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'S REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR A SEPARATE HEARING
AS TO THE THRESHOLD FACTOR

The Government does not object to the division of the penalty phase into distinct parts. Indeed, it endorses the idea as long as its formula is followed. All it objects to is not dividing the "eligibility phase." It does not suggest that it would limit the carnage it would present for the purpose of proving that which is already conclusively proven. Indeed, it is seemingly unconcerned with whether the defendant can receive a fair trial; its Opposition is devoid of any discussion of that issue, beyond bare-bones references to how jury instructions and the Federal Death Penalty Act will protect him.

Moreover, the Government ignores the fact that it drafted the binding admission for Mr. Moussaoui to sign that over 3,000 persons died on September 11 at the hands of al Qaeda "operatives" who crashed airplanes into the World Trade Center and the Pentagon, even though many of those facts were unnecessary to the plea. Instead, it claims that it is the defense which is attempting to "*force-feed* that admission to the Government . . . ." *Gov't Opp.* at 14 (emphasis added). In fact, the defense is attempting to feed the Government nothing. The Government prepared the meal itself. It should not be heard to complain.

The bifurcation schemes other courts have adopted have been appropriate for the facts and circumstances of the cases before them. In *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005), Judge Hudson separated the eligibility and selection phases specifically because his evidentiary rulings rendered certain evidence admissible at the former and not at the latter. He did not divide the eligibility phase itself, because (1) neither party requested it, and (2) it would not have solved the legal problem the Court was addressing. Thus, Judge Hudson's solution demonstrates that the Court may structure the penalty phase in a way that addresses the particular problem that a case presents. *Jordan* does not stand for the proposition that one size must fit all.[1]

Rather than addressing the problem the defense has actually raised, the Government asserts that a different problem -- the prejudicial effect of direct victim impact testimony -- can be addressed by dividing the eligibility and selection phases. *Gov't Opp.* at 7. That is true in most cases. But as powerful as the victim impact testimony will be in this case, so too are the scenes of death and destruction that the Government would present to the jury in connection with the threshold factor to prove a fact as to which it already has obtained a conclusive and binding admission as to the same fact. It is those scenes which will cause the extraordinary prejudice cited by the defendant, which is not denied by the Government. Separation of the selection phase, including victim impact testimony, will do nothing to address the problem raised by the defense. This is especially true given the Government's position that had the defendant told the truth, none of the deaths would have occurred in the first place. Therefore, the events surrounding the deaths

[1] This defendant's proposal is at least as consistent with the statutory framework of the FDPA as was the plan adopted in *Jordan*. Judge Hudson divided the eligibility and selection phases even though the mitigating and aggravating factors are set forth in the same section of the Code, 18 U.S.C. § 3592. The threshold factors, on the other hand, are contained in a separate section, 18 U.S.C. § 3591.

are not even relevant to determining whether Mr. Moussaoui participated in a act that directly caused death.

One of the most consistent flaws in the Government's argument is its dependence on an artificial distinction between "so-called victim impact evidence" and the evidence it will use to prove the deaths of the victims. *See, e.g., Gov't Opp.* at 10-11 & n.2. While it is true that, in relation to the threshold evidence, victim family members will not be allowed to testify as to certain aspects of victim impact testimony, such as the affect the loss of their loved ones has had on them, it is equally true that that evidence will very much partake of the same characteristics. Indeed, in this case, where the recorded images of September 11, have provided family members and friends a horrific and oft-repeated first-hand look at the crime and resulting deaths, it is disingenuous for the Government to suggest that these images, regardless of when they are presented and for what supposed purpose, do not fall within the ambit of victim impact evidence. *See United States v. McVeigh*, 153 F.3d 1166, 1201-04 (10th Cir. 1998) (describing guilt phase testimony of personal histories, pre-explosion activities, immediate impacts and long term effects); *see also Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (". . . [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase *evidence of the specific harm* caused by the defendant") (emphasis added). The problem is not that the distinction is lost on the defense, *Gov't Opp.* at 11, but that the distinction upon which the Government relies is illusory.

