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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

03 Cr. 1197 (SHS)

5 UZAIR PARACHA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 November 3, 2005
10 3:30 p.m.

11 Before:

12 HON. SIDNEY H. STEIN

District Judge

13 APPEARANCES

14 MICHAEL J. GARCIA

15 United States Attorney for the
Southern District of New York

16 ERIC BRUCE

KARL METZNER

17 Assistant United States Attorneys

18 EDWARD WILFORD

19 ANTHONY RICCO

Attorneys for Defendant

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1 (In open court)

2 THE DEPUTY CLERK: United States v. Uzair Paracha, 03
3 Cr. 1197.

4 Counsel, please state your names for the record.

5 MR. BRUCE: Good afternoon, your Honor. Eric Bruce
6 and Karl Metzner for the government.

7 THE COURT: Good afternoon, gentlemen.

8 MR. WILFORD: Good afternoon, your Honor. For the
9 defendant, Edward Wilford and Anthony Ricco.

10 Mr. Paracha is present.

11 THE COURT: Good afternoon.

12 Let's handle some administrative matters and then I
13 wish to give you my determinations on the expert testimony and
14 the 403 issues.

15 I signed the order that was presented to me by the
16 defense counsel permitting the defendant to be wearing civilian
17 clothes. In fact, I prefer that he be wearing civilian
18 clothes.

19 MR. RICCO: Those clothes have been delivered to the
20 MCC and accepted.

21 THE COURT: All right.

22 I have received the jury questionnaire with the names
23 filled in on page 4. If the questionnaire is acceptable to
24 both sides, I will present this to the jury administrator.

25 I take it, it is the jury administrator who makes the

1 copies, is that correct?

2 MR. METZNER: Actually, I think they would like us to,
3 and we are happy to.

4 THE COURT: Then I will give this back to you and you
5 can make the copies.

6 Is the jury questionnaire acceptable to the
7 government?

8 MR. METZNER: It is, your Honor.

9 THE COURT: To the defense?

10 MR. WILFORD: Yes, your Honor.

11 THE COURT: I am going to give this back to the
12 government.

13 As I stated, the jury administrator believes that the
14 questionnaires will be filled out by 3:00. Then it is the
15 government that is going to make copies, is that correct?

16 MR. METZNER: Yes, your Honor.

17 THE COURT: The attorneys for both sides then will
18 work on them --

19 MR. BRUCE: Yes.

20 THE COURT: -- here, and if the defense wants the
21 participation of the defendant, that is fine as well.

22 MR. WILFORD: I'm sorry, your Honor, I didn't hear
23 you.

24 THE COURT: I said if the defense wants the
25 participation of the defendant in that process, that is

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1 acceptable.

2 When do the lawyers want the panel to be back here?

3 We can have them back here Tuesday morning if you
4 think that that is adequate time for the attorneys to go over
5 them. It is somewhat preferable to have them back here on
6 Tuesday, but it is nonsensical if you don't think you are going
7 to be ready Tuesday morning.

8 MR. WILFORD: Your Honor, we have been trying to get
9 some sense of how long it would take, and just doing a rough
10 estimate, if each of the attorneys get half of the
11 questionnaires, that would be approximately 87 questionnaires,
12 spending five minutes on each one would take approximately
13 seven hours just to review all the questionnaires. That is
14 without any discussion between ourselves or with our client in
15 terms of decisions that need to be made.

16 So what we propose is the following, and this is in
17 consultation with the government, that we get together at 1:00
18 on Tuesday, have the jury present at 2:15, and we should be
19 able to have our discussion between 1 and 2 and arrive at the
20 joint cause challenges and be able to present them to the
21 court.

22 THE COURT: If I understand you, you want the panel
23 back here at 2 on Tuesday.

24 MR. WILFORD: Yes, and perhaps we could probably meet
25 with the government at 12, which would give us an opportunity

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1 to see if there were any differences that you could resolve or
2 whether or not it is actually necessary to have that particular
3 juror present for additional questioning.

4 THE COURT: The parties can arrange whenever and
5 however they want to meet. We will have the panel back here
6 or, rather, assemble wherever the jury administrator is having
7 them assemble, at 2 on Tuesday.

