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	)	

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

The United States respectfully replies to the Response of Standby Counsel to the Government's Motion to Use Summary Witness Regarding World Trade Center Attacks as follows:

Standby counsel agree that the use of a summary witness "in the circumstances posited by the government makes sense," but raise several concerns in their Response. First, standby counsel assert that videotapes, still photographs, and victim photographs must be provided to defendant or his standby counsel. We have already provided the videotapes and still photographs of the World Trade Center. As for the photographs of the victims, a CD-ROM has been produced to both standby counsel and the defendant containing the photographs of the victims currently in the possession of the Government.[1] Moreover, as requested by standby counsel, the Government will provide both defendant and standby counsel a copy of the proposed summary

[1]The Government continues to collect photographs of the victims and will provide a final CD-ROM with the photos when we have received them all. To date, we have provided photographs of 2,361 victims.

compilation of videos and still photographs in the near future. Therefore, this concern advanced by standby counsel will be addressed. See United States v. Bakker, 925 F.2d 728, 736-37 (4th Cir. 1991) (Government could introduce composite of 200 hours of television tapes where defense had access to all of the tapes before trial).

Standby counsel next state that they are troubled by the fact that Detective Wheeler was at the crime scene when the videos and pictures were taken of the World Trade Center. In raising this issue, they misunderstand the point of the motion. First, the Government does not intend to introduce charts through Detective Wheeler. Instead, we intend to take relevant portions of videotape and still photos to show the crime scene, *e.g.*, video showing the planes hitting the buildings, the condition of the buildings after the planes hit, the collapse of the buildings, and the resulting destruction. Second, the issue here is simply authentication. As stated before, Detective Wheeler can authenticate much of the videotapes\photographs because he was in the vicinity of the World Trade Center the morning of the attack, even if he did not witness every event that was recorded. Thus, the reliability of the summary composition is actually enhanced by his presence at the scene because he can describe the perspective of the videotape\photograph and the sequence of the various shots. See Fed. R. Evid. 901(b)(1) (authentication can occur by witness with knowledge that "a matter is what it is claimed to be."); United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992) ("Before admitting evidence for consideration by the jury, the district court must determine whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic."). Some of the videotapes and photographs that the Government will introduce through Detective Wheeler were merely taken from a different position than Detective Wheeler's viewpoint. He can, however, describe

in detail the position from which these videotapes\photographs were taken and the approximate time that they were taken. This testimony will most efficiently aid the jury in understanding the sequence of events that occurred at the World Trade Center. Therefore, this argument should be rejected.

Finally, standby counsel raise an objection pursuant to Fed. R. Evid. 403 to the introduction of the videotapes and photographs. In doing so, they seek to prevent the Government from meeting its burden of establishing the destruction of the aircraft, the murders of the victims at the World Trade Center, and the destruction of the property located at the World Trade Center – all of which constitute elements of at least one of the charged offenses. Because they wish to hide the gravity of the charged criminal conduct from the jury, standby counsel propose that the Court take judicial notice pursuant to Fed. R. Evid. 201 "that the airplanes crashed, people were injured and killed, and property was damaged." Standby Counsel's Response at 4.

> Rule 201 of the Federal Rules of Evidence states the following, in relevant portions:
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> (b) Kind of facts. 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 the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> (c) When discretionary. A court may take judicial notice, whether requested or not.
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> (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
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> * * *

> (g) Instructing the jury. In a . . . criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Here, the facts are clearly in dispute because defendant has refused all efforts to enter into any stipulations. Indeed, standby counsel are essentially attempting an "end run" around defendant's Faretta rights by essentially asking the Court to stipulate for the defendant. Moreover, standby counsel seek to impose an unwanted stipulation upon the Government and then may argue to the jury under subsection (g) of Rule 201 that they need not accept the fact. Such strategy should be rejected by the Court. See Haavistola v. Community Fire Company of Rising Sun, Inc., 6 F.3d 211, 218-19 (4th Cir. 1993) (trial court erred by taking judicial notice of facts in dispute).

Further, standby counsel's argument that Rule 403 precludes admission of the videotapes and photographs must fail. Rule 403 provides:

> 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 undue delay, waste of time, or needless presentation of cumulative evidence.

The Advisory Committee Notes to this rule define "undue prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." The videotapes and photographs do not serve improperly to inflame the jury; instead, they show criminal conduct alleged in the indictment. Indeed, the use of the proposed summary witness and the summary composite of the videotapes and photographs actually serve to promote one of the goals of Rule 403: avoiding "undue delay, waste of time, or needless presentation of cumulative evidence."

