

RECORD NO. 06-4494

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee.

v.

ZACARIAS MOUSSAOUI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA
THE HONORABLE LEONIE M. BRINKEMA, PRESIDING

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The plea entered by Zacarias Moussaoui in this case was not knowing, counseled, or voluntary. Perhaps the clearest demonstration of this is that, prior to Moussaoui's plea, Moussaoui's lawyers were given important evidence by the Government – evidence that, as the district court found, tended to show that Moussaoui was not guilty of the charges against him – but they were prohibited from communicating with their client about this evidence even as he was deciding whether or not to plead guilty. Moussaoui's lawyers complained bitterly about this restriction on their ability to counsel their client, but the district court rejected their complaints and accepted the plea. As explained in Moussaoui's opening brief (“MB”), no plea could be valid under these extraordinary circumstances.

Each of the fundamental defects identified in the opening brief can be traced to two mistakes that deprived Moussaoui of any chance of fundamentally fair proceedings. First, the district court permitted the Government, when it produced concededly discoverable information to the defense, to substitute *classified* information (rather than unclassified substitutes) for *classified* originals. This constituted a clear violation of the Classified Information Procedures Act (“CIPA”), 18 U.S.C. App. III §§ 1-16 (2007). Under CIPA, a district court is required to first determine whether information contained in a classified document is discoverable. If it is, then one option for the Government is to produce a substitute for the original that conveys the discoverable information without the

classified information; however, if the Government chooses to produce an unclassified substitute, that substitute must be produced to the defendant.

18 U.S.C. App. III § 6(c)(1). Indeed, production of still-classified substitutes is contrary to the plain language of CIPA, to the holding of this Court in *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), and to common sense. But, that is what the district court permitted here.

Second, aside from certain discovery proceedings and hearings involving pure questions of law, a defendant must be permitted to participate in briefings and hearings in a criminal proceeding. As this Court noted in *Abu Ali*, a defendant may be excluded from a hearing or from proceedings at which the parties discuss whether certain information is, in fact, discoverable. *Abu Ali*, 528 F.3d at 245. In that vein, CIPA permits such hearings to be conducted *ex parte* – without the defendant or defense counsel involved. *See* 18 U.S.C. App. III § 6(c)(2). But once a court holds information to be discoverable, this changes. At that point, the court may not prevent a lawyer from discussing discoverable information with his client; nor may a court, absent extraordinary circumstances, exclude a defendant from proceedings.

Permitting the Government to provide still-classified substitutes for classified information and authorizing the exclusion of the defendant from these

kinds of proceedings resulted in an unknowing, uncounselled, and involuntary plea. Indeed, several fundamental defects resulted from these errors:

- First, because the defense was to receive classified discovery, the district court held that any lawyer Moussaoui sought to hire had to undergo a national security clearance and be, essentially, Government-approved;
- Second, with classified, discoverable information going to the defense, the district court restricted defense lawyers from discussing discovery with their own client;
- Third, because discovery had not been produced in unclassified form, the district court prevented Moussaoui from participating in or attending critical hearings concerning, for example, the admissibility of evidence; and
- Fourth, because no unclassified versions of discoverable information were being produced, although the district court permitted Moussaoui to represent himself, the court restricted Moussaoui's access to concededly discoverable information and thereby prevented effective self-representation.

Importantly, the district court could have avoided each of these fundamental defects if it had just followed CIPA and required that when the Government chose to produce substitutes, those substitutes be unclassified.

Let us be clear: The Government should not have been required to give to Moussaoui a single piece of classified evidence. Neither the Constitution, CIPA, nor common sense would require that result. The Government's brief repeatedly asserts that it would be wrong to require the Government to produce classified information to Moussaoui, and the Government's brief spends entire sections

explaining why this is so. But in those sections of its brief, the Government is attacking arguments that Moussaoui is not making. For clarity's sake, we repeat this important point: The Government had no obligation to give Zacarias Moussaoui classified information, and not one argument in Moussaoui's opening brief is based on the failure of Moussaoui to receive classified information.

If the Government produces unclassified substitutes, CIPA and the normal rules and constitutional safeguards work. At that point, the defendant has the same discoverable information as his lawyers, and the lawyers and client are able to prepare for trial and make strategic decisions. The defendant can either represent himself, or participate in hearings with the discoverable information that his lawyers have. Under those circumstances, if a defendant is deciding whether to enter a plea or testify at trial, the defendant has the discoverable information and the ability to fully consult with his lawyer about the same.

Here, by April 2005, it was clear that Moussaoui's upcoming trial would be profoundly unfair. He would not be able to discuss the evidence with his lawyers, to participate in hearings about trial evidence, to be represented by counsel of his choice, or to present witnesses who were in the custody of the Government. Moreover, as Moussaoui was considering a plea, his lawyers could not discuss Moussaoui's choices or critical evidence with their client because the Government had not produced it, or even attempted to produce it, in unclassified form.

Against this backdrop, the court then violated Rule 11 during Moussaoui's plea colloquy in several ways. Even though it was clear that (1) Moussaoui did not understand what he was pleading to or (2) Moussaoui still would not admit guilt to the charges he was facing, the district court accepted the plea. In short, Moussaoui's plea was uncounselled, involuntary, unknowing, and improper under Rule 11, and this Court should vacate it.

This Court should also vacate the jury's finding of death eligibility. Moussaoui's act – lying to the Federal Bureau of Investigation – could not, as a matter of law, have “directly result[ed]” in any of the deaths in the 9/11 attacks. The Government – clearly nervous about the strength of its position – essentially ignores the merits and instead argues that Moussaoui's argument is moot. On the contrary, if correct, Moussaoui is entitled to a new sentencing – without the death penalty on the table – and as a result, this argument is not moot.

I. THE PERVASIVE DEPRIVATION OF MOUSSAOU'S FIFTH AND SIXTH AMENDMENT RIGHTS RENDERED MOUSSAOU'S PLEA INVOLUNTARY.

Actions by the Government or by a court may essentially force a defendant into pleading guilty. Just as threats of violence, mental disability, or other improper coercion can render a plea involuntary and invalid,¹ so too may

¹ See *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (vacating denial of *habeas* petition based on guilty plea coerced by threats by FBI agent); *United States v.*
Footnote continued on next page

extraordinary unconstitutional rulings that confine a defendant to two choices:
(1) plead guilty or (2) undergo a fundamentally unfair trial.

The Constitution “insists” that the plea must be “‘voluntary’ and that the defendant must make related waivers ‘knowingly,’ intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.’”

United States v. Bartram, 407 F.3d 307, 314 (4th Cir. 2005) (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002)) (alterations in *Bartram*). As explained in Moussaoui’s opening brief, when a defendant’s only “choices” are either a plea of guilty or a fundamentally unfair trial, the plea is not voluntary. MB23-25.

As *United States v. Hernandez*, 203 F.3d 614 (9th Cir. 2000), and similar cases make clear, only a very narrow class of extraordinary rulings by a trial court result in a fundamentally unfair trial; even most violations of the Constitution do not rise to that level. However, certain errors – including deprivation of the right to retain counsel of choice or the right to communicate with counsel – do

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Damon, 191 F.3d 561, 565 (4th Cir. 1999) (remanding on the basis that incompetence at the time of the plea can render plea involuntary); *Heideman v. United States*, 281 F.2d 805, 808 (8th Cir. 1960) (holding that prosecutor’s “gross exaggeration of the offense” and likely penalties could have rendered plea involuntary).

necessarily result in fundamentally defective proceedings. These defective proceedings are simply incompatible with our system of justice.²

The Government Is Wrong in Asserting that No Error Can Render a Plea Involuntary.

Based on several different arguments, the Government contends that a defendant's plea is voluntary even when a defendant is forced to choose between pleading guilty and proceeding with a fundamentally unfair trial. None of the Government's arguments has merit.

First, the Government cites cases discussing what it calls the "guilty plea bar" and argues that every error that precedes a guilty plea is absolutely and permanently waived. *See generally* Government Brief ("GB") 103-11.³ In this regard, the Government overstates the scope of the guilty plea bar. GB 103-05. None of this Supreme Court precedent "stand[s] for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (internal citations omitted). Rather, these

² Of course, structural errors do not require harmless error review, and some errors are structural precisely because they render the proceedings fundamentally unfair. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (explaining that certain structural defects "will always invalidate the conviction"); *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (explaining that, when a structural defect exists, "no criminal punishment may be regarded as fundamentally fair") (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

³ The Government's Brief cites *Tollett v. Henderson*, 411 U.S. 258 (1973); *Brady v. United States*, 397 U.S. 742 (1970) ("*Robert M. Brady*"); and *McMann v. Richardson*, 397 U.S. 759 (1970), among others.

cases establish that “a counseled plea of guilty is an admission of factual guilt” that, “where voluntary and intelligent,” is considered reliable enough to “remove[] the issue of factual guilt from the case.” *Id.* The guilty plea bar therefore only bars “those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.” *Id.* Moussaoui’s arguments clearly survive this bar.

Next, the Government cites a handful of cases in which courts rejected plea challenges that were based on constitutional claims, and the Government argues that this Court should similarly reject Moussaoui’s challenge. The cases cited by the Government are inapposite because not one of them involved a claim of error that necessarily renders the proceedings fundamentally defective. In most of the cited cases, the challenged decision would not have resulted in a fundamentally unfair trial. *See, e.g., Lefkowitz v. Newsome*, 420 U.S. 283, 285 (1975) (regarding evidence derived from unlawful search and seizure);⁴ *McMann v. Richardson*, 397

⁴ *See Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (holding that evidence obtained in violation of the Fourth Amendment is subject to harmless error review). The Government’s cite to *Newsome* for the proposition that a “guilty plea bars the later assertion of Constitutional challenges to the pretrial proceedings,” GB104, also is incorrect. In *Newsome*, the Supreme Court *permitted* the challenge to go forward. 420 U.S. at 292.

U.S. at 763-64 (addressing the admission of an involuntary confession);⁵ *Robert M. Brady*, 397 U.S. at 749-57 (evaluating an unconstitutional death-penalty statute); *Parker v. North Carolina*, 397 U.S. 790, 794-95 (1970) (dealing with a state statute that provided higher penalty for conviction following trial than upon guilty plea);⁶ *United States v. Seybold*, 979 F.2d 582, 583-85 (7th Cir. 1992) (regarding interference by standby counsel, but without exclusion of defendant from critical stage proceedings);⁷ *Brown v. Maryland*, 618 F.2d 1057, 1058 (4th Cir. 1980) (evaluating whether conviction of felony murder and underlying felony pursuant to plea bargain violated double jeopardy),⁸ *United States v. Montgomery*, 529 F.2d

⁵ See *Fulminante*, 499 U.S. at 309-10 (holding that “[t]he admission of an involuntary confession [is] a classic ‘trial error’” subject to harmless error review).

⁶ The Government inexplicably cites *Boykin v. Alabama*, 395 U.S. 238 (1969), for the proposition that a “confrontation claim could not be asserted on appeal.” GB105. That is not correct. In *Boykin*, the Supreme Court reversed the defendant’s conviction on direct appeal because “the record d[id] not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.” 395 U.S. at 244.

⁷ Moreover, *Seybold* is consistent with *Hernandez* and supports Moussaoui because, as the Seventh Circuit explained, the Sixth Amendment claim regarding the defendant’s guilty plea was “waived” – “except to the extent that it is a challenge to the knowing and voluntary character of [the] plea.” 979 F.2d at 586; see also *id.* at 586-88 n. 4 (noting that “Mr. Seybold does not suggest that the tapes he was unable to listen to contained any exculpatory evidence”).

⁸ The Government cites *Ricketts v. Adamson*, 483 U.S. 1 (1987), GB104, but that case has nothing whatsoever to do with this issue. The question in *Ricketts* was “whether the Double Jeopardy Clause bars the prosecution of [a defendant] for first-degree murder following his breach of a plea agreement under which he had

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1404, 1406 (10th Cir. 1976) (dealing with minor interference of defendant's rights to proceed *pro se*).⁹ The errors alleged in those cases are clearly serious, but are not the type of structural errors present in this case.

To Result in an Involuntary Plea, the Error Must Have the Potential to Affect the Decision to Plead.

Second, the Government cites a number of cases in which the error could not have affected the defendants' decisions to plead guilty. For example, in some of the cases, the defendant could not have known of the alleged error at the time of the plea. *Tollett*, 411 U.S. at 259 (grand jury composition); *Parker v. Ross*, 470 F.2d 1092, 1092-93 (4th Cir. 1972) (same).¹⁰ In other cases, the court had completely cured the alleged error before the plea, and, as a result, the defendant had no reasonable basis to believe that he faced a fundamentally unfair trial.

Fields v. Att'y Gen. of Md., 956 F.2d 1290, 1297 (4th Cir. 1992) (observing that

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pleaded guilty to a lesser offense, had been sentenced, and had begun serving a term of imprisonment." 483 U.S. at 3.

⁹ *Montgomery* likewise supports Moussaoui. In that case, the Tenth Circuit examined the substance of the defendant's Sixth Amendment claim to determine the voluntariness of the plea. See 529 F.2d at 1406 ("We are of the opinion that the defendant allowed Public Defender Martin to conduct plea bargaining on his behalf.").

¹⁰ The Government incorrectly cites *Hall v. McKenzie*, 575 F.2d 481 (4th Cir. 1978), as a case in which a "due process" claim was waived by a plea. That is inaccurate. In *Hall*, the Court reached the merits of all of the appellant's claims. See 575 F.2d at 483-85.

deprivation of counsel “prior to” and “unrelated to” the plea had been cured at the time of the plea). Thus, in these cases, the alleged error could not have resulted in an involuntary plea of guilty. *See Ross*, 470 F.2d at 1095 (confining its holding to “Constitutional deprivations that could not have caused or even triggered his decision to plead guilty”).

A Knowing Decision Can Still Be Involuntary.

Third, the Government asserts that Moussaoui’s plea could not have been involuntary because he knew he was waiving certain rights when he pled guilty. GB107. Not only is this demonstrably untrue, *see* MB139-40; *id.* at 137 n.66 (explaining Moussaoui’s confusion over his right to appeal), but it also confuses the “requirement that pleas be ‘voluntary’ and the requirement that they be ‘intelligent.’” *Hernandez*, 203 F.3d at 618 n.5 “According to the [Supreme] Court, the ‘voluntariness’ of a plea turns on the extent to which a defendant is permitted to make a *free choice* among the acceptable alternatives available at the plea stage.” *Id.* (emphasis added). “The ‘intelligence’ of a plea, on the other hand, turns on whether the defendant’s choice among those alternatives is made with the information (and an understanding of the information) necessary to choose intelligently between them.” *Id.* An involuntary plea may be “knowing,” in the sense that the defendant knows the consequences, *id.*, but it may still be involuntary. *See Heideman v. United States*, 281 F.2d 805, 808 (4th Cir. 1960)

("A plea of guilty is not voluntary simply because it is the product of sentient choice."). For example, if a man is forced, at gunpoint, to enter a plea of guilty, the man could fully understand that he is thereby exposing himself to punishment and waiving his rights. But, the plea nonetheless would be involuntary.¹¹

Hernandez Is Entirely Consistent with the Law of this Circuit and the Facts in this Case.

