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Dr #397

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84097

UNITED STATES OF AMERICA,	:	
	:	
- v. -	:	S(7) 98 Cr. 1023 (LBS)
	:	
USAMA BIN LADEN,	:	OPINION
a/k/a "Usamah Bin-Muhammad Bin-Ladin,"	:	
a/k/a "Shaykh Usamah Bin-Ladin,"	:	
a/k/a "Abu Abdullah,"	:	To Be Filed Under Seal
a/k/a "Mujahid Shaykh,"	:	
a/k/a "Hajj,"	:	
a/k/a "Abdul Hay,"	:	December 15, 2000
a/k/a "al Qaqa,"	:	
a/k/a "the Director,"	:	
a/k/a "the Supervisor,"	:	
a/k/a "the Contractor,"	:	
MUHAMMAD ATEF,	:	
a/k/a "Abu Hafs,"	:	
a/k/a "Abu Hafs el Masry,"	:	
a/k/a "Abu Hafs el Masry el Khabir,"	:	
a/k/a "Taysir,"	:	
a/k/a "Sheikh Taysir Abdullah,"	:	
a/k/a "Abu Fatimah,"	:	
a/k/a "Abu Khadija,"	:	
AYMAN AL ZAWAHIRI,	:	
a/k/a "Abdel Muaz,"	:	
a/k/a "Dr. Ayman al Zawahiri,"	:	
a/k/a "the Doctor,"	:	
a/k/a "Nur,"	:	
a/k/a "Ustaz,"	:	
a/k/a "Abu Mohammed,"	:	
a/k/a "Abu Mohammed Nur al-Deen,"	:	
MAMDOUH MAHMUD SALIM,	:	
a/k/a "Abu Hajer al Iraqi,"	:	
a/k/a "Abu Hajer,"	:	
KHALED AL FAWWAZ,	:	
a/k/a "Khaled Abdul Rahman Hamad al Fawwaz,"	:	
a/k/a "Abu Omar,"	:	
a/k/a "Hamad,"	:	

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FILED OPINION
U.S. DISTRICT COURT
2001 JAN -2 P 4:08
SOUTHERN DISTRICT
OF NEW YORK

MICROFILM
JAN 03 2001
9:00 AM

ALI MOHAMED, :
a/k/a "Ali Abdelseoud Mohamed," :
a/k/a "Abu Omar," :
a/k/a "Omar," :
a/k/a "Haydara," :
a/k/a "Taymour Ali Nasser," :
a/k/a "Ahmed Bahaa Eldin Mohamed Adam," :
WADIH EL HAGE, :
a/k/a "Abdus Sabbur," :
a/k/a "Abd al Sabbur," :
a/k/a "Wadia," :
a/k/a "Abu Abdullah al Lubnani," :
a/k/a "Norman," :
a/k/a "Wa'da Norman," :
a/k/a "the Manager," :
a/k/a "Tanzanite," :
IBRAHIM EIDAROUS, :
a/k/a "Ibrahim Hussein Abdelhadi Eidarous," :
a/k/a "Daoud," :
a/k/a "Abu Abdullah," :
a/k/a "Ibrahim," :
ADEL ABDEL BARY, :
a/k/a "Adel Mohammed Abdul Almagid :
Abdel Bary," :
a/k/a "Abbas," :
a/k/a "Abu Dia," :
a/k/a "Adel," :
FAZUL ABDULLAH MOHAMMED, :
a/k/a "Harun," :
a/k/a "Harun Fazhl," :
a/k/a "Fazhl Abdullah," :
a/k/a "Fazhl Khan," :
MOHAMED SADEEK ODEH, :
a/k/a "Abu Moath," :
a/k/a "Noureldine," :
a/k/a "Marwan," :
a/k/a "Hydar," :
a/k/a "Abdullbast Awadah," :
a/k/a "Abdulbasit Awadh Mbarak Assayid," :
MOHAMED RASHED DAOUD AL-'OWHALI, :
a/k/a "Khalid Salim Saleh Bin Rashed," :

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a/k/a "Moath," :
a/k/a "Abdul Jabbar Ali Abdel-Latif," :
MUSTAFA MOHAMED FADHIL, :
a/k/a "Mustafa Ali Elbishy," :
a/k/a "Hussein," :
a/k/a "Hussein Ali," :
a/k/a "Khalid," :
a/k/a "Abu Jihad," :
KHALFAN KHAMIS MOHAMED, :
a/k/a "Khalfan Khamis," :
AHMED KHALFAN GHAILANI, :
a/k/a "Fupi," :
a/k/a "Abubakary Khalfan Ahmed Ghailani," :
a/k/a "Abubakar Khalfan Ahmed," :
FAHID MOHAMMED ALLY MSALAM, :
a/k/a "Fahad M. Ally," :
SHEIKH AHMED SALIM SWEDAN, :
a/k/a "Sheikh Bahamadi," :
a/k/a "Ahmed Ally," :
:
Defendants. :
----------x

APPEARANCES:

MARY JO WHITE
United States Attorney for the
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007
PAUL W. BUTLER
KENNETH M. KARAS
PATRICK J. FITZGERALD
MICHAEL J. GARCIA
ANDREW McCARTHY
Assistant United States Attorneys

(appearances continued on following page)

SAM A. SCHMIDT
JOSHUA L. DRATEL
KRISTIAN K. LARSEN
Attorneys for Defendant El-Hage
111 Broadway, 13th Floor
New York, New York 10006

FREDERICK H. COHN
LAURA GASIOROWSKI
DAVID PRESTON BAUGH
Attorneys for Defendant Al-'Owhali
500 5th Avenue, 33rd Fl.
New York, New York 10007

JEREMY SCHNEIDER
DAVID STERN
DAVID RUHNKE
Attorneys for Defendant Khamis Mohamed
70 Lafayette Street, 7th Floor
New York, New York 10013

ANTHONY L. RICCO
EDWARD D. WILFORD
CARL J. HERMAN
SANDRA A. BABCOCK
Attorneys for Defendant Odeh
20 Vesey Street
New York, New York 10007

HON. LEONARD B. SAND, U.S.D.J.

