

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 08-CR-20314

Hon. Nancy G. Edmunds

v.

ISSAM GEORGE HAMAMA,

Defendant.

_____ /

MOTION TO ADMIT DOCUMENTS
BEFORE THE HONORABLE JUDGE NANCY G. EDMUNDS
United States District Judge
Theodore Levin U.S. Courthouse
Detroit, Michigan

JUNE 1, 2010

APPEARANCES:

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I N D E X

<u>Proceeding</u>	<u>Page</u>
MOTION TO ADMIT DOCUMENTS	
Argument by Mr. Martin	4
Response by Mr. Faraj	26
MOTION IN LIMINE TO EXCLUDE HEARSAY STATEMENTS OF CO-CONSPIRATORS	
Argument by Mr. Faraj	37

E X H I B I T S

<u>Exhibit No.</u>	<u>Offered</u>	<u>Received</u>
Government's Exhibit No. 1	26	26
Government's Exhibit No. 4	9	9
Government's Exhibit no. 5	26	26

1 Detroit, Michigan

2 Tuesday, June 1, 2010

3 9:30 a.m.

4 - - -

5 THE CLERK: Court calls the case of the United
6 States versus Hamama, 08-20314.

7 MR. MARTIN: Michael Martin for the government, Your
8 Honor.

9 MR. FARAJ: Haytham Faraj on behalf of the
10 defendant, Your Honor.

11 THE COURT: We have two motions. We have
12 defendant's motion in limine to preclude co-conspirator
13 statements, and we have the government's motion to admit
14 documents. I could hear the defendant's motion first. How are
15 we going to proceed on the motion to admit documents?

16 MR. FARAJ: I think they're both --

17 MR. MARTIN: I intend to proceed by proffer, and so
18 in thinking about how best to present my proffer to do it both
19 persuasively but also economically, because I have a stack of
20 documents that form the basis of the exhibit, which I believe
21 the Court has a copy of that.

22 THE COURT: Yes, I do.

23 MR. MARTIN: I don't want to go through each one of
24 those documents, so what I thought I would do is proffer some of
25 my evidence, and in doing so, go through a small subset of those

6/1/2010 Motion Hearing

1 documents. The defendant raises a number of objections to some
2 of those documents, and I thought I might highlight specific
3 documents to represent what the rebuttal to those objections
4 might be.

5 THE COURT: All right.

6 MR. MARTIN: So I'm spending a fairly limited amount
7 of time. I think, though, I would probably need about 45
8 minutes.

9 THE COURT: That's fine. Okay. So we'll do yours
10 first and then do the defendant's motion. That probably makes
11 more sense.

12 MR. MARTIN: I think so. And if it's okay with the
13 Court, I'd like to present from here.

14 THE COURT: Yes, and if you don't mind, I'm going to
15 take notes on my laptop.

16 MR. MARTIN: So, Your Honor, if I might proffer some
17 facts, and reserve some time at the end for argument.

18 As you know, the subject of the government's motion
19 is to admit documents from the Iraqi Intelligence Service.
20 These documents are attached to the government's motion as
21 Exhibit 1, and each page is marked so that we have Exhibit 1
22 consisting of Exhibit 1.1 to 1.55.

23 These documents were all recovered in Iraq after the
24 United States and coalition forces invaded Iraq in 2003. The
25 documents came from various sources; some of the documents were

6/1/2010 Motion Hearing

1 recovered by opposition -- an opposition group in Iraq and then
2 given to the United States government, some of the documents
3 were recovered by United States military forces in Iraq. In
4 both cases, the documents, the original documents were seized by
5 the government and processed and then given to the FBI, and then
6 from the FBI -- an FBI agent in Iraq, I should say. And then
7 from the FBI in Iraq, they were transmitted to the FBI in
8 Washington DC, and then from the FBI in Washington DC, they were
9 transmitted to Detroit.

10 I say that -- I provide that background as
11 background because the basis for the government's motion to
12 admit these documents is not chain of custody. The basis for
13 the government's motion to admit these documents is that they
14 are authentic on their face, and they are corroborated by other
15 independent information the government has developed such that
16 the authenticity and the admissibility of the documents is not
17 contingent upon a chain of custody. However, I do think it's
18 important to make the record very clear that all of these
19 documents were found and recovered in Iraq.

20 The government has provided these documents in their
21 original form to an expert witness. This expert witness is
22 Robert Smego, and if the Court will recall, Mr. Smego testified
23 in this courtroom in a related case, United States verses Najib
24 Shemami, and I don't want to repeat things the Court already
25 knows, but for the sake of the record I'd like to go through

6/1/2010 Motion Hearing

1 Mr. Smego's qualifications.

2 Mr. Smego, from 1998 to 2003, served in the U.S.
3 Army, and when he was in the Army, he received training in
4 Arabic at a language institute, and he became a fluent Arabic
5 speaker, and he can read Arabic fluently. From 2003 to the
6 present day, he works as a contract -- as an employee for a
7 defense contractor, and in that capacity as a defense
8 contractor, he works at the Department of Defense as a document
9 analyst. Now, as a defense department contractor from 2003 to
10 the present, Mr. Smego's job has basically been to analyze and
11 categorize and what he would refer to as triage documents
12 recovered by the United States government following the invasion
13 of Iraq in March of 2003, and the vast majority of these Iraqi
14 government documents are documents of the Iraqi Intelligence
15 Service.

16 Now, as he began analyzing and categorizing these
17 documents, he developed a method for identifying counterfeit
18 Iraqi documents, and he trained other individuals on this
19 method, and the reason he did that was because when the
20 documents were originally captured in Iraq, there was a very,
21 very large volume of them. No one person could process all of
22 them just himself, and so the United States government hired a
23 number of individuals, some of them local Iraqis, others from
24 the United States, to review the documents, conduct a quick
25 translation of the subject matter, what the documents pertain

6/1/2010 Motion Hearing

1 to, and Mr. Smego was training these individuals on how to
2 identify counterfeit documents right from the get go, as they
3 were coming in from the field, identifying counterfeit
4 documents.

