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 SUBMISSION REGARDING
RELEVANCE OF COCKPIT VOICE RECORDERS

Pursuant to the Court's Order dated September 13, 2002, the Government respectfully offers the following regarding the relevance of the Cockpit Voice Recorders (CVR) for Flight 93 and ExecuJet 956, which the Government seeks to introduce at trial:

I. Preliminary Issues Regarding the CVRs

Before addressing the relevance of the CVRs for the above flights, the Government wishes to clarify the relief that it sought in its Motion for Protective Order Regarding Cockpit Voice Recorders Pursuant to 49 U.S.C. § 1154(a)(4). If the Court permits introduction of the evidence, the Government does not seek to seal the courtroom while they are played. Instead, the Government seeks only to seal the tapes and transcripts after they are played as required by the statute. See 49 U.S.C. § 1154(a)(4)(B). Thus, standby counsel's rhetoric about "trying this case on evidence hidden from the public" is misplaced.

Also, the Government wishes to make clear that it filed its Motion for Protective Order solely to ensure compliance with the statute. There are no national security concerns or other policy reasons why the tapes and transcripts should be sealed. Indeed, if 49 U.S.C. § 1154 did not exist, the Government would have no qualms about complete public dissemination.

Congress, however, passed this statute and the Government has an obligation to comply with its mandates. Congress passed this statute to "protect the National Traffic Safety Board ("NTSB") against premature public speculation regarding the cause of any airline crash so it may 'conduct a full and fair investigation.'" *McCoy v. Southwest Airlines Co., Inc.*, __ F.R.D. __, 2002 WL 1400955 (C.D. Ca. 6/19/2002) (quoting Senate Report No. 101-450, 1990 U.S.C.C.A.N. 6376, 6381). Of course, these concerns are not present here because the crash of Flight 93 resulted from a criminal act.

II. The Unique Probative Value of the CVRs

A. Applicable Law

"Otherwise admissible evidence can still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *United States v. Yazzie*, 59 F.3d 807, 811 (9th Cir. 1995) (emphasis in original). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). *See also Yazzie*, 59 F.3d at 811 ("Evidence is unfairly prejudicial if it 'makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.'") (quoting *United States v. Johnson*, 820 F.2d 1065, 1069 (9th Cir. 1987)) (emphasis in original). Thus, the Fourth Circuit has held that Rule 403 requires exclusion "only in those instances where the trial judge believes 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." *United States v.*

Powers, 59 F.3d 1460, 1467 (4th Cir. 1995).

"The court's discretion to exclude evidence under Rule 403 is narrowly circumscribed." *United States v. Norton*, 867 F.2d 1354, 1361 (11th Cir. 1989). As the Fourth Circuit has stressed: "Because the evidence sought to be excluded under Rule 403 is concededly probative, the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly." *United States v. Aramony*, 88 F.3d 1369, 1378 (4th Cir. 1996). *See also United States v. Betancourt*, 734 F.2d 750, 757 (11th Cir. 1984) ("Rule 403 is an extraordinary remedy which should be used only sparingly since it permits the trial court to exclude concededly probative evidence."); *Norton*, 867 F.2d at 1361 ("The balance under the Rule [403] . . . should be struck in favor admissibility."); *United States v. Lewis*, 1999 WL 641882 at *2 (E.D. La. 1999) ("because Rule 403 operates to exclude relevant evidence, application of the rule 'must be cautious and sparing.'") (quoting *United States v. Garcia-Abrego*, 141 F.3d 142, 175 (5th Cir. 1998)).