OPINION[1]

SAND, District Judge.

The Defendants are charged with numerous offenses arising out of their alleged participation in an international terrorist organization led by Defendant Usama Bin Laden and that organization's alleged involvement in the August 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Presently before the Court are Defendant El-Hage's requests for the following relief: (1) suppression of statements made by the Defendant to United States law enforcement agents, on August 21, 1997, at Kenyatta International Airport in Nairobi, Kenya; (2) suppression of evidence obtained during the search of the Defendant upon his arrival in the United States at John F. Kennedy International Airport on September 23, 1997; (3) suppression of tape recordings or summaries of telephone conversations which are the product of electronic surveillance conducted in Arlington, Texas, pursuant to the Foreign Intelligence Surveillance Act (FISA), during August and September 1998; (4) sanctions against the Government for destruction of tape recordings of the electronic surveillance conducted pursuant to FISA; (5) dismissal of the Indictment or suppression of evidence in light of the Government's allegedly outrageous conduct during its investigation of the Defendant; and (6) partial disqualification of Assistant United States Attorney (AUSA) Patrick Fitzgerald.[2]

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[1] This opinion is being filed initially under seal. It will be unsealed on December 29, 2000 unless the Court is advised in writing on or before that date that there is good reason why it should continue to be under seal.

[2] El-Hage also sought additional relief, including suppression of evidence derived from electronic surveillance from August 1996 to August 1997 and suppression of evidence obtained during the August 21, 1997 search of his residence in Kenya. In an opinion issued by the Court on December 5, 2000, the Court denied these parts of El-Hage's suppression motion.

BACKGROUND

A detailed factual background of this case was set forth in the Court's memorandum and order addressing the Defendants' request for a bill of particulars. See United States v. Bin Laden, 92 F.Supp.2d 225, 228 (S.D.N.Y. 2000). For the purpose of resolving this motion, it is necessary to review some of the relevant facts before proceeding.

From August 1996 through August 1997, the United States intelligence community conducted electronic surveillance on five telephone lines (including the Defendant's residential line and a cellular phone that he used) which had been identified with Usama Bin Laden and his associates. (Resp.[3] at 2-3.) On August 21, 1997, American and Kenyan officials conducted a search of the Defendant's residence. (Schmidt Aff. ¶ 38.) It was apparently several weeks before El-Hage was informed that the property seized during the search of the residence was in the possession of the United States Government. (Id. ¶¶ 58-61.)

On August 21, 1997, the same day that his Kenyan residence was searched, El-Hage (who was not present during the residential search) arrived at the Kenyatta airport in Nairobi after a flight from Pakistan. (Id. ¶ 53.) Upon his arrival, El-Hage was directed to a private room in the terminal by a Kenyan official and was interviewed by several American officials. (Id.) El-Hage asserts (and the Government does not dispute) that he was not informed of his "Miranda" rights. (Id. ¶ 54.) El-Hage alleges that under the circumstances, he believed that he was not free to leave the room in which he was being questioned. (Id.) The Government,

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[3] The Government submitted two separate responses to El-Hage's motion to suppress. The abbreviation "Resp." is used in this opinion to refer to the Government's Response to El-Hage's Motions to (1) Suppress Evidence Seized During a Search at JFK Airport; (2) Suppress Statements Made to US Government Officials in Kenya; (3) Disqualify an Assistant United States Attorney; (4) Impose Sanctions for Destruction of Evidence; and (5) Dismiss the Indictment for Alleged Outrageous Government Conduct.

however, states that El-Hage was not in custody and that he did not express an unwillingness to answer questions. (Resp. at 3.) During this interview, government officials indicated that they believed that El-Hage and his family could be in danger if they remained in Nairobi and the agents offered to help the Defendant "if he cooperated with them." (Schmidt Aff. ¶ 56; Letter from Fitzgerald to Schmidt of 3/22/2000, at 1.)

On September 23, 1997, when the Defendant and his family transited JFK Airport in New York, en route to Arlington, Texas, they were detained by U.S. officials, their luggage was searched and numerous items were copied and later returned. (Schmidt Affirmation ¶¶ 62-67; Resp. at 3.) The Government served El-Hage with a subpoena to appear before the grand jury on the following day and interviewed El-Hage for several hours that evening. (Schmidt Aff. ¶¶ 65, 71.) The Government indicates that the principal goal of its investigation was to bring a case against Bin Laden. (Fitzgerald Aff. ¶ 26.) Their hope, in questioning El-Hage, was that he would either cooperate against Bin Laden or at least, perhaps even without knowing it, provide information that would assist the Government with its ongoing investigation. (Id.) El-Hage's appearance before the grand jury lasted less than five hours and the actual amount of time he spent testifying was approximately 3.5 hours. (Id. ¶ 28.) At no time during his appearance before the grand jury did the Defendant indicate that he felt fatigue. (Id. ¶ 31.) After he finished testifying, El-Hage proceeded to travel to Texas with his family. (Schmidt Aff. ¶ 72.)