8 The first order of business, then, is the attorneys
9 and the defendant will come into the courtroom at 2. You will
10 give me the list of those who both sides agree should be
11 excused for cause, and I will have that done. The jury
12 administrator can do that. But I want to see who they are.
13 Then we will jointly decide who is to be questioned further and
14 bring them up in groups.

15 Then I will have the jury administrator bring the
16 panel back at 2 on Tuesday.

17 In light of the fact that due to a prior appointment
18 by defense counsel we cannot have court on November 22nd --
19 that is the date, Mr. Wilford, is that right?

20 MR. WILFORD: Yes, your Honor.

21 THE COURT: I am trying to rearrange my schedule so we
22 will have at least a half a day on November 15th.

23 Do you remember I said we couldn't meet on November
24 15?

25 MR. WILFORD: Yes.

1 THE COURT: We will have at least half a day because,
2 again, I want to have the evidence go in as efficiently and
3 serially as possible.

4 We won't have court on the 22nd. We will have at
5 least a half a day on November 15th.

6 Yes.

7 MR. BRUCE: Excuse me, your Honor. I am just curious,
8 do you know if we would be having court in the morning or in
9 the afternoon?

10 THE COURT: Probably in the morning.

11 MR. BRUCE: Just so we can arrange the witnesses.

12 THE COURT: Now I want to give you my determinations
13 on the expert and the Rule 403 determinations.

14 I am going to be referring to the slides as given to
15 me yesterday.

16 For the record, government, were they denominated
17 something? Are they government exhibit something, as revised?
18 Remember what you gave me yesterday was the revised list.

19 MR. METZNER: 6, your Honor.

20 THE COURT: Government 6 at the Daubert hearing.

21 My determination is as follows:

22 On September 20, the government provided defendant
23 with notice of its intent to call Evan Kohlmann as an expert
24 witness to testify on certain matters.

25 On October 4th, the defendant submitted a letter

1 motion seeking an in limine ruling precluding admission of the
2 government's proposed expert testimony on several grounds,
3 including that expert testimony failed to meet the requirements
4 of Rule 702, as elucidated in the *Daubert* and *Kumho Tire* cases.
5 Alternatively, the defendant sought a pretrial Daubert hearing
6 to test the reliability of the expert's methodology.

7 On October 28th, I heard oral argument on this issue
8 and I issued preliminary rulings regarding the scope of the
9 expert testimony. Specifically, I concluded that the expert
10 testimony regarding the origins and organizational structure of
11 al Qaeda, the identification of leaders and members, and an
12 explanation of certain alleged al Qaeda tradecrafts,
13 specifically its use of operating by cells and its use of
14 individuals to provide logistical support are permissible
15 topics for the expert.

16 I concluded, though, that expert testimony regarding
17 al Qaeda's alleged use of counter-interrogation techniques,
18 including disinformation, would not be permitted on the ground
19 that such testimony impermissibly usurps the jury's fundamental
20 function of judging the credibility of witnesses. See *United*
21 *States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) and *United*
22 *States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1998), rev'd in part
23 on other grounds, 856 F.2d 5 (2d Cir. 1988).

24 Additionally, the court granted defendant's request
25 for a Daubert hearing to test the reliability of the expert's

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1 methodology and its application to the specific expert opinions
2 to be rendered. That hearing was a full-day hearing and was
3 held yesterday, November 2nd. As I say, I heard testimony for
4 the proposed expert as well as additional oral argument.

5 My rulings are as follows:

6 The government has met its burden of establishing by a
7 preponderance of the proof that its proposed expert, Evan
8 Kohlmann, has sufficient education, training, and knowledge to
9 be qualified as an expert, and that Kohlmann's methodology --
10 that is, his process of gathering sources, including a variety
11 of original and secondary sources, cross-checking sources
12 against each other, and subjecting his opinions and conclusions
13 to peer review -- is sufficiently reliable to meet the
14 standards for the admissibility of expert testimony set by the
15 Federal Rules of Evidence.

16 Everyone heard his qualifications yesterday. He is
17 employed as the president and founder of globalterroralert.com,
18 a clearinghouse for information concerning terrorism. He has
19 degrees in law and foreign service and Islamic studies, and he
20 has authored several thesis on topics related to the testimony
21 he proposes to give. He has conducted research into terrorist
22 organizations specifically, including al Qaeda, as well as what
23 he calls Arab-Afghan groups of Mujahadeen fighters in various
24 locales who are affiliated, he claims, with al Qaeda.

