

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**UNITED STATES OF AMERICA,**

Plaintiff,

v.

No. CR 07-1244 WJ

**DONALD SCOTT TAYLOR,**

Defendant.

**DEFENDANT TAYLOR’S MOTION IN LIMINE TO TO BAR THE  
INTRODUCTION OR DISPLAY OF CRIME SCENE AND/OR AUTOPSY  
PHOTOGRAPHS OR VIDEOS OF THE DECEASED VICTIM, OR  
PHOTOGRAPHS OR VIDEOS OF THE VICTIM WHILE ALIVE**

COMES NOW, Defendant Donald Scott Taylor, by and through his counsel of record, Michael N. Burt and Brian A. Pori, respectfully moves this Court for an order barring the introduction or display of crime scene and/or autopsy photographs or videos of the deceased victim, or photographs or videos of the victim while alive, at either the trial or penalty phase of this case. Such evidence is not relevant, because the defense does not dispute that the identity of the victim of the capital offense charged in Count Two and Four of the Superseding Indictment

was Jimmy Bo Chunn, that Mr. Chunn was in fact killed, or that he died as the result of a gunshot wound. While such photographs are therefore irrelevant to any material or disputed issue, the introduction of such photos as evidence at the trial or sentencing in this case would be highly inflammatory and unduly prejudicial, and would result in unfair proceedings in this capital case.

This motion is made pursuant to the Fifth, Sixth, and Eighth Amendments of the United States Constitution and Rules 402 and 403 of the Federal Rules of Evidence.

## **BACKGROUND**

Mr. Taylor is charged in a nine count Superseding Indictment that was returned by a Grand Jury for the District of New Mexico on March 18, 2008. The Indictment specifically alleges that Mr. Taylor committed the following crimes: Count 1 charges Violent Crimes in Aid of Racketeering Activity (Conspiracy to Murder Jimmy S. "Bo" Chunn), in violation of 18 U.S.C. §1959 (a)(5); Count 2 charges Violent Crimes in Aid of Racketeering Activity (Murder of Jimmy S. "Bo" Chunn), in violation of 18 U.S.C. §1959 (a)(1) and 18 U.S.C. § 2; Count 3 charges Conspiracy to Manufacture 50 Grams and more of Methamphetamine, in violation of 21 U.S.C. § 846; Count 4 charges Using a Firearm During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §924 (c)(1)(A)(iii), (j)(1) and 18

U.S.C. § 2; Counts 5 and 6 charge Felon in Possession of a Firearm, in violation of 18 U.S.C. § 922(g)(1); Count 7 charges Possession of an Unregistered Firearm, in violation of 26 U.S.C. §§ 5845(a)(2), 5861(d) and 5871; and in Count 8 charges Possession of Stolen Firearms, in violation of 18 U.S.C. § 922(j) and 924(a)(2).

[Doc. 83] Mr. Taylor are faces the death penalty if convicted of either Counts Two or Four. Trial is currently set for October 14, 2009.

On December 21, 2008, and again on April 9, 2009, defense counsel requested in writing that the government comply with Fed. R. Crim. Proc. Rule 12(b)(4)(B). The government's first and last response dated April 27, 2009, states in pertinent part:

With regard to your Rule 12 request, please be advised that the United States has not yet settled on its witness and exhibit list, nor has it mapped out precisely what evidence it will introduce at trial and what, if any, it will forego. I interpret *United States v. Lujan*, 530 F.Supp 2d 1224(D.N.M. 2008), a case cited in your letter to support your contention that the United States cannot rely on an "open file" policy to discharge its Rule 12 obligations, to require the "United States to notify the defense if it has made a concrete decision not to introduce a specific item of evidence that is otherwise subject to a

Rule 12 disclosure. As this letter finds you some seven and one-half months prior to the start of testimony, it should come as no surprise that the United States has not eliminated any specific item of evidence as potentially helpful at trial. For that reason, you should assume that the government intends to introduce every piece of physical, documentary, photographic, audio, and video evidence that has been collected. See *United States v. Brock*, 863 F.Supp. 851,868 (E.D. Wisc. 1994) (Notice that the government intends to use all evidence discoverable under Rule 16 satisfies Rule 12, although the government may not end up using all the discoverable information in its files.). This includes, but is not necessarily limited to, the following: (1) all audio recordings involving Mssrs. Taylor, Watson, and Brown; (2) all other statements and writings, in whatever form, involving the same trio; (3) all photographs and videos of the Chunn crime scene; (4) all firearms and ammunition seized; (5) all other photos taken from whatever source, including autopsy photos; and (6) all expert testimony provided by Agent Ted Griego, Forensic Chemists Iwamoto and Ted Chapman, Mr. Steve Guerra, and Doctors Ian Paul, Sam Andrews, and Rebecca Irvine.

