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MAY 15 2003
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,)
)
 v.)
)
 ZACARIAS MOUSSAOUI,)
 a/k/a "Shaqil")
 a/k/a "Abu Khalid")
 al Sahrawi, ")
)
 Defendant.)

Criminal No. 01-455-A

UNDER SEAL

Redacted

MEMORANDUM OPINION

I. Background

On April 14, 2003, pursuant to Section 5(c) of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, the United States Court of Appeals for the Fourth Circuit remanded this case to afford the Government "an opportunity to propose substitutions" for the videotaped Fed. R. Crim. P. 15 deposition [REDACTED] ordered by this Court on January 31, 2003.¹ The Fourth Circuit specifically directed this Court

¹ As explained in our Memorandum Opinion of March 10, 2003, in the absence of any alternative proposals from the United States, the Court concluded that a Fed. R. Crim. P. 15 deposition [REDACTED] fairly balanced the United States' national security concerns against the defendant's Fifth and Sixth Amendment rights. At the same time, the Court denied defense requests for access to and to compel the trial appearances [REDACTED]

In March, 2003, Moussaoui filed a motion requesting similar access to Khalid Sheikh Mohammed (a/k/a "Mukhtar"), a more recently captured high-ranking al Qaeda operative and purported "mastermind" of the September 11 plot. Although the Court has stayed resolution of the defense motion pending the outcome of the United States' appeal of our Order of January 31, 2003, [REDACTED]

to determine "whether the proposed substitutions, if any, will provide the defendant with substantially the same ability to make his defense as would" the videotaped deposition.²

On April 24, 2003, the United States filed its Proposed Substitution and accompanying Submission under seal with the Court Security Officer.³ As a substitution [REDACTED]

² Although the statute provides that the Government triggers the Section 6(c) analysis by filing a motion for leave to offer a substitution for the classified information authorized to be disclosed, in this case, the United States has not made such a request, and has consistently maintained that the issue of substitutions should not be reached claiming that "the witness is beyond the Court's jurisdiction." (Submission at 1; Reply at 1-2).

³ Although CIPA contemplates that any substitution for classified information be made public, both the United States' Proposed Substitution and accompanying Submission have been classified [REDACTED]

However, in its Submission, the Government stated that "when and if a final version of the proposed substitution[s] is settled upon, that document will be declassified... for use at trial" but would remain classified until then. The United States did not initially disclose its Proposed Substitution to the pro se defendant; but, instead, stated that "it would permit the defendant to review the final substitution[s] as a limited authorized disclosure of classified material so that [he] can prepare for trial." (Submission at 1-2). Finding that proposal to be unacceptable in light of the Fourth Circuit's explicit instruction that both "the defendant and standby counsel... be given an opportunity to respond to any proposed substitutions," this Court ordered the United States to disclose a copy of its Proposed Substitution to the pro se defendant. (Order of April 24, 2003). The Government promptly complied.

deposition testimony, the Government has offered a [REDACTED] document [REDACTED]

[REDACTED] which attempt to distill the essence of dozens of classified summaries [REDACTED] reports [REDACTED]

[REDACTED]

Moussaoui vehemently opposes the summary as a substitute for [REDACTED] deposition testimony. [REDACTED]

[REDACTED] In particular, the defendant argues that the Proposed Substitution is a complete fabrication [REDACTED]

[REDACTED]

[REDACTED] Moussaoui reiterates that [REDACTED] is a critical witness in this case because he can establish that the defendant was not part of the September 11 plot. [REDACTED]

[REDACTED].⁵ Finally, the defendant contends that no "paper"

⁴The Government proposes that the Substitution be introduced at trial with the following preamble: "[i]f called as a witness at trial, [REDACTED] who is otherwise unavailable, would testify..."