5 Now, during the course of his experience reviewing
6 these Iraqi government documents, he's reviewed over one million
7 pages of Iraqi government documents, again, the majority of
8 which are Iraqi Intelligence Service documents, and of those
9 over one million pages of documents, he has found 138 pages of
10 counterfeit documents, and I believe, as he testified in the
11 prior case, he would say, if he were here today, that
12 counterfeit -- Iraqi counterfeit documents are very easy to spy
13 because the forgeries tend to be of such poor quality.
14 Oftentimes, there are symbols or letterheads or logos, and
15 things of that nature, used by the Iraqi Intelligence Service,
16 and the forgeries, by and large, really are very poor when it
17 comes to replicating those logos and those letterheads, and we
18 will see some of the original logos and letterheads on the
19 exhibits later today.

20 Mr. Smego was also hired by a subcommittee of the
21 United States House of Representatives to review, translate, and
22 analyze Iraqi government documents pertaining to the Oil for
23 Food program. Mr. Smego, in that capacity, I think, reviewed
24 tens of thousands of Iraqi government documents and presented
25 his findings under oath to congress.

6/1/2010 Motion Hearing

1 Mr. Smego has, as I said, reviewed the originals in
2 this case, and he has concluded that the original documents
3 contained in Government Exhibit 1 are authentic documents, and I
4 will reserve some more specific comments about particular
5 documents when I turn to those.

6 So that is the first prong of the government's
7 proffer is the opinion of Mr. Smego.

8 The second prong of the proffer is that a former
9 Iraqi Intelligence Service officer has also reviewed
10 Government's Exhibit 1. This officer was a member of the Iraqi
11 Intelligence Service for approximately 20 years, and in the late
12 1990's, he defected to the United States, and he has been
13 resettled in the United States by the United States government.
14 He, in his capacity as an Iraqi Intelligence Service officer,
15 worked his way up through the chain in the organization. He
16 held a number of titles. His last title was the Chief of
17 Station in India, but prior to that, he had worked in the United
18 States, and he had worked at the Iraqi Intelligence Service
19 headquarters in Baghdad, specifically working and responsible
20 for Iraqi espionage in the United States.

21 This individual's name is Mohamed Al-Dani. He has
22 reviewed the Government Exhibit 1, and he has concluded that the
23 documents are authentic. He does not have any personal
24 knowledge of the defendant or the defendant's activities,
25 however, his basis for concluding that the documents are

6/1/2010 Motion Hearing

1 authentic is that he has reviewed them and he recognizes
2 signatures of other individuals in the documents, people that he
3 worked with for decades and has known for the better part of his
4 entire career. He recognized forms that are commonly used by
5 the Iraqi Intelligence Service. And again, I will show the
6 Court some details, some examples of that in a few moments.

7 And, of course, he's also very familiar with how the
8 Iraqi Intelligence Service would collect and store and record
9 information about Iraqi Intelligence Service sources working for
10 the Iraqi Intelligence Service, and he has opined that documents
11 in Government's Exhibit 1 conform to the way and manner in which
12 the Iraqi Intelligence Service would keep its records about the
13 activities of its source.

14 Now, because Mr. Al-Dani was a defector, he has been
15 provided with benefits from the United States government. I
16 have a list of them that I provided to defense counsel. Rather
17 than reading it, I'd just like to hand up a copy to the Court
18 and perhaps have it marked as Government Exhibit 4.

19 THE COURT: Received.

20 (Government's Exhibit Number 4 received.)

21 MR. MARTIN: As the Court can see, these benefits
22 are not -- you know, they're substantial, I'm not going to say
23 they aren't. He's received both monetary benefit as well as
24 health care benefits. He's received help with his children's
25 education, and things of that nature, but I think the important

6/1/2010 Motion Hearing

1 thing about this impeaching information is that when he defected
2 to the United States, he signed a contract with the United
3 States government that provided for the benefits listed in
4 Government Exhibit 4, and in exchange, all Mr. Al-Dani had to do
5 was continue to meet with the United States government and
6 provide intelligence information about the Iraqi regime, because
7 as you will recall, he defected in the late 1990's, before the
8 fall of the regime, so his intelligence information was what the
9 United States government was interested in at that time.

10 There's nothing requiring him to come into court and testify one
11 way or the other, and so his contractual obligation does not
12 pertain to testimony. Those benefits are purely provided for
13 resettlement purposes, and also compensation for his continuing
14 to provide the United States government with information about
15 the Saddam Hussein regime and the Iraqi Intelligence Service.

16 Also, Mr. Al-Dani has testified in federal court
17 before in a case from 2006, I believe, in the Northern District
18 of Illinois, United States versus Sami, S-a-m-i, Latchin,
19 L-a-t-c-h-i-n, and Mr. Al-Dani was performing a very similar
20 function as he would be performing in this case; namely,
21 reviewing Iraqi Intelligence Service documents and
22 authenticating them. However, that case was somewhat different
23 than this one because in that case, Mr. Al-Dani had firsthand
24 knowledge of the defendant.

25 The reason I'm raising this prior testimony is that

6/1/2010 Motion Hearing

1 Mr. Al-Dani testified in a pretrial hearing to admit the
2 documents in the Latchin case, and during the course of that
3 testimony, he testified to -- he presented some testimony which
4 the district court later said was untruthful, and I have a copy
5 of the district court's order and opinion which I'd like to hand
6 up to the Court. I will mark it as Government's Exhibit 5, and
7 I will just fold over the corner of the court's discussion of
8 Mr. Al-Dani's testimony. It begins on Page 5 of the order.

9 May I hand this up, Your Honor?

10 THE COURT: Please. And if you'll just hang on a
11 minute, I want to take a look at it.

12 (Brief pause.)

13 THE COURT: Okay.

14 MR. MARTIN: The court's characterization of his
15 testimony was on Page 7, and continues on at the top of Page 8,
16 and this was the order on the admissibility of the documents in
17 that case. Mr. Al-Dani then testified at trial, and obviously
18 defense counsel impeached him with this, and Mr. Al-Dani
19 testified that the reason that he made these misstatements was
20 because he believed that there were aspects of his relationship
21 with the United States government, details about his agreement
22 that he had with the United States government that he could not
23 get into, and in fact, the government in that case filed a CIPA
24 motion to preclude defense counsel from questioning Mr. Al-Dani
25 about the details of his relationship with the United States

6/1/2010 Motion Hearing

1 government. And the Exhibit 4 that I handed up, the list of the
2 benefits Mr. Al-Dani received, that was essentially the
3 unclassified disclosure that the Court ordered disclosed to the
4 defense for Giglio purposes in that case, and the defense was
5 really precluded from getting into any other details besides
6 what was on that page.

