

1 LAW OFFICES OF JAMES E. BLATT  
16000 Ventura Blvd.  
2 Penthouse Suite 1208  
3 Encino, California 91436-2746  
Telephone: 818/986-4180  
4 Facsimile: 818/990-4838

5 James E. Blatt, Esq. (SBN 56571)  
6 Michael G. Raab , Esq. (SBN 176112)

7 Attorneys for Defendant,  
WILLIAM SHAOUL BENJAMIN

8 UNITED STATES DISTRICT COURT

9  
10 CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) CASE NO. CR 06-221(B) - TJH  
12 )  
13 Plaintiff, ) RESPONSE TO GOVERNMENT'S  
14 v. ) NOTICE OF INTENT TO RELY IN  
15 ) RESIDUAL HEARSAY EXCEPTION  
16 WILLIAM SHAOUL BENJAMIN, )  
17 Defendant. ) DATE : January 22, 2008  
TIME : 10:00 AM  
PLACE: Courtroom for the  
Honorable Terry J. Hatter, Jr.

18 TO THE ABOVE-ENTITLED COURT, AND TO JANET HUDSON AND  
19 JUDITH HEINZ, ASSISTANT UNITED STATES ATTORNEYS:

20 COMES NOW the Defendant, William Shaoul Benjamin, by and  
21 through his undersigned counsel, and files this RESPONSE TO  
22 GOVERNMENT'S NOTICE OF INTENT TO RELY IN RESIDUAL HEARSAY  
23 EXCEPTION; MEMORANDUM OF POINTS AND AUTHORITIES.  
24

25 DATED: January 14, 2008 LAW OFFICES OF JAMES E. BLATT

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By: James E. Blatt  
Attorney for Defendant  
WILLIAM SHAOUL BENJAMIN

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant BENJAMIN hereby submits the following MEMORANDUM OF POINTS AND AUTHORITIES in support of his RESPONSE TO GOVERNMENT'S NOTICE OF INTENT TO RELY IN RESIDUAL HEARSAY EXCEPTION.

I.

DEFENDANT BENJAMIN'S RESPONSE

After the United States invasion of Iraq, also known as the Second Gulf War, in 2003, government agents became aware of certain Iraqi Intelligence files which had been found in Iraq and sold to them by Iraqi nationals. Among these files was an administrative file bearing the name, "William Benjamin Shaoul," as well as other files which purport to contain information relating to defendant Benjamin.

The government seeks to introduce these files at trial to demonstrate defendant Benjamin acted as an agent of the Saddam Hussein government from 1994 to 2001. The government should be precluded from so doing.

The files at issue are incomplete. There are no witnesses available to testify who may have prepared the files, organized the files, stored the files, or found the files. Indeed, the files appear to have been found, after the U.S. invasion, in a private residence, and ultimately sold to the U.S. several months after their discovery.

1 It is difficult to imagine evidence more lacking in all the  
2 indicia of trustworthiness.

3 Defendant objects to the admissibility of the files on the  
4 grounds that:

- 5 1. The government cannot properly authenticate the files;  
6 2. The files are hearsay without any exception; and  
7 3. Admission of the files violates the Confrontation Clause  
8 of the United States Constitution.  
9

10 II.

11 CHAIN OF CUSTODY AND AUTHENTICATION

12 United States government agents are prepared to testify how  
13 the government came into possession of the Iraqi files, and where  
14 the files were kept until now. The government also intends to  
15 authenticate the Iraqi files through the use of its witness, Mr.  
16 Sargon, a former Iraqi Intelligence officer who claims  
17 familiarity with Iraqi intelligence files.  
18

19 This proposed testimony is insufficient to demonstrate a  
20 proper chain of custody and to authenticate the files.  
21

22 There appear to be no witnesses who are qualified and  
23 prepared to testify how these files arrived at the location at  
24 which they were discovered in the condition in which they were  
25 found, who may have maintained them at that location, and who may  
26 have been present when they were found. There appear to be no  
27 witnesses who able to testify who maintained the files after  
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1 their discovery and before their ultimate negotiated sale to the  
2 United States.

3 A chain of custody cannot be established through the  
4 assertion that these files were properly maintained once  
5 negotiations for their purchase were completed. Likewise, proper  
6 authentication is also impossible.  
7

8 While Mr. Sargon may have been an Iraqi Intelligence agent,  
9 he is ignorant of any details surrounding the creation of the  
10 files, the circumstance of their discovery and sale, who prepared  
11 the files, or how the files were maintained at any time.

12 Under these circumstances, it is impossible to properly  
13 authenticate the not only the files, but each individual document  
14 in each file. Defendant Benjamin contends that not only must  
15 each file be authenticated, but each document within each file.  
16 It is not sufficient for a witness to merely state that the  
17 witness has seen Iraqi Intelligence files in the past, and the  
18 files here appear to be Iraqi Intelligence files.  
19

20 The files and their contents should not be admitted based  
21 solely on the testimony of Mr. Sargon.  
22

23 III.

24 HEARSAY

25 The government makes several claims regarding the  
26 admissibility of the files, assuming the files are authenticated:

- 27 1. That portions of the files are not hearsay, admissible  
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1 as statements of a party or co-conspirator statements; and

2 2. Any other portions of the file are either business  
3 records, public records; and finally,

4 3. The residual hearsay exception applies to the files.

5 Defendant Benjamin contends that the government cannot  
6 establish the admissibility of the files under any of these  
7 theories.