On October 17, 1997, AUSA Fitzgerald and other officials traveled to Texas to meet with the Defendant. (Schmidt Aff. ¶ 74; Fitzgerald Aff. ¶ 33.) The Government had become aware of information that an associate of Bin Laden's was traveling to Nairobi "to inquire into the status" of the Defendant and the Government believed that this person might

pose a threat to El-Hage or his family. (Fitzgerald Aff. ¶ 33.) At the October 17, 1997 interview, the Government warned El-Hage of this possible danger. (Id.; Schmidt Aff. ¶ 74.)

In August and September 1998, the Government conducted electronic surveillance of the Defendant pursuant to FISA, 50 U.S.C. §§ 1801 et seq. (1978). (Schmidt Aff. ¶ 85.) The majority of the conversations intercepted over El-Hage's telephone lines during August and September 1998 were not preserved. (El-Hage Mot. at 64; Resp. at 11.) The Government explains that because of a technological malfunction, these conversations were temporarily recorded on the hard drive of the recording system but were either not permanently recorded or were inadvertently erased. (Bryant Aff. ¶¶ 6-9.)

On September 16, 1998, El-Hage was again subpoenaed to appear before the grand jury in the Southern District of New York. (Schmidt Aff. ¶ 96.) Immediately after his appearance, he was arrested and taken into custody. (Id. ¶ 99.)

ANALYSIS

I. Suppression of Statements Made by the Defendant at Kenyatta Airport

El-Hage asks the Court to suppress the statements that he made to United States law enforcement agents at Kenyatta Airport on August 21, 1997. According to the Defendant, these statements were "involuntary" because they were made while he was "effectively in custody." (El-Hage Mot. at 24.) The Government indicates that it does not intend to introduce these statements as part of its case-in-chief. (Resp. at 2-3.) Nonetheless, the Defendant requests a hearing to determine whether the statements were obtained unlawfully and, if so, whether the

statements yielded any other evidence which ought to be suppressed. (Reply at 45.)

For the purpose of this analysis, the Court assumes that El-Hage's claim that he believed that he was not free to leave the interview room is true. Likewise, the Court accepts El-Hage's claim that he was not given his Miranda warnings. See Miranda v. Arizona, 384 U.S. 436, 467 (1966). Even if, after a hearing to determine the circumstances surrounding the interview, the Court were to find that El-Hage was, indeed, "in custody" at the time of the interview, the Court finds that the remedy that El-Hage seeks in this case would be unavailable. It is therefore unnecessary to resolve the lawfulness of the interrogation.

The rule that evidence derived from an unconstitutional search or interrogation will be suppressed as the "fruit of the poisonous tree" is firmly established. See Silverthorne v. United States, 251 U.S. 385, 392 (1920); Nardone v. United States, 308 U.S. 338, 342 (1939); Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, the Supreme Court, in applying Wong Sun and its precursors, has held that a Miranda violation alone will not trigger the application of the doctrine. See Michigan v. Tucker, 417 U.S. 433, 444 (1974) (refusing to extend Wong Sun to apply to the fruits of a Miranda violation); Oregon v. Elstad, 470 U.S. 298, 307-08 (1985) (same).[4] Thus, evidence (whether physical or testimonial) derived from "unwarned" statements is not excluded unless the original statements were made involuntarily. See id. See also United States v. Guzman, 11 F.Supp.2d 292, 298 (S.D.N.Y. 1998) (treating physical evidence derived from a statement obtained in violation of Miranda in the same way that derivative statements are treated and finding that "absent coercion or other misconduct" such

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[4] The Supreme Court in Dickerson v. United States, 120 S.Ct. 2326 (2000), held that a Miranda violation is a constitutional violation, but did not otherwise disturb its ruling in Elstad. Id. at 2334.

derivative evidence is admissible); United States v. Eggers, 21 F.Supp.2d 261, 267 (S.D.N.Y.,1998) (adopting the rule that the "fruits of a Miranda violation are to be suppressed only upon a showing of actual coercion").[5]

Therefore, the only remaining question is whether El-Hage's statements at Kenyatta Airport were involuntarily made. Other than summarily concluding that they were involuntary, El-Hage makes no real allegation that his statements to the United States officials were coerced or otherwise induced through the misconduct of the officials involved. The only related allegation proffered by the Defendant is that he was "compliant because he did not want to risk being detained by the Kenyan police" who have a "well-known and well-deserved reputation for mistreating persons in custody." (Schmidt Aff. ¶ 55.) This mere suggestion of coercion based only on the alleged bad reputation of the Kenyan officers and without any claim of a specific threat being made (See Resp. at 3) is insufficient to meet the requisite standard of involuntariness. See United States v. Guzman, 11 F.Supp.2d 292, 298 (S.D.N.Y. 1998) (stating that finding of involuntariness requires showing of "coercion or other misconduct on the part of law enforcement officers sufficiently egregious to offend due process"). The Court finds that the statements were not involuntary and, therefore, El-Hage's motion to suppress the fruits of statements made at Kenyatta Airport is denied.

