UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

AHMED ABDEL SATTAR,
a/k/a "Abu Omar,"
a/k/a "Dr. Ahmed,"
YASSIR AL-SIRRI,
a/k/a "Abu Ammar,"
LYNNE STEWART, and
MOHAMMED YOUSRY,

Defendants.

02 Cr. 395 (JGK)

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The defendants in this case--Ahmed Abdel Sattar, a/k/a "Abu Omar," a/k/a "Dr. Ahmed" ("Sattar"), Yassir Al-Sirri, a/k/a "Abu Ammar" ("Al-Sirri"), Lynne Stewart ("Stewart") and Mohammed Yousry ("Yousry")--were charged in a five-count indictment on April 8, 2002 (the "Indictment"). By Opinion and Order dated July 22, 2003, the Court dismissed Counts One and Two of the Indictment which charged all four defendants with conspiring to provide material support and resources to a designated foreign terrorist organization--namely, the Islamic Group ("IG")--in violation of 18 U.S.C. § 2339B and providing and attempting to provide material support and resources in violation of 18 U.S.C. §§ 2339B and 2. United States v. Sattar, No. 02 Cr. 395, 2003 WL

21698266 (S.D.N.Y. July 22, 2003).[1] Three counts now remain. Count Three of the Indictment charges Sattar and Al-Sirri with soliciting crimes of violence in violation of 18 U.S.C. § 373. Count Four charges Sattar, Stewart, and Yousry with conspiring to defraud the United States in violation of 18 U.S.C. § 371. Count Five charges Stewart with making false statements in violation of 18 U.S.C. §§ 1001 and 2.

There are currently several motions pending before the Court that are addressed in this Opinion and Order. Defendants Sattar and Stewart move to suppress evidence obtained through surveillance conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, ("FISA" or the "Act"), 50 U.S.C. § 1801 *et seq.*[2] The Government opposes the suppression motions and asks the Court to conduct an *ex parte* and *in camera* review of classified documents relevant to these motions; to find that each of the FISA surveillances at issue was lawfully authorized and conducted; and to order that none of the classified documents, or any classified information contained therein, be disclosed to the defendants as the defendants request.

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[1] The Government has filed a notice of appeal from that Order.

[2] Yousry joins Sattar in the motion to suppress the fruits of the FISA surveillance and in Stewart's motions to the extent they are applicable. (Letter from David Stern to the Court dated Jan. 10, 2003.) Defendant Al-Sirri is in England and takes no part in these motions.

Stewart has also filed a separate but related motion seeking, principally, to suppress videotapes of prison visits to her former client, Omar Abdel Rahman ("Sheikh Abdel Rahman"), on May 19 and 20, 2000 and July 13 and 14, 2001 and 63 audio tapes of phone calls recorded pursuant to FISA on the ground that the videotapes were allegedly made in violation of her Fourth Amendment right to communicate privately with her client.

Finally, the Government asks the Court for authorization to turn over to Sattar audio and video recordings of prison visits between Stewart, Yousry, and Sheikh Abdel Rahman in order to comply with the Government's potential obligations under Fed. R. Crim. P. 16 and Brady v. Maryland, 373 U.S. 83 (1963). The Government requests such an order out of concern that the recordings may include communications within the scope of Sheikh Abdel Rahman's attorney-client privilege or that are protected by the work-product doctrine. The Government also seeks to produce notebooks that Yousry used to record prison visits and phone calls while serving as a translator between Sheikh Abdel Rahman and his attorneys that the Government obtained through a valid search warrant. The Government asserts that the notebooks may also contain information protected by Sheikh Abdel Rahman's attorney-client privilege or the work-product doctrine. Moreover, Sattar has moved to dismiss Count Four of the Indictment because of the Government's failure to provide

discovery of these items.

In response to the Government's motion, Stewart filed a cross motion in which she requests (1) disclosure of allegedly attorney-client privileged material to the Court; (2) sequestration of all potentially privileged material from the Government attorneys prosecuting this case; (3) return of her work product; (4) suppression of the fruits of the alleged invasion of Stewart's and Sheikh Abdel Rahman's privilege and Fourth Amendment protected rights; (5) appointment of a Special Master to review any Government claims of right of access to the materials at issue; and (6) an evidentiary hearing to resolve these issues.

I.

Defendants Sattar, Stewart, and Yousry were arrested on the charges alleged in the Indictment on April 9, 2002. At their initial court appearance that same day, the Government represented that its case against the defendants was built, in part, on evidence obtained through court-authorized electronic surveillance obtained pursuant to FISA. See United States v. Sattar, No. 02 Cr. 395, 2002 WL 1836755, at *1 (S.D.N.Y. Aug. 12, 2002). In presenting an overview of the discovery in the case, the Government explained that the Government had

> conducted a series of court-authorized electronic surveillance over a period of several years authorized under the Foreign Intelligence Surveillance Act, consisting of the electronic surveillance of defendant

> Sattar's home phone, his computer, [and] fax machine, [and] defendant Yousry's telephone. The government also monitored several prison visits, both audio and video, to Sheik Abdel Rahman over the past several years, one of which involved defendant Stewart in May of 2000.

(Transcript of Apr. 9, 2002 Hearing ("Apr. 9, 2002 Tr.") at 16.) In a letter dated May 8, 2002, the Government notified the defendants that "information obtained or derived pursuant to the authority of the FISA was used, and will continue to be used, in connection with the prosecution of the above-referenced case." Sattar, 2002 WL 1836755 at *1.

Since that time, the Government has made extensive disclosures to the defendants, including over 85,000 audio recordings of voice calls, fax-machine sounds, and computer-modem sounds obtained through audio surveillance of telephone numbers used by Sattar and Yousry; the FBI's written summaries ("tech cuts") of approximately 5,300 voice calls that the FBI deemed to contain foreign intelligence information and therefore did not minimize; approximately 150 draft transcripts of voice calls; and approximately 10,000 pages of e-mails obtained through electronic surveillance of an e-mail account used by Sattar. The Government has also disclosed certain evidence solely to Stewart and Yousry, including audiotapes of 63 telephone conversations between the imprisoned Sheikh Abdel Rahman and his attorneys and Yousry, and audio and video recordings of three prison visits to Sheikh Abdel Rahman by his attorneys and Yousry on February 19, 2000, May 19

and 20, 2000, and July 13 and 14, 2001.

II.

The surveillance at issue in these motions was established pursuant to FISA, which "permits federal officials to obtain orders authorizing electronic[] surveillance 'for the purpose of obtaining foreign intelligence information.'" United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (quoting 50 U.S.C. § 1802(b)). FISA established a Foreign Intelligence Surveillance Court (the "FISA Court"), comprised of judges appointed by the Chief Justice of the United States, with jurisdiction to hear applications for and to grant orders approving electronic surveillance "in aid of protecting the United States against attack by foreign governments or international terrorist groups." United States v. Rahman, 861 F. Supp. 247, 249 (S.D.N.Y 1994), aff'd, 189 F.3d 88 (2d Cir. 1999); see also 50 U.S.C. §§ 1801(e), 1803.

