted From An Improper Capital Sentencing Proceeding. 196

5. Moussaoui Identifies No Other Reason To Excuse The Waiver Of His Sentencing Claim. 198

CONCLUSION. 199

TABLE OF AUTHORITIES

Cases **Page**

Beck v. *Angelone*, 261 F.3d 377 (4th Cir. 2001) 93

Blackledge v. *Allison*, 431 U.S. 63 (1977). 84

Bousley v. *United States*, 523 U.S. 614 (1998).. 74

Boykin v. *Alabama*, 395 U.S. 238 (1969). 67, 105

Bradshaw v. *Stumpf*, 545 U.S. 175 (2005). 74

Brady v. *Maryland*, 373 U.S. 83 (1963). . . . . *passim*

Brady v. *United States*, 397 U.S. 742 (1970). 67-68, 105, 109-110, 153

Brown v. *State of Md*, 618 F.2d 1057 (4th Cir. 1980). 105, 109

Bryson v. *Ward*, 187 F.3d 1193 (10th Cir. 1999). 95, 99

Burket v. *Angelone*, 208 F.3d 172 (4th Cir. 2000). 79

Cent. Intelligence Agency v. *Sims*, 471 U.S. 159 (1985). 136, 142

Childress v. *Johnson*, 103 F.3d 1221 (5th Cir. 1997).. 163

Dep't of Navy v. *Egan*, 484 U.S. 518 (1988). 136

Dusky v. *United States*, 362 U.S. 402 (1960). 40, 94

Faretta v. *California*, 422 U.S. 806 (1975). . . . . *passim*

Ferrara v. *United States*, 456 F.3d 278 (1st Cir. 2006). 166

Fields v. *Att'y Gen. of Md.*, 956 F.2d 1290 (4th Cir. 1992). 105, 110

Fields v. *Murray*, 49 F.3d 1024 (4th Cir. 1995). 172

Frederick v. *Warden, Lewisburg Corr.*,
308 F.3d 192 (2d Cir. 2002). 82

Geders v. *United States*, 425 U.S. 80 (1976). 142

Gilbert v. Moore, 134 F.3d 642 (4th Cir. 1998). 144

Godinez v. *Moran*, 509 U.S. 389 (1993).. 94

Haig v. *Agee*, 453 U.S. 280 (1981). 136

Hanson v. *Passer*, 13 F.3d 275 (8th Cir. 1994). 147

Hall v. *McKenzie*, 575 F.2d 481 (4th Cir. 1978). 105

Hall v. *United States*, 410 F.2d 653 (4th Cir. 1969).. 100

Hunter v. *Bowersox*, 172 F.3d 1016 (8th Cir. 1999). 98

Incumaa v. *Ozmint*, 507 F.3d 281 (4th Cir. 2007).. 197

Indiana v. *Edwards*, 128 S.Ct. 2379 (2008). 94, 97, 169

Jones v. *Cooper*, 311 F.3d 306 (4th Cir. 2002). 153-54

Journigan v. *Duffy*, 552 F.2d 283 (9th Cir. 1977). 104

Kentuck v. *Stincer*, 482 U.S. 730 (1987).. . . . . 145, 146

Koenig v. *Willingham*, 324 F.2d 62 (6th Cir. 1963). 99

Kyles v. *Whitley*, 514 U.S. 419 (1995). 151

Larson v. *Tansy*, 911 F.2d 392 (10th Cir. 1990).. 147

Lefkowitz v. *Newsome*, 420 U.S. 283 (1975). 104, 110

Lenz v. *Washington*, 444 F.3d 295 (4th Cir. 2006).. 162

Martinez v. *Ct. of App. of Cal.*, 528 U.S. 152 (2000).. 170

McCann v. *Mangialardi*, 337 F.3d 782 (7th Cir.2003). 154, 157

McCarthy v. *United States*, 394 U.S. 459 (1969).. . . . . 69, 111

McKaskle v. *Wiggins*, 465 U.S. 168 (1984). 170-73

McMann v. *Richardson*, 397 U.S. 759 (1970). 104, 109

Menna v. *New York*, 423 U.S. 61 (1975). 152

Miller v. *Angliker*, 848 F.2d 1312 (2d Cir. 1988).. 156

Morgan v. *Bennett*, 204 F.3d 360 (2d Cir. 2000). 141

Morris v. *Slappy*, 461 U.S. 1 (1983).. . . . . 141, 177

Moussaoui v. *United States*, 544 U.S. 931 (2005). 47, 131

Mudd v. *United States*, 798 F.2d 1509 (D.C. Cir. 1986). 143

Neder v. *United States*, 527 U.S. 1 (1999). 110

North Carolina v. *Alford*, 400 U.S. 25 (1970). 67

Orman v. *Cain*, 228 F.3d 616 (5th Cir. 2000). 151

Oses v. *Massachusetts*, 961 F.2d 985 (1st Cir. 1992).. 172

Parker v. *North Carolina*, 397 U.S. 790 (1970).. . . . . 105, 110

Parker v. *Ross*, 470 F.2d 1092 (4th Cir. 1972).. . . . . 105, 110

Perry v. *Leeke*, 488 U.S. 272 (1989).. 140-41

Powell v. *McCormack*, 395 U.S. 486 (1969). 197

Preiser v. *Rodriguez*, 411 U.S. 475 (1973).. 178

Ricketts v. *Adamson*, 483 U.S. 1 (1987). 104

Ring v. *Arizona*, 536 U.S. 584 (2002).. 42

Roper v. *Simmons*, 543 U.S. 551 (2005).. 197

Salinas v. *United States*, 522 U.S. 52 (1997). 71

Sampley v. *Att'y Gen. of N.C.*, 786 F.2d 610 (4th Cir. 1986).. 177

Sanchez v. *United States*, 50 F.3d 1448 (9th Cir. 1995).. 156

Snepp v. *United States*, 444 U.S. 507 (1980). 136

Snyder v. *Massachusetts*, 291 U.S. 97 (1934). 146

Strickland v. *Washington*, 466 U.S. 668 (1984). 67

Strickler v. *Green*, 527 U.S. 263 (1999). 151

Tate v. *Wood*, 963 F.2d 20 (2d Cir. 1992). 154

Tollett v. *Henderson*, 411 U.S. 258 (1973).. . . . . 62, 103, 104, 108, 110

Turner v. *Safley*, 482 U.S. 78 (1987). 178

United States v. *Abu Ali*, 528 F.3d 210 (4th Cir. 2008). . . . . *passim*

United States v. *Al-Talib*, 55 F.3d 923 (4th Cir. 1995).. 89

United States v. *Anderson*, 509 F.2d 724 (9th Cir. 1974). 148

United States v. *Anderson*, 872 F.2d 1508 (11th Cir. 1989). 137

United States v. *Aref*, 533 F.3d 72 (2d Cir. 2008). 114

United States v. *Avellino*, 136 F.3d 249 (2d Cir. 1998) 167

United States v. *Bagley*, 473 U.S. 667 (1985). 150, 154, 157

United States v. *Banks*, 10 F.3d 1044 (4th Cir. 1993). 71, 86

United States v. *Banks*, 482 F.3d 733 (4th Cir. 2007). 93, 100

United States v. *Barfield*, 969 F.2d 1554 (4th Cir. 1992).. 96

United States v. *Bell*, 464 F.2d 667 (2d Cir. 1972).. . . . . 141, 148-149

United States v. *Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999). . . . 136, 144, 179

United States v. *Bin Laden*, 92 F. Supp. 2d 225 (S.D.N.Y. 2000). 31

United States v. *Bin Laden*, 2001 WL 66393 (S.D.N.Y. 2001). 139, 144

United States v. *Bluso*, 519 F.2d 473 (4th Cir. 1975).. . . . . 104, 111

United States v. *Boone*, 759 F.2d 345 (4th Cir. 1985). 149

United States v. *Bowman*, 348 F.3d 408 (4th Cir. 2003). 69, 70, 88

United States v. *Bundy*, 392 F.3d 641 (4th Cir. 2004). 62, 103, 104

United States v. *Burgos*, 94 F.3d 849 (4th Cir. 1996). 71

United States v. *Bush*, 404 F.3d 263 (4th Cir. 2005). 170

United States v. *Broce*, 488 U.S. 563 (1989). 67, 103, 104, 151

United States v. *Calderon*, 243 F.3d 587 (2d Cir. 2001). 89

United States v. *Cardoen*, 898 F. Supp. 1563 (S.D. Fla. 1995). 147-48

United States v. *Cobb*, 905 F.2d 784 (4th Cir. 1990). 143

United States v. *Collins*, 372 F.3d 629 (4th Cir. 2004). 89

United States v. *Corporan-Cuevas*, 35 F.3d 953 (4th Cir. 1994). 179

United States v. *Cronic*, 466 U.S. 648 (1984). 162

Untied States v. *Cristobal*, 293 F.3d 134 (4th Cir. 2002). 98

United States v. *Crutcher*, 405 F.2d 239 (2d Cir. 1968). 147

United States v. *Damon*, 191 F.3d 561 (4th Cir. 1999). 69

United States v. *DeFusco*, 949 F.2d 114 (4th Cir. 1991). 67, 81-82

United States v. *Denkins*, 367 F.3d 537 (6th Cir. 2004). 101

United States v. *Dominguez Benitez*, 542 U.S. 74 (2004). 66-67, 91

United States v. *Dumeisi*, 424 F.3d 566 (7th Cir. 2005). 137

United States v. *Durrive*, 902 F.2d 1221 (7th Cir. 1990). 141

United States v. *El-Hage*, 213 F.3d 74 (2d Cir. 2000) 178

United States v. *Ellison*, 835 F.2d 687 (7th Cir. 1987). 99

United States v. *Ensign*, 491 F.3d 1109 (9th Cir. 2007). 177

United States v. *Faris*, 388 F.3d 452 (4th Cir. 2004). 162

United States v. *Flanders*, 491 F.3d 1197 (10th Cir. 2007). 177

United States v. *Frazier-El*, 204 F.3d 553 (4th Cir. 2000). 170

United States v. *General*, 278 F.3d 389 (4th Cir. 2002).. . . . . 93-94, 99, 134

United States v. *Glen*, 418 F.3d 181 (2d Cir. 2005). 77

United States v. *Goins*, 51 F.3d 400 (4th Cir. 1995). 65

United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006). 174-75

United States v. *Hamilton*, 391 F.3d 1066 (9th Cir. 2004).. 147

United States v. *Hashmi*, 2008 WL 216936 (S.D.N.Y. Jan. 16, 2008). 179

United States v. *Hawthorne*, 502 F.2d 1183 (3d Cir. 1974).. 68

United States v. *Hedgepeth*, 418 F.3d 411 (4th Cir. 2005). 71

United States v. *Hernandez*, 203 F.3d 614 (9th Cir. 2000). 108-110

United States v. *Herrera*, 23 F.3d 74 (4th Cir. 1994).. . . . . 181, 188, 194, 198

United States v. *Herrero*, 893 F.2d 1512 (7th Cir. 1990).. 141

United States v. *Hodge*, 19 F.3d 51 (D.C. Cir. 1994).. 146

United States v. *Holy Land Found. for Relief and Dev.*,
2007 WL 628059 (N.D. Tex. Feb. 27, 2007). 143

United States v. *Hughey*, 147 F.3d 423 (5th Cir. 1998). 177

United States v. *Hung*, 667 F.2d 1105 (4th Cir. 1981).. 141

United States v. *Hopkins*, 310 F.3d 145 (4th Cir. 2002). 194

United States v. *Hyde*, 520 U.S. 670 (1997).. . . . . 68, 88, 152

United States v. *Jackson*, 346 F.3d 22 (2d Cir. 2003). 194

United States v. *Johnson*, 139 F.3d 1359 (11th Cir. 1998). 148

United States v. *Johnson*, 520 U.S. 461 (1997). 66

United States v. *Kilmavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998). 137, 147

United States v. *Krankel*, 164 F.3d 1046 (7th Cir. 1998). 194

United States v. *Lambey*, 974 F.2d 1389 (4th Cir. 1992). 79, 84, 91

United States v. *Lalonde*, 509 F.3d 750 (6th Cir. 2007). 74

United States v. *Lawrence*, 161 F.3d 250 (4th Cir. 1998). 172

United States v. *Lemaster*, 403 F.3d 216 (4th Cir. 2005). 84

United States v. *Love*, 449 F.3d 1154 (11th Cir. 2006). 195

United States v. *Mancera-Perez*, 505 F.3d 1054 (10th Cir. 2007). 195

United States v. *Martinez*, 277 F.3d 517 (4th Cir. 2002). 89

United States v. *McDermott*, 64 F.3d 1448 (10th Cir. 1995). 172

United States v. *Mejia*, 448 F.3d 436 (D.C. Cir. 2006). 113-14

United States v. *Mitchell*, 104 F.3d 649 (4th Cir. 1997). 78

United States v. *Mohammed*, No. 01-1535 (2d Cir. Dec. 10, 2007). 139

United States v. *Montgomery*, 529 F.2d 1404 (10th Cir. 1976). 110

United States v. *Montilla*, 870 F.2d 549 (9th Cir. 1989). 110

United States v. *Montilla*, 907 F.2d 115 (9th Cir. 1990). 110

United States v. *Morsley*, 64 F.3d 907 (4th Cir. 1995). 71

United States v. *Moussaoui*, 65 Fed. Appx. 881, 2003 WL 21076836 (4th Cir. 2003). 179

United States v. *Moussaoui*, 365 F.3d 292 (4th Cir. 2004). 158

United States v. *Moussaoui*, 382 F.3d 453 (4th Cir. 2004). . . . . *passim*

United States v. *Mullen*, 32 F.3d 891 (4th Cir. 1994).. 108

United States v. *Nichols*, 841 F.2d 1485 (10th Cir. 1988). 179

United States v. *Nunez*, 432 F.3d 573 (4th Cir. 2005). 86

United States v. *O'Hara*, 301 F.3d 563 (7th Cir.2002). 114

United States v. *Olano*, 507 U.S. 725 (1993). 66

United States v. *Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006).. 143

United States v. *Perez*, 473 F.3d 1147 (11th Cir. 2006).. 159

United States v. *Quinones*, 511 F.3d 289 (2d Cir. 2007). 182, 193-94, 198

United States v. *Reckmeyer*, 786 F.2d 1216 (4th Cir. 1986). 67, 82

United States v. *Reid*, 369 F.3d 619 (1st Cir. 2004).. 31

United States v. *Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002).. 143

United States v. *Rezaq*, 156 F.R.D. 514 (D.D.C. 1994). 136

United States v. *Richards*, 2008 WL 2661304 (4th Cir. July 8, 2008) 153-54

United States v. *Robinson*, 404 F.3d 850 (4th Cir. 2005).. 93

United States v. *Ruiz*, 536 U.S. 622 (2002). 152-56, 160

United States v. *Sampson*, 486 F.3d 13 (1st Cir. 2007). 198

United States v. *Sandoval-Mendoza*, 472 F.3d 645 (9th Cir. 2006).. 142

United States v. *Santos*, 201 F.3d 953 (7th Cir. 2000). 143

United States v. *Seybold*, 979 F.2d 582 (7th Cir. 1992). 110, 172

United States v. *Singh*, 922 F.2d 1169 (5th Cir. 1991).. 148

United States v. *Singleton*, 107 F.3d 1091 (4th Cir. 1997).. 170-172

United States v. *Smith*, 440 F.2d 521 (7th Cir.1971). 106

United States v. *Smith*, 452 F.3d 323 (4th Cir. 2006).. 89

United States v. *Smith*, 780 F.2d 1102 (4th Cir. 1985).. . . . . 135, 155

United States v. *Sparks*, 67 F.3d 1145 (4th Cir. 1995).. . . . . 61, 69, 105

United States v. *Standiford*, 148 F. 3d 864 (7th Cir. 1998). 69, 106

United States v. *Taylor*, 984 F.2d 618 (4th Cir. 1993). 106

United States v. *Timmreck*, 441 U.S. 780 (1979). 106

United States v. *Tipton*, 90 F.3d 861 (4th Cir. 1996). 147, 149

United States v. *Velez Carrero*, 140 F.3d 327 (1st Cir. 1998). 195

United States v. *Vonn*, 535 U.S. 55 (2002). 66, 76

United States v. *Weathington*, 507 F.3d 1068 (7th Cir. 2007). 85

United States v. *West*, 877 F.2d 281 (4th Cir. 1989). 96

United States v. *White*, 366 F.3d 291 (4th Cir. 2004).. . . . . 84, 104

United States v. *Wiggins*, 905 F.2d 51 (4th Cir. 1990).. 107

United States v. *Wilson*, 750 F.2d 7 (2d Cir. 1984). 137

United States v. *Wood*, 378 F.3d 342 (4th Cir. 2004).. . . . . 69, 105

United States v. *Yearwood*, 518 F.3d 220 (4th Cir. 2008). 86

United States v. *Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).. 137

Vasquez v. *Hillery*, 474 U.S. 254 (1986). 110

Walton v. *Angelone*, 321 F.3d 442 (4th Cir. 2003).. . . . . 68, 94

Weatherford v. *Bursey*, 429 U.S. 545 (1977). 150

Wheat v. *United States*, 486 U.S. 153 (1988). 175, 177

Federal Statues and Rules

18 U.S.C. § 32. 3

18 U.S.C. § 34. 3

18 U.S.C. § 844. 3

18 U.S.C. § 1114. 3

18 U.S.C. § 1117. 3

18 U.S.C. § 2332 . . . . . 2-3, 191

18 U.S.C. § 3591. . . . . 3, 58, 180-82

18 U.S.C. § 3593. . . . . 58, 185, 190

18 U.S.C. § 3594. . . . . *passim*

18 U.S.C. § 4241. 94

18 U.S.C. App III (1980).. . . . . *passim*

49 U.S.C. § 46502. . . . . 2, 181

Federal Rule Appellate Procedure 28. 1

Federal Rule of Criminal Procedure 5.. 116

Federal Rule of Criminal Procedure 11.. . . . . *passim*

Federal Rule of Criminal Procedure 15.. 130

Federal Rule of Criminal Procedure 16.. 117

Federal Rule of Criminal Procedure 43.. 147

Miscellaneous

Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9-11 Commission Report (2004). 159

Black's Law Dictionary, 6th Edition (1990).. 86

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S. Rep. No. 96-823 (1980). 115, 138-39

H.R. Rep. No. 96-831 (1980). 139

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-4494

UNITED STATES OF AMERICA,
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v.

ZACARIAS MOUSSAOUI,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

Appellee notes that it is not "dissatisfied" with appellant's jurisdictional statement, except to the extent he suggests this Court has jurisdiction to consider certain moot sentencing issues or constitutional claims he affirmatively waived with his unconditional guilty plea. *See* Fed. R. App. P. 28(b)(1).

STATEMENT OF THE ISSUES

I. Whether Moussaoui's Knowing And Voluntary Guilty Plea To All Six Conspiracy Counts Was Valid Where The District Court Conducted The Plea Colloquy In Accordance With Federal Rule Of Criminal Procedure 11, And

Where The District Court Correctly Found No "Reasonable Cause" To Hold A Competency Hearing Before Taking The Plea.

II. Whether Moussaoui's Constitutional Claims Are Barred By His Valid Guilty Plea And Otherwise Without Merit.

III. Whether Moussaoui Waived His Sentencing Claim And Invited Any Error Regarding The Life Sentences The District Court Imposed On The Capital Counts.

STATEMENT OF THE CASE

Zacarias Moussaoui appeals from the judgment of conviction entered on May 4, 2006, in the United States District Court for the Eastern District of Virginia, following his guilty plea, and a bifurcated capital sentencing hearing before the Honorable Leonie M. Brinkema, United States District Judge, and a jury.

On July 16, 2002, the second superseding indictment was returned, in six counts, charging Moussaoui with participating in six conspiracies that resulted in the terrorist attacks of September 11, 2001. JAU803-32.[1] Count One charged conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. § 2332b(a)(2) & (c); Count Two charged conspiracy to commit aircraft piracy, in violation of 49 U.S.C. § 46502(a)(1)(A) & (a)(2)(B); Count Three charged

[1] "JAU" refers to the unclassified joint appendix; "JAC" refers to the classified joint appendix; "SJAU" refers to the supplemental unclassified joint appendix; "2SJAU" refers to the second supplemental unclassified joint appendix.

conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) & 34; Count Four charged conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332a(a); Count Five charged conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 & 1117; and Count Six charged conspiracy to destroy United States property, in violation of 18 U.S.C. § 844(f), (i) & (n). JAU803-32.

On April 22, 2005, Moussaoui pleaded guilty to all counts in the superseding indictment. JAU1416-46. As part of his plea, Moussaoui executed and adopted a "Statement of Facts," setting forth the offense conduct to which he was pleading guilty. *Id.* 1409-13, 1430-32.

The district court then conducted a bifurcated sentencing proceeding, pursuant to the Federal Death Penalty Act, 18 U.S.C. § 3591 *et seq.* On April 3, 2006, the anonymous jury unanimously agreed that Moussaoui was eligible for a death sentence. JAU4397-98, 4405-08. On May 3, 2006, the same jury failed to unanimously agree that Moussaoui should be sentenced to death. *Id.* 5582-83.

On May 4, 2006, the district court sentenced Moussaoui to two consecutive terms of life imprisonment. JAU5614-19. On May 8, 2006, Moussaoui filed a motion to withdraw his guilty plea, which the district court denied the same day. *Id.* 5620-21, 5626-27.

Moussaoui is currently serving his sentence.

STATEMENT OF THE FACTS

I. INTRODUCTION

Zacarias Moussaoui pleaded guilty to participating in the al Qaeda conspiracies that resulted in the terrorist attacks of September 11, 2001. The perpetrators of the attacks murdered nearly 3,000 innocent civilians — the largest loss of life resulting from a criminal act in the history of this country.

In pleading guilty, Moussaoui admitted that he swore loyalty to Usama Bin Laden and al Qaeda; was personally selected by Bin Laden to participate in a terrorist operation where commercial airliners would be hijacked and flown into prominent buildings in the United States; and came to America to carry out his part in the operation, which was to attack the White House. Moussaoui also admitted to concealing the plot from law enforcement agents, who arrested him weeks before the attacks, to ensure that his al Qaeda confederates could move forward undetected.

At a capital sentencing proceeding, the government presented evidence confirming Moussaoui's participation in the broad conspiracies charged in the indictment, and connecting him specifically to the September 11 attacks. Moussaoui twice took the witness stand at the sentencing proceeding and admitted that he came to the United States as part of al Qaeda's plot to fly hijacked commercial aircraft into prominent buildings, and that his assignment was to hijack a plane and fly it into the

White House.

Although the jury declined to impose the death penalty, and the district court imposed consecutive life sentences which he admitted at sentencing were appropriate, and in the face of his many admissions that he was in fact guilty, Moussaoui nonetheless asks this Court to overturn his guilty plea and sentence. He claims the district court committed multiple reversible errors at his guilty plea. Further, although he pleaded guilty unconditionally, he raises a number of constitutional challenges to a host of different rulings that preceded his plea, often by years. He also asks to be resentenced to a term of years on three counts. Following a description of Moussaoui's offense conduct and the procedural history of this case, we show that each of his claims are without basis in fact or law.

II. THE OFFENSE CONDUCT

A. Usama Bin Laden And Al Qaeda[2]

Moussaoui was a member of al Qaeda, the global terrorist network dedicated to opposing the United States with force and violence. JAU1409-10, 1679. Al Qaeda's leader was its founder, Usama Bin Laden, whom Moussaoui knew

[2] The subsections II.A. and II.B. are based on Moussaoui's guilty plea allocution and the government's evidence at the sentencing proceeding. Moussaoui's testimony about his offense conduct is recounted separately in subsection II.C.

personally. *Id.* 1409-10, 1664-65. Members of al Qaeda were generally required to swear *bayat* (allegiance) to Bin Laden and al Qaeda's agenda, which Moussaoui did. *Id.* 1409-10, 1671.

In 1996, Bin Laden publicly declared *jihad* against the United States, directing his followers to attack U.S. troops, particularly those in the Persian Gulf. JAU1679. Bin Laden soon targeted U.S. civilians as well, issuing a so-called "*fatwah*" in February 1998 that claimed it was "God's order" and an "individual duty for every Muslim" to "kill the Americans . . . wherever and whenever they [are found]." *Id.* 1409, 1679-83. This "ruling to kill," which was endorsed by three other terrorist groups, applied to American "civilians and military" alike. *Id.* 1681.

Al Qaeda operated multiple military-style training camps in Afghanistan, which it used to instruct its members and associates, and those from affiliated terrorist groups, in everything from basic physical fitness to the use of firearms, explosives, chemical weapons, and other weapons of mass destruction. JAU1409, 1694-96. In the camps, part of the curriculum for potential terrorists was "operational trade craft" — a set of methods designed to preserve terrorist operations from detection and disruption by the authorities. *Id.* 1710, 1716. For example, al Qaeda taught operatives to look and act "Western," to disguise their communications through code, and to prepare a "cover story" to give officials in the event of arrest. *Id.* 1711-13,

1718-19. Instructors explained that operations could be "compartmentalized" — meaning that participants might not know each other's identity or whereabouts — to minimize the repercussions of a security breach. *Id.* 1710, 1718.

Moussaoui trained at one of these camps. JAU1410. He also managed an al Qaeda guesthouse in Kandahar, a position of high respect in al Qaeda. *Id.* 1410. He communicated directly with Bin Laden and Mohammed Atef, a/k/a "Abu Hafs el Masry," the head of al Qaeda's military committee. *Id.* 1410, 1670-73.

B. The Planes Operation

1. Prospective Pilots Are Selected And Travel To The United States

As part of its *jihad*, al Qaeda conceived of an operation using suicide hijackers to fly commercial jets into prominent buildings in the United States. JAU1410. Bin Laden appointed Khalid Sheikh Mohammed as the operation's tactical mastermind. *Id.* 1678. Bin Laden also personally approved those selected to participate in the operation, the first six of whom were prospective pilots. *Id.* 1410; 2SJAU138, 141-44. Four of those six — Mohammed Atta (P-11), Marwan al-Shehhi (P-175), Ziad Jarrah (P-93), and Ramzi Bin al-Shibh — were friends in Hamburg, Germany, who traveled to Afghanistan in late 1999 and early 2000. JAU1808-10; 2SJAU138 .[3] The

[3] Parenthetical references follow names of hijackers, indicating the number of the flight they hijacked on September 11, with "11" indicating American Airlines Flight 11; "175" indicating United Airlines Flight 175; "77" indicating

other two — Nawaf al-Hazmi (77) and Khalid al-Mihdhar (77) — did not become pilots, although they were eventual hijackers. JAU1814, 1819, 1832.

In March 2000, Atta (P-11) and Jarrah (P-93) began e-mailing multiple U.S. flight schools requesting information from Germany. JAU1815-16; 2SJAU140. By May 2000, five of the six prospective pilots had secured visas to enter the United States. JAU1811-12; 2SJAU138-40. Two, Al-Hazmi (77) and al-Mihdhar (77), had actually already arrived in Los Angeles via Kuala Lumpur, Malaysia, and Bangkok, Thailand. 2SJAU141.[4] Bin al-Shibh, a Yemeni, was ultimately unsuccessful in multiple attempts to obtain a U.S. visa. JAU1812-13.

In early June 2000, Atta (P-11) and Al-Shehhi (P-175) arrived in New York City, Atta having flown from Prague, and al-Shehhi from Brussels. JAU1819-1820; 2SJAU142-43. Later that month, Jarrah (P-93) traveled from Munich to Florida, where he began flight training. JAU1822, 1829-30, 1835; 2SJAU144. After a month in New York, Atta and al-Shehhi traveled to Norman, Oklahoma, where they visited Airman Flight School, which Moussaoui would eventually attend. 2SJAU145;

American Airlines Flight 77; and "93" indicating United Airlines Flight 93. "P" denotes a pilot hijacker.

[4] Al-Mihdhar (77) left the United States on June 10, 2000, but rejoined al-Hazmi and other hijackers in New Jersey in July 2001. JAU1819, 1845; 2SJAU142, 171.

JAU1801, 1820-21, 2197.[5] They left Norman after several days and traveled to Florida, where they took flight training at a school on the same airfield as Jarrah. JAU1802, 1821-22, 1829-30; 2SJAU146.

2. Moussaoui Is Selected And Seeks Flight Training In Malaysia

Bin Laden also selected Moussaoui to be a pilot. JAU1410, 2019-21.[6] Moussaoui had told Bin Laden in Afghanistan that he had a dream of flying an airplane into the White House. *Id.* 2019-21. Bin Laden responded by authorizing Moussaoui to participate in the operation and approving him attacking the White House, telling Moussaoui to "remember [his] dream." *Id.* 1410, 2019-21.

Thereafter, in mid-2000, Moussaoui traveled from Afghanistan to Malaysia to obtain flight training, among other things. JAU2013, 2021. In Kuala Lumpur, Moussaoui was hosted by members of *Jemaah Islamiyah* ("JI"), an al Qaeda-affiliated terrorist group. *Id.* 1694, 1979-92. Moussaoui's hosts included Riuduan Isamuddin, a/k/a "Hambali," who was JI's military commander and liaison to al Qaeda, and Faiz Bafana, another JI member. *Id.* 1980-81, 1987-89, 1996-2011. Hambali and Bafana

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[5] Upon arriving in the United States, Atta immediately bought a prepaid cellular telephone, listing his address as the Airman Flight School in Norman, Oklahoma. 2SJAU142-43; JAU1820.

[6] Moussaoui had previously studied as a graduate student in London, England, had traveled extensively, and was conversant in English, Arabic, and his native French. JAU521, 1417.

were part of a small JI operational cell that worked closely with al Qaeda leadership to plan terrorist attacks against U.S. interests in Singapore, Indonesia and the Philippines. *Id.* 1980-81, 1987-89, 1996-2011.

Moussaoui told Bafana that it was important to "bring down" America before attacking other countries. JAU2015, 2017. He also told Bafana that he had a dream about flying an airplane into the White House; that he had disclosed the dream to Bin Laden; and that Bin Laden had encouraged him to follow it. *Id.* 2019-21, 2126-27. Bafana took Moussaoui to a flying club in Kuala Lumpur the next day, but Moussaoui chose not to take flight training there. *Id.* 2024. Moussaoui later explained to Bafana that he had managed to get "brothers" in Europe to assist him financially with flight training in the United States, where the training was cheaper. *Id.* 2025-26, 2029, 2125, 2131.[7]

In late September 2000, a week before leaving Malaysia, Moussaoui e-mailed Airman Flight School in Norman, Oklahoma, for information about its training program. JAU1410-11, 2179-80, 3608; 2SJAU239.[8] Moussaoui also obtained a fake

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[7] While in Kuala Lumpur, Moussaoui also had his JI hosts purchase a load of ammonium nitrate to build a bomb for a terrorist attack. JAU2163-65.

[8] A few weeks before, Moussaoui drafted a message to another school in the same e-mail account, but apparently never sent it. JAU2179. The subject of the draft e-mail message was "to be a jet pilot in a short time," and stated the following: "I would like to join you at high speed, so could you send me some

business reference letter to serve as a basis for a cover story during Moussaoui's travel to the United States. JAU2026-27. The letter, which was provided by another JI member, "appoint[ed]" Moussaoui as a "marketing consultant in the United States" for a fictional telephone venture called "Infocus Tech." 2SJAU276; JAU1992-94. The letter also explained that Moussaoui had been given, in addition to his salary, a lump sum of $10,000. 2SJAU276.

Moussaoui left Malaysia on October 5, 2000, and flew to London. JAU2026, 2035, 2180; 2SJAU205.

3. Pilot Hijackers Receive Overseas Money Transfers And Take Flight Training

Between June and September 2000, prospective pilots in the United States received overseas money transfers from Germany and the United Arab Emirates totaling approximately $125,000. JAU1784-85, 1824-28. Four of the transfers were sent from Germany by Ramzi Bin al-Shibh, who, as noted above, was part of the group of prospective pilots from Hamburg who traveled to Afghanistan in 1999 and 2000. *Id.* 1809, 1824; 2SJAU138. The money transfers from the United Arab Emirates were sent from Dubai in five transactions by a second co-conspirator named

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detail information about how to become fully jet engine pilot, which step and how much it cost, I interested in training of a very short period of time as possible will come from overseas." *Id.*

Ali Abdul Aziz Ali, a/k/a "Ammar al-Baluchi." JAU1784-85, 1824-27.

Between approximately July and December 2000, Mohammed Atta (P-11), Marwan al-Shehhi (P-175), and Ziad Jarrah (P-93) trained on small planes at flight schools in Venice, Florida. JAU1802, 1822, 1829-30; 2SJAU145-46. Upon completion of their flight training, Atta, al-Shehhi and Jarrah began training on Boeing 727, 737, and 767 jet simulators in the Miami area. JAU1833-34, 3560, 3603; 2SJAU148-49.

Jarrah told administrators at the flight school he attended — Florida Flight Training Center (FFTC) — about his friend, Ramzi Bin al-Shibh, who he expected to come train there. 2SJAU282-83. Bin al-Shibh applied to FFTC in August 2000, making a $2,200 deposit, but never enrolled because of his inability to get a U.S. entry visa. JAU1800, 1813, 1830-31; 2SJAU294.

4. Al Qaeda Sends Another Hijacker Pilot To The United States

By December 2000, it was clear that Ramzi Bin al-Shibh would not be one of the pilot hijackers, despite his efforts to enter the United States and train at FFTC with Ziad Jarrah (P-93). Bin al-Shibh's fourth and final application for a visa had been denied on November 2, 2000. JAU1805, 1813, 3597; 2SJAU300-01.[9]

[9] Bin al-Shibh's three prior applications were denied in May, June and September 2000. JAU1800, 1805, 1812-13, 3597.

Moreover, neither Nawaf al-Hazmi (77) nor Khalid al-Mihdhar (77) — the other two of the first six operatives selected by Bin Laden — was able to advance past cursory flight lessons while they were in San Diego. 2SJAU141-42; JAU1819, 1832.

On December 8, 2000, Hani Hanjour (P-77) flew from the United Arab Emirates to San Diego, where he joined al-Hazmi (77). JAU1822-23; 2SJAU145. Hanjour had been to Afghanistan in June 2000, had traveled to the United States on three prior occasions, and had prior experience as a pilot. JAU1810, 1832; 2SJAU140, 150. On one of his prior trips to the United States, Hanjour had trained at a flight school in Phoenix. JAU1832; 2SJAU150. Days after his December 2000 arrival in San Diego, Hanjour went to Phoenix with al-Hazmi, where Hanjour attended flight school and trained on Boeing 737 jet simulators until March 2001. JAU1822-23, 1832, 1834, 3603-04; 2SJAU150-51.[10]

5. Al Qaeda Sends Moussaoui To The United States

As Hanjour entered the United States, Moussaoui traveled to Pakistan from

[10] Hanjour was a notably poor student, JAU3366J, who did not have adequate skills or nearly enough flight time to train on a jet simulator. *Id.* 3366I-J. He also wanted to deviate from the standard training program, was uninterested in takeoff or landing procedures, and only wanted to use the simulator. *Id.* 3366L. After watching Hanjour struggle with training, the manager tried to convince him to quit. *Id.* 3366J, K. Hanjour stated that he wanted to finish the course, but in the event that he could not, he requested that he at least be allowed to train in the simulator. *Id.* 3366K.