Fourth, the Government attacks *Hernandez* as contrary to Fourth Circuit precedent and distinguishable on the facts. The Government is incorrect. As to Fourth Circuit precedent, this Court has long agreed that a plea resulting from "conduct devoid of physical pressure but" nevertheless "not leaving a free choice is a product of duress as much so as choice reflecting physical constraint." *Heideman*, 281 F.2d at 808 (quoting *Haley v. Ohio*, 332 U.S. 596, 606-07 (1948) (Frankfurter, J., concurring)). For example, in *United States v. Bradley*, 455 F.3d 453 (4th Cir. 2006), this Court held that a district court's participation in plea negotiations was "inherently coercive" and "unacceptably influenced the Defendants' decision to plead guilty." *Id.* at 460, 464 (internal quotation marks omitted). No threats were made against the defendants, and the Government was

¹¹ See, e.g., *Waley v. Johnson*, 316 U.S. 101, 102 (1942) (recognizing that FBI agent's threats to assault petitioner and incite violence against him could render a plea involuntary); *Martin v. Kemp*, 760 F.2d 1244, 1247-48 (11th Cir. 1985) (holding that "defendant's prior attestation of voluntariness is not an absolute bar to his subsequent claim that he pleaded guilty only to protect the third party").

prepared to present “uncontroverted evidence of the Defendants’ guilt if the trial had proceeded to verdict.” *Id.* at 460-65. Yet, this Court held that the pleas were not voluntary because: (1) the defendants on multiple occasions had initiated and then retreated from the process of pleading guilty, *id.* at 463-64; and (2) “the Defendants repeatedly ignored their counsel’s advice to enter guilty pleas,” *id.* at 465. Only upon the district court’s repeated violations of the rule against judicial involvement in plea bargaining did the defendants plead guilty. *Id.* This Court vacated the convictions on plain error review, holding that to uphold a plea under the circumstances would undermine the “fairness, integrity, and public reputation” of the proceedings. *Id.*¹²

¹² The Government asserts that the “guilty plea bar” on appealing Constitutional violations “does not stem from the traditional notion of waiver.” GB104 n.52. This is a *non sequitor*. A “guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (internal quotation marks omitted); *see also Marshall v. Lonberger*, 459 U.S. 422, 431 (1983) (explaining that a “guilty plea . . . works as a waiver of numerous Constitutional rights”). Thus, *Hernandez* is perfectly consistent with *United States v. Broce*, 488 U.S. 563, 569 (1989), and *Journigan v. Duffy*, 552 F.2d 283, 289 (9th Cir. 1977), as neither posed the issue of voluntariness. In fact, in *Journigan*, the court held that the defendant’s challenge to the constitutionality of the statute under which he was convicted was *not* barred by his guilty plea. *Id.* at 289. The court explained that “the guilty plea will not bar” a challenge “where the defendant asserts a Constitutional violation which is logically inconsistent with the valid establishment of factual guilt.” *Id.* at 288. That is the case here – the procedures established by the district court were inconsistent with the valid establishment of factual guilt.

Similarly, as explained in Moussaoui's opening brief, MB23-24, in *United States v. Mullen*, 32 F.3d 891, 892-98 (4th Cir. 1994), this Court invalidated a defendant's waivers of rights. Thus, notwithstanding the Government's attempt to dismiss *Mullen* in a footnote, GB108 n.54, this Court recognizes that a waiver of important Constitutional rights is invalid if the alternative is to undergo a fundamentally unfair trial.¹³ *Mullen*, 32 F.3d at 892-98.

The Government next attempts to distinguish *Hernandez* on the basis that only three weeks had elapsed between the decision denying Hernandez's rights and the coerced plea, while a longer time elapsed between the same rulings here and Moussaoui's plea. See GB108-09. This is not a relevant distinction. By the time Moussaoui entered his plea, his alternative was a trial that would violate the Fifth and Sixth Amendments in *several* ways, as discussed below. If anything, this is a far more serious case than *Hernandez*.

The Government fails to cite a single case in which a plea was upheld as voluntary when the defendant was choosing between a guilty plea and undergoing a fundamentally unfair trial. The Government's attempts to avoid or distinguish

¹³ The Government argues that the defendant in *Mullen* took the "sensible course of contesting guilt," GB108 n.54, but that is not the full story. As explained by the Court, the defendant "took no part in the jury selection and made no opening statement. She did not cross-examine any of the Government's eight witnesses. She presented no evidence and made no closing argument. She did not consult with [standby counsel] despite the court's constant urging that she do so. The jury was quick in finding her guilty." *Mullen*, 32 F.3d at 895.

Hernandez and *Mullen* are unavailing. For the reasons below, Moussaoui's plea was involuntary.

A. THE DISTRICT COURT DID NOT FOLLOW CIPA.

As Moussaoui argued in his opening brief, CIPA has built-in protections for the Government and for a defendant's Constitutional rights. Had the district court simply followed CIPA, it could have avoided most of the errors in this appeal, including those involving: (1) Moussaoui's right to choose his own counsel; (2) his right to communicate freely with his counsel; (3) his right to effective self-representation; and (4) his right to be present at critical stages of the proceedings.

This Court's decision in *Abu Ali* demonstrates this point. Consistent with Moussaoui's argument, in *Abu Ali* this Court essentially bifurcated the process for dealing with classified information between: (1) discoverability; and (2) other proceedings. *Abu Ali* involved certain classified information that was potentially discoverable, but the defendant and two of his counsel were not cleared by the Government. 528 F.3d at 248-49. The district court therefore appointed an attorney with a national security clearance to represent Abu Ali – with Abu Ali's consent – at CIPA-related hearings in which the court would make discoverability determinations. *Id.* at 249 n.17. Once the court concluded that certain classified evidence was in fact discoverable, the Government produced a redacted, declassified version to defendant and uncleared counsel. *Id.* This Court held that

nothing about this procedure violated Abu Ali's rights, except one order that failed to require discoverable evidence be shared with the defendant. *Id.* at 254-55.

Abu Ali illustrates the very process Moussaoui argues for in his appeal. Because Moussaoui was not entitled to classified information, the district court should have held CIPA proceedings to consider whether classified information was discoverable, and these proceedings could have been conducted *ex parte*.¹⁴ If the court decided the materials were discoverable, the Government could have met the discovery obligations by producing non-classified substitutes. It was not permissible, however, to do what the court did here, which was to require all defense counsel to be Government-approved, permit the Government to produce *classified* substitutes for classified discovery, restrict defense counsel from talking with their client about discoverable information, and exclude the defendant from entire proceedings.

In responding to Moussaoui's CIPA argument, the Government repeatedly asserts that Moussaoui is demanding access to classified information. *See, e.g.*, GB63 ("Moussaoui's right to communicate with counsel did not require the disclosure of national security information to him."); *id.* ("Moussaoui was not denied due process because classified information was protected from disclosure to

¹⁴ Consistent with *Abu Ali*, it also would have been permissible to appoint *additional* defense counsel (*i.e.*, beyond Moussaoui's chosen counsel) with a security clearance to assist in making these discoverability determinations.

him"); *id.* at 112 (“[H]e contends that . . . a trial without personal access to classified information would have infringed many of his Constitutional rights.”). These assertions are an attempt to divert the argument. Not a single constitutional claim in this appeal is based on Moussaoui’s failure to gain access to classified information. In other words, rather than responding directly to this argument, the Government mischaracterizes Moussaoui’s position, essentially constructing a straw man argument that Moussaoui’s “real disagreement is with the most basic CIPA-related procedures” and with “the rule that protected classified information from disclosure to him.” GB135. The Government then spends sections of its brief refuting this mirage, but no response is necessary – that is not the argument.

B. THE DISTRICT COURT DEPRIVED MOUSSAOUI OF THE RIGHT TO CHOOSE HIS OWN COUNSEL.

At the time Moussaoui pled guilty, he faced a trial at which he would be represented by counsel that he did not choose. The district court deprived Moussaoui of his right to choose counsel in two ways: (1) by failing to provide an opportunity to hire his own lawyer; and (2) by restricting Moussaoui to only those lawyers approved by the Government and able to obtain a top secret clearance.

1. The District Court’s Procedures Were Inconsistent with *Abu Ali*.

The Government concedes that the district court restricted Moussaoui’s choice of counsel to those willing and able to obtain a security clearance, GB118,

and SAMs prevented Moussaoui from contacting a lawyer of his choosing.

GB178. The Government insists, however, that these restrictions on choice of counsel were proper because this was a national security case and the defendant is a member of al Qaeda. Once again, *Abu Ali* illustrates the fallacy of the Government's position.

In *Abu Ali*, as here, the Government alleged that the defendant was an al Qaeda terrorist with plans to carry out attacks in this country. 528 F.3d at 221. Nevertheless, the defendant in *Abu Ali* was able to seek and retain counsel of his choice, and the district court did not require security clearances, even though some of the discovery in that case was classified. *See id.* at 248 (noting that of two non-cleared counsel representing defendant, one chose not to apply for security clearance and the other's security clearance application was denied by the Department of Justice). *Abu Ali* illustrates that a court can allow a defendant to seek and obtain counsel of his choice in a national security case without requiring all defense counsel to have national security clearances.

A security clearance was not mandatory in *Abu Ali* because, under CIPA, all discoverable information that the Government produces by substitutes should be unclassified. Thus, here, the requirement that all defense counsel be cleared was unnecessary and was inconsistent with *Abu Ali*. A defendant should not have to

ask for permission from the Government to hire a particular lawyer. That kind of Government veto is clearly unconstitutional.

2. Moussaoui Was Not Afforded a Chance to Hire His Own Lawyer – Including at His Arraignment.

The Government next asserts that Moussaoui had an opportunity to hire counsel at the arraignment. GB174. This is wrong and mischaracterizes the record. At the arraignment, the district court advised Moussaoui of his *Miranda* rights, alerting him that he had a right to a lawyer of his choice. *Id.* The Court did not, however, ask Moussaoui whether he wanted to hire a lawyer. And, the SAMs restrictions precluded Moussaoui from hiring his own lawyer.

In a typical case, *Miranda* warnings may be enough to give a defendant the opportunity to seek and obtain counsel of his choice because a typical defendant may contact the outside world. Where, as here, a defendant's conditions of confinement preclude him from contacting potential counsel, the court must do more than merely recite *Miranda*. The court thus failed to provide Moussaoui "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (explaining the right to counsel).

The Government also claims that Moussaoui failed to raise the deprivation of his right to seek counsel in the court below. GB178-79. This too is wrong. Moussaoui alerted the district court to this issue on the first occasion in which he had the opportunity to speak in court, describing how he was not afforded counsel

of his choice in the proceedings against him in New York, JA241, then in the Eastern District of Virginia. JA241-42. When the district court sought clarification, Moussaoui made clear that he had wanted to hire his own lawyer, but had never been given the chance to do so. MB28.

3. The Government's Other Arguments Relating to Moussaoui's Choice of Counsel Are Without Merit.

The Government argues that Moussaoui "acquiesced" in and, indeed, "embraced" the requirement that his lawyers would have to obtain national security clearances. GB176. This mischaracterizes the record. Moussaoui objected repeatedly. *See, e.g.*, JA298 ("I was denied by deceitful means the ability to hire my own Muslim standby lawyer (vetted by FBI, CIA, Secret Service)."). But, by the time of the *Faretta* hearing, the court had ruled. JA528 (stating that any prospective counsel would "have to pass at least the preliminary FBI background to be able to interact with you"). Because the district court had already decided the issue, there was nothing in which to "acquiesce."

The Government further argues that Moussaoui is required to exhaust administrative remedies before challenging the SAMs in court. GB178. But Moussaoui is not appealing the SAMs; rather, the violation of his right to hire counsel of choice left him facing a fundamentally unfair trial at which he would be

represented by lawyers he did not want. The SAMs are simply one mechanism by which Moussaoui was denied a chance to hire the lawyer he wanted.¹⁵

The Government next argues that Moussaoui cannot point to any particular lawyer he would have hired absent these restrictions. GB175. On the contrary, it would be impossible for Moussaoui – or any defendant – to show prejudice in a situation like this. Moussaoui had no opportunity to locate a particular lawyer because the SAMs restrictions cut off all contact with the outside world, and the moment that the district court informed him that any lawyer he hired would have to be Government-approved, he informed the district court that he would rather represent himself. A defendant cannot possibly be expected to identify a lawyer he would have hired *if* he had been able to contact the outside world and *if* he had not been unconstitutionally restricted to Government-approved lawyers. Indeed, it is for this reason that a defendant need not show prejudice when he is denied choice of counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 154 (2006) (holding that an “erroneous deprivation of counsel of choice, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error” (internal citation omitted)).

¹⁵ In any event, in the cases cited by the Government, the district court never approved the SAMs that the defendant was challenging. Here, the district court actually ruled on the SAMs, adopting them as “reasonable.” JA211-12. Thus, there is a final and appealable order, unlike in the cases cited by the Government.

The Government also asserts that Moussaoui somehow waived this issue by failing to raise it in the district court. Not so. As noted above, Moussaoui raised the issue at his first opportunity to speak. In those same proceedings, he protested that “[f]rom the beginning, the United States is preventing any Muslim help to reach me,” JA224, and he specifically stated that he wanted “to be able to choose a lawyer” and to contact a “Muslim association” in that process. JA279. Moussaoui preserved this issue.

Finally, the Government cites two cases suggesting that the right to choose counsel is not absolute. GB179. Both are consistent with Moussaoui’s argument. First, in *United States v. Corporan-Cuevas*, 35 F.3d 953, 956-57 (4th Cir. 1994), the court held that a defendant’s attempt to replace his counsel on the first day of trial was a “dilatatory tactic,” and the district court therefore did not err in rejecting the request. *Id.* at 957. Second, in *United States v. Nichols*, 841 F.2d 1485 (10th Cir. 1988), the Tenth Circuit held that a defendant does not have the right to access otherwise restricted funding to hire an attorney he cannot afford. These cases do not apply here because (1) Moussaoui sought to hire his own counsel early in the proceedings, and (2) Moussaoui made clear that he was not seeking financial assistance from the Court, but rather sought to hire his own counsel using his own funds or on a *pro bono* basis.

C. THE DISTRICT COURT IMPROPERLY RESTRICTED MOUSSAOUI'S COMMUNICATIONS WITH COUNSEL.

As Moussaoui argued in his opening brief, lawyer-client communications are sacrosanct, and a district court cannot restrict them except under very narrow circumstances. *Compare Geders v. United States*, 425 U.S. 80, 91 (1976) (Sixth Amendment violation where court ordered defendant not to speak with counsel during overnight recess of defendant's trial) with *Perry v. Leeke*, 488 U.S. 272, 273 (1989) (approving restriction of attorney-client communication during fifteen-minute break because of "virtual certainty that any conversation between the witness and his lawyer would relate exclusively to ongoing testimony"). Here, the district court barred communication between Moussaoui and his lawyers through two kinds of orders: (1) a Protective Order barring Moussaoui and his lawyers from discussing classified information; and (2) discovery orders approving the Government's production of classified substitutes – that could not be shared or discussed with Moussaoui – for classified discovery. As a result, Moussaoui's trial counsel could not discuss with Moussaoui discoverable information, including information that was material to the defense and exculpatory as to Moussaoui. This was a structural defect.