FISA requires that each application for an order approving electronic surveillance under the Act be made by a Federal officer upon oath or affirmation after approval by the Attorney General. 50 U.S.C. § 1804(a).[3] The application must set forth

[3] Except as otherwise specified, citations to FISA reference the statute as it was in effect at the time that the majority of the surveillance at issue was conducted. As explained below, Congress amended FISA in the Patriot Act, effective October 26, 2001, and expanded the requirement that "the purpose" of the surveillance be to obtain foreign intelligence information to a requirement that "a significant purpose of the surveillance" is

the identity of the Federal officer making the application; the identity, if known, of the target of the electronic surveillance; the facts upon which the applicant relied in concluding that the target of the electronic surveillance is a foreign power or an agent of a foreign power and that each of facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent thereof; a statement of proposed minimization procedures; the type of information sought and the means by which surveillance will be effected; a statement concerning the previous applications sought; and a statement of the period of time for which the surveillance must be maintained. 50 U.S.C. § 1804(a)(1)-(11). For purposes of the statute and as relevant to this case, a "foreign power" includes "a group engaged in international terrorism or activities in preparation thereof." 50 U.S.C. § 1801(a)(4).[4] An "agent of a foreign

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to obtain foreign intelligence information.

[4] FISA defines "International terrorism" as activities that

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
> (2) appear to be intended-
> (A) to intimidate or coerce a civilian population;
> (B) to influence the policy of a government by intimidation or coercion; or
> (C) to affect the conduct of a government by assassination or kidnapping; and
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear

power" includes any person who-

> (A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;
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> (B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;
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> (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;
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> (D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or
>
> (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

50 U.S.C. § 1801(a)(2).[5]

The application must be approved by the Attorney General upon the Attorney General's finding that it satisfies the criteria and requirements of such an application. 50 U.S.C. § 1804(a), 1804(a)(2). The application must also include a

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> intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801(c)(1)-(3).

[5] With respect to a non-United States person, an "agent of a foreign power" also includes any person who "acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in [50 U.S.C. § 1801(a)(4).]" 50 U.S.C. § 1801(b)(1)(A).

certification from a high ranking executive officer employed in the area of national security or defense as specified by the Act that the information sought is "foreign intelligence information" as defined by 50 U.S.C. § 1801(e). 50 U.S.C. § 1804(a)(7). FISA requires that the certification include a statement that the information sought cannot be obtained reasonably by normal investigative techniques and designating the type of foreign intelligence information sought in accordance with 50 U.S.C. § 1801(e). 50 U.S.C. § 1804(7)(C)-(E). Finally, prior to passage of the Patriot Act on October 26, 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), the executive officer was required to certify that "the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B) (2000). Amendments to FISA enacted by the Patriot Act now require only that "a significant purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B) (2003).

Prior to approving the requested electronic surveillance, a FISA judge must find that: (1) the President has authorized the Attorney General to approve FISA applications; (2) the application has been made by a Federal officer and approved by the Attorney General; (3) the application provides probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power and that each of the

facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power; (4) the proposed minimization procedures meet the statutory requirements under the Act; and (5) the application contains all statements and certifications required under § 1804 and, if the target is a United States person,[6] the certification or certifications are not clearly erroneous on the basis of statements made pursuant to § 1804(a)(7)(E) and any other information furnished under § 1804(d). 50 U.S.C. § 1805(a)(1)-(5).

A FISA judge who is satisfied that an application meets the statutory requirements may enter an *ex parte* order approving the requested electronic surveillance. 50 U.S.C. § 1805(a). The order shall specify the identity of the target of the surveillance; the location of each of the facilities or places at which the surveillance will be directed; the type of information sought and communications or activities to be subjected to the surveillance; the means by which the surveillance will be effected; the period of time for which the surveillance is approved; and the minimization procedures to be employed. 50 U.S.C. § 1805(b)(1)(A)-(F). Electronic surveillance of a target generally and initially lasts for 90 days, and extensions may be

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[6] FISA defines a "United States person" to include citizens of the United States or aliens lawfully admitted for permanent residence. 50 U.S.C. § 1801(i).

granted upon an application in compliance with statutory requirements. 50 U.S.C. § 1805(d)(1)-(2).[7]

Finally, FISA authorizes the use of evidence obtained through electronic surveillance in a criminal proceeding with the advance authorization of the Attorney General. 50 U.S.C. § 1806(b). Prior to introducing such evidence at a trial, hearing, or other proceeding, the Government must provide notice to the "aggrieved person" and to the court in which the evidence is to be introduced. 50 U.S.C. § 1806(c).[8] An aggrieved person may move to suppress such evidence if the information was acquired unlawfully or if the surveillance was not made in conformity with an order of authorization or approval. 50 U.S.C. § 1806(e).

When an aggrieved person moves to suppress the fruits of FISA surveillance or seeks to discover or obtain applications, orders, or other materials relating to FISA surveillance, the district court shall "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and

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[7] A new subsection (b) was added by an amendment effective December 27, 2000 and 50 U.S.C. § 1805(b) and (c) were renumbered § 1805(c) and (d) respectively. Pub. L. 106-567 § 602(b)(1) and (2).

[8] An "Aggrieved person" is defined as "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 18 U.S.C. § 1801(k).

conducted" "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. § 1806(f). The district court may disclose such materials to the aggrieved person "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." Id. If the district court finds that the surveillance was unlawfully authorized or conducted, it shall, in accordance with the requirements of the law, suppress the evidence which was unlawfully obtained or derived from the surveillance. 50 U.S.C. § 1806(g). However, should the district court determine that the surveillance was lawfully authorized and conducted, the court "shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure." Id.

III.

The Court notes at the outset that, contrary to the arguments of Stewart and Sattar, the Court need not disclose the materials relating to the Government's FISA applications in order to comply with 50 U.S.C. § 1806(f)-(g) or to comport with due process. The materials submitted *ex parte* and *in camera* are sufficient for the Court to determine without such disclosure whether the FISA surveillance was lawfully authorized and conducted.

The Attorney General has filed an affidavit in opposition to

the defendants' request in accordance with 50 U.S.C. § 1806(f). The affidavit states, in relevant part, that "it would harm the national security of the United States to disclose or have an adversary hearing with respect to materials submitted to the United States Foreign Intelligence Surveillance Court (USFIC) in connection with this matter. . . ." which have been submitted to the Court for *in camera* and *ex parte* review. (Affidavit of John Ashcroft dated May 8, 2003 ¶¶ 3, 4 attached to Letter from Robin Baker to the Court dated May 9, 2003.) A review of the sealed classified materials fully supports the Attorney General's sworn assertion that sealed materials filed with the Court contain "sensitive information concerning United States intelligence sources and methods and other information relating to United States efforts to conduct counterintelligence investigations; and that it would damage the security interests of the United States to further reveal the sources and methods this Nation is using to conduct such investigations." (Id. at ¶ 4.) In accordance with FISA and in view of the affidavit, the Court may order disclosure "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance" or when "due process requires discovery or disclosure." 50 U.S.C. §§ 1806(f), (g).

"The language of section 1806(f) clearly anticipates that an *ex parte, in camera* determination is to be the rule. Disclosure

and an adversary hearing are the exception, occurring *only* when necessary." United States v. Belfield, 692 F.2d 141, 149 (D.C. Cir. 1982) (emphasis in original); accord Duggan, 743 F.2d at 78. The Government represents that it is unaware of any court ever ordering disclosure rather than conducting *in camera* and *ex parte* review, and the defendants cite no such case to the Court. See United States v. Nicholson, 955 F. Supp. 588, 592 & n. 11 (E.D. Va. 1997) ("this court knows of no instance in which a court has required an adversary hearing or disclosure in determining the legality of a FISA surveillance") (collecting cases); United States v. Thomson, 752 F. Supp. 75, 79 (W.D.N.Y. 1990) ("No court that has been required to determine the legality of a FISA surveillance has found disclosure or any adversary hearing necessary.") (collecting cases); see also United States v. Ott, 637 F. Supp. 62, 65-66 (E.D. Ca. 1986) (rejecting motion for disclosure and finding § 1806(f)'s provision for *ex parte* and *in camera* review constitutional), aff'd, 827 F.2d 473 (9th Cir. 1987); United States v. Megahey, 553 F. Supp 1180, 1193-94 (S.D.N.Y.) (denying defendants' request for an adversarial evidentiary hearing on the propriety of FISA surveillance and finding *in camera, ex parte* review constitutionally sufficient to determine the lawfulness of surveillance at issue while safeguarding defendants' Fourth Amendment rights), aff'd sub nom, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984); Rahman, 861

F. Supp. at 250-51 (no disclosure necessary to determine whether FISA surveillance was lawfully authorized and conducted).