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[5] Although the Supreme Court and the Second Circuit have not resolved this issue, numerous other circuits have applied Elstad's holding regarding derivative *testimonial* evidence to admit *physical* evidence which is the fruit of a Miranda violation. See United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997); United States v. Barte, 868 F.2d 773, 774 (5th Cir. 1989); United States v. Wiley, 997 F.2d 378, 382-83 (8th Cir. 1993); United States v. Sangineto-Miranda, 859 F.2d 1501, 1516-19 (6th Cir. 1988); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1048 (9th Cir. 1990).

II. Suppression of Evidence Obtained During the Border Search at JFK Airport

In addition, El-Hage initially moved for the suppression of evidence obtained during the search of his property at JFK Airport in New York on September 23, 1997. Here again, the Government has indicated that no such evidence will be introduced as part of its case-in-chief at trial. (Resp. at 3.) El-Hage asserts, despite the Government's contention, that the issue is not mooted and asks that any fruits of the allegedly tainted search be suppressed. (Reply at 45.)

Because this involves an alleged Fourth Amendment violation, Wong Sun v. United States applies and the fruits of the search, if it was unlawful, should be suppressed. See 371 U.S. at 488. The Court must therefore determine whether or not the searches conducted at JFK Airport were lawful. To that end, the Court will examine whether, as the Government maintains, this was a valid and lawfully-executed border search. In addition, the Court will consider the Government's alternative argument that at least some part of the searches were conducted pursuant to the Defendant's wife's consent.

Routine border searches conducted at points of entry into the United States are not subject to a warrant, probable cause or even reasonable suspicion. See United States v. Montoya De Hernandez, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."); United States v. Ramsey, 431 U.S. 606, 619 (1977) ("Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside."). The Defendant alleges that the search of his luggage and the mass copying of his papers exceeded the

scope of a routine border search and that the government must therefore demonstrate reasonable suspicion. (El-Hage Mot. at 20.) See Montoya De Hernandez, 473 U.S. at 541 (requiring reasonable suspicion for detention of traveler that was more intrusive than a routine search). The Court is persuaded that even if the search at issue was more intrusive than a routine border search, "a more expansive search could be justified based upon the information known to the Government from prior intelligence collection."[6] (Resp. at 3.) The mere fact that the Government photocopied the Defendant's papers does not make the search unreasonable in scope.[7]

In addition, the Court finds that the Defendant's wife (Ms. Ray) gave valid consent to the officers conducting the search for at least some of the searching that was undertaken. The Defendant alleges that because Ms. Ray's consent was given while she was

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[6] According to the Government, the electronic surveillance conducted in Kenya:

> "revealed that *al Qaeda* persons in Nairobi (including el Hage . . .) were heavily involved in (i) providing passports and other false documentation to various *al Qaeda* associates . . . ; (ii) passing messages to *al Qaeda* members and associates in various countries, . . . about various matters; (iii) passing coded telephone numbers to and from *al Qaeda* headquarters; and (iv) passing warnings when *al Qaeda* members and associates were compromised by authorities."

(Government Response to El Hage's Motion to Suppress Information Obtained During Foreign Intelligence Operations in Kenya at 3.)

[7] The Defendant characterizes the border search as exceeding what was constitutionally permissible because the Government photocopied El-Hage's papers. (El-Hage Mot. at 21-22.) The Court does not accept this argument. As outlined by the court in United States v. Soto-Teran, 44 F.Supp.2d 185 (E.D.N.Y. 1996), the government's reading and photocopying of documents during a border search is appropriately subjected to a reasonable suspicion standard and does not automatically render a border search unconstitutional. Id. at 191 (indicating that photocopying of letter and other documents belonging to Defendant served to memorialize the observations of the searching agent). See also United States v. Fortna, 796 F.2d 724, 738 (5th Cir. 1986) (permitting customs agents to photocopy material as part of a border inspection and explaining that the photocopies "merely memorialized the agents' observations and provided a means to verify any subsequent recounting of them"). The Court finds, applying Soto-Teran and Fortna, that because the Government's examination of the documents was not improper; the photocopying of those documents was permissible. This holding is not prohibited by the Supreme Court's decision in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) which forbids the government from retaining copies of documents or photographs obtained during an *illegal* search. Id. at 391-92.

exhausted from traveling and distracted by the need to care for her young children, her consent was not "freely *or* voluntarily given." (El-Hage Mot. at 23.) These considerations, while perhaps relevant, do not, without more, establish that Ms. Ray's consent was involuntary. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that consent to a search is to be evaluated in light of the totality of the circumstances and must be "voluntarily given, and not the result of duress or coercion, express or implied"). The fact that Ms. Ray's consent was "grudging" (Resp. at 3) does not mean that it was the product of government duress. Because the Government had reasonable suspicion to search the Defendant upon his arrival into the United States and in light of the fact that some part of the search was condoned by the Defendant's wife, the Court does not suppress any fruits of the evidence obtained during the search at JFK Airport on September 23, 1997.