7 So Mr. Al-Dani, he was essentially correct that
8 there were aspects of his relationship with the government that
9 he understood rightfully were precluded from coming out at
10 trial, and I think that is why he made the statements that he
11 made about denied there was a contract, and then denied -- or
12 provided the wrong date for when he first reviewed the
13 government's exhibits in that case.

14 I also, frankly, think that in this hearing, the
15 pretrial hearing, Mr. Al-Dani was testifying without an
16 interpreter, and at trial he testified with an interpreter, and
17 the court even says in its order, said, "Even when Mr. Al-Dani
18 appeared to be making an effort to be fully forthcoming, his
19 choppy English was difficult to comprehend."

20 So I think you have communication problems, you have
21 this aspect where he's been told that he cannot get into certain
22 topics, and I, frankly, am startled that the district court
23 would say that he lied about the date upon which he reviewed the
24 documents that he is being asked to testify about in open court.
25 I mean, why lie about that? It seems to me it's more -- better

6/1/2010 Motion Hearing

1 characterized as a misunderstanding or a miscommunication on his
2 part.

3 And I would also point out that on the top of
4 Page -- or I'm sorry -- the very bottom of Page 7, the top of
5 Page 8, the court went on to say, "With respect to the subject
6 matter of the hearing, however, the authenticity of the files,
7 Mr. Al-Dani was forthcoming and candid." And the Court goes on
8 essentially to credit his testimony about the authenticity of
9 the documents, and it sort of serves as a pillar of the Court's
10 opinion.

11 The third portion of the proffer is that the
12 government showed Government's Exhibit 1, or I should say copies
13 of Government's Exhibit 1 to a former -- a different former
14 Iraqi Intelligence Service officer. This individual is known to
15 the Court as Mr. Sargon. He also testified in the case of
16 United States versus Najib Shemami here in court. He also has
17 approximately two decades of experience as an Iraqi Intelligence
18 Service officer, very similar background as to Mr. Al-Dani in
19 terms of the type of work he did; namely, specifically being
20 assigned to work and being responsible for and managing Iraqi
21 Intelligence Service activities in the United States, having
22 assignments both overseas as well as a headquarters in Baghdad,
23 Iraq.

24 Mr. Sargon differs from Mr. Al-Dani in that, unlike
25 Mr. Al-Dani, he was not a defector, he was captured in Iraq

6/1/2010 Motion Hearing

1 following the invasion in 2003. He has also received some
2 monetary payments from the United States government. The number
3 escapes me at the moment, but it's nowhere near on the order of
4 what Mr. Al-Dani has received.

5 He has also reviewed these files, and like
6 Mr. Al-Dani, he had no personal knowledge of the defendant or
7 his activities, but he was similar to Mr. Al-Dani in that he
8 also recognized signatures in some of the paperwork, forms, and
9 such, contained in Government's Exhibit 1.

10 The fourth area of the proffer is, and I will show
11 the Court some of this documentation in a moment, but some of
12 the Iraqi Intelligence Service documents detail payments that
13 were paid by the Iraqi Intelligence Service to the defendant.
14 The details contained in those Iraqi Intelligence Service
15 documents about the date and the amounts paid have been
16 corroborated by Government Exhibit 2 and Government Exhibit 3,
17 which was filed with the Government's motion to admit the
18 documents. These are basically banking records obtained from
19 Comerica Bank which match the payment information contained in
20 the Iraqi Intelligence Service documents.

21 I believe I'm up to the fifth prong.

22 THE COURT: You're on the fifth prong.

23 MR. MARTIN: Is the documents themselves. As the
24 Court knows, part of the question of hearsay admissibility is
25 whether the -- strike that. The Court knows that to prove a

6/1/2010 Motion Hearing

1 document is not hearsay, the Court can rely at least partly on
2 the document itself. It can't rely completely on the document
3 itself, but at least partly. Well, part of what you should rely
4 on to admit these documents is the documents themselves, not
5 entirely, but at least in part. And I will show you examples in
6 a couple broad categories, and that is, we've talked about the
7 signatures, you're going to see some originals that have stamps
8 and logos on there that our experts have said are authentic, but
9 you're also going to see that the documents cross reference each
10 other, and a typical example would be like a communication from
11 an Iraqi Intelligence Service headquarters in Washington to
12 their office in Washington DC, and in that communication, it
13 will say words to the effect like you received our Communication
14 Number 123 dated January first, 2005, what do you have to say
15 about that? Well, also in this file will be Communication 123
16 from January first, and so if these were forgeries or if these
17 were inaccurate, someone had to go to a tremendous amount of
18 effort to duplicate these cross references, and you'll see
19 examples of that.

20 And the last prong is statements of the defendant
21 himself. The defendant has acknowledged writing at least one of
22 the documents in Government Exhibit 1. He's made those
23 admissions to the FBI during an interview, and he was shown a
24 copy of that document authenticated himself, and I should say --
25 I believe I was up to six. I have one additional proffer, and

6/1/2010 Motion Hearing

1 that is some of the documents in the Iraqi Intelligence
2 Service -- in the Government's Exhibit 1 pertain to an
3 individual named Hamsa. Mr. Hamsa was an Iraqi Intelligence
4 Service officer who worked at the Iraqi Mission to the United
5 Nations, I-M-U-N, IMUN, during the mid 1990's. Some of these
6 documents are written by Mr. Hamsa about the defendant, and the
7 defendant has acknowledged in interviews with the FBI knowing
8 Mr. Hamsa, and there is a witness the government intends to call
9 at trial who is a former employee of the IMUN who can testify
10 that he personally observed the defendant meet with Mr. Hamsa on
11 numerous occasions during the 1990's. So, in other words, it
12 helps to corroborate that at least the relationship between the
13 defendant and Mr. Hamsa existed, that independent corroboration.

