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18 **UNITED STATES DISTRICT COURT**  
19 **CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION**

20 UNITED STATES OF AMERICA,

21 Plaintiff,

22 v.

23 JOSE LUIS NAZARIO, JR.,

24 Defendant.

Case No. ED CR 07-127 SGL

**MOTION FOR JUDGMENT OF  
ACQUITTAL**

Judge Stephen G. Larson

Action Filed: 9/4/07

25 NOW COMES THE DEFENDANT, JOSE LUIS NAZARIO, and  
26 respectfully requests that this Court enter a judgment of acquittal based on the  
27 government’s failure to introduce sufficient evidence of the charges alleged.  
28

1 **I. INTRODUCTION**

2 Jose Nazario has been charged with manslaughter and assault with a deadly  
3 weapon – two crimes that require the government to identify a specific victim.  
4 However, the government has utterly failed to prove that any of the alleged victims  
5 are actually deceased, nor has the government attached a name, or even a sufficient  
6 physical description, to any of the alleged victims. As a result, Jose Nazario is  
7 entitled to a judgment of acquittal.

8 The government’s lack of proof in this case is unprecedented in that there is  
9 no reported case nationwide, State or Federal, where, like here, a defendant was  
10 prosecuted for killing another human being 1) without a corpse; and 2) without an  
11 identified victim or any physical evidence. Such a failure of victim identification  
12 creates two problems:

13 (1) Without producing a body, a name, or any testimony that any  
14 specific individual is missing, the government cannot prove that any  
15 alleged victim is deceased, rendering the manslaughter charge  
16 insufficient on its face; and

17 (2) Failure to identify the victim creates a severe double jeopardy  
18 problem. Without a sufficient victim identification Sgt. Nazario is  
19 exposed to a future charge based on the same crime – a situation that  
20 violates Sgt. Nazario’s Fifth Amendment rights.

21 For these reasons, Sgt. Nazario respectfully urges the Court to enter a  
22 judgment of acquittal in this case.

23 **II. ARGUMENT**

24 **A. Legal Standard**

25 A defendant is entitled to a judgment of acquittal if the evidence produced  
26 against him is insufficient to sustain a conviction. Fed. R. Crim. Pro. 29(a); *United*  
27 *States v. Hazeem*, 679 F.2 d 770, 772, (9<sup>th</sup> Cir 1982). A judgment of acquittal  
28 should be granted where “there is no interpretation of the evidence that would allow

1 a reasonable jury to find the defendant guilty beyond a reasonable doubt.” *United*  
2 *States v. Gomez*, 165 F.3d 650, 654 (8<sup>th</sup> Cir. 1999); *see also United States v.*  
3 *Alarcon-Simi*, 300 F.3d 1172, 1176 (9<sup>th</sup> Cir. 2002) (relevant question is whether,  
4 after viewing the evidence in the light most favorable to the prosecution, any  
5 rational trier of fact could find the essential elements of the crime beyond a  
6 reasonable doubt). *United States v. Rojas*, 554 F.2d 938, 943 (9<sup>th</sup> Cir. 1977);  
7 *United States v. Dior*, 671 F.2d 351, 357 (9<sup>th</sup> Cir. 1982).

8 **B. Argument**

9 **1. The government has failed to prove that any of the**  
10 **alleged victims is “deceased”**

11 “It is a most elementary rule of law that in a murder case the prosecution  
12 must not only prove that the victim named in the specification is dead but also that  
13 the act or omission of the accused caused the death of that particular person.”  
14 *United States v. Robins*, 7 C.M.R. 314, 320 (ACMR 1953) (*citing Cooper v. State*,  
15 26 Ala. App. 326 (1935); *Branch v. State*, 94 Fla. 286 (1927); *State v. Smith*, 160  
16 La. 503 (1926); *Thomas v. State*, 33 Ga. App. 677 (1925); *Bolden v. State*, 140  
17 Tenn. 118 (1918)). Thus, at its most basic level, a manslaughter charge rests on the  
18 allegation that the victim is deceased and, absent such proof of death, any  
19 manslaughter charge must fail. In this case the government has failed to present  
20 evidence that any of the alleged victims is deceased.