B. The Evidence is Directly Relevant to Overt Acts in the Indictment

As the Court is aware, the Indictment contains six conspiracy counts that all involve singularly violent acts. Indeed, ranging from efforts to obtain chemical and nuclear weapons to the hijacking and use of commercial airliners to kill and maim thousands, the Indictment is an unparalleled chronicle of violent conduct that has been part of a declared war (*jihad*) against the United States for the past several years. While the defendant is alleged to have been a part of this *jihad* against America, and therefore to be a member of the charged conspiracies, he is not alone. In fact, the Indictment identifies the terrorist group *al Qaeda* as the enterprise at the core of the global *jihad*, and names numerous other individuals who also were part of this *jihad*. Therefore,

while the Indictment lists several acts undertaken by the defendant in furtherance of the conspiracy, the Indictment also details many overt acts committed by the defendant's co-conspirators, including the provision of terrorist training in Afghanistan, the issuance of *fatwah*s calling for the murder of American civilians whereever they can be found, and the hijackings on September 11. These overt acts not only are, in come cases, elements of the charged offenses, they also tell the story of the charged conspiracies. As such, they aid the jury in distinguishing each conspirator's role (including the defendant's) in the conspiracy, and also help the jury understand the existence and methods of the conspiracy. Thus, the evidence in support of the charged overt acts is *per se* relevant. *See United States v. Diaz*, 176 F.3d 52, 79 (2d Cir. 1999) ("[a]n act that is alleged to have been done in furtherance of the alleged conspiracy . . . is not an 'other' act within the meaning of Rule 404(b); rather, it is part of the very act charged.") (quoting *United States v. Concepcion*, 983 F.2d 369, 392 (2d Cir. 1992)); *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) ("Other criminal acts are intrinsic when they are 'inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged'") (quoting *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993)) ; *United States v. Lewis*, 1999 WL at *2 ("As a general rule, acts committed in furtherance of the charged conspiracy are themselves part of the act charged. Thus, where a murder is alleged to have been committed or attempted in furtherance of the conspiracy, evidence of such acts are relevant to the conspiracy charge. Moreover, such evidence may be relevant to show the existence of and nature of the conspiracy."), *aff'd*, 151 F.3d 1027 (3d Cir. 1998).

The CVRs of the two planes constitute the most probative evidence of some of the overt acts in the Indictment. For example, all six counts of the Indictment allege overt act 105 that:

> On September 11, 2001, Saeed al-Ghamdi, Ahmed al-Nami, Ahmed al-Haznawi, and Ziad Jarrah hijacked United Airlines Flight 93, a Boeing 757, which had departed from Newark, New Jersey, bound for San Francisco at approximately 8:00 a.m. After resistance by the passengers, Flight 93 crashed in Somerset County, Pennsylvania, at approximately 10:03 a.m., killing all on board.

Thus, the Government will need to, and is entitled to, prove that Flight 93 was hijacked. This is particularly true for Counts Two and Three, which involve allegations of hijacking and destroying aircraft, but it also true for the remaining, broader conspiracy counts. Simply put, there is be no better evidence of the hijacking than the actual words of the hijackers during the course of the hijacking. As such, exclusion under Rule 403 is unnecessary and improper. *See United States v. Eufrasio*, 935 F.2d 553, 573 (3d Cir. 1991) ("Rule 403 does not as a rule prohibit the government from presenting its strongest possible case against the criminal defendants.").

As important, the CVRs are probative of the identity of the hijackers. In short, the CVRs help establish that Saeed al-Ghamdi, Ahmed al-Nami, Ahmed al-Haznawi, and Ziad Jarrah were the hijackers, because the tapes support the Indictment's allegation that the hijackers were Islamic extremists. The tapes, coupled with descriptions given by some of the passengers to their loved ones during telephone calls from the plane, accomplish this. Moreover, one of Jarrah's classmates at the Florida Flight Training Center can identify Jarrah's voice as being that of the pilot-hijacker. Jarrah's role as a hijacker on Flight 93 is important to the Government's evidence linking defendant to the conspiracy because a telephone number that defendant called during the

conspiracy was scrawled on a business card belonging to Jarrah, which was found at the crash site in Pennsylvania. In the end, the CVRs constitute probative evidence that directly substantiates the overt acts charged in the Indictment, thus tipping the scale heavily in favor of admissibility,. *See United States v. Ramos*, 971 F. Supp. 186, 194-95 (E.D. Pa. 1997) (testimony admitted as it "tended to establish three overt acts specified in the indictment [and] was probative as evidence of the conspiracy").