The very language cited by the Government from *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (en banc), supports the defendant's position. "[E]xclusion of evidence should occur," the Government says, "'only in those instances where the trial judge believes that there is

a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.'" *Gov't Opp.* at 7 (quoting 381 F.3d at 341) (quoting *United States v. Powers*, 59 F.3d 1460, 1467 (4th Cir. 1995)). Well if not in this case -- where, on the one hand, the evidence is traumatizing and likely to inflame the passions of the jury and, on the other, the evidence has no probative value because the Government has obtained a conclusive admission -- then in what case?

Nor is the problem subject to cure by jury instructions. As the Supreme Court has recognized, there are circumstances under which the risk of prejudice is so great that the judicial system cannot maintain the assumption that jurors will follow their instructions. *See Bruton v. United States*, 391 U.S. 123, 135 (1968) (". . . [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"). Again, if not in this case in the face of extraordinary scenes of destruction and death, then in what case?

Interestingly, the Government itself notes, as the defense did in its Motion, that a number of federal courts have bifurcated the penalty phase *"mainly to avoid the possibility of unfair prejudice to the defendant."* *Gov't Opp.* at 8 (emphasis added). What the Government ignores, however, is that the perceived prejudice in those cases could be addressed by separating the eligibility and selection phases, while the prejudice at issue here cannot be. The lesson of those cases, however, supports the remedy sought by this defendant in light of the *facts and circumstances of this case*: it is appropriate to divide the sentencing phase into its component parts in order to address the issue of unreasonable/unnecessary prejudice. In this case, that

requires something more than separating the eligibility and selection phases.

The Government pointedly notes that the defense failed to mention *Booth-El v. Nuth,* 288 F.3d 571 (4th Cir. 2002). *Gov't Opp.* at 8-9. The Government is correct, but it was ignored for a reason: a more than superficial reading demonstrates that it is inapplicable. First, *Booth-El* was decided under the highly deferential standard applicable to the review of state court convictions. *See* 288 F.3d at 575-76. Indeed, the Court of Appeals gave unusual emphasis to this legal principle: "We underscored above the now-familiar standard of review in habeas cases because it severely restrains the authority of the federal courts, . . ." *Id.* at 577. In the final analysis, *Booth-El* only stands for the proposition that, "within constitutional limits," a state's decision to try principalship along with the aggravating and mitigating factors is not "contrary to, or an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at 582-83 (citations omitted).

The defense has never argued to the contrary. Moreover, the decision in *Booth-El,* unlike the defendant's Motion here, is devoid of any showing of specific prejudice. Thus, beyond its recognition of the obvious -- that the sovereignty must act within constitutional limits, a proposition which surely does not aid the Government here -- *Booth-El* adds nothing to the discussion and was properly ignored by the defense.[2]

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[2] The Government cites *Evans v. Smith,* 54 F. Supp. 2d 503, 531 (D. Md. 1999), *aff'd* 220 F.3d 306 (4th Cir. 2000) for the proposition that, "'[i]f the Constitution permits the issues of guilt and sentence to be decided in one trial, it does not require a sentencing trial to be subdivided.'" *Gov't Opp.* at 9 (quoting *Evans,* 54 F. Supp. 2d at 531). Once again there was no showing of prejudice flowing from the joint consideration of principalship and other sentencing evidence. Indeed, defense counsel had conceded principalship, causing the Court to note that "there would have been nothing for the jury to have considered in a separate proceeding." *Id.* Cases without a showing of prejudice finding that there is no constitutional requirement for bifurcation provide no guidance as to what the Constitution requires where there is a showing of

The Government's objections to the defense proposal are groundless. The fact that no court has previously trifurcated the sentencing hearing merely indicates that no court has faced the situation presented here -- a conclusive, binding admission from the defendant obtained at the Government's urging and a Government intent on presenting the most extraordinarily prejudicial evidence in American history to prove the admitted fact. The only reason the Government can say that the relief sought by the defendant would "bestow on the defendant a benefit to which he is not entitled," *Gov't Opp.* at 9, is that it does not seriously concern itself with the need for a *fair* sentencing hearing. Moreover, even if he is not *entitled* to the relief he seeks, that does not mean that the Court should not structure the trial in a manner it believes is fair.