21 The lack of physical evidence in this case is striking. Most notably, the  
22 government has not produced any corpses, photos of the deceased, or autopsy  
23 reports. In a “typical” manslaughter case, the jury is presented with photos of the  
24 deceased either at the crime scene or on the autopsy table. Even if a corpse is never  
25 recovered, the jury is still presented with photos of the alleged missing person so  
26 that the jury can identify the specific victim of the crime. In this case, however, the  
27 jury was not presented with a photo of any victim, dead or alive, let alone a photo  
28 taken at an autopsy.

1           Moreover, the government has failed to present any circumstantial evidence  
2 that the victims are deceased. There has been no testimony, from anyone, that any  
3 specific individual was alive on Nov. 9, 2004, and deceased on Nov. 10, 2004, as a  
4 result of the defendant's actions.<sup>1</sup> The jury has not heard the testimony of any of  
5 the victims' family members, friends, colleagues or even acquaintances to testify  
6 that they are missing. Therefore, no reasonable juror could conclude that any of the  
7 alleged victims is even a missing person, let alone a deceased person.

8           Finally, the jury has not heard any evidence regarding even the most  
9 rudimentary examination of the alleged corpses. No one examined the alleged  
10 victims at the scene to determine the extent of their wounds or check their vital  
11 signs. The only evidence the government has offered is the testimony of several  
12 Marines who saw bodies on the floor – yet none of those Marines performed any  
13 examination of the bodies, such as a check for a pulse. Simply put, there is no  
14 evidence, whatsoever, that any of the four alleged victims are not currently alive  
15 and well, and no evidence that a reasonable juror could rely on to find, beyond a  
16 reasonable doubt, that any of the alleged victims is deceased.

17                           **2. The government has failed to sufficiently identify any**  
18                           **of the alleged victims**

19           The government has also failed to offer evidence, beyond the name John  
20 Doe, from which a juror could specifically identify any of the alleged victims. This  
21 lack of evidence prevents any reasonable juror from reaching a guilty verdict in this  
22 case for two reasons:

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26                           <sup>1</sup> See *People v. Combs*, 22 Cal.Rptr.3d 61 (Cal 2004) (evidence of murder victim's sister's identification of  
27 victim was relevant to prove that victim was a human being who had been alive before the alleged criminal act and  
28 was dead afterwards). The government has not offered any such proof in this case and cannot show that any of the  
alleged victims were specifically alive before the alleged event and deceased afterwards.

1                   (a)   **Lack of victim identification results in an**  
2                                   **insufficient indictment and, in turn, insufficient**  
3                                   **proof at trial**

4            “It is well settled in both military and civil law that failure to establish  
5 identity, by name or other description, of a victim of a homicide alleged, is fatal  
6 error.” *United States v. Pribis*, 1 C.M.R. 734, 737 (AFCMR 1951); *see also United*  
7 *States v. Wells*, 1 C.M.R. 279, 280 (ACMR 1951); *United States v. Joe*, 8 F.3d  
8 1488, 1499 (10<sup>th</sup> Cir. 1993 (government has the burden of proving the identity of  
9 the alleged victims); *United States v. Pettigrew*, 468 F.3d 626, 638 (10<sup>th</sup> Cir. 2006)  
10 (cert den. 127 S.Ct 1343 (2007)); 26 Am Jur, Homicide § 250. It is essential to the  
11 defendant’s ability to prepare a defense that a victim be sufficiently identified. *See*  
12 *James v. Borg*, 24 F.3d 20, 24 (9<sup>th</sup> Cir. 1994) (citing *Gault v. Lewis*, 489 F.3d 993,  
13 1003 (9<sup>th</sup> Cir. 2007) (to determine whether defendant had adequate notice, Court  
14 looks to indictment, the purpose of which is to provide sufficient detail to defendant  
15 to prepare a defense); *U.S. v. Dailey*, 37 M.J. 1078 (NMCMR 1993) (to determine  
16 if variance in victim identification prejudiced the defense, Court must determine  
17 whether defense could adequately prepare for trial and whether accused is fully  
18 protected for prosecution for the same offense); *People v. Tostado*, 416 N.E.2d 353,  
19 357 (Ill. App. 1981) (“the identity of the victim as charged in the indictment must  
20 be proved by the State so that a defendant can prepare his defense and also to avoid  
21 double jeopardy problems”).