⁵Beyond [REDACTED] personal knowledge that Moussaoui was not slated to participate in the September 11 attacks, the defendant argues that, at trial, [REDACTED]

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substitute for [REDACTED] trial testimony will carry the appropriate weight or import with the jury. [REDACTED]

Standby defense counsel object to the Proposed Substitution arguing that it does not provide the defendant with "substantially the same ability to make his defense" as would the deposition ordered by this Court. Specifically, they claim that the Proposed Substitution is inadmissible, unreliable hearsay.⁶ In addition, standby counsel contend that the Government's proposal is too narrow in that it is only an indicator of what

[REDACTED] might say if called as a witness in this case, [REDACTED]

[REDACTED], and fails to reflect certain exculpatory information included in the classified summaries. Standby counsel further argue that the Government's proposal is too broad in that it incorporates inculpatory statements the defense would not elicit on direct exam, and deceptively

[REDACTED]

⁶According to standby counsel, not only does the Government's proposal deprive the defense of the opportunity to test the truthfulness of the inculpatory statements in violation of the Confrontation Clause of the Sixth Amendment, but it also precludes the jury from observing the demeanor and evaluating the credibility of this critical witness.

integrates statements [REDACTED]
[REDACTED] into a seamless "script" authored by the prosecution.

II. Discussion

The issue presented in this case is one of first impression. CIPA broadly defines classified information as "any information or material that has been determined by the United States Government... to require protection against unauthorized disclosure for reasons of national security," 18 U.S.C. App. 3 § 1. The paradigm context in which CIPA issues have been litigated in criminal cases involves a defendant's attempt to introduce a classified document into evidence. To perform a Section 6(c) analysis in that context, a court compares a proposed written substitution to a static, fixed classified document. However, in this case, because the United States has classified anything and everything [REDACTED]

[REDACTED] the Court must evaluate the adequacy of the Government's proposed written summary [REDACTED] as an alternative to his videotaped deposition testimony.

Although any substitute for live or videotaped trial testimony deprives the finders of fact of an opportunity to observe the witness' demeanor when assessing his credibility, see Maryland v. Craig, 497 U.S. 836, 846 (1990), the Court does not

find that a written summary [REDACTED] can never be an adequate substitute for live testimony. If there are sufficient compelling reasons for the substitution and the substitution has indicia of reliability equivalent to live testimony, a substitution may be acceptable.⁷ In this case, however, the Court finds that because of its unreliability, incompleteness and inaccuracy, the Government's Proposed Substitution will not "provide the defendant with substantially the same ability to make his defense as would" the court-ordered, [REDACTED] videotaped deposition [REDACTED].

A. The Summary is Not Reliable

Evidence is admissible if it bears indicia of reliability or guarantees of trustworthiness sufficient to afford the trier of fact a basis for evaluating its truth. See United States v. Shaw, 69 F.3d 1249, 1253 (4th Cir. 1995); United States v. Murphy, 696 F.2d 282, 286 (4th Cir. 1982). Traditionally, witness testimony given under oath and subject to cross-

⁷ The Government cites to United States v. Scarfo, 180 F. Supp.2d 572 (D. N.J. 2001) and United States v. Salim, 855 F.2d 944 (2nd Cir. 1988) as instances in which courts permitted substitutes for live witness testimony. However, in both cases, the "substitutes" possessed traditional indicia of reliability. In Scarfo, because the FBI agent's affidavit was under oath, it provided the defendant with sufficient, reliable information with which to litigate a motion to suppress. In Salim, the Second Circuit affirmed the use of a transcript of a Fed. R. Crim P. 15 deposition of a prosecution witness taken abroad in the presence of a foreign magistrate, under oath and recorded verbatim by a court stenographer.

examination is reliable. See Dutton v. Evans, 400 U.S. 74, 88 (1970). In its role as gatekeeper, the trial court has the discretion to determine whether particular evidence possesses adequate guarantees of trustworthiness to justify its presentation to the jury. See United States v. McCall, 740 F.2d 1331, 1339 (4th Cir. 1984); United States v. Horn, 185 F. Supp.2d 530, 536 (D. Md. 2002); see also Fed. R. Evid. 104(a).