Moreover, the Government has an absolute right to prove its case to the jury and standby

counsel may not foist unwanted stipulations upon the Government merely because the defendant participated in a heinous criminal scheme. The photographs and videotapes depict the murders and destruction of property alleged in the indictment, which the jury will need to find to convict defendant of some of the offenses. As such, the law is clear that the Government cannot be forced into a bland stipulation, which shields the jury from the crime committed.

In Old Chief v. United States, 519 U.S. 172 (1997), the Supreme Court held that, with the exception of a defendant's prior felony conviction, "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." Id. at 183. Justice Souter discussed at length the continuing viability of the "standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Id. at 186-87. As Justice Souter recognized:

> The 'fair and legitimate weight' of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.

Id. at 187. The logic of this point is only enhanced when applied to the viewpoint of the jury.

As Justice Souter noted, "[j]ury duty is usually unsought and sometimes resisted." Id. Thus, "[w]hen a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment." Id. at 187-88.

Added to this, there is the "prosecution's interest in resisting efforts to replace the evidence of its choice with admissions and stipulations, for beyond the power of conventional evidence to support allegations and give life to the moral underpinnings of law's claims, there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." Id. at 188. Thus, for example, "[t]he use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way." Id. at 189. On the other hand, far from filling a void left by strategically motivated concessions, stipulations merely add to the mystery of what the jury believes they will, or should, be told, particularly in cases involving interconnected facts. The sudden, and from the jury's standpoint random, introduction of stipulations is "like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing." Id. "In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense." Id.

In Old Chief, the "general presumption" against forced stipulations did not apply because the "proof of the defendant's status goes to an element entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense." Id. at 191. Given the "peculiarities of the element of felony-convict status and of admissions and the

like when used to prove it, there is no cognizable difference between the evidentiary significance of an admission and of the legitimately probative component of the official record the prosecution would prefer to place in evidence." Id.[2]

The use of the proposed summary witness with the introduction of the summary composite of videotapes and photographs meets the goal of moving the case forward while allowing the Government to adequately prove its case to the jury. As Justice Souter persuasively put it:

> People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Old Chief, 519 U.S. at 189. Detective Wheeler can tell the story of the attacks on the World Trade Center in an orderly, natural fashion, which will allow the jury to properly understand the facts while not being improperly inflamed.

The Second Circuit's opinion in United States v. Salameh, 152 F.3d 88 (2d Cir.1994) also supports the admissibility of the videotapes\photographs. In Salameh, the Second Circuit upheld the admission of graphic, disturbing photographs of the victims of the bombing of the World

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[2] Numerous courts have limited Old Chief to its narrow holding, and have upheld the Government's decision not to stipulate to certain facts in cases more akin to the case at bar. See United States v. Salameh, 152 F.3d 88, 122 (2d Cir.1994) (noting that Old Chief limited to "offers to stipulate to prior felony conviction"); United States v. Cisneros, 203 F.3d 333, 348 n.14 (5th Cir. 2000) ("Cisneros's reliance on Old Chief . . . is misplaced. The Supreme Court expressly noted that its holding was limited to cases involving proof of felon status.") (omitting citations).

Trade Center in 1993, even though the defense had offered to stipulate that "the explosion in the World Trade Center caused injury and death.". Id. at 122-23. The Second Circuit noted: "Probative evidence is not inadmissible solely because it has a tendency to upset or disturb the trier of fact." Id. at 123. See also United States v. Analla, 975 F.2d 119, 126 (4th Cir. 1992) (upholding admission of photographs of robbery and murder victims).