25 He has also performed research into the development of

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1 groups, including al Qaeda. He has gathered various original
2 source materials, including audio and video materials and
3 publications authored by various terrorist groups. He has
4 himself conducted a number of interviews with individuals who
5 are designated terrorists, or have associations with terrorist
6 groups. He has had experience working at a think tank devoted
7 to research in terrorist organizations, whose name is the
8 Investigative Project.

9 His methodology consists of gathering multiple sources
10 of information, including, as I said, original and secondary
11 sources. He testified that he juxtaposes new information
12 against existing information and evaluates new information to
13 determine whether his conclusions remain consonant with the
14 most reliable sources. He works collaboratively with his peers
15 in his field, gathering additional information and seeking out
16 and receiving comments on his own work and cross-checking the
17 information he has on his own proprietary database.

18 The facts and sources that form the basis of his
19 opinions and inferences, although they do include secondary
20 sources, are, I find, of a type reasonably relied upon by
21 experts in his particular field. That is the standard of
22 Federal Rule of Evidence 703. Experts may testify to opinions
23 based on hearsay or other admissible evidence where experts in
24 that field reasonably rely on such evidence in forming their
25 opinions. *United States v. Daly*, 842 F.2d 1380, 1387 (2d Cir.

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1 1988).

2 He has relied on sources regularly relied upon in his
3 field, including the 9/11 Commission report, confessions of al
4 Qaeda members, information made available on the Foreign
5 Broadcast Information Service, and original sources from
6 terrorist groups. He does rely on hearsay materials in
7 addition to the source materials.

8 As for peer review, he testified to various matters in
9 which his conclusions and opinions are subjected to review by
10 academics and other experts in his field. He explained the
11 process by which his written publications are submitted for
12 comment and critique by academics and peers in his field before
13 publication, and how his postings on the internet, and
14 presentations of public forums, are subject to review by his
15 peers, the comments of whom he considers and incorporates when
16 he deems it appropriate in his analysis.

17 Whatever the pitfalls of this vetting process, and
18 obviously it is not the same peer review as in a formal
19 academic setting, it is a sufficiently reliable methodology to
20 meet the requirements of Rule 702, and the weight to be given
21 that testimony is for the jury to determine. *See United States*
22 *v. Hammoud*, 381 F.3d 316, 337 (4th Cir. 2004).

23 So my first conclusion is that his methodology is
24 sufficiently reliable.

25 The second finding is that the government has met its

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1 burden of establishing by a preponderance that Kohlmann
2 reliably applied that methodology in reaching his conclusions
3 about the origins and structure of al Qaeda, the identification
4 of its leaders and its use of cells as a means of operating and
5 its use of individuals to provide logistical support, and that
6 testimony will be permitted, assuming the government chooses to
7 adduce it.

8 My third area of conclusion in regard to scope, I am
9 affirming my earlier ruling that Kohlmann will be permitted to
10 testify regarding, one, the origins and organizational
11 structure of al Qaeda; two, identification of its leaders;
12 three, explanation of al Qaeda tradecraft, insofar as its use
13 of cells and the use of individuals to provide logistical
14 support is concerned. But I am not going to permit the expert
15 to testify regarding the two alleged al Qaeda operatives who
16 are specifically involved in the allegations of this case; that
17 is, Ammar al-Baluchi and Majid Khan.

18 I am concerned by the fact that Kohlmann's testimony
19 regarding al-Baluchi's and Khan's role in al Qaeda is based in
20 not insubstantial part on Kohlmann's review of the unclassified
21 summaries of statements made by those individuals that are the
22 same summaries that have been offered to the defendant as a
23 substitution for his constitutional right to have live
24 deposition or trial testimony from those witnesses.

25 My concern, based on the testimony of Mr. Kohlmann, is

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1 that his proposed testimony regarding those two individuals is
2 too close to a summary of factual evidence from sources that
3 the government cannot introduce directly. This is of
4 particular concern here where the government proposes no fact
5 witness on those issues that would permit the defendant to test
6 through cross-examination the credibility of that factual
7 evidence. So there is going to be no evidence from Kohlmann on
8 Ammar al-Baluchi or Majid Khan.