The Government acknowledges that the Second Circuit Court of Appeals in Duggan noted that the need for disclosure "might arise if the judge's initial review revealed potential irregularities such as possible misrepresentations of fact, vague identification of the persons to be surveilled, or surveillance records which include[] a significant amount of nonforeign intelligence information, calling into question compliance with the minimization standards contained in the order" but argues that no irregularities exist in this case. Duggan, 743 F.2d at 79 (internal citation omitted, alteration in original); see also United States v. Ott, 827 F.2d 473, 476 (9th Cir. 1987) (hereinafter Ott II) (affirming district court's determination that no such circumstances indicating need for disclosure were present).

With the statutory requirements in mind, as well as the possible areas of abuse suggested by Duggan, and the assertions of the defendants and the Government's responses, the Court conducted a careful independent review of the FISA materials contained in the voluminous classified materials submitted to this Court. In addition, the Court issued two subsequent orders requiring the Government to supplement the initial submission. As explained below, the Court is satisfied that all of the

requirements of FISA were satisfied and that each of the FISA surveillances was authorized by a FISA Court order that complied with the statutory requirements for such orders and was supported by the statements and certifications required by the statute. The Court was able to reach its conclusions after a thorough review of all of the materials. This is not a case where disclosure was necessary or where a review of all of the materials suggested that due process required disclosure to the defendants. The Court addresses below the specific objections raised by the defendants.[9]

A.

Sattar moves to suppress the fruits of the FISA surveillance on the ground that there was no probable cause to believe that Sattar, a United States citizen and thus a United States person under the Act, was about to engage in foreign intelligence activities that involved a violation of the criminal statutes of the United States and was therefore an agent of a foreign power. See 50 U.S.C. § 1801(b)(2). As part of this argument, Sattar notes that a "United States person" may not be considered an agent of a foreign power "solely upon the basis of activities protected by the first amendment to the Constitution of the United States. . . ." 50 U.S.C. § 1805(a)(3)(A). Defendants

[9] The Court is also issuing an additional Order which is being filed under Seal because it deals with classified material submitted in connection with these motions.

Sattar and Yousry, and unindicted co-conspirator Sheikh Abdel Rahman, were the targets of the authorized FISA surveillances at issue. Stewart was never a target but was intercepted while communicating with one or more of these individuals. The materials submitted to the FISA Court established that there was probable cause to believe that each of the targets was an agent of a foreign power as defined in the statute; each of the facilities specified in the FISA Court orders as to which the surveillance was directed was being used or about to be used by the agent of a foreign power; and none of the targets were deemed to be an agent of a foreign power solely on the basis of activities protected by the First Amendment.

FISA "requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the electronic surveillance is to be directed is used or is about to be used by a foreign power or an agent of a foreign power. . . ." Duggan, 743 F.2d at 73. Once it appears that an authorized member of the executive branch has certified that the FISA surveillance was conducted for an appropriate purpose, that the certification is supported by probable cause, and it appears that the application is not clearly erroneous as it applies to a United States person, a reviewing court, whether a FISA judge or this Court, is not to "second guess" the certification. Duggan, 743 F.2d at 73-74, 77;

accord Rahman, 861 F. Supp. at 251.

Having reviewed the materials submitted for *ex parte, in camera* review, the Court concludes that there was ample probable cause to believe that the targets of the relevant surveillance--Sattar, Yousry, and Sheikh Abdel Rahman-were acting as agents of a foreign power which is defined to include "a group engaged in international terrorism or activities in preparation therefore," and that each of the facilities at which the surveillance was directed was being used, or was about to be used, by that target. See, e.g., Rahman, 861 F. Supp at 251; Thomson, 752 F. Supp. at 78; Ott, 637 F. Supp. at 66; In re Kevork, 634 F. Supp. 1002, 1009 (C.D. Ca. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986). The applications also meet the remaining requirements of the statute that the defendants do not challenge as well as those requirements that the defendants do contest, as discussed below. In sum, all of the statutory requirements were satisfied.

Sattar argues that, in violation of 50 U.S.C. § 1805(a)(3)(A), the FISA judge's finding of probable cause to believe that Sattar was an agent of a foreign power was based on communications regarding Sattar's views about the conditions and government in Egypt that are protected by the First Amendment. The underlying declarations show, however, that Sattar was considered an agent of a foreign power not because of activities protected by the First Amendment but rather because there was

probable cause to believe that he was engaged in activities that established that he was an agent of a foreign power as defined in the statute. See 50 U.S.C. § 1801(b)(2). There was ample probable cause to reach this conclusion. These activities are not protected by the First Amendment as this Court explained. See United States v. Sattar, No. 02 Cr. 395, 2003 WL 21698266, at *21 (S.D.N.Y. July 22, 2003). See also Rahman, 861 F. Supp. at 252; United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999); Megahey, 553 F. Supp at 1194-95 (finding that defendants "made no showing whatsover to support their allegation that [defendant's] first amendment rights may have been abridged by the authorization or conduct of the FISA surveillance").[10] Upon the Court's review, there is no indication that any finding of probable cause was improperly based on protected First Amendment activities.

Finally, Sattar argues that the duration of the surveillance conducted pursuant to FISA--which occurred on an intermittent basis between 1995 and 2002--undermines any finding of probable cause. Sattar argues, in effect, that if the Government truly believed that Sattar was involved in clandestine activities

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[10] To the extent that Stewart argues that she was wrongly identified as an agent of a foreign power on the basis of activities protected by the First Amendment, this argument fails. Stewart was not a target of the FISA surveillance at issue in this case but was intercepted in the course of speaking with such targets.

justifying FISA surveillance, the Government would have arrested Sattar rather than allowing him to continue such activities for approximately seven years. This argument is unpersuasive.

> One might wonder why the Government would not immediately arrest [known international terrorists]. In some cases, they may not have violated U.S. law . . . . In other cases it may be more fruitful in terms of combatting international terrorism to monitor the activities of such persons in the United States to identify otherwise unknown terrorists here, their international support structure, and the location of their weapons or explosives.

Megahey, 553 F. Supp. at 1190 (quoting H. R. Rep. 95-1283, Pt. I., "Foreign Intelligence Surveillance Act of 1978," 95th Cong., 2d Sess. 43-44 (1978)). The applications to the FISA Court, together with the underlying declarations and certifications, make it clear, as explained further below, that the purpose of the surveillance was in fact to obtain foreign intelligence information. The intelligence continued to be collected over a long period of time because of its importance as foreign intelligence information. See 50 U.S.C. § 1801(e). The length of the surveillance relevant to this case does not undercut the showing of probable cause.