The Proposed Substitution must be rejected because it does not contain indicia of reliability sufficient to justify its use as evidence at trial. To the Court's knowledge,

[REDACTED]

[REDACTED]

[REDACTED]

The Proposed Substitution is not reliable for the additional reason that the Court cannot determine whether the [REDACTED] reports upon which it is based accurately reflect [REDACTED]

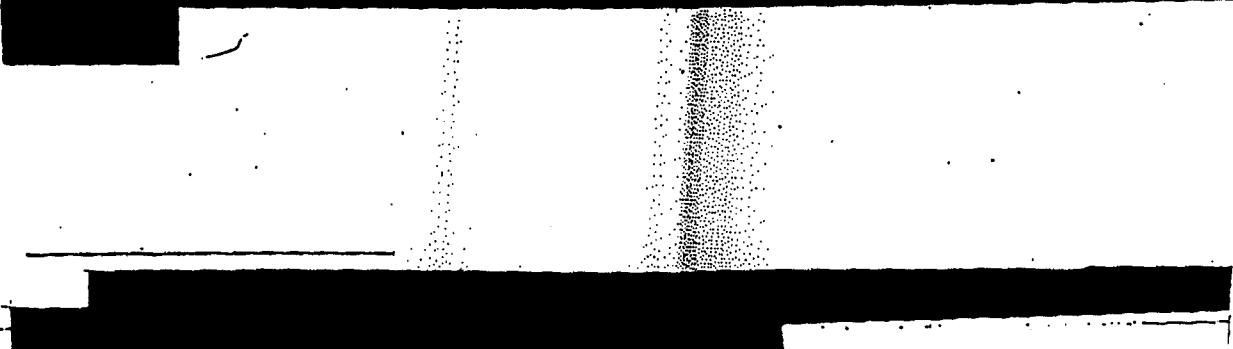
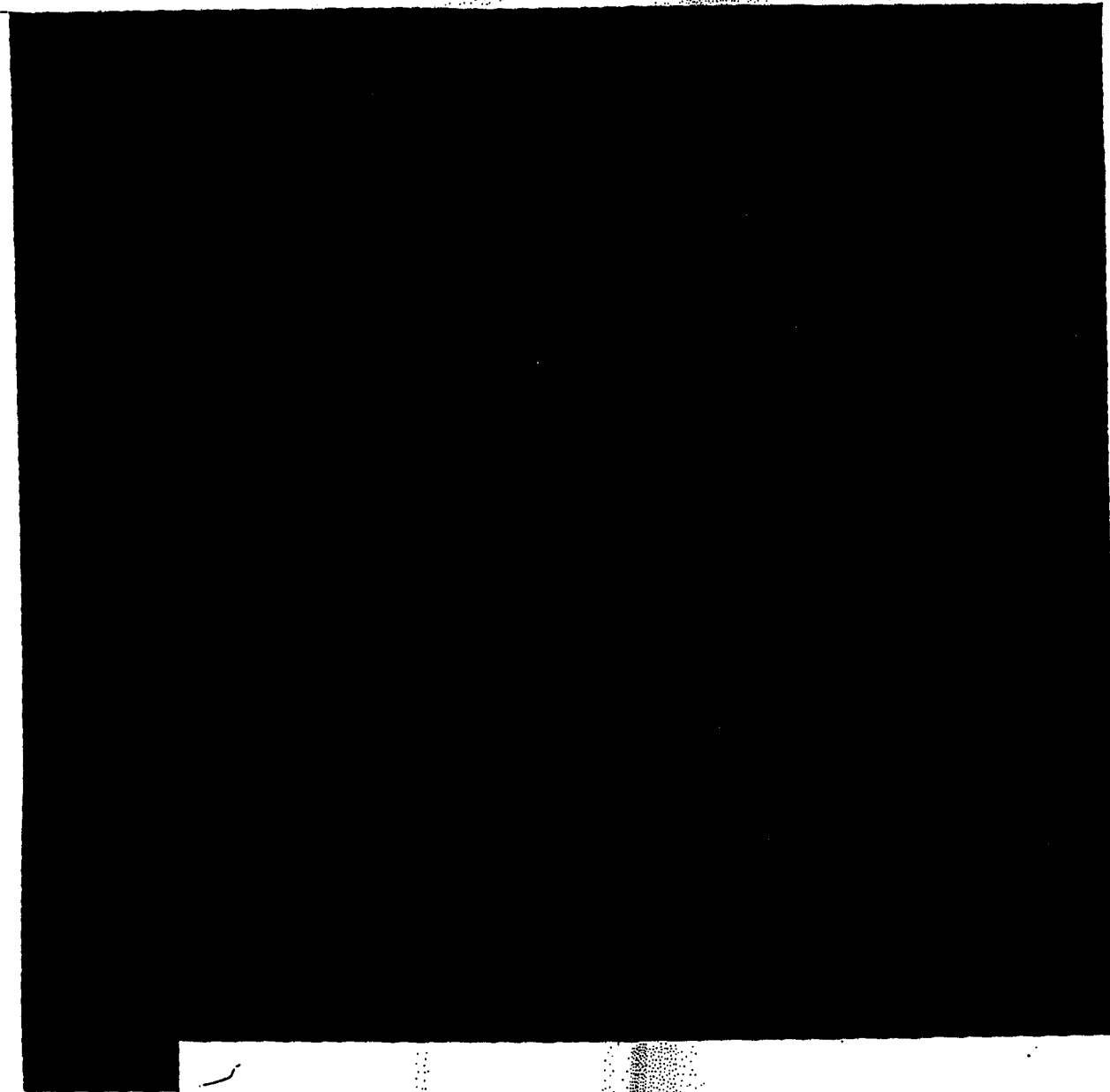
[REDACTED]¹⁰ For example, the Government has advised the Court that [REDACTED]

