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March 5, 2014

BY HAND & ECF

The Honorable Katherine B. Forrest
United States District Judge
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, New York 10007

**Re: United States v. Mustafa Kamel Mustafa
04 Cr. 356 (KBF)**

Dear Judge Forrest:

The Government respectfully submits this letter in response to the Court's Order dated March 3, 2014, regarding the reliability of Saajid Badat's proffered testimony via closed circuit television ("CCTV") or Rule 15 deposition. In short, Badat's testimony is of critical relevance to the Government's proof, bears particularly strong indicia of reliability, and will be subject to rigorous adversarial testing commensurate with that of live, in-person testimony. To demonstrate this reliability, the Government has provided the defense today with the entirety of Badat's 3500 material, well in advance of when the Government is required to make such a disclosure. In addition, though not required to do so because he will not be called as a witness, the Government has also provided the defense with reports of interviews of one of the defendant's co-conspirators, Feroz Abbasi, about whom Badat intends to testify. Abbasi's statements are entirely consistent with Badat's 3500 material and expected trial testimony. Moreover, Badat's reliability is buttressed by the fact that Badat has never met the defendant, has never had any relationship with the defendant, and thus is far less likely to have developed a motive to testify falsely against the defendant. Indeed, Badat first provided information about Abbasi's role in a conspiracy with the defendant in 2004, approximately eight years before the defendant was extradited to the United States. Given the presence of all the other elements of confrontation during CCTV or Rule 15 testimony and the extensive record of Badat's prior consistent and corroborated statements, there is more than a sufficient basis to ensure the reliability of Badat's out-of-court testimony. And, in this context, an expert's generalized opinion concerning the relative veracity of in-court testimony and out-of-court testimony would not meaningfully assist the Court's inquiry on this score. Accordingly, the Government respectfully requests that the Court grant the Government's motion to offer Badat's trial testimony via CCTV or Rule 15 deposition (the "Motion" or "Mot.").

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Summary of Badat's Expected Testimony

As set forth in the Government's prior submissions, Badat's testimony is critical to the Government's case. Badat's testimony is essential to a number of the central issues for the jury in this case, including whether the defendant sent Feroz Abbasi, his co-conspirator, to receive jihad training in Afghanistan in support of al Qaeda, as charged in Counts Seven through Ten of the Indictment.

Through the testimony of a cooperating witness ("CW-1") and other corroborating evidence, the Government will prove at trial that the defendant directed CW-1 to travel with Abbasi from London to Afghanistan. In Afghanistan, per the defendant's instructions, CW-1 was supposed to deliver Abbasi to Ibn Sheikh al-Libi ("Ibn Sheik"), another of the defendant's co-conspirators who was associated with al Qaeda.

CW-1 and Abbasi left London in November 2000 and traveled through Pakistan en route to Afghanistan. CW-1, however, separated from Abbasi after they reached Pakistan, failing to deliver Abbasi inside Afghanistan, as the defendant had directed. CW-1 then continued on alone to Afghanistan but while in Afghanistan, CW-1 unexpectedly encountered Abbasi at a Taliban compound in Kandahar where both of them were staying. Other than this brief encounter in Kandahar, CW-1 did not have any dealings with Abbasi inside Afghanistan or witness any of Abbasi's jihad training or meetings with al Qaeda leadership inside Afghanistan.