Also, the CVRs are relevant to the Government's claims regarding the methods used to hijack the planes and the ultimate targets of the hijacked planes. Indeed, the violent acts depicted on the CVRs assist the jury in determining the means the hijackers used to overtake the crew and passengers, a fact that may be critical in putting into context some of the evidence regarding the defendant's conduct. Furthermore, it is important to the Government's case that it be able to establish that Flight 93 was destined for a target in Washington, D.C., instead of the goal of the hijacking simply being to crash a plane into the countryside of Pennsylvania. Therefore, the Government will have to prove that the passengers of Flight 93 fought back against their attackers, thereby precluding the plane from hitting its target in Washington, D.C. Although widely reported, it is a fact that the Government needs to prove at trial. While we intend to offer evidence of the passengers' intentions to attack the hijackers through the testimony of family members of the passengers who received telephone calls from their loved ones, none of these calls shows the attack and its impact on the flight of the plane as explicitly as the CVR for Flight 93 does. As such, the CVRs complete the story of the Indictment and should be admitted. *See United States v. Fortenberry*, 971 F.2d 717, 721 (11th Cir. 1992) ("This evidence was an essential part of the chain of events explaining the context, motive, and set-up of the possession charge

and was necessary to complete the story of the crime for the jury.").

Thus, it is beyond dispute that the CVRs are relevant in this case, as they are directly probative of some of the overt acts charged in the Indictment and of the existence of the conspiracy. None of this is changed by the claim that the "defense may well agree to stipulate to whatever ultimate fact the government might be attempting to prove . . . ." Response of Standby Counsel at 1. Regardless of standby counsel's inclination to stipulate to facts, the defendant is clearly not so inclined. As stated in other motions, the Government has tendered stipulations to defendant that have met with no response. Thus, the Government is left in the position of having to prepare for trial assuming that there will be no stipulations. Moreover, as the Supreme Court has observed, "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." *Old Chief*, 519 U.S. at 183. Simply put, it is not up to the defendant to re-write the Government's order of proof. and select only those exhibits he wants the jury to see. *Id.* at 189 ("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."); *see also United States v. Crowder*, 141 F.3d 1202, 1207 (D.C. Cir. 1998) ("every Justice [in *Old Chief*] disagreed with the notion that a stipulation has the same evidentiary value as the government's proof. Even when coupled with a jury instruction that the fact stipulated must be considered proven, a stipulation cannot give 'the Government everything the evidence could show.'") (quoting *United States v. Crowder*, 87 F.3d 1405, 1410 (D.C. Cir. 1996), *vacated* 519 U.S. 1087 (1997)) (en banc). Thus, while there may be other, less graphic (and less direct) evidence of the overt acts, the rules of evidence do not require the Government only to offer the bare minimum, and the

evidence should be admitted. *United States v. Fortenberry*, 971 F.2d at 722 ("While we agree that a reasonable jury could have convicted on this evidence alone [murder used to prove defendant's possession of firearm], we decline to hold that the government must proffer only enough evidence to allow a jury to convict, but no more.").

C. The Probative Value of the Evidence is not Substantially Outweighed by Undue Prejudice

Weighed against the highly probative value of the CVRs, there is little, if any, undue prejudice to the defendant. While the evidence may be incriminating, "in one sense all incriminating evidence is inherently prejudicial." *United States v. Boyd*, 53 F.3d 631, 637 (4th Cir. 1995). Moreover, "[a]lthough the evidence may . . . be[] graphic, there [is] nothing 'unfair' in presenting it to the jury." *United States v. Ramos*, 971 F. Supp. at 195. Because, as noted, the evidence is directly related to the overt acts charged in the Indictment, and relates to the methods of the conspiracies, they are not an invitation to the jury to decide this case on any basis unrelated to the charges in the case.[1]

This holds true even if the evidence at issue relates to the conduct of the defendant's co-conspirators. It has long been black letter law that a coconspirator is liable for any reasonably foreseeable overt act committed in furtherance of the conspiracy, even if the coconspirator did not participate directly in the overt act in question. *See, e.g.*, *United States v. Blumenthal*, 332

[1] As a comparison, the Government is not seeking to introduce evidence of other violent acts committed by *al Qaeda* members/associates, such as the East Africa embassy bombings, which arguably were committed in furtherance of the same conspiracy with which the defendant is charged, or which could be relevant as background to some of the conspiracies charged in the Indictment. Instead, the evidence at issue relates to some of the more central overt acts in the Indictment.

