UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

UNITED STATES OF AMERICA : 04 Cr 356 (KBF)

- against - : (Electronically Filed)

MOSTAFA KAMEL MOSTAFA , :

Defendant. :
---X

MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION TO OFFER THE TESTIMONY OF A WITNESS VIA LIVE CLOSED-CIRCUIT TELEVISION DURING TRIAL OR, IN THE ALTERNATIVE, FOR DEPOSITION PURSUANT TO RULE 15, FED.R.CRIM.P

JOSHUA L. DRATEL
DRATEL & MYSLIWIEC
2 Wall Street
3rd floor
New York, New York 10005
(212) 732-0707

JEREMY SCHNEIDER
ROTHMAN, SCHNEIDER, SOLOWAY & STERN, LLP
100 Lafayette Street
Suite 501
New York, New York 10013
212-571-5500

Attorneys for Defendant Mostafa Kamel Mostafa

– Of Counsel –

Joshua L. Dratel
Jeremy Schneider
Lindsay A. Lewis
Lucas Anderson

TABLE OF CONTENTS

Table of Contents. i

Table of Authorities. iii

Introduction. 1

STATEMENT OF THE FACTS. 4

ARGUMENT

POINT I

THE GOVERNMENT HAS FAILED TO SATISFY
THE STANDARDS FOR LIVE VIDEO TESTIMONY
OR A RULE 15 DEPOSITION BECAUSE (A) IT HAS
FAILED TO ESTABLISH THAT MR. BADAT IS
UNAVAILABLE; AND/OR (B) MR. BADAT'S
PROFFERED TESTIMONY IS NOT MATERIAL HEREIN. 5

A. *The Principles Relevant to Witnesses Testifying Either By Closed-Circuit Television or Pursuant to a Rule 15, Fed.R.Crim.P., Deposition*. 6

1. *Live Testimony By Closed-Circuit Television*. 6

2. *Testimony Via Rule 15 Deposition*.. 7

B. *The Government Has Not Established That Mr. Badat Is "Unavailable"*. 8

1. *Mr. Badat Is Required to Cooperate With U.S. Authorities*. 9

2. *The Government Can Easily Provide Mr. Badat "Safe Passage" to Testify*.. . . . 15

C. *Mr. Badat's Proffered Testimony Is Not Material to This Case*. 20

POINT II

THE GOVERNMENT HAS NOT SATISFIED RULE 15(c)(3)'s
SEVERAL CONDITIONS FOR TAKING TESTIMONY
OUTSIDE MR. MOSTAFA'S PHYSICAL PRESENCE. 23

A. *Rule 15(c)(3)'s Provisions*. 23

B. *The Government Has Not Satisfied Rule 15(c)(3)'s Conditions*. 24

POINT III

TESTIMONY BY EITHER CLOSED-CIRCUIT TELEVISION OR RULE 15 DEPOSITION IF CONDUCTED ABSENT MR. MOSTAFA'S PHYSICAL PRESENCE, WOULD VIOLATE HIS SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND THE EFFECTIVE ASSISTANCE OF COUNSEL. 26

A. *The Sixth Amendment Confrontation Standard*. 27

B. *The 2012 Amendment to Rule 15, Fed.R.Crim.P. As Applied Here Violates Mr. Mostafa's Sixth Amendment Right to Confrontation*. 28

C. *Conducting Closed-Circuit Television Testimony or a Rule 15 Deposition Outside Mr. Mostafa's Physical Presence Would Deny Him Effective Assistance of Counsel*. . . . 35

POINT IV

MR. MOSTAFA'S PREFERENCE IF THE COURT GRANTS THE GOVERNMENT'S MOTION. 36

Conclusion. 37

TABLE OF AUTHORITIES

CASES

Barber v. Page, 390 U.S. 719 (1968). 8

Burger v. Kemp, 483 U.S. 776 (1987). 35

California v. Green, 399 U.S. 149 (1970). 27

Coy v. Iowa, 487 U.S. 1012 (1988). 27, 28, 29, 30, 35

Crawford v. Washington, 541 U.S. 36 (2004). 8, 18, 28, 30, 31, 32

Don v. Nix, 886 F.2d 203 (8th Cir. 1989). 33

Geders v. United States, 425 U.S. 80 (1976). 35

In re Letters of Request from Supreme Court of Hong Kong,
821 F. Supp. 204 (S.D.N.Y. 1993) 33

Jones v. United States, 526 U.S. 227 (1999). 6

Kentucky v. Stincer, 482 U.S. 730 (1987). 35

Lego v. Twomey, 404 U.S. 477 (1972).. . . . . 7, 24

Maryland v. Craig, 497 U.S. 836 (1990).. . . . . 27, 28, 29, 30, 31, 32, 33, 35

Mattox v. United States, 156 U.S. 237 (1895). 28

Ohio v. Roberts, 448 U.S. 56 (1980). 30, 35

Perry v. Leeke, 109 S. Ct. 594 (1989). 35

Triestman v. United States, 124 F.3d 361 (2d Cir. 1997). 6

United States ex rel. Attorney General, v. Delaware & Hudson Co.,
213 U.S. 366 (1909).. 6

United States v. Abu Ali, 528 F.3d 210 (4th Cir. 2008). 16, 25, 26, 31, 36

United States v. Abu Ghayth, S14 98 Cr. 1023 (LAK). 5, 22, 26

United States v. Benfield, 593 F.2d 815 (8th Cir. 1979). 33

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005). 33

United States v. Cohen, 260 F.3d 68 (2d Cir. 2001). 7, 8

United States v. Diaz, 176 F.3d 52 (2d Cir.1999). 19

United States v. Dolah, 245 F.3d 98 (2nd Cir. 2001). 18

United States v. Ebbers, 458 F.3d 110 (2d Cir. 2006). 19

United States v. Gifford, 892 F.2d 263 (3d Cir. 1989). 31

United States v. Gigante, 971 F. Supp. 755 (E.D.N.Y. 1997). 6, 7

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999). 7

United States v. Grossman, 2005 U.S. Dist. LEXIS 3135 (S.D.N.Y. 2005). 20

United States v. Johnpoll, 739 F.2d 702 (2d Cir. 1984). 8

United States v. Medjuck, 156 F.3d 916 (9th Cir. 1998). 31

United States v. Medunjanin, 10 Cr. 019 (JG) (E.D.N.Y.). 5

United States v. Salim, 664 F. Supp. 682 (E.D.N.Y. 1987). 16

United States v. Salim, 855 F.2d 944 (2d Cir. 1988). 31

United States v. Singleton, 460 F.2d 1148 (2d Cir.1972). 8

United States v. Yates, 438 F.3d 1307 (11th Cir. 2006).. . . . . 27, 31, 32, 33, 34

United States v. Yousef, 08 Cr. 1213 (JFK) (S.D.N.Y.).. 17

STATUTES

U.S. Const. Amend. XI. 1, 3, 8, 19, 26, 27, 28, 29, 32, 34, 35, 36

Rule 403, Fed.R.Evid.. . . . . 3, 20, 23, 24

Rule 804(a)(5), Fed.R.Evid. 15

Rule 15, Fed.R.Crim.P.. . . . . 1, 3, 5, 6, 7, 9, 10, 12, 19, 26, 28, 35, 36, 37

Rule 15(a)(1), Fed.R.Crim.P. 7

Rule 15(c), Fed.R.Crim.P.. 26

Rule 15(c)(3), Fed.R.Crim.P... . . . . 1, 23, 24, 26, 28, 32

Rule 15(c)(3)(A), Fed.R.Crim.P.. 24

Rule 15(c)(3)(B), Fed.R.Crim.P.. 24

Rule 15(c)(3)(C), Fed.R.Crim.P.. 24

Rule 15(c)(3)(D)(i), Fed.R.Crim.P.. 24

Rule 15(c)(3)(D)(ii), Fed.R.Crim.P.. 24

Rule 15(c)(3)(E), Fed.R.Crim.P. 25, 26

Rule 15(f), Fed.R.Crim.P.. 3

OTHER

2 William Blackstone, Commentaries on the Laws of England 373-74. 29

3 William Blackstone, Commentaries on the Laws of England 373-74. 35

104-23 Sen. Rep. (July 30, 1996).. 17

Advisory Committee Notes to Fed.R.Crim.P. 15(a). 7

Advisory Committee Notes to Fed. R. Crim. P. 15(c)(3). 7

"British al-Qaeda 'Supergrass' Lined Up As Star Video Witness in US Terror Trials," available at <http://www.telegraph.co.uk/news/worldnews/al-qaeda/10641180/British-al-Qaeda-supergrass-lined-up-as-star-video-witness-in-US-terror-trials.html>. 6