[REDACTED]

[REDACTED]

¹⁰ The Court is only competent to determine whether the Government's Proposed Substitution is an accurate summary of the classified summaries [REDACTED] on which it is based.

¹¹ Pursuant to Section 4 of CIPA, the Court granted the Government's request to disclose to standby counsel only the specific answers to the questions posed by the Court on May 7, 2003, and not the explanation offered in the ex parte Declaration. [REDACTED]



B. The Summary is Incomplete

A criminal trial is expected to be a quest for the truth. See Williams v. Florida, 399 U.S. 78, 80-81 (1970). In pursuit of that end, it is the trial court's responsibility to prevent the parties from misleading or deceiving the jury by intentionally presenting incomplete or fragmented evidence.

(Reply at 17 citing United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) and United States v. Castro, 813 F.2d 571, 576 (2nd Cir. 1987)).

Standby defense counsel correctly argues that the Proposed Substitution is incomplete because [REDACTED]

[REDACTED] Specifically, standby counsel believe that [REDACTED] would testify, if asked, [REDACTED]

[REDACTED]

The Government contends that the defense must accept [REDACTED]

¹³ For the first time, in summaries provided to standby counsel on May 7, 2003, [REDACTED]

If such a statement were made at trial, the defense would certainly follow up with questions probing the basis for the witness' assumption, and inquire [REDACTED]

[REDACTED]

the statements as reflected in the summaries, and may only offer inferences about missing statements, such as the ones identified by standby counsel, to the jury during closing arguments.

If [REDACTED] were available as a deposition witness the defense would have an opportunity to elicit definitive answers from him, and would be able to present the responses to these critical questions as evidence at trial rather than merely as argument. In our view, the difference between arguing an inference and eliciting an explicit statement from the witness is significant, and graphically illustrates the inadequacy of the Proposed Substitution as a replacement for [REDACTED] trial testimony.

The Court also finds merit in the defense's complaint that the Proposed Substitution omits some exculpatory information reflected in the classified summaries. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This statement was not incorporated in the Proposed Substitution. In response to standby counsel's complaint, the Government has generally offered to "consider" including any additional statements the Court finds to be "admissible and material to the defense" in an amended substitution.¹⁵ (Reply at 30).

