

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI,)	
Defendant)	

GOVERNMENT’S MOTION TO USE SUMMARY WITNESS
REGARDING WORLD TRADE CENTER ATTACKS

The United States respectfully requests the Court to allow it to introduce photographs and videotapes of the World Trade Center attacks and resulting damage as well as photographs of the victims through a summary witness pursuant to Rules 611(a), 901, and 1006 of the Federal Rules of Evidence for the following reasons:

The attacks on the World Trade Center (WTC) and the resulting damage may be one of the most photographed and videotaped events in the history of the United States. Both American Flight 11 and United Flight 175 were captured on film hitting WTC Towers 1 and 2, respectively. The collapse of both towers and the accompanying carnage were also captured on both videotape and still photographs. However, because of the size of the WTC complex, the photographs and videotapes were filmed from several different locations and heights. The Government intends to introduce relevant portions of the videotapes and photographs during both the guilt and penalty phases to describe the murders at the WTC. This will be particularly important during the penalty phase as the Government seeks to prove that the crime was committed in “an especially heinous, cruel, or depraved manner in that it involved torture or

serious physical abuse to the victim.” 18 U.S.C. § 3592(c)(6). Moreover, the Government intends to introduce photographs of the victims, numbering more than 2800 from the WTC alone, so the jury properly understands who was murdered instead of merely hearing statistics.

The Government respectfully requests the Court to allow it to present the relevant videotapes and photographs of the WTC through one summary witness, Port Authority Detective James Wheeler, instead of calling several persons (at least a dozen) to testify to each perspective of the WTC filmed. Detective Wheeler has served as a member of the Port Authority, which owned the WTC, for 23 years, including nine years as a detective. A significant period of Detective Wheeler’s work experience has been spent at the WTC. In short, Detective Wheeler knows the WTC complex very well. More importantly, Detective Wheeler was at the WTC on September 11, 2001, narrowly escaping death. Although he did not see personally see the two planes hit the towers, he did hear them both and witnessed the resulting damage. Detective Wheeler personally took some of the photographs that the Government intends to introduce; however, because much of his time that day was spent trying to save his life as well as others, he did not personally see every aspect of the WTC which will be depicted in the videotapes and photographs that we intend to introduce. However, Detective Wheeler’s testimony will provide an adequate basis for authentication of the videotapes and photographs under Fed. R. Evid. 901, particularly when this rule is read in conjunction with Rules 611 and 1006.

This same reasoning applies to the photographs of the victims, which have been provided to the Government by their loved ones. Detective Wheeler, as well other law enforcement agents working with him, has collected photographs of the majority of the victims as they appeared before September 11. Obviously, if the Government is forced to call a family member for each

victim in this case, the trial will be substantially lengthened for no reason. The use of Detective Wheeler as a summary witness is particularly appropriate in this case because there is no question that the September 11 attacks happened and these victims were murdered. Indeed, in his most recent *pro se* filings, defendant seems to take great joy in the work of his fellow al Qaeda conspirators.¹

Argument

To authenticate a document, photograph, or videotape under Fed. R. Evid. 901(a), courts “do not require absolute certainty in authentication, but rather ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’” *United States v. Mojica*, 746 F.2d 242 (5th Cir. 1984) (quoting Rule 901). The government’s “burden of proof for authentication is slight.” *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 927 (3d Cir. 1986); *see also Pasquotank Action Council, Inc. v. City of Virginia Beach*, 909 F. Supp. 376, 384 (E.D. Va. 1995) (same); *United States v. Perez-Montanez*, 202 F.3d 434, 440 n.2 (1st Cir. 2000) (only a “ ‘reasonable likelihood’ that proffered evidence is what it purports to be need be shown to authenticate it.”); *United States v. Phuta*, 176 F.3d 43, 49 (2d Cir. 1999) (“The burden of authentication does not require proof[f] . . . beyond any doubt that the evidence is what it purports to be.”); *Siam Numhong Products Co. Ltd. v. Eastimpex*, 866 F. Supp. 445, 451 (N.D. Cal. 1994) (“The burden of proof for authentication of a document is slight and circumstantial evidence suffices.”).