"Convicted Terrorist to Testify Via Video Link In Bin Laden Spokesman's Trial," available at

<http://newyork.cbslocal.com/2014/01/15/convicted-terrorist-to-testify-via-video-link-in-bin-laden-spokesmans-trial/>. 6

Mutual Legal Assistance Treaty (MLAT). 15, 16, 17, 31

Mutual Legal Assistance Treaty, Article 10. 16

Mutual Legal Assistance Treaty, Article 11. 16

Natalie Kijurna, *Lilly v. Virginia: the Confrontation Clause and Hearsay – "Oh What a Tangled Web We Weave. . . .,"* 50 DEPAUL L. REV. 1133, 1144 & n.67 (2001). 29

Introduction

This Memorandum of Law is submitted on behalf of defendant Mostafa Kamel Mostafa in opposition to the government's Motion to Offer the Testimony of a Witness Via Live Closed-Circuit Television During Trial Or, In the Alternative, For Deposition Pursuant to Rule 15 of the Federal Rules of Criminal Procedure. As detailed below, it is respectfully submitted that the Court should deny the government's motion because:

(1) the government has failed to satisfy two separate criteria for video testimony or a Rule 15 deposition, namely:

(a) the government has failed to establish that Mr. Badat is "unavailable" to testify in person at trial; and

(b) the proffered testimony is not material to this case;

(2) the government has failed to satisfy Rule 15(c)(3)'s criteria for conducting a deposition without Mr. Mostafa being physically present; and

(3) the presentation of video testimony, either via closed-circuit television or through a deposition conducted pursuant to Rule 15, Fed.R.Crim.P., would, if Mr. Mostafa were not personally present, violate his Sixth Amendment rights to confrontation and effective assistance of counsel.

As discussed below, the government's motion is a carefully crafted application that is extraordinary more for what it omits rather than what it includes. While the government claims Mr. Badat is "unavailable," and notes that he has entered into a cooperation agreement with the United Kingdom, the government fails to mention that Mr. Badat's agreement with the U.K. *requires* him to *cooperate with the United States*, including *to testify at U.S. proceedings at the*

U.S.'s request.

The government also fails to mention that Mr. Badat has *never* been informed by U.S. officials that he would be arrested upon arrival in the U.S. Indeed, the Declaration by Assistant United States Attorney Ian McGinley accompanying the government's motion is noteworthy for the absence of any discussion between AUSA McGinley and Mr. Badat – who have met on several occasions – on the subject.

In addition, the government fails to explain why it cannot provide Mr. Badat, as it has other witnesses in other cases – including defense witnesses who were arguably co-conspirators in those prosecutions – "safe passage" to, or some other parole status in, the U.S. in order to secure his testimony at trial in this case. Indeed, the Mutual Legal Assistance Treaty between the U.S. and the U.K. provides for such safe conduct for witnesses traveling from one jurisdiction to the other (requesting) jurisdiction.

Mr. Mostafa should not be penalized as a result of the government's dilatory conduct and conscious avoidance, *i.e.*, failing to seek the extradition of Mr. Badat – who is under indictment in the U.S. for a terrorism offense – for more than a decade, or its failure either to discuss with Mr. Badat what would occur to him if he traveled to the U.S., or arrange for safe passage or some other parole status for purposes of his testimony at Mr. Mostafa's trial. Thus, the government has not made the requisite "good faith" attempt to secure Mr. Badat's appearance at trial.

Moreover, as set forth below, Mr. Badat's testimony would not be material at Mr. Mostafa's trial. He was not in contact with Mr. Mostafa, and does not possess any evidence with respect to Mr. Mostafa's knowledge or intent. Rather, the government proffers his testimony

with respect to four counts (7 through 10), and only with respect to events in Afghanistan that did not involve Mr. Mostafa, which occurred after certain persons were no longer in contact with Mr. Mostafa, and which would present testimony about senior *al Qaeda* officials that lacks probative value. Even if that testimony possessed any probative value, that marginal probative value would be substantially outweighed by its unfair prejudicial impact, and therefore should be precluded pursuant to Rule 403, Fed.R.Evid.[1]

Furthermore, as discussed below, even if the government could satisfy the standards for live video testimony or a Rule 15 deposition, Mr. Mostafa's Sixth Amendment rights would be violated by such a procedure if he were not present at such testimony, as it would deny him both the face-to-face confrontation with a witness, as well as the ability to communicate securely and effectively with counsel during the testimony, guaranteed him by the Sixth Amendment.

In that context, again, as detailed below, the government's motion is more instructive for what it omits: any acknowledgment, much less discussion, of the two leading Supreme Court cases addressing a defendant's Sixth Amendment right to be present personally to confront witnesses against him in a criminal trial.

Accordingly, it is respectfully submitted that the government's motion should be denied. Should the Court grant the government's motion, however, and should Mr. Mostafa not be permitted to be present personally at such testimony, it is respectfully requested that the testimony be by live closed-circuit television during trial rather than via a Rule 15 deposition.

---

[1] Nothing in this Memorandum of Law, including Mr. Mostafa's preference for live testimony via closed-circuit television over a Rule 15 deposition should the Court grant the government's motion, should be construed as a waiver of Mr. Mostafa's right to object to the introduction of any and all proposed testimony at trial pursuant to the Federal Rules of Evidence and/or Rule 15(f), Fed.R.Crim.P.

STATEMENT OF THE FACTS

In November 2003, Saajid Badat was arrested by authorities in the United Kingdom and immediately confessed to his role in the al Qaeda "shoe bomb" plot. *See* Transcript of November 13, 2009, Proceedings in the Central Criminal Court, Old Bailey, United Kingdom, a copy of which is attached hereto as Exhibit 1, at 30. Mr. Badat was also indicted in the District of Massachusetts in 2004 for the same conduct.

Mr. Badat pleaded guilty February 28, 2005, in the Central Criminal Court at Old Bailey, London, United Kingdom, to one count of "conspiracy to destroy, damage, or endanger the safety of an aircraft contrary to section 1 of U.K..'s Criminal Law Act 1977." *Id*., at 16. Mr. Badat was sentenced April 22, 2005, to 13 years' imprisonment for his role in the "shoe bomb" conspiracy involving Richard Reid, who was apprehended aboard the aircraft en route to Boston, Massachusetts, prosecuted in the District of Massachusetts, convicted by plea of guilty, and sentenced to life imprisonment. *Id*.

Mr. Badat subsequently cooperated with both United Kingdom and United States authorities, and was re-sentenced November 13, 2009, to eleven years' imprisonment, making him eligible for parole that very day. *Id*., at 36. According to the January 29, 2014, Declaration of Assistant United States Attorney Ian McGinley (filed with the government's current motion), Mr. Badat is now "at liberty" in the United Kingdom. *See* Dkt. #238, at ¶ 9(c).

The Honourable Mr. Justice Calvert-Smith, presiding over Mr. Badat's re-sentencing, noted that he was moved to reduce Mr. Badat's sentence due to "the positive contribution thus far made by [Mr. Badat] to the administration of justice in the United States," noting that Mr. Badat "has expressed a willingness to – give evidence against some very, very serious offenders

currently in the United States." *Id*., at 29-30, 32.

Subsequently, Mr. Badat testified for the prosecution via Rule 15 deposition, conducted March 29, 2012, at the 2012 trial of Adis Medunjanin in the Eastern District of New York [*United States v. Medunjanin*, 10 Cr. 019 (JG) (E.D.N.Y.)].

ARGUMENT

POINT I

THE GOVERNMENT HAS FAILED TO SATISFY THE STANDARDS FOR LIVE VIDEO TESTIMONY OR A RULE 15 DEPOSITION BECAUSE (A) IT HAS FAILED TO ESTABLISH THAT MR. BADAT IS UNAVAILABLE; AND/OR (B) MR. BADAT'S PROFFERED TESTIMONY IS NOT MATERIAL HEREIN

The government's application fails to satisfy two essential criteria for either live testimony via closed-circuit television, or a deposition pursuant to Rule 15, Fed.R.Crim.P.: (1) it fails to establish that Mr. Badat is "unavailable;" and (2) Mr. Badat's proffered testimony is not material to Mr. Mostafa's case.