I. CIPA Does Not Authorize the Government to Substitute Classified Information for Classified Originals.

The Government first argues that CIPA authorizes the Government to satisfy its discovery obligations by producing classified substitutes to the defense counsel, even if the defendant himself does not get access to that discovery and the defense counsel cannot discuss that evidence with the defendant. GB135. The Government is wrong. Under the plain language of CIPA, the Government must produce discovery to “the defendant,” 18 U.S.C. App. III § 6(b)(1), and nothing in CIPA even suggests that the Government may satisfy its discovery obligations through productions to defense counsel where that information cannot be shared with the defendant. Similarly, CIPA clearly permits the Government, upon sufficient showing, to delete specific items of classified information from documents to be made available *to the defendant* through discovery if it provides “a statement admitting relevant facts that the specific classified information would tend to prove” or “a summary of the specific classified information.” 18 U.S.C. App. III § 6(c)(1). Thus, if material containing classified information is discoverable, and the Government chooses to produce substitutes, the Government

must produce those substitutes in unclassified form so they can be shared with the defendant.¹⁶

The Government next argues that adopting Moussaoui's plain reading of CIPA would "collapse CIPA's framework" because CIPA "depends" on "disclosure of classified information to cleared members of the defense team." GB139 n.72. There is, however, no support for this contention. CIPA permits a court to determine *ex parte* whether information that is classified must be produced and whether unclassified substitutes are adequate. 18 U.S.C. App. III § 4. CIPA provides the Government several choices to meet its discovery obligations without producing any classified information to anyone. *See* 18 U.S.C. App. III §§ 4 & 6(c). There is absolutely no need, therefore, for the Government to produce classified information to defense counsel. Surely if Congress had intended that security clearances for defense counsel be the linchpin to the proper operation of CIPA, as the Government contends, it would have mentioned such a procedure in the text of the statute. CIPA makes no reference at all to security clearances for defense counsel and repeatedly provides for making the resulting unclassified materials available to "the defendant." *See, e.g.*, 18 U.S.C. App. III § 4.

¹⁶ Indeed, even CIPA envisions having "the name of [a CIA] agent replaced by the term 'a CIA agent'" to protect classified information while still providing the defendant with substantive information necessary to mount his defense. S. Rep. 96-823, 1980 U.S.C.C.A.N. 4294, 4301 (1980).

2. **Moussaoui Does Not Seek Access to Classified Information.**

Next, the Government makes a lengthy argument that a district court has the discretion to protect classified information from disclosure. GB134-40. This argument is a red herring. Moussaoui does not demand “unfettered access to classified information,” as the Government claims. GB135. Rather, Moussaoui seeks only what he is entitled to under CIPA and the Sixth Amendment – unrestricted access to *unclassified* substitutes for otherwise discoverable classified information and the ability to discuss this discovery with his counsel. The fact that discoverable information is classified does not relieve the Government of its obligation to produce it, at least in a form that “provide[s] the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.” 18 U.S.C. App. III § 6(c)(1)(B). Here, the district court violated CIPA and Moussaoui’s Sixth Amendment rights by authorizing the Government to produce classified substitutes of discoverable materials – including material and exculpatory discovery – such that defense counsel could not discuss it with Moussaoui.

Finally, the Government’s reliance on *Abu Ali* for the proposition that “protective orders may prohibit disclosure of otherwise-discoverable classified information to a defendant and his counsel if they do not possess a security clearance” simply misrepresents the holding of that case. GB138. As explained

above, *Abu Ali* permits defendants to be excluded from certain proceedings that determine whether classified information is discoverable. Once a court finds that information must be produced, *Abu Ali* does *not* permit a court or the Government to withhold that information from the defendant.¹⁷

3. Moussaoui and His Lawyers Objected to the Restrictions on Communications.

The Government next claims that Moussaoui and his counsel failed to object to the district court's restrictions on attorney-client communications. GB140 n.74. Again, the Government is wrong. Moussaoui's counsel repeatedly objected to their inability to discuss material and exculpatory information with Moussaoui. JA130-165; JA865-901; CJA66-9; CJA147-66. Similarly, the Government contends that these objections only pertained to Moussaoui's *pro se* status and thus his right to counsel claim is somehow forfeited, because "no one ever contested the

¹⁷ The additional authorities cited on page 139 of the Government's brief are either wrong or misconstrued and thus do not support the Government's argument. In *United States v. Bin Laden*, No. 98-cr-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001), the court misapplied CIPA, as did the court below. The *Bin Laden* court took the very limited scope of the *Geders-Perry* range of acceptable prohibitions on attorney-client communications and expanded them beyond recognition under existing law. 2001 WL 66303, at *3-4. Additionally, the court in *United States v. Rezaq*, 156 F.R.D. 514 (D.D.C. 1994), also misapplied CIPA by the same flawed reasoning the Government asks this Court to adopt. For example, the *Rezaq* court relied on cases like *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), and *United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990), to permit CIPA protective orders prohibiting broad restrictions on attorney-client communications. As Moussaoui demonstrates below, those cases support his position, rather than the Government's.

restraint on Moussaoui's ability to consult with cleared counsel about classified evidence." GB140 n.74. Once again, the Government is wrong. Moussaoui clearly objected to the restrictions on the ability of his lawyers to communicate with him.¹⁸

4. Because the Restrictions on Attorney-Client Communications Were Both Unnecessary and Overbroad, They Violated Moussaoui's Sixth Amendment Rights.

Next, the Government argues that even if the bar on attorney-client communication was not sanctioned by CIPA, and even if Moussaoui objected on this issue, there is no violation of the Sixth Amendment when a court bars a lawyer from communicating with a client in a case that involves classified information. This argument is wrong in several respects. The right to free and uninhibited communication between counsel and client is essential to the effective assistance of counsel. *See Geders*, 425 U.S. at 88; *see also* MB78-79. Restrictions on attorney-client communication without the consent of the defendant can only occur when absolutely necessary and must be narrowly tailored, *see* MB80-81, as confirmed by the cases cited by the Government.

¹⁸ For example, on one occasion, Moussaoui complained to the court about the inability of his counsel to speak with him about information that counsel received before Moussaoui was *pro se* and that Moussaoui still had not received after he chose to represent himself. *See* JA747 ("[C]ounsel, now standby never inform me even of the existence of this secret conversation. Anybody can understand why the Judge, the prosecution, and Government lawyer try to force me to have a standby lawyer. So exculpatory evidence, evidence of cover up will never reach me.").

In several cases cited by the Government, for example, courts merely restricted counsel from discussing with their clients information that was *not discoverable*. For instance, in *United States v. Bell*, 464 F.2d 667 (2d Cir. 1972), GB141-42, the Second Circuit approved protections substantively identical to CIPA long before CIPA was enacted. *Bell* involved a witness whose only relation to the case was that he knew certain details about the Federal Aviation Administration's highly sensitive hijacker profiling system. 464 F.2d at 671. Because of the secret nature of the profiling system, the court barred the public and the defendant from a small portion of a pretrial suppression hearing while the witness testified about the details of the profiling system. *Id.* at 669. Except for that part, the defendant attended the hearing, and during the defendant's absence, the court instructed defense counsel to discuss with his client any "part of the testimony which has some effect on the knowledge of the defendant." *Id.* at 671 n.3. The *Bell* court, therefore, improvised pre-CIPA procedures that excluded irrelevant classified material, but made sure defense counsel could discuss with the defendant anything relevant to his case. That is how CIPA was supposed to work in Moussaoui's case.¹⁹

¹⁹ *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973), demonstrates further that the Government's reliance on *Bell* is misplaced. In *Clark*, the Second Circuit reversed the conviction of a defendant who was excluded from "an entire pretrial suppression hearing" at which only a portion dealt with testimony regarding the

Footnote continued on next page

In *United States v. Hung*, 667 F.2d 1105 (4th Cir. 1981), this Court similarly approved a narrowly tailored restriction that prevented a lawyer from revealing information to which the defendant was not entitled. In *Hung*, the district court allowed defense counsel to “inspect documents to assist the district court in determining if they were Jencks Act materials.” *Id.* at 1107. This Court concluded that, because the Jencks Act permitted *ex parte* determinations of discoverability, it was permissible to restrict counsel from discussing documents that were not discoverable. *Id.* at 1108. The same was true in *United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990), in which the Seventh Circuit upheld a restriction on counsel discussing with a client information (privileged confidential informant information) to which the client was not entitled. *Hung* and *Herrero* are consistent with Moussaoui’s arguments here, because the narrow restrictions in those cases only covered information to which the defendant was not entitled. Neither supports a blanket prohibition of attorney-client communications.

Likewise, *Morgan v. Bennett*, 204 F.3d 360 (2d Cir. 2000), only underscores that the district court’s restriction on attorney-client communication in this case

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FAA’s profiling system. *Id.* at 242. The Second Circuit distinguished *Bell* on the grounds that the defendant in *Bell* was only excluded from the limited portion dealing with testimony regarding the details of the profiling system. *Id.* at 244-45. The court held that excluding the defendant in *Clark* from the entire suppression hearing violated the defendant’s constitutional rights under the Sixth Amendment. *Id.* at 246.

was neither necessary nor narrowly tailored. In *Bennett*, following a specific showing of witness intimidation, the district court restricted a defense lawyer from disclosing to his client that a particular witness would be testifying the following day. *Id.* at 368. However, the attorney was permitted to discuss with his client everything else about that witness. *Id.* Moreover, the defendant attended the hearing and thereby learned the identity of the witness. *Id.* Thus, “[t]here was no blanket prohibition against communication between [the defendant] and his attorney.” *Id.* *Bennett* puts in stark relief the unconstitutionally overbroad restrictions on Moussaoui and his counsel.

None of the cases cited by the Government sanction what occurred here. The restrictions on Moussaoui’s lawyer-client communication were unconstitutional because: (1) the restrictions were unnecessary, and (2) they were so broad as to have effectively deprived Moussaoui of the right to counsel.

5. CIPA Does Not Alter Constitutional Rights.

The Government argues that even if these restrictions were unconstitutional, the right to communicate with counsel should be compromised in “the unique context” in which classified information is involved. GB143. This is fundamentally wrong. As many courts, including this Court, have held, CIPA does not alter normal discovery principles. *See* MB38. In creating CIPA, Congress recognized the Executive Branch’s interest and exclusive authority in protecting

classified information, and sought to create a process that did not compromise the defendant's rights under the Sixth Amendment.

In short, the district court unconstitutionally deprived Moussaoui of his right to communicate with his counsel.

D. THE DISTRICT COURT DEPRIVED MOUSSAOUI OF THE RIGHT TO EFFECTIVE SELF-REPRESENTATION.

After the district court granted Moussaoui permission to represent himself, it then authorized the Government to produce discovery only to his standby counsel, and it also conducted entire proceedings and hearings without Moussaoui involved or present. MB51-55; 100-04. This occurred because the district court permitted the Government to produce its discovery in classified substitutes, instead of unclassified substitutes. Because Moussaoui was not entitled to receive classified information, this rendered Moussaoui, who was representing himself, a bystander in his own proceedings: unable to review discovery, to follow up on that discovery or direct investigations, or to prepare properly for trial. In restricting Moussaoui in this fashion, the district court deprived Moussaoui of his Constitutional right to maintain "actual control" over his case – the right to speak for himself in his defense instead of having another speak "instead of" him. *McKaskle v. Wiggins*, 465 U.S. 168, 169 (1984). The district court also deprived Moussaoui of the right to effective self-representation by permitting the Government to preclude him from getting advice from his chosen legal advisor.

In response, the Government does not seriously dispute that Moussaoui was denied his right of self-representation. Rather, the Government asserts that because the district court eventually revoked Moussaoui's right to represent himself, and because Moussaoui does not specifically appeal this revocation, Moussaoui can have no argument on appeal based on this issue. GB169. The Government misapprehends Moussaoui's argument. Before he entered his guilty plea in April 2005, Moussaoui tried through every route to vindicate his Sixth Amendment right to counsel: through informing the court of his desire to hire the lawyer of his choice; through appointed and standby counsel; and through his efforts to represent himself. In each of these efforts, he was prevented from vindicating his right to counsel because, each time, the district court permitted the Government to produce classified substitutes instead of unclassified substitutes. Finally, resigned that the trial he faced would be defective, Moussaoui gave up and pled guilty. The district court's deprivation of Moussaoui's right of self-representation is a critical part of this sequence of events – it shows that Moussaoui tried every option available to him before finally giving up and pleading guilty.

After electing to proceed *pro se* and finding himself with no access to the important discovery and “no access to the outside world, no phone, no letter, no visit, no Freeman,” JA1052, Moussaoui's hope that self-representation would ensure fairness vanished, confirming that the trial he faced would be fundamentally

unfair. In other words, whether or not this would be a stand-alone basis for reversal, it is part of the proof that Moussaoui's plea was involuntary.

The Government next argues that Moussaoui waived the right to receive classified information when he was granted *pro se* status. GB120. Again, this misstates the issue. Moussaoui cannot waive a right he never had, and he does not claim the right to receive classified information. He does claim the right to receive unclassified substitutes pursuant to CIPA, and he never waived that right.

The Government also claims that Moussaoui offers no other approach the district court could have chosen under these circumstances. GB171. As discussed extensively, this is not true. Moussaoui argued in his opening brief, and has argued here, that the district court simply should have followed CIPA.

The Government next claims that standby counsel's role was "minimal and preliminary" and thus could not have deprived Moussaoui of his right to represent himself. GB171. This is wrong. As the Government admits, standby counsel were tasked "to represent [Moussaoui] on matters involving classified information" and "carrying out the . . . CIPA process on Moussaoui's behalf." GB169, 171. In this endeavor, standby counsel was responsible for "designating items for use at trial." GB171. This was no "minimal" task. It placed standby counsel squarely in control of what evidence would be presented at trial. Moreover, standby counsel represented Moussaoui at CIPA hearings on at least five occasions spanning the

seventeen months Moussaoui was permitted to proceed *pro se*. See, e.g., CJA228-29; CJA314-17; CJA322-24; CJA356-58; CJA578-80. Again, none of this would have happened if the district court had followed CIPA.

As the *McKaskle* Court noted, a defendant's right to proceed *pro se* "is either respected or denied." 465 U.S. at 177 n.8. Simply put, the district court denied Moussaoui's *pro se* right.