U.S. 539, 556-57 (1948). Concurrently, evidence of the criminal conduct of a co-conspirator which is in furtherance of the conspiracy may be highly relevant to the question of the defendant's guilt. *See United States v. Burgos*, 94 F.3d 849, 858-59 (4th Cir. 1996) (*en banc*) (in narcotics conspiracy case: "a defendant's participation in the conspiracy 'need not be explicit; it may be inferred from circumstantial evidence' . . . . In addition to selling narcotics, that participation may assume a myriad of other forms, such as supplying firearms or purchasing money orders for coconspirators or permitting them to store narcotics and other contraband in one's home, or purchasing plane tickets.") (omitting citations and quotations); *United States v. Wilson*, 565 F. Supp. 1416, 1439 (S.D.N.Y. 1983) ("The existence of a conspiracy and a defendant's participation therein is usually established by . . . independent proof of each alleged co-conspirator's . . . conduct . . . and the totality of conduct of all the participants and the reasonable inferences to be drawn therefrom."). Thus, the courts have had little difficulty in admitting evidence of even violent overt acts committed by a defendant's co-conspirators in furtherance of the charged conspiracy. *See, e.g.*, *United States v. Chin*, 83 F.3d at 87 (defendant's statements to undercover agent about murders committed by "his people" relevant to narcotics conspiracy charges); *United States v. Diaz*, 176 F.3d at 80 ("Although the defendants-appellants conceded that they were associated with the Latin Kings, several issues still remained in dispute, including the existence, nature and operations of the RICO enterprise, and the related racketeering and drug conspiracies. Since the evidence had significant probative value as to these disputed matters, its admission was not 'substantially outweighed by the danger of unfair prejudice.'"); *United States v. Kincaide*, 145 F.3d 771, 783 (6th Cir. 1998) ("Courts have regularly upheld the relevancy of evidence of violent acts that exemplify the conspiracy's pattern

of conduct."); *United States v. Brady*, 26 F.3d 282, 287-88 (2d Cir. 1994) (evidence of murders committed by co-conspirators relevant to show nature and existence of conspiracy); *United States v. Ramos*, 971 F. Supp. at 195 ("Nor does the fact that Elizabeth Ramos did not directly participate in any of the attacks which were the subject of the challenged testimony or that Maria Ramos did not take part in two of the three episodes render such testimony unfairly prejudicial.").

It also does Moussaoui no good to highlight the violence that will be revealed by the admissible evidence as this is a case that involves vast conspiracies to commit mass murder through the intended use of weapons of mass destruction, including hijacked airplanes. These are the charges that must be proved in this case, and their violent nature does not make the evidence any less relevant or more unfairly prejudicial under the circumstances. *See United States v. Cisneros*, 203 F.3d 333, 348 (5th Cir. 2000) ("Contrary to Cisneros's assertion, her offer to stipulate to the shooting of Fischer did not reduce the probative value of evidence of how Fischer's parents found their son, the pathologist's testimony about Fischer's autopsy, or the photographs of Fischer's corpse."), *vacated on other grounds*, 206 F.3d 448 (5th Cir. 2000) (*en banc*); *United States v. Hall*, 152 F.3d 381, 400-01 (5th Cir.1999) ("gruesome" photographs of victim's body in the grave and after its removal in state of decomposition "were relevant to Lisa Rene's identity and the cause of her death, and Hall's offer to stipulate to these facts did not render them irrelevant."), *abrogated on other grounds*, *United States v. Martinez-Salazar*, 120 S. Ct. 774 (2000). As the Second Circuit noted in upholding the introduction of victim photographs in the first World Trade Center case, "[p]robative evidence is not inadmissible solely because it has a tendency to upset or disturb the trier of fact." *United States v. Salameh*, 152 F.3d 88, 122

(2d Cir. 1998).