While the government points to Judge Kaplan's opinion in *United States v. Abu Ghayth*, S14 98 Cr. 1023 (LAK), in which the government's motion to have this same witness, Saajid Badat, testify via closed-circuit television, was granted, this case presents different facts, certain legal issues not raised in that case (or not raised in the same fashion as here), and, ultimately, it is respectfully submitted, a different conclusion after the Court's independent assessment of the factual and legal issues relevant to determination of the government's motion.[2]

---

[2] This Memo of Law identifies Mr. Badat by name (even thought the government does not) because Mr. Badat (a) has already testified publicly, via Rule 15 deposition, in a U.S. trial (in the Eastern District of New York) in 2012 (as noted in the government's papers); (b) is under indictment in the District of Massachusetts (also noted in the government's motion

A. *The Principles Relevant to Witnesses Testifying Either By Closed-Circuit Television or Pursuant to a Rule 15, Fed.R.Crim.P., Deposition*

Assuming *arguendo* Mr. Badat's testimony via closed-circuit television and/or Rule 15 deposition is constitutionally permissible if it occurs outside Mr. Mostafa's physical presence, an issue discussed **post**,[3] such testimony by such means requires, *inter alia*, that (a) the witness be unavailable; (b) his testimony be material to the case at issue; and (c) that permitting the testimony furthers the interest of justice.

1. *Live Testimony By Closed-Circuit Television*

Even in the principal case cited by the government for the viability of live, closed-circuit television testimony, *United States v. Gigante*, 971 F. Supp. 755 (E.D.N.Y. 1997), *aff'd* 166 F.3d

---

papers); and (c) is slated for testimony in another case in the U.S. (attendant to the same government motion not yet decided) besides this case and the prosecution of Abu Ghayth. Thus, Mr. Badat's identity is not a mystery. Nor is his identity covered by any protective order, and his identity as the witness in question in Abu Ghayth and this case and the third case has been reported by media outlets in both the U.S. and U.K. *See, e.g.*, "Convicted Terrorist to Testify Via Video Link In Bin Laden Spokesman's Trial," available at <http://newyork.cbslocal.com/2014/01/15/convicted-terrorist-to-testify-via-video-link-in-bin-laden-spokesmans-trial/>; "British al-Qaeda 'Supergrass' Lined Up As Star Video Witness in US Terror Trials," available at <http://www.telegraph.co.uk/news/worldnews/al-qaeda/10641180/British-al-Qaeda-supergrass-lined-up-as-star-video-witness-in-US-terror-trials.html>. Also, redaction of exhibits attached hereto to delete Mr. Badat's name would have been extraordinarily cumbersome, time-consuming, and possibly confusing. In addition, the government informed counsel that while it preferred not to name Mr. Badat in its motion, it could not prevent the defense from doing so.

[3] The doctrine of constitutional avoidance directs that when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *United States ex rel. Attorney General, v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). *See also Jones v. United States*, 526 U.S. 227, 239-40 (1999). *Accord Triestman v. United States*, 124 F.3d 361, 377 (2d Cir. 1997). Here, that doctrine would mandate denial of the government's motion on the grounds set forth in POINTS I & II rather than on the constitutional grounds set forth in POINT III.

75 (2d Cir. 1999), the rationale for such remote testimony – as the government acknowledges in its motion papers – was that the witness "could not be physically present" due to serious medical problems. Government's Memo of Law, at 4, *citing* 971 F. Supp. at 758-59. In *Gigante*, the Second Circuit also imposed the requirement that the use of closed-circuit television for a particular witness's testimony "further[] the interests of justice." 166 F.3d at 81.

2. *Testimony Via Rule 15 Deposition*

Similarly, in the Rule 15 context, because the Sixth Amendment's right to confrontation (generally before the triers of fact in question) is such a "bedrock procedural guarantee," Rule 15 authorizes the taking of a deposition only upon a showing that "exceptional circumstances" justify the taking of the witness's deposition and that doing so serves "the interest of justice." Rule 15(a)(1), Fed.R.Crim.P.

As a result, as the Advisory Committee noted,

> [u]nlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court . . ., this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations . . .

Advisory Committee Notes to Fed.R.Crim.P. 15(a), at 91.

As the party requesting the deposition, the government bears the burden of proof – "by a preponderance of the evidence" – of establishing the requisite elements justifying a Rule 15 deposition. *Id*., Fed.R.Crim.P. 15(c)(3), at 101; *see also Lego v. Twomey*, 404 U.S. 477, 489 (1972).

The Second Circuit has held that in order to meet the "exceptional circumstances" and "interest of justice" standard(s), "[a] movant must show that (1) the prospective witness is

unavailable, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice." *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001), *citing United States v. Singleton*, 460 F.2d 1148, 1154 (2d Cir.1972); *accord United States v. Johnpoll*, 739 F.2d, 702 709 (2d Cir. 1984) ("[i]t is well-settled that the 'exceptional circumstances' required to justify the deposition of a prospective witness are present if that witness' testimony is material to the case and if the witness is unavailable to appear at trial").

Unavailability is also a necessary (although not sufficient) requirement that must be met in order to comply with the Sixth Amendment's right to confrontation as defined in *Crawford v. Washington*, 541 U.S. 36, 59 (2004) ("testimonial statements of witnesses absent from trial have been admitted *only* where the declarant is unavailable . . .") (emphasis in original).

B. *The Government Has Not Established That Mr. Badat Is "Unavailable"*

The government has not demonstrated that Mr. Badat is "unavailable" to testify at trial *in* the United States. The Supreme Court has held that as a threshold matter, "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence . . . ." *Barber v. Page*, 390 U.S. 719, 724-25 (1968).

Here, the government's claim that Mr. Badat fears arrest in the U.S. should he travel here is insufficient to make him "unavailable," not only because it is a circumstance contrived and manipulated by the government itself to its tactical advantage, but also because it is very easily and customarily resolved in a manner – safe passage – that would readily permit a witness to travel to the U.S. to testify.

1. *Mr. Badat Is Required to Cooperate With U.S. Authorities*

Indeed, the government's motion papers are woefully and materially incomplete in their portrayal of Mr. Badat's situation. While acknowledging that Mr. Badat has a cooperation agreement with the U.K., and "continues to cooperate pursuant to that agreement[]" with the U.K., *see* January 29, 2014 Declaration of Ian McGinley, at ¶ 9(c), the government fails to mention that Mr. Badat's cooperation agreement requires that he testify for the U.S. in *U.S. proceedings*, and that he was actively involved in debriefings by U.S. authorities.

In Mr. Badat's testimony at the Medunjanin trial (via Rule 15 deposition), he testified as follows on direct examination by Assistant United States Attorney David Bitkower:

BITKOWER: Now, did there come a time that you actually did, uh, uh, sign a new cooperation agreement with the United Kingdom authorities?

BADAT: Yes.

BITKOWER: And do you remember approximately when that was?

BADAT: That was approximately in the year 2009.

BITKOWER: And, um, what is your understanding of what you agreed to do in that agreement?

BADAT: Uh, I agreed to cooperate fully with the authorities and this cooperation would include, uh, in – being involved in discussion, uh, with prosecutors, uh, and other – with prosecutors and other authorities to use a generic term. And also when required to, um, give evidence people, I'd be required to do that also.

BITKOWER: Okay did you understand whether you were required to assist not only British but also American authorities under that British agreement?

BADAT: Yes.

BITKOWER: Uh, did you understand that you would be required to testify in British, uh, or American proceedings?

BADAT:	Yes.
BITKOWER:	At the time that you signed that agreement, did you understand that uh, your testimony could be useful in particular, uh, cases that were pending in the United States?
BADAT:	Yes.
BITKOWER:	Um, after you agreed to cooperate pursuant to that agreement, did you actually engage in meetings with the UK authorities?
BADAT:	Yes.
BITKOWER:	Did you also engage in being in – with American authorities?
BADAT:	Yes.
BITKOWER:	Uh, did you actually answer questions posed by American and British investigators?
BADAT:	Yes.