Sattar also argues that the fruits of the FISA surveillance should be suppressed because of the Government's alleged failure to comply with the minimization procedures set forth in the FISA orders authorizing surveillance. More specifically, Sattar contends that the relevant electronic surveillance was

unreasonable because there were no reasonable durational limits on the surveillance as demonstrated by the fact that the Government continuously and without interruption intercepted any and all of Sattar's and his family's telephone conversations, facsimiles, and use of the internet for nearly seven years. The Government argues that the classified and nonclassified information set forth in the Government's submissions demonstrates that the Federal Bureau of Investigation ("FBI") made a good faith effort to minimize the interception of information that was not foreign intelligence information.

> Under [50 U.S.C. § 1805, the FISA judge] 'shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that . . . the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title.' 50 U.S.C. § 1805(a)(4). The statute defines minimization procedures in pertinent part as:
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> > (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;
> >
> > (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance.
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> Section 1801(h) also contains the following proviso:
>
> > (3) notwithstanding paragraphs (1) and (2),

> procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes. . . .

Id. § 1801(h).

In re Sealed Case, 310 F.3d 717, 730-31 (For. Intell. Surv. Ct. Review 2002) (per curiam) (ellipsis in original). The Foreign Intelligence Surveillance Court of Review ("FISA Court of Review") has explained that FISA's minimization procedures "are designed to protect, as far as reasonable, against the acquisition, retention, and dissemination of nonpublic information which is not foreign intelligence information." Id. at 731.

The minimization procedures used for the telephone surveillances at issue in Sattar's motion specifically permit either contemporaneous monitoring or automatic recording. See, e.g., Rahman, 861 F. Supp. at 252. The audio surveillances of Sattar's telephones used automatic recording and minimization occurred at the indexing and disseminating stages. Appropriate minimization also occurred during surveillance of Sattar's facsimiles and internet use.

Sattar contends that the continuous nature of the surveillance violates FISA's minimization requirements because such surveillance intercepted large amounts of non-pertinent information. However, "in practice FISA surveillance devices are normally left on continuously, and the minimization occurs in the

process of indexing and logging the pertinent communications. The reasonableness of this approach depends on the facts and circumstances of each case." In re Sealed Case, 310 F.3d at 740. The Government "is not required to make an instantaneous identification of information acquired through a FISA authorized surveillance as unequivocally being foreign intelligence or else discarding it." Thomson, 752 F. Supp. at 81; see also Rahman, 861 F. Supp. at 253 (rejecting what the court perceived to be the defendants' argument that "the wheat could have been separated from the chaff while the stalks were still growing."). Moreover, "[l]ess minimization at the acquisition stage may well be justified to the extent the intercepted communications are 'ambiguous in nature or apparently involve[] guarded or coded language,' or 'the investigation is focusing on what is thought to be a widespread conspiracy [where] more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise.'" In re Sealed Case, 310 F.3d at 741 (quoting Scott v. United States, 436 U.S. 128, 140-43 (1978)) (alteration in original).

In support of his motion, Sattar cites a number of intercepted telephone conversations that he asserts were non-pertinent and should have been minimized, such as calls between Sattar and his wife. However, "[m]inimization cannot be examined in retrospect. It may now be apparent that a conversation that

appeared to be innocent was, in fact, innocent. But such truths are often only apparent at the conclusion of the investigation, not while it is underway." United States v. Clark, No. 98-00061-A, at 10-11 (E.D. Va. May 18, 1998) attached as Addendum to Gov. Mem. Opp. Mot. Suppr.; see also Rahman, 861 F. Supp. at 252 (for intercepts completed during first 90-days of FISA authorizations "there was not a great deal of time to detect patterns of innocent conversations, if there were such patterns").

Moreover, the court in Thomson noted that FISA's legislative history made clear that

> [T]he definition of 'minimization procedures' does not state that only 'foreign intelligence information' can be acquired, retained, or disseminated. The committee recognizes full well that bits and pieces of information, which taken separately could not possibly be considered 'necessary', may together or over time take on significance and become 'necessary.' Nothing in this definition is intended to forbid the retention or even limited dissemination of such bits and pieces before their full significance becomes apparent.

Thomson, 752 F. Supp. at 81 (quoting H.R. Rep. No. 95-1283 at 58) (alteration in original). Similarly, "some flexibility must be provided with respect to the retention of information concerning U.S. persons. Innocuous-sounding conversations may in fact be signals of important activity; information on its face innocent when analyzed or considered with other information may become critical." In re Kevork, 634 F. Supp. at 1017 (quoting H.R. Rep. 95-1283 at 55).

Having reviewed the materials submitted *in camera* and *ex*

parte, the Court concludes that appropriate minimization procedures were both established and followed in accordance with FISA. The Government followed the minimization procedures on file with the FISA Court and each FISA application specified the minimization procedures that would be used and each FISA Court order required minimization procedures. Automatic recording and minimization at the logging and dissemination stages was reasonable in this case particularly in view of the developing nature of the investigation, and the use of cryptic language. Some evidence of the Government's effective minimization efforts is the fact that less than ten percent of Sattar's telephone voice calls that were intercepted were actually the subject of FBI "tech cuts" which sought to summarize briefly the information obtained. (Gov. Mem. Opp. Mot. Suppr. at 54 n. 30.) The Government's efforts at minimization were reasonable and in good faith and were in compliance with its reasonable procedures. See Thomson, 752 F. Supp. at 80. There is no basis to suppress the fruits of the FISA surveillance on this ground.[11]

B.

Stewart appears to argue that the surveillance in this case violated the terms of the Act because the surveillance was

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[11] Stewart states, without supporting argument, that the Government may not have complied with FISA minimization procedures. The Court's review of the relevant materials negates any such argument for the reasons explained above.

conducted improperly as part of a domestic criminal investigation rather than for the purpose of gathering foreign intelligence information. This argument is without merit.

FISA defines "Foreign intelligence information" as

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the Unites States to protect against-
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
>
> (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to-
>
> (A) the national defense or the security of the United States; or
>
> (B) the conduct of the foreign affairs of the United States.

50 U.S.C. § 1801(e)(1)-(2). Prior to the enactment of the Patriot Act on October 26, 2001, FISA required a high-ranking executive official to certify to the FISA judge "that the purpose of the surveillance is to obtain foreign intelligence information." 50 U.S.C. § 1804(a)(7)(B) (2000). The Second Circuit Court of Appeals interpreted this use of "the purpose" to mean that the "primary purpose" of the FISA surveillance was the interception of foreign intelligence information rather than simply the collection of evidence for a criminal prosecution.[12]

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[12] The Government states correctly, however, that there is no question that the fruits of valid FISA surveillance can be

See Duggan, 743 F.2d at 77 ("The requirement that foreign intelligence information be the primary objective of the surveillance is plain not only from the language of § 1802(b) but also from the requirements in § 1804 as to what the application must contain."); accord United States v. Johnson, 952 F.2d 565, 572 (1st Cir. 1992) ("Although evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance.") (internal citations omitted); see also In re Sealed Case, 310 F.3d at 725-26 (tracing the history of the primary purpose test).

In 2001, Congress enacted the Patriot Act and abolished what some courts had described as FISA's "primary purpose" test. Congress amended the language in 50 U.S.C. § 1804(a)(7)(B) to

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used against a defendant in a criminal prosecution. See Duggan, 743 F.2d at 78 ("we emphasize that otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1806(b), as evidence in a criminal trial"); see also In re Sealed Case, 310 F.3d at 727 ("In sum, we think that the FISA as passed by Congress in 1978 clearly did *not* preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution.") (emphasis in original); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("Information gathered pursuant to FISA authorization may be used in a criminal prosecution with the authorization of the Attorney General."); Rahman, 861 F. Supp. at 251 ("[FISA] itself was written with full anticipation that those defined as agents of a foreign power would violate the laws of the United States and that foreign intelligence information would be used in criminal prosecutions.") (internal citations omitted).

require not that "the purpose of the surveillance is to obtain foreign intelligence information" but "that a significant purpose of the surveillance is to obtain foreign intelligence information." Compare 50 U.S.C. § 1804(a)(7)(B) (2000), with 50 U.S.C. § 1804(a)(7)(B) (2003). In changing "the purpose" to "a significant purpose," "[t]here is simply no question . . . that Congress was keenly aware that this amendment relaxed a requirement that the government show that its primary purpose was other than criminal prosecution." In re Sealed Case, 710 F.3d at 732.