III. Suppression of FISA-Authorized Electronic Surveillance, August - September 1998

Originally, El-Hage sought the suppression of evidence obtained through electronic surveillance conducted (pursuant to FISA) during August and September 1998. The Government has now assured the Court that it does not intend to offer any of this evidence in its case-in-chief and has also indicated that there are "no 'fruits' from the FISA tree with respect to el Hage." (Letter from AUSA Karas to the Court of 10/23/2000, at 1.) In light of these representations, this part of the motion has been withdrawn except that the Government's alleged misconduct with respect to these FISA intercepts is part of the Defendant's outrageous government conduct claim and the Defendant also seeks sanctions against the Government for the destruction of the FISA recordings. (See United States v. Wadih El Hage, 98 Cr. 1023, Tr.

10/24/2000 (1:05 p.m.) at 21-23; Letter from Dratel to the Court of 10/24/2000.)

IV. Sanctions Against the Government for Destruction of Evidence

Because the FISA recordings from August and September 1998 were not preserved, the Defendant asks the Court to: (1) suppress the existing tapes; (2) suppress the fruits of those tapes; (3) preclude any cross-examination of El-Hage regarding the intercepted conversations; (4) preclude the introduction, by the Government, of transcripts or summaries of the FISA intercepts; and (5) permit the Defendant to introduce the same transcripts or summaries. (El-Hage Mot. at 64.) The Court does not address sanctions 1, 2 or 4 because the Government has indicated that it does not plan to introduce these conversations or any fruits of the conversations in its case-in-chief. (Letter from AUSA Karas to the Court of 10/23/2000, at 1-2.)

The Supreme Court and the Second Circuit have required that a defendant seeking sanctions show that the government acted in bad faith. See Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."); California v. Trombetta, 467 U.S. 479, 489 (1984) (refusing to impose sanctions where there was no proof that government's destruction of evidence was a "conscious effort to suppress exculpatory evidence"); Colon v. Kuhlmann, 865 F.2d 29, 30 (2d Cir. 1988) (affirming defendant's conviction, despite government's loss of evidence, where there was no showing of bad faith); Buie v. Sullivan, 923 F.2d 10, 11-12 (2d Cir. 1990) (listing bad faith as one of the requirements that defendant must meet to establish that a due process violation has resulted from

the loss or destruction of evidence).

There is no real dispute in this case that the loss of the evidence at issue is properly charged to the Government. See United States v. Rahman, 189 F.3d 88, 139 (2d Cir. 1999) (requiring that the analysis begin with a showing that the loss is chargeable to the State). However, El-Hage does not establish that the failure to preserve the evidence was motivated by bad faith or ulterior motives. In fact, the Government asserts that the loss of the evidence was wholly unintentional. (Bryant Aff. ¶¶ 3-4.) Although it clearly would have been preferable if the recordings of the electronic surveillance had been monitored more closely, the Court is not satisfied that the Government acted in bad faith.[8] For this reason, the Court finds that it would be inappropriate to impose sanctions on the Government.

V. Dismissal of the Indictment for Outrageous Government Conduct

El-Hage argues that the Government engaged in "a campaign of illegal wiretapping, illegal search and seizure, unlawful interrogation, deception and misuse of the grand jury power" and that taken together these actions qualify as "outrageous government conduct" in

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[8] In addition to establishing bad faith, courts have also required that a defendant seeking sanctions for the loss or destruction of evidence demonstrate that he or she is prejudiced by the loss of the evidence. See Trombetta, 467 U.S. at 488 ("Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense."); United States v. Morgenstern, 933 F.2d 1108, 1115 (2d Cir. 1991) (requiring for imposition of sanctions a showing of substantial prejudice resulting from the loss of evidence); Rahman, 189 F.3d at 139 (indicating that availability of sanctions depends in part on the "prejudicial effect" of the lost evidence). To establish the requisite prejudice, the defendant must show that the lost evidence would have been exculpatory and that there is no comparable evidence available. See Buie, 923 F.2d at 11 ("To establish a violation of the right to present a defense based on lost evidence, a defendant must show that the evidence was material and exculpatory, and that it was 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'") (quoting Trombetta, 467 U.S. at 489). Although the Defendant repeatedly concludes that the lost evidence was exculpatory (El-Hage Mot. at 64, 67), he provides no support for this assertion. In addition, he makes no showing that comparable evidence is unavailable.

violation of his substantive due process rights under the Fifth Amendment.[9] (El-Hage Mot. at 25-26.) In view of this alleged outrageous government conduct, El-Hage urges the Court to dismiss the Indictment against him, or, in the alternative, to suppress all evidence derived from this conduct. (Id. at 26, 48-50.) El-Hage requests that the Court conduct an evidentiary hearing to resolve the matter. (Id. at 29-31.)

The Court has considered several of these allegations in evaluating El-Hage's independent claims for suppression. In an opinion issued on December 5, 2000, the Court found that the physical search of El-Hage's Kenya residence and the electronic surveillance conducted in Kenya after April 4, 1997 were lawful. United States v. Bin Laden, No. 98 Cr. 1023, at 38, 40 (S.D.N.Y. Dec. 5, 2000). In addition, the Court relied, in part, on the good faith of the officials involved to find that the electronic surveillance undertaken prior to April 4, 1997 would not be suppressed despite the fact that it should have been conducted pursuant to Attorney General authorization. Id. at 35. In this opinion, the Court has established that the statements obtained from El-Hage at Kenyatta airport were not involuntarily made. See supra Section I. The Court has also ruled that the search of the Defendant's luggage which occurred at JFK Airport was lawful in that it did not exceed the permissible scope of a border search and it was conducted, at