Transcript of March 29, 2012, Rule 15 Deposition of Saajid Badat, a copy of which is attached as Exhibit 2, at 46. *See also id*., at 47 ("BITKOWER: Okay. And, uh, do you understand that pursuant to that agreement you are bound to continue to cooperate with British and American authorities? BADAT: Yes").[4]

In addition, Mr. Badat was re-sentenced in the U.K. in 2009, and the transcript of that proceeding reveals that the U.S. was instrumental in Mr. Badat obtaining a reduction of his initial U.K. sentence. The colloquy during that proceeding also indicated that Mr. Badat's testimony in the U.S. at U.S. trials was plainly contemplated by the court.

For example, the Crown Prosecutor announced that

---

[4] In its motion papers, the government quoted from Mr. Badat's Rule 15 deposition transcript, but did not include it as an exhibit. Nor were these passages cited to Judge Kaplan by either side in *Abu Ghayth*.

> one of those present in court is from the United States Department of Justice who was in consultation with us yesterday and, obviously, slightly depending on whatever order is made here, there will be a further process of some debriefing element because, of course, the debriefing is being done by trained officers here specifically to deal with [Mr. Badat's] giving evidence in the quite specific trials that are referred to, so there will be a further process here, or anticipated to take place here, *before he moves to the other jurisdiction*.

Transcript of November 13, 2009, Proceedings in the Central Criminal Court, Old Bailey, London, United Kingdom, at 8-9 (emphasis added) (Exhibit 1). *See also id*., at 11 (identifying the representative from the U.S. Department of Justice as "the assistant chief from the Department of Justice from America").

The Crown Prosecutor added that Mr. Badat had been "interviewed 55 times in scoping interviews; that was some almost 45 hours of interviews. He was assessed of being of potential use in between 12 and 18 future trials and the evidential debrief was some 112 interviews over some 26 days." *Id*., at 21.

Also, while the government notes that Mr. Badat is beyond subpoena power for purposes of U.S. courts, the government has had for more than a decade a far more powerful means of securing Mr. Badat's presence: extradition from the U.K. to the U.S. Mr. Badat is under indictment in the District of Massachusetts and the U.S. could easily have instituted extradition proceedings – just as it did against Mr. Mostafa and dozens of other persons apprehended in the U.K. and prosecuted in the U.S. during that period – but obviously chose not to alienate Mr. Badat because it preferred to use him as a cooperating witness.

However, rather than use the pending indictment against Mr. Badat as a means to bring him to the U.S., the government uses it as an excuse for why he cannot travel to the U.S. Yet,

again, the government's papers do not provide the precise circumstances that exist. In fact, as Mr. Badat testified at the Medunjanin trial, he has *never* been informed by any U.S. official that he faces arrest upon arrival in the U.S. Nor does AUSA McGinley's Declaration in support of the instant motion relate such notification. *See* McGinley Declaration, at ¶ 6.

Instead, as Mr. Badat testified at his Rule 15 deposition, the facts are far more indefinite and ambiguous. While he testified on direct that "[m]y expectation is that I would be arrested[,]" *see* Exhibit 2, at 74, upon arrival in the U.S., on cross-examination the following exchange revealed that Mr. Badat's "expectation" was not based on any direct information from U.S. authorities:

GOTTLIEB: My question is very straightforward. Has anybody from the United States told you that if you cooperate and you flew back and arrived in the United States, did anybody from the United States tell you that you would be arrested yes or no?

BADAT: No.

GOTTLIEB: Did you ask anyone point blank, directly from the United States, from the government, that if you flew back would you be arrested? Did you ask anybody that?

BADAT: No.

Exhibit 2, at 76.

On re-direct and re-cross, the communication was clarified further:

BITKOWER: You were asked questions, Mr. Badat whether you had direct conversations with anyone from the United States about whether you'd be arrested if you flew back to the United States. Uh, do you recall that question?

BADAT: Yes.

BITKOWER: Um, and putting aside individuals from the United States, have you discussed that topic with anyone else – with anyone from the

British government for example?

BADAT: I have had um, informal discussions.

BITKOWER: Okay and what – why is it that you believe that you'll be arrested if you return to the United States at this time?

BADAT: Uh, in, uh, and formal discussion of, uh, this nature, I've been told that if I were to land in the United States I would be arrested.

BITKOWER: And who told you that?

BADAT: Um, Mr. Ken McCauley.

BITKOWER: Is that someone with the British Police Service?

* * *

GOTTLIEB: And when did Mr. Ken McCauley of the, uh, Police here in the UK, when did he say that you would be arrested if you went to the United States?

BADAT: He said this to me, I would say about two or three weeks ago.

GOTTLIEB: And where did you have this conversation with him?

BADAT: This in London.

GOTTLIEB: Where was the conversation?

BADAT: Uh, in location, in central London.

GOTTLIEB: Was it at his offices?

BADAT: No.

GOTTLIEB: Was anybody else present when you had this conversation with him?

BADAT: Uh, I believe not, no.

GOTTLIEB: Uh, what time of day did you have this specific conversation where you say that Mr. McCauley said that you would be arrested if you went to the United States?

BADAT:	This was during the daytime on, uh, a more – one morning in central London.
GOTTLIEB:	And did he make that statement as a result of you asking him any question about it?
BADAT:	Uh, he told me that he asked, um, uh, Sharon, he had asked Sharon Lever, um, about me potentially traveling to the US in response to which, um, I was told that Sharon – Sharon Lever said that if I were to land on United States soil I would be arrested.
GOTTLIEB:	And Mr. McCauley actually told you that Sharon Lever of the Department of Justice –
BADAT:	Yes.
GOTTLIEB:	– said and told him that you would be arrested even if you cooperated?
BADAT:	The words were if I were to land on United States soil I would be arrested.
GOTTLIEB:	Did, uh, did McCauley say to you that if you cooperate in a trial in the United States that Sharon Lever or anybody else from the United States government said that you would be arrested? Did he make that statement to you?
BADAT:	There was no mention of this extra stipulation. It was just a general thing. If I landed in the United States I would be arrested.

Id., at 77-78.

Thus, Mr. Badat has never been informed by U.S. authorities that he faces arrest if he travels to the U.S. Nor has he even had that conversation with any U.S. official, the absence of which speaks volumes as to what the U.S. does not wish to tell either Mr. Badat or the Court: that he does not face arrest in the U.S.

Indeed, the government's passive approach to Mr. Badat's U.S. prosecution is instructive. The PACER docket of the indictment against Mr. Badat, 04 Cr. 10223 (GAO) (D. Mass.)

contains only nine docket entries, the most recent of which was filed in 2006.

Nor should Mr. Mostafa be disadvantaged by the government's dilatory conduct in studiously avoiding extraditing Mr. Badat. The government describes the extradition process as potentially "extremely lengthy," *see* Government's Memo of Law, at 16 – an astonishing remark considering the vast time and resources the government expended in extraditing Mr. Mostafa (and four others) from the U.K. after (in some instances) more than a decade of litigation.

There is no reason Mr. Badat could not have been included in that group if the U.S. were so keen on either prosecuting him or using him as a cooperating witness at U.S. trials. There is also no reason why the government waited until two months before trial to raise this issue.