The Government's suggestion that the jury will be left not just ill-prepared, but "*completely* ill-prepared to make a decision about the defendant's eligibility for a death sentence," *Gov't Opp.* at 9, (emphasis added) is inexplicable. As the defense made clear in its Motion, under its proposal the Government would be free to present its September 11 evidence in the second part of the eligibility phase, since the Government has alleged as a statutory aggravating factor that the deaths were "heinous, atrocious and cruel." Indeed, the Government, too, argues that will be relevant to that factor. Thus, before death eligibility is determined, the Government will have been able to, according to its own terms, fully prepare the jury for the task at hand.

The Government complains about its inability to distinguish between the evidence that supports the threshold factor and that which is just relevant to the rest of the case. *Gov't Opp.* at 9, 13. The division, of course is self-evident. At the first stage, the Government simply may not present evidence to prove the deaths of the victims, beyond that which is contained in the

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prejudice, nor what the Court may do in the exercise of its discretion.

Statement of Facts. Moreover, the suggestion that it would have to present evidence twice is incorrect. Evidence in capital cases is always incorporated from the guilt phase into the penalty phase, or from the eligibility phase into the selection phase. The evidence is *never* presented twice. Indeed, if the case were bifurcated along the lines suggested by the Government, it would face a comparable dilemma.[3] The fact is that no evidence will have to be presented twice and the trial will not be significantly lengthened.[4] Nor will the jury be confused by the "overlapping nature of the eligibility proof" and the Government certainly makes no attempt to explain its fear. In capital cases, which are always at least bifurcated if the defendant pleads not guilty, there are always overlapping areas of proof and bifurcation is not only constitutionally permissible, it is required. *See supra* at 5 n.3.

Finally, the Government's fear of an "exceedingly cumbersome" proceeding, *Gov't Opp.* at 9-10, is directly contradicted by its own endorsement of the result in *United States v. Jordan*. *See Gov't Opp.* at 10. It is true that there could be three sets of arguments to the jury, but the same is true in *Jordan* -- one set for guilt/innocence, which is not needed here, one set for eligibility, and one set for selection.

The Government's argument that the defense's proposal "would directly contradict the oft-repeated dictate that the jury must focus on both the defendant and the crime he committed

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[3] Indeed, if there is a problem in distinguishing what evidence belongs where, it is between the September 11 evidence the Government would introduce to prove the deaths and the victim impact evidence. For example, as part of its eligibility case the Government will no doubt seek to introduce evidence of cell phone calls from passengers on the hijacked planes to their loved ones. It is truly difficult to distinguish that evidence from victim impact evidence, yet the Government does not envision any problem making those distinctions. See *Gov't Opp.* at 11.

[4] In fact, it would be substantially shortened if the Government fails to convince the jury of the threshold factor.

when assessing the defendant's death-eligibility," *Gov't Opp.* at 12, is wrong as well. Under the defense proposal, eligibility will not be determined until after the jury considers the statutory aggravating factors in the second stage. *See Jones v. United States*, 527 U.S. 373, 377 (1999); *United States v. Bourgeois*, 423 F.3d 501, 507 n.10 (5th Cir. 2005) (reciting that *Jones* "explain[s] that the jury's finding of the statutory intent and statutory aggravating factors under the FDPA comprises the eligibility phase of sentencing"). The Government will not be prevented from presenting any of its September 11 evidence in that stage. Thus, in determining the defendant's eligibility for the death penalty, the jury will have before it all the evidence the Government wants to present, for no legitimate reason, in the first stage.[5]

Next, the Government complains that the evidence it would like to present in support of the requisite intent factor will overlap with the statutory aggravating factors. *Gov't Opp.* at 13. In doing so, the Government loses sight of the actual conduct at issue here. While the details of the manner in which a homicide is committed may provide insight into the intent of the actual perpetrator, it provides little or no insight into the intent of a defendant whose sole conduct, for the purposes of death eligibility, is that he lied to law enforcement when he was arrested, and was incarcerated at the time of the deaths. Therefore, *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004), in which the defendant actually committed the homicide, provides no guidance on this point.

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[5] In addition to *Bourgeois*, the Government provides "supra" cites to *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982). *Gov't Opp.* at 12. The earlier reference to those cases also did not include pinpoint cites. *Gov't Opp.* at 5. Therefore, the defense is unable to identify the language of those cases upon which the Government is relying. In the final analysis, all that matters is that, as explained above, the Government's complaint is based on the erroneous assumption that death eligibility will be decided without the evidence to be presented in support of the statutory aggravating factors.