London, where he had stayed since leaving Malaysia in early October 2000. 2SJAU205-06.[11] Moussaoui thereafter spent the next seven weeks in Afghanistan, returning to Karachi on February 2, 2001. *Id.* 206. Moussaoui then flew back to London, where he purchased the same type of "International Student ID Card" used in the United States by three of the pilot hijackers. *Id.*[12] On February 10, 2001, Moussaoui again e-mailed the Airman Flight School in Norman, Oklahoma, stating that he wanted to enroll in flight training. *Id.*

On February 23, 2001, Moussaoui flew from London to Oklahoma City, through Chicago, with $35,000 cash in his possession. JAU2310; 2SJAU207. He declared the cash at customs upon his arrival in Chicago, and was not questioned

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[11] Moussaoui departed London on December 9, 2000. 2SJAU205-06. Ramzi Bin al-Shibh, who would later wire $14,000 to Moussaoui in the United States, left London for Germany the same day. JAU1813, 2374-75; 2SJAU206, 231 . Bin al-Shibh had spent only a week in London, and Moussaoui obtained his visa for Pakistan on December 4, just two days after Bin al-Shibh's arrival. 2SJAU206, 232-33; JAU1813.

[12] Atta (P-11) and Al-Shehhi (P-175) used this type of card as identification when they enrolled at Huffman Aviation in Venice, Florida. 2SJAU316-17, 322-23. According to a veteran Huffman administrator, an "international" student identification card was uncommon, and, even though as many as 80 percent of Huffman's students were from other countries, she had never previously seen such a card. *Id.* 313, 317. Ziad Jarrah (P-93) also used the same card at FFTC. *Id.* 288, 308.

about the large sum by customs officials. 2SJAU207.[13] Three days after his arrival in the United States, Moussaoui was taking flight lessons at Airman Flight School. *Id.* 240. He told school officials that he wanted to finish as quickly as possible. *Id.* 241-43.

Moussaoui remained in Norman until early August 2001. During that time, in addition to flight training, Moussaoui maintained a gym membership and exercised regularly. 2SJAU209. He made purchases and conducted other business in his true name, including renting a post office box. *Id.* 223. Moussaoui used pay telephones and prepaid calling cards, even though there was a land-line telephone in his apartment. JAU3202-03. According to one of his roommates, Hussein al-Attas, a Yemeni citizen studying mechanical engineering at Oklahoma University, *id.* 3187-90, 3192, Moussaoui discussed *jihad* "every day," at one point proclaiming that *jihad* would be the only way he could get to paradise, *id.* 3203-05.

6. Moussaoui Aborts Flight Training And Inquires About Jet Simulator Training

Moussaoui trained regularly at Airman Flight School from February 26 through the end of May 2001. JAU2187-88. He completed a little more than 50 hours of

[13] In the event he was asked, however, Moussaoui had with him the "cover letter" appointing him "marketing consultant in the United States" for "Infocus Tech." 2SJAU276.

flight training, flying small planes, before abruptly quitting. *Id.* 2188-89.[14] Around the time Moussaoui stopped training at Airman, he began inquiring elsewhere about jet simulator training, which Airman did not offer. 2SJAU210-17; JAU2209B-2209F, 3643. He did this at al Qaeda's request, as an al Qaeda associate had directed him to attend training for larger jet planes. JAU1411. On May 23, 2001, for example, Moussaoui sent an e-mail to Pan Am Flight Academy, stating that he would "like to fly . . . one of the big airliners," but had not yet decided whether to train on a "Boeing 747, 757, 767, 777 and/or Airbus 300," as it would "depend on the cost and which one is easiest to learn." 2SJAU211; JAU2209F.

On June 28, 2001, Moussaoui received a fax from Pan Am Flight Academy in Eagan, Minnesota, offering him enrollment in a Boeing 747 simulator course at a cost of $8,300. JAU2209G-H. Moussaoui sent Pan Am a $1,500 deposit for the course. *Id.* 2209H; 2SJAU219.

7. Non-Pilot Hijackers Arrive In The United States

Between April 23 and July 4, 2001, the 14 remaining hijackers came to the United States, mainly in pairs, on flights from the United Arab Emirates. JAU1841-45. They were aided in traveling to the United States, and once they arrived there, by

[14] Although Moussaoui's main instructor rated him "just below average," JAU2189, the instructor was confident that Moussaoui would have obtained a license if he had not quit. *Id.* 2192-94.

an al Qaeda co-conspirator in Dubai named Mustafa Ahmed al-Hawsawi. *Id.* 1843-45.[15] In purchasing their tickets for flights to the United States, several of the hijackers used as a reference al-Hawsawi's cellular telephone number, which was 050-520-9905 (the "al-Hawsawi 9905 number"). *Id.* 1843-45. Once in the United States, hijackers regularly called the al-Hawsawi 9905 number from payphones, using prepaid calling cards. *Id.* 3536-3537; 2SJAU169-70.

The hijackers' activities in the United States were largely concerted. Most of them purchased short-term gym memberships for fitness training and some also took martial arts classes. JAU1865-67; 2SJAU157, 160, 183-85. Hijackers obtained state drivers' licenses or identification cards in their true names, and used their true names to transact business, such as opening bank accounts, leasing apartments, and renting cars. JAU1870-71. They used post office boxes to receive mail, *id.* 1865-66, 1874-75, and sent e-mails from publicly available computers at cyber cafés and places like Kinko's. *Id.* 1865, 1867. At least five hijackers purchased short-bladed knives. *Id.* 1865, 1869, 1874; 2SJAU183.

On July 4, 2001, the day the last of the hijackers arrived in the United States,

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[15] Al-Hawsawi also helped one hijacker open a bank account in Dubai, which the hijacker used to receive money following his arrival in the United States. JAU1846-47. The money was then used to purchase two tickets for United Airlines Flight 175. 2SJAU169; JAU1878.

Mohamed Atta (P-11) made several calls to the al-Hawsawi 9905 number from New Jersey, JAU1854-55, and then picked up a round-trip airline ticket to Spain. 2SJAU178. Over the next few days, Atta made dozens of calls to the al-Hawsawi 9905 number and to a German cellular telephone. JAU1855-57. Atta then flew to Madrid on July 7, 2001, *id.* 1853-54, 1863, and two days later met with Ramzi Bin al-Shibh for a week in Tarragona on Spain's east coast. *Id.* 1858-59; 2SJAU178-79.

8. Al Qaeda Sends Moussaoui Additional Funds And He Readies For The Operation

Moussaoui learned on July 25, 2001, that Pan Am Flight Academy had set his simulator training schedule to begin on August 13, 2001, and end on August 20, 2001. JAU2209L; 2SJAU220-21. Between July 29 and August 6, 2001, al Qaeda sent Moussaoui an additional $14,000 in wire transfers, and Moussaoui purchased short-bladed knives, inquired about buying global positioning system ("GPS") devices suitable for air navigation, and made plans to go to Minnesota for simulator training. This flurry of activity occurred after Moussaoui told an al Qaeda associate that he was approved for jet simulator training and would complete that training before September 2001. JAU1411.

The $14,000 transaction was carried out in several steps. Mustafa al-Hawsawi, the al Qaeda facilitator in Dubai who was helping the hijackers through the summer of 2001, first wire-transferred the money to Ramzi Bin al Shibh in Germany.

JAU3517-19, 3528, 3630-31, 3628.[16] Bin al-Shibh then wired the money to Moussaoui, who retrieved the funds in cash from Western Union offices in Oklahoma. *Id.* 3642, 2471, 3207-09, 3514-16, 3627-30, 3632, 1953-55; 2SJAU223. Throughout the transactions, Moussaoui was in repeated telephone contact with Bin al-Shibh, who he knew by the alias "Ahad Sabet." JAU3624-25, 3628-33.[17]

As for the short-bladed knives, Moussaoui bought two of them at a store in Oklahoma City during this seven-day period. 2SJAU223, 272-75. At the same time, Moussaoui e-mailed the Garmin Corporation, a manufacturer of GPS devices, asking

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[16] Al-Hawsawi used the alias "Hashem Abderahman," to wire the money, but listed his 9905 number on the wiring instructions. JAU3517-18, 3630-31, 3628, 3828.

[17] Bin al-Shibh used this alias to wire money to Moussaoui, but the evidence established that the sender was actually Bin al-Shibh. A notebook owned by Moussaoui included the name "Ahad Sabet" next to two telephone numbers that were associated with Bin al-Shibh. JAU1934, 2453-54, 3624, 5591. For example, the first number — 49-40-718-99042, a German land-line — was used by Moussaoui to fax wiring instructions. *Id.* 3627. Bin al-Shibh listed this number on his first U.S. visa application, and listed it as both a phone and facsimile number on his application to attend FFTC. *Id.* 1805, 1812, 3596. He also used the Hamburg address associated with this phone on an Emirates Airlines informational form, an application for an English-language training school, and his last application for a U.S. visa. *Id.* 1798, 1805, 1808-09, 3596-97. The second number listed for "Ahad Sabet" in Moussaoui's notebook — 49-175-953-1540 — was a German cellular phone, which Moussaoui called right before and after he faxed the wiring instructions. *Id.* 3627. Moreover, a U.S. citizen with the true name Ahad Sabet, a medical doctor living in the United States, lost his passport in Barcelona, Spain in 1998, and reported it stolen to the U.S. embassy there. *Id.* 3529-30. He was not involved with the wire transfers to Moussaoui. *Id.*

if he could "'convert' a street pilot 3 to a aviation GPSMAP 295" and requesting a quick response, 2SJAU222, and e-mailed Magellan, another manufacturer of GPS devices, asking whether he could "use this gps in a plane to find my position." *Id.*

9. Al Qaeda Tries To Send An Additional Hijacker

At the same time al Qaeda was sending Moussaoui additional funds, it tried unsuccessfully to send an additional hijacker to the United States. The would-be hijacker, Mohammed al-Kahtani, was stopped at the airport in Orlando, Florida, on August 4, 2001, upon arrival from Dubai. JAU1859-60. Immigration officials questioned al-Kahtani because he was traveling on a one-way ticket with only a small amount of money. *Id.* 1859-60. They found him to be hostile and deceptive, and denied him entry into the United States. *Id.*

Mohamed Atta (P-11) was waiting at the Orlando airport to pick up al-Kahtani. JAU1860-61. As al-Kahtani's arrival time came and went, Atta called the al-Hawsawi 9905 number (which al-Kahtani also listed on his travel itinerary) five times from airport payphones, using a prepaid calling card. *Id.* 1860-62; 2SJAU181.

10. Moussaoui Travels To Minnesota For Simulator Training

Moussaoui's simulator training at Pan Am was scheduled to begin on August 13, 2001, in Eagan, Minnesota. 2SJAU220-21. Moussaoui convinced his roommate, Hussein al-Attas, to drive with him to Minnesota, remain there with him through

simulator training, and then accompany Moussaoui to Colorado for additional unspecified flight training. JAU3227, 3268. Moussaoui told al-Attas that after Colorado they would go to New York City "to see the sites." *Id.* 3226.

Before the trip, Moussaoui told al-Attas that he (al-Attas) would have to shave his beard, wear "sporty" clothes, and refrain from speaking in Arabic. JAU3211-12. Al-Attas complied with this request because Moussaoui said it was for their "safety." *Id.*[18] Before departing, al-Attas also accompanied Moussaoui to purchase two additional knives that he told al-Attas were "small and easy to hide." *Id.* 3212-13, 3217. Moussaoui also inquired about GPS devices. *Id.* 3219.

Moussaoui and al-Attas left Norman on August 10, 2001, and arrived in Eagan the next day. JAU3221-22. In Eagan, in addition to Moussaoui's simulator training, Moussaoui and al-Attas practiced boxing and martial arts, using boxing gloves and shin guards. *Id.* 3228-29; 2SJAU224. Moussaoui also continued to shop for a GPS device. JAU3230. He used payphones to make calls, *id.* 3231, and went to Kinko's, on at least one occasion, where he bought computer time. JAU2458, 3223; 2SJAU223.

On August 13, 2001, Moussaoui went to Pan Am for the first day of his

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[18] At the time of his arrest, Moussaoui looked distinctly American, with a ball cap, cargo pants, shaved head and urban-styled goatee. *See* JAU2232-33, 2324; 2SJAU271.

training on a Boeing 747-400 simulator. 2SJAU224. He paid Pan Am $6,800 in cash to cover the tuition balance. *Id.* Moussaoui's instructor was Clarence Prevost, a former pilot for the Navy and Northwest Airlines. JAU2211. Moussaoui told Prevost that he was a businessman in London, working in "import/export." *Id.* 2243. Moussaoui also said that he was under a "time constraint" because his family was taking care of his business while he was away. *Id.* 2243-44. Moussaoui explained that he wanted to have the ability to fly a Boeing 747 from Heathrow airport across the Atlantic to Kennedy airport. *Id.* 2245-48. Prevost considered this attainable, despite Moussaoui's relative inexperience, given the ease with which one can pilot a commercial jet once familiarized with the computerized mode control panel. *Id.*

Prevost was skeptical of Moussaoui from the outset, however. First, Prevost had never encountered a simulator student with such limited flying experience. JAU2211, 2231. Second, in the course of an otherwise natural conversation, Moussaoui became oddly hostile when Prevost asked him if he was Muslim. *Id.* 2249-50. As a result, at the end of the first day, Prevost suggested that his Pan Am supervisor examine Moussaoui's background and consider calling off the training. *Id.* 2250-54. Prevost told his supervisor, "We don't know anything about this guy, and we're teaching [him] how to throw the switches on a 747, . . . maybe we shouldn't be doing this." *Id.* 2251.

When Prevost learned the next day that Moussaoui had paid Pan Am in cash, he told his supervisors to call the Federal Bureau of Investigation ("FBI"). JAU2253-54, 2269. Prevost abbreviated Moussaoui's instruction that day, giving him only a cursory tutorial on the mode control panel and asking him to come back in the evening to watch another student's final simulator test. *Id.* 2255-60, 2262-63. Moussaoui then informed al-Attas that although he originally expected to be finished with simulator training by August 17 or 18, he would need an additional week at Pan Am. *Id.* 3226-27. He told al-Attas that, as a result, they would not be going to Colorado, but straight to New York City, upon completion of his training. *Id.*

On August 15, 2001, Pan Am called the FBI, which made plans to interview Moussaoui and possibly have him arrested for immigration violations. JAU2264-65, 2297, 2301-02, 2310. Having entered the United States on a French passport, Moussaoui was entitled to remain in the country for 90 days under the visa waiver program, and had therefore been out of status since May 23, 2001. *Id.* 2308-10.

11. Moussaoui Is Arrested And Lies To Conceal The Operation

On August 16, 2001, law enforcement agents confronted Moussaoui outside his motel room in Eagan and arrested him for immigration violations. JAU2324-25, 2332-33. Searches revealed that Moussaoui possessed four short-bladed knives. *Id.* 2235-36, 2338-39, 2442-44. Throughout the encounter with the agents, and during

questioning following his arrest, Moussaoui repeatedly stated that it was urgent and time sensitive for him to continue his simulator training. *Id.* 2325, 2330, 2334, 2239-40, 2359, 2382, 2389.

After Moussaoui waived his *Miranda* rights and agreed to be interviewed, the agents conducted two interview sessions, one that night and one the following day. JAU2355. In these interviews, as Moussaoui would later admit while pleading guilty, he "lied to federal agents to allow his al Qaeda 'brothers' to go forward with the operation to fly planes into American buildings." *Id.* 1412.

In the first interview session, Moussaoui stated that he came to America to become a pilot, JAU2360, and that the simulator training was for his personal enjoyment, *id*. 2360-62. Agents asked about $32,000 Moussaoui deposited into his bank account in Norman shortly after he arrived there in February 2001. *Id.* 2365-67. Moussaoui stated that the money came from his own savings and "friends and associates" in the United Kingdom. *Id.* 2367-68. He claimed that he worked in marketing and for an import/export company in the United Kingdom, *id.* 2364-65, and that he had a business relationship with an Indonesian company that sold telephone cards, *id.* 2365.[19]

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[19] These statements tracked the "cover story" set forth in the fake reference letter that Moussaoui had obtained in Malaysia through the JI terrorist group. *See supra*, at 10-11.

Moussaoui stated that prior to coming to the United States he had been to Saudi Arabia, Morocco, Malaysia, and Indonesia. JAU2369-71. When agents noted that his French passport did not reflect those trips, Moussaoui claimed that he had recently obtained a new passport because his old one had been destroyed in a washing machine. *Id.* 2374, 2376. In explaining a Pakistan entry stamp that was in the new passport, Moussaoui stated that, from December 2000 to February 2001, he was in Karachi on business and to find a wife, and he claimed that he did not leave Karachi at any time during the trip. *Id.* 2370, 2372. On his future plans, Moussaoui stated that he intended to visit Denver, New York City, and the White House in Washington, D.C., as a tourist. *Id.* 1412, 2381-82.

The agents continued interviewing Moussaoui the next day, August 17, 2001. JAU2388. When pressed for the names of his "friends and associates" in the United Kingdom, Moussaoui became angry, shouted, and provided two names, both of which turned out to be fictitious. *Id.* 2390-93, 2430-31, 3116-17. Ultimately, one of the agents confronted Moussaoui, calling him an Islamic extremist, and asking him to identify his associates and his plan. *Id.* 2397. Moussaoui denied that he was a member of a terrorist group, or involved in terrorism in any way, and then asked to see an immigration lawyer. *Id.* 2397-98. The agents then stopped the interview. *Id.* 2398. Moussaoui remained in custody.

12. The Hijackers Buy Airline Tickets And Make Final Preparations

Nine days after Moussaoui's arrest, the hijackers began preparing for the attacks in earnest. On seven successive days, from August 25 to August 31, 2001, they reserved and bought the tickets they would use to board the September 11 flights. JAU1877. Ziad Jarrah (P-93) acquired a Garmin GPS device, after he tried, but failed, to buy four. 2SJAU188. At least two hijackers bought short-bladed knives. *Id.* 183, JAU1865, 1869, 1874. Some hijackers sent excess money — at least $26,000 — back to Mustafa al-Hawsawi in Dubai. JAU1882-85; 2SJAU193-95.

The hijackers also traveled to the places from which they would launch the attacks. By the beginning of September 2001, five hijackers were in place in Laurel, Maryland, near the Dulles airport, while the remaining 14 hijackers were in Florida. JAU1879-81. Between September 5 and September 9, 2001, 10 of those 14 traveled to Boston, near Logan airport, and the other four traveled to New Jersey, near the Newark airport. *Id.*

13. September 11, 2001

Five al Qaeda operatives — Mohamed Atta, Abdul Aziz Alomari, Satam al-Suqami, Waleed al-Shehri and Wail al-Sheri — violently hijacked American Airlines Flight 11, a Boeing 767, which departed from Boston's Logan airport on September 11, 2001, at 7:59 a.m., bound for Los Angeles. JAU1412, 1885-86. They crashed it

into the North Tower of the World Trade Center in New York City at approximately 8:46 a.m., killing all on board and causing the collapse of the tower. *Id.* 1886.

Five al Qaeda operatives — Marwan al-Shehhi, Fayez Banihammad, Ahmed al-Ghamdi, Hamza al-Ghamdi and Mohand al-Shehri — violently hijacked United Airlines Flight 175, a Boeing 767, which departed from Boston's Logan airport on September 11, 2001, at approximately 8:15 a.m., bound for Los Angeles. JAU1412, 1890-91. They crashed it into the South Tower of the World Trade Center at approximately 9:03 a.m., killing all on board and causing the collapse of the tower. *Id.* 1891.

The attacks on the World Trade Center resulted in the murder of approximately 2,830 people in or around the complex. JAU1412. Among those killed, were 343 firefighters from the New York Fire Department, 37 law enforcement officers from the Port Authority of New Jersey/New York, and 23 law enforcement officers from the New York City Police Department. *Id.* 1412-13.

Five al Qaeda operatives — Hani Hanjour, Khalid al-Mihdhar, Nawaf al-Hazmi, Salam al-Hazmi and Majed Moqed — violently hijacked American Airlines Flight 77, a Boeing 757, which departed from Virginia's Dulles airport on September 11, 2001, at 8:20 a.m., bound for Los Angeles. JAU1413, 1896-97. They crashed it into the Pentagon at approximately 9:37 a.m., severely damaging the building and

murdering 189 people, many of whom were United States government employees, including employees of the Department of Defense, engaged in their official duties. *Id.* 1413, 1897-1900.

Four al Qaeda operatives — Ziad Jarrah, Ahmed al-Haznawi, Saeed al-Ghamdi, and Ahmed al-Nami — violently hijacked United Airlines Flight 93, a Boeing 757, which departed from New Jersey's Newark airport on September 11, 2001, at 8:42 a.m. (42 minutes late), bound for San Francisco. JAU1413, 1901-02. After a confrontation in the cockpit, the plane crashed into a field in Somerset County, Pennsylvania, killing all 44 people on board. *Id.* 1906; 2SJAU128-31.

After the attacks, a handwritten two-page Arabic letter was recovered from luggage that Mohamed Atta (P-11) left behind at Boston's Logan airport. JAU1894. The letter was intended for the other hijackers and was disseminated to at least some of them before the hijackings. *Id.* 1793-95. The letter exhorted the hijackers to "embrace the will to die and renew allegiance," *id.* 1894, and encouraged them to "strike like heroes who are determined not to return to this world," *id.* 1895. "[W]hen the time of truth and the zero hour arrives," the letter instructed, "rip open your clothes and bare your chest to embrace death for the sake of Allah." *Id.*

C. Moussaoui's Testimony

Moussaoui testified twice during his sentencing proceeding, corroborating the

government's evidence against him and providing further details about his role in the "planes" operation. He admitted that he was in the United States to hijack a commercial aircraft and fly it into the White House as a part of al Qaeda's planes operation, described being selected by al Qaeda to become a suicide pilot in the operation, revealed his contacts with al Qaeda while in the United States, and disclosed his knowledge of the terrorist operation beyond his own part.

1. Moussaoui In Afghanistan And Malaysia

Moussaoui moved to Afghanistan in 1997, where he became a sworn member of al Qaeda. JAU3961. After training in al Qaeda's camps, Moussaoui's job was to run one of the group's guesthouses and serve as a driver for guesthouse occupants visiting al Qaeda's headquarters — a compound near Kandahar airport, where Usama Bin Laden resided along with other leaders like Mohammed Atef, a/k/a "Abu Hafs el Masry" and Khalid Sheikh Mohammed. *Id.* 3886, 3903-05. Moussaoui had "intermediate" stature in al Qaeda, but he was recognized by Bin Laden and Abu Hafs, who would meet with him and listen to his opinions. *Id.* 3883, 3911. They did this, in Moussaoui's view, because unlike most al Qaeda members, Moussaoui was raised in Europe and was personally familiar with Western culture. *Id.*

In late 1999, Abu Hafs had two discussions with Moussaoui about attacking the World Trade Center towers with airplanes. JAU3882-83. Hafs emphasized the

symbolic importance of bringing the towers down, and explained that truck bombs could not do it, as demonstrated by the 1993 attack. *Id.* Hafs invited Moussaoui to participate in the operation as a suicide pilot, but Moussaoui declined. *Id.*

Around March 2000, Moussaoui had a "dream" about flying a 747 aircraft into the White House. JAU3905, 3969-70. He went to see Bin Laden, and "told him about [his] dream," which Bin Laden thought was "good." *Id.* 3905. About a week later, Abu Hafs came to the guesthouse and again asked Moussaoui whether he "wanted to be a part of the suicide operation." *Id.* 3905, 3915. This time, Moussaoui said yes. *Id.* 3905. His target was the White House. *Id.* 3878.

Abu Hafs discussed the "methodology of the attack," asking Moussaoui, for example, whether he was prepared to use a knife in the hijacking. JAU3883. He instructed Moussaoui to train on small planes in Malaysia and then go to the United States for 747 jet simulator training. *Id.* 3965, 3970-71. Hafs gave Moussaoui a list of flight schools. *Id.* 3918.[20] They also discussed potential members for Moussaoui's

[20] This list — a two-page survey of U.S. flight schools from a German aviation magazine — was among Moussaoui's possessions in Norman, Oklahoma, that were searched after September 11, 2001. JAU3590. One of the listed schools was Huffman Aviation, the Florida flight school attended by Mohamed Atta (P-11) and Marwan al-Shehhi (P-175). *Id.* 3599. There was an Arabic notation meaning "good" next to the listing for FFTC, the Florida flight school Ziad Jarrah (P-93) attended and Ramzi Bin al-Shibh tried to attend. *Id.* 3591-94, 3596, 3599.

hijacking crew.[21]

Moussaoui was never told the full scope of the planes operation, its other participants, or the target attack date. JAU3880, 3903-05. But, before leaving for Malaysia, Moussaoui deduced that he was part of a larger terrorist operation, and that there would be more planes, pilots and hijacking crews. *Id.* 3906. Abu Hafs had told him, for instance, that the World Trade Center towers were targets, in addition to the White House. *Id.* 3878. In addition, Moussaoui had observed many operatives, including Atta (P-11) and Jarrah (P-93), spending time in an area of the al Qaeda compound reserved for people "on secret operation." *Id.* 3902-06, 3910, 3982-83. Some of these operatives would meet with Khalid Sheikh Mohammed, and some

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[21] Abu Hafs told Moussaoui that his crew would include Richard Reid, known to Moussaoui as "Abdul Jabar," who Moussaoui had met at the Brixton mosque in London, and associated with in Afghanistan, and who would later attempt to detonate an improvised explosive device hidden in his shoe on an American Airlines flight destined for the United States. JAU3878, 3905, 4493; *see also United States* v. *Reid*, 369 F.3d 619, 619-20 (1st Cir. 2004). Hafs told Moussaoui not to discuss the matter with Reid, who would be informed "when appropriate." JAU4495-96. Moussaoui believed that two Kenyan al Qaeda operatives would assist him as well. *Id.* 3879, 3955. The Kenyans — Fahid Mohammed Ally Msalam, a/k/a "Abu Usama al-Kini," and Ahmed Khalfan Ghailani, a/k/a "Haytham al-Kini" — had been part of the al Qaeda cell that bombed the U.S. embassies in East Africa in 1998. *Id.* 3879, 3955-56; JAC1955-56; *see also United States* v. *Bin Laden*, 92 F. Supp. 2d 225, 230-31 (S.D.N.Y. 2000). Like Reid, they knew Moussaoui in Afghanistan. JAU3955-56, 4493-96. Although the planes operation was not discussed between them, at some point after Moussaoui joined the operation, one of the Kenyans told him that he (the Kenyan) expected to be in an unspecified operation within six months. *Id.* 3955.

would ask Moussaoui to help them learn English. *Id.* 3905-06, 3983. Based on these observations, Moussaoui knew that there "was something going on" and that "it was the planes." *Id.* 3906.

Moussaoui went to Malaysia for flight training, as Abu Hafs directed. JAU3915, 3965. In Kuala Lumpur, he disclosed his "dream" to one of his hosts from the JI terrorist group. *Id.* 3956. Bin Laden and Hafs were alerted to this security breach, along with the fact that Moussaoui had caused JI to make an unnecessary purchase of explosives. *Id.* 3956-57. Although this resulted in Moussaoui being temporarily "excluded" from the planes operation, he traveled to London, with plans to go from there to the United States for flight training. *Id.* 3931-32, 3963-65. From London, Moussaoui tried to contact Hafs, but instead spoke with Khalid Sheikh Mohammed. *Id.* 3965. Mohammed ultimately told him to come back to Afghanistan because, "[Hafs] wants to talk to you." *Id.* 3966.

Upon being "recalled" to Afghanistan, Moussaoui met with Abu Hafs and Khalid Sheikh Mohammed to "explain" his conduct in Malaysia. JAU3931-32. Mohammed was "not happy at all," but Hafs said that Bin Laden would decide whether Moussaoui could participate in the operation. *Id.* 3932, 3982. Moussaoui met with Bin Laden, who "put [him] back into the operation," although his continued participation would be "under review" and he would be reporting to Hafs. *Id.*

Before Moussaoui left for the United States, Abu Hafs reviewed with him publicly available routing information for 747 jetliners in the United States, and gave Moussaoui additional strategic guidance, explaining, for example, that "as soon as we see [a] fighter [jet], we will crash the [hijacked] plane." JAU3883, 3952, 3971. Hafs provided few other details, telling Moussaoui just to train as a pilot in the United States and that he would "be informed of what [he] need[ed] to know in due time." *Id.* 3954, 3972. Hafs also directed Moussaoui to communicate with Khalid Sheikh Mohammed while in the United States. *Id.* 3901.

2. Moussaoui In The United States

In the Summer of 2001, while Moussaoui was in Oklahoma, he learned that other al Qaeda operatives were in the United States to carry out the planes operation. JAU3920-23, 3951-52. Moussaoui learned this when he told Khalid Sheikh Mohammed that he did not want the $15,000 he requested wired to him from the Middle East. *Id.*[22] Annoyed, Mohammed complained in response, "I send money to five people in America, and for you it is not good." *Id.* 3951.[23]

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[22] In the e-mail to Mohammed making the request, Moussaoui used "cover language," referring to bottles of champagne instead of money to conceal the true nature of the request. JAU3899-3900.

[23] In 2000, an al Qaeda operative, Ali Abdul Aziz Ali, had sent five wire transfers from the United Arab Emirates to Mohammed Atta (P-11) and Marwan al-Shehhi (P-175) in the United States. JAU1824, 1827.

Shortly after Moussaoui got his schedule for simulator training, he received approximately $14,000 from an al Qaeda member in Germany who Moussaoui knew as "Ahad Sabet" (Ramzi Bin al-Shibh). JAU3893-94. Moussaoui faxed "Sabet" his wiring instructions and spoke with "Sabet" on the telephone in connection with the transaction. *Id.* 3893-94, 3923-24, 3881. Moussaoui knew that the operation's plan required using knives to take over the aircraft, so he purchased knives he knew were short enough in length to pass airport gate security. *Id.* 3926-27. He was prepared to use the knives to kill flight attendants and passengers if necessary. *Id.* 3927.

Moussaoui expected, based upon two facts, that the attacks would occur shortly after the end of August 2001. JAU3887-88. First, Abu Hafs had said there was "time pressure" for Moussaoui to finish his flight and simulator training, leading Moussaoui to believe that others had completed their training and that the operation would be carried out soon after he finished. *Id.* 3902, 3954, 3983.[24] Second, al Qaeda knew that Moussaoui was getting simulator training and would "be ready before the end of August," as Moussaoui had conveyed that information by e-mail to Khalid Sheikh Mohammed. *Id.* 3933.

Moussaoui lied to the agents who arrested him in Minnestota. He concealed,

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[24] The other pilots had largely completed their flight and simulator training before Moussaoui arrived in the United States. JAU1833-34, 1865, 1869, 3560, 3603; 2SJAU148-49.

among other things, the true reason he was in the United States, the true reason he was training on a 747 jet simulator, and the true reason for his trips to Pakistan. JAU3890-92. Moussaoui had learned counter-interrogation techniques in al Qaeda training camps. *Id.* 3897-98. He employed those techniques in the post-arrest interviews to protect al Qaeda's ongoing planes operation and because he "wanted [his] mission to go ahead." *Id.* 3881-82.

After Moussaoui's arrest, he bought a radio in jail and listened for news of the attacks, because he knew they would happen soon. JAU3887-88, 3983. On the morning of September 11, 2001, when he heard on the radio about fire at the World Trade Center, he "immediately understood" and he "rejoiced." *Id.* 3887-88, 3937.

III. PROCEDURAL HISTORY

On December 11, 2001, a grand jury sitting in the Eastern District of Virginia returned an indictment charging Moussaoui in six counts for his role in the conspiracies that resulted in the terrorist attacks of September 11, 2001. JAU7-38. On December 19, 2001, Moussaoui was presented on the charges before a magistrate judge, where he was represented by Frank W. Dunham, Jr., Esq., and Gerald T. Zerkin, Esq., from the Federal Public Defender's Office, and Edward B. MacMahon, Esq., under the Criminal Justice Act. *Id.* 40-42.

On January 2, 2002, Moussaoui was arraigned on the indictment. JAU52-54.

Moussaoui stated: "In the name of Allah, I do not have anything to plea, and I enter a no plea." *Id.* 55. The district court replied that it would "interpret that to be a plea of not guilty." *Id.*

On March 28, 2002, the government filed notice of its intent to seek the death penalty. JAU115-123.

A. Moussaoui Is Found Competent And Proceeds *Pro Se*

On April 22, 2002, Moussaoui filed a *pro se* motion to proceed without his appointed counsel, stating that he was "entering a Pro Se Defense (self representation)." JAU213. That same day, the district court conducted a hearing on the motion, at which Moussaoui asked to proceed *pro se*, with a Muslim standby attorney "to assist [him] in matters of procedure and understanding of the U.S. law." *Id.* 217-79, 220. Defense counsel requested a competency evaluation for Moussaoui, stating that while they had not planned to "ask the Court to have an examination for him, for example, for purposes of participating in his own defense, understanding the charges against him, or as a defense to the charges themselves," they did "believe that under *Faretta* [v. *California*, 422 U.S. 806 (1975)], a competency inquiry [wa]s warranted." *Id.* 253. The government, in "an abundance of caution," did not object to a competency evaluation. *Id.* 254. The district court found that Moussaoui had made a knowing and intelligent waiver of counsel, but deferred a final ruling on the

motion pending a competency evaluation. *Id.* 263-64, 269.

The district court appointed a psychiatrist, Dr. Raymond Patterson, to perform the evaluation. JAU332. Moussaoui initially was uncooperative, *id.* 280-84, 297-98, stating that he would "not take part in an obscene jewish 'science' base[d] evaluation," *id.* 281. The district court rejected Moussaoui's opposition to the evaluation, holding that he had not offered a legitimate reason to oppose it. *Id.* 355.

Dr. Patterson [redacted]. JAU5757-59.[25] [redacted] *Id.* 5756-57. [redacted] *id.*

[25] [redacted]. JAU5744-48, 5758. [redacted]. *See id.* 5744-48.

5759, [redacted] *id.* 5758. [redacted] . *Id.*

In response, defense counsel filed reports of their own experts, [redacted] JAU5761-78. These experts — Dr. Xavier Amador and Dr. William Stejskal — had no meaningful contact with Moussaoui, *id.* 509-510, [redacted], *id.* 5775-76. [redacted], *id.* 5767-70, [redacted], *id.* 5772 [redacted] *Id.* 5776.

[redacted].

JAU5779-80. [redacted]

[redacted]. *Id.* 5784.[26] [redacted]. *Id.* 5779, 5788. [redacted] *Id.* [redacted] *Id.* 5787.

On June 13, 2002, the district court conducted a hearing on Moussaoui's motion to waive counsel and represent himself. JAU503-570. The district court rejected defense counsel's contention that further competency evaluations were necessary, *id.* 506, making clear that the evaluations to that point were sanctioned by the district court merely in "an abundance of caution," *id.* 514. The district court permitted defense counsel to supplement the record with a proffer of the testimony of Dr. Stejskal. *Id.* 507-09.