22            Stated another way, an indictment “must be so certain as to the party against  
23 whom the offense was committed that the person indicted may know and  
24 understand whom he or she is charged with having killed.” *Roberts v. State*, 25  
25 Ala.App. 477, 478 (1933); *see also Hutson v. State*, 202 Md. 333, 338 (1953) (“the  
26 rule is that the name of the person injured by the offense charged must be stated,  
27 and a failure to state it, or a material variance between the statement and the proof,  
28 is fatal (*quoting* 2 Wharton, Criminal Evidence (11th Ed.) sec. 1048, p. 1845)).

1 Unlike the majority of cases to address this issue, where there was at least an  
2 attempt to identify the victim, in this case there was no attempt to even *describe* the  
3 victim, resulting in very real prejudice to the accused and the inability for any  
4 reasonable juror to conclude that the defendant killed a particular individual.

5 *U.S. v. Schreiber*, 16 C.M.R. 639, 660 -661 (AFCMR 1954) and *U.S. v.*  
6 *Robins*, 7 C.M.R. 314 (ACMR 1953) are both illustrative of the issues facing this  
7 Court. In *Schreiber*, the Court noted that an indictment is not defective in failing to  
8 set out the name of the victim, provided that the victim is sufficiently described to  
9 particularize the offense charged *Id.* (*citing* 27 Amer Jur Indictments &  
10 Informations, §§ 80, 82; 42 CJS Indictments & Informations, §142a; 26 Amer Jur  
11 Homicide, § 250). The Court found the indictment sufficient in *Schreiber* because  
12 the proof established that the victim was “an Oriental male human being” and the  
13 court had photographs of the victim, the particular injuries sustained by the victim,  
14 and evidence of the locality and circumstances of the incident. *Id.* However, the  
15 government in this case has presented none of the evidence provided to the Court in  
16 *Schreiber*. The jury has not been presented with photos of the deceased, nor have  
17 they been instructed about the nature of the alleged injuries. Furthermore, the  
18 evidence regarding the locality and circumstances of the incident serves only to add  
19 additional confusion as to the identity of the alleged victims. Unlike *Schreiber*,  
20 where the location of the parties added credibility to the victim identification, here  
21 the alleged incident took place in Fallujah, Iraq – a city without residents located in  
22 the middle of a war zone. There is simply no way for the government to prove the  
23 nationality of the alleged victims, let alone their names.

24 In *Robins*, the record at trial showed that one of the accused, Wood, fired a  
25 rifle at a Korean, described by witnesses only as “a Korean fellow” or an “ROK  
26 soldier.” *Robins*, 7 C.M.R. at 322. The only evidence supplying a link in identity  
27 between the person who died and the person shot by the accused were the pretrial  
28 statements of the co-defendant, who stated that the alleged victim and Wood knew

1 each other and that the witness “believed” that the man he saw at the hospital was  
2 the victim. The Court held that guilty verdicts could not be approved on such  
3 evidence because the record “is far too equivocal to say that it identified beyond a  
4 reasonable doubt the person whom the accused Wood shot on the previous day or,  
5 for that matter, any certain individual among the thousands of ROK soldiers.” *Id.*  
6 at 320. Evidence of the alleged victims in this case is similarly lacking, and is  
7 actually *weaker* than the evidence considered in *Robins*. In *Robins*, the indictment  
8 did allege the name of a specific victim, and the testimony at trial referred to the  
9 identification of specific individuals linked to the defendant. By contrast, there is  
10 no name attached to any alleged victim in this case, nor has any witness pointed to a  
11 picture or description of any of the alleged victims. Thus, as the Court in *Robins*  
12 noted, there has been no identification of any specific individual Sgt. Nazario  
13 allegedly shot, or any certain individual among the thousands of enemy combatants  
14 in Iraq in 2004. Due to this lack of evidence no reasonable juror could conclude,  
15 beyond a reasonable doubt, that Sgt. Nazario is guilty of killing any particular  
16 individual.<sup>2</sup>

17 (b) **The government’s lack of evidence violates Sgt.**  
18 **Nazario’s Fifth Amendment rights.**

19 The Fifth Amendment to the United States Constitution forbids “any person  
20 be subject for the same offense to be twice put in jeopardy of life or limb.” The  
21 double jeopardy clause protects against a second prosecution for the same offense  
22 after either an acquittal or conviction. *North Carolina v. Pearce*, 395 U.S. 711, 717  
23 (1969). In order to sufficiently protect the Fifth Amendment rights of a defendant,  
24 an indictment must provide sufficient information to enable the defendant to  
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26 <sup>2</sup> See also *Wells*, 1 C.M.R. at 280 (holding specification that alleged manslaughter of an unknown Korean  
27 national constitutes “a failure of proof establishing the identity of the victim alleged. . .”). The same rationale applies  
28 to this case – the government alleges the manslaughter of unknown males from unknown countries, making a  
sufficient victim identification impossible.