14 So if I could go through some of the exhibits and
15 discuss with the Court how some of the proffer that I just gave
16 fits in with particular documents.

17 THE COURT: Yes.

18 MR. MARTIN: And if we could just start with
19 Government's Exhibit 1.1. Government Exhibit 1.1 should have on
20 the first page a translation.

21 THE COURT: Yes.

22 MR. MARTIN: And the second page should be the
23 original, or a copy of the original.

24 THE COURT: Yes.

25 MR. MARTIN: I have in court today with me the

6/1/2010 Motion Hearing

1 original, which I would like to hand up to the Court.

2 THE COURT: I don't want to hang onto these.

3 MR. MARTIN: I'll take them back. I thought it
4 would be helpful to see what they look like.

5 If you look at the translation, in the upper
6 left-hand corner you'll see Notification M4.D4/3/1.

7 THE COURT: Okay.

8 MR. MARTIN: Mr. Smego and Mr. Al-Dani would explain
9 that that's significant because that denotes, basically, levels
10 of the organization. M4.D4/3/1 basically denotes the America's
11 Desk of the IIS, the America's Desk being part of the larger
12 unit that covers both North America, South America, Europe, and
13 then on up to the section of the -- meaning Section 4, that
14 deals with foreign intelligence, because, as you may recall, the
15 Iraqi Intelligence Service dealt both with foreign intelligence
16 as well as domestic intelligence, so this designation here is
17 significant because it indicates precisely which unit within the
18 IIS is communicating here, and it will be precisely the unit
19 that you would expect to be involved with the defendant because
20 it refers to the section of the IIS that deals with the U.S.

21 As you can see, the text of the document refers to
22 our source, Issam Hamama, and it refers to a letter to the New
23 York Station manager. Again, the New York Station would be the
24 Iraqi Mission to the United Nations, about an individual named
25 Nu'il Hirmiz. I'm not going to get into all the details about

6/1/2010 Motion Hearing

1 this, but what I do want to point out is that, at the bottom,
2 there are three attachments listed. Those attachments are going
3 to be my next exhibits.

4 And then there are a number of signatures. The
5 translation just says signature, but if you looking at the
6 original, the signatures at the bottom, they're basically
7 squiggles. In Iraq, people don't sign their names like we sign
8 our names, so that it's legible, so you can read the name; they
9 have a mark or a unique swirl that they put on the page, and
10 this is what allows someone like Mr. Smego to identify who is
11 signing these documents, because some of the individuals that
12 are well known to the United States intelligence community,
13 their pen mark or their squiggle or their mark is distinctive,
14 and they can see it repeated over and over again, so they know
15 who is signing what.

16 There's one mark in here on the signature line
17 Mr. Smego recognized right away as being an official of the
18 Iraqi Intelligence Service.

19 So on to the attachments. Government's Exhibit 1.2.
20 Again, the first part is a translation, and the second portion
21 is copies of the original. I actually think I have two copies
22 of the original stapled to this. There should be only one, but
23 it's the same document.

24 You can see from the translation that this is a
25 letter enclosing a letter that is sent, quote, through the

6/1/2010 Motion Hearing

1 friend, Issam Hamama. This particular letter is signed by
2 Jabbar Hamza. That's the individual who worked for the Iraqi
3 Intelligence Service at the Iraqi Mission to the United Nations
4 who, according to a witness the government will call at trial,
5 met with the defendant repeatedly during the 1990's.

6 Now, one of the criticisms that the defendant has of
7 the government's documents, like Government Exhibit 1.1 and like
8 Government Exhibit 1.2, is that the government can't
9 authenticate this document because it's simply on notebook
10 paper. If I could hand up just Government Exhibit 1.2, or maybe
11 the Court can see it from here, it's just written on a regular
12 piece of notebook paper, so the defendant says, well, it's not
13 on any official stationery, how can you authenticate that.
14 Well, because, first of all, you have the corroboration from the
15 person who would testify that there at least was contact between
16 the defendant and Mr. Hamsa, but second of all Mr. Al-Dani, this
17 is the defector who came to the United States, would testify
18 that he has worked with Mr. Hamsa for almost his entire career,
19 the two went to college together, and that he recognizes this
20 signature as being that of Mr. Hamsa's.

21 THE COURT: I'm sorry, who did you say testified to
22 that?

23 MR. MARTIN: That would be Mr. Mohamed Al-Dani, the
24 defector.

25 And then the next attachment is Government

6/1/2010 Motion Hearing

1 Exhibit 1.3. Again, these are all attachments to Government
2 Exhibit 1.1. The next attachment is Government Exhibit 1.3, and
3 if you turn to the second page of the translation, this is a
4 letter written and signed by the defendant, Issam Hamama, from
5 San Diego, California.

6 The FBI interviewed Mr. Hamama, they showed him this
7 letter, and he admitted that he wrote the letter and that he
8 provided the letter to the Iraqi government. This series that
9 we just looked at, Government Exhibit 1.1, 1.2 and 1.3 also is
10 an example of what I mean by cross referencing. We have a
11 document in Government Exhibit 1.2, the letter from Mr. Hamama,
12 which the defendant contests, forwarding a letter from the
13 defendant which the defendant does not contest.

14 The fact that a letter from the defendant which he
15 has self-authenticated was found in Iraq with Government
16 Exhibit 1.2 and 1.1 in my view corroborates the authenticity of
17 Government Exhibit 1.1 and 1.2 as well.

18 If I could turn to Government Exhibit 1.7,
19 Government Exhibit 1.7 consists of a number of documents. These
20 are receipts of various types. The first receipt --

21 THE COURT: I don't have that.

22 MR. MARTIN: Government Exhibit 1.47, Your Honor.

23 THE COURT: I thought you said 1.7.

24 MR. MARTIN: Oh, I'm sorry.

25 THE COURT: Yeah, on here. It does say 1.7 on it,

6/1/2010 Motion Hearing

1 but to keep it in sequence, you mean 1.47, or should it say 1.7?