The district court found that Moussaoui was competent. JAU516-18. The

[26] The district court had also recently made its ruling on the motion for self-representation conditional on Moussaoui's agreement to be interviewed by Dr. Patterson, and had indicated that if Moussaoui continued to resist the court might send him for an evaluation at the Federal Medical Center in Butner, North Carolina. 2SJAU10-11.

court considered the defense doctors' reports, forensic reports prepared by Dr. Patterson, Moussaoui's *pro se* pleadings, and the court's own observations of Moussaoui, as well as the day-to-day observations of the Alexandria Detention Facility staff. *Id.* 514. These factors, the district court found, "consistently negate[d] any question about there being any serious mental illness or disease from Mr. Moussaoui." *Id.* In addition, the district court considered the impact of solitary confinement on Moussaoui's competency, stating that it was one of the reasons that the court "err[ed] on the side of caution" in ordering a competency evaluation before allowing Moussaoui to proceed *pro se*. *Id.* 515. Having "given very careful consideration to the issue," *id.* 514, the district court determined that Moussaoui was competent to waive his right to counsel, *id.* 516-18.

Upon concluding that Moussaoui was competent under the standard set forth in *Dusky* v. *United States*, 362 U.S. 402 (1960), the district court turned to the colloquy under *Faretta*. JAU518. After Moussaoui answered all of the court's *Faretta*-based questions, the district court determined that he made a valid waiver of his right to counsel and allowed him to proceed *pro se*, with standby counsel. *Id.* 550, 571.

B. Moussaoui's 2002 Attempt To Plead Guilty

On June 19, 2002, a grand jury returned a superseding indictment charging

Moussaoui with the same six counts in the original indictment, but adding overt acts and editing language in the original indictment. JAU576-605. The district court arraigned Moussaoui on the superseding indictment on June 25, 2002. *Id.* 664-97. At the hearing, Moussaoui tried to enter a plea of *nolo contendere* and claimed that when he stated "no plea" at his previous arraignment it was the equivalent of a plea of *nolo contendere*. *Id.* 678-79. The district court entered a plea of not guilty on Moussaoui's behalf and instructed his newly appointed standby counsel, Alan H. Yamamoto, Esq., to write a letter to Moussaoui explaining the ramifications of a plea of *nolo contendere*. *Id.* 680.[27]

Moussaoui then filed an array of *pro se* motions seeking, among many other things, to enter a *nolo* plea. *See, e.g.*, JAU712 ("Defendant's Motion to Confirm my

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[27] Mr. Yamamoto was appointed as standby counsel in June 2002 because the relationship between Moussaoui and his other court-appointed attorneys had deteriorated significantly. *See, e.g.*, JAU261 (Moussaoui told the district court that he has "no intention to have these people in any manner to defend me."); *id.* 278 ("But these people, I want the record to be clear I will not receive them, speak to them, ever."); *id.* 280 ("I Zacarias Moussaoui denounce in the most vehement manner the continuing presence of Dunham, the Jewish lawyer Zerkin and MacMahon as 'my' lawyer . . . ."). Indeed, on April 29, 2002, Moussaoui filed a *pro se* motion to "eradicate" his court-appointed counsel and levied numerous personal attacks upon them. *Id.* 336-49. At the *Faretta* hearing on June 13, 2002, Moussaoui told the district court that "I want to put on the record that these people, I will never meet them again, like I told you before, and I will never change my position, okay?" *Id.* 535. By the time of Moussaoui's guilty plea in 2005, Yamamoto was the only defense lawyer with whom Moussaoui would communicate. 2SJAU57; SJAU15; JAU6341, 6350.

No Plea Entry in this Case that began 25 June 2002, No Plea being and Meaning Nolo Contendre Plea"). The district court denied these motions, as they contested the allegations in the superseding indictment, and for that reason were inconsistent with a true *nolo contendere* plea. *Id.* 779-80. The district court, therefore, refused to accept Moussaoui's plea because it would likely be unknowing under Rule 11. *Id.*

On July 18, 2002, Moussaoui was arraigned on the second superseding indictment, which added death penalty allegations in light of *Ring* v. *Arizona*, 536 U.S. 584 (2002). JAU833-862. Moussaoui initially attempted to "enter formally today a pure plea and affirmatively plea." *Id.* 840. The district court entered a plea of not guilty on his behalf, explaining that Moussaoui's "plea" was not recognized in the Federal Rules of Criminal Procedure. *Id.* 842. Later in the hearing, Moussaoui expressed for the first time a desire to plead guilty, explaining that a guilty plea "will ensure me to save my life, because the jury will be, will be able to evaluate how much responsibility I have in this." *Id.* 858. The district court interrupted Moussaoui, warning that if he pleaded guilty, he would not be able to "undo those words." *Id.* 859. The district court adjourned for a week to give Moussaoui "a little time" to think about whether he wanted to plead guilty. *Id.* 860-61.

Standby counsel again challenged Moussaoui's competence. JAU872-75. Drs. Amador and Stejskal expressed "additional concern," about Moussaoui's competence,

and another psychiatrist, Dr. Stuart Grassian, who specialized in psychiatric effects of isolated confinement, agreed with Drs. Amador and Stejskal that Moussaoui might be mentally impaired to a degree that he was incompetent to waive counsel and represent himself. *Id.* 901, 926-86. Dr. Grassian based his opinion on the "reports of the other experts," because, like Drs. Amador and Stejskal, he had "not personally evaluated Mr. Moussaoui." *Id.* 935.

On July 25, 2002, the district court held a Rule 11 proceeding. JAU987-1041. The district court noted that Moussaoui was rejecting the advice of his standby counsel in pleading guilty. *Id.* 993. The district court explained to Moussaoui that he could plead guilty to allegations in the indictment that he did not dispute, or he could stipulate to certain facts without conceding others and proceed to trial. *Id.* 996-97. Moussaoui responded that he understood and reiterated his belief that, by pleading guilty, any jury considering whether to impose the death penalty would find him more credible and spare his life. *Id.* 997-99.

The district court again found Moussaoui competent based upon "careful[] consider[ation of] the materials that were submitted by standby defense counsel as well as their doctor reports." JAU992-93. The court found that Moussaoui was not suffering from a mental defect or disease that would "render him incompetent to represent himself or, assuming he answers the questions appropriately, to enter a

knowing and voluntary plea of guilty to any one or all six of the charges." *Id.* 993. In addition, the district court was "particularly impressed" with Moussaoui's behavior and responses to orders, which demonstrated that he was "perfectly capable of understanding the Court's directions." *Id.* The district court embraced Dr. Patterson's report, and rejected defense experts' opinions that Moussaoui's *pro se* filings evinced mental illness, noting that "although [the] pleadings are somewhat confrontational and somewhat unusual, they do not give the Court sufficient basis to make any kind of finding that this man is not competent to go forward with a guilty plea." *Id.* 993-94. The district court added that "there [was] clearly . . . no basis in this record" for further mental health evaluations. *Id.*

The district court confirmed that Moussaoui understood that he would be waiving all non-jurisdictional objections to the prosecution by pleading guilty. JAU1008. The district court also confirmed that Moussaoui was aware of the penalties he faced, *id.* 1009-20, and the role of a jury in a capital sentencing hearing, *id.* 1020-23. Moreover, the district court made sure that Moussaoui knew that a guilty plea would preclude arguments at the sentencing hearing that he was not part of the conspiracy. *Id.* 1023.

As the plea proceeding unfolded, however, it became apparent that Moussaoui was willing to admit certain facts — namely, that he was an al Qaeda member, who

trained in Afghanistan and ran a guesthouse — but not all elements of the charged offenses. JAU1024-29. Whereupon, the district court explained to Moussaoui the factual requirements of Count One, which charged conspiracy to commit acts of terrorism transcending national boundaries:

> If you're saying to the Court you never agreed with anybody to destroy or damage structures or to injure people — and that's your right to say you never did that — but what I'm telling you then is I can't accept your guilty plea, because you're not admitting to this offense, and you should not admit to the offense if you don't agree that you did that.
> . . . .
> I agree with you that you don't have to agree to necessarily every fact in the government's proffer, but the essence of a conspiracy is that a person joins with one or more people to do something the law forbids. . . . So, for example, if you came to the United States to learn how to fly crop duster planes because down the road maybe you were going to poison somebody's water supply, that's not the conspiracy alleged in this case.

Id. 1029-31. Based on Moussaoui's responses, the district court determined that Moussaoui was not "prepared to enter guilty pleas to any of these counts." *Id.* 1031 ("[Y]ou're not admitting to — or not prepared to admit, it seems to me, to the essence of the conspiracy.").

The district court also addressed Count Two, conspiracy to commit aircraft piracy, explaining to Moussaoui the factual requirements of that count.

> Now to be guilty of that conspiracy, you would — the government would first of all have to prove beyond a reasonable doubt . . . that there was a conspiracy with members of al Qaeda and others to commit aircraft piracy.
>
> Number two, they'd have to prove that at some point during the existence of

> that conspiracy, that you, knowing that that was the goal, that is, that this group of people planned to hijack aircraft, joined it. You agreed to help become a part of that.
>
> That's the essence of what they would have to . . . prove, that there was the conspiracy and that you knowingly and willfully joined that conspiracy in order to further its goals.

JAU1032. Moussaoui stated that he understood, and when the district court asked if he was willing to admit that he "joined with members of al Qaeda in a plan to seize and exercise control over aircraft," Moussaoui requested a 15-minute recess. *Id.* 1033. After the recess, Moussaoui stated that he had changed his mind and would not plead guilty. *Id.* 1033-35.

C. Revocation Of Moussaoui's Right To Proceed *Pro Se*

During the course of his self-representation, Moussaoui filed many pleadings that were repetitive and used abusive language. *See, e.g.*, JAU1287 ("Emergency Strike by Slave of Allah Mujahid Zacarias Moussaoui to counter Dirty Insider Dealing by Fat Megalo Dunham for his Chief Pay Persecution Master Ashcroft (a/k/a United Satan Chief Liar) and to Have Fat Megalo Out of 9/11 Circus Trial"); *id.* 1358-59 ("$ 100000 Cash in for 'Victim Impact' Extravaganza (a/k: Sucking Scavenger made in U.S.A.)"). In an order dated November 5, 2003, the district court noted that "[s]ince October 27, 2003, [it has] received more than twenty writings from Mr. Moussaoui, most of which [we]re not proper requests for appropriate judicial

relief," *id.* 1368, and which "include[d] veiled, and in some cases overt, threats to public officials, attacks on foreign governments, attempts to communicate with persons overseas, and efforts to obtain materials unrelated to this case," *id.*[28] The court stated that it had warned Moussaoui "on numerous occasions that he could lose his right to represent himself in this case if he abused that right," and that "[h]is conduct over the past two weeks [wa]s clear evidence of such abuse." *Id.* The district court therefore placed Moussaoui "on formal notice" that he would lose his right to self-representation if he filed any further "frivolous, scandalous, disrespectful or repetitive pleadings," *id.* 1369.[29]

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[28] In a separate order, the court also stayed all further action in the case, to conserve resources, while the government's interlocutory appeal was before this Court. JAU1378. As this Court knows, in Fall 2002, Moussaoui moved for pretrial access to, and to compel the trial appearances of, captured al Qaeda operatives. *Id.* 5957-58, 6045-48. Moussaoui's motions and the district court's subsequent sanctions levied on the government for refusing to make operatives available for videotaped deposition, were the subject of the government's previous appeals (Nos. 03-4162 and 03-4792) to this Court. On September 13, 2004, after panel rehearing, this Court reversed the sanctions imposed by the district court, concluding that while Moussaoui had a Sixth Amendment right to the depositions of the witnesses, the district court incorrectly determined (a) that no adequate substitutions for the depositions were possible and (b) that all substitutions were inherently inadequate. *United States* v. *Moussaoui*, 382 F.3d 453 (4th Cir. 2004). Moussaoui then filed a petition for a writ of certiorari with the Supreme Court, which it denied on March 21, 2005. 544 U.S. 931.

[29] The court followed up with a letter, dated November 7, 2003, in which the court "informally reminded Mr. Moussaoui of the sanctions he faced if he continued to send such writings to the Court." JAU1378.

Disregarding the district court's warning, Moussaoui filed two more abusive pleadings on November 12, 2003. *See* JAU1374 ("20th Hijacker: Leonie You Bitch, But ZM must get the Wicked Tyran Congress 9/11 Report!"); *id.* 6289 ("20th Hijacker: Real Bitch of Leonie Brinkema position on Uncle Sam"). On November 14, 2003, the district court entered an order construing Moussaoui's pleadings as a request for the then-classified congressional report on the September 11 attacks, and a request for reconsideration of its order imposing sanctions on the government, which, at the time, was the subject of the government's interlocutory appeal in this Court. *Id.* 1378. The district court denied the motions, noted that they violated its November 5 order warning Moussaoui about filing further frivolous, scandalous, disrespectful or repetitive pleadings, and ordered that Moussaoui had forfeited his right to represent himself in the case. *Id.* 1379. The court then reappointed standby counsel as Moussaoui's counsel of record. *Id.*

D. The Guilty Plea

1. Moussaoui Indicates He Wants To Plead

Shortly after the resolution of the government's interlocutory appeal, Moussaoui again indicated that he wanted to plead guilty, this time by writing a letter to the government and the district court. JAU6328-30. Moussaoui wrote, [redacted]

[redacted] *Id.* 6329. Defense counsel [redacted]. *Id.* 6294, 6338.

The district court convened a conference with all counsel, but not Moussaoui, [redacted] the court stated:

> [redacted]

Id. 6334, 6340-41. The district court further observed that, [redacted]. *Id.* 6345.

2. The Statement Of Facts

The government prepared a Statement of Facts ("SOF"), at the district court's request, for Moussaoui's review and adoption at his guilty plea. JAU1409-13, 1430-31, 6351-56. It contained many of the essential facts that the government expected to prove at trial. *Id.* 1409-13.

The SOF described al Qaeda and stated that "[a]s part of its conspiracy to attack the United States, al Qaeda members conceived of an operation in which civilian commercial airliners would be hijacked and flown into prominent buildings," in the United States. JAU1410. "To effect this attack, al Qaeda associates entered the United States, received funding from abroad, engaged in physical fitness training, and obtained knives and other weapons with which to take over airliners." *Id.* "Some al Qaeda associates obtained pilot training, including training on commercial jet simulators, so they would be able to fly hijacked aircraft into their targets." *Id.* "Bin Laden personally approved those selected to participate in the operation." *Id.*

As to Moussaoui, the SOF stated: that "Bin Laden personally selected [him] to participate in the operation to fly planes into American buildings and approved Moussaoui attacking the White House"; that "Moussaoui knew of al Qaeda's plan to fly airplanes into prominent buildings in the United States and agreed to travel to the United States to participate in the plan"; and, that, while in the United States, Moussaoui "received training as a pilot of smaller planes," was directed by "an al Qaeda associate . . . to attend training for larger jet planes," received money from an al Qaeda associate abroad "so Moussaoui could receive additional flight training," and purchased knives with "blades short enough to get past airport security." JAU1410-11. Paragraph 15 of the proposed SOF stated that Moussaoui "told an al

Qaeda associate that he would complete simulator training by August 20, 2001." *Id.* 1411; 2SJAU45-46. The SOF also stated that, after his arrest on August 16, 2001, Moussaoui "lied to federal agents to allow his al Qaeda 'brothers' to go forward with the operation to fly planes into American buildings." JAU1412.

3. The Pre-Plea *Ex Parte* Proceeding

On April 20, 2005, the district court conducted an *ex parte* proceeding with Moussaoui and his counsel, Mr. Yamamoto, to discuss the impending plea. 2SJAU41-68. The district court wanted to avoid another aborted plea attempt that could "poison the jury pool" with a "trial looming." JAU6335. So, the district court convened the proceeding, with the government's consent, to "ask [Moussaoui] some questions to make sure . . . that [the] plea . . . should properly go forward," 2SJAU42, and to develop a "record . . . so that [the Rule 11 proceeding could] be relatively straightforward," *id.* 51. Thus, at the outset of the proceeding, the district court stated that "the purpose of today's meeting . . . is for me to assure myself as the Court that this is a plea that is properly, voluntarily, and knowingly made." *Id.* 43.

Moussaoui made clear that his guilty plea would be knowing and voluntary. 2SJAU44-45. The district court confirmed that Moussaoui understood the potential penalties. *Id.* 48. Moussaoui expected to be sentenced to death, but understood that life in prison was also a possibility. *Id.* 49-50 ("It can be that some people decide

that I will spend my life in Florence, Colorado. It's possible."). Moussaoui was aware that his sentence would be determined by a jury and the district court. *Id.* 63 ("I know that . . . all the cards are in your hand and there will be hearing, but people will know that Moussaoui knowingly and voluntarily have chosen this course of action."). As a result, the district court concluded that Moussaoui "clearly underst[ood] the ramifications" to pleading guilty. *Id.* 51.

Moussaoui also made clear that, even though he would be pleading guilty against the advice of counsel, his decision was an informed one, as he had received advice not only from Mr. Yamamoto, but also from other members of his legal team, including Mr. Dunham, and Kenneth P. Troccoli, Esq.:

> I have voluntary choosing this course of action[.] . . . This is one of the privilege I have, to plead guilty, to testify on my, on my behalf if I want, okay? . . . So I have received [defense counsel's] letter. I have plenty of discussion with Mr. Yamamoto, who is just there. He can confirm this, if they have pour on me all their so-called legal advice. I have received letter from Kenneth Troccoli, from Dunham, and from different meeting with Yamamoto.
>
> So I have heard them, I have read them, I understand what they say, but we do not agree. That's all. But somehow they can't take that I don't, I don't agree with them. That's all.

2SJAU44-45, 62.

Moussaoui addressed the SOF, which he confirmed he had "read more than probably ten time[s]." 2SJAU45. Moussaoui made a single correction to the SOF,

in paragraph 15, changing the date that he told an al Qaeda associate he would finish his simulator training from "by August 20, 2001" to "before September 2001." *Id.* 45-46.

The district court, again, rejected defense counsel's suggestion that Moussaoui was not competent to plead guilty. 2SJAU51 ("[D]espite the fact that we may disagree about things, this defendant has always struck this Court as articulate, intelligent, fully understanding the proceedings"). While acknowledging that Moussaoui's "world view may be significantly different from ours and therefore at times perhaps difficult to understand," the district court did not consider this "a basis for arguing that he is incompetent." *Id.* The district court also rejected the notion that Moussaoui's conditions of confinement affected his competence. *Id.* ("[A]ny human being locked up under the conditions in which he has been housed would naturally at times [get] frustrated and angry. That again does not equate to incompetence.").

In response to the district court's questions, Mr. Yamamoto described Moussaoui as having been "friendly" and "cordial" to him, and indicated that their conversations had been "calm" and "rational." 2SJAU54-55. Mr. Yamamoto confirmed that Moussaoui "knows what we're talking about." *Id.* 55. Mr. Yamamoto added that he and Moussaoui had a disagreement about one of the consequences of the plea, namely, Moussaoui's waiver of appellate rights. *Id.* 54-55. In response,

Moussaoui confirmed his understanding that a guilty plea would preclude raising constitutional arguments on appeal:

> What is certain, okay, is I've listened to their advice, read their, read their case, they send me the *Blackledge* v. *Perry* case with the statement of the Supreme Court, who made absolutely clear that once you have pled guilty, you cannot raise any — you cannot raise claim relating to deprivation of constitutional rights . . . that occur prior to the entry of the guilty plea. This is the word of the Supreme Court.

Id. 59.

The district court was "satisfied that [Moussaoui was] fully competent to enter this guilty plea," 2SJAU60, and concluded the *ex parte* proceeding by finding that "this is a knowing and voluntary decision by the defendant. I'm not aware of any coercion that's been brought. If anything, the coercion has been for him not to plead. And I think he's had full advice of counsel. A defendant in our system has an absolute right to reject that advice." *Id.* 67.

4. The Public Rule 11 Proceeding

On April 22, 2005, two days after the *ex parte* proceeding, the district court held the change-of-plea hearing, pursuant to Rule 11. JAU1414-46. After Moussaoui affirmed that he would tell the truth, the district court confirmed that by pleading guilty Moussaoui would be waiving constitutional rights to plead not guilty; to a jury trial; to be represented by counsel; to confront and cross-examine witnesses; to be protected from compelled self-incrimination; to testify and present evidence; and to

compel the attendance of witnesses subject to the limitations outlined by this Court in the previous appeals. *Id.* 1416, 1418, 1424, 1426-28. The district court made sure Moussaoui understood the nature of each charge to which he was pleading guilty and the possible penalties. *Id.* 1420-26.

The district court explained to Moussaoui that he would be waiving subsequent challenges to his guilt by pleading guilty:

> COURT: [I]f you pled not guilty and you went to trial and you were found guilty of the offense, you could appeal the finding of guilt to a higher level court. Now, do you understand that if the Court accepts your guilty pleas today, you will be found guilty of the six charges in the indictment, and you will not have a right to appeal the findings of guilt? Do you understand that?
>
> DEFENDANT: I understand this.

JAU1428-30.

The district court described the six conspiracy charges and the elements of conspiracy, explaining, among other things, that the government would have to prove that the alleged conspiracies "did, in fact exist" and "that at some point during the life of the conspiracy [Moussaoui] knowingly and intentionally entered into acts in furtherance of the conspiracy." JAU1425-26. Moussaoui indicated that he understood. *Id.* 1426. The district court noted that Moussaoui had made only one change to the SOF — the date in paragraph 15. *Id.* 1430-31. Moussaoui confirmed that he had "read more than ten times this statement of facts, and . . . pondered about

each paragraph." *Id.* 1431. The district court cautioned, "If you sign that statement of facts and if I accept it, that will suffice to be a factual basis to find you guilty." *Id.* Moussaoui replied, "Absolutely. I do understand this." The district court reiterated that "there will be no further trial of the issue of guilt, you will not be able to come back and try to refute any of the facts in the statement of facts, and you will be found guilty today." 2SJAU70.[30] Again, Moussaoui stated, "I understand that these statements of fact is there to stay and I cannot go back and say no." *Id.* Moussaoui then executed the SOF, signing it as the "20th Hijacker." *Id.*; JAU1413.

The district court also established that the plea was voluntary. Moussaoui confirmed that no one had promised or suggested that his plea would result in a lighter sentence or more favorable treatment by the district court. JAU1432 ("I can't expect anything. . . . I can't expect any leniency from the American."). Moussaoui confirmed that no one pressured him to plead guilty. 2SJAU70. Indeed, acknowledging that his counsel had advised *against* pleading guilty, Moussaoui explained that he had received the advice of defense counsel and had nonetheless "made this decision . . . to plead guilty to the indictment." JAU1418.

The district court asked Mr. Yamamoto whether Moussaoui understood the

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[30] Page 20 of the guilty plea transcript was inadvertently omitted from the original Joint Appendix. The missing page is included in the Second Supplemental Joint Appendix as 2SJAU70.

legal ramifications of pleading guilty:

> YAMAMOTO: I've spoken to him, Your Honor, we have discussed the ramifications of the guilty plea and the fact that he has — he is facing the possibility of death and the possibility of life imprisonment. He has told me that he understands that.
>
> COURT: And you're satisfied that he understands that?
>
> YAMAMOTO: In speaking with him, he's — we've argued about it, and he indicates that — well, he understands it. We've gone around in circles. It started out differently initially as to what he was looking for, so he appears to understand it, Your Honor.
>
> COURT: I know it puts you in a difficult position because all counsel in this case are opposed to the defendant's decision. . . .
>
> YAMAMOTO: He has responded appropriately when I've spoken to him. He has had disagreements with me with respect to certain items. Those disagreements were appropriate disagreements.

JAU1433-34.

The district court then accepted Moussaoui's guilty plea to the six counts charged. JAU1433, 1435; 2SJAU70. In accepting the plea, the district court found that Moussaoui had "clearly exhibited both today and earlier this week a complete understanding of the ramifications of his guilty pleas." JAU1435. Moreover, the district court found that Moussaoui was "an extremely intelligent man" and that he "actually [had] a better understanding of the legal system than some lawyers I've seen in court." *Id.* Accordingly, the district court concluded that Moussaoui was competent to plead guilty, and that Moussaoui "entered these guilty pleas in a

knowing and voluntary fashion." *Id.* Finally, the district court found that the SOF, which Moussaoui had "several days to carefully go over" with "the advice and consultation" of counsel, *id.*, was "more than sufficient evidence to establish [Moussaoui's] guilt beyond a reasonable doubt as to all six counts," *id.* 1435-36.

E. The Sentencing Proceedings

Following Moussaoui's guilty plea, the district court conducted a sentencing proceeding under the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et seq.*, to determine Moussaoui's punishment. 18 U.S.C. § 3593. The district court bifurcated the proceeding into two phases so that the jury would initially have to render a verdict on a statutory threshold factor alone. The jury unanimously found that the government had established beyond a reasonable doubt the statutory threshold factor it had alleged — that Moussaoui's lies directly resulted in at least one death on September 11, 2001. JAU4397-98, 4405-08.

During the second phase, the jury unanimously found that the government proved certain statutory aggravating factors for each capital count, as well as several non-statutory aggravating factors. JAU6732-36, 6746-50, 6760-64. A number of jurors also found that Moussaoui had established several mitigating factors by a preponderance of the evidence. *Id.* 6737-40, 6751-54, 6765-68. Not one juror, however, found that Moussaoui had established that he suffered from a psychotic

disorder, or that his testimony about his plan to fly a plane into the White House was unreliable or contradicted by his other statements. *Id.* 6739, 6753, 6767.[31] Ultimately, the jury did not unanimously agree that Moussaoui should receive a death sentence. *Id.* 5582.

On May 4, 2006, the day after the jury failed to unanimously agree that Moussaoui should be sentenced to death, the district court sentenced Moussaoui to life without possibility of release on all six counts. JAU5604-05, 5614-19.[32] The court also ordered that Moussaoui would serve his sentence on Count One consecutively to the sentences in the remaining counts. *Id.* Defense counsel stated: "We believe the sentence is a proper sentence, that he should spend the rest of his life incarcerated for his participation in this conspiracy." *Id.* 5599. At the conclusion of the hearing, the district court thanked both sides for their efforts, stating, "Nobody will probably ever truly know how incredibly complicated it was to put this

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[31] Moussaoui took the witness stand in both phases of the proceeding. JAU3875-3984, 4409-4508.

[32] After the first phase of the sentencing hearing, the Probation Department prepared a Presentence Report ("PSR"), in which it determined that the U.S. Sentencing Guidelines called for a sentence of life imprisonment, based on a total offense level of 58, in criminal history category VI, on all of the six counts. *See* JAU5596, 6851-52. The PSR noted that the life sentence for Count One (conspiracy to commit acts of terrorism transcending national boundaries) could not run concurrently with any other term of imprisonment. *Id.* 6788, 6851 (PSR § 129).

prosecution together." *Id.* 5607. The court particularly thanked defense counsel for rising "to extraordinary challenges," in completing "a nearly impossible job with an absolutely impossible defendant." *Id.* 5608.

The day after he was sentenced, Moussaoui instructed defense counsel to move to withdraw his guilty plea, which they did on May 8, 2006. JAU5620-21. In an affidavit in support of the motion, Moussaoui stated that "his understanding of the American legal system was completely flawed" when he entered his guilty plea. 2SJAU435. Moussaoui claimed: "I now see that it is possible that I can receive a fair trial . . . even with Americans as jurors and that I can have the opportunity to prove that I did not have any knowledge of and was not a member of the plot to hijack planes and crash them into buildings on September 11, 2001." *Id.* The district court summarily denied the motion on the day it was filed. JAU5626-27.

On May 12, 2006, Moussaoui filed his notice of appeal to this Court. JAU5628.

SUMMARY OF ARGUMENT

Moussaoui tries to escape the consequences of his guilty pleas to six al Qaeda conspiracies that resulted in the September 11, 2001, attacks on America. He raises procedural challenges to his plea and his resulting life sentence, but the thrust of his brief is that an array of purported constitutional violations long before his plea left

him with no hope for a fair trial, and thus forced him to plead guilty. The arguments are without merit. None of the claims were raised in the district court, and all are contradicted by the comprehensive record of the plea — and indeed the entire case — which conclusively demonstrates that Moussaoui pleaded guilty, not because of any coercion, but because he was in fact guilty of the offenses charged.

Rule 11 of the Federal Rules of Criminal Procedure provides the framework for making the constitutional determination of whether a guilty plea is knowing and voluntary, and whether it is supported by a factual basis. The rule requires courts to personally address the defendant to ensure that he is pleading guilty of his own volition — free of coercion, threats or unauthorized promises — and that he fully understands the nature of the charges against him and the consequences of his plea. Thus, "guilty pleas tendered and accepted in conformity with Rule 11 [are] presumed final." *United States* v. *Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995).

The district court complied with Rule 11 in all respects in accepting Moussaoui's pleas. As a result, the record leaves no doubt that Moussaoui freely chose to plead guilty with a complete and accurate understanding of the charges against him and the consequences he would face. Moreover, Moussaoui's competence to plead was never in doubt. Even though his trial counsel pressed the issue throughout the case, nothing in the record casts doubt on the opinion that

Moussaoui was competent — an opinion rendered by the only medical expert who personally examined him. Nor does anything come close to suggesting that the district court, which regularly interacted with Moussaoui for more than three years, abused its ample discretion in finding no "reasonable cause" to hold a full competency hearing. Thus, there is no basis to disturb Moussaoui's plea.

Moussaoui's demonstrable guilt also bars his constitutional claims. Where guilt has been conclusively determined at a plea, the law naturally precludes a defendant from later raising "independent claims relating to the deprivation of constitutional rights that occurred prior to entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); *United States* v. *Bundy*, 392 F.3d 641, 644 (4th Cir. 2004) (guilty plea "waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea"). This rule applies with equal force to antecedent constitutional claims like Moussaoui's that are cloaked as challenges to the plea's voluntariness. Pleas could never be "presumed final" otherwise. Thus, this Court should not even entertain these claims.

The claims are meritless in any event. They allege infringement of Fifth or Sixth Amendment trial rights based on district court orders designed to protect classified information from unauthorized disclosure. The orders — all standard restrictions under the Classified Information Procedures Act ("CIPA") — are not to

Moussaoui's liking because they permitted disclosure of classified information to his cleared counsel, but not him. None of these restrictions were erroneous, however, much less an infringement of the Constitution. In imposing the restrictions, rather, the district court carefully balanced Moussaoui's rights against the government's compelling interest in protecting national security. Given Moussaoui's oft-repeated desire to kill Americans and destroy the Nation in the name of al Qaeda, the orders in question were certainly within the district court's wide latitude to deal with thorny problems of national security in the context of criminal proceedings. *United States* v. *Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008). Thus,

> (1) Moussaoui's right to communicate with counsel did not require the disclosure of national security information to him. He does not specify any harm that resulted from his inability to consult with counsel about classified information. The claim is particularly dubious in light of the fact that Moussaoui chose to reject his appointed counsel, and not speak to them, early on in the case;
>
> (2) Moussaoui's right to be present at critical stages of the proceeding was not infringed by his exclusion from CIPA hearings at which classified information was at issue. These hearings all occurred early on in the case and were far from "critical" in the constitutional sense. And, at any rate, Moussaoui's interests were fully represented by cleared counsel at these proceedings and Moussoui offers no insight into how he would have helped them if he were present;
>
> (3) Moussaoui was not denied due process because classified information was protected from disclosure to him in advance of his plea, even where some of that classified information was allegedly exculpatory. A criminal defendant does not have a constitutional right to obtain material exculpatory information before pleading guilty. Moreover, Moussaoui knew the substance of the

alleged exculpatory material, and presumably would have been able to use unclassified CIPA "substitutes" at trial had he not ended the ongoing CIPA process by pleading guilty;

(4) Moussaoui's right to self-representation was not violated by the district court's decision to permit standby counsel to represent him on matters involving classified information. He forfeited his right to self-representation long before his plea — so any apprehension of the right being infringed at trial could not have motivated him to plead — and, anyway, standby counsel never wrested "actual control" of the case from him during the 17 months they occupied that role; and

(5) Moussaoui's right to counsel of choice was not infringed by the conditions of his confinement or the requirement that classified information be disclosed only to counsel with security clearances. He cites not one instance where a lawyer refused to meet with him, much less represent him, because of his prison conditions — namely, the Special Administrative Measures — or security-clearance requirements, which were appropriate in any event.

Finally, Moussaoui's attack on his life sentence is baseless for a number of reasons, including the fact that he repeatedly asked the district court to instruct the jury at the capital sentencing proceedings that a life sentence was the only alternative to death; implored the jury to vote for a life sentence; told the district court at sentencing that life was a "proper sentence"; and a life sentence was otherwise "appropriate" and "fair," as the district court concluded.

ARGUMENT

I. MOUSSAOUI'S GUILTY PLEA WAS VALID AND NEED NOT BE DISTURBED

Despite pleading guilty to all six conspiracy counts and then testifying a year

later in his capital sentencing hearing affirming that he was in fact guilty, Moussaoui now claims that his guilty plea was invalid because the district court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting it and failed to hold a competency hearing before the plea. These claims should be rejected.

A. The District Court Did Not Plainly Err In Accepting Moussaoui's Knowing And Voluntary Guilty Plea

Moussaoui contends (Br. 135-75) that the district court violated Rule 11 by failing to inform him of the nature of the charges; failing to find an adequate factual basis for the plea; and misinforming him of the possible sentences. These arguments were never made in the district court. They are also wholly unsupported by the record, which overwhelmingly demonstrates that Moussaoui's guilty plea complied in all respects with Rule 11, that he knew exactly what he was doing, understood the nature of the charges and all of the consequences — including possible sentences — of pleading guilty, and that there was an ample factual basis for the plea.

1. Standard Of Review

This Court generally reviews *de novo* a properly raised issue respecting the adequacy of a guilty plea, and "in the Rule 11 context," preserved claims of "violations are evaluated under a harmless error standard." *United States* v. *Goins*, 51 F.3d 400, 402 (4th Cir. 1995); *see* Fed. R. Crim. P. 11(h) (variance from Rule 11 is "harmless error if it does not affect substantial rights"). However, claims of Rule

11 errors raised for the first time on appeal, like Moussaoui's here, are reviewed for plain error. *United States* v. *Vonn*, 535 U.S. 55, 71 (2002).

Under plain error review, this Court may correct an error not raised in the district court only if there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *United States* v. *Johnson,* 520 U.S. 461, 466-67 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). If all three conditions are met, this Court "may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 467 (quoting *Olano*, 507 U.S. at 732). In determining whether there has been a violation of "substantial rights," the scope of inquiry is not limited to the Rule 11 inquiry, but includes other pertinent portions of the record below. *Vonn*, 535 U.S. at 71.