E. THE DISTRICT COURT PREVENTED MOUSSAOUI FROM PARTICIPATING IN CRITICAL STAGE PROCEEDINGS.

A defendant has the constitutional "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975) (citation omitted). As this Court explained in *Rolle*, this principle protects the integrity of the proceedings themselves:

[E]ven in cases where the Sixth Amendment right of confrontation is not implicated, an accused's right of presence is premised on two basic principles: (1) assuring nondisruptive defendants the opportunity to observe - and, it is to be hoped, to understand - all stages of the trial not involving purely legal matters generally incomprehensible to the layman in order to prevent the loss of confidence in courts as instruments of justice which secret trials would engender; and (2) protecting the integrity and reliability of the trial mechanism by guaranteeing the defendant the opportunity to aid in his defense.

United States v. Rolle, 204 F.3d 133, 136 n.4 (4th Cir. 2000). In fact, this Court and others have found that it frustrates the fairness of proceedings to deny a defendant the opportunity to “give advice or suggestions to his lawyer” on matters that are not purely legal in nature. *Id.* at 136 & n.4; *see also Clark*, 475 F.2d at 245 (right to presence at pretrial suppression hearing denied where counsel did not have “benefit of [defendant’s] presence at her elbow to point out potential inaccuracies in the testimony of the two witnesses and to furnish factual information”).

Even outside of the CIPA context, when the Government receives “general” discovery requests – *e.g.*, a request for “all *Brady* material” – the Government ordinarily determines on its own what material is responsive, and when a court gets involved in that determination, it often does so *ex parte*. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987). On the other hand, if the defendant seeks specific discovery – *e.g.*, all statements by a specific person – the defendant himself is ordinarily entitled to participate in the briefing and hearing relating to that specific request and to “argue in favor of its materiality.” *Id.* In other words, where there is any possibility that a defendant will be able to assist his counsel on a factual issue, it is unconstitutional to impede the defendant from participating in the process or to exclude the defendant from attending the hearing. In fact, appellate courts have only excused a trial court’s exclusion of a defendant from

two limited kinds of proceedings: (1) proceedings that sought to determine whether information was, in fact, responsive to general discovery requests and (2) proceeding that involved purely legal matters on which the defendant cannot contribute.

There were at least two categories of proceedings from which Moussaoui was unconstitutionally excluded. First, the district court denied Moussaoui his right to participate in an entire series of briefings and hearings relating to evidence to be used at trial because some of that information was never produced in unclassified substitutes. As the Government concedes, the district court below imposed on cleared defense counsel the job of "wading through classified discovery [and] designating items for use at trial," GB171, but the protective order prohibited them from reviewing or discussing this discovery with Moussaoui before doing so. Moussaoui's counsel then were forced to file numerous CIPA § 5 designations prior to his guilty plea,²⁰ without the essential factual insight that their client could provide. Prohibiting Moussaoui from participating in the CIPA § 5 proceedings denied him the right to participate in critical stages of the proceedings.

Second, the district court excluded Moussaoui from a series of hearings that addressed Moussaoui's requests to produce certain witnesses at trial and for

²⁰ CJA0070, 0102, 0147, 0167, 0214, 0230, 0234, 0383, 0417, 0689, 0702, 0830, 0921, 1027, 1172.

pretrial access to the same witnesses. That is, Moussaoui had specifically requested that the Government produce – for pretrial access or depositions and to testify at trial – the following witnesses [REDACTED]

[REDACTED] Abu Zubaydah, [REDACTED]

[REDACTED] JA1134, 6029, 6033,

6045, 6094. Even though it was Moussaoui who had requested access to and production of these witnesses, the district court held a series of hearings considering whether these witnesses were material, whether the witnesses had to be produced in person, and whether written summaries of information gathered by the Government from these witnesses were reliable substitutes for the in-court testimony of these witnesses.

For example, on October 2, 2002, the district court held a hearing to consider the defense requests with respect to Zubaydah [REDACTED] CJA0228. Moussaoui was not present for this hearing, and, as a result, Moussaoui's lawyers had to rely solely on the Government's summaries of information from these witnesses and a few handwritten *pro se* papers from Moussaoui, along with the lawyers' understanding of the same to argue why these witnesses should be produced for trial. Moussaoui could not explain in person what he knew about this, and, as a result, the district court viewed the lawyers' proffers as "fairly vague." Ex. A to Mot. to Remand (Dkt. # 107) (Nov. 27, 2007).

Even the district court noted that Moussaoui's absence from the hearing put the lawyers "in a very difficult position" because Moussaoui could have identified information – not in the Government's summaries – that this witness could provide. *Id.*

On January 30, 2003, the district court heard again arguments relating to Zubaydah [REDACTED] CJA0314. Again, even though Moussaoui had requested access to and production of these witnesses by name, Moussaoui was not permitted to attend this hearing or to explain to the district court why he wanted access to the witnesses. The district court nonetheless held that [REDACTED] could provide material and exculpatory information, but without Moussaoui's participation, the district court concluded that "the defense ha[d] not been able to make out the necessary factual predicate that the information [Zubaydah [REDACTED] [REDACTED] have would be material, relevant, or at all under *Brady* favorable to the defendant. There's simply not enough there. It's too vague." CJA0319.²¹ These are just a few examples of the myriad instances of Moussaoui's exclusion from these types of proceedings.

Excluding Moussaoui from these proceedings denied him the right to be present to "give advice or suggestions" to his counsel regarding this information,

²¹ On May 7, 2003, the court heard additional argument on the materiality and reliability of the potential testimony of [REDACTED] and further held that "there is no question that the same legal argument is going to apply to [REDACTED] CJA0582.

Rolle, 204 F.3d at 136, or “argue in favor of its materiality,” *Ritchie*, 480 U.S. at 59-60. Thus, even if the Government’s intelligence summaries did not contain material or exculpatory information relating to a witness, Moussaoui could have explained why these were material witnesses.

In short, Moussaoui was excluded from proceedings and hearings addressing the admissibility of evidence at trial, and he was excluded from hearings relating to access to witnesses he had requested by name. These types of proceedings and hearings that turn on factual issues and factual representations are precisely the types of proceedings from which a district court cannot constitutionally bar the defendant. Prohibiting Moussaoui from participating in these hearings and briefings was no different than barring Moussaoui from the trial itself. This was clearly unconstitutional.

1. CIPA Does Not Authorize Exclusion of a Defendant from Proceedings Relating to Potential Trial Evidence.

In response, the Government claims that CIPA authorized the exclusion of Moussaoui from these proceedings and that he could not therefore have been deprived of his Sixth Amendment and due process rights. The Government is wrong in both respects, and in an effort to confuse the issues, the Government attempts to conflate CIPA proceedings that address discoverability with CIPA proceedings that address other issues. Under CIPA, a district court may hold *ex parte* proceedings under CIPA § 4 to determine the discoverability of information

that is classified. 18 U.S.C. App. III § 4.²² In this regard, CIPA is consistent with those cases excusing a district court's decision to conduct general discovery hearings without the defendant present or to bar a defendant from receiving through his lawyers information to which he was not entitled. *Ritchie*, 480 U.S. at 59 (noting that general discoverability determinations may be made by the prosecutor alone or, if the court is involved, on an *ex parte* basis).

However, a district court may not, even under CIPA, exclude a defendant from proceedings that involve factual issues or that relate to evidence that may be used at trial. In this respect, CIPA §§ 5 and 6 were intended to cover the so-called "Oliver North" situation – in which a defendant receives classified information *outside of discovery* and seeks to use that information at trial. In that limited circumstance, the defendant must notify the court that he intends to use this information at trial, 18 U.S.C. App. III § 5(a), and the district court, after hearing from the Government, must rule on the defendant's ability to do so.²³ 18 U.S.C. App. III § 6. Critically, because both the defendant and the Government possess the classified evidence that the defendant seeks to use at trial, the defendant is able

²² Moussaoui's opening brief discusses the relationship among CIPA §§ 4, 5, and 6. MB 39-40, 53-54.

²³ CIPA § 5 also requires a defendant to give notice when he "reasonably expects . . . to cause the disclosure of classified information." 18 U.S.C. App. III § 5. In such circumstances, the Government can move under CIPA § 4 to delete specific classified items from information sought by the defendant. 18 U.S.C. App. III § 4.

to participate personally in CIPA § 5 and § 6 proceedings. In fact, nothing in CIPA §§ 5 or 6 authorize any proceedings to be conducted *ex parte*; rather, those provisions authorize proceedings to be conducted *in camera* with the participation of the defendant. 18 U.S.C. App. III § 6(a); *see also* S. Rep. 96-823 at 8 (1980) (“[Section 6(b)(1)] hearing may be *in camera*, it is not to be *ex parte*. The government must provide the defendant with notice of the information that will be at issue in the hearing.”). In short, the Government is wrong about CIPA: Certain proceedings relating to whether the Government must produce certain information in response to a general discovery request may be conducted *ex parte*, but a defendant must be present and involved when it comes to, for example, discussing the evidence at trial.

The Government next argues that Moussaoui’s argument is “squarely foreclosed” by this Court’s decision in *Abu Ali*. GB145. The Government again is wrong. *Abu Ali* confirmed what CIPA states – that certain discovery proceedings under CIPA § 4 may be conducted *ex parte*. *See* 528 F.3d at 253. Nothing in *Abu Ali* addresses exclusion from proceedings under CIPA § 5 or § 6, because the defendant in *Abu Ali*, like Moussaoui, did not have any classified information. 528 F.3d at 253. In *Abu Ali*, the Government had moved *ex parte* for a protective order under CIPA § 4 to preclude disclosure of certain classified information, and the trial court granted the motion. *Id.* at 249-50. *Abu Ali* then moved under CIPA

§ 5 to force the Government to disclose the very same information the trial court held not to be discoverable. *Id.* at 250. In upholding the district court's exclusion of Abu Ali from the CIPA § 4 proceeding in question, this Court specifically noted that: (1) the district court had been "presented with a §4 motion [by the Government] and a §5 motion, made at a later date, by Abu Ali" that the information be disclosed; (2) the district court had already ruled that the redacted, unclassified version of the information at issue was "adequate to meet the defendant's need for the information"; (3) CIPA § 4 "expressly provides for such redactions of classified information from documents sought or required to be produced to the defendant"; and (4) CIPA provides that this "determination may be made on an *ex parte* showing." *Id.* at 253. Thus, *Abu Ali* is consistent with Moussaoui's arguments.²⁴

Indeed, *Abu Ali* confirms that Moussaoui was also entitled to participate in any CIPA hearings that touched upon the issue of admissibility of evidence. This Court does not "balance a criminal defendant's right to see the evidence which will be used to convict him against the government's interest in protecting that evidence from public disclosure. If the government does not want the defendant to

²⁴ That a proper CIPA § 5 motion was not before the court is reiterated by this Court's observation that Abu Ali "took issue with the government's decision to classify the information in the first instance which . . . is not subject to question." *Abu Ali*, 528 F.3d at 254 n.21.

be privy to information that is classified, it may either declassify the document, seek approval of an effective substitute, or forego its use altogether.” *Id.* at 255. The errors here could have been avoided had the district court followed the same procedures as followed in *Abu Ali*.

2. The Right to Be Present Does Not Disappear in a National Security Case.

The Government next argues that CIPA and the Due Process Clause should be compromised because Moussaoui is a terrorist who should not be permitted to participate in these CIPA proceedings. GB146. Once again, this Court rejected this argument in *Abu Ali* when it stated that “[w]hat the government cannot do is hide the evidence from the defendant” 528 F.3d at 255. Moussaoui was not entitled to classified information, but he was entitled to unclassified versions of the discovery. The Government cannot avoid its discovery obligations because this case involves allegations of terrorism. *See id.* at 255 (explaining that the Government “may either declassify the document, seek approval of an effective substitute, or forego its use altogether”).

3. Moussaoui Did Not Waive the Right to Be Present.

The Government also seizes on language in some of Moussaoui’s *pro se* pleadings and suggests that Moussaoui waived his right to attend CIPA hearings. GB145 n.76. The Government only provides half the story here. Moussaoui fiercely asserted his right to represent himself, and he demanded that he be allowed

to see discoverable evidence.²⁵ The Government, however, aggressively asserted that the district court should revoke Moussaoui's *pro se* status rather than allow him to participate in proceedings relating to the admissibility of this evidence. JA1214. Moussaoui was thus presented with an unconstitutional choice:²⁶ either waive the right to attend certain hearings that involved factual issues or lose his *pro se* status. In that context, Moussaoui skipped these hearings to avoid revocation of his *pro se* status.²⁷ This was not a valid waiver, but was instead an

²⁵ JA1066 (“I must be given direct access to material that prove that I am not 9/11”); JA1067-68 (“[Judge Brinkema] must declassif[y] evidence. . . . The 6 Amendment give the right to an accuse to see evidence against him”); JA1081-82 (“An hearing on classified evidence must be convene immediately. . . . I am the pro se lawyer, I must see evidence against me.”).

²⁶ Moussaoui recognized this fact. In protesting the unconstitutional choice he faced, Moussaoui invoked his right to “a process . . . by which classified information were ‘purge’ of their secret content and turn into a form that was accessible to the pro se.” JA1227. See also JA1067-68 (“Motion to Force US government to *Declassif[y]* information in my case”; “[Judge Brinkema] must declassif[y] evidence . . . Hearing must be conducted to justify US Gov position. The 6 Amendment give the right to an accuse to see evidence against him.”).

²⁷ JA1225 (Motion “to stop [Judge Brinkema] from removing pro se Zacarias Moussaoui by using fake non-existent classified disinformation as an excuse”; “[T]he world must know that [Judge Brinkema] is playing one of Ashcroft card to kill me by trying to remove me from my pro se self defense . . .”; “Everybody understand that I have a right to get access [REDACTED] . . . so [Judge Brinkema] is a smoke screen to remove me from my pro se self defense”); JA1231, 1233, 1235 (“Better be safe than sorry. . . .”; “United Satan[] want people to believe on whether she should give access to so call classified or revoke my pro se status”; I, Zacarias Moussaoui, will prefer in his interest of pro se status not to attend this 7 May hearing.”).

effort to avoid the revocation of his constitutional right to represent himself. There was, in other words, no waiver here.

4. Moussaoui Was Excluded from Critical Stage Proceedings.

The Government next asserts that there was no violation of the right because the proceedings at issue were not critical stage proceedings. GB146. In that regard, the Government first argues that these proceedings could not be a critical stage because they occurred before trial. This argument is entirely without merit. “[T]he period from arraignment to trial [i]s perhaps the most critical period of the proceedings.” *United States v. Wade*, 388 U.S. 218, 225 (1967) (internal quotation marks omitted). Indeed, many, if not most, of the proceedings federal courts consider to be critical stages occur in the pretrial period.²⁸ As these cases demonstrate, it is the nature of the proceeding – not how close in time it is to trial – that determines whether it is a critical stage.

