

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)	

**RESPONSE OF STANDBY COUNSEL TO GOVERNMENT'S MOTION TO USE
SUMMARY WITNESS REGARDING WORLD TRADE CENTER ATTACKS**

The government requests that this Court allow it to introduce photographs and videotapes of the World Trade Center (WTC) attacks and resulting damage as well as photographs of the victims through a summary witness pursuant to Fed. R. Evid. 611(a), 901 and 1006. More specifically, the government seeks to rely on one witness, Port Authority Detective James Wheeler, to introduce videotapes and still photographs of the collapse of both towers and the accompanying damage, as well as to introduce pictures of the victims.

A summary witness is certainly envisioned by Fed. R. Evid. 1006, which 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 use of such a witness in the circumstances posited by the government makes sense, depending upon whether the Court will even permit evidence for the purpose proffered in the government's motion, because it eliminates the laborious and time consuming process of authenticating before the jury each and every item (in this case, photographs and videos) the government seeks to present and what then goes to the jury is the summary chart or compilation, not all of the individual pieces which went into its composition.

The Rule also requires that the originals, or duplicates of the materials on which the summary is based, be made available for examination or copying, or both, by the other party. In its motion, the government does not advise whether or not it has provided the videotapes, still photographs and victim photographs to the *pro se* defendant or his standby counsel, and does not specifically identify the videotapes and still photographs it will seek to introduce in this manner. These materials, along with any summary they purport to support, must be separated from the mass of other discovery and provided to the defense well enough in advance of trial for the accuracy and fairness of the summary to be determined as well as its overall admissibility in accordance with the requirements of Fed. R. Evid. 403.

Notwithstanding the foregoing, we have significant concern with regard to the course the government charts. First, we have concern that the government's summary witness was on the scene of the WTC on September 11, and according to the government, was part of the struggle to escape harm, as well as to save the lives of others that day. A summary witness is ordinarily a dispassionate presenter of complex or numerous facts to aid the fact finding process, and not one who is also an eyewitness to, and participant in, events that may influence his or her interpretation of them and the presentation of such events in summary fashion.

Second, the summary the government seeks to introduce must be relevant and not excludable under Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of delay, waste of time, or needless presentation of cumulative evidence."). *See, e.g., United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C. Cir.) (stating that "photographs of

gore may inappropriately dispose a jury to exact retribution”), *cert. denied*, 525 U.S. 834 (1998); *Ferrier v. Duckworth*, 902 F.2d 545, 548-49 (7th Cir.) (finding the introduction of crime scene photographs, including pictures of the corpse, the wound and the “blood-bespattered floor,” was “inexcusable”), *cert. denied*, 498 U.S. 988 (1990); *United States v. Eyster*, 948 F.2d 1196, 1212-13 (11th Cir. 1991) (urging the district court to “give greater focus to Rule 403 determinations” where the trial judge admitted a photograph of the “torso of a burned body with an arm extending over a faceless head”); *Gomez v. Ahitow*, 29 F.3d 1128, 1139 (7th Cir. 1994) (finding fault with the admission of “several ‘gruesome’ photographs” of the murder victim’s body, where neither the fact nor the cause of the victim’s death were at issue in the defendant’s trial), *cert. denied*, 513 U.S. 1160 (1995). The government does not address the issue of unfair prejudice; nor does it make clear what it intends to introduce or whether it intends to introduce it in the guilt or penalty phases of the trial. The government merely notes that it intends to introduce “relevant portions” during both the guilt and penalty phases “to describe the murders at the WTC. ... [and] during the penalty phase ... 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.’” (See Gov’t Motion at p. 1-2). The government also apparently believes it can show photographs of the more than 2,800 victims “so the jury properly understands who was murdered instead of merely hearing statistics.”

The government seems to believe it must establish by the admission of highly inflammatory and unfairly prejudicial photographic evidence that the attacks occurred, and blames Mr. Moussaoui for this because he has failed in the past to respond to government offers of stipulations for other evidence.

(*See* Gov't Motion, n. 3).¹ There is no question but that two airplanes flew into the WTC towers, that the towers collapsed, that a third airplane flew into the Pentagon, a fourth crashed into the ground in Pennsylvania, all on September 11, 2001 and that as a result of these tragic events, a total of some 2,800-3,000 people were killed in this jurisdiction and in others. Although there was also tremendous damage to property, it pales in comparison, and almost seems absurd to think about, given the tragedy of the totality of the number of people killed and seriously injured.

