UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	~~UNDER SEAL~~
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant.	)	

GOVERNMENT'S MOTION *IN LIMINE* REGARDING
DEFENDANT'S MITIGATION EVIDENCE

The United States respectfully requests that the Court exclude from the second phase of the bifurcated sentencing hearing the proffered testimony of a number of defense witnesses.[1]

First, the Court should exclude the testimony of two of the defense's expert witnesses, Farhad Khosrokhavar and Dominique Thomas. Neither of these witnesses will have a thing to say about the defendant. They have never met him and know nothing about him that the jury does not already know. Their testimony, we suspect, will be nothing more than a long, oral history about the plight of Muslims around the world, replete with vivid and exploitive examples of the killing of Muslim children, geared solely to play to the jury's emotions. The Court should see this for what it is and exclude these witnesses because their testimony will be irrelevant, will unnecessarily complicate and lengthen the hearing, confuse the issues, and mislead the jury. See 18 U.S.C. § 3593(c).

Second, the Court should preclude the defense from introducing victim-impact evidence

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[1] We have filed this motion under seal consistent with the Court's past rulings because it addresses possible defense witnesses.

— yes, victim-impact evidence offered by the defendant. Of course, as we explain below, there is no basis for the defendant to offer the testimony of 9/11 victims, whose testimony about the impact of the crime of their lives can be either aggravating or nothing at all, but cannot by definition be mitigating evidence. The defense wants these witnesses only to sneak in something about their anti-death penalty views. There is no place for that here and the Court should not allow it.

I. Defendant's Expert Witnesses

The defense intends to introduce the testimony of Farhad Khosrokhavar, a sociologist at the Ecole des Hautes Etudes en Sciences Sociales in Paris, concerning the social circumstances of second generation immigrants in France of North African heritage. The defense also intends to introduce the testimony of Dominique Thomas, a diplomate of L'Institut national des langue et des civilisations orientales and the L'Institut d'etudes politiques in Paris. According to the defense, Mr. Thomas will testify about radical Islam in London and recruitment by al Qaeda and other radical jihadist organizations in and around the London mosques. His testimony will include a 41-minute video presentation about the struggle between Russia and the Chechnyans (def. ex. DT001), a presentation on the history of crimes committed by the Russians against Muslims (def. ex. DT003T.1), multiple presentations on the mistreatment of Muslims world-wide (see, e.g., DT004T.1), as well as several highly inflammatory exhibits showing the killing and wounding of Muslim children (see, e.g., DT012.1, DT012.9, DT012.10, DT012.11). To our knowledge, neither witness can offer any specific information about the defendant; instead, their testimony will merely offer general statements about the plight of Muslims with highly prejudicial exhibits that have no place in this trial.

The purpose of the penalty phase is to allow both the Government and the defendant to present information regarding aggravating and mitigating factors in the case, to allow the jury to weigh the factors, and then impose an appropriate sentence. The penalty phase is not, however, a forum for debating the socio-economic policies of continental Europe, the growing influence of radical jihadists in the United Kingdom, or the treatment of Muslims in Chechnya and elsewhere in the world. Consequently, unless the testimony of these proposed experts is relevant to the defendant in this case, it should be excluded.

The Supreme Court has long stated that a sentence of death requires "a greater degree of reliability" than any lesser sentence. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Accordingly, during sentencing in a capital case, the factfinder may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604.

Nevertheless, the Federal Death Penalty Act (FDPA), like the Federal Rules of Evidence, still requires that any information presented at the hearing must be "relevant." 18 U.S.C. § 3593(c). Moreover, under the FDPA standard, "judges continue their role as evidentiary gatekeepers and, pursuant to the balancing test set forth in § 3593(c), retain the discretion to exclude any type of unreliable or prejudicial evidence that might render a trial fundamentally unfair." United States v. Fell, 360 F.3d 135, 145 (2d Cir. 2004) (quotations and alterations omitted). This gatekeeping function of the court serves to prevent an "evidentiary 'free-for-all'" in which the parties could present any information they desired. United States v. Frank, 8 F. Supp.2d 253, 268–70 (S.D.N.Y. 1998).

Accordingly, the Supreme Court has explained that the courts must still determine whether information is "relevant," the meaning of which "is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context." Tennard v. Dretke, 542 U.S. 274, 284 (2004) (internal quotations omitted). As the Fourth Circuit has explained, for mitigation evidence to be relevant and admissible, it must bear some actual "linkage" to the defendant. United States v. Jackson, 327 F.3d 273, 299 (4th Cir. 2003). That is, a defendant must offer some information that would permit a factfinder to draw a conclusion connecting the expert's evidence with the defendant. Id.

In Jackson, the defendant put his mental health at issue and attempted to present the testimony of the adoptive parents of his biological sister, both of whom would testify that his sister had manifested abnormal behaviors. Jackson, 327 F.3d at 299. The Fourth Circuit affirmed the district court's exclusion of the testimony on the grounds that the defendant failed to offer some information "that would permit a factfinder to draw the conclusion connecting the sister's mental condition with [the defendant's.]" Id. The Court held that, although the defendant "must be able to present any evidence of his character or record, or the circumstances of the offense, to urge a penalty less than death, this [did] not entitle him to reach more broadly to matters unrelated." Id.