Moreover, for a defendant seeking reversal of his conviction, plain error review requires the defendant to carry the burden of showing prejudice. *See United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 (2004) ("[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea."). In other words, the defendant must convince the reviewing court that "the probability of a different result is 'sufficient to undermine

confidence in the outcome' of the proceeding." *Id.* (quoting *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984)).

Finally, in reviewing the adequacy of compliance with Rule 11, this Court "accord[s] deference to the trial court's decision as to how best to conduct the mandated colloquy with the defendant." *United States* v. *DeFusco*, 949 F.2d 114, 116 (4th Cir. 1991); *see United States* v. *Reckmeyer*, 786 F.2d 1216, 1221 (4th Cir. 1986) ("The manner of ensuring that the defendant is properly informed is committed to the good judgment of the district court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence.").

2. Applicable Law

"[A] guilty plea is a grave and solemn act" that is "accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). The guilty plea is "more than a confession which admits that the accused did various acts," *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); rather, it is an "admission that he committed the crime charged against him," *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970); *see United States* v. *Broce*, 488 U.S. 563, 570 (1989) ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime."). In other words, a guilty plea, like the

one in this case, represents an admission by the defendant that "he actually committed the crimes," and that "he is pleading guilty because he is guilty." *United States* v. *Hyde*, 520 U.S. 670, 676 (1997). As such, a defendant's admissions of guilt are entitled to significant weight and may not lightly be disavowed. *Walton* v. *Angelone*, 321 F.3d 442, 462 (4th Cir. 2003) (stating that in determining whether a guilty plea is constitutionally valid, reviewing courts grant "the defendant's solemn declaration of guilt a presumption of truthfulness"); *United States* v. *Hawthorne*, 502 F.2d 1183, 1185 (3d Cir. 1974) (statements by a defendant at a guilty plea proceeding should be accorded great weight when such defendant later disavows those statements in an effort to withdraw his plea).

To be constitutionally adequate, a guilty plea must "represent[] a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Walton*, 321 F.3d at 462 (citing *Alford*, 400 U.S. at 31). If the defendant is "fully aware of the direct consequences," his guilty plea must stand, so long as it was not "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled and unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Brady* v. *United States*, 397 U.S. at 755.

Under Rule 11 of the Federal Rules of Criminal Procedure, a district court must

conduct a plea colloquy with a defendant to "establish that the defendant knowingly and voluntarily enters his plea." *United States* v. *Wood*, 378 F.3d 342, 349 (4th Cir. 2004); *United States* v. *Standiford*, 148 F.3d 864, 868 (7th Cir. 1998) ("The whole point of the Rule 11 colloquy is to establish that the plea was knowingly and voluntarily made."). Rule 11 requires that the court personally address the defendant to inform him of, and ensure that he understands, the nature of the charges against him, along with the consequences of his guilty plea. *United States* v. *Damon*, 191 F.3d 561, 564 (4th Cir. 1999). As the Supreme Court has explained, Rule 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary[,]" and "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969); *accord United States* v. *Bowman*, 348 F.3d 408, 417 (4th Cir. 2003) ("Rule 11 colloquy is designed to provide a structure to protect the defendant against making an uninformed and involuntary decision to plead guilty").

Because the Rule 11 framework is designed to ensure that a defendant's plea is knowing and voluntary, "guilty pleas tendered and accepted in conformity with Rule 11 [are] presumed final." *United States* v. *Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995)). Thus, "a properly conducted Rule 11 guilty plea colloquy leaves a defendant

with a very limited basis upon which to have his plea withdrawn." *Bowman*, 348 F.3d at 414.

3. Discussion

Moussaoui's claims (Br. 139, 142) that the district court committed Rule 11 error center around his contention that he thought he was pleading guilty to a conspiracy different from the one alleged in the indictment. As demonstrated below, the argument runs counter to conspiracy law and the plain language of the indictment. In addition, the argument is belied by the record below, which conclusively demonstrates (1) that Moussaoui understood the charges in the indictment; (2) that Moussaoui knew he was pleading guilty to those charges; (3) that neither the government nor the district court misled Moussaoui about the implications of his plea; and (4) that the district court established a factual basis for the plea. Finally, even if there was a defect in the plea proceeding, it certainly did not constitute "plain error."

a. Conspiracy Law And The Indictment

As the district court repeatedly informed Moussaoui, JAU1032-33, 1419-26, the elements of a conspiracy offense are (1) an agreement among the defendants to do something which the law prohibits; (2) the defendant's knowing and willing participation in the agreement; and (3) an overt act by one of the conspirators in

furtherance of the agreement's purpose. *United States* v. *Hedgepeth*, 418 F.3d 411, 420 (4th Cir. 2005). Because the conspiracy is the agreement to commit the crime, the defendant does not need to know the details of the underlying crime. *See United States* v. *Burgos*, 94 F.3d 849, 858 (4th Cir. 1996) (en banc) (defendant may be convicted of conspiracy with "little or no knowledge of the entire breadth of the criminal enterprise"); *United States* v. *Banks*, 10 F.3d 1044, 1054 (4th Cir.1993) ("It is of course elementary that one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence."). "A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 64 (1997). Accordingly, "[a] conspirator need not have had actual knowledge of the co-conspirators," and "a conspiracy conviction must be upheld even if the defendant played only a minor role in the conspiracy." *United States* v. *Morsley*, 64 F.3d 907, 919 (4th Cir. 1995).

The indictment in this case alleged that Moussaoui participated (along with members of al Qaeda and others) in six conspiracies to violate U.S. laws. Each of the six counts was accompanied by 110 paragraphs of alleged "overt acts." JAU803-30. These acts set forth the background of the conspiracies, including al Qaeda's formation, history, structure, leadership, and mission to wage violent *jihad* against

U.S. military, citizens, and institutions. *Id.* 803-07, 809-12. The allegations also tracked the activities of Moussaoui and the 19 hijackers, as they traveled to America and prepared to carry out the hijacking attacks. *Id.* 812-24. The overt acts also alleged the activities of two unindicted co-conspirators, Ramzi Bin al-Shibh and Mustafa al-Hawsawi, who facilitated Moussaoui and many of the hijackers, including the pilots, by wiring money and providing logistical support in furtherance of the plot. *Id.* 812-25. The last set of overt acts, entitled "The September 11, 2001 Terrorist Attacks," described how the attacks were ultimately carried out and Bin Laden's claims of responsibility for the resulting carnage. *Id.* 823-25.

The ensuing charging language of the six counts alleged that Moussaoui conspired with al Qaeda confederates, known and unknown, to commit offenses under U.S. law, namely: acts of terrorism transcending national boundaries (Count One); aircraft piracy (Count Two); destroying aircraft (Count Three); using weapons of mass destruction (Count Four); murdering U.S. employees (Count Five); and destroying U.S. property (Count Six). JAU804-830. Each count other than Count Five concluded by stating in some form that the conspiracy "result[ed] in the deaths of thousands of persons on September 11, 2001." *Id.* Count Five charged Moussaoui with conspiring to kill officers and employees of the United States, which "includ[ed] members of the Department of Defense stationed at the Pentagon." *Id.* 829.

Thus, the indictment alleged that Moussaoui joined the conspiracies that resulted in the September 11 attacks. JAU808-09. It required the government to prove that Moussaoui agreed to participate in al Qaeda's plan to fly commercial aircraft into U.S. buildings, but not that he agreed to participate in (or even knew the details of) the particular hijackings that actually took place on September 11. *See* JAU6351 (district court noting [redacted]). In other words, to be guilty of these charges, it was not necessary for Moussaoui to know the precise date on which the attacks would take place, the identities of the other hijackers, the other targets beyond his own, or whether the attacks would be simultaneous or successive.[33]

b. Moussaoui Received The Indictment And Discussed It With Counsel And The District Court

Although Moussaoui now claims that he was unfamiliar with the indictment at the time of his plea (Br. 149), the record shows otherwise. First, because Moussaoui undeniably received a copy of the indictment (JAU55, 666), this Court

[33] Moussaoui claims (Br. 142) that "the Indictment charged [him] with participation in the September 11th attacks." In fact, the indictment alleged that Moussaoui participated in the conspiracies that *resulted* in those attacks. Thus, while the September 11 attacks were undoubtedly "*an* object" of the conspiracy, Br. 143 (emphasis added), the indictment did not preclude the possibility of other objects, and thus the September 11 attacks cannot be described as "*the* object of the charged conspiracy." *Id.* (emphasis added).

may presume that he was informed about the nature of the charges against him. *Bousley* v. *United States*, 523 U.S. 614, 618 (1998); *United States* v. *Lalonde*, 509 F.3d 750, 760 (6th Cir. 2007). This presumption is bolstered by the district court "formally" arraigning Moussaoui on each of the two superseding indictments to ensure that he understood any changes made to the previous version. JAU666-78, 837-40. Moreover, from June 14, 2002, to November 13, 2003, Moussaoui represented himself, demonstrating (in the district court's opinion) an understanding of the legal system superior to that of some lawyers. JAU1435. Given Moussaoui's self-representation, his current claim that he was unfamiliar with the indictment is wholly implausible. Indeed, Moussaoui himself refuted this claim at the plea hearing, noting that while he did not have a copy of the indictment with him, "I know very much what it's talking about." *Id.* 1418-19.[34]

Moussaoui not only received and reviewed the indictment on his own, he discussed it with his legal counsel. JAU55, 666; *see Bradshaw* v. *Stumpf*, 545 U.S. 175, 183, (2005) (court usually may rely on counsel's assurance that defendant has been properly informed of the nature and elements of the charge to which he is

[34] Moussaoui's claim (Br. 149) that he "told the court that it had been a long time since he had reviewed the Indictment" is false. In fact, he stated that he had *received* the indictment "a long time ago," right before assuring the district court that "[h]e kn[ew] very much what it's talking about." JAU1419.

pleading guilty). Indeed, at the *ex parte* hearing shortly before his plea, Moussaoui complained that his attorneys "have pour[ed] on me all their so-called legal advice" during recent letters and meetings. 2SJAU45, 62.[35] Moussaoui also offered to sign a letter acknowledging this advice. *Id.* 62. Mr. Yamamoto likewise confirmed that he had discussed with Moussaoui his decision to plead guilty, *id.* 55-56, and further made clear that Moussaoui understood the indictment's implications, noting that "[Moussaoui had] indicated *he's now willing to accept responsibility for the events of 9/11*." *Id.* 55 (emphasis added).[36]

Moussaoui also received information regarding the charges in the indictment

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[35] Moussaoui insinuates (Br.137) that this "dress rehearsal" demonstrates a plot between the district court and the government to trap him into pleading guilty to charges they knew he disputed. In fact, the district court held the hearing for his benefit — with the consent of the government — out of concern that another aborted plea attempt "[w]ith the trial looming," would "poison the jury pool." JAU6335, 2SJAU48.

[36] Because Moussaoui was prepared at the time of his plea to acknowledge his responsibility for the events of September 11, it is irrelevant that on earlier occasions he had denied that he was "guilty" of the crimes of that day. Br. 147 & nn.72, 74. Criminal defendants often deny culpability for the charges they face before pleading guilty, and these denials cannot be used to impeach their later pleas. Likewise, [redacted]JAU6329, and because Moussaoui's attorney clearly indicated that Moussaoui had changed his mind about "accept[ing] responsibility for the events on 9/11," 2SJAU55, the district court did not need to "[seek] to understand the distinction in Moussaoui's mind between this plea and the failed 2002 plea." Br. 151.

and the nature of conspiracy law at the prior hearings where he attempted to enter a *nolo* or guilty plea. *Vonn*, 535 U.S. at 75 ("[D]efendants may be presumed to recall information provided to them prior to the plea proceeding[.]"). At the July 25, 2002 hearing, for example, when it became clear that Moussaoui was willing to admit to certain facts alleged in the indictment — such as his membership in al Qaeda, JAU1024-29 — but not others, the district court engaged Moussaoui in an extended discussion on the law of conspiracy. *Id.* 1024-33. The court warned Moussaoui that a guilty plea to Count One required an admission that he agreed with others "to destroy or damage structures or to injure people," and that if Moussaoui did not agree to this central fact, it could not accept his guilty plea. *Id.* 1029.[37] The court also made clear that it could not accept Moussaoui's plea if he maintained that he conspired with al Qaeda to commit a different offense, explaining that "for example, if you came to the United States to learn how to fly crop duster planes because down the road maybe you were going to poison somebody's water supply, *that's not the conspiracy alleged in this case*." JAU1030 (emphasis added). Thus, Moussaoui was plainly warned that, in order to plead guilty, he must admit to "the essence of the conspiracy," as alleged in the indictment, and not to some other offense. *Id.* 1029-31.

[37] The court likewise explained to Moussaoui that, to plead guilty to Count Two, he needed to agree that he knowingly and willingly joined an al Qaeda conspiracy to commit aircraft piracy. JAU1033-35.

c. Moussaoui Carefully Reviewed And Signed The Statement Of Facts

Likewise, Moussaoui received notice of the indictment's charges through the SOF, which he read "more than 10 time[s]," "ponderi[ing] each paragraph," and then signed after making a single correction. 2SJAU45-46; JAU1430-32, 1435; *see also id.* at 1435 (district court noting that Moussaoui had "several days to carefully go over" the SOF, along with "the advice and consultation" of counsel). Not only did the SOF track the essential elements of the conspiracies, but it also detailed background information about al Qaeda, the plot, and Moussaoui's actions in furtherance of the plot, JAU1409-13. As a result, the SOF "added factual flesh to the bones of the charge[s] . . . , thereby giving [Moussaoui] notice of the meaning of the charge[s]." *United States* v. *Glen*, 418 F.3d 181, 184 (2d Cir. 2005) (internal citations and quotations omitted). Although Moussaoui now claims (Br. 136, 148) that this document was "artfully" drafted to mislead him into thinking that he was pleading guilty to an "inchoate" conspiracy unrelated to September 11, a glance at the SOF itself refutes this claim.

The SOF laid out what the government would have proved if the case had gone to trial, including that al Qaeda members conceived of a plan in which civilian commercial airliners would be hijacked and flown into prominent buildings in the United States, JAU1410; that Moussaoui knew of the plan and agreed to travel to the

United States to participate in it, *id.*; and that the September 11 attacks resulted from the plan, *id.* 1412-13. Although the SOF did not allege that Moussaoui knew the exact date and targets of the attack, or the identity of other participants, neither did the indictment. And, as explained above, the government was not required to either make or prove such claims. *See supra*, at 70-73.[38] At the same time, the SOF did not shy away from Moussaoui's involvement in the September 11 plot. Paragraph 16, for example, provided that "[a]fter his arrest, Moussaoui lied to federal agents to allow his al Qaeda 'brothers' to go forward with the operation to fly planes into American buildings." JAU1412. The final six paragraphs of the SOF, which immediately followed this passage, went on to describe the September 11 attacks. *Id.* 1412-13.[39] No reasonable reader of this document could conclude that Moussaoui had been

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[38] Contrary to Moussaoui's claim, the district court did not "caution the Government not to specifically mention the September 11th conspiracy in its list of facts to be admitted." Br. 136 (citing JAU6351). Nor did the district court indicate a belief that "Moussaoui would not admit to any involvement in the September 11th conspiracy." *Id.* (citing JAU6353-54); *see also id.* at 148.

[39] The SOF was therefore "more than sufficient evidence to establish [Moussaoui's] guilt beyond a reasonable doubt as to all six counts," JAU1436, and certainly justified the conclusion that there was a factual basis for Moussaoui's plea. *See* Fed. R. Crim. P. 11(b)(3); *United States* v. *Mitchell*, 104 F.3d 649, 652 (4th Cir. 1997) ("[A] district court need not replicate the trial that the parties sought to avoid. . . . Rather, it need only be subjectively satisfied that there is a sufficient factual basis for a conclusion that the defendant committed all of the elements of the offense.").

charged with (or was pleading guilty to) a conspiracy unrelated to September 11; clearly Moussaoui, who signed the SOF as the "20th Hijacker," did not read it that way.[40]

d. The District Court Complied With Rule 11 At The Guilty Plea Hearing, Again Informing Moussaoui Of The Charges In The Indictment

Finally, the district court complied with every requirement of Rule 11 at the April 22, 2005 change-of-plea hearing, including the requirement that it inform Moussaoui of the nature of the offenses charged, and the requirement that the court be satisfied that the plea had a factual basis in the record. JAU1414-46.[41] First, the

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[40] Moussaoui undoubtedly understood the legal effect of signing this statement, as the district court carefully explained it to him, and he acknowledged that he understood. JAU1431 ("If you sign that statement of facts and if I accept it, that will suffice to be a factual basis to find you guilty."); *see also* 2SJAU70 ("I understand that these statements of fact is there to stay and I cannot go back and say no."). He cannot now disavow it. *See United States* v. *Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) ("Statements of fact by a defendant in Rule 11 proceedings may not ordinarily be repudiated."); *Burket* v. *Angelone,* 208 F.3d 172, 191 (4th Cir. 2000) ("Absent clear and convincing evidence to the contrary, [petitioner] is bound by the representations he made during the plea colloquy.").

[41] Moussaoui complains that he was represented by only one lawyer at the plea hearing, and suggests that he signed the SOF as a result of this "restraint." Br. 138. At the time of the plea, however, Moussaoui had made clear his extreme dislike of his other two attorneys, and had refused to communicate with them, describing — just two days earlier — one of them as "openly racist" and the other as "just a rude man." 2JAU57. The district court, moreover, viewed their "overheated argument" at a sealed hearing as evidence that they were trying to "undercut this process." SJA15. Thus, the court prohibited them from sitting at

district court made clear to which charges Moussaoui was pleading guilty, stating "I need to go over the indictment with you at this time, the specific charges that are included in the indictment, . . . and to make sure that you understand what the elements would be that the government would have to prove if the case went to trial." *Id.* 1419. The district court then summarized the allegations in each count of the indictment, and Moussaoui indicated that he understood these charges. *Id.* 1419-1420. The district court's discussion of the potential penalties likewise emphasized that the charges to which Moussaoui was pleading were Counts One through Six of the indictment. *Id.* 1421-1423. In return, Moussaoui made clear that he "want[ed] to plead guilty to the six charges that he faced in the indictment." *Id.* 1424.

Significantly, in summarizing the elements of the offenses, the district court asked Moussaoui:

> Do you understand that the government would also have to prove beyond a reasonable doubt that at least one act in furtherance of the conspiracy occurred in the Eastern District of Virginia? So, for example, the allegation that the Pentagon was one of the recipients of the – or targets of the conspiracy would give this Court jurisdiction over the conspiracy. Do you understand that?

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counsel table, although they could sit in the front row and would "be easily available to either Mr. Yamamoto or the defendant for consultation." *Id.* Moussaoui provides no reason to believe that the presence of either attorney at counsel table — a difference of no more than a few feet from the front row — during the plea hearing would have altered his insistence on pleading guilty, even assuming he would have wanted to consult them.

JAU1425; *see id.* (district court noting that the five other counts would require the government to prove "that at least one act in furtherance of the conspiracy occurred in the Eastern District of Virginia"). In indicating that he understood this point, Moussaoui made absolutely clear that he knew he was pleading guilty to conspiracy charges that involved the September 11 attacks. *Id.* 1426. Moreover, at no time during the plea colloquy did Moussaoui deny that he participated in the conspiracies described in the indictment, or that these conspiracies resulted in the September 11 attacks.

Under these circumstances, the district court was entitled to conclude that Moussaoui understood the nature of the conspiracy charges to which he pleaded guilty. Moussaoui was repeatedly advised of the nature of the charges over a three-and-a-half-year period, in which the district court carefully explained the elements of conspiracy, even providing hypothetical examples to ensure Moussaoui's complete understanding of the charges. JAU1030; *DeFusco*, 949 F.2d 114, 117 (4th Cir. 1991) (guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing). The district court also properly took into account Moussaoui's intelligence and capacity to comprehend legal questions. *See DeFusco*, 949 F.2d at 117 (when crafting "the best method to inform and ensure the defendant's understanding" a district court has wide discretion

and should consider "the defendant's personal characteristics, such as age, education, and intelligence"); *Reckmeyer*, 786 F.2d at 1221 ("The manner of ensuring that the defendant is properly informed is committed to the good judgment of the district court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence.").[42] Given the depth of the district court record, it is "unclear . . . what sort of elaboration would have enhanced in any significant measure appellant's understanding of the conspiracy charge." *Frederick* v. *Warden, Lewisburg Corr.*, 308 F.3d 192, 197 (2d Cir. 2002).

e. Moussaoui's Post-Plea Comments Do Not Affect The Validity Of His Guilty Plea

Faced with this overwhelming evidence that he was informed about, and understood, the charges to which he entered guilty pleas, Moussaoui contends that he actually disavowed any involvement in the September 11 attacks at the plea hearing, and insisted that he was involved in a different conspiracy. Br. 138-139, 149-150,

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[42] The district court viewed Moussaoui as "an extremely intelligent man," who "actually [had] a better understanding of the legal system than some lawyers I've seen in court." JAU1433, 1435; *see also* 2SJAU51 ("this defendant has always struck this Court as articulate, intelligent, fully understanding the proceedings"). This finding was well founded. Moussaoui had received degrees in commerce and technology; had studied as a graduate student in London, England, where he received a Master's Degree in International Business; had traveled extensively; and was conversant in English, Arabic, and his native French. JAU521, 1417.

155. This claim is seriously misleading. To understand why this is so, however, we first outline the relevant facts relating to this claim, which are missing from Moussaoui's brief. *After* his pleas had been accepted and the district court had declared the proceedings "finished," JAU1437, Moussaoui seized the opportunity to launch into a monologue in which he (1) noted that the SOF did not contain a single paragraph "where they say that I am specifically guilty of 9/11"; (2) suggested that he was part of "a broader conspiracy" to use airplanes as weapons of mass destruction; (3) admitted that he was being trained to fly a plane into the White House but claimed that "this conspiracy was different conspiracy that 9/11"; (4) stated that the aim of his conspiracy was "to free Sheikh Omar Abdel Rahman, the blind sheikh, who is held in [federal custody in] Florence, Colorado"; and (5) claimed that "[e]verybody know that I'm not 9/11 material." *Id.* 1440-45. The district court tolerated that speech briefly before cutting him off. *Id.* 1444. Critically, however, neither Moussaoui nor his counsel suggested that the guilty pleas he had just entered should be set aside due to these remarks.

Without ever acknowledging that this speech occurred *after* his pleas had been accepted, Moussaoui salts his brief with excerpts to suggest that he was obviously confused at the plea hearing, and that the district court somehow violated Rule 11 in

accepting his plea. *See, e.g.*, Br. 138-139, 149-151, 152.[43] This suggestion is misguided. Rule 11(b)(1) (entitled "Advising and Questioning the Defendant") describes what a court must do "[b]efore it accepts a plea of guilty or nolo contendere." Neither this rule, nor any other portion of Rule 11, requires the district court to *sua sponte* reconsider an already accepted guilty plea based on post-plea remarks by the defendant. To the contrary, a defendant's "solemn declarations" at a Rule 11 plea colloquy "carry a strong presumption of verity." *United States* v. *White*, 366 F.3d 291, 295 (4th Cir. 2004) (quoting *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977)); *see also Lambey*, 974 F.2d at 1394 ("If an appropriately conducted Rule 11 proceeding is to serve a meaningful function, on which the criminal justice system can rely, it must be recognized to raise a strong presumption that the plea is final and binding."). Thus, even assuming that anything Moussaoui stated after the court accepted his plea was inconsistent with, or contradicted, his statements during the colloquy, those statements should be presumed false. *United States* v. *Lemaster*, 403 F.3d 216, 221 (4th Cir. 2005) (defendant's later statements that directly contradict his "sworn statements made during a properly conducted Rule 11 colloquy are always palpably incredible and patently frivolous or false") (internal quotation marks

[43] At one point in his brief, Moussaoui actually states, incorrectly, that he denied he was a part of the September 11 attacks "*during* the district court's plea colloquy[.]" Br. 187 (emphasis added).

omitted); *cf. United States* v. *Weathington*, 507 F.3d 1068, 1072 (7th Cir. 2007) (holding that courts "may discredit any reason that a defendant gives for withdrawing his guilty plea that contradicts his testimony at a plea hearing").

In fact, Moussaoui's post-plea comments were not inconsistent with his guilty plea. First, it is true (but completely irrelevant) that no single paragraph in the SOF said, "Moussaoui is specifically guilty of 9/11." Instead, the SOF provided a factual basis for finding Moussaoui guilty of the indictment, which charged him with participating in the conspiracies that resulted in the September 11 attacks. Second, Moussaoui's claim that he was part of a conspiracy to use airplanes as weapons of mass destruction and that this conspiracy was "broader" than the September 11 attacks is also entirely consistent with the indictment's allegations. *See supra*, at 72.

Likewise, whether or not Moussaoui actually believed, as he claimed in his speech, that his motive for the hijackings was to free the "blind sheikh," or that his attack on the White House would have taken place sometime after the September 11 attacks, was completely irrelevant to the charges. The broad goals in the conspiracies charged were to commit terrorism transcending national boundaries, aircraft piracy, destruction of aircraft, the use of weapons of mass destruction, the murder of United States employees, and the destruction of United States property, all of which the SOF summarized as an operation in which civilian commercial airliners would be hijacked

and flown into prominent buildings in the United States. JAU1410; *United States* v. *Nunez*, 432 F.3d 573, 578 (4th Cir. 2005) ("The focus of a conspiracy is the single-mindedness to achieve a particular goal."). Thus, Moussaoui's post-plea assertion that he, in effect, did not take part in the full range of the conspiracies' activities, was beside the point. *Banks*, 10 F.3d at 1054 (holding that "one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence").[44]

Indeed, it is probably because Moussaoui's post-plea comments were not actually inconsistent with his guilty plea that no one, including his own counsel, found anything problematic in those comments.[45] If Moussaoui actually believed that

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[44] Moussaoui's claim (Br. 150, 151) that he participated in an "inchoate conspiracy" adds nothing useful to his argument. Moussaoui's plan to fly an airplane into the White House is properly viewed as part of the broader al Qaeda conspiracy to fly aircraft into buildings, regardless of whether Moussaoui actually achieved his goal. *See* Black's Law Dictionary 761 (6th ed. 1990) (describing "inchoate" as "Imperfect; partial; unfinished; begun, but not completed"); *cf. United States* v. *Yearwood*, 518 F.3d 220, 227-28 (4th Cir. 2008) (explaining that conspiracy is an agreement to commit the crime and conviction does not require that crime actually occurred), *petition for cert. filed*, (U.S. Jun. 4, 2008) (No. 07-11309).

[45] As Moussaoui points out in his brief (Br. 155), at a CIPA hearing in February 2006, the district court remarked that [redacted] JAC1816, while his counsel [redacted] *id.* 1817.

the district court did not properly inform him of the charges and that as a result he had mistakenly pleaded guilty to a different conspiracy (and that his post-plea comments were evidence of this), he could have immediately moved to withdraw the plea. *See* Fed. R. Crim. P. 11(d) (defendant may withdraw a plea of guilty after the court accepts it, but before the court imposes sentence, if the defendant can show a fair and just reason). He had more than a year following his guilty plea before his sentencing to do so. *Id.*[46]

Indeed, everyone understood that the broad goal in the conspiracies charged, for which Moussaoui knowingly agreed to work, was to hijack civilian commercial airliners and fly them into prominent buildings in the United States. Thus, Moussaoui's post-plea assertions that he had in mind some motive like freeing the "blind sheikh" or that he did not take part in the full range of the conspiracies' activities was inconsequential to his guilty plea.

[46] Moreover, the circumstances of Moussaoui's speech strongly suggest that it was not a sincere expression of his beliefs, intended for court or counsel, but rather a public relations stunt. First, at the hearing shortly before his plea, Moussaoui told the court "on Friday [*i.e.*, at the plea proceeding], I just want the opportunity *after my guilty plea* to, to say that I want what I want." 2SJAU62 (emphasis added). Moussaoui then explained that he "just want[ed] a few words so *people* will know my own position." *Id.* 63 (emphasis added); *see id.* ("[p]eople will know that Moussaoui knowingly and voluntarily have chosen this course of action."). Second, the fact that Moussaoui waited until after his pleas were accepted to launch into this speech (as he told the district court he would) demonstrates that he was not trying to assist the district court in determining whether to accept his plea, but rather was trying to spread propaganda as part of his *jihad*. *See, e.g.*, JAU3945 (Moussaoui discussing his "war of propaganda"); *id.* 4484-85, 4440, 4452, 4461. Finally, Moussaoui acknowledged during his penalty phase testimony that this speech was a ploy. After Moussaoui provided detailed testimony erasing any doubt that he was supposed to be a pilot on

In sum, Moussaoui's contentions that his comments demonstrate that the district court violated Rule 11 by permitting him to plead guilty to a "wholly separate conspiracy" from those charged in the indictment, Br. 149, and that he had a "profound misunderstanding of what he was pleading to," Br. 148, are without merit. Accordingly, his other arguments based entirely on the success of his "different conspiracy" contention similarly fail. His claim, for example, that the guilty plea was factually unsupported as to certain counts because deaths did not result from the unspecified conspiracy "to which Moussaoui believed he pled," Br. 156-58, is groundless — the conspiracies to which Moussaoui pleaded guilty included as a result the murder of nearly 3,000 people on September 11, 2001, even though their scope was not limited to those events.[47] Equally baseless is Moussaoui's claim (Br.

September 11th, his counsel asked him about his post-plea comments: "You pled guilty in April of 2005. And at that time you said you were not part of 9/11, correct?" JAU4504. Moussaoui responded, "I signed the Statement of Facts, okay, and every single piece in the Statement of Facts was correct, okay. And after I say that I was not part." *Id.* This testimony confirms that Moussaoui's post-plea speech was not intended to retract his admissions; it suggests, on the contrary, that Moussaoui viewed the plea proceedings as an elaborate game. This Court has stated, however, that the Rule 11 plea colloquy is not "a procedural game in which pieces are moved and manipulated to achieve a result that can beat the system established for providing due process to the defendant." *Bowman*, 348 F.3d at 417; *Hyde*, 520 U.S. at 677 ("serious act of pleading guilty" should not be "degrade[d]" into "something akin to a move in a game of chess").

[47] For the same reason, Moussaoui's contention (Br. 156-58) that an essential element of the offense was that a death resulted from the conspiracy —

159-61) that, despite the Pentagon attack, venue was not proper in the Eastern District of Virginia. It is fundamental that "'a prosecution may be brought in any district in which any act in furtherance of the conspiracy was committed,' and 'proof of acts by one co-conspirator can be attributed to all members of the conspiracy.'" *United States* v. *Smith*, 452 F.3d 323, 335 (4th Cir. 2006) (quoting *United States* v. *Al-Talib*, 55 F.3d 923, 928 (4th Cir. 1995)).[48]

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because that fact increased the maximum punishment that could be imposed — and therefore the district court needed (but failed) to find a factual basis for that element is meritless. Even if Moussaoui's argument that "death resulting" is an essential element was correct, which we do not concede, the deaths on September 11, 2001, referenced in the stipulated SOF, JAU1412-13, clearly sufficed on that score. Moussaoui acknowledged as much before the sentencing proceedings even began. *See* 2SJAU84-85. Moreover, Moussaoui's penalty phase testimony that he was part of the September 11 conspiracy closed any conceivable gap in the factual basis for the plea. *See United States* v. *Martinez*, 277 F.3d 517, 522 n.4 (4th Cir. 2002) (because judgment is not entered until after sentencing, district court may defer the finding of a factual basis for the plea until the sentencing hearing).

[48] Moreover, any objection to venue was waived by the guilty plea. *United States* v. *Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (venue can be waived); *United States* v. *Calderon*, 243 F.3d 587, 590 (2d Cir. 2001) (venue is not jurisdictional). Although Moussaoui complains (Br. 160-61) the waiver was unknowing because at the plea "the Court included the issue of venue in the middle of a long compound question," Moussaoui had long before indicated he understood this particular consequence of his plea when the district court specifically warned him that a guilty plea would waive all nonjurisdictional defects, "including the Court's denial of your request for a change of venue . . . ." JAU1008.

f. The District Court Properly Advised Moussaoui Of The Possible Penalties

Moussaoui claims (Br. 171-77) that the district court did not properly advise him of the penalties he faced. This contention, also raised for the first time on appeal, is unsupported by the record. Rule 11 requires that a defendant be informed of "any maximum possible penalty." Fed. R. Crim. P. 11(b)(1)(H). The district court satisfied this requirement by advising Moussaoui during the plea proceeding that the maximum sentence for each of the six counts was death or life imprisonment. *See* JAU1420-23.[49] Moussaoui nonetheless suggests that the plea should be vacated because the district court "informed him that there were only two sentencing options available." Br. 171. He is wrong. The district court advised him of the *maximum* sentences, as required by Rule 11, and did not state that there were only two sentencing alternatives. In fact, as to Counts Four, Five and Six, the district court also advised that a "term of years," or something less than life, was available. JAU1420-23.

Moussaoui points only to a comment by the district court on June 13, 2002, to

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[49] In fact, the district court had provided Moussaoui with a list of the maximum penalties for each count, and had ensured that Moussaoui "discussed those penalty provisions with Mr. Yamamoto," before ultimately going over the maximum penalties with Moussaoui in open court at the plea proceeding. JAU1420-21.

support his claim that the district court misinformed him about the possible sentences. Br. 172, 177 (citing JAU524, where the district court stated, at a hearing relating to Moussaoui's right to waive counsel, that Moussaoui was "looking at either life imprisonment without the possibility of parole or the death penalty"). This comment — which likely reflected the district court's awareness that, in the event Moussaoui was not sentenced to death, the Sentencing Guidelines would call for a life sentence — hardly could have confused Moussaoui nearly three years later at his guilty plea proceeding. Indeed, at that same proceeding, in addition to setting forth the maximums, the district court advised him of other possible sentences. *See* JAU1420-23; *Lambey*, 974 F.2d at 1395 (rejecting claim that defendant misunderstood possible sentences because of erroneous information he was given before the plea when the district court later corrected that information at the Rule 11 hearing).

g. Any Alleged Defects In The Plea Do Not Constitute "Plain Error"

There was no error with respect to any aspect of the Rule 11 proceeding. Even if there was, Moussaoui cannot satisfy the remaining requirements for a reversal based on plain error. For example, even if the district court *had* failed to make clear to Moussaoui that he was pleading guilty to an offense that involved the September 11 attacks, additional clarification would not have affected Moussauoui's choice. *Dominguez Benitez*, 542 U.S. at 83 ("[A] defendant who seeks reversal of his

conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea."). As the procedural history demonstrates, *see supra*, at 35-60, Moussaoui's decision to plead guilty was firm and irrevocable, and efforts to change his mind merely provoked his derision. Moreover, in advance of the plea, Moussaoui expressly stated his desire to [redacted] JAU6329. At the guilty plea, Moussaoui willingly embraced a role in the September 11 attacks — beyond anything the indictment itself required — by spontaneously signing the SOF as "20th Hijacker Zacarias Moussaoui." *See supra*, at 56. Any alleged error in explaining the indictment's implications, therefore, would not have affected his decision to enter a guilty plea.