Moreover, this Court and others have recognized that proceedings under CIPA §§ 5 and 6 essentially move trial proceedings into the pretrial phase to ensure that classified information is properly handled. *See* MB102. The Government cannot have it both ways: If the Government moves trial proceedings

²⁸ *See Estelle v. Smith*, 451 U.S. 454, 457-59 (1981) (psychiatric evaluation for competency to stand trial); *Wade*, 388 U.S. at 236-37 (post-indictment lineups); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961) (arraignments); *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (plea bargaining).

into the pretrial period to protect classified information, it cannot deprive the defendant of the right to participate in these trial proceedings because they are held ahead of trial. Notwithstanding the Government's efforts to deflect the force of the cases cited by Moussaoui, GB146-47 n.77, each of those precedents demonstrates that pretrial evidentiary hearings are critical stage proceedings. See MB101.

The Government next contends that Moussaoui had no right to participate personally in the proceedings at issue because they involve only "questions of law." GB147. The Government is wrong, both in its conclusion and in the legal support it cites. First, the Government represents that *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998), held a defendant need not be at a "Section 6" CIPA hearing because "only questions of law" are involved. GB147. *Klimavicius-Viloria* actually had nothing to do with CIPA § 6. The appellants in *Klimavicius-Viloria* argued that the district court violated CIPA by holding CIPA § 4 *ex parte, in camera* hearings to examine the materials, when, according to the appellants, CIPA § 4 provides only for "*ex parte, in camera* review of written material." 144 F.3d at 1261. The Ninth Circuit specifically noted that the appellant based their argument on CIPA § 4, not § 6. *Id.* Nothing in *Klimavicius-Viloria* supports the notion that CIPA § 6 hearings are necessarily legal in nature.

The Government also misrepresents that *United States v. Cardoen*, 898 F. Supp. 1563 (S.D. Fla. 1995), supports exclusion of a defendant from a CIPA § 6

hearing on the basis that only questions of law are involved. First, the defendants in *Cardoen* were not excluded from the CIPA § 6 hearing. *Id.* at 1570. Second, the question raised by the defendants in *Cardoen* was whether “factual issues” arising at the CIPA hearing need to be resolved by the judge or the jury. *Id.* at 1571. The court merely held that “factual questions” relating to admissibility determinations may be made by the court, rather than the jury, not that CIPA § 6 hearings involve only questions of law. *Id.* at 1572. Thus, *Cardoen* demonstrates that factual questions do arise at CIPA evidentiary hearings and that the defendant must be present for such hearings. In other words, evidentiary hearings are critical stage proceedings from which a defendant may not be excluded.²⁹

5. Moussaoui Was Forced to Choose Between Pleading Guilty and Facing a Trial at Which He Would Be Excluded from Critical Stage Proceedings.

The Government next argues that Moussaoui fails to demonstrate harm. GB148. On the contrary, as Moussaoui argued in his opening brief, he was excluded from the entire process during which the district court considered whether discoverable evidence was admissible, and if so, in what form. Because

²⁹ The other cases cited by the Government, *United States v. Singh*, 922 F.2d 1169 (5th Cir. 1991), and *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974), are similarly inapposite here because the proceedings from which the defendants in those cases were excluded related to general discovery requests. GB148 (noting that the issue in *Singh* and *Anderson* was whether information “should be closed to the defendant”).

this is such a fundamental issue, excluding a defendant entirely from critical stage proceedings results in a presumption of prejudice. *United States v. Tipton*, 90 F.3d 861, 875 (4th Cir. 1996).³⁰

F. THE DISTRICT COURT DENIED MOUSSAOUI PERSONAL ACCESS TO EXCULPATORY INFORMATION.

The Government cannot discharge its *Brady*³¹ and other disclosure obligations by producing documents to defense counsel with the restriction that the materials cannot be shared or discussed with the defendant. This material is relevant to critical decisions that belong to the defendant alone, not his counsel. MB104-07. The Government does not dispute that, had these restrictions remained in place, the result would have been a fundamentally unfair trial.

Rather, the Government's only response is that "some unclassified equivalent" of the materials in question "would have been available to Moussaoui had he gone to trial." GB160. It argues that the "fair inference" is that the

³⁰ Contrary to the Government's claims, Moussaoui himself specifically expressed why it was important for him to attend these hearings personally. JA1080 ("I know more than the FBI all together about Bin Laden group."; "I might recognize somebody using false identity paper. Believe me I have a precise ID in mind."; "I am the only one who can identify a suicide bomber. . . . I wonder if the standby lawyer are going to pretend to be able to recognize possible suicide bomber of Bin Laden group?").

³¹ *Brady v. Maryland*, 373 U.S. 83 (1963) (noting that withholding exculpatory evidence from the accused violates the Due Process Clause).

constitutional error would have been remedied had Moussaoui not pled “before the CIPA process ran its course.” *Id.* To the contrary, that is not a fair inference.

As explained *supra*, and in Moussaoui’s opening brief, rather than following CIPA, the district court’s orders cut Moussaoui off from the evidence and quashed meaningful communications between Moussaoui and his lawyers. Under the correct CIPA procedures, the Government would have been required to produce unclassified substitutes for otherwise discoverable material. But the Government, with the district court’s approval, skirted CIPA’s substitution process. Therefore, contrary to the Government’s suggestion, Moussaoui had no basis whatsoever to infer that, at some point, the Government (with or without the district court’s direction) would reverse course and begin to comply with CIPA.

Indeed, at the death penalty trial, the court and the Government *continued* to unconstitutionally cut the defendant off from the evidence. At least one classified document used at trial was shown to the jury – but kept from Moussaoui. JA3524. In this light, the Government’s assertion that Moussaoui should have known that unclassified substitutes were on the way is without foundation.³²

³² Finally, it is important to note that *Brady* requires the Government to produce any exculpatory evidence sufficiently in advance of trial that a defendant can make use of it in preparing for trial. *United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) (“[T]he prosecutor must disclose ‘material’ . . . exculpatory and impeachment information no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had

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G. MOUSSAOUI WAS DENIED THE RIGHT TO COMPULSORY PROCESS.

As this Court is aware, since the filing of Moussaoui's opening brief, the Government has made a series of important disclosures to this Court and to the district court about the tapes of witness interrogations – an issue that was critical to the compulsory process analysis by both courts in the prior proceedings. These disclosures are discussed in greater length in Appellant's Contested Renewed Motion for Limited Remand and Memorandum in Support Thereof, filed today.³³

There is no doubt, however, that this Court should remand this appeal to the district court for the limited purpose of reviewing the disclosures and ascertaining the effect on Moussaoui's plea. Indeed, the district court has itself expressed its indignation at some of the conduct in this case:

One of the saddest realities I've had to confront in the *Moussaoui* case, in particular, has been the reality that my government did not always tell me the truth. The prosecutors didn't lie, they just didn't know. But the folks behind them were giving them misinformation and so when they came into court, they were giving me misinformation. That is a very scary thing because most judges, and most lawyers, do have a certain belief that what the government says to us, if a prosecutor comes in

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been made."); *Smith v. Black*, 904 F.2d 950, 965 (5th Cir. 1990) ("Timing is critical to proper *Brady* disclosure . . .").

³³ Moussaoui incorporates by reference the arguments in that Renewed Motion and Memorandum.

and says, A, B, and C, and purports to present evidence as to A, B, and C, it will be as it was described.

* * *

In the course of that back and forth about trying to get some kind of controlled access to those witnesses for the defendant, it struck me, having been a prosecutor in my past life, that it was impossible to conceive of such important assets not having been interrogated with a million cameras going on videotaping that interrogation. Those of you from law enforcement background know that most local police departments now, in taking a confession of a statement from any major suspect, are taping it. And so I was hoping we could get some taped conversations of some taped answers to questions and play then in court. And the government assured me that they had never tape-recorded a single one of those conversations. Now, as you've read in the papers recently, it keeps coming out – in fact, some of them were taped. And that's why I said you have to be worried as a consumer of information that the facts are accurate. And, as I said, one of the sad and troubling things about the Moussaoui case was that we were not given accurate information.³⁴

In expressing its ire to the press, the district court is only confirming what Moussaoui has been saying: The availability or absence of tapes of the interrogations was a critical issue to Moussaoui, his defense, and to the district court, and it was the subject of specific inquiries from the district court to the

³⁴ See www.colby.edu/news_events/feeds/feed-item.cfm?feedname=Goldfarb%20Center%20Lecture%20Series&postid=1421696. Last accessed November 6, 2008.

Government. The latest disclosures on the tapes require --both because of their impact on this case and out of respect for the district court itself -- a remand.³⁵

H. THESE FIFTH AND SIXTH AMENDMENT VIOLATIONS RENDERED MOUSSAOUI'S PLEA INVOLUNTARY.

By the time Moussaoui entered his plea on April 22, 2005, the alternative was bleak and unacceptable -- a fundamentally unfair trial, marred by numerous unconstitutional restrictions on the defendant's basic right to present a defense. At a trial conducted pursuant to the district court's orders, Moussaoui:

- Would have *no right to choose his own lawyer*;
- Would *not be entitled to unrestricted communications with counsel*;
- Would *not be entitled to see discoverable information, including material, exculpatory evidence*;
- Would have *no advice from his lawyers* concerning material, exculpatory evidence;
- Would *not be present* at critical stage proceedings; and
- Would *not be permitted to exercise his right to represent himself*.

³⁵ The Government argues in its brief that its destruction of the Zubaydah tapes, described in more detail in Moussaoui's opening brief, raises no concerns because the district court found that he had no material evidence. GB164. The Government's argument is circular, at best. There is no way to know on this undeveloped record *what* the district court would have held if the Government had not destroyed the tapes, because the district court had no opportunity to view them.

These were errors of the most serious magnitude. To face a trial without these core rights – Fifth Amendment right to due process and Sixth Amendment right to counsel – was as egregious as facing a trial before a biased judge.

At the time Moussaoui entered his guilty plea, these needless restrictions made it certain that the upcoming trial would have been fundamentally unfair. It also would be unworkable to prepare for a complex trial like Moussaoui's with these restrictions. Thus, Moussaoui was not "offered the lawful alternatives – the free choice – the Constitution requires." See *Hernandez*, 203 F.3d at 627. No plea can be called voluntary under these circumstances. *Id.*

II. THIS COURT SHOULD VACATE MOUSSAOUI'S PLEA BECAUSE IT WAS UNKNOWING AND UNCOUNSELLED.

A. PRIOR TO THE PLEA, MOUSSAOUI WAS PREVENTED FROM REVIEWING OR DISCUSSING WITH HIS LAWYERS DISCOVERABLE AND EXCULPATORY INFORMATION.

Prior to the plea, Moussaoui was prevented from seeing or discussing with his lawyers evidence that the district court held to be material and exculpatory. As a result, Moussaoui's plea was unknowing and uncounselled. It was unknowing because Moussaoui was prevented from understanding the case against him, and it was uncounselled because his lawyers were unable to advise him on the law in relation to the facts. The plea was therefore invalid. *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir.), *cert. denied*, 488 U.S. 890 (1988) (holding that "even a guilty plea that was [otherwise] 'knowing' and 'voluntary' may be vulnerable to

challenge if it was entered without knowledge of material evidence withheld by the prosecution”); *see also* MB118-19. The Government makes a few arguments that the *Brady* violations in this case do not invalidate Moussaoui’s plea, but none is persuasive.

First, the Government argues that the *Brady* violations did not result in an unknowing plea because “Moussaoui knew the substance” of the information “despite restrictions on his access to it.” GB156. In this regard, the Government contends that “unclassified versions of this Court’s access opinions” in *Moussaoui II* “provided more than the gist of what the enemy combatants’ testimony might be.” GB158 (citing *United States v. Moussaoui*, 365 F.3d 292, 310 (4th Cir. 2004); *United States v. Moussaoui*, 382 F.3d 453, 473-74 (4th Cir. 2004)). The Government’s account ignores that the referenced passages in *Moussaoui II* omit (appropriately, and by design) the key facts. Even a quick comparison of *Moussaoui II* to the information identified in the opening brief makes clear that *Moussaoui II* does not serve as a fair proxy for that information.

The Government argues that Moussaoui should have learned of this classified, discoverable information from reading the unclassified *Final Report of the National Commission on Terrorist Attacks Upon the United States*, *i.e.*, the “9/11 Commission Report.” GB159. However, the 9/11 Commission Report, like other public information, suffers from the same shortcomings as the *Moussaoui*

opinions in that critical discoverable information was missing, sufficiently non-specific, or actually distorted by the 9/11 Commission Report.

Even the district court recognized the weaknesses of the 9/11 Commission Report as a source of evidence in lieu of the classified documents produced by the Government. When the Government asked if the defense could be forced to rely on it in lieu of classified documents, the district court criticized the report as an inadequate substitute for actual knowledge of the documents in the case:

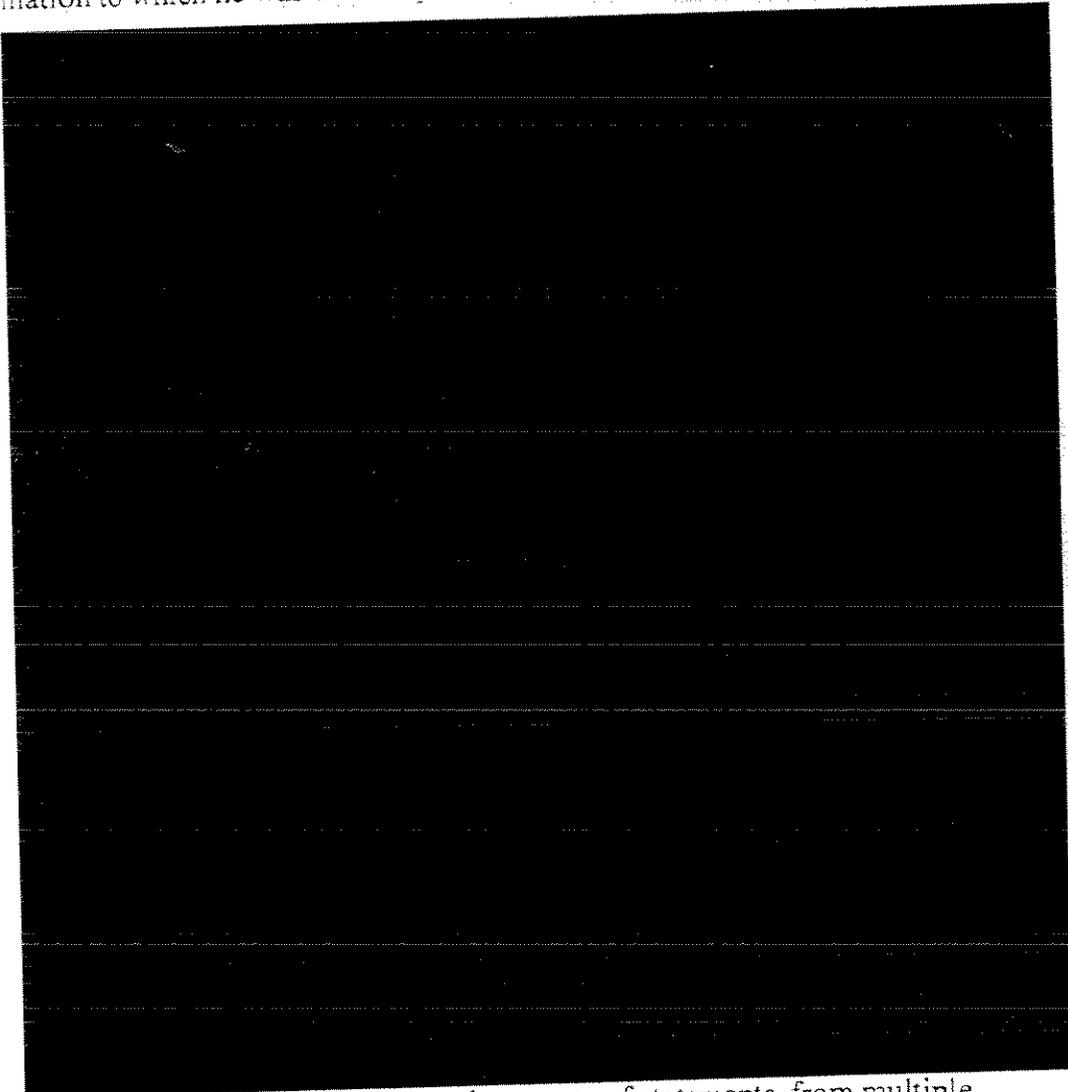
THE COURT: As to the September 11 Commission Report, which I have read, it's a . . . clear but not complete in my view discussion of the September 11 events. It's written for an audience, I think almost a high school-level soft history book . . . [Using the Report in lieu of the actual evidence] so sanitizes this case as to make it almost incomprehensible. The difference in information is significant in my view. I mean, I think that there's a great deal lost between particularly the September 11 Commission report and some of these other documents.