Like the defendant in Jackson, the defendant in this case has offered nothing by which the Court can conclude that the expert witnesses' testimony has at least some minimal connection to the defendant so as to be relevant. Mr. Khosrokhavar is a sociologist who will apparently testify about the common experience among second generation immigrants in France of North African heritage and Mr. Thomas will apparently add testimony about how young Muslims in London are

generally recruited. Such testimony, while certainly relevant to much broader policy discussions, has no place in this case without some direct relevance to the defendant. United States v. Johnson, 223 F.3d 665, 675 (7th Cir. 2000) ("A mitigating factor is a factor arguing against sentencing *this* defendant to death") (emphasis in original). Allowing these two experts to testify for the defendant in broadly sweeping generalizations can only unnecessarily complicate and lengthen the hearing, while confusing the issues, and misleading the jury. As the Supreme Court has recently noted in the context of state death penalty proceedings,

> the Eighth Amendment . . . insists that a sentencing jury be able to consider and give effect to mitigating evidence about the defendant's character or record or the circumstances of the offense. . . . But the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted. Rather, States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.

Oregon v. Guzek, 126 S. Ct. 1226, 1232 (2006) (internal quotations and citation omitted). Here, the FDPA provides the structure for presenting mitigation evidence to the jury with the goal of a more rational and equitable administration of the death penalty. The FDPA requires that irrelevant information, like that of Mr. Khosrokhavar and Mr. Thomas, be excluded. The FDPA likewise provides the courts with the discretion to exclude even relevant information if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.

In contrast to Messrs. Khosrokhavar and Thomas, the defense intends to call mitigation specialist Jan Vogelsang as a witness. Ms. Vogelsang will provide detailed testimony about the defendant's life and his transformation into a terrorist. See Defendant's Amended Notice of

Expert Evidence of Mental Condition (docket no. 1473). Ms. Vogelsang's testimony is completely appropriate and is, indeed, the type of mitigation evidence that the defense should offer because it directly relates to the defendant.

For the foregoing reasons, the United States respectfully requests the Court to exclude the testimony of defendant's expert witnesses, Farhad Khosrokhavar and Dominique Thomas, from the second phase of the defendant's bifurcated sentencing hearing. If, however, the Court declines to exclude the expert witnesses' testimony outright, the United States respectfully requests that the defense be required to show its relevance by proffering some information that would permit a factfinder to draw a conclusion connecting the experts' testimony with the defendant.

II. Victim Impact Evidence

The defense has also identified several witnesses who will offer victim-impact evidence. The Court should preclude the defense from offering victim-impact evidence because it cannot possibly constitute mitigating evidence. The law is clear that neither party may ask witnesses about their "opinions about the crime, the defendant, and the appropriate sentence . . . ." Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991); United States v. Brown, __ F.3d __, 2006 WL 587875, at *14-15 (11th Cir. Mar. 13, 2006) (precluding defense from calling victim-impact witnesses to testify to opinion about appropriate sentence). Defense counsel has acknowledged that their witnesses may not express any opinion about the sentence. See 1/5/06 Tr. 55. Despite such acknowledgment, the defense intends to introduce victim-impact evidence without any

demonstration of how such evidence could possibly mitigate the defendant's sentence.[2]

The FDPA provides only for the Government to introduce victim-impact evidence. See 18 U.S.C. § 3593(a). None of the statutory mitigating factors even mention victim-impact evidence. See 18 U.S.C. § 3592(a). The "catch-all" mitigating factor identifies: "Other factors in the defendant's background, or character or any other circumstance of the offense that mitigates against imposition of the death sentence." 18 U.S.C. § 3592(a)(8). Similarly, the Supreme Court has only addressed the introduction of victim-impact evidence by the Government. See Jones v. United States, 527 U.S. 373, 395 (1999); Payne v. Tennessee, 501 U.S. 808, 819 (1991) ("the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment. Thus, two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause differing amounts of harm."). Indeed, the Government is unaware of any case where the defense has been permitted to offer victim-impact evidence.

If the defendant complies with the law pertaining to victim-impact evidence, such evidence cannot possibly constitute mitigating evidence. For example, if the defendant calls the mother of a victim, the mother would testify about the life of the victim and the impact of the victim's murder on her. The mother would either say that she has suffered emotionally, which would not mitigate the sentence, or that she has not suffered emotionally. Her lack of emotional suffering would not constitute mitigating evidence because her lack of suffering does nothing to

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[2] We have asked defense counsel on multiple occasions to explain how the victim impact evidence constitutes mitigation evidence. Defense counsel has refused to provide any explanation.

undercut the suffering of the Government's victim-impact witnesses.

We suspect that the defense, instead, merely intends to offer this evidence to convey improperly the anti-death penalty views of the witnesses. The Court should preclude the defense from doing so. At a minimum, the defense should be ordered to provide a proffer of the witnesses' testimony with a detailed legal basis demonstrating the admissibility of this evidence.

Respectfully submitted,

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By: /s/

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Date: April 3, 2006

CERTIFICATE OF SERVICE

I certify that on the 3d day of April, 2006, two copies of the foregoing Government pleading were served, by hand, on the following counsel:

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