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.

89290

02 Cr. 395 (JGK)

OPINION and ORDER

JOHN G. KOELTL, District Judge:

Defendant Stewart has moved for an evidentiary hearing on both "government noncompliance with discovery obligations, principally concerning electronic surveillance evidence," and the "admissibility of electronic surveillance evidence." (Notice of Mot. dated July 25, 2003, at 1.) Stewart contends that the motion is warranted because the Government has acknowledged that it is unable to retrieve roughly two percent of the unminimized voice calls recorded pursuant to the Foreign Intelligence Surveillance Act of 1978 ("FISA") pertinent to this case, and because the FBI's procedures for handling electronic evidence allegedly raise doubts about the admissibility of the electronic surveillance evidence. For the reasons that follow, the motion is denied.

Defendant Stewart requests a pretrial hearing on the admissibility of the electronic surveillance evidence obtained pursuant to the FISA. She contends that the evidence can be challenged on the grounds of authenticity and best evidence, among others, and that the factual and legal issues relating to the admissibility of this evidence are so complex that a pretrial hearing would promote trial efficiency. However, the Government acknowledges that it must establish a proper foundation before the electronic surveillance can be admitted into evidence. The Government concedes that it will bear the burden of establishing by clear and convincing evidence the authenticity of any audio recordings it seeks to offer into evidence. See United States v. Hamilton, 334 F.3d 170, 186-87 (2d Cir. 2003). There is no reason at this point to believe that the issues relating to the admissibility of this evidence cannot be resolved efficiently at trial. Indeed, when there is sufficient evidence of authentication for admissibility of electronic evidence, challenges to the reliability of the evidence go to the weight of the evidence, as accorded by the jury, and not to its admissibility. United States v. Tropeano, 252 F.3d 653, 661. Therefore, Stewart's motion for a pretrial hearing on the admissibility of the electronic surveillance evidence is denied.

Stewart also requests an evidentiary hearing to address the Government's alleged noncompliance with its discovery obligations. Stewart contends that the Government failed to comply with its discovery obligations by disclosing the audio files in .mp3 format rather than in their original file format. This argument is now moot because the Government has since agreed to provide the audio files in the original file format, as requested by Stewart. (See Letter of Robin L. Baker to the Court dated Aug. 22, 2003, at 2.)

Stewart also contends that the Government has failed to comply with its discovery obligations because the Federal Bureau of Investigation ("FBI") is unable to retrieve the audio files for certain intercepted telephone calls. The FBI has retrieved and disclosed to the defendants over 85,000 audio files of voice calls, fax-machine sounds, and computer-modem sounds obtained through FISA surveillance of telephones used by defendants Sattar and Yousry. (Declaration of Scott L. Kerns dated Sept. 8, 2003 ("Kerns Decl.") at ¶ 4.) The telephone surveillance resulted in approximately 5,165 pertinent voice calls that were not minimized, for which the FBI made "tech cuts," or written summaries. (Id. ¶ 5.) The FBI has retrieved the audio files for all but 114, or about 2.21%, of these unminimized voice calls. (Id.) The FBI has been unable to retrieve the audio

files for an unknown number of non-pertinent calls. (Kerns Decl. ¶¶ 8-10, 18.) There is no evidence that the percentage of those audio files which are not retrievable is any different from the 2.21% applicable to the unminimized files for which tech cuts were made. Stewart contends that the failure to turn over the 114 audio files, and the failure to preserve even the irretrievable non-pertinent calls, represents not only a failure of the Government's obligation to preserve evidence, but also noncompliance with Rule 16 of the Federal Rules of Criminal Procedure and FISA itself. Stewart therefore seeks sanctions against the Government.

The Court of Appeals for the Second Circuit has made clear the showing that a defendant must make to succeed on a claim that the Government has failed to preserve evidence that is material to the defense:

> 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.' California v. Trombetta, 467 U.S. 479, 489 (1984); see United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982); United States v. Rastelli, 870 F.2d 822, 833 (2d Cir.), cert. denied, 493 U.S. 982 (1989). Moreover, unless the defendant can show bad faith on the part of the state, 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.' Arizona v. Youngblood, 488 U.S. 51, 58 (1988); Trombetta, 467 U.S. at 488; Valenzuela, 458 U.S. at 872.