¹Since the attacks are not in dispute, stipulations should address this evidence; however, defendant has not responded (neither rejecting or accepting) to the Government’s offers of stipulations to other evidence in this case. Consequently, it appears that the Government will be in the position of proving every aspect of this case, even those not in dispute.

As the Third Circuit has noted, “the showing of authenticity is not on a par with more technical evidentiary rules, such as the hearsay exception governing admissibility,” *Threadgill v. Armstrong World Industries, Inc.*, 928 F.2d 1366, 1375 (3d Cir. 1991), and “the burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994) (citing *United States v. McGlory*, 968 F.2d 309, 328-29 (3d Cir. 1992)). “Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood,” *Holmquist*, 36 F.3d at 168, and “there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility.” *Threadgill*, 928 F.2d at 1375. “Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.” *Id.*

Rule 901(b) provides several nonexhaustive, nonexclusive examples of proper authentication, and “any combination of items of evidence illustrated by Rule 901(b) . . . will suffice so long as Rule 901(a) [discussed above] is satisfied.” *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994); *see also Holmquist*, 36 F.3d at 167 (“There is no single way to authenticate evidence”). As the D.C. Circuit explained in *United States v. Rembert*, 863 F.2d 1023, 1026 (D.C. Cir. 1988), Rule 901(b) “expressly prefaces” its list of appropriate methods of authentication with “language that they function ‘[b]y way of illustration only, and not by way of limitation,’ thereby leaving room for the general application of Rule 901(a).” In this case, therefore, the photographs and videotapes can be authenticated under a combination of the

illustrative examples provided in Rule 901(b), and due to the flexible nature of Rule 901, testimony by the summary witness should be sufficient for purposes of authentication.

Multiple subsections in Rule 901 provide support for the summary testimony of Detective Wheeler for the authentication of the videotapes\photographs of the WTC. Under 901(b)(1) (Testimony of Witness with Knowledge), a photograph or videotape can be authenticated if “a sponsoring witness . . . who has personal knowledge of the scene depicted testifies that the photograph fairly and accurately portrays that scene.” *Rembert*, 863 F.2d at 1026. The “personal knowledge” requirement of *Rembert* and 901(b)(1), however, is not particularly strict. *See United States v. Clayton*, 643 F.2d 1071, 1074 (5th Cir. 1981) (“A witness qualifying a photograph need not be the photographer or see the picture taken; *it is sufficient if he recognizes and identifies the object depicted and testifies that the photograph fairly and correctly represents it.*”) (emphasis added). In this case, therefore, where the proposed summary witness directly witnessed many of the events of September 11 in New York, his testimony would serve to authenticate much of the pictorial evidence presented regarding those events. Moreover, as the discussion below demonstrates, even where the summary witness was not a direct eyewitness to the scene depicted in a particular photograph or videotape, “a photograph’s contents, buttressed by indirect or circumstantial evidence can form a sufficient basis for authentication” *Holmquist*, 63 F.3d at 169.

Additionally, under 901(b)(4) (Distinctive Characteristics and the Like), evidence can be authenticated by its “appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.” Consequently, as Judge, now Justice, Kennedy, explained in *United States v. Stearns*, 550 F.2d 1167, 1171 (9th Cir. 1977),

“[e]ven if direct testimony as to foundation matters is absent . . . the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence.” *See also Link*, 788 F.2d 918 (stating that “circumstantial evidence may, in principle, suffice to authenticate a document” and that “the contents of challenged documents themselves can support a claim of authenticity”); *United States v. Hawkins*, 905 F.2d 1489, 1493 (11th Cir. 1990) (“There need be only some competent evidence in the record to support authentication, which can consist of merely circumstantial evidence.”). In other words, sometimes a picture speaks for itself, and in this case, where the pictures presented could be corroborated by dozens of nearly identical images if necessary, and where the actual occurrence of the events portrayed are not contested, ample circumstantial evidence exists to authenticate the evidence presented. Indeed, if Rule 901(b)(4) is not applicable here, it is difficult to imagine a scenario where it would be.