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[9] El-Hage specifically alleges that government officials:

> (1) illegally wiretapped Mr. El-Hage in two separate instances covering years of conversations; (2) illegally searched his residence; (3) unlawfully obtained statements from him in violation of his Fifth and Sixth Amendment rights; (4) lied to him repeatedly about the whereabouts and disposition of his property that had been illegally seized from him; (5) lured him to return to the United States by making misrepresentations and frightening him and his wife with rumors that he was in danger; (6) illegally searched his luggage upon his return to the United States; (7) knowingly and intentionally *twice* compelled his appearance in the grand jury in a manner designed not only [(a)] to deprive Mr. El-Hage of his right to consult counsel, but also [(b)] to exploit his extreme fatigue on both occasions; and (8) knowingly used the illegally derived evidence as a means of setting a "perjury trap" for Mr. El-Hage in the grand jury.

(El-Hage Mot. at 25.)

least in part, with the consent of the Defendant's wife. See supra Section II. These aspects of the Defendant's claim, having been resolved by the Court in favor of the Government, do not support a finding of outrageous government conduct (or dismissal of the Indictment) and are therefore not included in the following analysis.[10] The Defendant's other specific allegations are briefly reviewed after a general explanation of the requirements that must be met to establish a claim of outrageous government conduct.

The Due Process Clause of the Fifth Amendment "protects individuals against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense, but not against government action that is 'incorrect or ill-advised.'" Lowrance v. Achtyl, 20 F.3d 529, 537 (2d Cir. 1994) (citations omitted). The "outrageous government conduct" doctrine invoked by El-Hage is a species of a substantive due process claim. The doctrine has its origins in dicta from United States v. Russell, 411 U.S. 423 (1973) which suggested that in certain instances government conduct could be "so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Id. at 431-32.

The Supreme Court has never ruled on an assertion of outrageous government

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[10] In addition, the Supreme Court decision in Albright v. Oliver, 510 U.S. 266 (1994), provides another reason for excluding the previously considered Fourth Amendment claims from the outrageous conduct analysis. Albright indicates that because the Fourth Amendment explicitly protects against the types of government actions being challenged by El-Hage, "'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" Id. at 273 (plurality opinion) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). See also Ayeni v. Mottola, 35 F.3d 680, 691 (2d Cir. 1994), abrogated on other grounds, Wilson v. Layne, 526 U.S. 603 (1999)("[I]t is doubtful that any plaintiff may pursue a Fifth Amendment substantive due process claim based on the same facts as alleged in a Fourth Amendment unreasonable search claim."). The Albright rule suggests that the Court should also not consider El-Hage's assertion that the FISA surveillance was unlawful when weighing his charge that the Government engaged in outrageous conduct.

conduct. Although it has been raised in numerous lower federal court cases, only three federal appellate courts have granted relief to a criminal defendant on the basis of the outrageous misconduct defense. See United States v. Lard, 734 F.2d 1290, 1292, 1296-97 (8th Cir. 1984) (finding outrageous conduct where ATF agents had assisted defendants in making a pipe bomb); United States v. Twigg, 588 F.2d 373, 382 (3d Cir. 1978) (holding that government's conduct was outrageous when DEA agents concocted a drug crime and supplied the defendants with the means to accomplish it); United States v. Greene, 454 F.2d 783, 787 (9th Cir. 1971) (preceding United States v. Russell and finding outrageous conduct in a case in which the government had manufactured a crime for the sole purpose of convicting the defendant).[11]

In the vast majority of lower federal court cases in which the defendant raised the outrageous government misconduct defense, the court ruled in favor of the government. See United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993) (collecting cases). As with the circuit court cases, in the district court cases which have found outrageous conduct,[12] the government actively participated in the criminal enterprise. As the preceding cases strongly suggest, the requisite level of outrageousness is extremely high. See United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999) ("Especially in view of the courts' well-established deference to the Government's choice of investigatory methods, the burden of establishing outrageous investigatory conduct is very heavy.") (citing United States v. Meyers, 692 F.2d 823, 843 (2d Cir. 1982) and United

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[11] Moreover, two circuits have expressly repudiated the defense. See United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995); United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994).

[12] See, e.g., United States v. Marshank, 777 F. Supp. 1507, 1524 (N.D. Cal. 1991) (government collaboration with defense attorney against his own clients); United States v. Gardner, 658 F. Supp. 1573, 1576-77 (W.D. Pa. 1987) (government manufactured crime for sole purpose of convicting defendant); United States v. Batres-Santolino, 521 F. Supp. 744, 751-53 (N.D. Cal. 1981) (same).

States v. Schmidt, 105 F.3d 82, 91 (2d Cir. 1997)). See also United States v. Chin, 934 F.2d 393, 398 (2d. Cir. 1991) (suggesting that the doctrine may extend beyond entrapment cases but emphasizing that "the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience'").