9 Next, he will not be permitted to offer testimony
10 regarding Iyman Faris or Aafia Siddiqui.

11 I do not see the relevance of the proposed testimony
12 regarding Faris and, as the defense noted yesterday, the
13 description of his involvement in al Qaeda still refers to a
14 specific plot here in New York, which I have excluded.

15 Next, the expert will not be permitted to testify
16 regarding al Qaeda's use of counter-interrogation or
17 disinformation techniques. I think I have already said that.

18 Next, 403 rulings.

19 Pursuant to Rule 403, with a specific finding that the
20 probative value is substantially outweighed by the danger of
21 unfair prejudice, I am excluding testimony concerning any
22 specific terrorist plot. You know that ruling applies to 9/11
23 and the 1993 World Trade Center bombing because I have already
24 excluded those. But now I am extending the 403 ruling to apply
25 to descriptions of any specific terrorist plot. The probative

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1 value of the specific plots is substantially outweighed by the
2 danger of unfair prejudice.

3 Mr. Paracha is not alleged to have any connection to
4 those plots, and describing them with specificity unnecessarily
5 focuses attention on them.

6 Kohlmann may refer to terrorist plots and attacks
7 generically without specifying individual plots and attacks.
8 In other words, he cannot talk about a plot to hijack 12
9 airlines or a plot to bomb embassies or a plot to bomb the USS
10 Cole. He can talk about terrorist attacks in general.

11 Next, I am denying the defendant's Rule 403 objection
12 to general references to attacks against the United States.
13 Those references can stay in, and those are under the KSM
14 slide. Those references are not unfairly prejudicial.

15 The defendant is alleged to have provided material
16 support to a person he knew to be an al Qaeda member in order
17 to make it possible for the al Qaeda member to enter the United
18 States. The role of al Qaeda in the United States is therefore
19 pertinent to this case and the risk of unfair prejudice is
20 sufficiently taken care of by my elimination of references to
21 specific attacks, whether in the United States or anywhere in
22 the world. So the reference to the United States may remain.

23 Just so there is no doubt in my mind, let's go through
24 the slides on Government 6.

25 The first substantive page, UBL's Influences and

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1 Mentors, there is no objection, so that stays. The expert can
2 identify those individuals.

3 The next page regarding Bin Laden, the fourth bullet
4 point goes out because it is specific. The government can make
5 a generic reference to bombings if it wishes, or bombings in
6 1988 even.

7 The next slide, which is The Organization and
8 Structure of AQ, 2001 to 2003, the third level goes out because
9 there is not going to be anything on Ammar al-Baluchi and Khan.

10 The rest of the slide, that is, the first two levels,
11 have not been objected to and they are permissible.

12 The next slide, the KSM slide, the defendant objected
13 to the third bullet point, and I have specifically addressed
14 that. That stays.

15 The reference to the United States I am permitting.

16 The fourth bullet point goes out for the reasons I
17 have said, at least in the form that now exists because it is a
18 reference to a specific plot. The government should come up
19 with the generic if it wants. Helped fund and plan a series of
20 terrorist plots in 1995, that is acceptable. But that is up to
21 the government.

22 Then you have the Ammar al-Baluchi slide. There are
23 two Ammar al-Baluchi slides. They go out because they include
24 Ammar al-Baluchi, and also Jose Padilla and Tawfiq Attash.
25 They are out. They are out on relevancy and 403.

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1 The next slide is Majid Khan. The entire slide is
2 out.

3 I am excluding Iyman Faris and Aafia Siddiqui as well
4 pursuant to 403.

5 The last slide I think is just a duplicate of what
6 went earlier. I don't know if that is a mistake or you were
7 including it as a summation, the wrap up. Again, the ruling is
8 the same.

9 I think that handles it.

10 Should we plan on meeting again on Monday just to see
11 if anything else has come up, or are we OK waiting until I see
12 you on Tuesday afternoon?

13 I think we are a little safer. I may need to speak to
14 the parties on Monday.

15 Presumably, based on our two conferences ago, the
16 government is going to make a national security presentation to
17 me tomorrow, so I will need to render rulings based on that,
18 which I think probably you should come in, why don't we do it
19 on Monday. I want you to have started to make some headway in
20 the questionnaires by then.