2 MR. MARTIN: I have jumped ahead from where we just
3 were to the, basically, close to the end of the stack.

4 THE COURT: Okay. My 1.7 is something that says,
5 "In light of the preceding information." Is that what you're --

6 MR. MARTIN: No, ma'am. I'm referring to Government
7 Exhibit 1.47.

8 THE COURT: All right. Okay. I have that.

9 MR. MARTIN: It basically consists of a number of
10 receipts.

11 THE COURT: Yes.

12 MR. MARTIN: The first is a translation of a receipt
13 from the -- it just says Embassy of the Republic of Iraq in
14 Washington, DC. It's a disbursement receipt of \$250.75. The
15 name of the recipient is Code 6129. There are other documents
16 in Government's Exhibit 1 that name Issam Hamama as Code 6129.

17 The date of the receipt is important. It's
18 January 23, 2001. Mr. Al-Dani, the defector, would testify that
19 this -- if you look at the original, which is the next page,
20 it's essentially a form, the receipt is a form. Mr. Al-Dani
21 will testify that this form is commonly used throughout the IIS,
22 and he himself has used this form on numerous occasions, so he
23 recognizes the form. He doesn't recognize, obviously, the
24 defendant or this particular payment or the amount, but
25 certainly the form.

6/1/2010 Motion Hearing

1 Also found with this disbursement receipt is a
2 receipt, and this is on -- this is the fourth page of the
3 exhibit. It's a receipt from Alexandria, Virginia from the post
4 office. The copy, I understand, is difficult to see, but I do
5 have the original here. It might help if I were to pass this
6 original up, Your Honor, so you can --

7 THE COURT: I think I can see it.

8 MR. MARTIN: Can you see it fine?

9 THE COURT: Yes, I can see it fine.

10 MR. MARTIN: Okay. What the receipt shows is a
11 purchase of a money order, and you can see the domestic money
12 order number there listed, it ends in 6510, for \$250. The date
13 the money order was purchased was January 23, 2001, and a
14 domestic order fee of 75 cents was assessed, for a total price
15 of \$250.75.

16 Also included is, if you just turn to the previous
17 page, is a customer's receipt, so not only do they get a
18 printout from a piece of tape, they basically also were given a
19 customer's receipt. I have the original here. It's, again,
20 it's difficult to see on your copy, but in the lower left-hand
21 corner there is the money order number, which also ends in 6510.
22 The date that the receipt is dated is January 23, 2001, and it's
23 significantly paid to the order of Issam Hamama.

24 If you go to the last two pages of this exhibit,
25 Government Exhibit 1.47, you'll see essentially what is a

6/1/2010 Motion Hearing

1 ledger. This is a ledger of expenditures and payments. Could
2 just read right across the top, Assistance for Work,
3 Hospitality, other expenditures, things of that nature. Listed
4 in the comment that reads Assistance for Work Purposes is an
5 entry from January 2001 for \$250.75. Mr. Al-Dani, the defector,
6 has reviewed this document, and he said it is very common for
7 the Iraqi Intelligence Service to keep a tabulation of payments
8 made to sources in this fashion, and in fact, he recognizes a
9 signature of an individual who goes by the name of Hamid
10 Al-Jumely.

11 Mr. Al-Jumely was an Iraq Intelligence Services
12 officer who worked at the Iraqi Interests Section in Washington,
13 DC at this time. As the Court may recall, after the first Gulf
14 War, the United States closed down Iraq's embassy in Washington,
15 DC; they had no official embassy, but they did have an Interests
16 Section in another country's embassy. That is where
17 Mr. Al-Jumely worked. And the defendant, in interviews with the
18 FBI, has admitted to knowing and meeting with Mr. Al-Jumely.

19 So the January 23, 2001 money order ending in 6510,
20 paid by the IIS reflected in these documents is corroborated by
21 Government Exhibit 2 and Government's Exhibit 3 which were
22 obtained by subpoena from Comerica Bank. Government's Exhibit 2
23 is a copy of the money order worth \$250 paid to Issam Hamama.
24 Government's Exhibit 3 is a deposit ticket signed by Issam
25 Hamama for \$250, deposited into his Comerica Bank account, and

6/1/2010 Motion Hearing

1 you know that these two transactions are linked, the money order
2 and the deposit ticket, because Comerica Bank has put a date
3 stamp on the back of each, listing that the deposit was made on
4 February 14, 2001, and then it has a transaction number which it
5 ends in 1836, that both the money order and the deposit ticket
6 have on them.

7 If I could, Your Honor, go back towards the
8 beginning of the exhibits, look at Government's Exhibit 1.16. I
9 wanted to address this particular document because this is a
10 document that the defendant objects to on the ground that the
11 document itself can't be authenticated because it's just on
12 another little scrap piece of paper, as you can see here.

13 Now, one thing that's not on the translation, didn't
14 make it onto the translation, you see on the first page, is that
15 in the upper left-hand corner of the original, this document has
16 a serial number listed on it, the serial number of 59. This is
17 significant because the next exhibit, Government's Exhibit 1.17,
18 in the first line, says, "In relation to your letter 53, on
19 April 8, 1997, in your letter M40/59 on April 13, 1997," and
20 then the letter goes on. Well, if you look back at Government's
21 Exhibit 1.16 which is Serial number 59, you'll notice that in
22 the upper right-hand corner it's dated April 13, 1997.

23 This is that cross referencing I was mentioning to
24 you earlier. You have Government Exhibit 1.16, serial number
25 59, being referenced by name and date in another document. But

6/1/2010 Motion Hearing

1 more significantly is that Government Exhibit 1.16 has a stamp
2 on it, and if you look at the original, you see this circular
3 stamp with a triangle on the inside and an eagle within the
4 triangle. Mr. Smego would testify that this stamp is a stamp
5 affixed by a unit within the Iraqi Intelligence Service
6 headquarters in Baghdad when a communication was encrypted;
7 typically, a communication between headquarters and a station
8 out in a foreign country, either a message coming in or going
9 out. As a matter of fact, if you look at Government
10 Exhibit 1.16, you'll see that is a communication to New York.

11 THE COURT: I'm sorry, who testified to this?

12 MR. MARTIN: Mr. Smego, the former military officer.

13 THE COURT: Yes.

14 MR. MARTIN: Many of the documents that the
15 defendant objects to have these same types of characteristics; a
16 stamp from the communication or encryption unit, or references
17 to -- or are referred to or have references within them to other
18 documents in Government's Exhibit 1.