Badat's testimony will essentially begin where CW-1's testimony ends. Badat will testify that, in early 2001, he met Abbasi, who was accompanied by Ibn Sheik at the time, in Kandahar. Ibn Sheik later asked Badat to look after Abbasi, who, like Badat, was also from the United Kingdom. Badat agreed and brought Abbasi to a "guesthouse" run by al Qaeda. Badat will testify that, after this initial meeting with Abbasi, he saw Abbasi again in Afghanistan. During this second encounter, both CW-1 and Abbasi together received jihad training at the al-Faruq training camp. Badat will testify that the al-Faruq training camp was run by al Qaeda, and that someone had to be trusted by al Qaeda to attend the camp. Badat will also explain that the course Abbasi took at the al-Faruq camp included training in, among other things, weapons, such as AK-47s, explosives, and navigation. Badat will also testify that he was present, and acting as a translator, when Abbasi was asked by two of al Qaeda's most senior leaders, Mohamed Atef, a/k/a "Abu Hafs al-Masri," and Saif al Adl, whether he (Abbasi) would be willing to engage in attacks against American and Jewish targets outside of Afghanistan. Badat will testify that Abbasi responded affirmatively. Badat will further testify about the training he (Badat) underwent, including attending an explosives training supervised by Abu Khabab.

Badat will also testify that, when he first arrived in Kandahar in 1999, he met with senior al Qaeda leader Saif al-Adl. Upon learning that Badat was British, al-Adl asked whether Badat knew the defendant. The al Qaeda leader also explained to Badat that the defendant's son had recently been arrested in Yemen.

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Applicable Law

In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court held that a district court may constitutionally admit testimony taken in the physical absence of the defendant so long as two conditions are met. *Id.* at 850, 110 S.Ct. 3157. First, the denial of “face-to-face confrontation” must be “necessary to further an important public policy.” *Id.*¹ Second, the district court must ensure that protections are put in place so that “the reliability of the testimony is otherwise assured.” *Id.*

Numerous cases have held, even after the Supreme Court’s decision in *United States v. Crawford*, 541 U.S. 36 (2004), that admitting testimony via CCTV or by Rule 15 deposition does not violate the Confrontation Clause. *See United States v. Abu Ali*, 528 F.3d 210, 242 (4th Cir. 2008) (“We thus find there to be no violation of the Confrontation Clause”); *United States v. McGowan*, 590 F.3d 446, 456 (7th Cir. 2009) (“We have already held that there is no Confrontation Clause violation when admitting fully cross-examined testimony preserved by properly conducted Rule 15 deposition, and that this holding had not changed after *Crawford*.”); *United States v. Cannon*, 539 F.3d 601, 604 (7th Cir. 2008) (“[W]e see no reason, post *Crawford* to question that constitutionality of admitting fully cross-examined testimony preserved by a properly conducted Rule 15 deposition. *Crawford* held that the Confrontation Clause bars the admission of testimonial statements of witnesses absent from trial unless the witness is unavailable and the defendant had a prior opportunity to cross examine. Both requirements were satisfied here.”); *United States v. Cooper*, 947 F. Supp. 2d 108, 144-116 (D.D.C. 2013) (holding that foreign deposition with opportunity for full cross-examination would not violate Confrontation Clause); *United States v. Rosenau*, 870 F. Supp. 2d 1109 (W.D. Wash. 2012) (denying Confrontation Clause challenge to live video testimony of a witness in Canada); *United States v. West*, No. 08 Cr. 669, 2010 WL 3324886, at *5 (N.D. Ill. Aug. 18, 2010) (“The Defendants will be able to participate in the [foreign videotaped] depositions under conditions that this Court, along with other courts, finds satisfies the Confrontation Clause”).

As to the reliability prong of the *Craig* test, the Supreme Court noted that “the presence of [the] other elements of confrontation—oath, cross-examination, and observation of the witness’ demeanor—adequately ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.” *Craig*, 497 U.S. at 851.

¹ In its reply memorandum in support of the Motion, the Government explained that the important public policy in this case is the preservation of national security and the prosecution of a terrorist leader. *See* Gov. Reply at 16, fn.4; *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008) (“[N]o government interest is more compelling than the security of the Nation.”) (internal citation and quotation omitted)).