The issue in this case is whether or not Mr. Moussaoui was involved in the conspiracies that resulted in the deaths on 9/11, not whether the airplanes flew into the WTC, the Pentagon, and the ground in Pennsylvania, and there was loss of life caused by this, and damage to property. Videotapes and photographs of the crashes, the resulting panic, heroic actions and catastrophic injuries, loss of life and damage to property on September 11 is completely irrelevant to the issue of Mr. Moussaoui's role and/or involvement in the charged conspiracies. Thus photographs and videotapes establishing that the attacks occurred, that people were killed and property was damaged, are unduly prejudicial to the issue of Mr. Moussaoui's participation in the alleged conspiracies when these facts can easily be established in a less prejudicial way.

To avoid the government's dilemma of "proving every aspect of the case" (Gov't's Motion at n. 1), the Court may take judicial notice that the airplanes crashed, people were injured and killed, and property was damaged. (*See* Fed. R. Evid. 201(b), (c): "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of

¹ Mr. Moussaoui is now at least listening to and considering the advice of counsel and may well reconsider his refusal to stipulate on this point.

the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned ... A court may take judicial notice whether requested or not.”).

Taking judicial notice of events that no one could challenge occurred is particularly appropriate where the defendant is *pro se* and where it is so wholly unnecessary and prejudicial to introduce the kind of evidence the government seeks to introduce. Admission of the photographs of the victims of the tragic events of September 11– to identify their names and faces – while sad and of great emotional impact, does not further the resolution of any issues in this case, and would serve only to inflame the jury during either phase of the case. With regard to the issue of whether or not the crime was committed “in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim,” the Court will need to first resolve the constitutionality of that factor² and its applicability to a defendant who did not directly participate in the 9/11 conduct,³ and then determine

² The statutory factor alleging that the crime was “especially heinous, cruel or depraved,” is unconstitutionally vague on its face, *Walton v. Arizona*, 497 U.S. 639 (1990), and the statutory limitation of the term “serious physical abuse” cannot save it, since that supposed “limitation” does not narrow the class of murderers to which the factor applies. Every murder by definition involves “serious physical abuse” – the killing of a human being – so that this factor is broad enough to subject every murder defendant to the death penalty and is thus unconstitutional. *Godfrey v. Georgia*, 446 U.S. at 428-29 (factor which could be applied to “almost every murder” violates Eighth Amendment).

³ See *Tison v. Arizona*, 481 U.S. 137 (1987), wherein the four dissenters noted that the majority, at 146, n. 2, “expressed no view on the constitutionality of Arizona’s decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings.”

However, four dissenters did note that “

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whether photographic evidence aids in, or is relevant to the determination of that factor. Even assuming the constitutionality and applicability of this factor, the photographs of the numerous victims should be excluded as more prejudicial than probative, and on grounds of relevancy. Likewise, videotapes and still photographs of the “carnage,” as described by the government, are not relevant to

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the issues in this case.

However, in the event the Court is not inclined to prohibit this evidence altogether, the summary presentation should be made available to the defense well in advance of trial so that appropriate motions *in limine* can be filed as to the scope of such summary presentation.

CONCLUSION

For the foregoing reasons, it is requested that the court exclude videotapes and photographs offered to establish that the attacks occurred and those offered “so that the jury understands who was murdered,” not because it is offered in summary form, but on the grounds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, particularly where there are alternative means to establish the facts that the government needs to establish. In the alternative, it is requested that the Court set a date by which the summary presentation must be made available to the defense so that appropriate motions *in limine* to limit its scope may be filed and ruled on well in advance of trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response of Standby Counsel to Government's Motion to Use Summary Witness Regarding World Trade Center Attacks was served upon AUSA Robert A. Spencer, AUSA David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314, by facsimile, and also by placing a copy BY HAND in the box designated "U.S. Attorney" in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia; and, by first class mail upon Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, Virginia 22314 on this 6th day of September, 2002.

_____/S/
Frank W. Dunham, Jr.