8  
9 A. ADMISSIONS

10 Defendant Benjamin objects to the admissibility of any  
11 portion of the Iraqi Intelligence as party admissions unless the  
12 government is able to present credible evidence defendant  
13 Benjamin wrote, prepared, or caused to be prepared any  
14 correspondence, communication, or file. Without such evidence,  
15 the government cannot claim the files, or portions of the files,  
16 qualifies as a party admission pursuant to Fed. R. Evid.

17 801(d)(2)(A). To the extent that defendant Benjamin personally  
18 has admitted authorship of any communication or statement, he  
19 does not object to that evidence.  
20

21  
22 The government contends the Iraqi Intelligence files also  
23 are admissible as co-conspirator statements under Fed. R. Evid.

24 801(d)(2)(E). This contention is misplaced.

25 Evidence that would otherwise be considered hearsay may be  
26 admitted as a statement by a co-conspirator if the government  
27 establishes, by a preponderance of the evidence, "(1) that there  
28

1 was a conspiracy involving the declarant and the party against  
2 whom admission of the evidence is sought and (2) that the  
3 statements at issue were made during the course of and in  
4 furtherance of that conspiracy." Id. See United States v.  
5 Blevins, 960 F.2d 1252, 1255 (4th Cir.1992); see also Bourjaily  
6 v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d  
7 144 (1987). Here, there is no evidence from which the declarant  
8 can be identified, nor that the statements contained within the  
9 file were made during the course of and in the scope of any  
10 alleged conspiracy.  
11

12 Reliance on United States v. Squillacote, 221 F.3d 542 is  
13 inappropriate. In Squillacote, a husband and wife were convicted  
14 of transmitting information relating to the national defense.  
15 The trial court admitted into evidence East German intelligence  
16 documents. Ruling the documents admissible as co-conspirator  
17 statements, the Court found that the statements themselves, as  
18 contained in the documents, were sufficient to over-come the  
19 government's inability to identify the declarants.  
20  
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22 Such is not the case with the Iraqi Intelligence files.  
23 There are no statements in the Iraqi Intelligence files which  
24 provide the necessary evidence of reliability. Squillacote, at  
25 p. 564, citing United States v. Cruz, 910 F.2d 1072, 1081 n.10  
26 (3d Cir.1990).

27 Defendant Benjamin believes his alleged Iraqi Intelligence  
28

1 file is incomplete, and contains no information which would tend  
2 to indicate he did anything whatsoever for the Iraqi government.  
3 The sole file in the possession of the government is an  
4 administrative file, which contains records only of alleged  
5 payments of small sums of money. The other Iraqi Intelligence  
6 files relate to other individuals, but may contain some reference  
7 to defendant Benjamin.  
8

9 These files, whether viewed singly or together, cannot be  
10 characterized as statements of a co-conspirator. The declarant  
11 cannot be properly identified, and the contents of the files are  
12 not detailed or reliable enough to over-come the inability to  
13 identify the declarant.  
14

15 B. BUSINESS AND PUBLIC RECORDS

16 The Iraqi Intelligence files contain observations of law  
17 enforcement personnel. Fed. R. Evid. 803(8)(B) excludes hearsay  
18 statements found in the recorded observations of law enforcement  
19 personnel, and Rule 803(8)(C) excludes in criminal cases any  
20 findings resulting from governmental investigations. The  
21 government maintains that the files in questions or records of  
22 the Iraqi Intelligence Service. Yet, the IIS is a law  
23 enforcement agency. Its files, concerning defendant Benjamin and  
24 others, are inadmissible under Rule 803(8), and alternative  
25 theories, such as those found in Rule 803(6) and 807, do not  
26 permit an end-run around the limitations found in Rule 803(8).  
27  
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1 United States v. Oates, 560 F2d 45, 77 (2d Cir.1977).

2 Even if the government could make use of Rules 803(6) and  
3 803(8), there are factual predicates that it must sustain. At  
4 this point, the Court has only the most general predictions by  
5 the government that it can supply those predicates.  
6

7 First and foremost, there are serious questions about the  
8 trustworthiness of the documents, as discussed above.

9 C. RESIDUAL EXCEPTION

10 Contrary to the suggestion in the government's motion,  
11 United States v. Dumeisi, 424 F.3d 566 (7<sup>th</sup> Cir. 2005) has little  
12 to say about the government's motion in this case, and it  
13 certainly does not mandate this Court to admit the proffered  
14 evidence. As recounted in Dumeisi, the only issue raised on  
15 appeal was whether the documents were, as represented, found in  
16 Baghdad. *Id.* at 576. The issue in Dumeisi seems to have been  
17 solely one of authentication, not hearsay.  
18

19 The Iraqi Intelligence files are not trustworthy. There is  
20 no evidence who prepared them, how or why they were prepared, how  
21 they were kept, and what happened to them before they were  
22 discovered and sold to the United States. There is no witness  
23 who has any personal knowledge of defendant Benjamin's alleged  
24 IIS activities. Without trustworthiness, the residual exception  
25 cannot apply.  
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IV.

CONFRONTATION CLAUSE

The government's inability to present sufficient indicia of reliability for the admission of the files violates defendant Benjamin's right as contained in the Sixth Amendment's Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 65-66, (1980), abrogated by Crawford v. Washington, 541 U.S. 36 (2004); see Idaho v. Wright, 497 U.S. 805, 821.

V.

CONCLUSION

Defendant Benjamin respectfully objects to the admission into evidence of any Iraqi Intelligence files and further requests this Court conduct an evidentiary hearing to determine the admissibility, if any, of this evidence.

DATED: January 7, 2007

LAW OFFICES OF JAMES E. BLATT

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By: James E. Blatt  
Attorney for Defendant  
WILLIAM SHAOUL BENJAMIN