One of the bases for the Defendant's claim of outrageous conduct is that the Government deliberately deceived him by pretending concern for his safety while actually trying to "lure him" to the United States so that he could be subpoenaed before the grand jury.[13] (El-Hage Mot. at 36.) El-Hage also argues that the Government's "ruse" was intended "to establish venue — via Mr. El-Hage's grand jury testimony — for the subsequent indictment." (Id. at 38.) The Court is not persuaded that, if true, the Defendant's allegations would constitute outrageous government conduct. See United States ex rel. Lujan v. Gengler, 510 F.2d 62, 63-66 (2d Cir. 1975) (holding that American agents' hiring of a third party to lure the defendant to Bolivia and their payment of the Bolivian police to arrest the defendant did not qualify as shocking government conduct and was insufficient to establish a violation of due process); Chin, 934 F.2d at 399 (finding that harm resulting from government agent establishing phony pen-pal relationship with defendant did not "shock the conscience").

El-Hage argues that, with respect to each of his two grand jury appearances, the Government engaged in outrageous conduct by "subpoena[ing] him after the conclusion of a

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[13] The alleged deception consisted of: the Government informing El-Hage and his wife that they could be in danger from associates of Usama bin Laden; the Government promising to assist El-Hage's return to the United States so that they could search and interrogate him upon his arrival; the Government lying to El-Hage about the disposition of the property that had been seized from his Nairobi residence. (El-Hage Mot. at 36-38.)

completely exhausting journey — for an appearance the very next day . . . ."[14] (El-Hage Mot. at 40.) The Defendant also alleges that the Government's maneuvering was intended to prevent him from retaining an attorney. (Id.) El-Hage relies on the Supreme Court holding in Watts v. State of Indiana, 338 U.S. 49 (1949), as support for this proposition. The Court finds that the facts presented in Watts were significantly more egregious than those presented here and holds that El-Hage's allegations do not constitute outrageous conduct for due process purposes.

El-Hage also asserts that the Government, by ensnaring him in a "perjury trap," engaged in conduct so outrageous that his rights under the Due Process Clause were violated. The "perjury trap" doctrine holds that an indictment for perjury should be invalidated if the subpoenaing of a witness is "for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury." Wheel v. Robinson, 34 F.3d 60, 67 (2d Cir. 1994) (quoting from United States v. Chen, 933 F.2d 793, 796-97 (9th Cir. 1991)). The Defendant concedes that the Court of Appeals for the Second Circuit has yet to adopt the so-called "perjury trap" doctrine. (El-Hage Mot. at 42.) The Second Circuit has explicitly noted that "the existence of a 'legitimate basis' for an investigation and for particular questions answered falsely precludes 'any application of the "perjury trap" doctrine.'" United States v. Regan, 103 F.3d 1072, 1079 (2d Cir. 1997) (quoting Wheel, 34 F.3d at 68). The Court is persuaded that, for both of the Defendant's grand jury appearances, the Government had a legitimate basis for its investigation of El-Hage. Thus, the Court finds that the officials involved in this case did not set a perjury trap for the

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[14] In addition, the Defendant complains about the long duration of his September 24, 1997 grand jury appearance. The Government indicates that the appearance did not last longer than five hours and the Court does not find that to be an overly burdensome length of time.

Defendant.[15]

The only remaining ground for the Defendant's outrageous conduct claim is the FISA surveillance. The Defendant does raise important questions about the legality of the electronic surveillance conducted in Texas in August and September 1998. However, these concerns do not, under the standard outlined here, constitute outrageous government conduct.[16] The Court, therefore, also denies the Defendant's related discovery requests. (See Letter from Dratel to the Court of 10/24/2000.)

For the reasons set forth above, the Court is not persuaded that the Government engaged in outrageous conduct when it investigated El-Hage. El-Hage's motion to dismiss the Indictment on the ground that the government's investigation of him constituted outrageous government conduct is denied in its entirety. For the same reasons, his alternative motion that all evidence gathered via such conduct be suppressed is likewise denied in its entirety. The arguments presented here do not require resolution of substantial factual issues and therefore do not warrant an evidentiary hearing. See United States v. La Porta, 46 F.3d 152, 159 (2d Cir. 1994) ("Nothing . . . requires a district court to conduct a hearing every time a defendant alleges outrageous government misconduct. . . . Without disputed facts, no hearing was necessary.");

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[15] In his attempt to persuade the Court that these grand jury appearances were a perjury trap, the Defendant argues that the Government "knew the answers to its questions." (El-Hage Mot. at 43.) We find this argument highly unpersuasive. Even assuming that the government's search and surveillance of El-Hage was highly competent and thorough, it was obviously impossible for the government to be confident that it had acquired all it needed to know about El-Hage or Usama bin Laden and al Qaeda. It would also be strange to assert that whenever the government obtains information from a witness by means of electronic surveillance or physical search, the government is precluded from questioning the witness about this information before a grand jury — lest the witness be "tricked" into perjuring himself.

[16] It also may be inappropriate for the Court to fashion a Fifth Amendment remedy for unlawful electronic surveillance which would be a Fourth Amendment violation. See supra note 10.

United States v. Cuervelo, 949 F.2d 559, 567 (2d Cir. 1991) ("Most often, conducting a hearing is the preferred course of action in cases *where disputed factual issues exist*.") (emphasis added).