C. The Summary is Not Accurate

As drafted by the Government, the summary is inaccurate and misleading in that it does not reflect [REDACTED]

[REDACTED] Further, as noted above, the summary is merely an organized distillation of information contained in the classified summaries produced to standby defense counsel, and not a compilation [REDACTED]

Standby counsel also complain that the Government has incorporated inferences in the Proposed Substitution which are not reflected in the classified summaries themselves. For example, paragraph 7 of the Proposed Substitution reads,

¹⁵ Although the Government filed an Addendum to Its Proposed Substitution [REDACTED] on May 7, 2003, it did not include these exculpatory statements.

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[REDACTED]

The Government's inclusion of inferences in its Proposed Substitution is inconsistent with its opposition to standby counsel's efforts to do the same,¹⁶ and its own argument that it is improper to include inferences in any substitution intended to represent [REDACTED] proposed trial testimony.

III. Alternative Substitutes

Although beyond the scope of its responsibility under CIPA,

¹⁶ Incorporated within standby counsel's proposed alternative to the Government's Proposed Substitution were inferences, including but not limited to [REDACTED]

[REDACTED] For the reasons stated in our Order of May 13, 2003, the adequacy of standby counsel's proposal is not before this Court.

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and not explicitly indicated in the Fourth Circuit's order of remand, the Court asked the United States to consider other alternatives to the court-ordered deposition [REDACTED]

[REDACTED]. Specifically, to overcome some of the inherent inadequacies in the Government's Proposed Substitution discussed above, the Court asked the United States whether it would permit



The United States has unequivocally rejected this proposal. [REDACTED]

While preserving their objection to any substitute for the court-ordered deposition [REDACTED] standby counsel request,

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as an alternative to the Proposed Substitution, that the Government stipulate to or that the Court take judicial notice of only the exculpatory information attributed to [REDACTED] 17

[REDACTED]. The Government rejects standby counsel's proposed alternative as a distortion of the truth and inconsistent with the principle of completeness.

On this argument, the Court agrees with the Government. Despite standby counsel's assertions to the contrary, Section 6 of CIPA is not designed to "benefit" or regard a defendant who is deprived of the opportunity to introduce certain classified information at trial. Rather, the statute is intended to prevent the public disclosure of national security information while protecting a criminal defendant's right to mount an effective defense. If [REDACTED] were called as a defense witness at trial, whether in person or by deposition, the prosecutors could cross-examine him to attempt to elicit the inculpatory statements

[REDACTED] It would, therefore, be a complete distortion of the truth and the rule of completeness to present a one-sided, unrebuttable substitution for [REDACTED] testimony as evidence at trial.

Despite our concerns about the reliability of the statements reflected in the classified summaries and underlying [REDACTED]

¹⁷ Moussaoui opposes any consideration by the Court of standby counsel's proposed stipulation or judicial admission.

reports, to resolve standby counsel's specific objection to the Proposed Substitution as a "script" authored by the Government, the Court asked standby counsel to identify the particular classified summaries which contain the information they would attempt to elicit on direct exam if [REDACTED] were available as a witness in this case. Again, preserving their objection to any substitute for [REDACTED] deposition testimony, standby counsel complied with the Court's request by offering a list [REDACTED]

[REDACTED] summaries which contain the information they would attempt to elicit from the witness.¹⁸ Although the United States has responded to the Court's request by counter-designating a list of summaries "necessary to complete the statements contained in standby counsel's designated summaries," it also represents that [REDACTED]

IV. Conclusion

The inherent unreliability of the Proposed Substitution and the critical contribution this witness can make to the search for the truth convince the Court that the Government's Proposed Substitution will not "provide the defendant with substantially

¹⁸ Standby counsel also identified these documents in footnote 12 on page 16 of their Response and Objection.

the same ability to make his defense" as would the videotaped deposition ordered on January 31, 2003.

The Court Security Officer is directed to forward copies of this Memorandum Opinion to counsel for the United States, and standby defense counsel; and is further directed to submit this Memorandum Opinion for an expedited classification review so that appropriate versions can be disclosed to the pro se defendant and placed in the public record.

Entered this 15th day of May, 2003.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia