



1 [p. 2] taunts of the security guard, a confrontation ensued. According to the statements provided  
2 by the Codefendants to the police and other witnesses,<sup>1/</sup> Repeki and Magofna ran up the stairs and  
3 cornered Valerio who was in possession of mace and a pair of scissors. Basa followed.

4 ¶4 In a statement provided to the police, Basa indicated that when he reached the top of the  
5 stairs, he saw Magofna holding the security guard and witnessed the security guard stabbing  
6 Magofna with the scissors. Basa claimed to have kicked the security guard after he attacked  
7 Magofna. After the security guard stabbed Magofna, Magofna and Basa reported that Repeki  
8 hit the security guard in the head with a heavy metal ashtray. Although Magofna also admitted  
9 striking the security guard in the back of the head with the ashtray, Basa claimed not to have  
10 witnessed it. When the security guard fell, the three ran away from the scene. The security guard  
11 later died from injuries sustained as a result of a blow to the head.

12 ¶5 In addition to his statements, Magofna also accompanied DPS personnel to the scene of  
13 the crime where, the Government contends, DPS reenacted the circumstances leading up to and  
14 following the homicide according to a scenario described by Magofna. Contrary to the statements  
15 provided by Magofna and Basa, however, the videotape prepared by DPS and narrated by Captain  
16 Delbert Sablan depicts a distinctly different version of events. Contrary to the statements  
17 provided by Magofna and Basa, the videotape makes no mention of the stabbing incident or the  
18 mace, and does not track the sequence of events recounted in the statements. The videotape also  
19 repeats the incident from several vantage points to allow police officers to reenact the crime. In  
20 contrast to the actual sequence of events, moreover, the reenactment was filmed in the daytime.  
21 Thus the expressions, facial gestures, and the like are portrayed more clearly on the videotape  
22 than they arguably could have been seen by the actual witnesses to the crime.

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24 <sup>1/</sup> Statements submitted by the Defendant for *in camera* review include the transcript of a taped investigative  
25 interview of Thomas Ch. Basa(March 12, 2000); a memorandum from Det. Charley K. Patris to Sgt. Joe Aldan  
26 recounting an interview with Art Norita; a memorandum from Capt. Delbert Sablan to file dated October 13, 1999,  
27 concerning a confidential informant's conversations with Thomas Basa; a statement from Det. Patris dated October 20,  
28 1999 concerning a confidential informant's conversation with Tom Basa; a report prepared by Capt. Sablan and dated  
March 10, 2000, concerning an interview with Anthony B. Magofna; a summary interview dated March 12, 2000  
between Det. Dewain Stephen and Thomas Ch. Basa; a handwritten Q & A dated March 4, 1999 of an interview with  
Anthony B. Magofna. Also submitted was Volume I of a transcript of police interviews with Eugene B. Repeki, Jr.,  
Anthony B. Magofna, and Thomas Ch. Basa dated March 9, 2000 and March 12, 2000.

1 ¶6 In omitting any reference to the scissors and mace, moreover, the videotape depicts only  
2 the critical facts as they will be argued by the Government. Therefore, the reenactment, whether  
3 admitted into evidence or used for illustrative purposes only, would have the effect of  
4 preconditioning the minds of the jurors to accept the Government's theory. *See French v. City of*  
5 *Springfield*, 65 Ill.2d 74, 357 N.E.2d 438, 442 (1976). Because it appears, that, under the  
6 circumstances, the pictorial representation would tend to become an "extra witness" against the  
7 Codefendants, whose testimony is neither entirely fair nor accurate, the court considers whether the  
8 video reenactment of the crime scene should be seen by the jury.

### 9 III. ISSUE

10 ¶6 Whether a videotaped recreation of the crime scene and selected allegedly criminal  
11 activities, portrayed by "actors" and narrated by DPS personnel, should be admitted into evidence  
12 and/or displayed to the jury.

### 13 IV. ANALYSIS

14 ¶7 Photographs, audio and video recordings, and motion pictures are demonstrative evidence,  
15 defined as "evidence addressed directly to the senses without intervention of testimony."<sup>2/</sup> Like  
16 other evidence, demonstrative evidence can be classified as either direct or circumstantial. It also  
17 may be classified as "real" evidence if it plays a direct part in an incident leading to trial, or  
18 illustrative evidence if offered to make other evidence more comprehensible to the trier of fact.  
19 However classified, the admissibility of a photograph, as well as an audio and video recording,  
20 lies within the discretion of the trial court which may consider its length, relevance, and  
21 prejudicial effect. *See generally* 2 J.W. Strong, MCCORMICK ON EVIDENCE § 214 (5th ed.1999).