VI. The Partial Disqualification of AUSA Fitzgerald

Finally, El-Hage urges the Court to disqualify AUSA Fitzgerald from cross-examining him.[17] (El-Hage Mot. at 55.) The Defendant asserts that such disqualification is necessary to prevent a violation of the rule prohibiting testimony from unsworn witnesses. (Id.) See United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993) (explaining that an attorney may not "subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross-examination"). AUSA Fitzgerald questioned the Defendant for two full days in front of the grand jury on September 24, 1997 and September 16, 1998. (El-Hage Mot. at 51.) In addition, he participated in interviews of El-Hage on September 23, 1997 and October 17, 1997. (Id. at 56.) As a result, according to the Defendant, AUSA Fitzgerald's credibility, if he is permitted to conduct the cross-examination of El-Hage, will be improperly weighed by the jury because it will be inevitable that either AUSA Fitzgerald or the Defendant will "during the heat of cross-examination" make reference to the fact of AUSA Fitzgerald's presence at these interviews. (Id. at 57.)

The Court has previously considered and rejected similar arguments proffered by

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[17] In his original motion, El-Hage also asserted that with respect to AUSA Fitzgerald's participation in the October 17, 1997 interview, the Court should disqualify AUSA Fitzgerald unless the Defendant and the Government agreed to a stipulation which "set[] forth the relevant facts and circumstances of AUSA Fitzgerald's statements without identifying him as the declarant." (El-Hage Mot. at 52.) The Defendant now indicates that he and the Government are in the process of forming such a stipulation and that, therefore, the Court's resolution of this matter is unnecessary. (El-Hage Reply at 47.) As such, the Court does not consider this aspect of El-Hage's claim.

Defendant Odeh (against AUSA. Fitzgerald) and Defendant K.K. Mohamed (against AUSA Kenneth Karas). United States v. Bin Laden, 91 F.Supp.2d 600, 623 (S.D.N.Y. 2000). In that opinion, the Court addressed the Defendants' concerns that other witnesses would testify about the AUSAs' involvement in the events in question, thereby making the AUSAs unsworn witnesses for the Government. Id. The Court rejected the argument that disqualification was therefore required and, instead, explained that steps could be taken (including "redaction of documents and explicit instructions to witnesses") to ensure that references to the involvement of the AUSAs were avoided. Id. at 624. The Court finds that in this case, similar precautions should be taken to protect El-Hage's rights.

El-Hage asserts, however, that there are aspects of his situation which merit distinction from the questions presented by Defendants Odeh and KK Mohamed. The Defendant relies, in part, on United States v. McKeon, 738 F.2d 26, 34-35 (2d Cir. 1984), for the proposition that when an attorney cross-examines a witness about a conversation in which the attorney participated, the unsworn witness problem may arise. (El-Hage Mot. at 57.) In McKeon, a case which is factually dissimilar from the instant case in important respects, there is no suggestion of any attempt to shield from the jury the attorney's involvement in the conversations at issue. 738 F.2d at 35 (addressing the involvement of a defense attorney in a trial where statements made by that attorney were to be the *subject* of the attorney's direct examination of his client). Similarly, United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), the other Second Circuit decision cited by the Defendant, involved the potential cross-examination by a defense attorney of a witness who would be testifying as to the substance of statements *made by the attorney*. Id. at 1068.

The Second Circuit holding in United States v. Regan, 103 F.3d 1072 (2d Cir. 1997) is more clearly applicable to the facts presented here. In Regan, the court explained that "[s]tanding alone, the mere fact that a prosecutor took part in grand jury proceedings in which a Defendant presented false testimony should not bar that prosecutor from participating in a subsequent trial for perjury." Id. at 1083 (citing United States v. Reilly, 33 F.3d 1396, 1422 (3d Cir. 1994)). After viewing the trial record, the Regan court determined that there was no evidence that the Assistant United States Attorney (whose participation was challenged) "sought to use her first-hand knowledge of Regan's case to influence the jury." Id. The Second Circuit ruled against disqualification even where the AUSA's participation in the grand jury proceedings was not hidden from the trial jury. (The government's offer to remove the AUSA's name from the grand jury transcripts had been rejected by the defendant.) See id. See also United States v. Marshall, 75 F.3d 1097, 1106 (7th Cir. 1996) (holding that disqualification was not required where AUSA made two references in front of trial jury to his presence during grand jury proceedings against the defendant).

In this case, the Government has stated that it intends to make no reference to AUSA Fitzgerald's participation in the grand jury proceedings and other interviews of El-Hage; AUSA Fitzgerald will be referred to as a "government attorney" and not by name. (Resp. at 11.) The Court finds the Defendant's concern about having to engage in "artificial self-editing" during his testimony (El-Hage Mot. at 56) unsatisfactory to merit even partial disqualification, given AUSA Fitzgerald's significant involvement in the investigation and prosecution of the case against El-Hage (Resp. at 11). See Regan, 103 F.3d at 1083 ("Given [the AUSA's] familiarity with the case, replacing her without a compelling reason to do so would have been an

unwarranted waste of resources."). In light of Regan, the Court denies the Defendant's motion to disqualify AUSA Fitzgerald and declines to prohibit Fitzgerald's participation in the cross-examination of El-Hage.

CONCLUSION

For the foregoing reasons, El-Hage's motion to suppress (1) the fruits of the statements he made in Nairobi and (2) the fruits of evidence obtained during a search conducted at JFK Airport are denied. In addition, the Defendant's requests that the Court (3) impose sanctions on the Government for the destruction of FISA evidence, (4) dismiss the Indictment for outrageous government conduct, and (5) disqualify AUSA Patrick Fitzgerald from cross-examining the Defendant are also denied.

SO ORDERED

Dated: New York, New York

December 15, 2000

U.S.D.J.