Put another way, the Government is not seeking to introduce the CVRs to inject violence in a case that does not otherwise involve violence. Nor is the Government seeking to horrify the jury with evidence that has marginal relation to the allegations in the Indictment, such as prior bad acts of the defendant under Fed. R. Evid. 404(b). *See United States v. Hernandez*, 975 F.2d 1035, 1041 (4th Cir. 1992) ("Here . . . the probative value of the evidence is slight. Hernandez's 'cooking' recipe and her sale of crack in New York at some indefinite time are in no way connected to cocaine she is charged with conspiring to sell in this case."). Rather, the Government is merely seeking to provide the jury with the best available evidence of the violent charges contained in the Indictment. This evidence is plainly pertinent to some of the core allegations in the Indictment, and would be admissible in the trial of any of other conspirators who might be charged for their participation in the conspiracies. For example, even if the co-conspirator Mustafa Ahmed al-Hawsawi were tried in this case, the evidence would be relevant and not unfairly prejudicial even though he is not alleged to himself have committed any violent acts, or to have trained in preparation for any hijackings. *See United States v. Bin Laden*, 109 F. Supp.2d 211, 217 (S.D.N.Y. 2000) ("The embassy bombings are said to have been overt acts in furtherance of each of these conspiracies. All of the Defendants – including those only charged with the various conspiracies – are, therefore 'bombing' Defendants, and evidence about the bombing is relevant to the Government's case against each of them."); *accord United States v. DiNome*, 954 F.2d 839, 843 (2d Cir. 1992) ("the evidence of numerous crimes, including the routine resort to vicious and deadly force to eliminate human obstacles, was relevant to the charges against each defendant because it tended to prove the existence and nature of the RICO

enterprise"). Moreover, given the extraordinarily violent nature of the charges in this case and the volume of other evidence regarding violence that is likely to be admitted at trial, it is difficult to imagine how the evidence at issue will unfairly prejudice any defendant accused of being a part of the charged conspiracies in this Indictment. *Cf. United States v. Abdel Rahman*, 854 F. Supp. 254, 264 (S.D.N.Y. 1994) ("[I]t bears mention that even the least of these defendants is charged with knowingly agreeing to and, according to the government's memorandum[], with actually assisting conduct which, if it had been fully carried out, would have resulted in mass murder. Such a charge makes it particularly difficult to credit claims of prejudicial spillover from evidence of, for example, an incident such as the Kahane slaying or the plan to assassinate Mubarak, or even the bombing of the World Trade Center."); *see also United States v. Cahalane*, 560 F.2d 601, 607 (3d Cir. 1977) ("it is well known that continued exposure to even emotion-rousing [evidence] tends to reduce [its] effect.") (brackets in original).[2]

[2] As a final point, any residual prejudice to the defendant can be cured by a charge to the jury. *See United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980) (residual unfair prejudice "can be generally obviated by a cautionary or limiting instruction, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt"); *United States v. Fortenberry*, 971 F.2d at 721 ("The evidence had clear probative value; its prejudicial effect was minimized by the district court's limiting instruction.").

III. Conclusion

For the foregoing reasons, the CVRs are evidence the probative value of which is not substantially outweighed by the danger of unfair prejudice. Therefore, the Government respectfully requests the Court to permit introduction of the CVRs at trial.[3]

Respectfully submitted,

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[3] If the Court rules that the Government may introduce the CVRs, the Government respectfully requests an opportunity to brief the issue regarding the constitutionality of 49 U.S.C. 1154, which has been challenged by Gannett Satellite Information Network, Inc.

Certificate of Service

The undersigned hereby certifies that on the 24th day of September, 2002, a copy of the Government's Response was provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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