B. The District Court Correctly Found No "Reasonable Cause" To Hold A Competency Hearing Before Taking Moussaoui's Plea

Moussaoui does not claim that he was actually incompetent to plead guilty. Moussaoui contends (Br. 161-71) only that the district court should have held a full competency hearing before accepting his plea, because (1) his family medical history included mental illness; (2) defense experts were concerned about his competence; and (3) he was subject to solitary confinement for more than three years leading up to his guilty plea. The argument is without merit.

1. Standard Of Review

A district court's decision not to conduct a competency hearing is reviewed for abuse of discretion. *United States* v. *Banks*, 482 F.3d 733, 742 (4th Cir. 2007). Because the trial court "is in a superior position to adjudge the presence of indicia of incompetency constituting reasonable cause to initiate a hearing," *id.* at 743, "this Court may not substitute its judgment for that of the district court," *id.* 742-43. Ultimately, this Court must determine whether the district court's "exercise of discretion, considering the law and the facts, was arbitrary or capricious." *Id.* (citation and internal quotations omitted).[50]

2. Applicable Law

A contention that the district court should have ordered a competency evaluation or hearing is a "procedural competency claim." *United States* v. *General*, 278 F.3d 389, 396 (4th Cir. 2002) (internal quotation omitted); *see Beck* v. *Angelone*, 261 F.3d 377, 387 (4th Cir. 2001) ("Competency claims can raise issues of both procedural and substantive due process."). Procedural competency claims are governed by a "reasonable cause" standard, which requires a competency hearing "if

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[50] This Court usually reviews the district court's "competency determination for clear error[,]" *United States* v. *Robinson*, 404 F.3d 850, 856 (4th Cir. 2005), but Moussaoui does not claim on appeal that he was actually incompetent to plead guilty.

there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a); *General*, 278 F.3d at 396. This standard is the same as that for competence to stand trial. *Godinez* v. *Moran*, 509 U.S. 389, 399 (1993) (standard for competence to plead guilty same as standard established in *Dusky*); *but see*, *Indiana* v. *Edwards*, 128 S. Ct. 2379, 2387-88 (2008) (Constitution permits states to adopt higher standard of competency when mentally impaired defendant seeks to represent himself at trial).

To prevail on such a claim, an appellant "must establish that the trial court ignored facts raising a 'bona fide doubt' regarding [his] competency to stand trial." *Walton* v. *Angelone*, 321 F.3d 442, 459 (4th Cir. 2003). This Court examines "all of the record evidence pertaining to the defendant's competence, including: (1) any history of irrational behavior; (2) the defendant's demeanor at and prior to sentencing; and (3) prior medical opinions on competency," *General*, 278 F.3d at 397, while recognizing that "there are no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Walton*, 321 F.3d at 459 (internal quotations omitted).

3. Discussion

The district court's decision not to hold a competency hearing was supported by the record, which was voluminous on the subject. That record did not offer "reasonable cause" to believe that Moussaoui was mentally incompetent to the extent that he was unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. The district court carefully and repeatedly considered defense counsel's submissions and expert evidence on Moussaoui's mental health, but found none of it persuasive in light of, among other things, countervailing expert evidence, and the district court's own dealings with, and observations of, Moussaoui over the course of several years. This record demonstrated that Moussaoui always understood the nature and consequences of the proceedings against him, and that he was clearly able to assist — if he so desired — in his defense. *See Bryson* v. *Ward*, 187 F.3d 1193, 1202 (10th Cir. 1999) (in deciding whether to conduct a full competency hearing, "[a] trial court may rely on its own observations of the defendant's comportment").

During a period of more than three years before the guilty plea, Moussaoui spoke often in open court — before, during, and after he was *pro se*. The district court was able to observe Moussaoui's demeanor, assess his arguments, and gauge his reactions to rulings. Moreover, the district court reviewed motions, letters, and

other filings, which Moussaoui personally drafted. The district court even witnessed Moussaoui represent himself at a Rule 15 deposition of Faiz Bafana, in November 2002, where many of his objections were sustained and where he conducted his own extensive cross-examination. *See* JAU1967-69, 2049-2076; *cf. United States* v. *Barfield*, 969 F.2d 1554, 1557 (4th Cir. 1992) (defendant's ability to represent himself in complex case was further proof of competency to stand trial).

Throughout the proceedings below, the district court was "particularly impressed" with Moussaoui, JAU992-93, finding him to be [redacted] *id.* 6340-41, and always "oriented to time and place," 2SJAU44. The district court "always" considered Moussaoui to be "articulate, intelligent, fully understanding the proceedings," *id.* 51, and "an extremely intelligent man" with "a better understanding of the legal system than some lawyers," JAU1435. These observations, moreover, were made in light of the district court's cautious and careful approach, as exemplified by the *ex parte* proceeding two days before the guilty plea, which the district court convened to be certain that Moussaoui was competent to plead and would do so knowingly and voluntarily. 2SJAU41-43; *see United States* v. *West*, 877 F.2d 281, 285 n.1 (4th Cir. 1989) ("The district court, having observed and talked with [the defendant] at numerous prior hearings, found no reasonable cause to believe he was unfit to stand trial. . . . Such a determination is within the trial court's

discretion . . . ."); *cf. Indiana* v. *Edwards*, 128 S. Ct. at 2387 ("[T]he trial judge, particularly one such as the trial judge in this case, who presided over one of [defendant's] competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."). Thus, the district court was uniquely well-positioned to determine that a competency hearing was unnecessary. Given that this decision was fully supported by the conclusions of the only medical expert with meaningful access to Moussaoui, it is virtually unassailable on appeal.

Moussaoui's argument (Br. 167-68) that his family medical history and the defense expert reports required the district court to conduct a full competency hearing is without support. The district court carefully considered those factors throughout the proceedings, but consistently found that the quantum of information "negate[d] any question about there being any serious mental illness or disease from Mr. Moussaoui." JAU514, 992-93, 1435. The district court rejected the qualified conclusions of defense counsel's experts in favor of the findings of Dr. Patterson, the only mental health expert to have interviewed Moussaoui. [redacted] *Id.* at 5787-88. [redacted]

[redacted] *Id.* 5758. The district court was certainly entitled to find Dr. Patterson's assessment more persuasive than those of the defense experts who had never evaluated Moussaoui in person. *See United States* v. *Cristobal*, 293 F.3d 134, 144 (4th Cir. 2002) ("Assessing and evaluating the strength and weaknesses of two experts' conflicting testimonies is a task particularly within the fact finder's province.").

Moussaoui's contentions (Br. 168-70) based on his confinement fare no better. The district court was well aware of the possible impact of solitary confinement on Moussaoui's competency. This was one of the reasons why the district court "erred on the side of caution" in ordering any competency evaluation before granting him *pro se* status. JAU515. The district court "carefully considered" defense counsel's expert report on solitary confinement, *id.* at 992-93, but ultimately found that anger arising from being detained "under the conditions in which he has been housed" did "not equate to incompetence," 2SJAU51. This conclusion was consistent with the findings of many other courts, which have rejected similar confinement-based claims. *See Hunter* v. *Bowersox*, 172 F.3d 1016, 1020-23 (8th Cir. 1999) (affirming district court's dismissal of habeas petition claiming that coercive conditions of pretrial solitary confinement rendered petitioner incompetent to plead); *United States* v.

Ellison, 835 F.2d 687, 692-93 (7th Cir. 1987) (rejecting claim that psychological pressures resulting from solitary confinement rendered guilty plea involuntary); *Koenig* v. *Willingham*, 324 F.2d 62, 64-65 (6th Cir. 1963) (rejecting claim that two years' pretrial solitary confinement undermined voluntariness of guilty plea). Moreover, Moussaoui points to no case in which solitary confinement was enough to warrant a competency hearing.

The personal views of Moussaoui's trial counsel are not determinative here. While defense counsel typically have maximal exposure to the defendant, and therefore are usually in the "best position to determine whether a defendant's competency is questionable," *Bryson*, 187 F.3d at 1201, that was not necessarily the case here. For the most part, Moussaoui refused to meaningfully interact with several members of his defense team. However, the only member of the defense team to have meaningful contact with Moussaoui — Mr. Yamamoto — described him to the district court as "friendly" and "cordial"; stated that they engaged in "calm" and "rational" discussions; and confirmed that, prior to pleading guilty, Moussaoui knew "what we're talking about" and "responded appropriately" to questions. SJAU15; JAU1433-34; 2SJAU54-55. At any rate, "the concerns of counsel alone are insufficient to establish doubt of a defendant's competency." *Bryson*, 187 F.3d at 1202; *General*, 278 F.3d at 398 (crediting counsel's statements about defendant's

behavior as true, but finding that they did not establish "any reasonable doubt" as to competence in light of medical evidence).

The district court observed, and heard about, Moussaoui's combative behavior towards his counsel. But there need not be a "competency hearing . . . any time that a defendant engages in disruptive tactics or pursues a frivolous legal strategy." *Banks*, 482 F.3d at 743. Moreover, the district court observed that [redacted] JAU6341 ([redacted]); *cf. Hall* v. *United States*, 410 F.2d 653, 658 (4th Cir. 1969) (rejecting defendant's contention that further psychological examinations were required because district court was "thoroughly acquainted" with defendant's mental condition).

The record shows that Moussaoui understood the nature and consequences of the proceedings against him, and was able, if he so chose, to assist properly in his defense. Thus, there was not "reasonable cause" to believe that Moussaoui was mentally incompetent, and the district court was well within its broad discretion not

to hold a full competency hearing before the guilty plea.[51]

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As the record demonstrates, although the district court faced daunting challenges because of, among other things, the nature of this particular defendant, the court never deviated from strict adherence to Rule 11 and all of the constitutional protections embodied therein. Thus, the record definitively establishes that Moussaoui understood the nature of the charges in the indictment; that he knew he was pleading guilty to those charges; that he was competent to do so; that neither the government nor the district court misled Moussaoui about the implications of his

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[51] The jury's findings at the sentencing proceeding were consistent with the district court's rulings. After hearing extensive evidence about Moussaoui's mental health, including the testimony of Drs. Amador, First and Patterson, JAU4826-4983, 4997-5071, 5246-5393, not one juror found by a preponderance of the evidence that Moussaoui suffered "from a psychotic disorder, most likely schizophrenia, paranoid subtype." *Id.* 6739. The jury rejected the contention after observing Moussaoui for approximately two months during the sentencing hearing, which included Moussaoui twice testifying at length, and undergoing rigorous cross-examination. *Id.* 3875-3984, 4486-87, 4410-4508. Thus, even if one disagrees with the district court's "reasonable cause" determination at the time of Moussaoui's guilty plea, the extensive competency proceedings following the guilty plea confirmed the district court's previous assessment. *See United States* v. *Denkins*, 367 F.3d 537, 545-48 (6th Cir. 2004) (holding that, even assuming district court had "reasonable cause" to believe that defendant might have been mentally incompetent and thus erred in going forward with guilty plea hearing without first conducting competency hearing, such error was harmless in light of post-plea competency examinations showing that defendant did not meet the statutory standard of incompetence).

plea, and all of its consequences, including possible sentences; and, that there was an ample factual basis for the plea. Moreover, although Moussaoui repeatedly suggests the district court was willing to "compromise or eliminate core constitutional protections" because of the nature of this prosecution, Br. 19, the record demonstrates the exact opposite. The court successfully ensured that, as CIPA mandates, the government's national security interests were protected without sacrificing any of Moussaoui's constitutional rights. But, at any rate, as demonstrated in the next section, his constitutional claims are not properly before this Court.

II. MOUSSAOUI'S CONSTITUTIONAL CLAIMS ARE BARRED BY HIS GUILTY PLEA AND ARE WITHOUT MERIT

Moussaoui alleges that the district court committed multiple Fifth and Sixth Amendment violations, all of which preceded — often by years — his decision to plead guilty. Br. 19-116. He asserts, for instance, that the district court infringed his right to choose counsel, Br. 19-49; communicate with counsel, Br. 49-84, 120-25; represent himself, Br. 84-100; be present at critical stages of the case, Br. 100-04; and personally access exculpatory information, Br. 104-07, 118-20. Recognizing that his guilty plea bars these claims, Moussaoui tries to shoehorn them into this appeal by contending that the combination of purported errors left the prospect of a trial so unappealing that he had no choice but to plead guilty.

The claims should be rejected for what they are — arguments about pre-plea

proceedings that became legally irrelevant once the defendant's guilt was conclusively determined by his own admissions. Moussaoui's guilt could not be more clear, as it was established by the comprehensive Rule 11 proceeding and later affirmed by his testimony from the witness stand. An appellant whose guilt has been resolved "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). This bar, moreover, fully encompasses back-door efforts by appellants, like Moussaoui, who cast constitutional claims as challenges to an unconditional plea. In any event, Moussaoui's constitutional claims have no merit. Accordingly, for the reasons below, the claims should be rejected.

A. The Constitutional Claims Are Barred By Moussaoui's Knowing And Voluntary Guilty Plea

"When a defendant pleads guilty," as this Court has explained, "he waives all nonjurisdictional defects in the proceedings conducted prior to entry of the plea." *United States* v. *Bundy*, 392 F.3d 641, 644 (4th Cir. 2004). This is so because a guilty plea "represents a break in the chain of events which has preceded it in the criminal process," *Tollett*, 411 U.S. at 267, and "comprehend[s] all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *United States* v. *Broce*, 488 U.S. 563, 569 (1989). As a result, an appellant "has no non-jurisdictional ground upon which to attack that judgment except the

inadequacy of the plea," *Bundy*, 392 F.3d at 644-45, or the government's power "to bring any indictment at all," *Broce*, 488 U.S. at 575; *United States* v. *Bluso*, 519 F.2d 473, 474 (4th Cir. 1975) ("A guilty plea is normally understood as a lid on the box, whatever is in it, not a platform from which to explore further possibilities.").[52]

The Supreme Court has made clear that even challenges of a constitutional magnitude are foreclosed by a valid guilty plea. *See Tollett*, 411 U.S. at 267 (appellant who pleaded guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea"); *see also*, *Ricketts* v. *Adamson*, 483 U.S. 1, 9-10 (1987) (double jeopardy claims not apparent from face of indictment precluded by guilty plea); *Lefkowitz* v. *Newsome*, 420 U.S. 283, 288 (1975) ("guilty plea . . . bars the later assertion of constitutional challenges to the pretrial proceedings"); *McMann* v. *Richardson*, 397 U.S. 759, 768 (1970) (coerced confession claim could not be pursued after guilty

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[52] The guilty plea bar does not stem from the traditional notion of waiver, "but from the admissions necessarily made upon entry of a voluntary plea of guilty." *Broce*, 488 U.S. at 573-74; *accord Journigan* v. *Duffy*, 552 F.2d 283, 287-88 (9th Cir. 1977) (Supreme Court's case law premised on neither "waiver nor by-pass," but concept that "a guilty plea establishes as a substantive matter the factual guilt of the defendant"). For that reason, as this Court has noted, Rule 11 "does not require a district court to inform a defendant that, by pleading guilty, [he] is waiving [his] right to appeal any antecedent rulings or constitutional violations," *United States* v. *White*, 366 F.3d 291, 299 n.6 (4th Cir. 2004), although, in an abundance of caution, the district court did in fact apprise Moussaoui of this particular consequence of his plea. *See* JAU1428-29, 1439.

plea; if the defendant were not guilty he could have pursued "sensible course" of contesting guilt and confession claim through trial and appeal); *Brady* v. *United States*, 397 U.S. 742, 749-57 (1970) (guilty plea valid even where plea was motivated by effort to avoid death penalty under unconstitutional statute); *Parker* v. *North Carolina*, 397 U.S. 790, 794-95 (1970) (state statute that provided for lower maximum penalty for conviction upon guilty plea than for conviction after jury trial did not render plea involuntary); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (confrontation claim could not be asserted on appeal).

This Court too has routinely rejected challenges to valid guilty pleas based on claims of antecedent constitutional errors. *See, e.g.*, *Fields* v. *Att'y Gen. of Md.*, 956 F.2d 1290, 1296 (4th Cir. 1992) (right to counsel); *Brown* v. *State of Md.*, 618 F.2d 1057, 1058 (4th Cir. 1980) (double jeopardy); *Hall* v. *McKenzie*, 575 F.2d 481, 484 (4th Cir. 1978) (due process); *Parker* v. *Ross*, 470 F.2d 1092, 1093 (4th Cir. 1972) (composition of grand jury). To rule otherwise would defeat the notion that valid guilty pleas are "presumed final." *United States* v. *Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995).

Of course, the district court's plea colloquy with a defendant is the proceeding which conclusively "establish[es] that the defendant knowingly and voluntarily enters his plea." *United States* v. *Wood*, 378 F.3d 342, 349 (4th Cir. 2004); *United States* v.

Standiford, 148 F.3d 864, 868 (7th Cir. 1998) ("The whole point of the Rule 11 colloquy is to establish that the plea was knowingly and voluntarily made."). This requirement that the defendant "demonstrate his voluntariness *ex ante*, . . . reduces litigation costs *ex post*, and ultimately promotes the fair and efficient entry of his plea." *United States* v. *Taylor*, 984 F.2d 618, 621 (4th Cir. 1993). As the Supreme Court has explained, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States* v. *Smith*, 440 F.2d 521, 528-529 (7th Cir. 1971) (Stevens, J., dissenting)). Moreover, "[t]he impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas." *Id.*

Against this landscape, Moussaoui's constitutional claims are clearly barred by his guilty plea, which was knowing, voluntary, supported by a solid factual basis, and confirmed by his subsequent testimony. Moussaoui does not anywhere contend that his plea was induced by threats, improper promises, or misrepresentations. And, as discussed previously, he cannot credibly contend that he was actually unaware of the direct consequences of his plea. Moussaoui instead contends (Br. 23, 113-16) that constitutional errors rendered his plea involuntary "as a matter of law" — because

otherwise he would have faced a trial marred by Fifth and Sixth Amendment error. But that claim fails on the facts and the law.

Moussaoui knew exactly what he was foregoing by pleading guilty. The district court constantly confirmed that he understood the consequences of his plea, including constitutional challenges he would waive. *See* JAU1008, 1023, 1428-30; 2SJAU59-62. Indeed, it is difficult to imagine a clearer articulation of the precise scope of an appellate waiver than the one enunciated by Moussaoui at the *ex parte* proceeding:

> What is certain, okay, is I've listened to [defense counsel's] advice, read their, their case, they send me the *Blackledge* v. *Perry* case with the statement of the Supreme Court, who made absolutely clear that once you have pled guilty, you cannot raise any — you cannot raise claim relating to deprivation of constitutional rights . . . that occur prior to the entry of the guilty plea. This is the word of the Supreme Court.

Id. 59. His appellate brief does not provide any factual basis for the suggestion that the plea was coerced by the notion of an unfair trial; it contains only legal argument designed to sidestep the guilty plea bar.[53]

The claim, moreover, has no persuasive legal support, as the decisions cited

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[53] If Moussaoui had been truly interested in preserving appellate rights, he could have sought a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2). *See United States* v. *Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990) ("direct review of an adverse ruling on a pre-trial motion is available only if the defendant expressly preserves that right by entering a conditional guilty plea"). Moussaoui did not pursue this option.

above show. To overcome the settled principle that his guilty plea waived all nonjurisdictional defects antecedent to the plea, *Tollet*, 411 U.S. at 267, Moussaoui relies on a sole outlier, *United States* v. *Hernandez*, 203 F.3d 614, 626 (9th Cir. 2000). *See* Br. 23, 49, 84, 100, 103-104, 107, 115. But *Hernandez*, which reversed a conviction upon a guilty plea because of an erroneous pre-trial denial of *Faretta* rights, is factually distinguishable and, we submit, plainly wrong in its holding.[54]

First, *Hernandez* is inapposite on its facts. There, the Ninth Circuit concluded that the outright denial of the defendant's right to proceed *pro se*, which occurred three weeks before the guilty plea, constituted "unreasonable constraints" and "coercion" undermining the voluntariness of the guilty plea. 203 F.3d at 626. Here, on the contrary, Moussaoui was not denied the right to proceed *pro se*; he represented himself for 17 months before the district court revoked that right because of his own misbehavior. JAU1378-79. Indeed, Moussaoui does not challenge the revocation on appeal. Even if he did, the extended time between the revocation (November 2003)

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[54] Moussaoui also relies on *United States* v. *Mullen*, 32 F.3d 891 (4th Cir. 1994). *See* Br. 23-24, 49, 84, 104. But that case, in which this Court ruled on various constitutional challenges after finding that they were not validly waived in the district court, involved a defendant who was convicted at trial, rather than admitting her guilt in a Rule 11 proceeding. *Mullen*, 32 F.3d at 895, 897. Thus, unlike Moussaoui, the defendant in *Mullen* preserved her pre-trial objections by taking the "sensible course" of contesting guilt and prevailing on appeal. *McMann*, 397 U.S. at 768. As a result, any relevance that *Mullen* has here only cuts against Moussaoui.

and his plea (April 2005) undercuts any attempt to show the same cause-and-effect that may have existed in *Hernandez*, where there was only a three-week gap. Thus, *Hernandez* hardly suffices as a "framework for analyzing the impact of a structural defect on a plea," as Moussaoui suggests, Br. 23.

Moreover, the holding in *Hernandez* does not withstand scrutiny. The Ninth Circuit held that the guilty plea was invalid because "the denial of a defendant's Sixth Amendment right to conduct his own defense [was] structural error." 203 F.3d at 626 (defendant was left to choose between pleading guilty and "submitting to a trial *the very structure* of which would be unconstitutional") (emphasis in original). This proves too much. The holding undermines the axiomatic treatment of valid guilty pleas as final and, in an extreme sense, would permit serial constitutional challenges from appellants who validly admit their guilt.

For this reason, *Hernandez* contravenes decades of decisions by the Supreme Court and this Court. *See, e.g.*, *Brady* v. *United States*, 397 U.S. at 750 (even though statute later held unconstitutional, and even though that infirmity "caused the plea" in a "but for" sense, this circumstance did "not *necessarily* prove that the plea was coerced and invalid as an involuntary act") (emphasis added); *Brown*, 618 F.2d at 1058-59 (guilty plea not "induced" by desire to avoid punishment in prosecution that

violated double jeopardy).[55] The analysis does not depend on whether the error is considered "structural." *Compare Tollett*, 411 U.S. at 266-68 (valid guilty plea waived claim that blacks were systematically excluded from indicting grand jury), *and Parker*, 470 F.2d at 1093 (same), *with Vasquez* v. *Hillery*, 474 U.S. 254, 262-64 (1986) (systematic exclusion of blacks from the grand jury is "structural" error); *see also Neder* v. *United States*, 527 U.S. 1, 8 (1999) (listing types of structural error). Indeed, the Supreme Court has never differentiated among the pre-trial "independent claims relating to the deprivation of constitutional rights" that are precluded by a guilty plea. *See Lefkowitz*, 420 U.S. at 288.

In determining voluntariness of a guilty plea, courts do not focus on alleged antecedent constitutional error, as the Ninth Circuit did in *Hernandez*, but on "the relevant circumstances surrounding [the plea]." *Brady* v. *United States*, 397 U.S. at 749. Of course, the relevant circumstances are found in the Rule 11 proceeding,

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[55] *See also Fields*, 956 F.2d at 1296 (guilty plea barred claim that counsel was denied at critical stages); *Parker*, 470 F.2d at 1093 (guilty plea "blocks a subsequent attack on the [racial] composition of a grand jury"); *accord United States* v. *Seybold*, 979 F.2d 582, 585-86 (7th Cir. 1992) (guilty plea waives self-representation claim); *United States* v. *Montgomery*, 529 F.2d 1404, 1406-07 (10th Cir. 1976) (same). *Hernandez* also appears to contradict previous Ninth Circuit precedent. *See United States* v. *Montilla*, 870 F.2d 549, 553 (9th Cir. 1989) ("forced choice between asserting a constitutional right at trial and accepting the government's offer, while undoubtedly difficult, is not unconstitutional"), *amended*, 907 F.2d 115 (9th Cir. 1990).

which is designed "to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). Here, the district court conducted a proper Rule 11 proceeding, the comprehensive record of which comfortably establishes that Moussaoui's plea was not "coerced" by the prospect of an unfair trial or any other factor.

In sum, Moussaoui's guilt of the charged offenses was established by his valid guilty plea. That plea cannot now be used as "a platform from which to explore further possibilities." *Bluso*, 519 F.2d at 474. Moussaoui's constitutional claims, therefore, should not be entertained by this Court.

B. In Any Event, Moussaoui's Fifth And Sixth Amendment Claims Fail On The Merits

Each of Moussaoui's constitutional claims also fails on the merits. Virtually all of them challenge restrictions imposed by the district court to protect classified information from disclosure to the defendant and the public. None of these restrictions were erroneous, much less unconstitutional.

More basically, however, the constitutional claims are inherently speculative, and, at times, simply illogical. Moussaoui casts them in terms of the voluntariness of his guilty plea, asserting that the upshot of various rulings was an unfair choice between pleading guilty and proceeding to trial without constitutional guarantees. In other words, Moussaoui asks for a measurement of the rulings' effect on a trial that

never occurred. This disconnect makes his claims untenable.

For example, Moussaoui suggests that violations of his right to self-representation compelled him to plead guilty. But Moussaoui forfeited that right nearly a year and a half before the plea, so there was no basis for him to fear infringement of the right at trial. Likewise, he contends that he pleaded guilty because a trial without personal access to classified information would have infringed many of his constitutional rights. The claim elides the distinction between pretrial and trial rights. Contrary to Moussaoui's forecast, relevant and material classified information would have been available for Moussaoui's use at trial in declassified or substituted form, as it was at the penalty phase hearing. *See United States* v. *Abu Ali*, 528 F.3d 210, 245 (4th Cir. 2008) ("A defendant's right to see the evidence that is tendered against him *during* trial, . . . does not necessarily equate to a right to have classified information disclosed to him *prior* to trial.") (emphasis in original).

Moussaoui's myriad of constitutional allegations stem from the CIPA-authorized process employed by the district court to protect classified information from unauthorized disclosure. In particular, he challenges the provisions of CIPA and the district court's protective order that permitted disclosure of classified information to cleared defense counsel, but not to him. This construct, according to Moussaoui, violated his right to effective counsel (Br. 49-84); to be present at critical stages of

the case (Br. 100-04); to personal access to arguably exculpatory discovery (Br. 104-107, 118-25); and to self-representation during the 17 months he was *pro se* (Br. 84-100). He adds (Br. 25-49) that his right to counsel of choice was infringed by the conditions of his confinement and the requirement that classified information could be accessed only by counsel who had received security clearances.[56]

None of these arguments withstand scrutiny. CIPA procedures, such as those used in this case, have for decades been upheld against constitutional challenges by this Court and virtually every other court to consider the question. Moussaoui's case was no different — if not a stronger case for restrictions because of who he was — even during the period of his self-representation, where his rights were fully and appropriately protected by standby counsel. In short, Moussaoui's CIPA-based claims are both unpersuasive, and completely foreclosed by his guilty plea.

1. CIPA

The Classified Information Procedures Act ("CIPA"), Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1-16) safeguards "the government's privilege to protect classified information from public disclosure" in criminal proceedings, *Abu Ali*, 528 F.3d at 245 (citing *United States* v. *Mejia*, 448

[56] Moussaoui also renews his compulsory process claims, which, he expressly concedes, he has raised only to reserve "for later review," Br. 107, and thus we do not respond in detail. *But see* n.87, *infra*.

F.3d 436, 455 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 989 (2007)), and does so "in a way that does not impair the defendant's right to a fair trial." *United States* v. *Aref*, 533 F.3d 72, 78 (2d Cir. 2008) (quoting *United States* v. *O'Hara*, 301 F.3d 563, 568 (7th Cir.2002)). CIPA's framework permits courts to authorize the government, upon proper showing, to eliminate or limit disclosure of "classified information" that it otherwise would produce under discovery rules. *See* 18 U.S.C. app. 3 § 4.[57] If the defendant seeks to disclose classified information, he must expressly notify the government and the court, *see id.* § 5(a), and is barred from using it at the trial or pretrial proceeding unless and until the court resolves any government objections to "the use, relevance, or admissibility of classified information," at a hearing. *Id.* § (6)(a). Such a hearing must be held *in camera* if the "Attorney General certifies. . . that a public proceeding may result in the disclosure of classified information." *Id.*

The district court may order the use of a substitution — in the form of "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information" — if the substitution "will provide the defendant with substantially the same ability to make his defense

[57] "Classified information" is defined, in pertinent part, as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. app. 3 § 1(a).

as would disclosure of the specific classified information." *Id.* § 6(c)(1). Hearings to determine use of a substitution must also "be held *in camera* at the request of the Attorney General." *Id.*

Upon its enactment, CIPA commanded the Chief Justice of the United States to "prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court." *Id.* § 9(a). As a result, on February 12, 1981, Chief Justice Burger promulgated security procedures providing, in relevant part, that "[t]he government may obtain information by any lawful means concerning the trustworthiness of persons associated with the defense and may bring such information to the attention of the court for the court's consideration in framing an appropriate protective order pursuant to Section 3 of the Act." Security Procedures Established Pursuant To Pub. L. 96-456, 94 Stat. 2025, By The Chief Justice Of The United States For The Protection Of Classified Information, at ¶ 5.

CIPA also grants district courts broad authority to enter protective orders "to protect against the disclosure of any classified information." 18 U.S.C. app. 3 § 3; *see* S. Rep. No. 96-823, at 6, *reprinted in* 1980 U.S.C.C.A.N. 4294, 4299-4300 ("The details of each [protective] order are fashioned by the trial judge according to the circumstances of the particular case."). A common feature of protective orders under

this provision is to require counsel to undergo background checks to obtain security clearance for access to classified information. *See, e.g.*, *Abu Ali*, 528 F.3d at 248-49.

2. Relevant District Court Proceedings

a. The Initial Appearance And Arraignment

On December 19, 2001, Moussaoui was presented on the original indictment, pursuant to Fed. R. Crim. P. 5(a), before a United States magistrate judge. 2SJAU1-7.[58] At the proceeding, Moussaoui was represented by Messrs. Dunham, Zerkin, and MacMahon. *Id.* 2. The magistrate judge summarized for Moussaoui the charges against him, and advised him of certain constitutional rights. *Id.* 2-6. Specifically, after advising Moussaoui of his rights against self-incrimination, the magistrate judge advised:

> You have the right to be represented by attorneys, and the court has appointed counsel to represent you. If you're able to retain counsel of your own choosing, then you have the right to counsel of your own choosing.

Id. 2-3. Moussaoui did not seek bail, and remained detained at the government's request. *Id.* 6.

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[58] After his arrest in Minnesota on immigration charges on August 16, 2001, Moussaoui had been held there before being moved to the Southern District of New York on those same charges and as a material witness. On December 13, 2001, after a proceeding pursuant to Fed. R. Crim. P. 5(c)(2) in New York, a federal judge ordered Moussaoui transferred to the Eastern District of Virginia to face the charges on the original indictment. JAU43-51.

Moussaoui was arraigned on January 2, 2002. JAU52-77. Moussaoui was represented by the same three attorneys. *Id.* The district court set the trial to begin with jury selection on September 30, 2002. *Id.* 56-57, 63. The court also set a detailed schedule for discovery and pretrial motions in advance of the trial. *Id.* 63-76.

b. The District Court's Protective Order

Without objection from the defense, on January 22, 2002, the district court entered the government's proposed protective order, pursuant to Section 3 of CIPA, and Fed. R. Crim. P 16(d)(1). JAU78-89, 93 (hereinafter, the "Protective Order"). Among other things, the Protective Order established procedures for those "individuals who receive access to classified national security information or documents in connection with this case," and applied "to all pre-trial, trial, post-trial, and appellate aspects concerning this case." *Id.* 93. The Protective Order also provided that "[n]o defendant . . . shall have access to any classified information involved in this case[,]" absent extraordinary circumstances, such as the defendant having a demonstrable "need to know." *Id.* 97. The Protective Order further provided that defense counsel who received security clearances could access classified materials, but could not "disclose such information or documents to the defendant without prior concurrence of counsel for the government, or, absent such concurrence, prior approval of the Court." *Id.* 104. The practical result of the

Protective Order was that cleared counsel could review certain classified material that they could not share with Moussaoui, who did not have (and obviously would not be given) a security clearance.

c. First Pretrial Conference

At the first pretrial conference, on April 22, 2002, Moussaoui informed the district court that he rejected his court-appointed counsel and wanted to proceed *pro se* with a Muslim lawyer, who he would hire to assist him "in matters of procedure and understanding of the U.S. law," but not to "assume any representation [of Moussaoui] in the Court." JAU219-20. The district court advised Moussaoui, among other things, that he had a "right to hire an attorney at [his] own expense," but that the right was limited by the Protective Order's requirement that all counsel receive appropriate security clearances before reviewing classified information. *Id.* 246. The district court also advised Moussaoui that he had a right to proceed *pro se* upon a finding that he knowingly and voluntarily waived his right to counsel, but that he could forfeit his right to self-representation if he did not "conduct [himself] in accordance with the rules and procedures of this Court." *Id.* 262. In anticipation of a hearing on whether Moussaoui could proceed *pro se*, the district court ordered a

preliminary competency evaluation. *See supra*, at 36-40.[59]

d. The Motion For Moussaoui's Personal Access To Classified Material, If Allowed To Proceed *Pro Se*

The district court scheduled a *Faretta* hearing for June 13, 2002. A week before that hearing, defense counsel moved for Moussaoui to have personal access to classified discovery, notwithstanding the Protective Order, *if* the court granted him *pro se* status. *See* JAU430-45. Counsel suggested that a significant amount of classified information was "potentially relevant and material to either the government's case or the defense's case." *Id.* 437. Noting that it had "not seen any mitigation or exculpatory evidence" based on *ex parte*, *in camera* review of the government's CIPA § 4 filings, the district court resolved the motion by ordering the defense to provide, under seal, "examples of the classified materials at issue and an explanation of why they believe these materials constitute either mitigation or *Brady*

[59] Before the pretrial conference, Moussaoui, through counsel, had filed a motion challenging his conditions of confinement imposed under Special Administrative Measures (SAMs). JAU130-65. At the conference, based on the representations of counsel for both parties, the district court found the issues raised by the motion had been resolved, and were therefore moot, with one exception. *Id.* 248-50, 211. The sole open issue was Moussaoui's request to have unsupervised consultation with a Muslim cleric, known only as "John Doe." *Id.* 211, 250. Ultimately, Moussaoui refused to meet with "John Doe," resolving the issue, although the district court remained willing to consider the issue if Moussaoui changed his mind. *Id.* 261, 265.

evidence." JAU459-60.[60]

e. The *Faretta* Hearing

At the June 13, 2002 hearing, the district court permitted Moussaoui to proceed on a *pro se* basis. JAU503-570. The district court confirmed that Moussaoui was aware of difficulties he would likely encounter if proceeding *pro se*. With respect to the SAMs, for example, the district court asked, "Are you aware that by being your own attorney, it will become more difficult for you to have access to evidence, access to witnesses, access to legal research because of the restrictions under which you are presently housed?" *Id.* 534. Moussaoui replied, "Absolutely." *Id.* In addition, the district court explained that standby counsel would be needed for classified discovery, which Moussaoui would not be allowed to see. JAU537 ("[T]here will be clearly information that is covered by both CIPA, which would be national security types of information, as well as sensitive airport information that could be relevant to your defense to which you will not be able to get access."). Moussaoui said he understood. *Id.*

In response to the district court's questions about waiving his right to counsel, Moussaoui stated, "I'm giving [up] the right to have a lawyer, but I'm taking the right

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[60] Defense counsel filed a classified response. *See* JAC1-26. The district court then took the motion under advisement, eventually denying it in August 2002. JAU1124. That order is discussed *infra*, at 128-29.

to represent myself." JAU545. Moussaoui asked if he could choose standby counsel. *Id.* 534. The court explained that Moussaoui did not have a right to insist on a particular standby attorney, but granted that "if an attorney enters his appearance in this case and he's licensed to practice in this Court or he retains or associates with an attorney who can practice here, then that lawyer will be permitted to help you during the trial[.]" JAU534-35. Moussaoui explained his intention to have an attorney (later identified as an attorney from Texas named Charles Freeman) act as his "standby" lawyer on a *pro bono* basis. *Id.* 525-28, 535.