19 Your Honor, I think at this time what I'd like to do
20 is give the defense a chance to present some of their
21 objections, and then if I could have maybe an opportunity to
22 rebut some of that with some additional examples, but I don't
23 want to overload the Court with going through each one of these
24 documents, so I think at this time I've given the Court some
25 examples of the types of issues I've raised in my proffer, and

6/1/2010 Motion Hearing

1 I'll let defense counsel make his presentation.

2 THE COURT: All right. Let's take about a
3 ten-minute break first.

4 (Recess taken 2:07 p.m. until 2:25 p.m.)

5 LAW CLERK: Court is back in session.

6 MR. MARTIN: Your Honor, may I just interrupt for a
7 moment before Mr. Faraj begins? It came to my attention during
8 the break, the Court did not receive into evidence Government
9 Exhibit 5, and I'd just ask the Court to do so at this time.

10 THE COURT: I'll receive all the Government's
11 exhibits into evidence.

12 (Government's Exhibit Numbers 1 and 5 received.)

13 MR. MARTIN: Thank you, Your Honor.

14 THE COURT: Mr. Faraj.

15 MR. FARAJ: Good afternoon, Your Honor. I know I'm
16 operating within narrow parameters. I recognize that the Court
17 has admitted documents similar to these, and perhaps overlapping
18 these in a previous case, and I had an opportunity to read the
19 order from the district court in Illinois. It seems to me that
20 the government is moving to authenticate these documents based
21 on some fanciful, residual authenticity exception, because it
22 doesn't fit under the Rule 901, and they're certainly not
23 self-authenticating as contemplated by 902.

24 You've heard a lot of testimony from government
25 counsel, but I haven't had a chance to cross examine any of the

6/1/2010 Motion Hearing

1 people that he mentioned. I don't even know if the documents
2 that were admitted before are the same as the documents we're
3 referring to here today. I recognize that some documents are
4 going to be authentic in this pack, and we've spoken to
5 government counsel about this in the past, but there are a lot
6 of documents that are simply scraps of paper. They have some
7 signatures that perhaps Mr. Smego recognizes, or that he doesn't
8 recognize. I can't know that unless I have Mr. Smego on the
9 stand and I cross examine him.

10 I understand Mr. Shemami -- or Mr. Smego testified
11 before. He was cross examined, you admitted some of the
12 documents, but that doesn't apply in this case because, again, I
13 don't even know if they're the same documents, we didn't have a
14 chance to cross examine him, and we didn't have a chance to even
15 see if those exhibits were the same.

16 Now, addressing, step by step -- and this is where I
17 think Government counsel is trying to fit the authenticity of
18 these documents under some residual authenticity by offering a
19 lot of facts about the people that looked at these, and so I
20 guess I have to go into some facts.

21 The documents, yes, were in fact found in Iraq, and
22 Mr. Al-Dani testified that at the time of the invasion some of
23 the -- many documents were put in safe houses, I understand
24 that, but they weren't always under the custody of Iraqi
25 officials. Some were found by opposition groups who may have

6/1/2010 Motion Hearing

1 had a motive to fabricate, others were found by U.S. forces who
2 I assume -- and it's not a chain of custody issue, but I assume
3 they kept them and they did not alter or modify them. So I
4 guess to the extent that they were picked up by U.S. forces or
5 through sources that have some indicia of reliability, then
6 we're okay there, but I don't know who else handled these
7 documents, and I don't know who wrote up scraps of paper or
8 included it in the files.

9 There is an interesting analysis in that decision
10 from the district court in Illinois, and I know she keeps them
11 out under a hearsay exception, but they kind of go together,
12 because if we're going to talk, for example, about business
13 records or self-authenticating documents under 902 where the
14 courts look -- they're kept in the course of normal business
15 activity at or near the time, they're indicias of reliability.
16 We don't have that here. Even as authentication -- I'm not
17 talking about hearsay now -- we know records come from files and
18 they're kept in the normal course of business. We don't have
19 that.

20 Now, I'm sure Mr. Smego is qualified, and I'm sure
21 he's reviewed hundreds of thousands, perhaps a million
22 documents, but I find it incredible that we are going to bring
23 in documents to this court without us having a chance to talk to
24 Mr. Smego. He says he's only found 138, 100-and-some forged
25 documents, and he says they're very poor quality. It stretches

6/1/2010 Motion Hearing

1 logic and reason to believe that the Iraqi government, who we
2 never had any faith in, produced a lot of evidence that we went
3 to war over, and intelligence documents, would only have 138
4 forged documents. But then again, I can't test the capabilities
5 of Mr. Smego because he's not here, without even questioning his
6 capabilities.

7 The government then speaks about the testimony of
8 Mr. Al-Dani and Mr. Sargon. Of all the people here, including
9 Mr. Hamama, they're the only two that were IIS agents, so that
10 right there raises some issues of doubt for me. They have a
11 motive to lie and fabricate. In fact, Mr. Al-Dani does lie on
12 the stand, and, you know, Mr. Martin didn't think that the
13 district court made the right analysis in finding him a liar,
14 but if you read the decision, I think you'll find that there
15 were some lies in there. I don't know why he did it, but again
16 he's not here so I can cross examine him, nor is Mr. Sargon.

17 The government counsel represented to you that, you
18 know, they're just here to work and tell you the truth, but it's
19 axiomatic that if they're getting money to cooperate with the
20 U.S. government, they're going to produce, they're going to
21 generate, fabricate or produce testimony or evidence that
22 supports what the government wants, and you can only hear about
23 that, Your Honor, if they're here to testify, and they're not
24 here, and this is just authenticity.

25 Mr. Al-Dani, in a fairly substantial transcript that

6/1/2010 Motion Hearing

1 I received from the government on Friday, leaves no doubt, and I
2 guess this kind of maybe touches authenticity a little bit, but
3 perhaps you would say that I can attack this at trial, the
4 weight, but he says that Intelligence officers sometimes
5 fabricated information in order to get money, and created
6 receipts to say that they paid people. Of course, that would
7 still be I guess an authentic document and I could attack the
8 weight.