2. *The Government Can Easily Provide Mr. Badat "Safe Passage" to Testify*

The government, in claiming "[t]here are no further reasonable steps that the Government can take to procure his testimony in the United States[,]" *see* Gov't Memo of Law, at 14, also fails to apprise the Court of a traditional, and in this case *codified*, means of securing a foreign witness's physical presence in the U.S. to testify: "safe passage" for the limited purpose of testifying at a U.S. proceeding.[5]

The government cannot make a good faith showing of Mr. Badat's unavailability until – at a minimum – it offers him "safe passage" (also known as "safe conduct") to the U.S. for purposes of testifying in this case. Pursuant to Article 10 of the Mutual Legal Assistance Treaty ("MLAT") to which the United States and United Kingdom are signatories, the U.S. may, consistent with the terms of the MLAT, seek the assistance of U.K. authorities in "facilitating the

---

[5] Rule 804(a)(5), Fed.R.Evid.'s definition of "unavailable" – a witness not obtainable "by process or *other reasonable means*" (emphasis added) (cited by the government in its Memo of Law, at 15) applies here as well to defeat the government's motion.

appearance of any person in the territory of the Requesting Party for the purpose of giving evidence before a court . . . ."[6]

Article 10 of the MLAT also provides that a person agreeing to appear in the U.S. pursuant to Article 10's terms "shall not be subject to service of process, or be detained or subjected to any restriction of personal liberty, by reason of any acts or convictions which preceded his departure from the territory of the Requested Party." Pursuant to the MLAT, the "safe passage" provided for by Article 10 ceases 15 days after the U.S. notifies the U.K. that the person's presence is no longer required.[7]

The MLAT's provision for "safe passage" distinguishes this case from most, if not all, of the cases in which a foreign witness has been deemed "unavailable." *See, e.g., United States v. Salim*, 664 F. Supp. 682, 689 (E.D.N.Y. 1987), *aff'd*, 855 F.2d 944 (2d Cir. 1988) (witness unavailable when incarcerated in France and there was a "*lack of a treaty* between the United States and France which would permit her extradition to testify") (emphasis added);[8] *United States v. Abu-Ali*, 528 F.3d 210, 238 (4th Cir. 2008) (use of deposition justified for two witnesses located in Saudi Arabia).[9]

---

[6] The terms of the MLAT were not raised by the defendant in *Abu Ghayth* as a basis for contesting the government's claim of "unavailability," and therefore the issue was not addressed by Judge Kaplan in his opinion.

[7] Apparently, Mr. Badat was released from custody in the United Kingdom in 2010. If, however, he remains incarcerated in the United Kingdom, Article 11 of the MLAT provides for the transfer of persons in custody.

[8] The MLAT between the U.S. and France was ratified in 2001, and therefore did not exist in 1988 when *Salim* was decided, thereby dispositively distinguishing that decision.

[9] The United States and Saudi Arabia do not have an MLAT, thereby depriving the District Court in *Abu Ali* of that option for securing the witnesses' presence in the U.S.

Indeed, according to the legislative history developed in connection with the ratification of the MLAT, the purpose of an MLAT is to "provide for the sharing of information and evidence related to criminal investigations and prosecutions." 104-23 Sen. Rep. (July 30, 1996). The Senate Report further acknowledges that "[d]ocuments and other evidence of crime often are located abroad. It is necessary to be able to obtain materials and statements *in a form that comports with U.S. legal standards* . . ." *Id.* (emphasis added).

The government has acknowledged it has already relied upon the MLAT for countless purposes in this case (including an extraordinary volume of discovery), which indisputably involves a U.K. resident as the defendant and alleged conduct that predominantly allegedly occurred outside of the United States, and most of which allegedly occurred in the United Kingdom. The government should not be permitted to ignore that same MLAT and its terms when those provisions can and must be used in an attempt to obtain Mr. Badat's physical presence at trial.

Even outside the MLAT context, "safe passage" to the U.S. has been provided by the government to a number of witnesses and potential witnesses. For example, in *United States v. Yousef*, 08 Cr. 1213 (JFK) (S.D.N.Y.), Judge Keenan directed the government to provide safe passage to a prospective defense witness (located in Honduras) who was arguably a co-conspirator in the charged conduct, and consequently expressed an unwillingness to travel to the U.S. for fear of arrest. The result was the letter attached hereto as Exhibit 3. There is not any reason the same "safe passage" letter – even more available in this case due to the existence and terms of the MLAT – could not be provided to Mr. Badat to obtain his testimony in person at trial.

In addition, counsel has represented a defendant who had a pending Southern District of New York indictment and who had left the U.S., was not the subject of pending extradition proceedings, but who was provided by letter assurance by the U.S. government that he would not be arrested or detained for purposes of being arraigned (and released on his own recognizance) and attending proffer sessions in the U.S., and that he would be permitted to leave the U.S. after conclusion of those sessions. A copy of that letter is attached hereto as Exhibit 4.

Similarly, arrangements could easily be made to grant Mr. Badat bail once he arrives in the U.S. As a cooperating witness who has already served an 11-year sentence in the U.K., it is quite possible he would not be sentenced to any additional imprisonment even if convicted on the pending U.S. charges.

Counsel also has represented in the Southern District of New York a defendant whose extradition from the U.K. to the U.S. was actively underway, but who was granted three-day "parole" status in order to travel to the U.S. and appear in court for purposes of implementing a deferred prosecution agreement. Also, attached as Exhibits 5 & 6 are two additional letters affording potential cooperating witnesses "safe passage" to the U.S. for purposes of interviews by U.S. authorities.[10]

The government may argue that it cannot be forced to grant immunity to a witness. *See United States v. Dolah*, 245 F.3d 98, 103 (2nd Cir. 2001), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 (2004). Yet that argument is entirely unavailing. The availability of the MLAT's "safe conduct" option would facilitate Mr. Badat's presence at

---

[10] None of these examples were provided in Abu Ghayth, in which the defendant did not raise the issue of formalized "safe passage" for Mr. Badat.

trial in this matter without requiring the government to give him a broader grant of immunity.

Thus, while Mr. Badat would be temporarily immune from criminal prosecution during the limited time he would be present in the United States to testify at trial, he would not be immune from later attempts by the U.S. to extradite him from the U.K. at a later time. At the same time, the limited granting of safe conduct would secure Mr. Badat's rights during the pendency of his testimony here and would not expose him to any greater harm than already exists (*e.g.*, the threat of future extradition). Yet the "safe passage" option would have the extraordinarily salutary effect of preserving Mr. Mostafa's Sixth Amendment right to confront a witness against him.

The continuing charade that Mr. Badat fears arrest in the U.S. – presented now in three courts, affecting multiple defendants and their Sixth Amendment rights – is simply untenable. It is well established that a party cannot create the very problem from which it seeks relief – here, the government's contrivance of Mr. Badat's professed "unavailability" – particularly one that would so severely infringe upon the rights of an accused. Permitting the government to benefit from the circumstances it so calculatingly has constructed would be tantamount to withholding immunity deliberately in order to gain an unfair tactical advantage, and should not be countenanced. *Cf. United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006), *citing United States v. Diaz*, 176 F.3d 52, 115 (2d Cir.1999).

By seeking to admit Mr. Badat's testimony by live closed-circuit television or Rule 15 deposition, the government seeks to gain a tactical advantage by making it logistically more difficult for the defense to conduct a vigorous and effective cross-examination. Also, allowing the government to offer Mr. Badat's testimony in such fashion would create needless expense

and logistical work for the Court and the parties as trial approaches.

C. *Mr. Badat's Proffered Testimony Is Not Material to This Case*

Nor is Mr. Badat's testimony material to this case. He will not testify about any conversations with Mr. Mostafa; about any conduct by Mr. Mostafa; even about any hearsay statements attributed to Mr. Mostafa. He was unfamiliar with Mr. Mostafa personally, and does not claim contact with him.

Instead of such direct evidence, the government seeks Mr. Badat's testimony with respect to conduct by *others*, namely Feroz Abassi, *after* Mr. Abassi was already in Afghanistan and allegedly attending *al Qaeda* training camps there. While seeking such testimony to corroborate the testimony of a cooperating witness, such testimony is not probative with respect to the government's allegation and the alleged offense conduct itself, *e.g.*, Mr. Mostafa's alleged direction and assistance to Mr. Abassi to travel to Afghanistan for the express purpose of engaging in violent *jihad*.

Thus, Mr. Badat's testimony provides nothing with respect to the essential elements of Counts Seven through Ten: Mr. Mostafa's knowledge or intent with respect to Mr. Abassi's reasons for and intentions in traveling to Afghanistan in the first place. The trial is about Mr. Mostafa's knowledge and intent, and not Mr. Abassi's alleged conduct after he was no longer in contact with Mr. Mostafa.

Also, Mr. Badat's proffered testimony includes abundant inadmissible hearsay, as well as testimony that would be barred by Rule 403, Fed.R.Evid., because its unfair prejudicial value substantially outweighs any probative value it might possess. *See, e.g., United States v. Grossman*, 2005 U.S. Dist. LEXIS 3135, at *8 (S.D.N.Y. 2005) ("a court may properly deny the

motion if the proposed testimony would be cumulative or consists of hearsay").

For example, testimony about members of *al Qaeda*'s hierarchy, such as Abu Hafs al Masri (Mohamed Atef), *see* Government's Memo of Law, at 11, lacks any connection or relation to Mr. Mostafa. In addition, the reference to Mr. Abassi's willingness to engage in suicide attacks, *see id*., is overwhelmingly prejudicial without providing the slightest connection to Mr. Mostafa.