The district court, however, warned Moussaoui that *pro bono* counsel would be subject to the same requirements as court-appointed counsel, including a "preliminary" background check, to which Moussaoui responded: "I don't have a problem with FBI background." JAU528. The district court also explained that if his *pro bono* counsel was qualified to have access to classified information, he could not share that information with Moussaoui. *Id.* 537.

The district court appointed Mr. Yamamoto, who was experienced in defending capital prosecutions, as standby counsel in place of Mr. MacMahon. *Id.* 574. The district court maintained the Federal Public Defenders as standby counsel as well, until such time as Moussaoui found his own *pro bono* counsel. *Id.* at 575. The district court committed to replacing the Federal Public Defenders as standby counsel

if Mr. Freeman "ha[d] not entered his appearance by June 28, 2002." *Id.*

f. The *Pro Se* Motions Regarding Mr. Freeman

Moussaoui then filed several pleadings with the assistance of, and apparently signed by, Mr. Freeman.[61] Moussaoui also asked permission for Mr. Freeman's assistance with an upcoming deposition. *Id.* 632. The district court rejected the request because Mr. Freeman was not licensed to practice law in Virginia, had not been admitted *pro hac vice*, and had not entered an appearance. *Id.* 640.

On June 24, 2002, the eve of Moussaoui's arraignment on the first superseding indictment, Moussaoui filed a motion entitled "Emergency Order Must be Given to Dismiss and Exclude the Government Appointed Standby Lawyer to Appear in My Case and in Court on the Arraignment on the June 2002 Because these Appointed Standby Lawyer Undermine my Constitutional Right to Represent Myself (Pro Se) and are Actively Conspiring by 'Legal' Means to Kill Me." JAU630. In the motion, Moussaoui sought to bar standby counsel from counsel table at arraignment. *Id.* 631. Instead, he requested the presence of Mr. Freemen, as a "legal consultant." *Id.*

The district court granted Moussaoui's request with respect to standby counsel, ordering that they not sit at counsel table. JAU657. The district court explained,

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[61] *See, e.g.*, JAU606 ("Stop Undermining My Constitutional Right To Represent Myself"); *id.* 623 ("Emergency Motion for Immediate Release from Detention and the Dropping of All Charges").

however, that while Moussaoui was "free to refuse assistance from his stand-by counsel," that refusal did not relieve them "of their obligation to pursue a defense strategy for [him] and to be prepared to defend th[e] case if [he] should forfeit his right to represent himself." *Id.* 656-57. In addition, the district court denied Moussaoui's request to have Mr. Freeman sit at counsel's table, as he had still not entered an appearance in the case. *Id.* The district court noted that Mr. Freeman might have already violated local rules by submitting two pleadings on Moussaoui's behalf. *Id.*[62]

In response to subsequent motions regarding Mr. Freeman — which sought, for example, authority for him to provide "out-of-court legal assistance" — the district court ruled that Moussaoui was "not entitled to the standby or 'advisory' counsel of his choice — particularly if the proposed lawyer [wa]s unwilling to enter a formal appearance and be bound by the rules of [the district] court." JAU783-84. The district court explained that neither Moussaoui nor Mr. Freeman had "offered any meaningful or relevant distinction between 'standby' and 'advisory' counsel," *id.* 784, and that if Mr. Freeman or any other practicing attorney sought to assist Moussaoui "in a standby capacity, including providing out-of-court advice, that attorney must

[62] Even after the June 28, 2002 deadline to file his appearance, Mr. Freeman submitted at least one document with the district court, which it marked "received" but refused to address. *See* JAU783 n.1.

enter a formal appearance in this case pursuant to [the] Local Rule[s]," *id.* Because Mr. Freeman refused to enter his appearance and comply with local rules, the district court denied Moussaoui's motions. *Id.* 784-85.

g. The Absence Of Additional Willing Standby Counsel

The district court also endeavored to secure other acceptable standby counsel for Moussaoui. For example, in addition to Mr. Yamamoto, the district court arranged for Moussaoui to meet with Professor Sadiq Reza from New York Law School; although Moussaoui met with Professor Reza, Moussaoui never accepted him as standby counsel. JAU990-92, 1037-38.[63] The district court also searched without success for a medium- to large-size law firm to represent Moussaoui. *Id.* 786-87.[64]

When these repeated efforts failed to bear any fruit, the court was compelled to deny Moussaoui's motion to remove standby counsel. The district court articulated

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[63] After Moussaoui indicated that he wanted to meet with Professor Reza, JAU1052-53, [redacted]. *Id.* 5870.

[64] Before he began proceeding *pro se*, [redacted]. JAU5768. For example, Moussaoui's mother retained Randal Hamud, Esq., to represent him, but Moussaoui rejected his services because Mr. Hamud supported the American invasion of Afghanistan. *Id.* 529-31, 4417.

three principal reasons for the denial: the "complexity of the charges," JAU785; Moussaoui's "exposure to the death penalty," *id.*; and the absence of other options for standby counsel, *id.* 786-87. As the district court explained:

> Unfortunately, it is now obvious that no attorney appointed by the Court will satisfy the defendant. He has vehemently and categorically refused to meet with or even accept communications from Mr. Yamamoto. It is also clear that no law firm with the resources and experience equivalent to those of the Federal Public Defender is willing to enter the case. Even if such a firm came forward at this point, we have no reason to conclude that the defendant would accept that firm's services.

Id. 786-87. Indeed, [redacted]. *See id.* 5768 ([redacted]).[65]

Therefore, to "ensure that [Moussaoui] ha[d] an opportunity for a fair trial," the district court determined that "the best available standby legal counsel for the defendant [was] the Federal Public Defender in conjunction with experienced additional counsel." JAU786-87. Accordingly, the district court ordered Mr. Yamamoto and the Federal Public Defender to remain as standby counsel, and

[65] Mr. Freeman died on May 12, 2003 — approximately two years before Moussaoui's guilty plea. JAU4425; *see also* http://www.chron.com/CDA/archives/archive.mpl?id=2003_3654253.

reappointed Mr. MacMahon to assist them in that role. *Id.*[66]

h. The Government's Discovery

The government began producing discoverable material to the defense in January 2002 — approximately one month after the original indictment was returned. 2SJAU8-9. The government stated that it would err on the side of over-disclosing even classified information to protect Moussaoui's rights. *See* JAU498 ("We do not believe that all of that [classified] material is exculpatory or even properly discoverable, but, to be cautious, we have produced it."). During the period of Moussaoui's self-representation, he was given his own set of unclassified discovery (including declassified materials), in addition to the set provided to standby counsel. *See, e.g.*, 2SJAU12-38.

Classified discovery was produced only to defense/standby counsel. *See, e.g.*, JAC167 n.1, 214 n.1, 383 n.1, 689 n.1, 702 n.1, 830 n.1, 921 n.1. The government continually sought to declassify classified material that it produced. *See, e.g.*, *id.* 78 (noting that 148 of the original 170 CD-ROMs that were produced had been declassified); *id.* 152 (standby counsel stating they were "pleased that many of the documents that we identified have been declassified, thus enabling us to investigate

[66] The district court later ordered standby counsel to submit any unclassified pretrial motions to Moussaoui for his review before they could submit them with the court. JAU1122-23.

the leads found therein without violating the Court's protective order regarding classified discovery").

The government filed numerous motions under Section 4 of CIPA to replace highly classified discovery material with summaries or redacted versions of the material that could be disclosed to cleared standby counsel. *See, e.g.*, JAC311, 419, 449, 575, 648, 686, 711A, 712, 856. These motions were granted. *See, e.g.*, *id.* 311-13, 419-21, 449-51, 686-88. Cleared standby (and later, defense) counsel designated some of this material pursuant to Section 5. *See, e.g.*, *id.* 78, 232, 384, 691, 831-32, 921-22, 1172. Although Moussaoui did not attend CIPA proceedings, he received redacted CIPA transcripts, pleadings, and court orders. *See, e.g.*, JAU1207; JAC362-66; 2SJAU40.

Much of this classified discovery consisted of reporting of statements made by detainees. *See, e.g.*, JAC311-13, 449-51. The reports were provided *ex parte* to the district court under Section 4 in connection with motions to disclose only material that was discoverable in the original document to cleared counsel through a classified summary. *See, e.g.*, *id.* 419-421, 575-577, 686-688, 711A-C, 712-714, 929-931, 1038-1040, 1054-1056. These motions were granted. *See, e.g.*, *id.* The district court noted that it was impressed with the accuracy of the summaries. *See, e.g.*, *id.* 582-83. Standby counsel designated some of the summaries pursuant to Section 5, prompting

the parties, in accordance with this Court's opinion, *United States* v. *Moussaoui*, 382 F.3d 453 (4th Cir. 2004), to craft substitutions for detainees' testimony. As part of this process, Moussaoui was to receive personally a copy of the proposed substitution, which, although still classified, had been approved by the appropriate Executive agencies for declassification in the event the substitution would be introduced at trial. JAC452-55.

i. The *Pro Se* Motions For Personal Access To Classified Discovery

At certain points while Moussaoui represented himself, he sought personal access to classified discovery, notwithstanding his prior acknowledgment that his *pro se* status would not, without more, merit an exception to the Protective Order. JAU1066, 1067, 1079. Standby counsel supported those requests and renewed the request they had made before the *Faretta* hearing. *Id.* 1082A-B.

On August 23, 2002, the district court denied the motions on three grounds. JAU1124-26. First, the district court recognized that Moussaoui understood he would not have access to classified material when he exercised his *Faretta* right to waive counsel and represent himself. *Id.* 1124. Second, the district court cited Moussaoui's "repeated prayers for the destruction of the United States and the American people, admission to being a member of al Qaeda, and pledged allegiance to Osama Bin Laden" as "strong evidence that the national security could be

threatened if the defendant had access to classified information." *Id.* 1125. Finally, the district court found that Moussaoui's trial rights were sufficiently protected by standby counsel's review of classified discovery, their participation in CIPA proceedings, and the government's continuing effort to declassify information. *Id.* 1125-26. For these reasons, the district court concluded that the government's "interest in protecting its national security information outweigh[ed Moussaoui]'s desire to review the classified discovery." *Id.*

j. The Aborted Guilty Plea

On July 18, 2002, as discussed above (*see supra*, at 42), Moussaoui indicated that he wanted to plead guilty. JAU858. Before the hearing, standby counsel filed a "Memorandum Regarding Rule 11 Considerations," arguing that "[b]efore pleading guilty, Mr. Moussaoui should be advised that there is exculpatory evidence which has not been provided to him and that his plea of guilty may mean that he might never have the benefit of such information to use to contest his guilt." *Id.* 866. Standby counsel served a copy of the Memo on Moussaoui himself. *Id.* 882. Standby counsel also filed one document as a classified supplemental exhibit in support of the Memo. JAC66-69 (quoted at Br. 67). At the proceeding itself, on July 25, 2002, Moussaoui decided not to plead guilty, and thus the district court never addressed the issue of evidence with Moussaoui. JAU987-1041.

k. Moussaoui's Motion For Access To Enemy Combatant Witnesses

In September 2002 and November 2002, Moussaoui moved, both *pro se* and through standby counsel, for pretrial access to, and to compel the trial appearances of, captured enemy combatants. *See, e.g.*, JAU1134-35, 6004A-E; JAC181-88, 233A-233E; *Moussaoui*, 382 F.3d at 458 & n.4. On January 31, 2003, the district court granted the motion in part, requiring the government to make one of the enemy combatants available for a videotaped deposition. JAU1148; JAC320-21; *Moussaoui*, 382 F.3d at 458.

The government appealed to this Court (No. 03-4162).[67] On April 14, 2003, this Court stayed the appeal and remanded the case to the district court to provide the government the opportunity to propose substitutions for the witness's testimony. JAU1165 (2003 WL 1889018). This Court directed the district court to determine whether substitutions proposed by the government would provide Moussaoui with substantially the same ability to make his defense as would the disclosure ordered by the district court. *Id.*

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[67] While this appeal was pending, Moussaoui, moved *pro se* for access to two other enemy combatants. *Moussaoui*, 382 F.3d at 459; JAU6088-6095; JAC837-40. Because the government had noticed its appeal of the district court's order raising the same issues, the district court stayed resolution of the two additional requests until the appeal was resolved. JAC840. On August 29, 2003, the district court granted Moussaoui access to both witnesses for purposes of conducting Rule 15 depositions. JAC854-55; *Moussaoui*, 382 F.3d at 459.

On April 24, 2003, the government submitted its proposed substitution, JAC452-471, which was "material that the Executive Branch ha[d] determined after careful review could be appropriately declassified for use at trial," and thus was given to both standby counsel and Moussaoui, *pro se*. JAU1213. Standby counsel filed a response and objections to the proposed substitution, JAC477, while Moussaoui filed his own *pro se* responses and objections, *id.* 472, 511, 523, 525; JAU1225, 1240, 1245. On May 15, 2003, the district court rejected the government's proposed substitution, JAU1306, and the case returned to this Court.[68]

l. The Defendant's Refusal to Attend CIPA Hearings

Moussaoui made clear at certain points that, even if he were allowed, he did not want to appear at classified hearings himself. For example, Moussaoui told the court

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[68] On September 13, 2004, after a panel rehearing, this Court resolved the appeals regarding Moussaoui's access to certain enemy combatant witnesses. *Moussaoui*, 382 F.3d 453. This Court concluded that Moussaoui had a Sixth Amendment right to the depositions of the witnesses and that the government faced the choice of either complying with the district court's production order or suffering a sanction. *Id.* at 476. While this Court agreed with the district court's "assessment that the particular proposals submitted by the Government [we]re inadequate in their current form[,]" *id.* at 478, it disagreed with the district court that no adequate substitutions were possible and that all substitutions are "inherently inadequate," *id.* Instead, this Court concluded that substitutions could be fashioned that would provide Moussaoui with substantially the same ability to make his defense as the witnesses' deposition testimony, and it set forth detailed guidelines for crafting such substitutions. *Id.* at 478-80. Moussaoui filed a petition for a writ of certiorari with the Supreme Court. 544 U.S. 931. The Supreme Court denied Moussaoui's petition on March 21, 2005. *Id.*

that he did not want to attend one of the very first CIPA hearings the district court held. *See* JAU1145 ("I don't want to be present in your classified hearing on 30 Jan[uary]."). Further, in April 2003, the court specifically indicated that it wanted Moussaoui present at one of the CIPA hearings on the government's proposed substitution. *Id.* 1209. The government objected, but Moussaoui rendered the point moot when he filed several pleadings unequivocally refusing to attend the hearings because he objected to the substitution process. *See id.* 1227 ("I, Zacarias Moussaoui clearly declare that I do not want to be present in any so called classified hearing. . . . So the Court should take clear notice that I will not participate in the hearing"); *id.* 1231 ("Emergency Strike by Slave of Allah Zacarias in SUPPORT OF UNITED SATAN OPPOSITION TO COURT ORDER for defendant To Attend CIPA Hearing") (emphasis original); *id.* 1236 ("MOUSSAOUI DOES NOT WANT TO BE IN ANY CLASSIFY HEARING ANYWAY"). Accordingly, after it was "advised by Mr. Moussaoui that he d[id] not wish to participate in the hearing[,]" the district court ordered that he would not be present. *Id.* 1237. That hearing, held May 7, 2003, was the last CIPA hearing before Moussaoui pleaded guilty almost two years later. *Id.*

m. No Further Challenge To The Protective Order

After the district court found that Moussaoui had forfeited his right to represent

himself, and reappointed standby counsel as counsel of record, JAU1378-79; *see supra*, at 46-48, defense counsel represented Moussaoui for the next two and a half years, through his guilty plea, the interlocutory appeals to this Court, and the capital sentencing proceeding. The government and defense counsel continued to proceed through the discovery process described, *supra*, at 126-28. *See, e.g.*, JAC1027 n.1 (government continuing to produce classified material); *id.* 929, 1038, 1050, 1052, 1054 (government continuing to file under Section 4); *id.* 1027, 1172 (defense counsel continuing to designate material for use at trial). Defense counsel never again objected to the district court's Protective Order.

n. Resolution Of The Appeal And Moussaoui's Guilty Plea

On April 22, 2005, a month after the Supreme Court denied certiorari in the interlocutory appeal, Moussaoui pleaded guilty. *See supra*, at 54-58. Thereafter, the discovery process focused on the penalty phase. The government continued to produce both classified and unclassified discovery. *See, e.g.*, JAC1473-1474, 1587, 1655, 1681-1689. Classified information was processed in accordance with CIPA, with defense counsel filing a total of approximately 814 Section 5 filings, many of which cited detainee statements. The CIPA litigation culminated with all defense Section 5 designations — that were determined by the district court to be relevant or

noncumulative — being declassified or resolved with unclassified substitutes.[69] Furthermore, the defense introduced substitutes for the testimony of six detainees. JAU3988-4033, 4051-4082, 4984-92. This same process would have occurred at a trial as to Moussaoui's guilt had he not exercised his right to plead guilty.

3. Discussion

a. Standard Of Review

In the typical case, a district court's rulings pursuant to CIPA are reviewed for abuse of discretion, while constitutional claims are reviewed de novo. *See Abu Ali*, 528 F.3d at 253. However, as previously explained, this is not a typical case because Moussaoui unconditionally pleaded guilty, waiving all of his present claims. At any rate, even if this Court were to entertain these claims, because they were never raised below, as we note *infra*, at best, they would be subject to plain error review. *United States* v. *General*, 278 F.3d 389, 393 (4th Cir. 2002).

b. There Was No CIPA-Related Error

The district court committed no error here, much less one of constitutional proportions, with respect to its CIPA rulings protecting classified information from

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[69] The only exceptions were two documents introduced at the penalty hearing pursuant to the "silent witness rule" — one by the defense, JAU3050, and one by the government, *id.* 3610-11. *See Abu Ali*, 528 F.3d at 250 n.18 (describing operation of silent witness rule).

unauthorized disclosure. Moussaoui couches his arguments in constitutional terms, but his real disagreement is with the most basic CIPA-related procedures. Moussaoui simply does not like the rule that protected classified information from disclosure to him; or the rules that permitted his cleared counsel, but not him, to see classified information and participate in CIPA hearings; or the rule that required any of his counsel who wanted to see classified information to undergo a background check and obtain a security clearance. In Moussaoui's view, he should have been able to see classified information, or have it all declassified for his pre-plea use. Br. 37-40.

But the district court lacked the authority to grant Moussaoui unfettered access to classified material. *See, e.g.*, *Abu Ali*, 528 F.3d at 253 (explaining that courts have no authority to "consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security") (citation and internal quotation omitted). Rather, in evaluating the government's privilege in protecting classified information, the district court was required to "balance this 'public interest in protecting the information against the individual's right to prepare his defense.'" *Id.* at 247 (quoting *United States* v. *Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc)).

It is axiomatic that the government (and the public) have a compelling interest in protecting classified information from unauthorized disclosure. *See, e.g.*, *Dep't of*

Navy v. *Egan*, 484 U.S. 518, 527 (1988) (recognizing government's "compelling interest"); *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (noting that "no governmental interest is more compelling than the security of the Nation"). The concern was at its apex in this case, where Moussaoui was a sworn member of a terrorist organization whose leader, Bin Laden, had publicly declared, and commenced, a non-traditional, terrorist war against America and her citizenry. JAU1679-83; *see also id.* 1368 (district court noting that some of Moussaoui's *pro se* pleadings included veiled and overt threats to public officials and foreign governments, as well as "attempts to communicate with persons overseas"); *cf. United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999) (stating in terrorism case that it would be "practically impossible to remedy the damage of an unauthorized disclosure *ex post*"); *United States* v. *Rezaq*, 156 F.R.D. 514, 524 (D.D.C. 1994), *vacated in part on other grounds*, 899 F. Supp. 697 (D.D.C. 1995) (there was simply "no reason to think that [the] defendant can be entrusted with national secrets").[70]

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[70] Even the mere appearance that classified information was disclosed to Moussaoui could have hurt national security. *See Cent. Intelligence Agency* v. *Sims*, 471 U.S. 159, 175 (1985) ("The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.") (quoting *Snepp* v. *United States*, 444 U.S. 507, 509 & n.3 (1980) (per curiam)); *Snepp*, 444 U.S. at 512-513 & nn.7-8 (noting that unless the government has adequate mechanisms to prevent unauthorized disclosures, potential sources of classified information may be unwilling to

In light of these risks, the district court issued the Protective Order and required the parties to follow standard CIPA procedures that have consistently survived challenges like Moussaoui's. *See, e.g.*, *Abu Ali*, 528 F.3d at 248-255 (CIPA-based restrictions on defendant's personal pretrial access to classified information did not violate Confrontation Clause; such restrictions were erroneous, however, as to classified information presented to the jury at trial); *United States* v. *Dumeisi*, 424 F.3d 566, 577-78 (7th Cir. 2005) (upholding CIPA substitution for classified information over Sixth Amendment challenges); *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1261-62 (9th Cir. 1998) (finding that *ex parte*, *in camera* CIPA hearings did not violate defendant's right to be present at trial); *United States* v. *Yunis*, 924 F.2d 1086, 1094-95 (D.C. Cir. 1991) (upholding CIPA against Fifth and Sixth Amendment challenges); *United States* v. *Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989) (CIPA procedures did not deprive defendant of right to present complete defense); *United States* v. *Wilson*, 750 F.2d 7, 9-10 (2d Cir. 1984) (CIPA designation requirements do not violate the Fifth Amendment).

Moussaoui's contentions boil down to disagreement with the Protective Order's provisions that permitted disclosure of classified information to cleared counsel, but not to him, and barred counsel from disclosing such information to him

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provide such information to the intelligence-gathering community).

absent court authorization. *See* JAU97, 104. But CIPA "vests district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings." *Abu Ali*, 528 F.3d at 247; *see also* S. Rep. No. 96-823, at 6 ("The details of each [protective] order are fashioned by the trial judge according to the circumstances of the particular case."). The Protective Order was a proper exercise of that broad discretion, especially given Moussaoui's membership in al Qaeda and his repeated prayers for the destruction of the United States. JAU1124-26. Moussaoui's interests were protected by at least five cleared counsel working on his behalf. *See Abu Ali*, 528 F.3d at 254 (noting the significance of having cleared counsel available).[71]

Moreover, the law is clear that protective orders may prohibit disclosure of otherwise-discoverable classified information to a defendant and his counsel if they do not possess the requisite security clearance. *See Abu Ali*, 528 F.3d at 254 ("A defendant and his counsel, if lacking in the requisite security clearance, *must* be excluded from hearings that determine what classified information is material and whether substitutions crafted by the government suffice to provide the defendant

[71] Even so, the district court entertained the few requests Moussaoui filed under the Protective Order for disclosure of specific classified items. *See, e.g.*, JAU430-45 (not granted because unspecific), *id.* 1082A-B (denied); *see also id.* 1066, 1067, 1079 (*pro se* requests for access, which were denied).

adequate means of presenting a defense and obtaining a fair trial.") (emphasis added); *United States* v. *Bin Laden*, 2001 WL 66393, at *4 (S.D.N.Y. 2001), *appeal argued sub nom. United States* v. *Mohammed*, No. 01-1535-cr (2d Cir. Dec. 10, 2007); *Rezaq*, 156 F.R.D. at 525; *see also* S. Rep. No. 96-823, at 6 (protective order "can forbid disclosure by a defendant or an attorney in any context"); H.R. Rep. No. 96-831, at 26 (1980) (under Section 3 "protective orders are to be issued, if requested, whenever the government discloses classified information to a defendant in connection with a prosecution").[72]

In sum, in this case, with this defendant, the district court properly exercised the "wide latitude" it is afforded pursuant to CIPA to protect classified information

[72] In various parts of his brief, Moussaoui contends that the district court "misapplied" CIPA by authorizing the government under Section 4 to replace discoverable classified information with classified summaries of the information in question. *See* Br. 39-40, 51-53, 93. In essence, he is arguing that while Section 4 permits classified items to be deleted from discovery, anything and everything that is produced to the defense must be in unclassified form. The claim is groundless. Such a requirement would collapse CIPA's framework, which not only contemplates the disclosure of classified information to the cleared members of the defense team, but depends on such disclosure so that appropriate classified items may be designated under Section 5 for use at trial. Moussaoui cites no authority in support of his contention. Indeed, the relevant authority is to the contrary, *see Abu Ali*, 528 F.3d at 247 (describing wide latitude of district courts in CIPA context). Authorizing the disclosure of summaries in classified form was certainly within the district court's broad discretion to craft the manner in which the parties worked though the CIPA process towards declassification and agreeable unclassified substitutes.

from unauthorized disclosure. Furthermore, as we show below, even when Moussaoui dresses his CIPA claims in constitutional clothes, they are still without merit.

c. There Was No Constitutional Error

i. There Was No Deprivation Of The Right To Counsel

Moussaoui argues (Br. 49-84) that the CIPA procedures violated his Sixth Amendment right to counsel by preventing him from consulting with cleared counsel about classified information.[73] The claim is without merit. Moussaoui's right to counsel does not require the disclosure of national security information to an admitted al Qaeda operative. Nor does he identify any harm resulting from his inability to consult with counsel about classified information.[74]

The right to counsel is not absolute. *See Perry* v. *Leeke*, 488 U.S. 272, 284-85

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[73] *Amicus Curiae*, National Association of Criminal Defense Lawyers, raise the same argument in their brief. Am. Br. 4-10.

[74] Moussaoui never made this right to counsel claim in the district court, so in addition to being foreclosed by his guilty plea, the claim is also forfeited on appeal. Moussaoui insists that he "repeatedly protested" his inability to discuss classified discovery with counsel. *See* Br. at 52 n.26. That is wrong. Moussaoui objected, to be sure, but only about not having access to classified materials as a *pro se* defendant; likewise, defense counsel sought only to loosen the restrictions when Moussaoui was *pro se*. *See* JAU432-58, 865-901; JAC66-69,147-66, 872-75. Thus, no one ever contested the restraint on Moussaoui's ability to consult with cleared counsel about classified information, which is the gravamen of this claim.

(1989) (order barring attorney-client consultation during short trial recess did not violate right). "Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise prepare for trial violates a defendant's Sixth Amendment right to counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983). Rather, courts may "properly restrict the attorney's ability to advise the defendant [where] the defendant's right to receive such advice is outweighed by some other important interest." *Morgan* v. *Bennett*, 204 F.3d 360, 365 (2d Cir. 2000).

This Court and others have held that the right to counsel abides restriction on attorney-defendant communications where privileged or confidential information is involved. *See United States* v. *Hung*, 667 F.2d 1105, 1107 (4th Cir. 1981) (finding no Fifth or Sixth Amendment violations where trial court allowed defense counsel to review Jencks Act material to assist in determining whether material should be disclosed, but precluding counsel from consulting with defendant about the material); *see also, e.g.*, *Morgan*, 204 F.3d at 367 (counsel barred from disclosing to defendant identity of next day's cooperating witness); *United States* v. *Herrero*, 893 F.2d 1512, 1526-27 (7th Cir. 1990) (counsel properly prohibited from revealing name of the confidential informant to defendant), *abrogated on other grounds by*, *United States* v. *Durrive*, 902 F.2d 1221, 1225 (7th Cir. 1990); *United States* v. *Bell*, 464 F.2d 667, 671-72 (2d Cir. 1972) (counsel barred from disclosing sensitive airport hijacker

profiling system).

Given the "compelling interest" of the government (and the public) in safeguarding national security information, *Sims*, 471 U.S. at 175, this Court has approved CIPA procedures designed to protect classified information from public disclosure, including disclosure to a defendant and his counsel if they do not possess the necessary security clearance. *Abu Ali*, 528 F.3d at 254 ("A defendant and his counsel, if lacking in the requisite security clearance, *must* be excluded from hearings that determine what classified information is material and whether substitutions crafted by the government suffice to provide the defendant adequate means of presenting a defense and obtaining a fair trial.") (emphasis added). In light of this well-established precedent, Moussaoui's right to communicate with counsel was certainly outweighed by the grave danger to the national security that disclosing classified information to him would have risked.

Moussaoui cites only inapposite cases in which violations were found in the decidedly different context of a trial. Br. 78-84 (citing *Geders* v. *United States*, 425 U.S. 80, 91 (1976) (defendant precluded from consulting with counsel during overnight recess between his direct and cross-examination at trial); *United States* v. *Sandoval-Mendoza*, 472 F.3d 645, 651 (9th Cir. 2006) (overnight ban on attorney-client communication regarding defendant's testimony at trial); *United States* v.

Santos, 201 F.3d 953, 965-66 (7th Cir. 2000) (same); *United States* v. *Cobb*, 905 F.2d 784, 791-92 (4th Cir. 1990) (weekend ban on same); *Mudd* v. *United States*, 798 F.2d 1509, 1512 (D.C. Cir. 1986) (same)).

Moreover, none of these cases deals with the unique context of access to classified information. Indeed, absent from his argument is a single example of a terrorism defendant being granted access to classified or sensitive information. The cases are to the contrary. *See, e.g.*, *United States* v. *Holy Land Found. for Relief and Dev.*, 2007 WL 628059, at *2 (N.D. Tex. Feb. 27, 2007) (defendants barred from classified discovery based on alleged connections to organizations associated with *Hamas*); *United States* v. *Paracha*, 2006 WL 12768, at *4 (S.D.N.Y. Jan. 3, 2006) (referencing CIPA protective order precluding defendant charged with providing material support to al Qaeda from access to classified information); *United States* v. *Ressam*, 221 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002) (discussing court's various CIPA protective orders precluding access to classified information by defendant who planned to attack Los Angeles International airport); *United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 121-22 (S.D.N.Y. 1999) (al Qaeda defendants barred from access to classified information).

Nor does Moussaoui identify any particular harm — as opposed to mere suppositions — that arose from his inability to consult counsel about classified

information. *See, e.g.*, Br. 66 n.36 ("well may be other evidence" produced in discovery that could not "be identified as such without input from Moussaoui"). He laments the "insidious nature of 'secret evidence'" Br. 66, but there was no "evidence" here, secret or otherwise, as there was no trial. Moussaoui's conjecture is particularly dubious, moreover, as the likelihood of his absorbing anything meaningful from counsel whom he vociferously rejected — or, conversely, counsel's learning anything valuable from him — was exceedingly remote. In sum, Moussaoui's claim can be rejected for lack of factual basis alone. *See Abu Ali*, 528 F.3d at 248 ("the defendant must come forward with something more than speculation as to the usefulness of such disclosure") (internal quotation omitted); *Bin Laden*, 2001 WL 66393, at *4 (rejecting al Qaeda defendant's non-specific reasons for access to classified materials, as "this hypothetical benefit" was insufficient basis upon which to find CIPA unconstitutional).[75]

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[75] *Amicus Curiae*'s argument (Am. Br. 10-14) that the district court's Protective Order created an ethical conflict of interest for defense counsel is likewise unsupported by facts or law. As discussed below (*see infra*, at 156-63), Moussaoui knew that his counsel was working through the CIPA process to get him classified, arguably exculpatory, information — through either declassification or court-approved substitution — for use at trial. Thus, there was no conflict here. *See Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir. 1998) (en banc) (defining an actual conflict to exist when the interests of the attorney and the defendant have "diverged with respect to a material fact or legal issue or to a course of action.") (citation omitted).

Thus, in addition to being foreclosed by Moussaoui's guilty plea, this claim has no merit.

ii. There Was No Deprivation Of The Right To Be Present

Next, Moussaoui contends (Br. 100-04) that his exclusion from the CIPA process, and, in particular, CIPA hearings — the last of which predated his plea by almost two years — violated the Confrontation Clause of the Sixth Amendment and Due Process Clause of the Fifth Amendment. He relies principally on *Kentucky* v. *Stincer*, 482 U.S. 730, 745 (1987), which construed the Constitution as "guarantee[ing] the right to be present at any stage of the criminal proceeding that is critical to its outcome," so long as the defendant's "presence would contribute to the fairness of the procedure." Thus, Moussaoui claims that the CIPA hearings constituted "critical stages of the trial," and professes to be "virtually certain" that he could have assisted counsel at these hearings had he been allowed to participate. Neither prong of the argument has merit: the first is squarely foreclosed by this Court's *Abu Ali* decision and the second is mere guesswork.[76]

In *Abu Ali*, this Court approved the district court's exclusion of a terrorist

[76] In addition, apart from being foreclosed by his guilty plea, this claim was arguably waived by Moussaoui's refusal to attend certain CIPA hearings, even when he was invited by the district court. *See* JAU1145, 1209, 1231, 1237; *see also id.* 1227-28 ("[T]here is no need for me to be present as I have received copy of the United Satan proposed substitution. . . .").

defendant and his uncleared counsel from CIPA proceedings, some of which occurred in the midst of trial. *See Abu Ali*, 528 F.3d at 253-55. The district court had properly balanced the respective interests in determining that classified information could not be disclosed; cleared counsel was able to carry out CIPA hearings on the defendant's behalf; and, thus, the defendant was not "deprived of his right to confrontation or to a fair trial merely because he and his uncleared counsel were not also allowed to attend." *Id.* at 254.

The exclusion of Moussaoui from CIPA hearings was equally justified, as he too was charged with serious terrorism offenses and had cleared counsel (or standby counsel) to participate on his behalf. The CIPA hearings in this case were obviously no closer to being "critical" than they were in *Abu Ali*. In fact, they were far more removed from an actual trial. *See Stincer*, 482 U.S. at 745 (exclusion of defendant from pretrial hearing on competency of juvenile rape victim did not violate Sixth Amendment); *cf. Snyder* v. *Massachusetts*, 291 U.S. 97, 105-07 (1934) (exclusion of the defendant, but not his counsel, from procedure where jury viewed crime scene did not violate right to be present).[77]

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[77] Moussaoui's claim that "[c]ourts generally hold that proceedings relating to admissibility of evidence are critical stages at which the defendant must be present," (Br. 101, 103), is unsupported by the cases he cites. Indeed, they are either entirely inapposite, *see United States* v. *Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994) (holding that because suppression hearing affects rights of accused, any

The nature of the CIPA hearing itself, moreover, provides justification for excluding the defendant. As CIPA hearings principally involve questions of law — that is, resolving the relevance and admissibility of classified information, 18 U.S.C. app. 3 § 6(a) — they are analogous to standard pretrial proceedings at which the defendant's presence is not required, *see* Fed. R. Crim. P. 43(b)(3) (excusing defendant's presence where "proceeding involves only a conference or hearing on a question of law"); *Klimavicius-Viloria*, 144 F.3d at 1261-62 (Constitution did not require defendant's presence at *ex parte* Section 6 hearing because only questions of law were involved); *United States* v. *Cardoen*, 898 F. Supp. 1563, 1571-72 (S.D. Fla.