SCJA0006.³⁶

In addition, the fact that information appears in a public government report does not mean that the information was reliable or admissible at trial, and in that regard, use of the 9/11 Commission Report as a source of discovery or leads for investigation was not a useful substitute for the discovery. Moussaoui had to prove

³⁶ Cites to "SCJA" refer to the Supplemental Classified Joint Appendix filed concurrently with this brief.

his case by admissible evidence, and hearsay statements in that report presumptively did not qualify. Moreover, even a few examples show that the 9/11 Commission Report in no way provided Moussaoui with the critical, exculpatory information to which he was entitled prior to his plea. *See generally* MB67-77.



Moussaoui could have relied on these sorts of statements, from multiple individuals, to show that he was not involved in any way in the September 11 plot.

But Moussaoui could not have learned of these statements, or others like them, from the 9/11 Commission Report.

To Moussaoui, the 9/11 Commission Report likely appeared to be much like the newspaper articles he cited when pleading with the district court and his counsel for access to evidence for his defense. Moussaoui believed, from reading the newspapers, that the Government may have detained some critical witnesses, but without confirmation from the Government, that information was suspect. But when Moussaoui asked the district court and his counsel for information based on what he read in the newspapers, he was told that the court and his counsel could neither confirm nor deny the exculpatory evidence he believed the detainees to possess.³⁷ The 9/11 Commission Report, stripped of classified evidence and intended for widespread public distribution, was equally useless to him in terms of preparing for trial and formulating his defense.

³⁷ Judge Leonie Brinkema directly commented on the absurdity of this situation in a speech on April 6, 2008 at Colby College. She said, "[I]t was all over the papers, and it was interesting what that created in that trial, because Mr. Moussaoui read the papers, and he would write motions and say, 'You've got these people, I want them to come and testify at my trial.' And I would have to say to him, 'We don't know whether we have them or not.' But he knew we had them, as did anybody who was reading the papers or watching television. But at one point, they were classified. We could not even reference them by name in pleadings or in any open hearing. [M]uch of that has not been declassified. But it created an incredible problem." See www.colby.edu/news_events/feeds/feed-item.cfm?feedname=Goldfarb%20Center%20Lecture%20Series&postid=1421696. Last accessed November 6, 2008.

Even if these sources *did* provide Moussaoui with the functional equivalent of the information the Government withheld – which they did not – that *still* does not cure Moussaoui’s inability to communicate with his *lawyers* on this subject.³⁸ Moussaoui’s counsel *could not so much as confirm or deny* that Moussaoui’s understanding of these sources was true, much less clear up any misunderstandings – or perform their court-appointed role by counseling Moussaoui about the significance of this evidence. *See Brown v. Maryland*, 618 F.2d 1057, 1059 (4th Cir. 1980) (explaining that “the crucial inquiry is whether the plea was voluntary and based on advice of counsel”). Moreover, Moussaoui could not be sure that he was getting full and reasonable guidance from his lawyers.

Second, the Government argues that *United States v. Ruiz*, 536 U.S. 622 (2002), *sub silentio* overruled the cases holding that a defendant’s plea is unknowing if the prosecution has withheld material exculpatory evidence prior to the plea. GB155 n. 79; *see also* MB118-19. The Government ignores, however, that eight Justices in *Ruiz* rejected the holding it is now urging. Justice Thomas, concurring in the judgment, stated that he would have held that *Brady* is inapplicable to a conviction resulting from a plea. *Ruiz*, 536 U.S. at 633-34. None

³⁸ The Government contends that “Moussaoui knew . . . that defense/standby counsel believed some of the discovery was material and exculpatory.” GB 156. Even if true, it does not follow that Moussaoui knew the “substance” of this information.

of the other Justices joined in that opinion. *Id.* at 633. Instead, the majority relied on the fact that the plea agreement in *Ruiz* required the Government to turn over “any information establishing the factual innocence of the defendant.” *Id.* Thus, its holding was confined to impeachment evidence only and to “those guilty pleas that are factually justified.” *Id.* at 631. As a result, *Ruiz* cannot apply where, as here, the evidence at issue was exculpatory.³⁹ See *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (noting that *Ruiz* should not be extended to exculpatory *Brady* violations).

The reasoning in *Ruiz* also, therefore, disposes of the Government’s argument that *Brady* is a “trial right” only, with no application once a defendant pleads guilty. The Government’s argument misses the point – *i.e.*, that a defendant who pleads guilty under these circumstances has not knowingly waived his rights.⁴⁰ As the Supreme Court has explained, “the decision to plead guilty is heavily influenced by the defendant’s appraisal of the prosecution’s case against him.” *Robert M. Brady*, 397 U.S. at 756; see also *id.* at 758 (noting that conviction by

³⁹ The Government cites *Jones v. Cooper*, 311 F.3d 306 (4th Cir. 2002), for the proposition that even “exculpatory” *Brady* violations cannot render a plea unknowing or involuntary, but *Jones* involved only evidence that was potentially relevant as mitigation in the death penalty phase. *Id.* at 309.

⁴⁰ *United States v. Hyde*, 520 U.S. 670 (1997) does not support the Government’s argument. In that case, it was undisputed that the defendant pled guilty “knowingly, voluntarily, and intelligently, and that there was a factual basis for the plea.” *Id.* at 672.

plea is “no more foolproof than full trials to the court or to the jury” and warning courts to “take great precautions against unsound results”). A guilty plea cannot therefore be “knowing” if it is entered while the Government, the district court, and the defense counsel hold exculpatory evidence not available to the defendant himself. See MB118-19. Evidence is “material,” and the conviction must be vacated, if there is a “reasonable probability” that, but for the *Brady* violation, the defendant “would not have pleaded guilty, but, rather, would have . . . opted for a trial.” *Ferrara v. United States*, 456 F.3d 278, 294 (1st Cir. 2006).

Finally, the Government argues that the restrictions on counsel’s legal advice to Moussaoui were not so debilitating as to render his plea functionally uncounselled under *United States v. Cronin*, 466 U.S. 648 (1984). GB162. In reality, however, the restrictions prevented Moussaoui’s lawyers from providing crucial advice at the most important stage of the case, when their client was exhibiting confusion. This more than suffices to meet the *Cronin* standard. See *Cronin*, 466 U.S. at 659-60 & n.25 (explaining that a conviction is invalid where counsel was “prevented from assisting the accused during a critical stage of the proceeding” or where “the likelihood that any lawyer, even a fully competent one,

could provide effective assistance is so small that a presumption of prejudice is appropriate”).⁴¹ Moussaoui’s plea was, therefore, functionally without counsel.

B. THE PROCESS USED BY THE DISTRICT COURT WHEN ACCEPTING MOUSSAOUI’S PLEA WAS DEFECTIVE.

As explained in his opening brief, Moussaoui pled guilty (laboring, in part, with no legal counsel) amidst fundamental confusion over the charges. From day one, Moussaoui disputed that he was a member of the conspiracy charged in the Indictment – a conspiracy that included the attacks of September 11. MB135-40. But, when presented with a Statement of Facts that carefully avoided drawing any direct connection between Moussaoui and September 11, Moussaoui agreed to enter a plea to what he believed was a more general conspiracy that did not include the September 11 attacks. *Id.* In other words, he believed he could “plead” to the Statement of Facts, notwithstanding the allegations in the Indictment.

Footnote 33 of the Government’s brief states the following about the nature of the charged conspiracies and their relationship to the September 11 attacks:

⁴¹ The Government cites *United States v. Faris*, 388 F.3d 452 (4th Cir. 2004), for this point, but the case does not apply here. In *Faris*, the defendant sought to withdraw his guilty plea on the basis of the prosecution’s failure to turn over a statement that allegedly contradicted the Statement of Facts supporting the plea made by the defendant to the FBI. *Id.* at 454-55. The Court held that because the defendant already knew these facts – facts contained in statements by him – and could easily have discussed them with his lawyer, there was no interference with the attorney-client relationship. *Id.* at 459 n.4.

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."

GB73 n.33. The problem is that the district court never explained this to Moussaoui, and if it had, he would not have pled guilty.

The Government does not, for the most part, take issue with Moussaoui's description of Rule 11's requirements. Rather, in light of the Government's arguments, the relevant issues appear to be:

- (1) Did the district court explain, and did Moussaoui comprehend, "the law in relation to the facts" alleged in the Indictment?
- (2) Did the facts admitted, or otherwise found by the district court, suffice to support a conviction of the crime alleged in the Indictment?

The answer to each question is "no." MB140-52. Throughout the plea hearing and throughout the case, Moussaoui denied any involvement in the September 11 attacks; those denials left the district court with no basis on which to convict Moussaoui of the crimes charged. None of the Government's arguments should persuade the Court to affirm in spite of the defective Rule 11 colloquy.

I. **Moussaoui Did Not Knowingly Plead to a Conspiracy that Included the September 11 Attacks.**

The final Rule 11 colloquy in this case was cursory rather than searching. MB149. The district court stated the elements of conspiracy in general terms and accepted a carefully worded Statement of Facts drafted by the Government. MB136-37, 148-49. On appeal, the Government does not seriously contest the cursory nature of the colloquy, stating only that the district court “made clear to which charges Moussaoui was pleading guilty” and “summarized the allegations.” GB80. This reference – to a “summar[y]” of “the allegations” – apparently means that the district court recited the elements. See JA1419-20.

The Government insists that by these actions “the district court complied” with Rule 11. GB79.⁴² However, that is not the case. See *United States v. Damon*, 191 F.3d 561, 566 (4th Cir. 1999) (requiring a “searching . . . inquiry”); *United States v. DeFusco*, 949 F.2d 114, 117 (4th Cir. 1991) (stating that “the defendant must receive notice of the true nature of the charge rather than a rote recitation of the elements of the offense”). Perhaps recognizing this deficiency, the

⁴² The Government also calls “[s]ignificant[]” the district court’s statement to Moussaoui that “*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*” and Moussaoui’s “yes” response to the court’s inquiry on that point. GB 80-81 (emphases added). To the contrary, as explained in the opening brief, this cryptic point about “jurisdiction” is both confusing to a lay person *and wrong* – the Government would have had the burden of proving this fact at trial. MB 160.

Government devotes the bulk of its argument to scouring the extensive record for other indications that might show that Moussaoui understood, when he pled guilty on April 22, 2005, “the law in relation to the facts.” The Government makes a few points in this regard, none of which cures the defective Rule 11 procedure.

First, the Government notes that Moussaoui received a copy of the Indictment. GB73-74. At the plea hearing, Moussaoui stated that he did not have the Indictment, JA1418 (“No, I do not have this copy. I only have the copy of the statement of facts.”), but confirmed that he had received it “a long time ago,” JA1418.⁴³ Of course, a defendant receives the indictment in virtually all criminal prosecutions. When, as here, this occurred years prior to the plea – and prior to the confusion resulting from the Statement of Facts – past possession of the document is poor evidence of Moussaoui’s understanding of the complex charges.⁴⁴

The two cases cited by the Government are not to the contrary. Indeed, the Government incorrectly cites *Bousley v. United States*, 523 U.S. 614 (1998), for the proposition that where the defendant “received a copy of the indictment” the

⁴³ The Government suggests that Moussaoui’s opening brief misrepresents the record about when Moussaoui had last reviewed the Indictment. On the contrary, the fair implication of the record is that Moussaoui had not reviewed the Indictment for a long time before the plea hearing.

⁴⁴ In light of the complexity of the charges here, the fact that Moussaoui received a copy of the Indictment on or about July 16, 2002, sheds no light on his understanding on April 22, 2005.

“Court may presume” for purposes of accepting a guilty plea “that he was informed about the nature of the charges.” GB73-74. In fact, *Bousley* held that *despite* the defendant’s receipt of the indictment, his conviction would *nevertheless* be “Constitutionally invalid” if the district court failed to explain the charges correctly at the plea hearing. 523 U.S. at 618-19. And, in *United States v. Lalonde*, 509 F.3d 750 (6th Cir. 2008), the Sixth Circuit *rejected* adherence in complex cases to the presumption urged by the Government, confirming that “the amount of discussion required to properly inform the defendant of the charges against him varies based upon the complexity of the charges.” *Id.* at 760.

Second, the Government states that Moussaoui received “information regarding the charges in the indictment and the nature of conspiracy law at the prior hearing where he attempted to enter a *nolo* or guilty plea.” GB75-76 This argument misses the point. There is no dispute that Moussaoui’s attempts to plead guilty and *nolo contendere* in 2002 failed because Moussaoui was unwilling to admit guilt of a conspiracy that included the September 11 attacks. *See generally* MB135-36; JA1036, 1023, 1029-33 (district court’s holding that Moussaoui may not plead guilty while denying culpability in connection with September 11). The record shows that Moussaoui misunderstood the significance of the Statement of Facts, believing mistakenly that he could “plead” to the Statement, which was drafted carefully to avoid any direct connection between Moussaoui and the

September 11 attacks. However, crafting the Statement of Facts in this manner did not change the basic fact that, as the Government admits, the Indictment charged Moussaoui with a conspiracy that included September 11 – and Moussaoui was never willing to admit that he was guilty of a conspiracy that included those attacks. *See* MB135-40.