9 I see you with a confused look, Your Honor.

10 THE COURT: No, I'm not confused. I'm listening.

11 MR. FARAJ: So that's what Mr. Al-Dani says, he says
12 sometimes Iraqi Intelligence Service officers fabricated
13 receipts in order to keep the money, and I'll touch on the issue
14 of receipts here in a little bit with respect to Mr. Hamama.

15 Of course, you would argue, or the government would
16 argue that's still an authentic document, just the information
17 in there is not verifiable, and therefore you can attack it.
18 But the reason we in this country accept documents as authentic
19 is because we have some indicia of reliability in documents that
20 are created, especially when we're talking about government
21 documents, that they're truthful, that they're made to keep a
22 record of things, and so I would argue that because the
23 information in there is false, and I'm stretching the argument,
24 that it shouldn't be considered authentic until we are able to
25 at least question these witnesses.

6/1/2010 Motion Hearing

1 THE COURT: Of course, we don't have just the IIS
2 documents here in terms of the receipts. That last receipt
3 package also had a deposit to Mr. Hamama's bank account at
4 Comerica. So if you're suggesting not only was the information
5 fabricated with respect to the payment, but they would have had
6 to fabricate a false deposit, as well. Comerica --

7 MR. FARAJ: Yes, that's not what I'm arguing, Your
8 Honor. Mr. Martin did a great job of wrapping up his argument
9 with documents we didn't object to. He gave you a lot of
10 argument about very -- about documents that are easily attacked
11 but then wrapped it up with, for example, a letter that he
12 wrote, and the receipts from Mr. Hamama. Mr. Hamama even in his
13 302 never -- his interview with the FBI.

14 THE COURT: I know what a 302 is.

15 MR. FARAJ: I know, Your Honor. Just for the
16 record.

17 Never denied that he received some payment. It
18 wasn't for nefarious activity, but that's beside the point,
19 that's for trial. So, and I guess what I'm saying is you have
20 some documents here that are going to come in, we don't dispute
21 that, they're going to be authentic, but they're lumping them
22 together saying someone outside this courtroom looked at them
23 and they should be admitted because they're all authentic, and
24 they're trying to tie that up by saying you can cross reference
25 some information, but there are no official files, these

6/1/2010 Motion Hearing

1 witnesses aren't here, and we're moving simply on a proffer from
2 government counsel, and perhaps it makes sense to the Court
3 because you've heard testimony from these witnesses before, but
4 we have not.

5 Government counsel referred to the documents
6 themselves. These are not self-authenticating documents, and
7 under 902, it's very clear what the factors that we look at, and
8 it refers specifically to foreign documents, and I think that's
9 important because when the rule was created it contemplated
10 foreign documents. Here we have foreign documents. It
11 contemplated foreign documents, it contemplated factors that
12 should be considered to allow foreign documents in, but you have
13 none of that here. Government has presented no evidence to
14 support admission of those documents under authenticity based on
15 the rule.

16 Your Honor, I don't have -- this is argument, and I
17 don't have a lot of it, but really it comes down to, under 103,
18 under 104, you can take proffers, but when a fundamental right
19 of the accused is contemplated, it is -- I can raise an
20 objection, and I think here, his right to confrontation is
21 certainly implicated.

22 These -- by the way, these documents were discovered
23 before Melendez-Diaz, and I think Melendez-Diaz demands some
24 consideration in this case. The translations were made. We
25 didn't talk about translations. The translations were made with

6/1/2010 Motion Hearing

1 an eye towards litigation. It was made by an expert similar to
2 Melendez-Diaz, and in the wake of that decision, I think -- I
3 request, I respectfully request that this Court give the accused
4 some right to confrontation with respect to these witnesses to
5 at least establish whether some of these documents are authentic
6 or not.

7 Alternatively --

8 THE COURT: Do you have any reason to believe that
9 they're going to testify any differently from what the proffer
10 is? I understand your argument, and I mean, there's some
11 persuasive force to saying, you know, the government can't just
12 get up here and say here's what these witnesses will testify.
13 I've heard these witnesses before, so I have a sense of what
14 they'll testify to, and I understand that even though I have,
15 you haven't, and I'm just asking what makes you think that
16 you're going to get them to say something different. I mean, I
17 have the impeachment evidence, so I know what the judge said
18 about Mr. Al-Dani lying on the stand, or whatever, you know,
19 what he lied about. What do you think you're going to
20 establish -- and it's still going to be in front of me, not in
21 front of a jury, at least the Level 1 authentication issues, so
22 what do you think you're going to be able to establish that's
23 going to undercut the government's proffer here?

24 MR. FARAJ: I can't tell you what I -- I don't know,
25 Your Honor. I'm hoping that by cross examining -- first of all,

6/1/2010 Motion Hearing

1 I don't know if it was the same documents, by the way, and we
2 haven't established that yet.

3 THE COURT: I think it's not the same documents. I
4 think it's different. I mean, my recollection is that it's
5 different documents.

6 MR. FARAJ: Right. So I guess I would want to cross
7 examine them to go document by document, at least on the ones
8 that we're disputing, and then have Your Honor decide on whether
9 authenticity has been established. This is not for my benefit,
10 it's your -- I mean, it's the Court's benefit. I'm going to
11 rely on you, based on a cross examination, based on questions
12 you may pose to decide whether they have indicias of reliability
13 to bring them in as authentic. But, and maybe we'll be
14 unsuccessful and maybe they all come in, but I think Mr. Hamama
15 at least deserves that right before he has to --

16 THE COURT: All right. Thank you.

17 MR. FARAJ: I don't have anymore, Your Honor, unless
18 you have questions for me.

19 THE COURT: Mr. Martin, where are these witnesses?

20 MR. MARTIN: Some of them are overseas, some of them
21 are in the United States. Mr. Smego is in the United States,
22 Mr. Al-Dani is in the United States, Mr. Sargon is overseas, so
23 it's a mix.

24 One of the reasons that I did not bring Mr. Al-Dani
25 here, quite frankly, is because when he testifies at trial, I

6/1/2010 Motion Hearing

1 will be submitting a CIPA section for a motion to preclude some
2 cross examination of his background with the government as a
3 result of his defection. I didn't, frankly, want to have to do
4 that if I could proceed by proffer.