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limitations on right of cross-examination beyond typical evidentiary limitations must be justified by "weighty considerations"), or hold that a defendant has a right to have *counsel* present at a critical hearing, *see United States* v. *Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) (pretrial motion to suppress evidence is a critical stage of the prosecution "requiring the presence *of counsel* for the accused") (quotations omitted) (emphasis added); *Hanson* v. *Passer*, 13 F.3d 275, 278 (8th Cir. 1994) (defendant denied Sixth Amendment right to counsel at pretrial hearing where defendant was without counsel and parties examined two witnesses and presented evidentiary motions).

Morever, the cases Moussaoui cites (Br. 103-04) for the proposition that this Court must presume prejudice when a defendant was excluded from a "critical proceeding" address only exclusion in the context of trial. *See United States v. Tipton*, 90 F.3d 861, 875 (4th Cir. 1996) (opining that *only* complete exclusion from the entire jury voir dire process would warrant presumption of prejudice); *Larson* v. *Tansy*, 911 F.2d 392, 395 (10th Cir. 1990) (holding that defendant's right to presence violated when excluded from courtroom during instructing of jury, closing arguments, and rendering of verdict); *United States* v. *Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968) (remanding because court could not determine if defendant prejudiced by exclusion from impanelling of the jury).

1995) (Section 6 rulings do not involve "factual questions that are relevant to the determination of guilt or innocence"), *aff'd sub nom. United States* v. *Johnson*, 139 F.3d 1359 (11th Cir. 1998).

Even if Moussaoui could establish that the CIPA hearings were critical, the second prong of his argument — that he "could have" assisted counsel "in identifying key individuals, events, and places throughout this [CIPA] process" (Br. 103) — is no more persuasive than the first. He offers no specifics. He does not even identify a particular hearing or issue. In any event, whatever intangible value Moussaoui might have added, his exclusion was amply justified by the national security risk he represented. *See Bell*, 464 F.2d at 671-72 (approving exclusion of defendant from pretrial hearing involving airport hijacker profiling system because interests in maintaining secrecy of the system outweighed defendant's right to be present at hearing that did not concern guilt or innocence); *see also United States* v. *Singh*, 922 F.2d 1169, 1172-73 (5th Cir. 1991) (finding it constitutionally acceptable to exclude defendant from pretrial hearing to determine whether informant's identity should be disclosed to defendant; whether informant's privilege applied was a "matter of law to be determined by the court"); *United States* v. *Anderson*, 509 F.2d 724, 730 (9th Cir. 1974) (same).

Finally, Moussaoui cannot establish, as he must, that he was prejudiced by his

exclusion from CIPA proceedings. *See Tipton*, 90 F.3d at 875 (right to be present at trial is not one "to be enforced 'independent of any prejudicial impact' from defendant's absence but as one actually dependent upon the existence of such an impact") (citing *United States* v. *Boone*, 759 F.2d 345 (4th Cir. 1985)). CIPA hearings are by definition preliminary, and thus hardly could have affected Moussaoui's trial rights. *See Bell*, 464 F.2d at 671-72 (justifying exclusion of defendant from pretrial hearing because he would be present at trial where the evidence would be offered against him). The fact that there was no trial here makes any claim of prejudice illogical, notwithstanding Moussaoui's claim that his exclusion from CIPA hearings "forced" him to choose between a "fundamentally defective process" and pleading guilty. Br. 103-04.

iii. There Was No Due Process Violation

Moussaoui claims (Br. 104-07, 118-25) that the district court's refusal to give him personal access to "exculpatory" material violated the Due Process Clause of the Fifth Amendment and also rendered his plea unknowing. He also renews (Br. 125-35) his motion for remand along similar grounds. He does not contend that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Rather, his three-fold argument is that the decision to plead guilty was personal to him; personal access to exculpatory material was essential to that decision; and barring access to such

material thus rendered his subsequent plea involuntary and unknowing. Br. 107. The argument is groundless for a number of reasons.

(a) Moussaoui Did Not Have A Constitutional Right Personally To Obtain Material Exculpatory Information Before Pleading Guilty Because A Conviction Pursuant To A Guilty Plea Rests On The Defendant's Own Admissions, Not The Government's Evidence

Moussaoui's claims assume that a criminal defendant has a constitutional right to obtain material exculpatory information from the government before pleading guilty. The assumption is incorrect for the following reasons.

In *Brady* v. *Maryland*, the Supreme Court held that a prosecutor has a duty to disclose material exculpatory information to a defendant in order to protect the fairness of a verdict at trial, and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. 373 U.S. 83, 87 (1963). The due process rights at issue in *Brady* v. *Maryland* can therefore best be described as "trial rights." *See Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977) ("[T]here is no general constitutional right to discovery in a criminal case and *Brady* did not create one."). Indeed, the Supreme Court's decisions applying *Brady* v. *Maryland* hold no more than that the government has a duty to disclose exculpatory information when such disclosure is necessary to ensure a fair trial. *See, e.g.*, *United States* v. *Bagley*, 473 U.S. 667, 675 (1985) (explaining that purpose of *Brady* v.

Maryland rule is to "ensure that a miscarriage of justice does not occur" and therefore prosecution is required only "to disclose evidence favorable to the accused that, if suppressed would deprive the defendant of a fair trial"); *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (constitutional violation occurs only "when the government's evidentiary suppression undermines confidence in the outcome of the trial") (internal quotations omitted); *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) ("[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

Thus, the purpose of *Brady* v. *Maryland*, and the Supreme Court's later cases applying it, is to protect the fairness of the *trial* and to guard against the risk that an innocent person might be found guilty because the government withheld evidence. That purpose is not implicated where, as in this case, the defendant enters a plea in open court, thereby "admitting guilt of a substantive crime." *Broce*, 488 U.S. 563, 570 (1989); *see also Orman* v. *Cain*, 228 F.3d 616, 617 (5th Cir. 2000) ("*Brady* requires a prosecutor to disclose exculpatory evidence for purposes of ensuring a fair trial, a concern that is absent when a defendant waives trial and pleads guilty."). This is so because a guilty plea is an admission of factual guilt "so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the

case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted). Consequently, because a criminal defendant who pleads guilty waives his right to a trial, a defendant's access to material exculpatory information under *Brady* v. *Maryland* never arises in the guilty plea context. *Cf. United States* v. *Ruiz*, 536 U.S. 622, 623, 631, 633 (2002) (holding that the "Constitution does not require the Government to disclose material impeachment evidence," or evidence of an "affirmative defense," before "entering a plea agreement with a criminal defendant"; in the context of the agreement at issue, "the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea" and the due process considerations that led the Court to find "trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*," argued against the existence of the "right" to material impeachment evidence in guilty plea context).

Moussaoui argues (Br. 106) that his plea was involuntary and unknowing because he lacked a complete understanding of the strength of the case against him. The claim is misguided. When a defendant admits that he is guilty in open court, he does not admit that the government will be able to prove his guilt to a jury beyond a reasonable doubt. Rather, he admits that "he actually committed the crimes," and that "he is pleading guilty *because* he is guilty." *United States* v. *Hyde*, 520 U.S. 670, 676 (1997) (emphasis added). A defendant does not need to know of potential

weaknesses in the government's case in order to make those admissions voluntarily and intelligently. *See Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision."). Indeed, as discussed, *supra*, at 103-11, the inquiry into whether a plea is voluntary and intelligent turns only on whether the defendant is competent, acts without coercion, and is aware of the charges and the direct consequences of the plea. *Brady* v. *United States*, 397 U.S. at 749-57.

Thus, even if the receipt of information from the government might improve the defendant's calculations of the odds of acquittal at trial, it does not mean that a guilty plea entered without such information is involuntary or unknowing. *See Ruiz*, 536 U.S. at 629-31 (rejecting the view that guilty plea can never be constitutionally valid absent full disclosure of material impeachment information; "the Constitution . . . permits a court to accept a guilty plea . . . despite various forms of misapprehension under which a defendant might labor"); *Jones* v. *Cooper*, 311 F.3d 306, 315 n.5 (4th Cir. 2002) (holding that appellant's contention that he would not have pleaded guilty had he been provided allegedly withheld *Brady* v. *Maryland* information was "foreclosed" by *Ruiz*); *United States* v. *Richards*, 2008 WL 2661304, at *2 (4th Cir. July 8, 2008) (under *Ruiz*, "failure to disclose *Brady* evidence prior to

a guilty plea does not establish a constitutional violation").[78]

Moreover, as in *Ruiz*, the same due process considerations that led the Court to find "trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*," argue against the existence of the "right" for which Moussaoui argues. 536 U.S. at 631. Those considerations include "not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." *Id.* Here, the government's interest is in protecting national security information from disclosure.

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[78] While the Supreme's Court's holding in *Ruiz* only addressed the disclosure of "impeachment" evidence, we submit that, as this Court seemed to acknowledge in *Jones*, 311 F.3d at 315 n.5, *Ruiz*'s rationale applies with equal force to all exculpatory evidence, especially in light of the Supreme Court's previous explicit "reject[ion] [of] any such distinction between impeachment evidence and exculpatory evidence" for defendants who stand trial, *see Bagley*, 473 U.S. at 676. Moussaoui provides no justification for adopting a dichotomous approach in guilty-plea cases. Instead, he cites (Br. 123 n.62) only dicta from *McCann* v. *Mangialardi*, 337 F.3d 782 (7th Cir.2003), where the Seventh Circuit interpreted *Ruiz* to draw a distinction between impeachment information and "exculpatory evidence *of actual innocence*," *id.* 788 (emphasis in original), and predicted that the Supreme Court would find a Due Process violation where prosecutors had knowledge of a defendant's factual innocence, but nonetheless withheld exculpatory information before the guilty plea, *id.* Whatever the merits of *Mangialardi*'s reasoning, Moussaoui points to no evidence approaching his factual innocence. Indeed, one of the pre-*Ruiz* cases upon which Moussaoui relies heavily (Br. 119) is distinguishable for this very reason. *See Tate* v. *Wood*, 963 F.2d 20, 24-25 (2d Cir. 1992) (government bargained for a guilty plea, produced no discovery, and told media that deal was offered because defendant might be innocent).

This is at least as compelling as the government's interest in *Ruiz*, which was to protect the "identities of cooperating informants, undercover investigators, or other prospective witnesses." *Id.* at 632; *see, e.g.*, *United States* v. *Smith*, 780 F.2d 1102, 1109 (4th Cir. 1985) ("To give the domestic informer of the police more protection than the foreign informer of the CIA seems to us to place the security of the nation from foreign danger on a lower plane than the security of the nation from the danger from domestic criminals."). Yet, under Moussaoui's view — *i.e.*, that the Constitution confers upon a defendant the "right" to have personal access to all arguably exculpatory information, including classified information, before he pleads guilty — a court could never accept a defendant's guilty plea in a prosecution implicating national security without full resolution of any CIPA litigation. Such a result would distort the very purpose of CIPA, which is designed to prevent the unnecessary disclosure of classified information at trial while concomitantly ensuring that the defendant receives a fair trial. *See Abu Ali*, 528 F.3d at 245 ("A defendant's right to see the evidence that is tendered against him *during* trial, however, does not necessarily equate to a right to have classified information disclosed to him *prior* to trial.") (emphasis original).[79] Thus, in this particular CIPA context, the "right"

[79] Moussaoui relies (Br. 118-20) upon several cases pre-dating the Supreme Court's decision in *Ruiz* to support his proposition that *Brady* v. *Maryland* claims survive an otherwise knowing and voluntary guilty plea, because such a plea

advocated by Moussaoui — pre-guilty plea disclosure of all arguably exculpatory national security information — would obviously have an "adverse impact" upon "the government's interest[]" in precluding the unnecessary disclosure of national security information through the vehicle of a knowing and voluntary guilty plea.

(b) Moussaoui Knew The Substance Of The Alleged Exculpatory Material, Despite Restrictions On His Access To It

Moussaoui's claim also fails because his assertion (Br. 125) that he was "completely in the dark" about the alleged exculpatory information, and whether he would be able to see it, is simply false. Moussaoui knew early on in the case that defense/standby counsel believed some of the discovery was material and exculpatory, and that they were trying to get the information declassified for use at

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"cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution,'" and because "prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Sanchez* v. *United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (quoting *Miller* v. *Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988)). These cases do not support Moussaoui for a number of reasons. First, Moussaoui does not — nor could he — suggest that anyone attempted to elicit his guilty pleas in this case. More fundamentally, because these cases precede *Ruiz*, none addresses *Ruiz*'s reasoning that the Constitution permits a court to accept a guilty plea despite various forms of misapprehension under which a defendant might labor. *Ruiz*, 536 U.S. at 629-31. Further, none of the cases balance the due process considerations, as the Supreme Court did in *Ruiz*, to assess, among other things, "the adverse impact of the requirement upon the Government's interests." *Id.* at 631. Certainly, none addresses the government's compelling interest in protecting national security, an interest at stake here.

trial. JAU1126.[80] Before the aborted plea, in 2002, counsel advised the district court and Moussaoui personally that at that early stage there was "exculpatory evidence which ha[d] not been provided to him and that his plea of guilty may mean that he might never have the benefit of such information to use to contest his guilt." JAU866, 882. Indeed, it was Moussaoui himself who moved for access to enemy

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[80] Most of the information to which Moussaoui refers in his brief addresses his role in the offenses charged. For example, Moussaoui argues that he was not the so-called "20th highjacker" (and not involved in the September 11 attacks), that he was to be part of a second wave of attacks, and that he had limited knowledge of the plot. Br. 13, 73-76, 124. Although this Court previously stated that such information could be exculpatory, *see Moussaoui*, 382 F.3d at 473-74, that assessment was made in light of the Court's observation that "the scope of an alleged conspiracy is a *jury* question . . . and the possibility that Moussaoui [would] assert that the conspiracy culminating in the September 11 attacks was distinct from any conspiracy in which he was involved." *Id.* at 473 (citation omitted; emphasis added). As discussed *supra*, however, Moussaoui eliminated any factual question about the scope of the conspiracy by pleading guilty to all counts of the indictment. In any event, none of the information in question, if true, exonerates Moussaoui to a degree where it could conceivably be said that a factually innocent person was wrongly convicted, *see Brady* v. *Maryland*, 373 U.S. at 87, or that the guilty plea was a "miscarriage of justice," *Bagley*, 473 U.S. at 675. The charges to which Moussaoui pleaded, as explained above (*supra*, at 70-89), were broad al Qaeda conspiracies to kill Americans by flying hijacked aircraft into prominent buildings. As the information at issue relates mainly to Moussaoui's intended role in such attacks, it may have been relevant in the penalty phase of this case (i.e., arguably mitigating), but of far less consequence to the question of factual guilt. *See Mangialardi*, 337 F.3d at 788. In other words, the information was not "material" as to Moussaoui's guilt. *Bagley*, 473 U.S. at 682 (defining exculpatory information as "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

combatant witnesses ("ECWs") whom he claimed would exonerate him. JAU1134-35, 5957-58, 6045-47, 6088-95, 6138-40, 6232-33, 6247-50, 6253-54.

Moreover, the ensuing compulsory process litigation publicly disclosed the essence of what those potential witnesses had to say. *See, e.g.*, JAU1213; JAC472, 511, 523, 525 (Moussaoui's *pro se* responses and objections to the substitution, which included some of the information in question). For example, the redacted, unclassified versions of this Court's access opinions provided more than the gist of what the enemy combatants' testimony might be. *See United States* v. *Moussaoui*, 365 F.3d 292, 310 (4th Cir. 2004); *Moussaoui*, 382 F.3d at 473-74. In those opinions, this Court explained that the information from the ECWs could possibly support a defense argument in the guilt phase grounded in multiple conspiracies. *Moussaoui*, 382 F.3d at 473. Further, this Court declared that, at bottom, the information was "critical to the penalty phase[, because if] Moussaoui had no involvement in or knowledge of September 11, it is entirely possible that he would not be found eligible for the death penalty." *Id.*[81] Consequently, Moussaoui not only knew by the time of

[81] This Court made clear that Moussaoui would be entitled to use at the trial and/or penalty phase some form of substitution for enemy combatant statements, some of which implicated him in the September 11 attacks, but others of which "tend[ed] to exculpate" him; "indicated that [his] operational knowledge was limited"; could "undermine the theory . . . that [he] was to pilot a fifth plane into the White House"; were "consistent with [his] claim that he was to be part of a post-September 11 operation"; and could allow a jury to reasonably infer that he

his guilty plea that arguably exculpatory, classified material existed as to both guilt and sentencing, but he had also received a road map from this Court as to how the information could be used to his benefit in both phases of the prosecution. These opinions alone therefore undermine Moussaoui's assertion that if he "would have known that he had important evidence that could prove his innocence of the September 11th attacks, [he] surely would have changed his mind about pleading guilty." Br. 124.

Finally, the unclassified 9-11 Commission Report, which was released in July 2004, and which defense counsel provided to him, JAU3886, devoted a separate section to Moussaoui, and described enemy combatants' comments about him, including the notion that Moussaoui was to be part of a second wave of attacks, 9-11 Commission Report, at 246-47, 273-76.[82] In sum, on this record, Moussaoui cannot credibly claim that he pleaded guilty without any sense of what the enemy combatants were saying.

"was not involved in September 11." *Moussaoui*, 382 F.3d at 473-74.

[82] While Moussaoui's testimony indicated that he may not have read the Report, JAU3886-87, 3973, even if true that fact can hardly work to his benefit now. *Cf. United States* v. *Perez*, 473 F.3d 1147, 1150 (11th Cir. 2006) (defendant alleging *Brady* v. *Maryland* violation must show that he did not possess the evidence nor could have obtained it himself with any reasonable diligence).

(c) Moussaoui Would Have Had CIPA Substitutes For Any Exculpatory Information Had He Gone To Trial

More fundamentally, the premise of Moussaoui's argument — that CIPA rulings denying him personal access to exculpatory material left him no choice but to plead guilty — is faulty because there is no causal connection between the alleged violation (CIPA rulings) and the alleged harm (coerced plea).

The district court's rulings prevented disclosure of classified information to Moussaoui and invoked CIPA to establish a pretrial process through which any classified information that was relevant and material to Moussaoui's defense could be used at trial in the form of an unclassified substitute. This process was designed to leave Moussaoui in substantially the same position he would have been in if he had access to classified information. Indeed, this Court held that Moussaoui was entitled to use at the trial and/or penalty phase some form of substitution for enemy combatant statements that would be essential to his defense. *Moussaoui*, 382 F.3d at 476, 482.

Thus, fair inference suggests that some unclassified equivalent of the material in question would have been available to Moussaoui had he gone to trial, as it was at the penalty phase. JAU3988-4034, 4051-4082, 4984-91. Consequently, to the extent Moussaoui lacked information before his plea, it was not because of the CIPA rulings, as he suggests, but because he chose to waive his right to a trial and plead guilty before the CIPA process ran its course. *See Ruiz*, 536 U.S. at 629 ("[T]he law

ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances — even though the defendant may not know the *specific detailed* consequences of invoking it.") (emphasis original).

(d) The Plea Was Not Rendered "Uncounselled" Because The Information At Issue Was Not Disclosed To Moussaoui

Even though Moussaoui was not constitutionally entitled to alleged exculpatory information before his plea, even though he knew the substance of the information in question notwithstanding the restrictions on his access, and even though he would have been able to use CIPA substitutions at trial, Moussaoui nonetheless asserts (Br. 120-25) that his plea was constructively "uncounselled" because his attorneys — who repeatedly advised him against pleading guilty — were barred from discussing the alleged exculpatory information with him before his plea. The claim is without merit.

First, the record demonstrates that Moussaoui, of his own volition, rejected his counsel's assistance throughout the case. For example, as discussed *supra*, at 51-58, at both his guilty plea and the *ex parte* hearing preceding it, Moussaoui made clear that he rejected any advice his counsel gave him against pleading guilty. Moreover, trial counsel apparently did not believe it was necessary for the information about which Moussaoui now complains to be disclosed to him before the plea, as they made

no such request of the district court like they did before the aborted plea in July 2002, JAU866, JAC66-69. The fact of the matter is that, by April 2005, this was far less of a concern to defense counsel because it was understood that Moussaoui had more than a working understanding of the substance of the information at issue. Thus, it is far-fetched for Moussaoui to now claim that it would have been of consequence for him to know "why [counsel] opposed the plea." Br. 125.

Moreover, Moussaoui does not meet the legal standard for showing he was constructively denied counsel at the guilty plea. *See United States* v. *Cronic*, 466 U.S. 648, 659 (1984) (requiring showing that "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing"); *cf. United States* v. *Faris*, 388 F.3d 452, 459 & n.4 (4th Cir. 2004) (rejecting defendant's claim that it was impossible for counsel to provide adequate assistance at guilty plea without allegedly withheld *Brady* v. *Maryland* material because material would have made counsel "far more inquisitive of [defendant] as to what was true[,]" and explaining that "the person who should have known what was true was [defendant] himself"). Indeed, this Court has stated that constructive denial of counsel arises only when a counsel is so ineffective that counsel "might as well be absent from the proceedings." *Lenz* v. *Washington*, 444 F.3d 295, 304 (4th Cir. 2006) (quotation marks omitted). As the

record makes clear, that was simply not the case here.[83]

(e) The Government's Post-Guilty Plea Disclosures Regarding Interrogation Recordings Are Irrelevant To An Assessment Of The Propriety Of Moussaoui's Guilty Plea

In a effort to re-litigate his motion to remand, Moussaoui additionally argues (Br. 108-112, 125-35) that a remand is necessary because the government's "inaccurate representations about the taping of witness interrogations . . . relate directly to the voluntary and knowing nature of Moussaoui's plea[,]" Br. 112, and he declares (Br. 127) that information on the tapes are "plainly *Brady* evidence." Specifically, he adds (Br. 135) that the government's post-guilty plea disclosures about (a) the CIA's destruction of certain recordings of interrogations of Abu Zubaydah, and (b) the existence of recordings of other detainee interrogations, "raise far more questions than they answer."

Moussaoui's remand motion has already been litigated extensively in separate

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[83] Moussaoui's brief (Br. 117, 121, 123) is loaded with citations to inapposite cases where woeful performance by counsel was found to violate the Constitution. For example, citing *Childress* v. *Johnson*, 103 F.3d 1221, 1226-30 (5th Cir. 1997), where counsel took "a potted plant approach," and was so inconsequential at the plea hearing that defendant did not even "know why counsel was present," Moussaoui seeks to extrapolate a general rule that prejudice must be presumed wherever "standby counsel" or its equivalent is involved at a plea. But prejudice was presumed in *Childress* because counsel was "not merely incompetent *but inert*." 103 F.3d at 1228 (emphasis added). Thus, that case, as well as the factually similar cases Moussaoui cites on this point, are not relevant here.

pleadings with this Court.[84] This Court properly rejected Moussaoui's claims and concluded that a remand was not necessary. Moussaoui should not now be permitted to re-litigate this motion in the guise of a merits brief. At any rate, just as was the case in January of 2008 when this Court first denied Moussaoui's remand motion, it remains the case today that these post-guilty plea disclosures have no bearing on the knowing and voluntary nature of Moussaoui's guilty plea, and a remand is not necessary.[85]

First, as to the Zubaydah tapes, Moussaoui posits (Br. 132) that the "timeline" relating to the destruction of those tapes "raises concerns." But he concedes (Br. 59-60, 108, 131) that the district court twice found that Zubaydah lacked any material evidence and, accordingly, Moussaoui was not entitled to access to Zubaydah, or, even substitutions like those for other ECWs. These conclusions were firmly grounded in the district court's review of the reporting of Zubaydah's interrogations.[86]

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[84] The government incorporates by reference its prior pleadings relating to Moussaoui's motion to remand.

[85] Nor is a remand necessary with respect to Moussaoui's sentence in light of the jury's decision not to impose the death penalty. *See* Section III, *infra*, at 180-99.

[86] Moussaoui's insinuation that the district court requested information about tapes of Zubaydah's interrogations is simply false. *See* Br. 131 (tapes were "never produced to the district court, despite direct questions on point"). Moreover, as he did in his remand pleadings, Moussaoui continues to conflate the various ECWs in an attempt to leave the impression that a remand is necessary to

As Moussaoui was never entitled to Zubaydah substitutions, the Zubaydah tapes obviously would not have played any role in an assessment of the reliability of — non-existent — Zubaydah substitutions. Put another way, the presence or absence of recordings relating to a non-material witness cannot possibly be said to undermine the knowing and voluntary nature of Moussaoui's plea.

Second, as to the found tapes, the government has already provided this Court with transcripts of them. This Court thus can confirm — again — the government's consistent affirmation that those tapes are devoid of any exculpatory material. More fundamentally, however, even if any of them contained arguably exculpatory material, as we have described, *supra*, at 150-56, that fact still would not mean that Moussaoui's plea could be undone. A defendant simply is not constitutionally entitled to material exculpatory information before pleading guilty. Thus, contrary to Moussaoui's present claims (Br. 135), there are no extant, relevant "issues" relating to the found tapes that demand resolution in any sort of a remand proceeding.[87]

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sort out confusing factual questions. We have already explained the three distinct categories of ECWs and their relevance (or lack thereof) to this case, and so we do not repeat this detailed explanation here. *See* Appellee's Supplemental Response to Appellant's Motion for Limited Remand and Appellee's Opposition to Motion for Tape and Transcript (Doc. 118) at 2-7.

[87] Moussaoui's additional claim (Br. 108-112) that a remand is necessary because the found tapes bear on his compulsory process claim is even more groundless. He argues that the inaccuracies regarding taping "relate directly to the

Finally, to the extent that Moussaoui hints at a right to explore potential government misconduct on remand (Br. 131-32), he is again mistaken. Even assuming for the sake of argument that government misconduct could *ever* serve as the legal basis for vacatur of an otherwise knowing and voluntary guilty plea, *cf.* *Ferrara* v. *United States*, 456 F.3d 278 (1st Cir. 2006), nothing in the present record begins to approach the type of egregious conduct reflected in, for example, *Ferrara*. *See id.* at 291 ("[W]e are dealing with more than simple neglect to turn over exculpatory evidence; the government manipulated the witness . . . into reverting back to his original version of events, then effectively represented to the court and the defense that the witness was going to confirm the story (now known by the

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voluntary and knowing nature of Moussaoui's plea because they concern the reliability of substituted evidence in this case." Br. 112. But this Court has already explained why the reports, upon which the substitutions were based, provide sufficient indicia of reliability to alleviate the concerns — including concerns about the lack of recordings — of the district court. *See Moussaoui*, 382 F.3d at 478 (explaining the "profound interest in obtaining accurate information" from ECWs and "in reporting that information accurately to those who can use it to prevent acts of terrorism"). More fundamentally, any concern about the reliability of "substituted evidence" for use at trial became irrelevant when Moussaoui pleaded guilty. *See* JAU1428-30 (district court explaining that Moussaoui's guilty plea would bar him from further challenging the issue of access to ECWs with regard to his guilt). Moreover, while Moussaoui points (Br. 112) to the district court's inquiry into recordings following his guilty plea and in preparation for the sentencing proceedings, any question about his compulsory process rights at sentencing is irrelevant in light of the jury's decision not to impose the death penalty. *See* Section III, *infra*, at 180-99.

prosecution to be a manipulated tale) that the petitioner was responsible for killing Limoli"). Nor does anything in the record, including facts disclosed post-plea, provide a basis for speculating that interrogation recordings, or information about them, contain information establishing Moussaoui's factual innocence, or would have altered Moussaoui's decision to plead guilty. *See id.* at 290 (egregiously impermissible misconduct must be "material" to defendant's decision to plead guilty). Indeed, as we have shown, Moussaoui understood the charges against him and the consequences of pleading guilty. He knew the substance of the ECWs' statements from a variety of sources. His subsequent decision to plead guilty was firm, irrevocable, and against the advice of his counsel. He is not entitled to a remand on this issue now simply because he asserts — without any support — that "inaccurate representations about the taping of witness interrogations . . . relate directly to the voluntary and knowing nature of Moussaoui's plea." Br. 112. *Cf. United States* v. *Avellino*, 136 F.3d 249, 260 (2d Cir. 1998) (defendant not entitled to evidentiary hearing on motion to withdraw guilty plea based on evidence that government's key witness had perjured himself because evidence was in no way material to defendant's decision to plead guilty).

Thus, it is still the case (just as it was back in January of 2008) that Moussaoui is not entitled to a remand based on the government's post-plea disclosures. As we

demonstrated in our remand papers, none of these disclosures raise any factual questions that are remotely germane to the core question pending before this Court, *viz.*, did Moussaoui freely choose to plead guilty with a complete and accurate understanding of the charges against him and the consequences he would face. And, while the government certainly regrets the need for these disclosures, all of the reasons that supported this Court's summary denial of Moussaoui's initial motion for remand remain in full force and effect to this day.[88]

* * * *

In sum, Moussaoui did not have a constitutional right to alleged exculpatory information before his plea; he knew the substance of the information anyway; and his due process argument additionally fails for lack of a causal connection between the alleged violation and harm. With full knowledge that exculpatory information was coming to him — in the form of court-mandated substitutions — Moussaoui knowingly and voluntarily decided to plead guilty, ending the ongoing, pretrial CIPA process. Moreover, nothing that has been discovered post-guilty plea changes these

[88] The government will continue to make disclosures as necessary to fulfill its duty of candor to the Court, as it has done previously, and as it plans to do in short order. The Department of Justice's investigation of the CIA tapes will continue to get to the bottom of the underlying circumstances. The information uncovered to date, however, provides no legal basis for calling into question the validity of Moussaoui's plea or for undertaking any additional factfinding proceedings in this case.

core facts, much less provides a basis for a remand to the district court. The guilty plea, therefore, dooms his due process claim, notwithstanding its lack of merit.

iv. There Was No Violation Of The Right To Self-Representation

Moussaoui argues (Br. 84-100) that his Sixth Amendment right to self-representation was violated by the district court's decision to permit standby counsel to represent him on matters involving classified information. According to Moussaoui, standby counsel usurped control of his *pro se* case by having exclusive access to classified discovery, "exculpatory" material, and Section 6 hearings. Moussaoui asserts (Br. 100) that this circumstance compelled him to plead guilty because the only other choice was a trial at which his right to self-representation would be denied. The argument fails at the threshold because Moussaoui forfeited his right to self-representation long before his plea, a ruling that he does not challenge on appeal. Consequently, Moussaoui could not possibly have pleaded guilty to prevent any infringement at trial of a right he no longer possessed.

The Supreme Court in *Faretta* v. *California*, 422 U.S. 806, 819-22 (1975), recognized that a criminal defendant has a Sixth Amendment right to self-representation. "*Faretta* itself and later cases," however, "have made clear that the right of self-representation is not absolute," *Indiana* v. *Edwards*, 128 S.Ct. 2379, 2384 (2008), and the "government's interest in ensuring the integrity and efficiency

of the trial at times outweighs the defendant's interest in acting as his own lawyer," *United States* v. *Bush*, 404 F.3d 263, 272 (4th Cir. 2005) (quoting *Martinez* v. *Ct. of App. of Cal.*, 528 U.S. 152, 162 (2000)). Thus, courts may choose to appoint standby counsel to assist a *pro se* defendant, *Faretta*, 422 U.S. at 834, n. 46, and are entitled to "deference" with respect to difficult "judgment calls" they make in balancing standby counsel's duties against the *pro se* defendant's objection to their participation, *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984).

Here, the district court did not abuse its discretion by appointing standby counsel to deal with classified information in a case involving a *pro se* defendant to whom such information could not be disclosed. *See Abu Ali*, 528 F.3d 247 ("CIPA vests district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings."). The appointment of standby counsel permitted the district court to employ CIPA to isolate classified information that would be relevant and material at trial, and craft unclassified substitutes for those items. In these circumstances, use of standby counsel was necessary. Any minimal adverse consequence to Moussaoui's right of self-representation was outweighed by the government's interest in protecting national security information from disclosure, an interest at least as compelling as protecting "the integrity and efficiency of the trial." *Bush*, 404 F.3d at 272.

Nor does Moussaoui explain what the district court should have done to avoid the alleged constitutional deprivation. The implication of his argument is that his self-representation rights command the disclosure of classified information to him. But the Sixth Amendment mandates no such disclosure. Indeed, a contrary rule would create terrible incentives, inducing many defendants in cases involving classified information to discharge counsel as a tactical ploy. *See United States* v. *Frazier-El*, 204 F.3d 553, 560 (4th Cir. 2000) (right of self-representation does not exist "to be used as a tactic . . . for distortion of the system") (citing *United States* v. *Singleton*, 107 F.3d 1091, 1102 (4th Cir. 1997)).

Moussaoui's claim that standby counsel dominated his defense to the point of a constitutional violation is hyperbole. To establish such a violation, Moussaoui must show that he was unable to maintain "actual control" over the case he wanted to present to the jury. *McKaskle*, 465 U.S. at 178. But here, standby counsel's assigned role was minimal and preliminary in nature. They were tasked with carrying out the pretrial CIPA process on Moussaoui's behalf, a process that involved wading through classified discovery, designating items for use at trial, and participating in CIPA hearings. In contrast, unclassified pretrial motions they filed had to first be provided to Moussaoui for his review. *See* JAU1122-23.