Buie v. Sullivan, 923 F.2d 10, 11-12 (2d Cir. 1990); see also United States v. Rastelli, 870 F.2d 822, 833 (2d Cir. 1989); Gonzalez v. Fischer, No. 01 Civ. 217, 2002 WL 31422882, at *6 (S.D.N.Y. Feb. 26, 2002); United States v. Bin Laden, No. S7 98 Cr. 1023, 2001 WL 30061, at *5 & n.8 (S.D.N.Y. Jan. 2, 2001); United States v. Baron, No. 92 Cr. 898, 1996 WL 551625, at *5 (S.D.N.Y. Sept. 27, 1996).[1]

Stewart's motion is without any merit because she can show neither materiality nor bad faith. Stewart provides no support for her conclusory allegations that the irretrievable evidence is exculpatory. She insists that the tapes would be exculpatory

[1] Even before the Supreme Court's decisions in Trombetta and Youngblood, it has been well established in the Second Circuit that whether to sanction the Government for failing to preserve discoverable evidence depends on a variety of case-specific factors, including "the government's culpability for the loss, ... a realistic appraisal of its significance when viewed in light of its nature, its bearing upon critical issues in the case and the strength of the Government's untainted proof." United States v. Grammatikos, 633 F.2d 1013, 1020 (2d Cir. 1980); see also United States v. Bakhtiar, 994 F.2d 970, 975-76 (2d Cir. 1993); United States v. Morgenstern, 933 F.2d 1108, 1116 (2d Cir. 1991). As explained below, Stewart has made no showing that the electronic evidence that was lost in this case was in any way exculpatory, and she has also not shown that the Government's failure to preserve the evidence was the result of bad faith on its part. Therefore, sanctions against the Government would not be appropriate under the Grammatikos standard. See United States v. Rahman, 189 F.3d 88, 139 (2d Cir. 1999) ("When it occurs, the Government's loss of evidence may deprive a defendant of the right to a fair trial. Whether that loss warrants sanctions depends on the Government's culpability for the loss and its prejudicial effect." (citing Bakhtiar, 994 F.2d at 975-76)).

because the "electronic surveillance files, taken as a whole, would exculpate Lynne Stewart because they show a conscientious, ethical lawyer doing her job," and because they show "that most of the conversations are in a language she does not speak or understand." (Reply Declaration of Michael E. Tigar dated Sept. 29, 2003, at ¶ 3.) These statements do not even attempt to analyze the tech cuts for the 114 audio files to show why those audio files would be relevant to Stewart or the proffered generalizations. Nor is there any effort to place the specific audio files in context to lend any credence to any allegation that those conversations would be relevant, much less exculpatory for Stewart. Similarly, having had access for many months to the thousands of audio files, including those that the FBI did not think pertinent enough even to summarize at the time, there is no showing from the context of those audio files that the unretrieved and unsummarized conversations are exculpatory in any way for Stewart. Finally, there is no showing why the unretrieved conversations are significant in showing that most of the conversations are in a language Stewart does not understand. The language on the tapes can be deduced from the overwhelming number of conversations that have been produced, and there is no showing that Stewart was even a participant in any of the unretrieved conversations.

Stewart's motion to sanction the Government for failure to preserve all of the audio files also fails for the independent reason that she has not shown any bad faith on the part of the Government. Stewart contends that the Government's bad faith is evident in the FBI's alleged track record for sloppiness in storing and retrieving electronic evidence, an allegation she supports by referring to various public records, articles, and websites that have been critical of the FBI in this regard. In conducting the FISA telephone surveillance in this case, the FBI's New York Field Office primarily used two computerized recording systems, the newer system replacing the older system in or about July 2000. (Declaration of Michael T. Elliott dated Sept. 5, 2003 ("Elliott Decl."), at ¶ 3.) These systems are different from the systems that the FBI uses for Title III wiretaps and for other databases, such as Trilogy and the Automated Case Support system, which Stewart shows have been subject to public criticism. (See id. ¶ 3 n.1.) The FBI made a careful search of both the old and the new system used to record the FISA surveillances in this case, and it concluded that the 114 voice calls are irretrievable as a result of accident or technical problems. (Kerns Decl. at ¶¶ 9-10, 15-19.) There is simply no showing by Stewart that the FBI's failure to retrieve approximately 2.21% of the recorded voice calls that were not

minimized during the FBI's intelligence investigation in this case was the result of bad faith on the part of the Government. See Bin Laden, 2001 WL 30061, at *2, *5 (concluding that although majority of voice calls intercepted on defendant's telephone line pursuant to FISA were irretrievable, and although loss of the evidence was properly charged to Government, sanctions were not appropriate because defendant had not established Government's bad faith in failing to preserve FISA evidence); Baron, 1996 WL 551625, at *5 (finding loss of tape recorded conversations not result of Government bad faith where Government offered sworn statements that careful search was conducted for the materials and where Government had provided written summaries of conversations on lost tapes).

