

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA

4 v. S(7)98CR1023

5 USAMA BIN LADEN, et al.,
6 Defendants.

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8
9 New York, N.Y.
10 May 23, 2001
11 10:30 a.m.

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Before:

HON. LEONARD B. SAND,
District Judge

1 APPEARANCES

2 MARY JO WHITE
United States Attorney for the
3 Southern District of New York
BY: PATRICK FITZGERALD
4 KENNETH KARAS
PAUL BUTLER
5 MICHAEL GARCIA
Assistant United States Attorneys
6

7 SAM A. SCHMIDT
JOSHUA DRATEL
8 Attorneys for defendant Wadih El Hage

9 ANTHONY L. RICCO
EDWARD D. WILFORD
10 CARL J. HERMAN
Attorneys for defendant Mohamed Sadeek Odeh
11

FREDRICK H. COHN
12 DAVID P. BAUGH
LAURA GASIOROWSKI
13 Attorneys for defendant Mohamed Rashed Daoud Al-'Owhali

14 DAVID STERN
DAVID RUHNKE
15 Attorneys for defendant Khalfan Khamis Mohamed
16

17 (In the robing room; classified - to be transcribed
18 under separate cover)

19 (In open court; jury not present)

20 THE COURT: The jury began deliberations at
21 approximately the 9:15 this morning, and we received a note
22 from the jury which says: Judge Sand, the jury would like to
23 request Wadih El Hage's passport which we believe is in
24 evidence, but we don't know the exhibit number. We also
25 request the following: Government Exhibit 611 letter from El

1 Hage, Government Exhibit 437A, letter from El Hage, Government
2 Exhibit 621C-13, call from El Hage satellite phone, Government
3 Exhibit 632 fax to Abu Khadija in Germany, and ID for El Hage
4 as quote investigative reporter close quote.

5 Are there any problems in identifying those?

6 MR. KARAS: No, Judge. Everything is ready to go.
7 I'm ready to give it to Mr. Kenneally and Mr. Dratel has seen
8 the exhibits.

9 THE COURT: Very well. All right. Just send it into
10 the jury.

11 MR. KARAS: In the meantime we'll have copies made
12 and we're sending the originals in.

13 THE COURT: We'll await further from the jury and
14 we'll take a five minute recess, and then I'll continue with
15 counsel on the classified matters in the robing room.

16 (Recess)

17 (Continued on next page)

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A F T E R N O O N S E S S I O N

2:15 p.m.

(In open court; jury not present)

THE COURT: A juror developed a serious dental problem. Efforts to arrange for immediate emergency treatment were not successful, and the juror said that her pain was such that she could not continue deliberating. Indeed, I saw that half of her face was considerably swollen, and so we sent the jury home. The juror said that she had every hope that she would be able to attend tomorrow.

There was no alternative. You weren't here. In any event, I didn't think there would be an objection to excusing the jury. It was clear that the juror could not continue. There is every hope that she'll be able to come to court tomorrow. But we're adjourned for the day insofar as the jury is concerned, and in about ten minutes I'll resume in the robing room with counsel.

MR. COHN: Your Honor, considering the balance of what we have to consider in the robing room you might want to inquire whether the clients wish to go back?

THE COURT: Why don't you inquire of your clients.

MR. COHN: Yes. Mr. Al-'Owhali would like to return.

THE COURT: If all of the defendants wish to return.

MR. BAUGH: Mr. Odeh would like to go back to the MCC.

1 MR. STERN: Khalfan Mohamed would like to return.

2 MR. DRATEL: Mr. El Hage would like to go back.

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1 (Pages 6449 through 6488 sealed)
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1 (Pages 6492 through 6528 sealed)

2 (In open court; jury not present)

3 THE COURT: Have the parties now had an opportunity
4 to review the preliminary instructions?

5 MR. GARCIA: Yes, your Honor.

6 THE COURT: I suppose one question which we should at
7 least articulate is the appropriateness of any preliminary
8 instructions at all. In McVeigh I think there weren't any.

9 MR. FITZGERALD: In McVeigh we had given your Honor
10 the preliminary instructions from McVeigh.

11 THE COURT: Wasn't it just two or three paragraphs?

12 MR. FITZGERALD: Yes.

13 THE COURT: It was very short. It was certainly not
14 as detailed as this. I'm inclined to favor having preliminary
15 instructions simply because this process is not something that
16 would be commonly known by a jury. Does anybody think we
17 should not have preliminary instructions?

18 MR. RUHNKE: No, your Honor.

19 MR. BAUGH: No, your Honor.

20 MR. RUHNKE: I think, your Honor, there are things
21 about the penalty phase in the federal death penalty case that
22 are just not within anyone's average knowledge. I think a
23 jury needs to have a preview of what's coming.