Third, the Government states that Moussaoui carefully reviewed the Statement of Facts. This is true, but, as discussed, the Statement of Facts was drafted intentionally so as not to alert Moussaoui that he was pleading guilty to a conspiracy that included the September 11 attacks. The Government's description of this document undermines, rather than supports, the argument that Moussaoui knew the nature of the conspiracy. As the Government states, some paragraphs of the Statement of Facts describe Moussaoui's involvement in a broad conspiracy, *see, e.g.*, JA1412-13 (¶¶ 5, 6, 9-12), while others describe the plot to commit the September 11 attacks, *see, e.g., id.* (¶¶ 7, 8, 17-21), but there is no explicit link of Moussaoui to the September 11 attacks, which everybody understood Moussaoui would not accept, *see* MB135-37.

Fourth, the Government relies on a statement by Moussaoui's appointed lawyer, Mr. Yamamoto, that "he's now willing to accept responsibility for the events of 9/11." GB75. This comment can carry no weight in this Court's assessment of Moussaoui's understanding of the charges. *See United States v.*

Agee, 83 F.3d 882, 887 (7th Cir. 1996) (holding that counsel's statement of defendant's consent to appeal waiver was not evidence that waiver was knowing and voluntary). It is the district court's obligation to "address the defendant personally" to assess, through a searching inquiry, the defendant's own understanding of the charges. Fed. R. Crim. P. 11(b)(1).

The Government makes two further points regarding Moussaoui's failure to understand the nature of the charges. Neither changes the analysis.

First, the Government makes much of the fact that many of the statements cited in Moussaoui's opening brief, which illustrate that Moussaoui would not admit participation in a conspiracy that included September 11, were made in the moments following the district court's questioning of Moussaoui, "*after* his pleas had been accepted." GB83. The effort by the Government to discount these statements because of timing is peculiar, juxtaposed as it is against the Government's attempts to scour the (more than) four-year record for indications that Moussaoui understood the charges when he pled on April 22, 2005. While the Government seizes upon irrelevant facts scattered through four years of proceedings as proof of Moussaoui's understanding on April 22, 2005, it protests that Moussaoui's statements in the plea hearing itself are not evidence of his contemporaneous understanding.

The Government also argues that Rule 11 does not “require[]” the district court to *sua sponte* reconsider an already accepted guilty plea based on post-plea remarks by the defendant.” GB84. But the Rule 11 colloquy is supposed “to produce a complete record” of the defendant’s understanding “at the time the plea is entered.” *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Here, the Rule 11 colloquy was defective and did not produce the required record. Thus, the Court is left to examine the record for other indications of Moussaoui’s understanding of the “nature” of the charges. The best evidence in that record are Moussaoui’s statements in the moments following the “yes” and “no” portion of the colloquy. *See, e.g.*, JA1440 (“[T]his conspiracy was a different conspiracy tha[n] 9/11.”); JA1442-43 (insisting that he was “part of a different conspiracy”). Those denials are inconsistent with a plea of guilty to this Indictment.

The Government is wrong to assert that the district court’s obligation to ensure the knowing and voluntary character of the plea cuts off at the instant the questioning ceases. *See United States v. Dixon*, 479 F.3d 431 (6th Cir. 2007) (examining post-plea statements to assess knowingness and voluntariness of plea); *see also* MB153. In this case, during the plea hearing itself, Moussaoui insisted, as he had *throughout* the case, that he was not guilty of any conspiracy that included the September 11 attacks as an objective.

Finally, the Government repeats several times, and at length, that conspiracy law does not require Moussaoui to know the “exact date and targets” of or the “identity of the other participants” in the attack. GB78. This is not the basis of any argument here. Moussaoui is not arguing that his plea was invalid because he did not know these things. The plea was invalid because he did not understand, and the district court did not explain, the “law in relation to the facts.” See MB140-52. Whatever the permissible contours of a conspiracy, the indictment in this case charged Moussaoui with a conspiracy that included the September 11 attacks – a criminal act for which he consistently disclaimed any liability, direct or conspiratorial. Moussaoui may well have believed himself guilty of *some* conspiracy, but he denied that he was guilty of any conspiracy that included those attacks. A defendant may not plead guilty to a conspiracy by redefining it – the indictment controls. MB153-56.

In sum, the Rule 11 colloquy on April 22, 2005, was defective, and Moussaoui labored throughout under the misimpression that he was not pleading to a conspiracy that included as an object the September 11 attacks. “If a court determines that a non-harmless Rule 11 error occurred, the typical remedy is to vacate the conviction and guilty plea and remand, to give the defendant the opportunity to plead anew.” *United States v. Hairston*, 522 F.3d 336, 342 (4th Cir. 2008) (internal quotation marks omitted) (vacating plea where the record made

“abundantly clear . . . that [the defendant] would not have pleaded guilty” if not for the Rule 11 error). Here, the record is absolutely clear that Moussaoui would not have pled guilty had he understood the charges. Under these circumstances, the Court must vacate the conviction. See *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) (holding that conviction must be vacated if there is “a reasonable probability that, but for the error,” the defendant “would not have entered the plea”).

2. The District Court Erred in Accepting Moussaoui’s Plea Absent an Appropriate Factual Basis.

The Government also glosses over the lack of evidence connecting Moussaoui to September 11. Whenever the facts cast doubt on the Government’s theory, the Government broadens and posits a more vague conspiracy. The Government originally named Moussaoui as the “20th Hijacker,” and then as the pilot of a phantom fifth plane in the September 11 attacks. Now, the Government contends, Moussaoui was actually guilty of conspiring to “wage violent *jihād* against U.S. military, citizens, and institutions,” GB71-72, including a “plan to fly commercial aircraft into U.S. buildings,” *id.* at 73, but which “plan” was also “broad” enough to include a plot to free the “blind sheikh,” *id.* at 85. Under this theory, any member of Al Qaeda, no matter his personal culpability or involvement, may be held responsible for the September 11 attacks.

First, as explained in Moussaoui's opening brief, Rule 11 prohibits the district court from accepting a plea of guilty to a conspiracy – or any other crime – distinct from the conspiracy alleged in the indictment. MB153. In a conspiracy case, the Government must prove or the defendant must admit that the defendant knew the objective of the conspiracy. *United States v. Mastrapa*, 509 F.3d 652, 656-60 (4th Cir. 2007) (vacating plea where defendant insisted he did not know the objective). In this context, "knowledge" means "knowledge of the essential objectives of the conspiracy." *United States v. Stewart*, 256 F.3d 231, 250 (4th Cir. 2001); *United States v. MacDougall*, 790 F.2d 1135, 1152 n.13 (4th Cir. 1986). "Proof that the defendant knew that *some* crime would be committed is not enough." *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002); *see also United States v. Xiao Qin Zhou*, 428 F.3d 361, 377 (2d Cir. 2005) (vacating conviction for extortion conspiracy where evidence proved, at most, uncharged conspiracy to rob). Here, Moussaoui denied knowledge (and the district court believed his denial) of the gravamen of the conspiracy – the September 11 attacks.

Second, the Government's strategy to salvage the conviction in light of that defect – by expanding the "goals" of the conspiracy to include the whole of al Qaeda's *jihad* against the United States – exceeds the bounds of what constitutes a single conspiracy. "When a charged conspiracy centers around a central organizer or organizers (a so-called 'hub-and-spoke' conspiracy), the Government must

establish that a given defendant was party to that central conspiracy, rather than to a separate and uncharged conspiracy with one of the organizers.” *United States v. Baker*, 432 F.3d 1189, 1232 (11th Cir. 2005). Here, the facts may have connected Moussaoui to Bin Laden and others, but there were no facts to connect him to the crime charged – a conspiracy to crash the planes into the buildings (perhaps on September 11, perhaps at other times). *See Moussaoui*, 382 F.3d at 473 (noting the “possibility that Moussaoui may assert that the conspiracy culminating in the September 11 attacks was distinct from any conspiracy in which he was involved”). Thus, the conviction cannot stand.

3. There Was No Basis for Venue in the Eastern District of Virginia.

As explained in Moussaoui’s opening brief, the absence of a factual basis connecting Moussaoui to the attack on the Pentagon means that venue was improper in the Eastern District of Virginia, another aspect of the plea Moussaoui did not understand. MB160. As discussed, the Court’s questioning of Moussaoui did not state the issue correctly or in a manner that a layperson would understand and did not create a clear record. *See* MB160-61. In response, the Government states that “Moussaoui had long before indicated that he understood” this issue when, three years prior to the guilty plea, the court “specifically warned him that a guilty plea would waive all nonjurisdictional defects,” including a “request for a change of venue.” GB89 n.48 (quotation omitted). This misstates the record because (1) Moussaoui did *not* indicate that he understood at that time, JA1008

("Before I say yes, I understand, I want – you, you have me seven different, different set of rights, okay, in your letter."); and (2) the request for a "change of venue" to which this refers did not pertain to the Constitutional requirement of proper venue at issue here, which the court did not explain and which Moussaoui did not waive.

This Court has emphasized that waivers of venue rights "should not readily be inferred." *United States v. Stewart*, 256 F.3d 231, 238 (4th Cir. 2001). In light of the district court's misstatement of the issue and Moussaoui's misunderstanding of the scope of the conspiracy, no valid waiver took place. Thus, the venue question is yet another aspect of the plea that Moussaoui failed to understand.

4. The District Court Erred in Failing to Hold a Competency Hearing Prior to Accepting the Plea.

At the time of the plea, there was an insufficient factual basis to conclude that Moussaoui was competent, and that his plea was knowing and voluntary. The Government argues that the district court considered all evidence of incompetence and found it unpersuasive in light of countervailing evidence of competence. GB95. However, the Government cannot resolve a procedural competency claim by merely providing some evidence of competence. *Cf. Allen v. Mullen*, 368 F.3d 1220, 1239 (10th Cir. 2004) ("The question is . . . whether the trial court failed to give proper weight to the information suggesting incompetence which came to light.") (quotation omitted).

Moreover, the Government's assessment of the evidence of competence is flawed.⁴⁵ First, the district court did not have sufficient opportunity to observe Moussaoui; in fact, the district court first found him to be competent in June 2002, after limited contact with the defendant. JA514-16. The district court thereafter refused to disturb its ruling, despite arguments to the contrary.⁴⁶

Second, the district court should not have rejected without a competency hearing the conclusions of defense counsel's experts in favor of the findings of the court-appointed expert.⁴⁷ Here, on the one side there were defense experts'

⁴⁵ The cases cited by the Government in support of its argument that a competency hearing was not warranted are inapposite. *See, e.g., United States v. General*, 278 F.3d 389, 397-98 (4th Cir. 2002) (defendant evaluated at Butner for three months); *United States v. West*, 877 F.2d 281, 285 n.1 (4th Cir. 1989) (defendant made *no* factual showing in support of his motion to determine his mental competency); *Bryson v. Ward*, 187 F.3d 1193, 1202 (10th Cir. 1999) (competency hearing sought one business day before trial based on a modicum of evidence). Moreover, the Government cites several cases where competency proceedings were in fact held. *See, e.g., Indiana v. Edwards*, 128 S. Ct. 2379, 2382 (2008) (where the court held three competency hearings between the defendant's arrest and trial); *Hunter v. Bowersox*, 172 F.3d 1016, 1020-23 (8th Cir. 1999) (court held competency hearings); *Hall v. United States*, 410 F.2d 653, 658 (4th Cir. 1969) (where court was "thoroughly acquainted" with defendant's mental condition because it had presided over an entire trial devoted to the question of defendant's mental competency).

⁴⁶ JA6625-26; JA5788.

⁴⁷ In support of its argument, the Government cites *United States v. Cristobal*, 293 F.3d 134 (4th Cir. 2002). However, in *Cristobal*, the court was weighing conflicting expert reports in its consideration of an insanity defense, which must be proven by clear and convincing evidence. *Id.* at 144. In contrast, the standard for holding a competency hearing is quite different: there need be only reasonable

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multiple reports containing significant evidence of incompetence; on the other side, there was Dr. Patterson's report, based on a two-hour visit with Moussaoui that he admitted did not comprise a complete competency evaluation. JA5784-86. Under these circumstances, the court's marginalization of the defense experts' reports, coupled with the other evidence of incompetence, was unreasonable.

Third, the district court improperly rejected an expert report on the effects of solitary confinement. *See Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) (“[W]hen human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.”).⁴⁸ Even prior to Moussaoui's several years of solitary confinement, there were serious questions as to Moussaoui's mental

Footnote continued from previous page
cause that the defendant was suffering from a mental disease or defect. 18 U.S.C. § 4241.

⁴⁸ In fact, several courts have held that conditions that involve extreme isolation rise to the level of Constitutional violations with regard to mentally ill inmates because of the likely exacerbation of their symptoms. *See, e.g., Madrid*, 889 F. Supp. at 1165 (placing mentally ill inmates or those at increased risk of mental illness in conditions of extreme social isolation “is the mental equivalent of putting an asthmatic in a place with little air to breathe”); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1125-26 (W.D. Wis. 2001) (requiring Supermax facility in Wisconsin not to house seriously ill inmates at Supermax); *see also Giano v. Kelly*, No. 89-CV-727(C), 2000 WL 876855, at *8 (W.D.N.Y. May 16, 2000) (“[T]he often-devastating effect of prolonged isolation . . . is a factor that this court cannot ignore, particularly in cases . . . in which segregated confinement continued for more than one year.”).

health. JA6575-76. The district court also improperly disregarded defense counsel's observations. As indicated in cases cited by the Government, "[d]efense counsel is often in the best position to determine whether a defendant's competency is questionable." *Bryson*, 187 F.3d at 1201 (citation omitted).⁴⁹

In short, it was plainly unreasonable for the court to refuse to hold a competency hearing, and thus there was not a sufficient factual basis for the Court to conclude that the plea was knowing and voluntary.

5. The District Court Misinformed Moussaoui About the Possible Sentences He Faced.

Prior to the plea, the district court repeatedly advised Moussaoui that there were only two sentencing options if he were convicted: (1) life imprisonment, and (2) the death penalty. *See, e.g.*, JA523-24; JA1420-24. As the Government concedes, GB185, 189, this was incorrect – a term of years was also an option under the applicable statutes. Moussaoui's guilty plea was therefore unknowing.

The Government makes several arguments, however, that the error was essentially harmless. First, the Government argues that Rule 11 requires that a defendant be informed of any maximum penalty. GB90. But, as explained, it is

⁴⁹ The court must look at record as a whole and accept as true all evidence of possible incompetence. *United States v. Mason*, 52 F. 3d 1286, 1290 (4th Cir. 1995).

also true that the court must inform the defendant of *all* sentencing options, or else the plea is not sufficiently knowing. *See* MB175-76.