22 ¶8 The admissibility of motion pictures purporting to reenact a crime has not been previously  
23 addressed by the Commonwealth courts. Pictures and video recreations have, however, been held  
24 admissible under proper safeguards by the courts of other jurisdictions. Because a motion picture  
25 artificially recreating an event may unduly accentuate certain phases of the happening, and because  
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27 <sup>2/</sup> *See* BLACK'S LAW DICTIONARY 389 (5th ed. 1979).  
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1 this evidence makes a forceful impression upon the minds of jurors, it should be received with  
2 caution. See *Cornell v. State*, 265 Ga. 904, 905(2), 463 S.E.2d 702 (1995). In *Eiland v. Georgia*,<sup>3/</sup>  
3 an early case dealing with the admissibility of a "posed movie" reenacting a crime, the Georgia  
4 Court of Appeals rejected the film as evidence because it differed from reality in substantial ways  
5 and became an extra witness for the state. The court explained: "movies which are posed, which  
6 are substantially different from the facts of the case, and which because of the differences might  
7 well be prejudicial and misleading to the jury, should not be used, and this is especially true  
8 where the situation or event sought to be depicted is simple, the testimony adequate, and the  
9 picture adds nothing except the visual image to the mental image already produced." *Id.*, 265 Ga.  
10 at 429, 203 S.E.2d 619. "[Where] videotapes ... do not portray original facts in controversy, but  
11 rather represent one party's staged reproduction of those facts[,] ... the extreme vividness and  
12 verisimilitude of pictorial evidence is truly a two-edged sword. For not only is the danger that the  
13 jury may confuse art with reality particularly great, but the impressions generated by the evidence  
14 may prove particularly difficult to limit or, if the film is subsequently deemed inadmissible, to  
15 expunge by judicial instruction." 2 MCCORMICK ON EVIDENCE § 214 at 19 (4th ed. 1992).<sup>4/</sup>

16 ¶9 Given these difficulties, courts have required parties seeking to use a video reenactment  
17 to show that: (1) the reenactment is a fair and accurate representation of the event in question; (2)  
18 the reenactment was filmed under conditions substantially similar to those existing at the time of  
19 the event; and (3) the recording's visual image adds something to the mental image already

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21 <sup>3/</sup> 130 Ga.App. 428, 203 S.E.2d 619 (1973).

22 <sup>4/</sup> In *Lopez v. Texas*, 651 S.W.2d 413 (Tex. app. 1983), the Texas court of appeals held that the admission of a  
23 video recording depicting the police officers' reenactment of a crime scene was reversible error. The court reasoned:

24 While videotape recreations of criminal activities may be acceptable in some  
25 jurisdictions, the concept of recreating human events with the use of actors is a course of  
26 conduct that is fraught with danger. The general appearance of an actor, his facial  
27 expression or slightest gesture whether intended or not may sway a juror who has listened  
28 to lengthy testimony. The danger of jurors branded with television images of actors, not  
testimony, is too great to ascertain. No court instruction could remove highly prejudicial  
evidence of a re-enacted rape or murder if we establish this precedent.

651 S.W.2d at 435.

1 produced by oral testimony, due either to the event's complexity or the inadequacy of the  
2 testimony. See *Pickren v. Georgia*, 269 Ga. 453, 500 S.E.2d 566 (1998); *People v. Rodriguez*,  
3 8 Cal.4th 1060, 1114, 36 Cal.Rptr.2d 235, 260 (1994).

4 ¶10 Not only has the Government failed to lay a proper foundation for admissibility but it has  
5 also failed to respond to the Defendant's objections of hearsay. The videotape does not include  
6 the participation of any defendant, nor does any defendant serve as a narrator. The narration does  
7 not fall within any exception to the hearsay rule applicable to this case, and no effort was made  
8 to qualify the videotape as a business record.

9 ¶11 Given the discrepancies between the videotape and the Defendants' statements, the court  
10 therefore finds the videotape to be highly prejudicial and of questionable probative value.  
11 Accordingly, the court will not permit the video recording to be admitted into evidence, nor will  
12 it allow the video recording to be played for the jury.

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14 SO ORDERED on this 8<sup>th</sup> day of August, 2001.

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17 /s/ \_\_\_\_\_

18 TIMOTHY H. BELLAS, ASSOCIATE JUDGE  
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