Standby counsel also suggest that the "Court will need to first resolve the constitutionality of" the aggravating factor alleging that the crime was committed "in an especially heinous, cruel, or depraved manner." See Standby Counsel's Response at 5. This is simply incorrect. Standby counsel were permitted to file their challenges to the Notice of Intent to Seek a Sentence of Death but never challenged this aggravating factor. Therefore, it will be considered by the jury. Moreover, any such challenge would fail because every court that has considered the issue has ruled that this aggravating factor as set forth in the Federal Death Penalty Act is not unconstitutionally vague. See United States v. Chanthadara, 230 F.3d 1237, 1262 (10th Cir. 2000), cert. denied, 122 S. Ct. 457 (2001); United States v. Paul, 217 F.3d 989, 1001 (8th Cir. 2000), cert. denied, 122 S. Ct. 71 (2001); United States v. Hall, 152 F.3d 381, 414-15 (5th Cir. 1998), abrogated on other grounds, United States v. Martinez-Salazar, 120 S. Ct. 774 (2000); United States v. Minerd, 176 F. Supp.2d 424, 438 (W.D. Pa. 2001); United States v. Hammer, 25 F. Supp.2d 518, 541 (M.D. Pa. 1998); United States v. Frank, 8 F. Supp.2d 253, 277-78 (S.D.N.Y. 1998); United States v. Nguyen, 928 F. Supp. 1525, 1533-34 (D. Kan. 1996); see also Fullwood v. Lee, 290 F.3d 663, 694 (4th Cir. 2002) (rejecting vagueness challenge to similar aggravating factor in North Carolina state statute). Indeed, the Supreme Court in Walton v. Arizona, 497 U.S. 639 (1990), which standby counsel cite, upheld the constitutionality of a

similar aggravating factor in the Arizona state system when jury instructions defined the words used in the aggravating factor. Id. at 653-54. The additional limiting instructions set forth in Walton and Maynard v. Cartwright, 486 U.S. 356 (1988), have been incorporated into the FDPA to ensure constitutional compliance. United States v. Frank, 8 F. Supp.2d at 278. Consequently, there is no vagueness issue regarding this statutory aggravating factor and the Government should be given a full opportunity to prove this aggravating factor to the jury.

The Fifth Circuit's opinion in United States v. Hall, supra, a federal death penalty prosecution, directly addressed the issue of precluding gruesome photographs and a videotape during the penalty phase. In Hall, the defendant argued that the trial court should not have permitted the introduction of photographs of the victim partially decomposed in her grave and a videotape depicting the victim's walk through a park where she was killed and the exhumation of her body. As to the photographs, the Fifth Circuit found that "the photographs were relevant to [the victim's] identity and the cause of her death, and Hall's offer to stipulate to these facts did not render them irrelevant." Id. at 401. The court then upheld the trial court's ruling denying the defendant's Rule 403 objection to their introduction. Id. at 401-402. The Fifth Circuit also upheld the introduction of the videotape, finding that it helped prove that the crime was committed in a heinous, cruel, or depraved manner, which had been alleged as an aggravating factor. Id. at 402. See also United States v. Allen, 247 F.3d 741, 793-94 (8th Cir. 2001) (upholding trial court's decision to admit autopsy photographs during federal death penalty prosecution), cert. granted and vacated on other grounds, 122 S. Ct. 2653 (June 28, 2002).

Standby counsel also contend that the Court will have to resolve the applicability of this aggravating factor to the defendant who, according to standby counsel, "did not directly

participate in the 9/11 conduct." See Standby Counsel's Response at 5. As we previously stated in the Government's Response in Opposition to Defendant's Motion to Strike Government's Notice of Intent to Seek a Sentence of Death regarding the threshold findings, the applicability of this factor or any other aggravating factor is a proof issue for the jury to decide. The Government should have a full opportunity to meet its burden.

Finally, the photographs of the victims depicting them before their murders is clearly admissible during the penalty phase as evidence of "victim impact," which the Government has alleged as an aggravating factor. The FDPA specifically provides for introduction of "victim impact" evidence. 18 U.S.C. § 3593(a) (Government may introduce a "victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."). Moreover, the courts have repeatedly upheld the admissibility of "victim impact" evidence during the penalty phase. Jones v. United States, 527 U.S. 373, 395 (1999) (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991)); United States v. Allen, 247 F.3d at 778-79; United States v. McVeigh, 153 F.3d 1166, 1216-22 (10th Cir. 1998); United States v. Hall, 152 F.3d at 405; United States v. Frank, 8 F. Supp.2d at 280; United States v. Nguyen, 928 F. Supp. at 1542-43. Therefore, the Government may introduce the photographs of the victims during the penalty phase. The proposed use of the summary witness to accomplish this task merely serves to expedite the introduction of the evidence.

In conclusion, the Government respectfully submits that the only possible issue regarding use of a summary witness as proposed in our motion is whether the videos or photographs are overly prejudicial in the guilt phase. The Government submits that the appropriate resolution of

the issue is to allow the use of Detective Wheeler as a summary witness while reserving the right of standby counsel to raise any challenges based on undue prejudice after they have seen the summary composite. If, after seeing the summary composite, standby counsel continues to object to any portion of it, the Court could then rule upon the specific objection.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 23rd day of September, 2002, a copy of the Government's Reply was provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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