24 THE COURT: As a result of our conference thus far,
25 we've left unresolved the standards for determining the

1 weighing of the factors. We've left unresolved what the
2 Eighth Circuit would call the mercy instruction, that is, the
3 instruction to the jury that regardless of their weighing of
4 the factors they need not find the death penalty.

5 We've left unresolved what, if anything, the Court
6 would say in the final instructions with respect to
7 deterrence. And we've left unresolved whether there must be
8 unanimity as to the gateway aggravators not being applicable.
9 Those four items.

10 MR. RUHNKE: I'm sorry. You dropped your voice at
11 the end of the last.

12 THE COURT: The unanimity as to if the jury finds
13 that the gateway factors or the aggravators are not
14 applicable. Whether they must be unanimous as to that.

15 MR. RUHNKE: Your Honor, as to either way, is that?

16 THE COURT: Either way, that's right. In other
17 words, the Fifth Circuit held that if the jury is undecided
18 then there is, if the jury is not unanimous, then you impanel
19 a new jury. The district court held that. The Fifth Circuit
20 said no, that was not right.

21 MR. RUHNKE: No, the Fifth Circuit held that if there
22 was a hung jury there would be a retrial. United States
23 Supreme Court said, no, that's not correct.

24 THE COURT: But didn't explicitly say what does
25 happen. The Supreme Court said you didn't have to

1 affirmatively tell the jury what happened.

2 MR. RUHNKE: That's correct.

3 THE COURT: And you see I sort of dealt with the
4 issue in the preliminary instructions by not dealing with it.

5 MR. RUHNKE: Yes.

6 THE COURT: All right. So those four items we know
7 we have to address further with the aid of whatever input
8 counsel will give us on the timetable we've indicated.

9 Is there anything else with respect to the proposed
10 preliminary instructions?

11 MR. FITZGERALD: Just one issue regarding language on
12 page 7. In the top paragraph which is one sentence the fourth
13 line the government would suggest that the language be changed
14 to say, lead a juror to conclude that the defendant should not
15 receive the death penalty, instead of, be executed.

16 MR. RUHNKE: Your Honor, it's getting a little bit
17 euphemistic. We're talking about execution, that's what we're
18 talking about as the alternative to the sentence of life
19 imprisonment. It may be not nice to say it out loud, but
20 that's what we're talking about.

21 THE COURT: I think that's the only time we use that
22 language. Anything else? Anybody else?

23 MR. BAUGH: Did the Court just rule on the
24 government's suggestion?

25 THE COURT: I think we should have consistent

1 language and I think, yes, I'm adopting the government's
2 suggestion.

3 Any other comment with respect to the Court's
4 proposed preliminary instruction?

5 MR. BAUGH: There is one very small issue, your
6 Honor, on page 5. Future dangerousness we were talking about
7 this morning the first sentence is, the defendant is likely to
8 commit --

9 THE COURT: We're going to have a revision of that,
10 right?

11 MR. GARCIA: Yes.

12 THE COURT: I mean that's why we dealt earlier in the
13 day.

14 MR. BAUGH: The word likely.

15 THE COURT: The government is going to submit a
16 revised list of aggravators and defendants are going to submit
17 a revised list of mitigators.

18 All right. I think we're finished for the day.

19 MR. RUHNKE: I think so, your Honor, yes.

20 THE COURT: Except that we all wish the juror with
21 the toothache a speedy recovery. Okay, thank you.

22 You've given me telephone numbers. If we cannot the
23 sit tomorrow we'll try and get word out to you as soon as we
24 know that that's the case.

25 MR. BAUGH: Your Honor, as one of the lawyers who is

1 closest to the courtroom, would you like me to be here early?
2 I'll take the responsibility for calling my co-counsel.

3 THE COURT: Fine. Be here at 9:30. That will be
4 fine.

5 MR. BAUGH: Do you want me here before that?

6 THE COURT: In the past the jurors have been getting
7 here about ten minutes after 9.

8 MR. RUHNKE: I just noted in the past when we had a
9 juror who was sick there was apparently a mechanism for
10 contacting the Marshals to tell them they were not going to be
11 able to come.

12 THE COURT: To contact the other jurors?

13 MR. RUHNKE: I don't know if there is such a
14 mechanism.

15 THE COURT: I'll leave that to the Marshals. The
16 other thing that I've been thinking about is whether we should
17 contact the alternates and give them some clue that their
18 lives must be very much in limbo, and I suppose the clue --
19 let's think about that at the close of business tomorrow. All
20 right. Thank you all.

21 (Adjourned to 9:30 a.m., Thursday, May 24, 2000)

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