Based on this notice, Mr. Taylor has no idea what, if any, crime scene and/or autopsy photographs or videos of the deceased victim, or photographs or videos of the victim while alive, the government intends to offer into evidence. However, the discovery provided by the government contains literally hundreds of such photographs or videos, and many of them are shocking close-up photographs or videos of the victim's decomposed face or body. As part of this motion, Mr. Taylor requests that the Court order the government to identify which of such hundreds of photographs and videos the government intends to introduce, so that the Court can rule on their admissibility.

## **ARGUMENT**

### **I. INTRODUCTION**

Donald Scott Taylor, by counsel, moves this Court under the Fifth, Sixth and Eighth Amendments to the United States Constitution and Rules 401,<sup>1</sup> 402,<sup>2</sup> and 403<sup>3</sup> of the Federal Rule of Evidence to prohibit the government from introducing

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<sup>1</sup> Rule 401 defines “relevant evidence” as evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

<sup>2</sup> Under Rule 402, “[e]vidence which is not relevant is not admissible.”

<sup>3</sup> Rule 403 provides that, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”

or displaying inflammatory crime scene and/or autopsy photographs or videos of the deceased victim, Jimmy Bo Chunn, as well as any photograph or videos of Mr. Chunn while he was alive, at either the trial or the penalty phase in this case. The defense does not dispute the death of Mr. Chunn, the cause of his death, or the fact that Mr. Chunn was indeed the homicide victim of the capital offense charged in Counts Two and Four of the Superseding Indictment. Therefore, photographs of his body from the scene of the crime, or photographs taken during the subsequent autopsy, are not relevant to any material issue in this case. While such photographs are not relevant, they are unduly prejudicial to the defense, and are likely to inflame the jury and skew its verdict and/or sentencing determination in this capital case. The defense thus requests that any such photographs be excluded from admission as evidence at the trial and/or sentencing proceeding. *See Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968) (“An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.”). For similar reasons, any photographs or videos of Mr. Chunn while he was still alive are also irrelevant and very inflammatory and prejudicial to the defense, and should be excluded.

Accordingly, Mr. Taylor requests that this Court conduct a hearing to determine the admissibility in this case of any photograph or video of Mr. Chunn.

The only purpose served by the introduction of crime scene and autopsy photographs or videos, or photographs or videos of the victim while he was alive, will be to inflame the passions of the jury. If this occurs, Mr. Taylor will be denied his right to due process and a fundamentally fair trial and sentencing proceeding under the United States Constitution. It is beyond dispute that the Due Process Clause requires “a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) (pursuant to due process, “criminal prosecutions must comport with prevailing notions of fundamental fairness”); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) (central to concept of fundamental fairness is notion that “a defendant on trial for his life [has] the right to an impartial jury”).

## **II. PHOTOGRAPHS OR VIDEOS OF THE DEAD VICTIM’S BODY AT THE CRIME SCENE OR AT THE AUTOPSY ARE IRRELEVANT AND PREJUDICIAL TO THE DEFENSE.**

Recognizing that “there is no right which is more essential to an accused’s defense than the right to a fair trial free from prejudice,” *Tobler v. State*, 688 P.2d 350, 353 (Okla. Cr. App. 1984) (gruesome photos of murder victims’ bodies should have been excluded due to danger of unfair prejudice and lack of probative

value, where defendant admitted to the killings, medical examiner testified as to cause of death, and defendant stipulated to everything shown in photos), many jurisdictions have acted to safeguard the integrity of the jury's determination of the facts by restricting the trial court's acceptance of inflammatory photographs that, as in this case, serve little purpose but to poison the jury. *See e.g. Commonwealth v. Rogers*, 401 A.2d 329, 330 (Pa. 1979) (reversing conviction on grounds that single photograph of victim at crime scene, out of series of four, was so gruesome and inflammatory that its use "denied [the defendant] a constitutionally required fair and objective determination of his guilt of the crimes charged").

While the government is entitled to prove its case, the prosecution's use of potentially gruesome photographs or videos of the deceased victim's body taken at either the crime scene or during the autopsy will merely serve to impede the jury from rendering a fair and impartial verdict. Such photos are not a necessary part of the prosecution's case and serve no purpose other than to inflame the jury, and should therefore be excluded at both the trial and penalty phase. *See Spears v. Mullin*, 343 F.3d 1215, 1228-29 (10<sup>th</sup> Cir. 2003) (reversing death sentence because of erroneous admission of gruesome crime scene photographs of dead victim's body at penalty phase; "[e]ven if the photographs were minimally relevant to the [alleged aggravating factor], the photographs' prejudicial effect outweighed their



probative value” and therefore “deprived [the defendants] of [their] constitutional rights to a fundamentally fair sentencing proceeding”); *see also State v. Lafferty*, 749 P.2d 1239, 1256-57 (Utah 1988) (“[T]here is no legitimate need for the gruesome photographs of a homicide victim’s corpse that prosecutors usually seek to introduce.”).