While the government claims that evidence of Mr. Abassi's training is "absolutely essential to proving that the defendant sent Abassi to Afghanistan to work with Ibn Sheik and train in violent jihad, as charged in Counts Seven through Ten of the Indictment[,]" *id*., that does not prove Mr. Mostafa's knowledge or intent at all. Rather, the government improperly seeks to establish Mr. Mostafa's knowledge and intent by reference to Mr. Abassi's conduct and statements that are attenuated from Mr. Mostafa by the passage of time and thousands of miles. There is simply no evidence connecting that subsequent conduct by Mr. Abassi to Mr. Mostafa, or communication between them (or anyone affiliated with *al Qaeda* or the training camps) during that period.

Similarly, the alleged question from Saif al Adel to Mr. Badat – whether he knew Mr. Mostafa – does not prove anything, as Mr. Badat answered in the negative. While the government, in Memo of Law at 12-13, contends that Mr. Badat's projected "testimony about al-Adel demonstrates that the defendant was well-known to senior al Qaeda leadership, and that the defendant was trusted by al Qaeda to send them trainees[,]" that assertion is built entirely on a fictional narrative built by the government from that single question, *answered in the negative*, and not from any evidence.

In fact, in footnote 6 (at p. 13) of its Memo of Law, the government acknowledges that Mr. Badat, not personally familiar with Mr. Mostafa, built trust through his other connections. Indeed, we do not know whether, if Mr. Badat had replied that he was familiar with Mr. Mostafa personally, he would have been *rejected*. Moreover, Saif al Adel's alleged remark about Mr. Mostafa's son is merely rank hearsay.

Also, while the government, in its Memo of Law, at 14, maintains "it is crucial for the jury to understand who Ibn Sheik and Abu Khabab were, the nature of the training they provided, and their associations with terrorist organizations[,]" such testimony from Mr. Badat should be precluded under Rule 403, as it would inject in the case generalized terrorist names and affiliations that would serve to obscure the lack of evidence with respect to Mr. Mostafa, and his particular conduct, knowledge, and intent.

This lack of connection to Mr. Mostafa's conduct, knowledge, and intent distinguishes Mr. Badat's proposed testimony in this case from that projected in *Abu Ghayth*, in which Mr. Badat would testify about his personal involvement in a specific terrorist plot involving an airplane "at approximately the same time, [Abu Ghayth] appeared in public videos threatening that al Qaeda was going to strike America with more airplane-borne suicide terrorist attacks." 2014 WL 144563, at *2.

As a result, as Judge Kaplan concluded, Mr. Badat's testimony in that case would be "probative of Abu Ghayth's knowing involvement in a conspiracy to kill Americans and provision of material assistance to terrorism." *Id.* The government has not even approached that showing of materiality here with respect to Mr. Mostafa. Accordingly, Mr. Badat's testimony is not material, and/or much of it would be so unfairly prejudicial – substantially outweighing its

probative value – that it would be inadmissible under Rule 403.

POINT II

THE GOVERNMENT HAS NOT SATISFIED RULE 15(c)(3)'s SEVERAL CONDITIONS FOR TAKING TESTIMONY OUTSIDE MR. MOSTAFA'S PHYSICAL PRESENCE

Rule 15(c)(3) of the Federal Rules of Criminal Procedure permits a deposition outside the United States without the defendant's physical presence in very limited circumstances. The Rule prescribes several conditions precedent, and the government has failed to satisfy them in this case with respect to Mr. Badat's proposed testimony.

A. *Rule 15(c)(3)'s Provisions*

Rule 15(c)(3), Fed.R.Crim.P., provides as follows:

> (3) Taking Depositions Outside the United States Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:
>
> (A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
>
> (B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
>
> (C) the witness's presence for a deposition in the United States cannot be obtained;
>
> (D) the defendant cannot be present because:
>
> (i) the country where the witness is located will not permit the defendant to attend the deposition;
>
> (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
>
> (iii) for an out-of-custody defendant, no reasonable conditions

will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

As the party requesting the deposition, the government bears the burden of proof with respect to all five criteria enumerated in Rule 15(c)(3) "by a preponderance of the evidence." *See* Advisory Committee Notes to Fed. R. Crim. P. 15(c)(3); *see also Lego v. Twomey*, 404 U.S. 477, 489. Examination of those requirements demonstrates the government cannot do so in this case.

B. *The Government Has Not Satisfied Rule 15(c)(3)'s Conditions*

For example, with respect to Rule 15(c)(3)(A), for the reasons set forth **ante**, at 20-23, Mr. Badat's projected testimony would not be material to this case. Regarding witness unavailability, Rule 15(c)(3)(B) and (C), as detailed **ante**, at 8-20, the government has failed to demonstrate that Mr. Badat is "unavailable" to testify in person at trial, and/or that the government has made the requisite good-faith effort to secure his in-person testimony.

Regarding Rule 15(c)(3)(D)(i) and (ii), while the government, in AUSA McGinley's Declaration, at ¶ 7, suggests that the U.K. "would very likely not permit the defendant to enter the United Kingdom while not in custody (or perhaps at all)[,]" that is not based on any evidence or representations by the U.K. government, and therefore purely speculative and certainly not dispositive.

In fact, the history of the protracted litigation of Mr. Mostafa's extradition from the U.K. indicates the opposite. Throughout that process the U.K. and the European Court for Human Rights were diligent in seeking assurance from the U.S. that Mr. Mostafa would receive due

process and a fair trial. There is no reason to believe that ensuring that Mr. Mostafa had an authentic opportunity to confront Mr. Badat would meet resistance from the U.K. Indeed, considering the public opposition to Mr. Mostafa's extradition, the U.K. government would have an incentive to provide the means for Mr. Mostafa to have the benefit of his constitutional rights.

Nor should secure transportation to or custody in the U.K. be an impediment. Mr. Mostafa was safely transported to the U.S. without incident, and was in custody in the U.K. for nearly a decade without any security issues. Thus, neither of those conditions for conducting a deposition outside a defendant's physical presence – lack of secure transportation or confinement options to or at the location of the deposition – have been met here.

Regarding Rule 15(c)(3)(E)'s requirement that the Court find that Mr. Mostafa can "meaningfully participate in the deposition through reasonable means[,]" is problematic as well on a functional level. While arrangements can be made for a defendant's telephone access to counsel conducting the deposition (and for co-counsel to be present with the defendant), such communications do not have the assurance of confidentiality, and often, in counsel's experience, do not operate as they are designed.

In *United States v. Abu Ali*, 528 F.3d 210, 238 (4th Cir. 2008), the Rule 15 depositions were conducted via two-way video feed so the defendant could virtually face his accusers. At government expense, two defense attorneys attended the depositions in Saudi Arabia and personally cross-examined the witnesses. A third lawyer stayed with the defendant, where the trial judge also presided. The trial court ordered that the depositions could be interrupted at any time for private telephone conversations between the defendant and counsel. *Id.* at 239-40.

However, even that modest aspirational protocol met difficulty in practice, as the

telephone line for continuous communication between counsel and the defendant was not provided (and without explanation). As a substitute, the District Court limited the defendant's consultation to an unsecure cellular phone connection during the breaks in testimony.[11] Thus, even with best of intentions, the "meaningful participat[ion] in the deposition through reasonable means" required by Rule 15(c)(3)(E) will likely be realized.

Accordingly, the government has not met the conditions set by Rule 15(c)(3) for conducting a deposition overseas without the defendant being physically present.