Following this change, in In re Sealed Case, the FISA Court of Review rejected the primary purpose test altogether as it applied to FISA surveillance. The court noted that foreign intelligence information "includes evidence of crimes such as espionage, sabotage or terrorism." Id. at 723. The court accepted the Government's argument that there was a "false dichotomy between foreign intelligence information that is evidence of foreign intelligence crimes and that which is not. . . ." Id. at 725.

In place of the "primary purpose" test, the FISA Court of Review announced the "significant purpose" test whereby "[s]o long as the government entertains a realistic option of dealing with the agent [of a foreign power] other than through criminal prosecution," the test is satisfied. Id. at 735.

> The important point is . . . [that] the Patriot Act amendment, by using the word 'significant,' eliminated any justification for the FISA court to balance the relative weight the government places on criminal prosecution as compared to other counterintelligence responses. If the certification of the application's purpose articulates a broader objective than criminal prosecution--such as stopping an ongoing conspiracy--and includes other potential non-prosecutorial responses, the government meets the statutory test. Of course, if the court concluded that the government's sole objective was merely to gain evidence of past criminal conduct--even foreign intelligence crimes--to punish the agent rather than halt ongoing espionage or terrorist activity, the application should be denied.

Id.

The Government argues persuasively that the FISA surveillance at issue in this case was authorized and conducted in accordance with the statute, and thus with the defendants' Fourth Amendment rights, as discussed below, even if this Court applies the primary purpose test to all of the surveillance in this case. The Government explains that, as a practical matter, the Government continued to adhere to the primary purpose standard for the duration of all of the surveillance at issue in this case because all of the surveillance occurred before the FISA Court of Review issued its decision disapproving the "primary purpose" test and because the FISA Court disapproved of what it perceived to be inappropriate intermingling of criminal and foreign intelligence investigations on the part of the Government. See In re All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 619-22

(For. Intell. Surv. Ct. 2002), rev'd sub nom In re Sealed Case, 310 F.3d 717 (For. Intell. Surv. Ct. Review 2002).

Having reviewed the materials submitted both publicly and for *ex parte* and *in camera* examination, the Court concludes that all of the surveillance at issue was conducted with the appropriate purpose. In so doing, the Court reviews the underlying certifications only for clear error. See In re Sealed Case, 710 F.3d at 739; Duggan, 743 F.2d at 77; Rahman, 861 F. Supp. at 250. In each of the pre-Patriot Act applications, an appropriate executive branch official certified that "the purpose" of the surveillance was to obtain foreign intelligence information, and in each of the post-Patriot Act applications an appropriate executive branch official certified that "a significant purpose" of the surveillance was to obtain foreign intelligence information. The Court of Appeals for the Second Circuit has made clear that these certifications are to be "subjected to only minimal scrutiny by the courts." Duggan, 743 F.2d at 77. The FISA judge in reviewing the application "is not to second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information." Id. Further, "a reviewing court is to have no greater authority to second-guess the executive branch's certifications than has the FISA Judge. . . ." Id.

In this case, the materials submitted to the FISA Court

support the FISA Court orders for each of the applications. The certifications conformed to the statutory requirements in each case. There was an ongoing foreign intelligence investigation and there is ample support for the conclusions of the executive branch official in each case that "the purpose" or, after the Patriot Act, "a significant purpose" of the requested surveillance was to obtain foreign intelligence information. The materials submitted to the FISA Court support the correctness of those certifications and easily satisfy the level of review to be accorded to such certifications. Stewart's motion to suppress the fruits of the FISA surveillance on account of an improper purpose is denied.

C.

Stewart makes several arguments to the effect that the FISA evidence should be suppressed because the surveillance allegedly violated her rights under the Fourth Amendment.

Stewart argues that she is an inappropriate target of FISA surveillance because she is a United States citizen. This argument has no merit because she was never designated as a target in any of the applications at issue in this case. Her conversations were intercepted when she communicated with targets. Moreover, to the extent that Stewart is arguing that she was improperly intercepted as a non-target of the surveillance, the Second Circuit Court of Appeals rejected this

argument on the merits in Duggan. See Duggan, 743 F.2d at 79.[13] The interception of a non-target United States citizen during the course of lawfully authorized and conducted FISA surveillance does not violate the non-target's Fourth Amendment rights. The Court of Appeals in Duggan explained that "[t]he identification requirement imposed by FISA is only that an application for surveillance identify the 'target of the electronic surveillance.' 50 U.S.C. § 1804(a)(3). . . . Once the proper preconditions are established with respect to a particular target, there is no requirement in FISA that all those likely to be overheard engaging in foreign intelligence conversations be named." Id. The Court of Appeals explicitly found no "Fourth Amendment requirement that all such persons be identified." Id. at 79 n.7.

Furthermore, Stewart's status as a non-target intercepted by a FISA surveillance did not violate her Fourth Amendment rights. Courts have repeatedly held that FISA comports with the Fourth Amendment, even when violations of Fourth Amendment rights are alleged by non-targets. See, e.g., Duggan, 743 F.3d at 73 (rejecting Fourth Amendment arguments made by target and non-target defendants because "the procedures fashioned in FISA [are] a constitutionally adequate balancing of the individual's Fourth

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[13] The Court of Appeals also rejected this argument because the defendants had waived it. See Duggan, 743 F.2d at 78-79.

Amendment rights against the nation's need to obtain foreign intelligence information"); accord Johnson, 952 F.2d at 573 (rejecting argument of Fourth Amendment violation set forth by target and non-target defendants); see also Pelton, 835 F.2d at 1075 ("We now join the other courts of appeal that have reviewed FISA and held that the statute meets constitutional requirements.")

This Court's *ex parte, in camera* review of the FISA applications and orders has made clear that the surveillances at issue were lawfully authorized and executed. Therefore, those surveillances were performed in accordance with the statutorily established court authorized procedure that satisfies the Fourth Amendment. Stewart has not suffered a constitutional violation, nor is she entitled to relief on this basis.

Stewart filed a subsequent motion in March 2003 in which she moved to suppress 20 videotapes of meetings between herself, Yousry, and Sheikh Abdel Rahman at the Federal Medical Center in Rochester, Minnesota recorded on May 19 and 20, 2000 and July 13 and 14, 2001. In her reply to the motion, Stewart extended the request to all recorded communications allegedly related to the provision of legal services. This includes the 20 videotapes and all attorney-client phone calls contained on 63 audio cassettes

produced by the Government to Stewart and Yousry.[14] Stewart believes that her voice was recorded on only one of the audio tapes. These recordings were made as part of the FISA surveillance performed in this case. Stewart asks the Court, in the alternative, to order the Government to provide the Court with copies of the recordings for *in camera* review or to allow Stewart to provide the Court with such copies.