Moussaoui cites no case in which pretrial actions of standby counsel served as

a basis for a constitutional violation. On the contrary, the relevant authority tends to measure the issue in terms of respective roles at trial. *See, e.g.*, *McKaskle*, 465 U.S. at 181 (involving role of standby counsel at trial, and stating that alleged over-participation is less "problematic" when conduct in question is outside presence of jury); *United States* v. *Lawrence*, 161 F.3d 250, 253-54 (4th Cir. 1998) (assessing quantum of advice standby counsel permitted to give *pro se* defendant at trial); *United States* v. *Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997) (affirming rejection of defendant's mid-trial request to replace counsel with legal advisor); *Fields* v. *Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (en banc) (holding that standby counsel's cross-examination at trial did not violate rights).[89]

Moussaoui also ignores the reality that standby counsel's role was exceedingly short-lived in the context of a case that lasted for almost half of a decade. Standby counsel performed their role for a period of less than a year and a half before Moussaoui forfeited his right to self-representation. Moussaoui sheds no light on

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[89] Indeed, the two cases upon which Moussaoui relies (Br. 91-92) both involve violations occurring in the context of a trial. In *Oses* v. *Massachusetts*, 961 F.2d 985, 986 (1st Cir. 1992), the trial court conducted bench conferences with standby counsel, but not the defendant; ordered that the defendant conduct the case in leg irons and shackles; and made derisive remarks to the jury about *pro se* representation. In *United States* v. *McDermott*, 64 F.3d 1448, 1451-53 (10th Cir. 1995), the district court barred the *pro se* defendant from bench conferences solely because the defendant was not familiar with legal issues.

how standby counsel dominated his case during this time, other than generally to challenge their involvement in the CIPA process. There is no telling what the respective roles would have been at trial, given Moussaoui's forfeiture of self-representation and his subsequent decision to plead guilty. *See United States* v. *Seybold*, 979 F.2d 582, 585-589 (7th Cir. 1992) (rejecting defendant's claim that the district court violated right to self-representation by dealing with standby counsel instead of *pro se* defendant — including conducting pretrial hearings with the government and standby counsel in his absence — because defendant pleaded guilty).[90]

In sum, Moussaoui's self-representation claim fails for a multitude of reasons, even if it is not foreclosed by his guilty plea.

v. There Were No Choice Of Counsel Violations

Finally, Moussaoui claims (Br. 25-49) that the district court violated his Sixth Amendment right to counsel of choice. He asserts that he was not advised of the right

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[90] There are other flaws in Moussaoui's claim. For example, he agreed to accept the circumstance about which he now complains — having standby counsel handle aspects of his case involving classified information. *See* JAU537; JAC445 n.22. His claim is also belied by his refusal to attend CIPA hearings. *See* JAU1145, 1227, 1231-36; *McKaskle*, 465 U.S. at 182 ("Even when he insists that he is not waiving his *Faretta* rights, a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably.").

in the initial stages of the case (Br. 26-27, 32-36), and, when he did become aware of it, the right was unconstitutionally frustrated by a combination of the conditions of his confinement — namely, the SAMs — and the district court's requirement that attorneys submit to background investigations (Br. 27-49). The claim is unsupported by the record or the law.

First, Moussaoui is simply wrong in asserting (Br. 27) that "the district court never asked him whether he wanted to hire his own lawyer" during the initial phase of this case, running from December 11, 2001, when the original indictment was returned, to April 22, 2002, when Moussaoui first rejected appointed counsel. At his initial appearance, Moussaoui was correctly advised that if he was "able to retain counsel of [his] own choosing, then [he had] the right to counsel of [his] own choosing." 2SJAU2-3. *See United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (holding that an element of the Sixth Amendment right to counsel "is the right of a defendant who does not require appointed counsel to choose who will represent him"). The record demonstrates, moreover, that Moussaoui was fully cognizant of this right in the initial stages of the case. JAU220 (April 22, 2002 conference, where Moussaoui had already formulated his "intention . . . to hire [his] own chosen Muslim lawyer" to assist him as a legal advisor once granted *pro se* status). The record, therefore, belies Moussaoui's claim that he was not fully cognizant of the right to

choose counsel at any point in this case.

Second, Moussaoui does not identify any lawyer that he purportedly "chose" in a constitutional sense. Nor does he claim that the district court rejected any attorney that he proposed. On the contrary, the district court was willing to permit the only counsel whose name Moussaoui put forward — Mr. Freeman — to participate in the case in either a "standby" or "advisory" capacity, so long as Mr. Freeman, an out-of-state practitioner, moved for admission *pro hac vice*, and filed a notice of appearance. JAU783-84. Because neither Mr. Freeman nor any other attorney who offered to enter an appearance on Moussaoui's behalf was rejected, there is no basis for Moussaoui's claim. *Gonzalez-Lopez*, 548 U.S. at 148 ("Deprivation of the right is 'complete' when the defendant is erroneously *prevented* from being represented by the lawyer he wants . . . .") (emphasis added); *see also Wheat* v. *United States*, 486 U.S. 153, 159 (1988) ("[A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant.").

Moussaoui additionally contends that a combination of court- or government-imposed restrictions infringed his choice of counsel. He points to the SAMs' restriction that he communicate from jail only with pre-cleared attorneys and family members, and the Protective Order's requirement that classified information be

disclosed only to attorneys with security clearances. The claim is unsupported by fact. For example, Mr. Freeman repeatedly met with Moussaoui, notwithstanding the SAMs. JAU525-26, 613-14, 659-663, 4414-17. Moussaoui also met with Professor Reza. *Id.* 990-92, 1052-53, 5870. Moussaoui cites not one instance where a lawyer refused to meet with him, much less represent him, because of SAMs or security-clearance requirements. Moussaoui himself acquiesced in the security-clearance requirement, when the district court explained that it would apply to any counsel he chose who wished to review classified materials. *Id.* 215 (Moussaoui stating that his lawyer will assist him "after security clearance"); *id.* 278 ("This lawyer will be vetted, vetted by CIA, FBI, whatever you want"); *id.* 528 ("I don't have a problem with FBI background.").[91]

Neither the SAMs nor the necessity of a security clearance caused Moussaoui's difficulty in finding counsel. Moussaoui himself was more likely the reason. The district court, his family, and appointed counsel, all diligently sought other willing defense counsel when it became clear that Moussaoui would not work with appointed counsel. *See supra*, at 124-26. Even Mr. Freeman [redacted]

[91] Moussaoui's acquiescence also belies his complaint (Br. 44) that the district court improperly denied his choice to completely forgo his counsel's access to classified information. Moussaoui never articulated any such choice. Indeed, all of Moussaoui's actions suggested the opposite, *i.e.*, he embraced the necessity of having cleared counsel.

[redacted] JAU5768 n.1. After spending considerable time with Moussaoui, Mr. Freeman refused to comply with the district court's basic requirements for appearance in the case, likely because he was uninterested in continuing. *Id.* 525-26, 613-14, 659-63, 4414-17.[92]

Moreover, Moussaoui's SAMs claim fails procedurally, as well as on the merits. The procedural default is twofold. First, the claim that limitations on Moussaoui's communications in and from jail prevented him from securing counsel

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[92] After Mr. Freeman declined to enter an appearance, retain local counsel, or appear *pro hac vice* under local district court rules, JAU783-87, after he arguably violated local rules by preparing court filings for Moussaoui, *id.* 606-610, 657, and after the district court repeatedly warned Moussaoui that Mr. Freeman had to abide by local rules in order to represent him in whatever capacity, *id.* 534-35, 575, 640, 657, 783-85, the district court ultimately barred Mr. Freeman from assisting Moussaoui, *id.* 784-87. It was certainly within the court's discretion to do so. *See United States* v. *Ensign*, 491 F.3d 1109, 1115 (9th Cir. 2007) (district court properly terminated attorney's representation in light of the attorney's ethical issues, because the attorney's action "raised concerns that he would neither abide by the court's rules and practices, nor be readily answerable to the court") (internal citation and quotations omitted), *cert. denied*, 128 S. Ct. 1870, 1871 (2008); *United States* v. *Flanders*, 491 F.3d 1197, 1216 (10th Cir. 2007) (balancing the defendant's constitutional right to retain counsel of choice against the court's responsibility to "maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice") (internal citation and quotations omitted); *see also Wheat*, 486 U.S. at 159 (right to counsel of choice is "circumscribed in several important respects," for example, bar membership, declining to represent the defendant, ethical conflict); *Morris*, 461 U.S. at 11-14 (recognizing trial court's latitude in balancing the right to counsel of choice against demands of its calendar); *Sampley* v. *Att'y Gen. of N.C.*, 786 F.2d 610, 613 (4th Cir. 1986); *United States* v. *Hughey*, 147 F.3d 423, 428-431 (5th Cir. 1998).

of choice was not raised in district court. Second, given that the claim is essentially a challenge to prison conditions, despite its constitutional wrapping, Moussaoui was required to exhaust available administrative remedies, which he did not. *See Abu Ali*, 528 F.3d at 244 ("We do not have jurisdiction to consider th[e SAMs] claim. . . . The defendant must exhaust his administrative remedies before challenging the SAMs in federal court."); *see also Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973) (prisoners cannot "evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings"). On the merits, a prison regulation is valid over a constitutional challenge "if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). Given Moussaoui's membership in al Qaeda and professed desire to kill Americans, the SAMs' restrictions on his communications were reasonably related to prison and public safety, and therefore easily pass constitutional muster. *See United States* v. *El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) (upholding constitutionality of SAMs limitations on detained al Qaeda member's communications).[93]

Finally, Moussaoui's security-clearance claim — which likewise is raised in the first instance on appeal — also fails on the merits. Again, Moussaoui does not

[93] Moussaoui's claim that the SAMs violated his right to self-representation (Br. 97-100) fails for the same reasons.

point to any prospective counsel he would have chosen but for a security-clearance requirement. Moreover, given that the right to choose counsel is not absolute, courts have found that the right abides certain countervailing government interests. *See United States* v. *Corporan-Cuevas*, 35 F.3d 953, 956 (4th Cir. 1994) (integrity of the judicial process); *United States* v. *Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988) (adverse affect on an important public interest). "[T]here can be no doubt that the Government's interest in protecting the security of classified information is a compelling one." *United States* v. *Moussaoui*, 65 Fed. Appx. 881, 887, 2003 WL 21076836 (4th Cir. 2003) (unpublished). In cases involving national security and classified information, courts have readily found that the right to counsel of choice is permissibly limited by the security-clearance requirement. *See United States* v. *Hashmi*, 2008 WL 216936, at *4-8 (S.D.N.Y. Jan. 16, 2008) (defendant charged with providing material support to al Qaeda); *United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 117-23 (S.D.N.Y. 1999) (finding in case involving al Qaeda members that "[t]he text and structure of both CIPA and the Security Procedures . . . create a presumption that the Court possesses the authority to require Defense counsel to seek security clearance before the Court will provide them with access to classified materials"). The district court's requirement here was equally justified, given the nature of the charges and the defendant.

Thus, apart from being foreclosed by his guilty plea, Moussaoui's choice of counsel claim can be rejected on multiple grounds.

III. MOUSSAOUI'S SENTENCING CLAIM IS BASELESS

Although Moussaoui prevailed in the penalty phase, receiving the life sentences he repeatedly asked the jury and district court to impose, he now asks this Court to vacate those sentences and remand for a re-sentencing. He claims (Br. 178-200) that the evidence in the first phase of the sentencing hearing was insufficient to show that he committed an act directly resulting in a death under the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et seq.*, and argues for the first time on appeal that "as a direct consequence of the jury's incorrect finding of death eligibility, the district court was bound, under 18 U.S.C. § 3594, by the jury's recommendation of life imprisonment." Br. 200. In Moussaoui's view, "[w]ithout that incorrect finding, the district court would have had the discretion to impose the sentence it believed was appropriate." *Id.* Moussaoui therefore requests that this Court "vacate [his] sentence and remand for the district court to decide between life imprisonment or a term of years." *Id.* 201.

Moussaoui's present attack on the sentence he advocated below is baseless. The district court's decision to sentence Moussaoui to life imprisonment on all counts of conviction did not result from the jury's finding that Moussaoui was eligible for

the death penalty on three of those counts, and thus this Court need not review that finding (or consider the constitutionality of the FDPA, as applied in this case). Moreover, Moussaoui expressly and repeatedly waived any objection to the imposition of life imprisonment during the penalty proceeding and at sentencing. Finally, Moussaoui cannot identify any reason why these waivers should not be enforced by this Court. Indeed, in light of the strategic nature of these waivers, reopening Moussaoui's sentence now would itself "taint[] the integrity of the judicial process." *United States* v. *Herrera*, 23 F.3d 74, 76 (4th Cir. 1994) (citation and internal quotation omitted).

A. The Sentencing Proceedings

1. The Jury Proceedings Under The FDPA

Following Moussaoui's guilty plea, the government sought the death penalty under the capital eligible counts — Counts One, Three and Four.[94] Under the FDPA, the government had to prove a threshold factor to establish Moussaoui's capital-eligibility, and the district court bifurcated the hearing, at Moussaoui's request, so that the jury would first render a verdict on the threshold factor alone. The threshold factor alleged here was that Moussaoui intentionally participated in an act,

[94] Before the sentencing proceedings, the district court concluded that Count 2, aircraft piracy under 49 U.S.C. § 46502, did not provide death as a possible penalty in this case. JAU1482-94.

"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. § 3591(a)(2)(C). The government identified the relevant "act" as Moussaoui's lies to law enforcement officers after his arrest, which concealed the ongoing al Qaeda plot. JAU4367-68. Only if the jury unanimously found this threshold factor would the case move on to a second phase where the jury would weigh aggravating and mitigating factors to determine whether to impose a sentence of death.

To minimize the possibility that Moussaoui would be sentenced to death, defense counsel made the strategic decision — common in death penalty cases — to portray life imprisonment as the only possible alternative to death. As the Second Circuit has noted, this tactic "strengthen[s] [the defendant's] argument to the jury, at the penalty phase of this case, that justice did not demand [his] death[]." *See United States* v. *Quinones*, 511 F.3d 289, 319 (2d Cir. 2007); *id.* at 321-22 (describing the "obvious" "tactical value of such a concession").

Thus, *before* opening statements in the first phase, Moussaoui asked the district court to instruct the jury that he already faced a minimum sentence of life imprisonment without possibility of release:

> The burden of proof [in the first phase] rests on the Government. To that end, you must decide whether or not the Government has proved the threshold

> finding beyond a reasonable doubt. If you fail to unanimously find that the Government has proved this threshold finding beyond a reasonable doubt, your deliberations are over. *The Court will then sentence the defendant to life imprisonment without the possibility of release.*

2SJAU115 (emphasis added); *see also id.* at 3 ("Under federal law, the punishment for each of these charges can be death or life imprisonment without the possibility of release. . . . *Your conclusion that the defendant will be sentenced to death or life imprisonment will be binding on the Court* . . . .") (emphasis added). The court then gave this instruction to the jury verbatim at the beginning of the proceeding. JAU1589-92. Defense counsel also emphasized this point in their opening remarks, referring to Moussaoui as "the man behind me in the prison jumpsuit that he will wear for the rest of his life . . . ." *Id.* 1626. Likewise, before closing arguments in the first phase, the district court again instructed the jury, at Moussaoui's request, that if it failed unanimously to find that the government proved the threshold finding beyond a reasonable doubt, the sentencing hearing would be over and "[t]he Court *will* then sentence the defendant to life imprisonment without the possibility of release." JAU4368 (emphasis added). After the jury unanimously found that Moussaoui was death-eligible on all three capital counts, defense counsel continued to pursue this strategy. JAU4397-98, 4405-08.[95]

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[95] The government presented evidence in the first phase showing that if, after waiving his right to remain silent, Moussaoui had told the truth instead of

During the second phase, the jury was required to make specific findings as to aggravating and mitigating factors, and then weigh those findings in order to determine whether to impose a sentence of death. In this phase, Moussaoui stipulated that if the jury declined to sentence him to death, the district court would impose a mandatory sentence of life imprisonment without the possibility of parole and, at Moussaoui's request, the district court later instructed the jury along the same lines. JAU4408F-H, 5528, 5548-50, 5557, 6507-08; 2SJAU389, 394-95, 424-25. The defense made ample use of the instruction in closing argument, imploring the jury to "confine him to a miserable existence until he dies . . . [a] long, slow death of a common criminal." JAU5481. Moussaoui also identified the option of life imprisonment without the possibility of parole as a mitigating factor, and five jurors found this factor to exist. *Id.* 6737.

At first glance, Moussaoui's decision to stipulate to a life sentence if the death penalty was not imposed would appear to involve a substantial concession. As

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telling lies, the government would have used Moussaoui's truthful information to take steps that would have saved at least one life on September 11, 2001. JAU1598-1623. Moussaoui moved for a judgment of acquittal at the close of the government's case. *Id.* 3782-90. The district court denied the motion, stating it would not hesitate to grant an acquittal if it thought the jury's verdict was "against the weight of the evidence or the law." *Id.* 3799. After Moussaoui presented his defense, he "renew[ed] [his] motion to strike the death penalty notice" without elaboration or explanation. *Id.* 4277. The district court denied the motion. *Id.*

Moussaoui notes (Br. 172-174), he was not subject to a mandatory minimum sentence of life imprisonment on any of the six counts of conviction. Thus, had the instructions permitted it, the jury could have recommended that he receive a term of years. *See* 18 U.S.C. § 3593(e). In fact, however, Moussaoui's strategy conceded nothing of real significance because the Sentencing Guidelines recommended life imprisonment on each count, and the sentence on Count One was, by law, consecutive to the sentence on all other counts. JAU6851 (Presentence Report ¶ 129). There was, therefore, no realistic possibility that Moussaoui would receive anything other than a life sentence or the death penalty. *See* 18 U.S.C. § 3594 (jury recommendation of a sentence to a term of years not binding on the district court, which can impose sentence of life imprisonment without possibility of release if authorized by law).

Although the jury unanimously found that the government had proved two statutory aggravating factors for each capital count, as well as several non-statutory aggravating factors, JAU6732-36,6746-50, 6760-64, a number of jurors also found that Moussaoui had established several mitigating factors, *id.* 6737-40, 6751-54, 6765-68, and the jury ultimately did not unanimously agree that Moussaoui should receive a death sentence. *Id.* 5582. At defense counsel's request, the jury was not asked to decide unanimously whether he should receive life imprisonment. *Id.* 5411-15. Instead, the instructions proposed by Moussaoui and given by the court, informed

the jury that its non-unanimous verdict would result in a sentence of life-imprisonment. JAU5556-57; 2SJAU394-95, 427.

2. The District Court's Sentencing Hearing

On May 4, 2006, the day after the jury declined to impose the death penalty, the district court sentenced Moussaoui. JAU5593-5613. The court first addressed the Presentence Report (PSR), which calculated an advisory guideline sentence of life for each of the six counts, based on a total offense level of 58, and a criminal history of category VI. *Id.* 5596, 5619, 6787-6877. As the court explained, the PSR also called for the life sentence for Count 1 to run consecutive to the life sentences imposed on the remaining five counts. *Id.* 5596, 6851. While Moussaoui requested (unsuccessfully) that the district court add facts about his previous travel, *id.* 5596, he did not dispute the Guidelines calculation. JAU5597.[96] The district court also found that the Guidelines calculation was accurate, and indicated that no departure or variance would be appropriate because Moussaoui had not "accepted responsibility since he has expressed no remorse whatsoever for the actions in this case." JAU5596.[97]

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[96] Moussaoui's counsel stated that he objected generally to the entire PSR, which the district court overruled. JAU5596.

[97] The PSR had prepared an alternative calculation with a three-level reduction in the event that Moussaoui demonstrated an acceptance of

Defense counsel then stated that the district court should sentence Moussaoui to life in prison:

> Mr. Moussaoui has not accepted responsibility, he's shown no remorse, but this system has shown that it doesn't matter, that the American justice system will still take into consideration the act and somebody's role in that act to determine a proper sentence.
>
> We believe the sentence is a proper sentence, that he should spend the rest of his life incarcerated for his participation in the conspiracy.

JAU5598-99.

After three family members of victims gave statements to the court, and Moussaoui responded by calling them hypocrites and asking God to curse America, the district court sentenced Moussaoui to life imprisonment without the possibility of release on all counts, and imposed the life sentence on Count One to run consecutively to the remaining counts. JAU5604. After imposing this sentence, the court addressed Moussaoui:

> As for you, Mr. Moussaoui, you came here to be a martyr and to die in a great big bang of glory, but to paraphrase the poet, T. S. Eliot, instead, you will die with a whimper. The rest of your life you will spend in prison. . . . You will never again get a chance to speak, *and that is an appropriate and fair ending*.

JAU5613 (emphasis added).

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responsibility, which would have nonetheless called for the same sentences. JAU6854-6862.

B. Standard Of Review

In light of Moussaoui's above-detailed strategic choices, if any error occurred — which we do not concede — it was invited. Accordingly, this Court should not review the merits of his claim. *See Herrera*, 23 F.3d 74, 76.

C. Discussion

1. Moussaoui's Life Sentence Was Not Dictated By Either The Jury's Finding That He Was Death Eligible Or 18 U.S.C. § 3594

Moussaoui now claims that his sentence of life imprisonment resulted from (1) the jury's finding that he was death eligible, which (2) required the district court, under 18 U.S.C. § 3594, to impose a sentence of life imprisonment, and (3) knowing that it was so bound, the district court sentenced him to life in prison, when it might otherwise have sentenced him to a term of years. Br. 177, 200. Each step of this argument is incorrect. In fact, the jury's finding that he was death eligible had no effect on Moussaoui's ultimate sentence; 18 U.S.C. § 3594 does not apply to this case; and the district court did not sentence Moussaoui to life imprisonment because it felt bound to do so, but because the Guidelines recommended this sentence, which the Court found "appropriate" and "fair."

Moussaoui devotes the vast majority of his sentencing argument (Br. 178-196) to challenging the jury's determination in phase one of the penalty proceeding that his own actions directly resulted in the death of another. The reason for this emphasis

is clear: although Moussaoui failed to object to life imprisonment at the sentencing hearing, he did move for a judgment of acquittal at the close of the government's case on phase one. JAU3782-90. Thus, by focusing on the jury's phase-one decision, Moussaoui attempts to craft a sentencing challenge that was actually preserved below.

This strategy fails, however, because Moussaoui cannot show how his life sentence was the "direct consequence" (Br. 200) of the jury's phase-one finding. Instead, after spending 18 pages attacking the jury's finding, Moussaoui simply asserts, in conclusory fashion, that "the jury's incorrect finding of death eligibility" bound the district court to the jury's recommendation of life imprisonment. Br. 200. This claim is incorrect. None of the underlying statutes on the six counts of conviction dictated a sentence of life imprisonment if the jury found that the defendant's actions directly caused death to another. Nor does the FDPA provide that, once this finding has been made, life imprisonment is the only possible sentence.

In an effort to fill this gap in his argument, Moussaoui claims that the jury's finding of death eligibility somehow "bound" the district court to impose a sentence of life imprisonment by virtue of 18 U.S.C. § 3594. Br. 200. Once again, Moussaoui fails to explain his reasoning, and with good cause. Section 3594 does not provide that a finding that the defendant is death eligible binds the district court to a life sentence. Instead, Section 3594 provides that if, after weighing all the aggravating

and mitigating factors, the jury unanimously recommends that a death-eligible defendant be sentenced to either death or life imprisonment, "the court shall sentence the defendant accordingly." 18 U.S.C. § 3594; *see* 18 U.S.C. § 3593(e). Clearly, the jury's threshold "finding" of death eligibility did not "b[ind]" the district court or the jury to do anything under Section 3594 or 3593(e). Instead, these sections of the FDPA come into play only *after* both the threshold finding of death eligibility, and the process of weighing aggravators and mitigators.

Indeed, Section 3594 does not even apply in this case. As noted above, this statute requires the district court to sentence the defendant based on a unanimous jury recommendation for death or life imprisonment. In this case, however, the jury did not unanimously recommend either sentence. Indeed, defense counsel objected to the requirement that, if the jury did not impose the death penalty, it must unanimously recommend a sentence of life imprisonment. JAU5411-15. Accordingly, all the jury verdict established here is that the jury did not unanimously recommend death. That finding was insufficient under Section 3594 to trigger any requirement that the district court impose a life sentence on Moussaoui.

The record likewise does not support the last part of Moussaoui's argument, namely, that the district court imposed life in prison because it felt that the death eligibility finding and/or Section 3594 bound it to this result. Br. 177, 200. At no

point in the sentencing hearing did the district court suggest that its decision on Counts One, Three and Four was dictated by the jury's penalty-phase verdict.[98] In fact, the hearing transcript indicates that the district court imposed life imprisonment on all six counts because (1) the Guidelines sentence on all counts was life imprisonment, JAU5596-5597; (2) defense counsel did not dispute the Guidelines calculations or move for a variance or departure, and indeed, pronounced the sentence "proper," *id.* 5597-5599; and (3) life in prison was "an appropriate and fair ending" to the proceeding, *id.* 5613.

Moreover, had the district court actually believed that life imprisonment was *not* appropriate, but that the jury's verdict bound it to this result on the capital counts, it would at least have sentenced Moussaoui to a term of years on Counts Two, Five and Six, which were not at issue in the penalty proceeding. Although the PSR indicated that there was no mandatory minimum on Count Five, and only minimum sentences of 20 years on Counts Two and Six, the district court nonetheless imposed life sentences on all three counts. JAU5604. The fact that the district court imposed

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[98] The district court used the word "mandatory" only once, stating that "as to Count One, the mandatory guideline sentence and statutory sentence would be life consecutive to any other sentence imposed." JAU5596. Because it did not also describe the statutory sentence on Counts Three and Four (on which the government also sought the death penalty) as "mandatory," it appears that the court was referring here — and correctly so — to the statutory mandate that any sentence on Count One be "consecutive." 18 U.S.C. §§ 2332b(a)(2) and (c).

life imprisonment on these counts as well underscores that its decision was not driven by the "binding" effect of the penalty proceeding, but rather by its view of what sentence was "appropriate" and "fair" given Moussaoui's crimes.

2. The Invited Error Doctrine Bars Any Claim That The Jury's Decision Not To Impose The Death Penalty Incorrectly Bound The District Court To Impose Life In Prison On Counts One, Three And Four

As the discussion above makes clear, the jury's finding of death eligibility in no way bound the district court to impose a sentence of life imprisonment. Nor is there any evidence that the district court felt itself so bound. Nonetheless, the record suggests that the district court might, in fact, have been bound to sentence Moussaoui to life imprisonment on Counts One, Three and Four by virtue of the stipulation and instructions that Moussaoui himself sought in both phases of the penalty proceeding. As noted above, *see supra*, at 182-86, Moussaoui chose to present the jury with a simple binary choice — death or life imprisonment — and repeatedly and successfully requested that the jury be instructed that if it did not unanimously recommend death, Moussaoui would be sentenced to life in prison instead. Although this strategy was not successful in phase one of the penalty proceeding, it may have been helpful in phase two, where five jurors found the fact that "ZACARIAS MOUSSAOUI will be incarcerated in prison for the rest of his life, without the possibility of release," to be a mitigating factor. JAU6737.

Thus, even assuming that the district court actually believed that it lacked discretion to impose a sentence below life on Counts One, Three and Four, that belief stemmed from the defendant's calculated decision repeatedly to secure legal instructions to that effect. Having successfully convinced the district court to instruct the jury in this fashion, Moussaoui cannot now complain about the binding of the sentencing court (if any "binding" in fact occurred).

The Second Circuit's decision in *Quinones* is on point. In that case, defendants were convicted of racketeering, drug trafficking and murder. Although the guilty verdict on one count exposed the defendants to the death penalty, the jury ultimately decided to impose life in prison. 511 F.3d at 291. At the beginning of the case and throughout the proceedings, the defense constantly urged the district court to instruct the jurors that only life imprisonment and death were available. *Id.* at 319-320.

On appeal, defendants claimed that the district court erred in sentencing them to life because a term of years was an available sentence under both the guidelines and the statute. *Id.* at 316. The Second Circuit found that neither the statute of conviction nor the advisory sentencing guidelines mandated a life sentence, and that the court erroneously viewed a life sentence as mandatory. *Id.* at 317-19. Nonetheless, the Court "decline[d] to entertain" defendants' appellate claim, *id.* at 320-21, because "the defendants agreed to life imprisonment as the only possible non-

capital sentence to strengthen their argument to the jury, at the penalty phase of this case, that justice did not demand their deaths," *id.* at 319. As the court explained, "[t]he singular alternative of life imprisonment was thus plainly critical to defendants' arguments to the jury that justice did not require imposition of the death penalty." *Id.* at 320.

Moussaoui's counsel employed the same strategy. Thus, not only did Moussaoui "explicitly request this very instruction, but 'he did so as a matter of sound trial strategy.'" *United States* v. *Hopkins*, 310 F.3d 145, 151 (4th Cir. 2002) (quoting *United States* v. *Herrera*, 23 F.3d 74, 76 (4th Cir. 1994)). As a result, Moussaoui waived his sentencing claim (and did not merely forfeit it) before the district court. "Where . . . a claim has been waived through explicit abandonment, rather than forfeited through failure to object, plain error review is not available." *United States* v. *Jackson*, 346 F.3d 22, 24 (2d Cir. 2003); *Herrera*, 23 F.3d at 75 (defendant "cannot complain of error which he himself has invited") (quotations omitted); *Quinones*, 511 F.3d at 321 ("[I]f, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true 'waiver' which will negate even plain error review.") (internal quotation marks omitted); *see also United States* v. *Krankel*, 164 F.3d 1046, 1053 (7th Cir. 1998) (noting particular reluctance to find plain error when defendant fails to object at trial ''because of a tactical

decision'') (quotations omitted).[99]

3. Moussaoui Has Waived Any Challenge To His Sentence On Counts One, Three And Four By Agreeing At The Sentencing Hearing That Life Imprisonment Was A "Proper Sentence"

As the discussion above makes clear, Moussaoui waived his sentencing claim by stipulating that life imprisonment was the only alternative sentence to death on the capital counts. Moussaoui then waived this claim *again* at the sentencing hearing when his counsel affirmatively approved the life sentence the district court imposed, describing it as "proper" that Moussaoui should "spend the rest of his life incarcerated for his participation in the conspiracy." JAU5598-99. A defendant who agrees that the sentence the district court intends to impose is appropriate cannot later challenge that sentence, even under the plain error standard of review. *United States* v. *Mancera-Perez*, 505 F.3d 1054, 1057-1060 (10th Cir. 2007) (challenge to length of defendant's sentence was waived where counsel agreed at sentencing that sentence was reasonable); *United States* v. *Love*, 449 F.3d 1154, 1157 (11th Cir. 2006)

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[99] *See generally United States* v. *Velez Carrero*, 140 F.3d 327, 330 (1st Cir. 1998) (drawing analogies between judicial estoppel as it applies in civil cases and waiver principle applicable in criminal cases: ''Just as the companion doctrines of judicial estoppel and election of remedies preclude parties in civil litigation from asserting legal or factual positions inconsistent with the positions that they took in prior proceedings, so, too, a criminal defendant ordinarily must raise claims in a timely fashion, consistent with his prior positions in the case, or suffer the consequences.'' (internal citations omitted)).

(declining to review claim that five year term of supervised release was unlawful where this sentence was requested by defense counsel).

4. Moussaoui Cannot Argue That His Waivers Resulted From An Improper Capital Sentencing Proceeding

As noted above, *see supra*, at 192-95, if the penalty phase proceeding compelled a life sentence on Counts One, Three and Four, it was Moussaoui's stipulation and proposed jury instructions that caused this result, not the jury's verdict on phase one or 18 U.S.C. § 3594. Indeed, Moussaoui not only fails to explain why the stipulation and instructions should not bind him, he does not address them at all. Moussaoui may nonetheless intend to argue in his reply brief that the district court should have disregarded the penalty phase stipulation and instructions at sentencing, because they were the product of a proceeding that should never have taken place, and thus were in some way involuntary or coerced.

Should Moussaoui attempt to raise this argument, the Court should reject it outright. Although Moussaoui now suggests that he should have been deemed ineligible for the death penalty "[a]s a matter of law," Br. 200, he does not argue that the district court should have dismissed the government's death penalty notice without holding a capital sentencing hearing. Instead, he claims that he "should have been found ineligible for the death penalty *at the conclusion of Phase I*." Br. 178 (emphasis added). But, as noted above, Moussaoui requested that the jury be

instructed *at the beginning of phase one* that life imprisonment was the only alternative to the death penalty in this case. *See supra*, at 182-83. Accordingly, even assuming that a litigant can rescind a strategic concession if he can show that the underlying proceeding was unnecessary, that tactic would not assist Moussaoui because his own concession was made before he contends that the district court should have brought the capital sentencing proceedings to a close.[100]

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[100] Because the jury's finding on Moussaoui's death eligibility had no effect on his ultimate sentence, his claims that the evidence was insufficient or alternatively that the FDPA is unconstitutional as applied are both moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the out-come." *Incumaa* v. *Ozmint*, 507 F.3d 281, 286 (4th Cir. 2007) (quoting *Powell* v. *McCormack*, 395 U.S. 486, 496(1969)).

At any rate, to be clear, the government does not agree with Moussaoui's belabored suggestion that he should have been deemed ineligible for the death penalty as a "matter of law." Br. 177-96, 200. Moussaoui's arguments notwithstanding, the government adduced sufficient evidence to demonstrate that Moussaoui's lies to law enforcement — which, he admitted in the SOF and from the witness stand, he intentionally made to allow the plot to move forward — sufficed to show that at least one person died on September 11 as a "direct result" of his concealment. Indeed, this Court has already indicated — albeit in dicta — its implicit endorsement of the legal viability of the government's eligibility theory in this case. *See United States* v. *Moussaoui*, 382 F.3d 453, 473 n.21 (4th Cir. 2004) ("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").

Likewise, the government also does not agree with Moussaoui's alternative argument that the FDPA *would* have violated the Eighth Amendment. Br. 196-200. The Eighth Amendment prohibits excessive punishment, *see Roper* v. *Simmons*, 543 U.S. 551, 560 (2005), not precursor findings, and to seek Eighth Amendment review of a preliminary, threshold decision calls for stretching the Eighth Amendment — as well as the Court's jurisdiction — beyond recognition.

5. Moussaoui Identifies No Other Reason To Excuse The Waiver Of His Sentencing Claim

This Court has previously indicated that where an alleged error was invited by the defendant, he can escape the resulting bar on his claim only by showing that he was prejudiced in a way that "tainted 'the integrity of the judicial process' or caused 'a miscarriage of justice.'" *Herrera*, 23 F.3d at 76 (citations omitted). Moussaoui cannot possibly meet this standard. First, even assuming that some error occurred, Moussaoui cannot show that he was prejudiced at all. The sentence the district court imposed on the capital counts was consistent with the Guidelines, deemed "proper" by his own counsel, and identical to the sentence imposed on the non-capital counts. Nor can Moussaoui show any compelling need for a resentencing. To the contrary, the jury was told, at Moussaoui's own request, that a life sentence would be imposed. Accordingly, as the Second Circuit has noted, if this Court "were to entertain an argument that afforded [the defendant] the possibility of a lesser sentence than the one the jury was told would be required when it voted to spare [him] the death penalty, that ruling, and not the challenged life sentences, would raise concerns about the fairness, integrity, and repute of the capital proceeding." *Quinones*, 511 F.3d at 323. In short, overturning Moussaoui's life sentences on the capital counts now

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See United States v. *Sampson*, 486 F.3d 13, 36 (1st Cir. 2007) (refusing to apply the *Enmund*/*Tison* standard to a statutory aggravating factor under the FDPA).

would foster a public perception that gamesmanship, rather than fairness or integrity, determines the outcome of legal proceedings. Moussaoui asked for life in prison. The district court found that sentence to be "appropriate and fair." This Court should make clear that it is indeed, appropriate, fair, and final.

CONCLUSION

For the foregoing reasons, the Court should affirm appellant's convictions and sentences.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 06-4494
UNITED STATES V. ZACARIAS MOUSSAOUI

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s/Kevin R. Gingras
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Dated: August 25, 2008

CERTIFICATE OF SERVICE

The undersigned certifies that on the 25th day of August 2008, I electronically filed the foregoing Unsealed Brief for the United States with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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