POINT III

TESTIMONY BY EITHER CLOSED-CIRCUIT TELEVISION OR RULE 15 DEPOSITION IF CONDUCTED ABSENT MR. MOSTAFA'S PHYSICAL PRESENCE, WOULD VIOLATE HIS SIXTH AMENDMENT RIGHTS TO CONFRONTATION AND THE EFFECTIVE ASSISTANCE OF COUNSEL

Testimony by closed-circuit television, or pursuant to Rule 15(c) is unconstitutional to the extent it denies Mostafa in-person confrontation of the witness (which the government seeks to accomplish here), a Sixth Amendment constitutional right Mr. Mostafa invokes here. It would also violate his concurrent Sixth Amendment right to effective assistance of counsel.[12]

---

[11] Also, in *Abu Ali*, the Fourth Circuit recognized the grave confrontation clause concerns raised by the introduction of testimony by agents of the Saudi Arabian Mabahith. Noting that nothing "diminishes the fact that face-to-face confrontation is a critical component of the defendant's Sixth Amendment right," 528 F.3d at 243, the court nonetheless upheld the procedures used given the "unusual" circumstances of the case, which included (i) the fact that the Saudi witnesses were beyond the court's subpoena powers; (ii) Saudi Arabia's refusal to permit the Mabahith officers (the witnesses) to testify in the U.S.; and (iii) the defendant's disinterest in traveling to Saudia Arabia for fear of prosecution, and because he alleged that he had been tortured there during his confinement and interrogation. *Id.*

[12] The defendant in *Abu Ghayth* did not raise a constitutional challenge to either Rule 15(c) or testimony via closed-circuit television.

A. *The Sixth Amendment Confrontation Standard*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (*en banc*), the Eleventh Circuit, sitting *en banc*, explained that "[t]his clause, known as the Confrontation Clause, 'guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.'" *Id.*, at 1312, *quoting Coy v. Iowa*, 487 U.S. 1012, 1016 (1988).

In *Coy*, the Court recognized the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" 487 U.S., at 1021, *quoting California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring). *See also Maryland v. Craig*, 497 U.S. 836, 844 (1990). Indeed, the Court in *Yates* found that denying the defendants the right to be *present* at trial testimony presented by two-way video conferencing violated their Sixth Amendment confrontation rights.

However, as the Court in *Yates* pointed out, as a result of the Supreme Court's decision in *Craig*, "[t]his right to a physical face-to-face meeting, however, is not absolute and may be compromised under limited circumstances where 'considerations of public policy and necessities of the case' so dictate." 438 F.3d at 1312, *quoting Craig,* 497 U.S. at 848. Nevertheless, the exception created in *Craig* was very narrowly drawn, and the holding was tailored to a particular situation: child witnesses testifying in child abuse cases. 497 U.S. at 860.

There are several qualifying elements in that exception, the narrowness of which was reinforced by the Court's conclusion that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some

cases, a defendant's right to face his or her accusers in court." 497 U.S. at 853.[13]

Also, the Supreme Court has long recognized that the "primary object" of the Confrontation Clause is to prevent trial by depositions and ex parte affidavits. *See Mattox v. United States*, 156 U.S. 237, 242-45 (1895). More recently, in *Coy*, the Court reaffirmed that confrontation of adverse witnesses is an "essential" component of a fair criminal proceeding. 487 U.S. at 1015 (citations omitted). A witness may be less likely to lie about the defendant if he must do so in front of the defendant. *Id.*, at 1019-20.

The importance of the Confrontation Clause was again reiterated in *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Court referred to it as a "bedrock procedural guarantee," and held that the touchstone of the Sixth Amendment is the right to actual confrontation of one's accusers, not reliability. *Id.*, at 55-56.

B. *The 2012 Amendment to Rule 15, Fed.R.Crim.P. As Applied Here Violates Mr. Mostafa's Sixth Amendment Right to Confrontation*

Rule 15 was amended in 2012 to add subsection (c)(3), which permits the deposition of a witness outside the United States without the defendant's presence. Advisory Committee Notes to Fed. R. Crim. P. 15(c)(3), at 101. However, Rule 15(c)(3) is unconstitutional as applied here to the extent it permits the taking of witness testimony outside Mr. Mostafa's physical presence (without his consent). As discussed briefly above, the Supreme Court has long recognized that the Sixth Amendment's Confrontation Clause "guarantees the defendant a face-to-face meeting

---

[13] In addition, the compelling state interest the Court recognized in *Craig* was "the protection of minor victims of sex crimes from further trauma and embarrassment[.]" 497 U.S. at 851 (citations omitted). No such interest exists here, and rather than representing the complainant-witness, Mr. Badat is a proposed witness whose probative value, as discussed **ante**, at 20-23, is marginal at best.

with witnesses appearing before the trier of fact." *Coy*, 487 U.S. at 1015 (citations omitted) (tracing the right back to Roman law); *see also Maryland v. Craig*, 497 U.S. at 845-47.[14]

Such confrontation of adverse witnesses is an "essential" component of a fair trial. *Coy*, 487 U.S. at 1019-20. As a result, as the Court in *Coy* explained, the "explicit right to face-to-face confrontation is a distinct constitutional guarantee from that of cross-examination, though it serves much the same purpose." *Id.*

Craig followed *Coy*, although subsequent to *Craig* the Court abandoned the precedent upon which it was based, emphasizing that the touchstone of the Sixth Amendment is the right to actual confrontation of one's accusers, not reliability.[15] In *Craig,* a 5-4 decision from which Justice Scalia, the author of the opinion in *Coy*, dissented, the majority wrote that the "central

---

[14] Blackstone viewed face-to-face confrontation as an essential right:

> [t]his open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify ina public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.

2 William Blackstone, Commentaries on the Laws of England 373-74, *quoted in* Natalie Kijurna, *Lilly v. Virginia: the Confrontation Clause and Hearsay – "Oh What a Tangled Web We Weave . . . .,"* 50 DEPAUL L. REV. 1133, 1144 & n.67 (2001).

[15] In *Craig*, the Court permitted one-way video testimony only because the trial court had made individualized findings that the child witnesses needed special protection. 497 U.S. at 845.

concern of the Confrontation Clause is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." 497 U.S. at 845.

Although that majority in *Craig* recognized that "face-to-face confrontation forms 'the core of values furthered by the Confrontation Clause,'" 497 U.S. at 846 (citation omitted), the Court, relying on *Ohio v. Roberts*, 448 U.S. 56 (1980), concluded that the Sixth Amendment right to confrontation was not absolute. Instead, it read its precedent merely as establishing a "preference" for face-to-face confrontation. 497 U.S. at 63.

Justice Scalia, joined by three other Justices, disagreed sharply. Setting forth reasoning that would later, in *Crawford*, be adopted by a majority of the Court, Justice Scalia explained that the "Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." 497 U.S. at 862. He added that a defendant's right to confrontation at trial is not a "preference 'reflected' by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed." *Id.*, at 863. *See also id.*, at 866-67 (requirement that the accuser look the defendant in the eye as she makes the accusation that is the essence of face-to-face confrontation).

In *Crawford*, a seven-member majority of the Court adopted the *Craig* dissent's reasoning regarding the purpose of the confrontation right, and overruled *Roberts* with respect to testimonial statements. In so doing, the Court explained,

> [w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . To be sure, the Clause's ultimate goal is to

> ensure reliability of evidence, but it a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61.[16]

While the government cites cases permitting deposition or video testimony taken outside the defendant's physical presence, those decisions pre-date *Crawford* and therefore are of limited or no value. *See, e.g., United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989); *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988).[17] In the only post-*Crawford* Court of Appeals decision, *Abu Ali*, as discussed **ante**, at 16-17 and 25-26, the case involved Saudi Arabia, a country with which the United States does not have an MLAT, and the defendant refused to travel to Saudi Arabia for the deposition.

Also, in *Yates*, the Eleventh Circuit deemed inadequate the government's claim that the evidence was crucial to its case:

> there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously

---

[16] While *Crawford* addressed the procedural right of cross-examination, the dissent in *Craig* presented virtually identical reasoning regarding face-to-face confrontation. Indeed, Justice Scalia's dissent in *Craig* explained that cross-examination is simply an "implied and collateral right[ ]" to the explicit right of confrontation. 497 U.S. at 862.

[17] In addition, each of those decisions is actually distinguishable either because the country at issue lacked an MLAT with the United States, or the defendant refused to travel to the country where the deposition was to be conducted.

> are important public policies that support the admission of two-way video conference.

438 F.3d at 1316. *See also Crawford*, 541 U.S. at 55-56 ("[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes").

Even if that portion of *Craig* relevant to this case has not been overruled by *Crawford*, its remaining prong requires at a minimum a showing that denial of a defendant's right to confrontation is "necessary" to further an "important public policy." 497 U.S. at 850. The professed "important purpose" underlying Rule 15(c)(3) is to assist the United States in prosecuting "transnational" crimes.