Stewart moves to suppress the recordings on the ground that the surveillance violated her rights under the Fourth Amendment because she had a reasonable expectation of privacy in her meetings with her client, Sheikh Abdel Rahman. For purposes of the motion the Government does not dispute that Stewart had a reasonable expectation of privacy but argues that the FISA surveillance satisfies the requirements of the Fourth Amendment. Stewart simply ignores the cases, including the decision of the Court of Appeals for the Second Circuit in Duggan, that have squarely held that surveillance authorized and conducted in accordance with FISA does not violate the Fourth Amendment rights of those whose communications are intercepted. See supra at 31-33; see also In re Sealed Case, 710 F.3d at 746 ("FISA as amended is constitutional because the surveillances it authorizes are

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[14] As discussed below, these materials have not been produced to Sattar because of the Government's concern that they contain communications protected by Sheikh Abdel Rahman's attorney-client privilege or the work-product doctrine.

reasonable"). The relevant surveillance was authorized and conducted lawfully. Therefore, Stewart's motion to suppress the audio and video tapes as allegedly violative of her Fourth Amendment rights is denied.

Stewart's argument that the recordings should be suppressed for failure to comply with FISA's minimization requirements is similarly unavailing. As the Government correctly points out, "FISA does not prohibit the use of automatic tape recording equipment" as was used in the surveillances at issue. In re Kevork, 634 F. Supp. at 1017. In response to this argument, Stewart contends that in view of the blanket recording that occurred, the Government failed to live up to its minimization obligations for retention or dissemination. Stewart takes issue, for example, with the Government's admission that the videotapes are, at least in part, "not-yet-minimized." (Letter from Robin Baker to the Court dated June 2, 2003 at n. 1.) As the Court has already explained, "some flexibility must be provided with respect to the retention of information concerning U.S. persons." In re Kevork, 634 F. Supp. at 1017 (quoting H.R. Rep. 95-1283 at 55). As discussed below, contrary to Stewart's argument, the Government has minimized the dissemination of the relevant recordings and draft transcripts. Indeed the full recordings have not been made available to defendant Sattar and the Government trial attorneys (the "Government Trial Team").

For the reasons already explained, Stewart's motion to suppress the surveillance of her prison visits of Sheikh Abdel Rahman is denied. Similarly, having reviewed the applications and orders underlying the relevant FISA surveillance for this motion, and for the reasons explained above, the Court will not disclose those materials to the defendants. Therefore, Stewart's request for such disclosure is denied. Finally, Stewart asks the Court to review the audio and video surveillance of Sheikh Abdel Rahman that she seeks to suppress. It is clear from the papers, however, that some of those recordings would be in Arabic and would necessitate translation. The Court's review of the underlying applications and orders for the relevant FISA surveillance and consideration of the parties' arguments is sufficient for the Court to conclude that such review is not necessary for purposes of the current motions. However, as explained below, the Court will provide for its review if necessary for portions of those materials.

IV.

The Government has filed a separate motion for an Order authorizing the Government to disclose to Sattar certain materials within the Government's custody and control that potentially contain communications that fall within Sheikh Abdel Rahman's attorney-client privilege. Specifically, the Government seeks to disclose audio recordings of 63 telephone conversations

and audio and video recordings of three prison meetings between Sheikh Abdel Rahman and his legal team, including Stewart and Yousry, recorded pursuant FISA (the "Prison Recordings"). The Government also seeks to disclose notebooks belonging to Yousry containing, among other things, notes that Yousry took during these telephone calls and visits that the Government obtained when executing a search warrant at Yousry's residence on April 9, 2002 (the "Yousry Notebooks"). The Government is concerned that portions of the Yousry Notebooks may include attorney-client privileged material or work product. Sheikh Abdel Rahman, through his attorneys (who no longer include Stewart), has declined to waive his privilege with respect to these materials.[15] As explained below, the Government Trial Team is not fully aware of the contents of the Prison Recordings and Yousry Notebooks and therefore cannot assess whether they contain information that is actually privileged or that falls within the scope of its disclosure obligations under Federal Rule of Criminal Procedure 16 or Brady. Therefore, in an excess of caution, the Government has proceeded on the assumption that the

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[15] The Government attempted to resolve this matter by asking Sheikh Abdel Rahman, through counsel, to waive his relevant privileges. However, by latter dated June 10, 2003, Sheikh Abdel Rahman's counsel informed the Government that his client declined to do so. (Letter from Ramsey Clark to Christopher J. Morvillo dated June 10, 2003 attached as Ex. A to Gov. Mem. Supp. Order.)

materials are both privileged and covered by Rule 16 and Brady.[16]

Stewart has filed a cross motion seeking a panoply of relief. Stewart asks the Court (1) to order the Government to disclose the attorney-client privileged information to the Court; (2) to sequester all potentially privileged material from the Government Trial Team pending a hearing; (3) to return all attorney work product to Stewart; (4) to suppress the fruits of the alleged invasion of Stewart's and Sheikh Abdel Rahman's privilege and Fourth Amendment protected rights; and (5) to appoint a Special Master to determine any Government claims of right of access to allegedly privileged material. Stewart seeks an evidentiary hearing on these issues.

Although the Government is in possession of the Prison Recordings and the Yousry Notebooks, the Government represents that the Government Trial Team has had limited access to these materials. The Government Trial Team has not reviewed any of the Yousry Notebooks, which are principally in Arabic, and has had access to summaries only and redacted transcripts of the Prison Recordings. The Government has produced the Yousry Notebooks and the Prison Recordings to Stewart and Yousry because these

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[16] The court in Thomson found that the Government has no obligation to provide discovery under Rule 16 of information collected under FISA beyond that constitutionally mandated by Brady. Thomson, 752 F. Supp. at 82-83. The Government does not rely on Thomson at this time but seeks to fulfill any potential obligations under both Rule 16 and Brady.

defendants were parties to some of the potentially privileged communications and because the Government believes that Stewart and Yousry, as arguably members of Sheikh Abdel Rahman's legal team, may be entitled to breach the privilege in order to defend against the charges in the Indictment. The Government also contends that the Court's April 26, 2002 Protective Order weighs in favor of disclosure to Sattar because it specifically restricts the dissemination of potentially privileged materials beyond the parties to this case. Therefore, the disclosure sought by the Government would be limited to allowing Sattar access to the materials Stewart and Yousry already have and the intrusion on the attorney-client privilege or work product for Sheikh Abdel Rahman would be limited to that disclosure. Before there could be further disclosure, the party seeking such disclosure would require Court authorization.

The Yousry Notebooks were turned over to Yousry's counsel in September 2002 and to Stewart and Yousry in January 2003. (Gov. Aug. 5, 2003 letter at 1-2 & n. 1.) The Government intended to provide these defendants with translations of the Yousry Notebooks in January 2003 but inadvertently failed to do so and represents that it will do so presently. (Id. at 3.) The Government also represents that a "taint team" or "privilege team" that is walled off from the Government Trial Team has been preparing transcripts of the Prison Recordings and redacting

those transcripts in accordance with FISA to remove privileged communications, after which time the redacted materials are being provided to the Government Trial Team as well as to Stewart and Yousry. Use of the taint team ensures that members of the Government Trial Team are not exposed to potentially privileged material.

A.

The Government argues that the Court should issue an Order authorizing the Government to disclose the Prison Recordings and Yousry Notebooks to Sattar because Sattar's due process rights to potentially relevant, exculpatory, or impeachment material outweigh Sheikh Abdel Rahman's interest in maintaining the confidentiality of the communications. In so doing, the Government seeks to fulfill its constitutional obligation under Brady to provide the defendant with exculpatory and impeachment material in its possession and its obligation under Federal Rule of Criminal Procedure 16, which requires the Government to disclose, among other things, documents that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(i).

