

FILED

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

Alexandria Division 2006 APR -4 P 4:21

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA,)
)
 v.)
)
 ZACARIAS MOUSSAOUI,)
)
 Defendant.)

~~UNDER SEAL~~

Criminal No. 01-455-A
Hon. Leonie M. Brinkema

unsealed per
order of 6/20/06
(# 1872)

DEFENDANT ZACARIAS MOUSSAOUI'S RESPONSE TO
GOVERNMENT'S MOTION *IN LIMINE* REGARDING
DEFENDANT'S MITIGATION EVIDENCE

Mr. Moussaoui, by counsel, hereby responds to the Government's motion *in limine* regarding mitigation evidence. The Government, citing the Defense's "play[ing] to the jury's emotions" and a planning to "sneak in something" seeks to limit the defense presentations of two defense expert witnesses and of any victim impact testimony.

I. The Defense Expert Witnesses Are Entirely Appropriate Under the FDPA and Eighth Amendment

The Government argues that Dominique Thomas and Farhad Khosrokhavar should be excluded, apparently reading a new requirement into the FDPA that mitigation witnesses have direct personal knowledge of the defendant, offering, as

reason for exclusion, that “[t]hey have never met him and know nothing about him that the jury does not already know.” The former argument is not relevant and the latter is simply untrue.

The FDPA provides that “information may be presented as to any matter relevant to the sentence, including any mitigation ... factor.” It goes on to provide “[t]he defendant may present any information relevant to a mitigating factor.” And finally, “[i]nformation is admissible regardless of its admissibility under the rules ... except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.” *See* 18 U.S.C. § 3593(c). The FDPA favors inclusion and the jury 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 v. Ohio*, 438 U.S. 586, 604 (1978). "Equally clear is the corollary rule that the sentence may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)).

Cultural evidence is a relevant mitigating factor. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting ABA Guidelines for the Appointment and

Performance of Counsel in Death Penalty Cases 11.8.6 (1989)).(quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases providing that investigations into mitigating evidence should comprise efforts to discover *all* reasonably available mitigation evidence, which should include investigation into medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.") Other court's have held this as well. *Cf. Siripongs v. Calderon*, 35 F.3d 1308, 1316 (9th Cir. 1994) (in reversing a district court's denial of summary judgment for an evidentiary hearing on an ineffective assistance of counsel claim, the court noted insufficiency in failing to present cultural evidence about the defendant, "[s]imilarly, evidence of Siripongs' Thai culture, including Thai concepts of remorse and shame, might well have bridged a cultural gap between the jury and the accused"). *See also Mak v. Blodgett*, 970 F.3d 614, 618-619 (9th Cir. 1992) (granting habeas relief based on cumulative errors including failure to use a witness in mitigation relevant to cultural issues, "to show the effects of cultural conflict on young Chinese immigrants.")

Mr. Thomas and Mr. Khosrokhavar both provide critical cultural and background information the jury is entitled to hear when considering whether to

sentence Mr. Moussaoui to life or death under the FDPA. The Defense filed a Notice of Non-Mental Health Summary and Expert Witnesses which outlined that Mr. Khosrokhavar will present evidence that Mr. Moussaoui's experience was typical of a larger social phenomenon in Europe for second generation immigrants from North Africa. This evidence is highly relevant to educating the jury about Mr. Moussaoui has his background in a larger social and economic context which is clearly permissible under the FDPA.

This same notice indicated that Mr. Thomas's testimony will demonstrate for the jury the recruitment process typical in the London mosques Mr. Moussaoui attended, during the time he lived in London. Again, this evidence is relevant to explaining to the jury how Mr. Moussaoui became involved in jihad and is again, entirely consistent and appropriate with the limitations of the FDPA, to include "any information relevant to a mitigating factor."

The case cited by the Government as supporting the limitation they propose on mitigation testimony is inapposite. *United States v. Jackson*, 327 F.3d 273, 299 (4th Cir. 2003) As the Government acknowledges, the witnesses at issue in *Jackson* were testifying about the mental health of a relative of the defendant. *See id.* Unlike the testimony in *Jackson*, the testimony at issue here relates specifically to the life and cultural experiences of Mr. Moussaoui.

The Court should deny the Government's Motion in Limine to exclude the testimony of Mr. Thomas and Mr. Khosrokhavar.

II. Victim-Witnesses Are Appropriate Defense Witnesses.

The government's contention that the FDPA only provides for the government to introduce victim-impact evidence is mistaken. While the FDPA permits the government to use victim impact information as an aggravating factor in the notice it submits to the court, 18 U.S.C. § 3593(a), it does not restrict the introduction of victim impact evidence to the government.

The FDPA provides that "information may be presented as to any matter relevant to the sentence." 18 U.S.C. § 3593©. In this case, defense's victim-impact evidence constitutes proper rebuttal evidence to the government's contention that it is calling a representative sample of 45 victims to represent the universe of victims whose lives and loved ones lives were impacted by the events of September 11. In addition to providing that "information may be presented as to any matter relevant to the sentence," the FDPA provides that "the defendant shall be permitted to rebut any information received at the hearing and shall be given a fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating . . . factor. . . ." 18 U.S.C. § 3593©.

Thus, if the government is calling what it contends is a representative

sample of the victims, the defense is entitled to present victim evidence which rebuts the government's representative sample. Approximately 45 victims will be call by the government to relate how the events of September 11 devastated their lives and the lives of their loved ones. While the government will not have its victim witnesses testify regarding the ultimate sentence they are hoping the jury will return, there is no question that the testimony is being elicited from these victims to evoke the most emotion and sympathy from the jury and to communicate to the jury that these victims, as a representative sample of all the approximately 3,000 victims, need these proceedings to provide closure for them and their loved ones. This testimony necessarily leaves hanging heavy in the air before the jury the unstated request for the death penalty.

There is no question that the tragic events of September 11 resulted in one of the most devastating losses of life in United States history and that emotions will be high and on edge during the testimony of the victims witnesses. But there have also been victims who have been able to come to terms with the devastation in their lives and who have moved beyond these events in their lives. The defense intends to introduce evidence from a number of victims whose lives were also devastated by those events and what they have done to maintain their equilibrium and go on with their lives.

The testimony of the defense victims is proper rebuttal testimony to the government's contention that its 45 victims are representative of all the victims of September 11. "[V]ictim impact testimony admitted in rebuttal under § 848 must be reasonably tailored to the information the victim impact testimony is intended to rebut." *United States v. Stitt*, 250 F.3d 878, 897 (4th Cir. 2001).

The defense has no intention of asking its victim witnesses their "opinions about the crime, the defendant or the appropriate sentence" and plans to fully comply with the requirements of *Payne v. Tennessee*, 501 U.S. 808, 830 N.2 (1991).

Conclusion

For these reasons, Mr. Moussaoui requests that the Court deny the Government's motion in limine regarding the Defendant's mitigation evidence.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 4th day of April 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314.

/s/

Anne M. Chapman