The Rule thus fails to require a showing that the evidence sought is "necessary" to the government's case. Rather, Rule 15(c)(3) permits depositions if the district court finds merely that the projected testimony "could" provide proof of a material fact. Reducing the standard below "necessity" impermissibly dilutes Mr. Mostafa's Sixth Amendment right to confrontation.

Craig involved charges of child abuse, and the witness was a minor and the victim of the alleged abuse. The Court emphasized that "[t]he requisite finding of necessity must of course be a case-specific one." 497 U.S. at 855. Here, of course, none of those compelling interests are at stake.

In *Yates*, the *en banc* Court, citing *Craig*, listed several steps a court should take before it could allow "a departure from usual procedures":

> [t]he court generally must: (1) hold an evidentiary hearing and (2) find: (a) that the denial of physical, face-to-face confrontation at trial is necessary to further an important public policy and (b) that the reliability of the testimony is otherwise assured.

438 F.3d at 1315 (*citing Craig*, 497 U.S. at 850, 855).

In *Yates*, the defendants enjoyed real-time access to the witnesses via the video feed, as "[b]oth Defendants, the jury, and the judge could see the testifying witnesses on a television monitor; and the witnesses could see the temporary courtroom in the U.S. Attorney's conference room." 438 F.3d at 1310 (footnote omitted). The government argued that "confrontation rights would not be violated because the two-way video conference would allow Defendants to see the witnesses and the witnesses to see Defendants during the testimony." *Id.*, at 1309.

Yet not even that level of access satisfied the Eleventh Circuit *en banc*. As the Court reasoned, "[t]he simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent." *Id.*, at 1315, *citing United States v. Bordeaux,* 400 F.3d 548, 554-55 (8th Cir. 2005) ("'confrontation' via a two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation"). *See also Yates*, 438 F.3d at 1315 ("[t]he Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium"); *Don v. Nix,* 886 F.2d 203, 206 (8th Cir. 1989) (holding that the Sixth Amendment guarantees a criminal defendant the opportunity to be present at the deposition of an accuser); *United States v. Benfield,* 593 F.2d 815, 821 (8th Cir. 1979); *In re Letters of Request from Supreme Court of Hong Kong,* 821 F. Supp. 204, 209 (S.D.N.Y. 1993) (stating that Rule 15 guarantees defendants a right to be present at deposition in order to prevent the testimony's use at trial from violating the right to confrontation).

The Court in *Yates* added that

> [i]t is the extraordinary circumstance where deposition testimony is taken despite a defendant's want of opportunity to be present. *See, e.g., United States v. Salim,* 855 F.2d 944, 949 (2d Cir. 1988) (finding that deposition may be taken, despite foreign country's refusal to allow defendant to be present but deferring question of whether admission of such a deposition would violate the Confrontation Clause). Even in those exceptional cases, courts have said that the government must have made diligent and reasonable efforts to produce the defendant at the taking of the deposition. *Id.* at 950-51; *see also United States v. McKeeve,* 131 F.3d 1, 8 (1st Cir. 1997). Other circuits have recognized that failure to make such efforts, followed by use of the deposition at trial, violates the defendant's confrontation rights. *See, e.g., Christian v. Rhode,* 41 F.3d 461, 465-67 (9th Cir. 1994).

Id.[18]

The Supreme Court has characterized confrontation as the "greatest legal engine ever

---

[18] The *en banc* Court in *Yates* pointed to other indicia that the two-way video conferencing failed to conform with Sixth Amendment standards:

> [i]n 2002, the Advisory Committee on the Criminal Rules suggested a revision to Federal Rule of Criminal Procedure 26 that would have allowed testimony by means of two-way video conferencing. Thereafter, the Supreme Court transmitted to Congress proposed amendments to the Federal Rules of Criminal Procedure. The Court declined to transmit the proposed revision to Rule 26 that would have allowed testimony by two-way video conference. Justice Scalia filed a statement explaining that he shared "the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution ...." *Order of the Supreme Court,* 207 F.R.D. 89, 93 (2002). He remarked that the proposed amendments were "contrary to the rule enunciated in *Craig*" in that they would not limit the use of remote testimony to "instances where there has been a 'case-specific finding' that it is 'necessary to further an important public policy.' " *Id.* (citation omitted). Rule 26 was not revised to allow such testimony.

438 F.3d at 1314-15.

invented for the discovery of truth." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987). The specific benefits of face-to-face confrontation have been articulated by the Supreme Court on several occasions. *See, e.g., Coy,* 487 U.S. at 1019-1020 ("[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"); *Ohio v. Roberts,* 448 U.S. at 63 n. 6; and 3 W. Blackstone, Commentaries 373-374.

Denying Mr. Mostafa the right to face Mr. Badat personally would have the effect of protecting the witness from "the hostile glare of the defendant[,]" *Craig*, 497 U.S. at 866 (Scalia, J., *dissenting*) that is at the heart of the Sixth Amendment's right to confrontation. Accordingly, admitting Mr. Badat's testimony either by closed-circuit television or a Rule 15 deposition would, if conducted outside Mr. Mostafa's physical presence, be unconstitutional as applied in this case.

C. *Conducting Closed-Circuit Television Testimony or a Rule 15 Deposition Outside Mr. Mostafa's Physical Presence Would Deny Him Effective Assistance of Counsel*

The role of counsel in a criminal case is "to ensure that the adversarial process works to produce a just result . . ." *Burger v. Kemp*, 483 U.S. 776, 788 (1987). Thus, like the right to face-to-face confrontation, the right to counsel is an indispensable element of the factfinding process. Here, despite the best intentions, it is respectfully submitted that the prospect of Mr. Mostafa's access to counsel being impaired during Mr. Badat's testimony (by either closed-circuit television or Rule 15 deposition) is sufficient to deny the government's motion because that impairment would deny Mr. Mostafa effective assistance of counsel.

Except when the defendant is testifying as a witness, the defendant has a "right to unrestricted access to his lawyer for advice . . ." *Perry v. Leeke*, 109 S. Ct. 594, 602 (1989) (emphasis added); *Geders v. United States*, 425 U.S. 80, 89 (1976) (right to consult). The Sixth

Amendment right to counsel is necessarily diluted by physically separating a defendant and his counsel, and then severely limiting their ability to consult in any effective manner. As discussed **ante**, at 25-26, in *Abu Ali* the District Court's protocols designed to provide real-time continuous access between counsel and the defendant – in effect attempting to replicate the traditional courtroom environment – were not implemented, and the defendant's ability to confer with counsel, and *vice versa* was significantly limited.

As a result, for practical purposes, the defendant's contribution to cross-examination was substantially diminished, as was the ability of counsel to represent him in a constitutionally adequate manner. The prospect that the same technical or other logistical difficulties will occur here is reason enough to deny the government's motion, as at that point little can be done to protect Mr. Mostafa's right to effective assistance of counsel.

POINT IV

MR. MOSTAFA'S PREFERENCE IF THE COURT GRANTS THE GOVERNMENT'S MOTION

If the Court grants the government's motion, and denies Mostafa the right to be present, he would prefer that the testimony occur "live" via closed-circuit television during trial rather than via a Rule 15 deposition. The government has known about this witness for years, yet only now did it make the motion. It is respectfully requested that the defense should not be diverted from essential trial preparation to adjust already compressed schedules (due to the impending trial date) in order make arrangements to travel to London (and then perform the travel and deposition itself) for the deposition.

Conclusion

For all the reasons set forth above, it is respectfully submitted that the Court should deny the government's Motion to Offer the Testimony of a Witness Via Live Closed-Circuit Television During Trial Or, In the Alternative, For Deposition Pursuant to Rule 15 of the Federal Rules of Criminal Procedure, in their entirety.

Dated: 20 February 2014
New York, New York

Respectfully submitted,

/S/ Joshua L. Dratel

Joshua L. Dratel
Joshua L. Dratel, P.C.
29 Broadway
Suite 1412
New York, New York 10006
(212) 732-0707

Jeremy Schneider
Rothman, Schneider, Soloway & Stern, LLP
100 Lafayette Street
Suite 501
New York, New York 10013
212-571-5500

Attorneys for Defendant
Mostafa Kamel Mostafa

– Of Counsel –

Joshua L. Dratel
Jeremy Schneider
Lindsay A. Lewis
Lucas Anderson