The Government is correct that the evidentiary privileges asserted by Stewart are not constitutional in nature. The attorney-client privilege, while "the oldest of the privileges for confidential communications known to the common law," Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citing 8 J.

Wigmore, Evidence § 2290 (McNaughton rev. 1961)), is itself based in policy, rather than in the Constitution, and therefore it alone "cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose." United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 504 (2d Cir. 1991); see also In re Application of Sarrio, S.A., 119 F.3d 143, 147 (2d Cir. 1997) (attorney-client privilege applies only where necessary to achieve its purposes). Therefore, the Government argues, the attorney-client privilege must yield in the face of Sattar's constitutional rights and the Government's constitutionally-based discovery obligations.

The Government argues by analogy to cases where the Supreme Court has found that the need for evidence at a criminal trial trumped other claims of privilege. See, e.g., United States v. Nixon, 418 U.S. 683, 713 (1974) ("The generalized assertion of [executive] privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial."); Davis v. Alaska, 415 U.S. 308, 319 (1974) (finding "that the right of confrontation is paramount to the State's policy of protecting a juvenile offender" and therefore state privilege for protecting anonymity of juvenile offender records must yield to defendant's right to cross-examine key witness). The Government argues that this is such a case.

The Supreme Court has expressly left open the question of whether a criminal defendant's constitutional rights may overcome the attorney-client privilege. In Swidler & Berlin v. United States, 524 U.S. 399 (1998), the Court declined to find that the attorney-client privilege ceases upon the client's death. The Court therefore found that certain materials were protected by the privilege and were not required to be produced to the prosecution. In doing so, however, the court noted: "Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not present here." Id. at 408 n.3 In her dissent Justice O'Connor would have recognized an even broader exception to the privilege. As she explained: "When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege." Id. at 413-24 (O'Connor, J. dissenting).

In Morales v. Portundo, 154 F. Supp. 2d 706, 709 (S.D.N.Y. 2001), Judge Chin of this court found that the attorney-client

privilege of a deceased client was overcome by the constitutional need of a habeas petitioner to obtain evidence where the exclusion would render the proceeding fundamentally unfair.

In this case the Government seeks disclosure of the materials to assure that materials that are potentially required to be produced to Sattar are in fact produced.

Stewart claims that the Court should deny the Government's motion because the Prison Recordings and the Yousry Notebooks contain privileged communications protected by the attorney-client privilege and the work product doctrine.[17] The Government is correct, however, that Stewart lacks standing to invoke these protections on behalf of her former client. Moreover, while Sheikh Abdel Rahman has refused to waive his privilege he has not interposed any reasoned opposition to the Government's motion arguing the importance of preventing access by Sattar to these documents nor has he requested the relief that Stewart now seeks. Nor has Yousry objected to the Government's proposal.

The attorney-client privilege belongs "solely to the

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[17] Stewart claims that the Government's motion should be denied at the outset because the Government lacks standing to waive Sheikh Abdel-Rahman's attorney-client privilege and because the disclosure issue is not ripe for review. The assertions are without any merit. The prosecution has a duty to provide Sattar with potential Brady and Rule 16 materials in its possession and thus has the right to seek authorization for the relevant disclosures. Moreover, Sattar has moved to dismiss Count Four of the Indictment because of the Government's failure to produce relevant discovery and therefore the Government's motion is ripe for decision.

client." In re Von Bulow, 828 F.2d 94, 100 (2d Cir. 1987). Therefore the privilege can be asserted only by the client or by a person authorized to do so on the client's behalf. Sarrio, 119 F.3d at 147. Third parties against whom the evidence is offered cannot insist that the privilege be maintained. Id. Despite the case law to the contrary, Stewart repeatedly attempts to assert Sheikh Abdel Rahman's attorney-client privilege as a bar to the Government's turning over the materials in its possession to Sattar. The privilege, however, is not hers to invoke.

Stewart bases her argument on cases that are factually distinct from the one before this Court and which do not support her argument for standing. In Republic Gear Company v. Borg-Warner Corporation, 381 F.2d 551 (2d Cir. 1967), a litigant moved to compel discovery of documents from a non-party's attorney that the Court of Appeals ruled were protected by the attorney-client privilege and work-product doctrine. Stewart relies on Republic Gear for the proposition that "[n]ot only may an attorney invoke the privilege in his client's behalf when the client is not a party to the proceeding in which disclosure is sought, but he should do so, for he is duty bound to raise the claim in any proceeding in order to protect communications made in confidence." Id. at 556 (internal citations and quotation marks omitted). In so doing, however, the Court of Appeals made clear that the attorney-client privilege "is the client's, not the

attorney's, in the sense that an attorney can neither invoke the privilege for his own benefit when his client desires to waive it nor waive the privilege without his client's consent to the waiver." Id. (internal citation omitted).

Republic Gear and Swidler & Berlin, on which Stewart also relies, do not support Stewart's argument that she has standing to raise Sheikh Abdel Rahman's privilege to block disclosure of the documents from the Government to her co-defendant. In both cases, parties sought to compel an attorney to disclose privileged information in the attorney's possession to the potential detriment of the attorney's clients. The Government, however, asks nothing of Stewart. Instead, the Government is already in possession of the allegedly privileged material and merely seeks to turn that material over to Stewart's co-defendant, Sattar. Indeed, Stewart has already benefitted from the discovery that the Government seeks to provide Sattar and from which the Government Trial Team itself will remain shielded at this time. Stewart's characterization of these cases and of her role in the issue before the Court is simply wrong.

The true question before the Court is whether the Prison Recordings and Yousry Notebooks, which may or may not contain privileged materials, should be turned over to Sattar. At the outset, the Court notes that the materials at issue are not alleged to be attorney-client communications between any of the

defendants on trial and their defense counsel. Nor has the alleged work-product been prepared on behalf of any one of the defendants. Instead, the Prison Recordings and Yousry Notebooks may include privileged materials relevant to Sheikh Abdel Rahman's consultations with his lawyers. Therefore, this is not a case in which the Government seeks to use or disclose materials to prosecute a criminal defendant who even potentially maintains a privilege over the recordings or documents at issue. The defendants' constitutional rights are not implicated. Cf. United States v. Neill, 952 F. Supp. 834, 839-40 (D.D.C. 1997) (outlining circumstances in which violations of a criminal defendant's attorney-client privilege can raise Sixth Amendment concerns).

There is an insufficient record to determine whether all of the Prison Recordings and the Yousry Notebooks should be produced to Sattar. None of the parties has pointed to specific portions of any of these materials that actually contain any privileged or work product materials, even though Stewart and Yousry have had access to these materials. Therefore the Court could not even assess as to those portions of the materials that are allegedly protected by some privilege, whether any of Sattar's rights require production of those materials and whether this case fits within those exceptional cases left open by the Supreme Court in Swidler & Berlin and which Judge Chin found in Morales.

Invocation of the attorney-client privilege requires a party to show that there was "(1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice." United States v. Construction Prods. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996).

A party asserting the protection of the work-product doctrine must show that the materials at issue "were prepared principally or exclusively to assist in anticipated or ongoing litigation." Construction Prods., 73 F.3d at 473. "At its core, the work-product doctrine shelters the mental processes of the attorney providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 (1975). A party seeking discovery of attorney fact work-product must ordinarily show "substantial need." As for work-product that shows "mental impressions, conclusions, opinions, or legal theories of an attorney," Fed. R. Civ. P. 26(b)(3), the Court of Appeals has held that "at a minimum, such material is to be protected unless a highly persuasive showing [of need] is made." In re Grand Jury Proceedings, 219 F.3d 175, 190 (2d Cir. 2000) (internal quotation marks omitted).