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Argument

As discussed in the Motion, every one of the other elements of confrontation identified by the Supreme Court in *Craig* will apply to Badat's testimony. Badat will be placed under oath prior to testifying. He will be subject to full and fair cross-examination by defense counsel who will be physically present in the room with him and in contact with the defendant by telephone. And he will testify in full view of the jury, the Court and the defendant as if he were physically present in the courtroom. *See* Gov. Reply at 13-14. According to *Craig*, this is all that is required to ensure reliability. However, as described below, Badat's prior consistent statements spanning the past decade, Abbasi's corroborative statements to law enforcement, and the absence of any apparent motive to lie provide substantial additional assurances to the Court of Badat's reliability on this topic.

1. Badat's Record of Prior Consistent Statements

During the course of multiple interviews with law enforcement over approximately the past ten years, Badat's statements about Abbasi, Ibn Sheik, Abu Khabab, and the defendant have been entirely consistent. Beginning in 2004, approximately eight years before the defendant in this case was extradited to the United States, and continuing to the present, Badat has never materially varied in recounting his meetings with Abbasi in Afghanistan after Abbasi was sent there by the defendant.

In 2004, Badat was interviewed by British authorities. *See* Summary of 2004 British Interviews of Badat, selected pages of which are attached hereto as Exhibit A.² During these initial interviews, Badat stated that Abbasi arrived in Khandahar with Ibn Sheik, and that Abbasi attended the al-Faruq training camp. *Id.* Badat also stated that he translated for Abbasi during Abbasi's interview with Saif al-Adl and Abu Hafs, an interview in which the al Qaeda leaders asked whether Abbasi was interested in conducting attacks. *Id.*

In January 2009, British authorities and the FBI interviewed Badat over the course of several weeks. On January 17, 2009, Badat again stated that he remembered Ibn Sheik arriving at the House of Pomegranates with "a new kid," who he identified as "Feroz Abbasi." *See* Transcript of January 17, 2009 Interview of Badat, selected pages of which are attached hereto as Exhibit B. Badat recalled that Ibn Sheik may have asked Badat to "look after" Abbasi. *Id.* Badat stated that, a few days later, Abbasi traveled to the al-Faruq training camp, where Badat later saw Abbasi. *Id.* On January 19, 2009, Badat stated that he (Badat) was present for Abbasi's meeting with Abu Hafs and Saif al-Adl, when Abbasi was tasked with carrying out attacks on American and Jewish targets, and indicated his willingness to do so. *See* Transcript of January 17, 2009 Interview of Badat, selected pages of which are attached hereto as Exhibit C.

² The entire Summary of 2004 British Interviews of Badat was provided to defense counsel today.

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In October 2012, in a meeting with British authorities, the FBI, and an Assistant United States Attorney from the Southern District of New York, Badat again made consistent statements about Abbasi, Ibn Sheik, and the above-mentioned events. *See* FBI 302 Summarizing October 2012 Interview of Badat, selected pages of which are attached hereto as Exhibit D.

Badat has also made consistent statements over time about Abu Khabab and the defendant. In 2004, Badat stated that he attended Abu Khabab's explosives training course in Derunta, Afghanistan. *See* Ex. A. In January 2009, Badat again discussed the training he received from Abu Khabab. *See* Transcript of January 13, 2009 Interview of Badat, selected pages of which are attached hereto as Exhibit E. In January 2009, Badat also stated that during his initial meeting with Saif al-Adl, al-Adl asked if Badat has heard that the defendant's son had been arrested in Yemen. *See* Transcript of January 13, 2009 Interview of Badat, selected pages of which are attached hereto as Exhibit F. Badat also noted that he had used the alias, "Abu Issa." *Id.*

All of these statements are identical to the testimony the Government expects Badat to provide at trial. The substance of the proposed testimony has been strikingly consistent over a period of approximately ten years. Moreover, Badat's prior statements in 2004 and 2009 were made *before* the defendant was extradited in this case and *before* Badat knew that his testimony would be required in this case, alleviating any concern that Badat's testimony against the defendant in this case is a product of Badat attempting to curry favor with the Government. The consistency of Badat's prior statements – made only a few years after the events in question and over the course of ten years on multiple occasions – provides the Court with significant additional indicia of reliability.