Mr. Taylor’s argument that photographs or videos of the dead victim are inadmissible when they do not relate to any disputed issue of fact is supported by the Seventh Circuit’s decisions in *Gomez v. Ahitow*, 29 F.3d 1128, 1139 (7<sup>th</sup> Cir. 1994) and *Ferrier v. Duckworth*, 902 F.2d 545, 548-49 (7<sup>th</sup> Cir. 1990). In each case, the Seventh Circuit noted that the district judge had erred in admitting at trial photographs of the deceased victim (although in neither habeas case was the error deemed to be reversible). In *Gomez*, for instance, the defendant was convicted of armed robbery and murder. *See* 29 F.3d at 1129. The trial court admitted photographs of the victim’s body at the crime scene that depicted the gunshot wounds from which he died. *See id.* at 1139. In his habeas petition, the defendant claimed admission of these photographs violated his constitutional right to due process and his right to a fair trial, while the government contended the photographs were properly admitted because they were “corroborative of testimonial evidence and were probative of the circumstances of [the victim’s]

death.” *Id.* Because neither the fact nor the cause of the victim’s death were at issue, the Seventh Circuit subsequently found that the trial judge erred in admitting the photos, emphasizing that the ““only conceivable reason for placing them in evidence was to inflame the jury[.]”” *Id.* at 1139 (quoting *Ferrier*, 902 F.2d at 548); *see also Ferrier*, 902 F.2d at 548 (color photographs showing victim’s blood were not relevant to any issue in murder case because the killing was not denied; only conceivable reason for placing photos into evidence was to inflame jury against defendant); *Fuller v. Cox*, 315 F. Supp 867, 870 (W.D. Va. 1970) (“If the principal effect of photographs is to inflame the jurors against the defendant because of the horror of the crime, the court should not permit them to be introduced as evidence.”); *United States v. Rezaq*, 134 F.3d 1121, 1138 (D.C. Cir. 1998) (“[P]hotographs of gore may inappropriately dispose a jury to exact retribution.”); *United States v. Rose*, 104 F.3d 1408, 1414 (1<sup>st</sup> Cir. 1997) (trial court abused its discretion by admitting photo of defendant pointing gun at head of another person); *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978) (photograph of deceased victim is inadmissible when its probative value is outweighed by danger of inflaming jury; photo was admissible in this case, however, because “[o]ne of the principal issues [in the case] was the cause of death”).

In addition to barring the admission of irrelevant and inflammatory photographs or videos of the dead victim at the crime scene, courts also generally condemn the presentation of autopsy photographs or videos when the cause of death is not in dispute. *See, e.g., People v. Landry*, 368 N.E.2d 1334, 1336 (Ill. App. 1977) (reversing conviction based on trial court’s abuse of discretion in admitting autopsy photographs that were not necessary to state’s case; emphasizing that “[p]hotographs of a deceased victim, taken during the autopsy, are highly prejudicial because they tend to arouse the passions of the jury”); *People v. Turner*, 169 N.W.2d 330, 335 (Mich. App. 1969) (reversing conviction based on erroneously admitted autopsy photographs, finding that photographs were unnecessary to aid pathologist in explaining his findings; noting that cause of death was undisputed and that “fairness to an accused demands that the photograph be restricted to that which is reasonably necessary to furnish visual aid to the jury in determining the question of fact presented”); *People v. Fierer*, 503 N.E.2d 594, 599 (Ill. App. 1987) (autopsy photographs “add nothing to a trial unless the cause of death is at issue and the photos are necessary to supplement the medical examiner’s testimony”; therefore, “trial court abused its discretion in admitting the autopsy photographs in light of their highly prejudicial content and slight relevance, if any, to a material issue in the case”); *State v. Boyd*, 532 P.2d 1064,

1068 (Kan. 1975) (reversing conviction in part based on trial court’s error in admitting autopsy photographs, particularly one excessively gruesome picture of victim’s body).