Finally, under 901(b)(9) (Process or System), “the admissibility of a photograph is based on the reliability of the process by which it is made.” *Rembert*, 863 F.2d at 1026. This example is often applied in bank robbery cases where recordings were “made by surveillance equipment that operates automatically, such that no human being actually witnessed what the camera recorded while the camera was recording it.” *United States v. Stephens*, 202 F. Supp. 2d 1361 (N.D. Ga. 2002). Although the circumstances of this case are clearly different than a bank robbery, 901(b)(9) provides additional support to for the use of Detective Wheeler’s summary testimony to authenticate videotapes\photographs showing scenes, such as the collapse of the Twin Towers, that could not have been directly observed by eyewitnesses near the crime scene

due to the danger presented. In *United States v. Taylor*, 530 F.2d 639 (5th Cir. 1976), for example, the pictures at issue were taken by a bank camera after all of the potential bank robbery witnesses were locked in a vault. Even though there was no eyewitness verification, authentication was established by government witnesses not present at the crime scene who testified generally about the installation of the film, the operation of the camera, and the chain of custody. Similarly, in *Rembert*, the sole authenticating witness was a bank manager who had “no personal knowledge of the events that transpired” and “did not really speak to the reliability of the [surveillance] process,” but the court ruled that sufficient authentication was provided by her testimony as custodian of the film, the testimony of victim witnesses, and internal indicia of date, place, and event depicted in the evidence itself. *Rembert*, 863 F.2d at 1026. In this case, videotapes of events that the proposed summary witness did not directly witness can be authenticated by the fact that the events were broadcast live on several television channels before millions of people, often with “internal indicia of date, place, and event” (*Rembert*) on the tapes. This process of live television on multiple sources is arguably as reliable as the bank surveillance videos authenticated in *Taylor* and *Rembert*.

Thus, Rule 901 on its own provides more than adequate support for the use of Detective Wheeler as a summary witness to authenticate the videotapes\photographs of the WTC and the victims of the attacks.

Rule 611(a) supplies an additional basis to proceed in this manner. Subsection (a) of Rule 611 states:

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid

needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Allowing Detective Wheeler to testify as a summary witness to the videotapes\photographs will not only eliminate a day of testimony, but also allow the description of the events to be established in one comprehensive, orderly presentation, instead of a piece-meal approach. Additionally, the Government intends to introduce a CD-ROM with all of the victims' photographs, which will then be used throughout the trial at relevant points. The use of Detective Wheeler's testimony in this fashion clearly achieves the goals of the first two parts of Rule 611(a) without prejudicing the defendant in any manner. *See United States v. Johnson*, 54 F.3d 1150, 1158-60 (4th Cir. 1995) (Rule 611 authorizes admission of summary chart).

Finally, Rule 1006 of the Federal Rules of Evidence lends additional support for Detective Wheeler's testimony. Rule 1006 provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court." In *United States v. Bakker*, 925 F.2d 728, 736-37 (4th Cir. 1991), the court allowed the Government to present composite videotapes of a televangelist's broadcasts without formally introducing the over 200 hours of original broadcast tapes on which the summary was based, stating that "under Rule 1006, the summary of voluminous information is itself the evidence to be examined by the fact-finder." *See also United States v. Loayza*, 107 F.3d 257, 264 (4th Cir. 1997) ("The complexity and length of the case as well as the numbers of witnesses and exhibits are considered in making [the]

determination [whether the summary chart will aid the jury in ascertaining the truth].”). Unlike *Bakker*, the summary testimony of Detective Wheeler will not edit out any information; instead, it will merely serve to authenticate a series of videotapes and photographs taken from different positions at different times. Therefore, there is no possibility of any prejudice to the defendant.

Conclusion

For the foregoing reasons, the Government respectfully requests the Court to enter an order pretrial allowing the Government to introduce videotapes and photographs of the WTC attacks and photographs of the victims as they appeared before September 11, 2001, through the summary testimony of Port Authority Detective James Wheeler. We respectfully seek a pretrial ruling on this issue to avoid the needless subpoenaing of witnesses, who may not be called as witnesses.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 8th day of August, 2002, a copy of the Government's Response was provided to defendant Zacarias Moussaoui through the U.S.

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