1 investigate his case and dispute the charges against him. *United States v.*  
2 *Tsinhnahiginnie*, 112 F.3d 988 (9<sup>th</sup> Cir. 1997). “To hold otherwise would, in effect,  
3 require the accused to defend himself against a charge, not only of the killing of a  
4 victim named or otherwise described in the specification, but also of the homicide  
5 of any other person occurring at about the time and places alleged.” *Pribis*, 1  
6 C.M.R. at 737.

7 The constitutional requirement that the accused be entitled to a description of  
8 the particular act alleged to have been committed is not a mere technicality. The  
9 purposes served by the constitutional requirement include “(i) to put the accused on  
10 notice of what he is called upon to defend by characterizing and describing the  
11 crime and conduct; (ii) to protect the accused from a future prosecution for the  
12 same offense; (iii) to enable the defendant to prepare for his trial; (iv) to provide a  
13 basis for the court to consider the legal sufficiency of the charging document; and  
14 (v) to inform the court of the specific crime charged so that, if required, sentence  
15 may be pronounced in accordance with the right of the case.” *Ayre v. State*, 291  
16 Md. 155, 163-64, 433 A.2d 1150 (1981). The *Ayre* Court went on to elaborate on  
17 the significance of proper charging:

18 We deal here not with hypertechnical rules of pleading which plague  
19 unwary prosecutors and free fortuitous defendants, but rather a  
20 requirement imposed upon the State as a constitutional minimum. As  
21 was stated by Chief Judge Marbury for this Court over thirty-five years  
22 ago: To the lay mind all of these things are technicalities which should  
23 not interfere with prosecution for a crime. This point of view is based  
24 upon an assumption, which may be true in many cases, that the party  
25 charged knows what he is charged with, and therefore he is not harmed  
26 if the crime is not very definitely defined. The purpose of requiring an  
27 indictment, however, and of requiring that indictment to set  
28 specifically the crime charged, is to protect the innocent man who may



1 be wrongfully charged and who may know nothing whatsoever about  
2 the crime... *An objection made on the ground that an indictment fails*  
3 *in these particulars is not a technical objection; it is one that goes to*  
4 *the very heart of the law, and it must be seriously dealt with.*

5 *Id.* at 165-66 (emphasis added); *see also U.S. v. Dailey*, 37 M.J. 1078  
6 (NMCMR 1993) (to determine if variance in victim identification prejudiced the  
7 defense, Court must determine whether defense could adequately prepare for trial  
8 and whether accused is fully protected for prosecution for the same offense).

9 In this case, the insufficiency of the indictment, followed by the insufficient  
10 evidence at trial, creates a severe double jeopardy problem for Sgt. Nazario. By  
11 failing to identify the alleged victims, the government has made it impossible for  
12 Sgt. Nazario to fully prepare his defense. For example, Sgt. Nazario was unable to  
13 investigate whether any of the alleged victims are actually deceased because,  
14 without such basic information as their names or country of residence, such an  
15 investigation is akin to a search for a needle in the world's largest haystack. In  
16 addition, the lack of evidence regarding the alleged victims will make it impossible  
17 for Sgt. Nazario to protect himself if, ten years from now, the government seeks to  
18 bring fresh charges relating to the killing of a "John Doe" in Fallujah. Sgt. Nazario  
19 is without either a specific charging document or jury verdict with which he can  
20 assert, "I have already faced this charge." The John Doe victims are, sadly, exactly  
21 as described – anonymous victims who may or may not be from Iraq, who may or  
22 may have been in Fallujah, and who may or may not be deceased. This flies in the  
23 face of the specificity requirement.

### 24 **III. CONCLUSION**

25 Based on the evidence submitted at trial, no rational juror could find, beyond  
26 a reasonable doubt, that Sgt. Nazario committed the crimes alleged. The  
27 government has failed to produce evidence demonstrating that any of the alleged  
28 victims is deceased, nor has the government identified any alleged victim with the



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