Although Stewart and Yousry have been in possession of the unredacted and allegedly privileged materials, neither has put forth any affirmative evidence that the Prison Recordings or

Yousry Notebooks qualify for these privileges. Instead, Stewart makes blanket assertions that this is so. Even if Stewart had standing to assert these privileges, her showing on the papers would be insufficient to meet her burden of establishing the essential elements of the privileges. See Construction Prods., 73 F.3d at 473-74.

It is clear from the papers that the Government taint team has been preparing redacted transcripts of the Prison Recordings and Yousry Notebooks and distributing those transcripts to Stewart and Yousry's counsel, as well as to the Government Trial Team. Apparently Sattar has not received these materials, despite the fact that in their redacted form there should be no objection. (Transcript of August 1, 2003 Hearing at 7.) Any available redacted copies of the Prison Recordings or Yousry Notebooks (or their translations) should therefore be given to Sattar at this time. When the Government taint team has finished redacting the material to exclude any attorney-client or work product material, it should provide those segregated portions to the Court, together of course with translations. The Court will then review the allegedly privileged material to determine whether the purported attorney-client communications or work product should be turned over to Sattar. The Court may require further briefing or explanation at that time.

The use of a Government taint team to provide redacted

versions of the materials is particularly appropriate with respect to these materials. The materials are being redacted to excise any attorney-client or work product materials with respect to Sheikh Abdel Rahman. There is no suggestion that these materials contain communications where the defendants on trial were seeking legal advice. Even in those cases, taint teams have been used to assure that the defendants' privileged communications will not be used by the Government against them. See, e.g., Neill, 952 F. Supp. at 841 (finding that the Government met its burden of rebutting presumption of harm from use of taint team).

Moreover, the Court's function in reviewing *in camera* the redacted portions is consistent with other situations where courts review materials *in camera* in criminal cases to determine whether they should be turned over to defendants or whether privileges apply. See, e.g., United States v. Pena, 227 F.3d 23, 28 (2d Cir. 2000) (when defendant requests pretrial services materials from Government during discovery, district court should review such materials *in camera* for exculpatory and impeachment information and, if it exists, turn over only portions that contain such information); United States v. Moore, 949 F.2d 68, 72 (2d Cir. 1991) (when co-defendant requests presentence report of accomplice witness, court should examine report *in camera* for exculpatory statements or impeachment material and, if found,

should release such material only if there is a compelling need); United States v. Zolin, 491 U.S. 554, 565-68 (1989) (sanctioning *in camera* review at request of party opposing assertion of attorney-client privilege to determine whether communications fall within crime-fraud exception). Such procedures provide for the efficient disclosure of appropriate discovery while allowing the Court to determine whether certain materials should be withheld when evidentiary privileges or other legal principles do, in fact, apply. This will also allow Sattar access to the evidence necessary and available to defend against the charges in the Indictment. As a result, Sattar's motion to dismiss Count Four of the Indictment on the ground that the Government has failed to provide discovery is denied.[18]

B.

Finally, Stewart requests various forms of relief that the Court declines to grant.

First, to the extent that Stewart argues again in her cross motion that she has suffered a violation of her Fourth Amendment rights, and that the Government should return any illegally seized communications or work product, this argument is no more

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[18] The Government argues that in the event that the defendants seek to rely on any of the potentially privileged information at trial the Government should be provided with sufficient notice to prevent unfair surprise and prejudice because the Government will not have access to the information. The Court need not address this request at this stage of the case.

availing now than in her two earlier motions. As the Court has explained, the FISA surveillance generating the Prison Recordings was lawfully authorized and executed. The Yousry Notebooks were obtained through a valid search warrant issued by the Magistrate Judge. Nothing about the Government's possession or use of those materials, to this point, violates Stewart's Fourth Amendment rights.

Second, Stewart alleges that the Government's motion reveals several misrepresentations on the part of the Government that undermine the Government's credibility regarding its possession and protection of allegedly privileged materials. These assertions are contradicted by the record. Stewart portrays the Government as admitting at a late date that it overheard attorney-client conversations, prepared summaries of those conversations that were shared within the Government, and seized notebooks from Yousry that may contain attorney-client communications or work product. These contentions are without merit.

The Government made clear from the outset that it overheard attorney-client conversations as is apparent from the face of the Indictment and from the Government's representation at the defendants' initial appearance when the Government stated that, "The government also monitored several prison visits, both audio and video, to Sheik Abdel Rahman over the past several years, one

of which involved defendant Stewart in May of 2000." (Apr. 9, 2002 Tr. at 16.) Moreover, Stewart's former counsel admitted knowing that the Government had prepared the allegedly newly revealed summaries when she wrote to a member of the Government Trial Team on April 19, 2002, ten days after the defendants were indicted, stating in part, "You advised me that your office has only redacted copies of transcripts of certain telephone conversations and meetings which were recorded pursuant to FISA warrants." (Letter from Susan V. Tipograph to Christopher J. Morvillo dated Apr. 19, 2002 attached to Gov. Reply.) Lastly, contrary to Stewart's argument, at a pretrial conference on October 3, 2002, the Government stated explicitly that the Yousry Notebooks appeared to contain summaries of prison visits and phone calls and that the Government was preparing translations of the Yousry Notebooks. (Transcript of Oct. 3, 2002 Hearing at 4.)

Third, Stewart asks the Court to appoint a Special Master to review the Prison Recordings and Yousry Notebooks for privileged communications or work product. Stewart claims that the Court's June 11, 2002 Opinion and Order appointing a Special Master dictates such a result. See generally United States v. Stewart, No. 02 Cr. 395, 2002 WL 1300059 (S.D.N.Y. June 11, 2002). The Court has made clear, however, that the appointment of the Special Master was solely for the purpose of reviewing materials obtained pursuant to a search warrant for Stewart's law offices

for privilege and responsiveness to the warrant and was not a blanket appointment. See Sattar, 2002 WL 1836755, at *7. The appointment was not the "law of the case" for any conceivable discovery reviews as Stewart now argues.

Appointing another Special Master at this time would be inappropriate. As explained above, there is no assertion that Stewart's privilege is implicated at all in any of the materials, and certainly she has made no such showing. Further, Stewart has been in possession of the unredacted Prison Recordings and Yousry Notebooks for over six months and has known of the Government's efforts to redact those materials for many months. She has long since waived any objection to that process. In any event, it is unnecessary to appoint a Special Master, and such an appointment at this time would only cause undue delay. Indeed, the Special Master appointed in June 2002 has yet to produce a report on the materials before him. The motion to appoint a Special Master is therefore denied.

CONCLUSION

All of the defendants' motions to suppress the fruits of the FISA evidence are denied. The Government's motion is granted. The Court has conducted an *ex parte, in camera* review of the materials submitted by the Government and finds that the FISA surveillance was lawfully authorized and executed. The Court will not disclose those materials to the defendants. The

Government may provide Sattar with those portions of the Prison Recordings and Yousry Notebooks that have been redacted so as not to contain material covered potentially by the attorney-client privilege or the work-product doctrine. When the Government taint team has completed the redactions, the Government should provide the Court with the portions that the Government taint team believes may contain privileged material for the Court's review and potential disclosure to Sattar. Finally, Stewart's motion for disclosure, sequestration, return of property, suppression, appointment of a Special Master and for an evidentiary hearing is denied in its entirety. The Court has considered all of arguments raised by the parties. To the extent not specifically discussed above, the arguments are either moot or without merit.

SO ORDERED.

Dated: New York, New York
September 15, 2003

John G. Koeltl
United States District Judge