21 Shall we plan on Monday at 4:30? If I don't need you,
22 I will let you know.

23 MR. WILFORD: That is fine, Judge.

24 MR. BRUCE: Your Honor, could I ask --

25 THE COURT: Government, is that all right, 4:30?

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1 MR. BRUCE: That is fine. Of course.

2 If I could ask two questions about your ruling
3 regarding the expert.

4 THE COURT: Yes, sir.

5 MR. BRUCE: First, as I indicated last Friday,
6 Mr. Wilford indicated that the defense was willing to stipulate
7 that Majid Khan and Ammar al-Baluchi were al Qaeda members.

8 I would like to know if that stipulation is still
9 available.

10 THE COURT: I think you all have agreed it is not
11 seriously at issue.

12 Mr. Wilford.

13 MR. WILFORD: No objection.

14 THE COURT: All right. Then put that in writing,
15 gentlemen.

16 MR. WILFORD: Yes.

17 THE COURT: You said no objection.

18 MR. WILFORD: No, I didn't say no objection. I said
19 no, we are not willing to stipulate, Judge.

20 THE COURT: I'm sorry. I thought you said no
21 objection.

22 What is your current position? You want to discuss
23 that with the government?

24 MR. WILFORD: We will discuss that with the
25 government.

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1 MR. BRUCE: I think we need to reach some resolution.

2 THE COURT: He is going to discuss it with you. He
3 just doesn't want something on the record right now, but he is
4 going to discuss it with you right now. As soon as we are
5 over, correct?

6 MR. WILFORD: Yes.

7 MR. BRUCE: If in fact, your Honor, we can't reach a
8 stipulation as to that --

9 THE COURT: I am not going to force a stipulation. By
10 the same token, you heard me say I think in reality it is not
11 an issue, but you should follow up with Mr. Wilford.

12 MR. BRUCE: I will, and if it is not an issue, that
13 would be great. That is why I hoped we could get a
14 stipulation. But he just said he is not willing to do that.
15 So I don't have a lot of hope in that regard.

16 THE COURT: It depends upon the glass is half full or
17 half empty. He said he wants to talk to you.

18 MR. BRUCE: OK. If in fact we can't reach a
19 resolution, your Honor, I would like to visit the issue, and
20 maybe we have to revisit it on Monday, as to whether a
21 different expert who hasn't read the unclassified summaries,
22 perhaps even an FBI agent, could testify as to the al Qaeda
23 affiliation of these two individuals. Because as I have tried
24 to lay out on a number of occasions, I think it is critical to
25 the case, it is clearly relevant, in our view, and, as you

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1 indicated, it really shouldn't be in dispute.

2 But now we are left with a hole based on your Honor's
3 ruling as to what evidence is going to be presented to the
4 jury. If we can reach an accommodation, that would be great,
5 but if not, we have to have some back up.

6 THE COURT: I understand.

7 MR. RICCO: I think on this subject we are on a long
8 run for a short slide. I think this issue will be resolved
9 before we walk out of the courtroom.

10 THE COURT: Fine.

11 MR. BRUCE: That would be wonderful.

12 THE COURT: What else?

13 MR. BRUCE: The only other thing is, with respect to
14 specifically Aafia Siddiqui --

15 THE COURT: I'm sorry. What was the metaphor?

16 MR. RICCO: Long run for a short slide.

17 THE COURT: All right.

18 MR. BRUCE: I don't know what it means either.

19 THE COURT: I have an image.

20 MR. BRUCE: Specifically with respect to Aafia
21 Siddiqui, your Honor, I understand your ruling. I am not going
22 to reargue it now.

23 THE COURT: To the extent she is relevant, you will
24 put her in through a fact witness. She is not appropriate for
25 expert. It is 403. That is how I see it.

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1 MR. BRUCE: I would ask for permission to revisit it
2 after you have seen the proof if we think it is appropriate.

3 THE COURT: Yes.

4 MR. BRUCE: Thank you.

5 THE COURT: 4:30 on Monday.

6 Thank you, gentlemen.

7 (Adjourned)

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