Even if the September 11 evidence would be technically relevant to the question of the defendant's intent, it is important to remember what the defendant has conclusively admitted, beyond the simple fact that he lied; that:

> (1) he became a member of al Qaeda and pledged *bayat* to Bin Laden;
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> (2) he trained at al Qaeda camps where members were instructed in firearms, explosives, chemical weapons and other weapons of mass destruction;
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> (3) as part of the al Qaeda conspiracy to which he has pled guilty, members conceived of an operation in which civilian commercial airliners would be hijacked and flown into prominent buildings in the United States;
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> (4) he knew of that plan and agreed to travel to the United States to participate in it;
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> (5) bin Laden approved his attacking the White House;
>
> (6) he obtained flight training;
>
> (7) he lied to allow his al Qaeda "brothers" to go forward with the operation to fly planes into American buildings; and
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> (8) al Qaeda operative hijacked the planes on September 11 and crashed them into buildings, destroying them and killing thousands of people

It goes without saying that, in light of these admissions, the evidence the Government wants to introduce is irrelevant as to the threshold factor.

The question then is not whether the prejudice that would be created by the Government's evidence would outweigh its probative value. It unquestionably would and the Government has not suggested otherwise. Rather, the question is whether the Court may limit the Government's presentation of evidence which would deny the defendant a fair capital sentencing proceeding, by precluding the Government from seeking to prove facts it has obtained in an admission from the defendant. The answer to that question is obviously "yes."

None of the cases cited by the Government hold or suggest otherwise. Since, in each, the defendant, unlike Mr. Moussaoui, was truly attempting to foist a stipulation on the Government. Indeed, the Government itself notes that that was the case in *Sampson*, 335 F. Supp. 2d at 178, *United States v. Barnette*, 390 F.3d 775, 799-800 (4th Cir. 2004), *United States v. Hall*, 152 F.3d 381, 400-02 (5th Cir. 1998), and *McVeigh*, 153 F.3d at 1203-04 (10th Cir. 1998). *Gov't Opp.* at 15. And in *United States v. Dunford*, 148 F.3d 385, 396 (4th Cir. 1998), that appears to be the case also.[6] Here, the conclusive, binding admission exists *because the Government created it* in order to strengthen its case for death eligibility. The only remaining question is whether, in light of it, the Court should conclude that the minimal probative value of the additional September 11 evidence which the Government seeks to introduce is outweighed by the overwhelming prejudicial affect it will have.

The red herrings the Government has raised provide no obstacle to the relief the defendant seeks. Most importantly, under the defense proposal, the Government will be able to introduce all its September 11 evidence prior to the jury considering the statutory aggravating factors, or determining the defendant's eligibility for the death penalty. The jury will have all the information it needs to properly weigh the threshold factor and the statutory aggravating factors, *see Gov't Opp*. at 16, when it is actually called upon to weigh those factors -- at the end of the penalty phase. The only thing the Government will lose is the prejudicial impact of its evidence. The only

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[6] The decision is unclear on this point. Although it refers to the defendant having "stipulated," it does not say that the Government agreed to the stipulation. Moreover, the Court states that the claim was "almost identical" to that raised in *Old Chief* and that the defendant there "stipulated," *Dunford*, 148 F.3d at 395. It is, of course, undeniable that *Old Chief* only involved an *offer to stipulate* by the defendant. 519 U.S. 172, 175 (1997). Finally, the issue before the *Dunford* Court was only whether the District Court had abused its discretion. *See* 148 F.3d at 394-95.

thing the defendant, and the public, have to gain is a fair sentencing hearing, consistent with Due Process, *see Estelle v. McGuire*, 502 U.S. 62, 75 (1991), and the Eighth Amendment to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand-delivering a copy of same to the Court Security Officer on this 19th day of October 2005.[7]

/S/
Alan H. Yamamoto

[7] Pursuant to the Court's Order of October 3, 2002 (dkt. no. 594), on the date that the instant pleading was filed, a copy of the pleading was provided to the Court Security Officer ("CSO") for submission to a designated classification specialist who will "portion-mark" the pleading and return a redacted version of it, if any, to defense counsel. A copy of this pleading, in redacted form or otherwise, will not be provided to Moussaoui until counsel receive confirmation from the CSO and/or classification specialist that they may do so.