Second, the Government asserts that the district court advised Moussaoui once, on April 22, 2005, that as to Counts Four, Five, and Six, a term of years was available, GB90, but that is misleading. The district court repeatedly advised Moussaoui from the beginning that he faced only life imprisonment or the death penalty. *See, e.g.*, JA523-24 (advising that the counts “carry two possible penalties . . . either life imprisonment without the possibility of parole or the death penalty”); JA536 (“Actually Counts 1 and 4 are punishable by any term of years and life or death, but Counts 2 and 3 only have the life or death option, so we’re just correct about that.”); JA1015 (“Count 3. . . if a death results, which the Government has alleged here, then it’s punishable by either death or imprisonment for life.”); JA1019 (same). The court’s advice at the April 2005 plea colloquy left Moussaoui unaware that a term of years was available for Count Four or Count Six. *See* JA1422 (“Count 4 . . . again could result in a death sentence or any term of years life or death, but again, life or death is affected by whether a death results from that conspiracy, and if it’s life imprisonment, it’s without the possibility of parole.”); JA1423 (“And the last count . . . , if death results as a proximate result of conduct, then that could be up to life imprisonment followed by five years of supervised release, a fine of up to \$250,000, and a special assessment of \$100.”).

Third, the Government argues that there was “no realistic possibility that Moussaoui would receive anything other than a life sentence or the death penalty.” GB185. But this is irrelevant to the fact that Moussaoui pled guilty under a fundamental misunderstanding of the sentences he faced at trial. See *Wilkins v. Bowersox*, 145 F.3d 1006, 1015 (8th Cir. 1998) (finding defendant’s guilty plea not “voluntary and intelligent” because the court “did not explain the full range of sentences that [defendant] could receive”) (internal quotation marks omitted).

In sum, the district court misstated the sentencing options, and, as a result, Moussaoui’s plea was not knowing and voluntary.

III. THIS COURT MUST VACATE THE FINDING OF DEATH ELIGIBILITY AND REMAND FOR RESENTENCING.

As explained in Moussaoui’s opening brief, the jury found Moussaoui death eligible on legally insufficient evidence and imposed life sentences based on that finding. MB177-201. This Court should therefore vacate and remand for a resentencing on all six counts.

A. MOUSSAOUI SHOULD NEVER HAVE BEEN FOUND TO BE DEATH ELIGIBLE.

The Government does not dispute Moussaoui’s threshold argument that it failed to prove that even one death on September 11 was the “direct result” of Moussaoui’s lies, as required under the Federal Death Penalty Act (“FDPA”),

18 U.S.C. § 3591(a)(2)(C).⁵⁰ To credit this theory, the Court would have to hold that Moussaoui's lies "direct[ly] result[ed]" in a death in the 9/11 attacks because: (1) had Moussaoui instead told the FBI in 2001 everything in the April 2005 Statement of Facts, the FBI would have investigated the case as it did after September 11 and would have identified some of the hijackers; (2) the FBI would have conveyed the identity of some hijackers to the FAA, and the FAA would have added those names to the "no fly" lists; and (3) at least one of the September 11 hijackings would have been prevented. This causal chain is the paradigm of "indirect" causation. Indeed, the Government points to no capital conviction under the statute based on such an attenuated theory. Quite simply, there is none.⁵¹

The district court erred in denying Moussaoui's motion to strike the notice of death eligibility on this theory and in permitting this theory to be submitted to the jury. For the same reason, there was insufficient evidence upon which the jury could find Moussaoui death eligible, and, even if this theory and evidence were sufficient under the FDPA, the FDPA was unconstitutional as applied. *See*

⁵⁰ The Government admits this issue is preserved for review. GB 189.

⁵¹ Instead, the Government quotes *dicta* in *United States v. Moussaoui*, 382 F.3d 453, 473 n.21 (4th Cir. 2004), speculating that Moussaoui *might* be death eligible based on his failure to disclose what he knew. However, the Court made this early observation without the benefit of trial evidence, and it certainly was not a holding of any kind.

MB196-200. For each of these reasons, this Court should vacate the finding of death eligibility and remand for resentencing.

B. MOUSSAOU'S CHALLENGE TO THE FINDING OF DEATH ELIGIBILITY IS NOT MOOT.

The Government essentially concedes the weakness of its death eligibility theory by relegating the defense of this theory to a half-page footnote. GB197. Instead, the Government argues that Moussaoui's challenge is moot because, even if resolved in his favor, Moussaoui cannot get a different sentence. The Government is wrong on each argument.

1. The FDPA Required the Court to Impose Life Sentences.

The Government first argues that the district court was not bound, as a result of the jury's finding of death eligibility, to impose life sentences once the jury did not vote to impose the death penalty. GB191. However, the plain language of Section 3594 *requires* the district court to impose the jury's sentencing verdict: "Upon a [jury] recommendation ... the court shall sentence the defendant accordingly." 18 U.S.C. § 3594.⁵² Here the final verdict was entitled "Sentence Of Life Imprisonment Without Possibility Of Release." JA6744. Not only had the

⁵² See also *United States v. Ostrander*, 411 F.3d 684, 687-88 (6th Cir. 2005) (holding Section 3594 is mandatory and requires court to impose jury's verdict); *United States v. Bass*, 460 F.3d 830, 839 (6th Cir. 2006) (same); *accord In re United States*, 197 F.3d 310, 311 (8th Cir. 1999) (Section 3594 requires imposition of jury's recommendation).

parties agreed on this language, the Government *conceded* that if the jury was not unanimous on death, “the default is life imprisonment.” 3SJA79.⁵³ Both parties agreed that the district court would be so bound. Contrary to the Government’s implication, there was no deadlock – the jury’s verdict called for a life sentence.⁵⁴

2. The Sentencing Guidelines Had No Relevance to the Three Capital Counts.

Next, the Government argues that the jury’s finding of death eligibility and the application of Section 3594 are irrelevant because the Sentencing Guidelines required a life sentence. GB191. The Government fails to mention that under the plain statutory language of the FDPA, the Sentencing Guidelines do not apply at all. That is, the FDPA directs that “no presentence report shall be prepared” when a defendant pleads guilty to a capital offense. *See* 18 U.S.C. § 3593(c).

Here, the court noted after jury selection began that a presentence report (“PSR”) was required for the three non-capital counts. JA1568.⁵⁵ This was an

⁵³ Cites to “3SJA” refer to the Third Supplemental Joint Appendix filed concurrently with this brief.

⁵⁴ Furthermore, as detailed *infra*, the Government requested, and the court repeatedly instructed, that it would impose the jury’s recommendation. Once the jury was so instructed, the court, for this additional reason, had no discretion to do otherwise. *See Romano v. Oklahoma*, 512 U.S. 1, 8 (1994) (stating that “the jury must not be misled regarding the role it plays in the sentencing decision”).

⁵⁵ The court’s own words demonstrate that it sentenced Moussaoui on the capital counts pursuant to the jury’s verdict. *See* JA5606 (district court immediately praised the jury that “rendered a decision”); JA5612-13 (court stating that “the 12 who finally decided this case” had acted in a “rational, dispassionate way”).

unnecessary exercise for the capital counts because the FDPA requires the court to follow a jury's recommendation and renders the Guidelines inapplicable to a capital count. See *United States v. Quinones*, 511 F.3d 289, 318 n.19 (2d Cir. 2007). Moussaoui's six sentences were premised on the jury's erroneous factual finding in phase one that Moussaoui's lies had directly resulted in a death. For that reason, this argument is not moot, and the error is reviewable here.

3. The Invited Error Doctrine Does Not Apply.

Next, the Government relies on the parties' and the court's misunderstanding of the sentencing options to contend that Moussaoui has "waived" his objection to the sentence of life imprisonment without possibility of parole because he invited the error. The Government's reliance on the "invited error" doctrine is misplaced.

First, an error is not "invited" or waived when the party is unaware of the mistake.⁵⁶ When all involved share an erroneous view of the law, the error is considered "forfeited" rather than waived, and is therefore reviewable. In *United States v. Perez*, 116 F.3d 840, 844 (9th Cir. 1997), both parties agreed to a flawed instruction omitting an essential element of the crime. Citing this Court's decision

⁵⁶ See *United States v. Bennafeld*, 287 F.3d 320, 323-24 (4th Cir. 2002) (no objection to duplicative offenses charged at counsel's request; reviewed for plain error); *Livingston v. Murdaugh*, 183 F.3d 300, 302 (4th Cir. 1999) (no invited error as parties requested erroneous instruction); *United States v. Nelson*, 102 F.3d 1344, 1348 (4th Cir. 1996) (holding that counsel had not waived – merely forfeited – objection, where counsel failed to request or to object to the omission of a standard jury instruction, and reviewing for plain error).

in *Nelson*, the Ninth Circuit held that under those circumstances, the issue had not been intentionally waived. *Id.*; see also *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (error reviewable where parties and court unaware that defendant's proposed instruction and instructions given were defective).

Here, the record proves that, prior to the sentencing proceedings, and indeed prior to Moussaoui's plea, the district court informed the parties that (1) Moussaoui was only eligible for life imprisonment without parole or the death penalty, and (2) that if the jury did not sentence Moussaoui to death, the court must sentence Moussaoui to life. As a result of this early error by the district court:

- Both the Government's and the defense's proposed jury questionnaires stated that the only possible sentences were the death penalty or life imprisonment. 3SJA6 (stating the second phase of the trial would involve "the question of whether Mr. Moussaoui should be sentenced to either life imprisonment without the possibility of release or to death"); 3SJA4 ("The Court will sentence the defendant according to the decision of the jury.").
- The court instructed each jury panel about only two possible sentences, life imprisonment or the death penalty. 3SJA10-11. The court added it "must impose the sentence found appropriate by the jury." 3SJA12.
- On February 17, 2006, the parties agreed to a stipulation on a life sentence for phase two if the jury declined to sentence the defendant to death. SJA6507, ¶61.
- The defendant's proposed jury instructions, adopted by the court, set out that there were only two sentencing options. JA1589; 2JA112. The Government proposed similar instructions. 3SJA28-29.
- Before phase one deliberations, the court repeated the jury instruction above (JA4367) and added that if the jury failed to find unanimously that the Government had proved the threshold finding beyond a reasonable doubt,

the deliberations would be over and the court would then sentence the defendant to life imprisonment without possibility of parole. JA4368.

- The Government's jury instruction for phase two, adopted by the court, set out only two sentencing options. JA4408H; 3SJA29-30. The defense instruction was similar. 2SJA355.
- When discussing the instructions, the parties agreed that only a death sentence required unanimity, and the default sentence would be life imprisonment. 3SJA79; 2SJA430. As agreed, the penalty verdicts were captioned: "Death Sentence," reading in part, "we the jury, by unanimous vote, determine that a sentence of death shall be imposed," and "Sentence of Life Imprisonment Without Possibility of Release," reading in part, "we the jury, do not unanimously find that a sentence of death shall be imposed on the defendant." JA5414-15; *see, e.g.*, JA6743-44.
- On April 24, 2006, the court's final instructions again told the jurors they would determine Moussaoui's sentence, which would either be the death penalty or, if the jury did not unanimously find in favor of the death penalty, life imprisonment without possibility of parole. JA5557; JA5566.⁵⁷

These facts rebut any claim that the defense "invited error" or made a strategic choice to limit the sentencing options. GB192. The defense never waived the issue; the repeated failure to state all potential sentences, to request appropriate instructions, and to object to erroneous instructions was not strategic.

In this regard, the Government's reliance on *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007), is misplaced. In *Quinones*, the defendant was acquitted of the only count with a mandatory life or death sentence, yet insisted on an instruction limited to those two options. 511 F.3d at 319. The Second Circuit

⁵⁷ The PSR erred as well. It stated Count 3 required either death or life imprisonment. SJA6787-88.

concluded that the defendants' submission of only two sentencing options was a strategic decision, and thus the error was invited. *Id.* at 319-20. Here, counsel did not fail to object to the sentence error for strategic reasons. Thus, under *Quinones*, the invited error doctrine is inapplicable to this case.

C. THIS COURT SHOULD VACATE ALL SENTENCES AND REMAND FOR RESENTENCING.

If the Court holds that the evidence of death eligibility was legally insufficient, Moussaoui must be resentenced as that error affected every count. Assuming, *arguendo*, that plain error review applies to the mistake on Moussaoui's related sentences, this Court has discretion to notice the error. An error that dictates life imprisonment affects the fairness, integrity and public reputation of the judicial proceedings. *See United States v. Ruhbayan*, 406 F.3d 292, 301-02 (4th Cir. 2005) (vacating sentence since court's reliance on improper facts permeated and increased sentence); *United States v. Perkins*, 108 F.3d 512, 517 (4th Cir. 1997) (plain error review despite Government's failure to object to "windfall sentence reduction" that "seriously affect[ed] the fairness, integrity, and public reputation" of the proceedings).

We cannot know what sentence the district court would have imposed on any count – capital or non-capital – absent the death eligibility finding and the jury's subsequent verdict. The court had no chance to exercise its discretion. *See Gall v. United States*, 552 U.S. ___, 128 S. Ct. 586, 596-97 (2007) (court may not

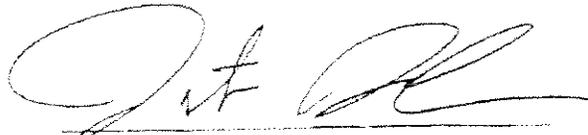
presume Guidelines range is reasonable); *United States v. Booker*, 543 U.S. 220, 264-65 (2005) (holding Guidelines advisory). For these reasons, a resentencing on all six counts is required.

CONCLUSION

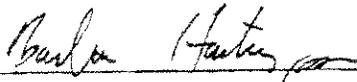
For the foregoing reasons, and for the reasons set forth in Moussaoui's opening brief, this Court should vacate the conviction.⁵⁸ In the alternative, this Court should remand for resentencing without the death penalty as an option, and/or such further proceedings as the district court deems necessary to address the Government's post-conviction disclosures.

⁵⁸ Moussaoui respectfully reserves all claims relating to ineffective assistance of counsel in the district court along with other claims that require development and presentation of evidence for a petition under 28 U.S.C. § 2255.

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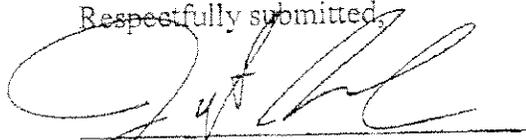
Dated: November 10, 2008

CERTIFICATE OF COMPLIANCE WITH PAGE LIMITS

This brief was written with Microsoft Word 2003 using Times New Roman, fourteen point font. Pursuant to this Court's Order of October 7, 2008 (Dkt. # 223), the reply brief was to be limited to 85 pages.

The brief as filed contains 87 pages, and simultaneously with the filing of this brief, undersigned counsel are filing a Consented to Motion to Filed Oversized Brief. If this Court grants that motion, this brief will comply with the type-volume limitation of Federal R. App. P. 28.1(e)(2) or 32(a)(7)(B) and this Court's orders.

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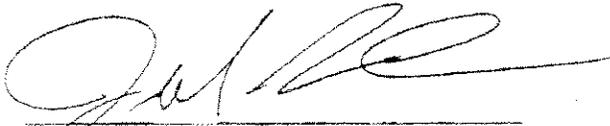
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CERTIFICATE OF SERVICE

I certify that on November 10, 2008, a copy of the foregoing pleading was served on the Court Security Officer for distribution to the following counsel:

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