The danger of undue prejudice is no more important than in a death penalty case such as this one. *See Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (citations omitted) (because “death is a different kind of punishment from any other which may be imposed in this country” it is “of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”); *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (when determining whether admission of evidence at penalty phase was violative of Constitution, court considers whether admission of evidence “so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process”);<sup>4</sup> *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10<sup>th</sup> Cir. 1999) (examining “whether

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<sup>4</sup> *Cf. Beck v. Alabama*, 447 U.S. 625, 638 (1980) (“To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.”) (quotation and footnote omitted); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1968) (capital cases must involve procedures that replace arbitrariness with “objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death”).

the admission of the photographs rendered the proceedings fundamentally unfair”); *see also Spears*, 343 F.3d at 1228 (reversing death sentence because of erroneous admission of autopsy photographs at penalty phase); *State v. Poe*, 441 P.2d 512, 515 (Utah 1968) (reversing conviction and death sentence solely based on erroneous introduction of color autopsy slides having no probative value because material facts had been established through undisputed testimony; noting that “[t]he only use of the slides from the prosecution’s standpoint was to arouse the emotions of the jury so that they would not recommend life imprisonment” and that “[t]he slides could very well have tipped the scales in favor of the death penalty”) (footnote omitted). In this capital case, photographs or videos of the victim, Mr. Chunn, are not probative of any issue in dispute, and will surely infect the jury’s deliberations at trial and/or sentencing. Accordingly, such photos should be excluded under the Federal Rules of Evidence and the United States Constitution.

### **III. PHOTOGRAPHS OF THE VICTIM WHILE HE WAS ALIVE ARE IRRELEVANT AND UNDULY PREJUDICIAL, AND SHOULD ALSO BE EXCLUDED.**

To the extent that the government will seek to display photographs or videos of Mr. Chunn taken during his lifetime, the defense objects to the introduction of these photographs as well. While there may be times when a photograph or video

of the victim when he or she was alive will be relevant and admissible to prove the identity of the deceased, in this case there is no dispute that the homicide victim was in fact Jimmy Bo Chunn. Therefore, it is unnecessary and unduly prejudicial to admit any photos of Mr. Chunn while he was still alive. *Cf. United States v. Joe*, 8 F.3d 1488, 1499 (10<sup>th</sup> Cir. 1993) (photos of homicide victims taken while alive are relevant on issue of identity; emphasizing that defense “never stipulated to the identity of the victims” and therefore “the government was not relieved of its burden to prove identity and the photographs are probative of the victims’ identity”); *see Valdez v. State*, 900 P.2d 363, 381 (Okl. Cr. App. 1995) (photographs of homicide victims taken during life “should be admitted to the jury only under very limited circumstances”; such photos “are inadmissible unless they are relevant to some material issue and their relevancy outweighs the danger of prejudice to the defendant”; “where there is no purpose in introducing such pictures into evidence, such admission invokes the sympathy of the jury and constitutes error”) (quotation and footnote omitted); *Boutwell v. State*, 659 P.2d 322, 326 (Okl. Cr. App. 1983) (holding that photos showing victim while alive were not relevant because victim’s identity was not at issue); *People v. Bonin*, 765 P.2d 460, 484 (Cal. 1989) (trial court erred in admitting photographs of murder victims while alive and testimony establishing foundation for photos, since only

facts of consequence proven by such evidence – that victims were human beings and alive prior to homicides – were not disputed by defendant); *Davie v. Mitchell*, 291 F. Supp.2d 573, 602 (N.D. Oh. 2003) (pictures of murder victims while they were alive “had questionable relevance”).

In this case, any photograph of the victim while he was alive is not relevant to any material or disputed issue, and should therefore be excluded under the Federal Rules of Evidence and the Constitution. The determinations facing the jury at trial and/or sentencing in this case will not be furthered by the display of inflammatory and irrelevant photographs or sympathetic portrayals of the victim while he was alive. The only purpose of such evidence at trial would be to inflame and incite the jury – to insure that the jurors would express a quite natural revulsion at a horrific spectacle and would return verdicts of guilt on that basis.

### **CONCLUSION**

The introduction of irrelevant and extremely prejudicial photographs or videos of the victim in this case would render Mr. Taylor’s trial and/or sentencing unreliable in violation of the Eighth Amendment and fundamentally unfair under the Fifth and Sixth Amendments to the United States Constitution. For the reasons set forth above, this Court should exclude any photograph or videos of the victim that the government seeks to admit at trial and/or sentencing in this case.

Government counsel advised undersigned counsel that the government objects to this motion.

Dated: July 27, 2009

Respectfully Submitted,

By: Submitted Electronically 7/27/09

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of July, 2009, I served a true and correct copy of this **DEFENDANT TAYLOR'S MOTION IN LIMINE TO TO BAR THE INTRODUCTION OR DISPLAY OF CRIME SCENE AND/OR AUTOPSY PHOTOGRAPHS OR VIDEOS OF THE DECEASED VICTIM, OR PHOTOGRAPHS OR VIDEOS OF THE VICTIM WHILE ALIVE** by CM/ECF electronic filing, which caused a copy of the pleading to be delivered electronically on counsel for the United States at the address listed below:

Gregory Fouratt, Esq., United States Attorney  
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/s/ Submitted Electronically 7-27-09  
Michael N. Burt