Stewart next contends that the Government's bad faith can be inferred from the timing of the FBI's transition from the old to the new recording system in July 2000. The Government concedes that because the old system was dismantled, it cannot play audio files from the old system in their original electronic format, but rather must play them using the file format that has been disclosed to the defendants. (See Elliott Decl. ¶ 7.) Stewart, however, contends that the Government's explanation should be disbelieved because the transition to the new system occurred at about the same time that then Assistant

United States Attorney Patrick Fitzgerald was briefed about FISA electronic surveillance conducted by the FBI's New York Field Office which involved Stewart, and because Mr. Fitzgerald considered the possibility of a criminal case against Stewart and others. (Declaration of Jill. R. Shellow-Lavine dated Oct. 1, 2003, at ¶ 9-12.) Stewart contends that the FBI deliberately dismantled the recording system that would permit access to the audio files in their original format, even though it was aware of the possibility of a criminal prosecution against Stewart. Stewart maintains that the natural inference to be drawn is bad faith on the part of the Government.

The Government has credibly responded that the FBI's transition from the old to the new computer recording system in July 2000 had no relation to any possible prosecution of Stewart, that the upgrade was done in the ordinary course of the FBI's business, and that no one involved in the FBI's computer upgrade had any personal knowledge of the investigation into Stewart's activities. (Second Declaration of Michael T. Elliott dated October 14, 2003, at ¶ 3-6.) Moreover, there is no reason to believe that the file format in which the older system's recordings must now be played fails to maintain the files' original fidelity, or that it compresses or destroys any data. (See Elliot Decl. ¶ 7.) Moreover, there could be no reasonable

allegation that the system was changed in bad faith to avoid producing any materials helpful to Stewart, given the quantity of materials that were retained and the failure by Stewart to make any showing of the significance of any materials that cannot be retrieved. Because Stewart has made no showing that the Government acted in bad faith in failing to retrieve some of the audio files recorded pursuant to FISA, in addition to the fact that she has made no showing that any of the files are material and exculpatory, her motion must be denied.

Stewart makes similar arguments with respect to the fax and computer-modem transmissions that were recorded in this case. The FBI used two different computerized systems to conduct the FISA fax and computer-modem surveillance. (Kerns Decl. ¶ 21.) The first system intercepted only faxes, and it generated an electronic file of the fax images; periodically, authorized members of the FBI's technical staff printed hard copies of the fax images, stored them in a secure file, and deleted the electronic files. (Id. ¶ 22.) The second system intercepted both faxes and uses of a computer modem, both of which were stored in proprietary software files. (Id. ¶ 23.) Printouts of the faxes were subsequently disclosed to the defendants, as were electronic files replicating the recorded internet sessions, although these files had been converted from the original file

format. (Id. ¶¶ 24-26.) Stewart contends that the deletion or non-disclosure of the underlying electronic file formats amounts to destruction of the original evidence for purposes of the best evidence rule, as well as destruction of potentially exculpatory evidence. However, it is plain under the legal standard discussed above that no sanctions are warranted against the Government because Stewart has made no showing that the underlying electronic files contain exculpatory evidence or that the Government deleted the files in bad faith. Indeed, the Government proffers that the materials disclosed to the defendants exactly replicate the fax and internet images that were recorded pursuant to FISA and that were accessed by the FBI in the course of the intelligence investigation. (Id. ¶¶ 22-26.) As is true for electronic audio tapes, the Government will have the burden of showing authenticity of any proffered evidence at trial, and, if there are challenges with respect to the reliability of individual items of evidence, those challenges go to the weight to be accorded the evidence by the jury.

The Court has considered all of the other arguments raised by the parties. To the extent not specifically discussed above, they are either moot or without merit.

CONCLUSION

For the reasons explained above, the motion is denied.

SO ORDERED.

Dated: **New York, New York**
November 3, 2003

John G. Koeltl
United States District Judge