2. Abbasi's Statements to the FBI Corroborate Badat

In December 2001, Abbasi was detained by United States military forces in Kandahar, and he was subsequently transferred to Guantanamo Bay, Cuba where he was interviewed by the FBI. During these interviews, Abbasi provided detailed, inculpatory statements about his time in Afghanistan, all of which are consistent with Badat's prior statements and proposed testimony.

For example, in early February 2002, Abbasi stated that, once he entered Afghanistan, he met Ibn Sheik near Kabul. *See* FBI 302 dated February 11, 2002, portions of which are attached hereto as Exhibit G. Ibn Sheik then took Abbasi to Kandahar and checked Abbasi into the Institute for Arabic Studies ("IAS") (also known as the House of Pomegranates). *Id.* Abbasi stated that he then stayed at a guesthouse across the street from the IAS for a few days, before attending the al-Faruq training camp, where he received military-style training. *Id.*

In a subsequent interview on February 19, 2002, Abbasi told law enforcement that Ibn Sheik took him from Kabul to Kandahar. *See* FBI dated February 11, 2002, portions of which

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are attached hereto as Exhibit H. Abbasi described that Ibn Sheik outlined for Abbasi a two-year training course that would include instruction at the al-Faruq training camp. Abbasi further described how Ibn Sheik took him to the IAS for lodging, and that Abbasi later learned that IAS was run by al Qaeda. *Id.* Importantly, Abbasi stated that, while at the IAS and before he attended the al-Faruq training camp, he met “a short ethnic Pakistani of medium build who appeared to be about 24 years old and spoke with a distinct British accent,” who went by the name “Abu Issa.” *Id.* As set forth above, “Abu Issa” was the alias Saajid Badat used in Afghanistan. *See* Exhibit F. Abbasi added that he believed that either Ibn Sheik or another man had instructed “Abu Issa” to socialize with Abbasi.

Finally, on February 21, 2002, Abbasi told law enforcement that “Abu Issa” “translated for Abbasi during his meeting with Abu Hafs,” referring to the meeting in which Abbasi was asked whether he was interested in attacking American and Jewish targets. *See* FBI 302 dated February 21, 2002, portions of which are attached hereto as Exhibit I. *Id.*³

3. Badat Has No Apparent Incentive To Lie

Badat will be offering testimony only about his contacts with Abbasi and other co-conspirators such as Ibn Sheikh. He does not personally know the defendant, does not recall ever meeting the defendant, and did not participate in any crimes with the defendant. Unlike the typical case where a cooperating witness has a shared history with a defendant, which can generate bias or opportunities for false testimony, here Badat has no apparent motive to mislead the jury about the defendant given the lack of a personal relationship with the defendant and the substantial record of his prior consistent statements. There is simply no basis to believe that Badat’s prior statements or expected testimony are fueled by any personal animus, desire to exact revenge, or any other improper intent. Moreover, Badat has already testified once in this Circuit in *United States v. Medunjanin*, 10 Cr. 19 (JG) (E.D.N.Y. 2102), in which the defendant in that case consented to his out-of-court testimony. On appeal in that case, the defendant did not challenge the reliability of Badat’s testimony. And Judge Kaplan is permitting Badat to testify next week via CCTV in *United States v. Abu Ghayth*, S14 98 Cr. 1023 (LAK).

* * * *

Because Badat’s expected testimony is undoubtedly relevant, supported by a record of his own prior consistent statements as well as those of Abbasi, and will be subject to all the other required elements of confrontation, its reliability is sufficient to allow it to be presented to the jury via CCTV. Despite its research on the topic, the Government has been unable to identify any expert that has testified regarding the relative truthfulness of in-court and out-of-court testimony. However, such generalized expert testimony, to the extent it could be considered

³ Abbasi was released from United States custody in 2005, and he returned to the United Kingdom. The Government does not intend to call Abbasi as a witness at trial.