5 THE COURT: Well, you wouldn't have to do that in
6 front of me.

7 MR. MARTIN: Yes, ma'am, because there are some
8 details about his relationship with the government that I don't
9 want defense counsel and the defendant to know about that he
10 could draw out on cross examination.

11 So I personally have examined Mr. Al-Dani's file
12 that the United States government has on him. I have put
13 together the impeachment information that I've submitted to the
14 Court. Very similar to what was submitted several years ago.
15 Of course, it's been updated now with new totals and whatnot.
16 So I feel confident that I've met my obligations to provide
17 impeaching information to the defense, but his live testimony
18 carries some risks that I was hoping to avoid by proceeding by
19 proffer, which I am allowed to do, understanding of course that
20 the Court, particularly given the impeachment information I have
21 disclosed about Mr. Al-Dani may not credit his testimony. But
22 of course I'm not relying on Mr. Al-Dani's testimony, you know,
23 I'm relying on other evidence, testimony, which corroborates
24 Mr. Al-Dani's.

25 THE COURT: You don't have the same problem with

6/1/2010 Motion Hearing

1 Mr. Smego that you have with Mr. Al-Dani though, right?

2 MR. MARTIN: That's correct, that's correct, but as
3 the Court knows, the Court did hear from Mr. Smego live.

4 THE COURT: I did, but he didn't.

5 MR. MARTIN: That's correct, that's correct.

6 But I will say this about the issue of I'm not able
7 to cross examine. Authenticity is not a high threshold. I
8 think the cases refer to it as, you know, a prima facie case.

9 THE COURT: I don't disagree with you about that.

10 MR. MARTIN: And the jury will have an opportunity
11 to decide for itself whether the documents are authentic and
12 should be believed, and the defense will have an opportunity to
13 attack that at trial. So the purpose for this is to decide have
14 I met a relatively low threshold of authenticity.

15 THE COURT: Well, let me ask you something, because
16 let's assume that I rule in your favor here and that this case
17 does proceed to trial with my initial -- with my finding that
18 the documents have satisfied that threshold, and you've made the
19 adequate showing of authenticity. Would Mr. Faraj be precluded
20 from cross examining Mr. Smego, Mr. Al-Dani, et cetera, about
21 authenticity at that point?

22 MR. MARTIN: No, no, absolutely not.

23 THE COURT: All right. So the same information --

24 MR. MARTIN: The defense can call them as witnesses
25 if they wish, just as I suppose they could have done today if

6/1/2010 Motion Hearing

1 they wanted to.

2 THE COURT: Doesn't Mr. Al-Dani's presence at that
3 time pose the same risk that it poses today?

4 MR. MARTIN: Yes, ma'am. But --

5 THE COURT: I understand there are tactical reasons
6 for opposing his production here at this time.

7 All right. Well, was there anything further on this
8 motion?

9 MR. MARTIN: No, ma'am.

10 THE COURT: Then do you want to go to your motion
11 with respect to co-conspirator's statements?

12 MR. FARAJ: Your Honor, my brief was fairly on
13 point, I believe. We sought to have the government produce some
14 evidence to establish the conspiracy before they can overcome
15 the hearsay, our hearsay objection on the documents, and --

16 THE COURT: I don't disagree that they have to do
17 that. I just don't think they have to do it in advance of
18 trial. I mean, they -- generally speaking, when you have
19 co-conspirator statements that they want to introduce under the
20 exception to the hearsay rule, they do it, they have to lay the
21 foundation, no question about it, but it's done in the course of
22 the examination of witnesses at trial.

23 MR. FARAJ: And the Sixth Circuit says exactly that,
24 but they also allow or recognize that judges do have discretion
25 to have a hearing on the evidence because if it's ultimately not

6/1/2010 Motion Hearing

1 proven, then that information is already before the jury and it
2 may prejudice the jurors' view of the evidence even though you
3 may give a limiting instruction.

4 THE COURT: Well, I think you can take care of that
5 by insisting on the foundation being laid in the first instance,
6 rather than saying, you know, I'm relying on you to tie it up.
7 So I'm going to deny your motion for a pretrial hearing on this
8 issue, recognizing that you're absolutely correct that the
9 foundation has to be laid. I don't think the government really
10 contests that, it's just a question of whether it's laid now or
11 at trial.

12 MR. FARAJ: Thank you, Your Honor.

13 THE COURT: All right. Okay. Well, I'll take this
14 under advisement and I'll get something out to you on the
15 government's motion, the authenticity issue.

16 MR. MARTIN: Yes. And Your Honor, I just want to be
17 clear that the government's motion moved to admit the documents
18 into evidence, not just based on authenticity, but also on the
19 co-conspirator exception. My intent, frankly, was to, today,
20 establish by a preponderance that there was a conspiracy and
21 that these documents are a big reason why I have met the
22 preponderance burden.

23 THE COURT: So do you -- I wasn't clear about that.
24 So do you have additional evidence, or are you resting on what
25 you've produced so far?

6/1/2010 Motion Hearing

1 MR. MARTIN: I am resting on what I've produced so
2 far.

3 THE COURT: All right. Thank you.

4 MR. FARAJ: If I may --

5 THE COURT: Mr. Faraj.

6 MR. FARAJ: Yes, Your Honor. Based on case law, I
7 would request that the Court make essential findings of fact,
8 and you may do that as a matter of course, but in the event that
9 we lose this, and specifically with respect to the
10 co-conspirator statements, in order to preserve my issue for
11 appeal, I would need essential findings.

12 THE COURT: Well, then, if you want specific
13 findings, then --

14 MR. FARAJ: Submit them?

15 THE COURT: Submit them, please. Government, too.

16 MR. MARTIN: Yes, ma'am.

17 THE COURT: Yes, with reference to the specific
18 documents in the transcript if necessary. So how long do you
19 need to do that?

20 MR. FARAJ: I can have this to the Court by the 6th.

21 THE COURT: You don't have to do it that fast.

22 MR. MARTIN: It might help if we had a transcript of
23 the hearing today. So maybe, I don't know, three or four weeks
24 for us to get our submissions to you. That would give --

25 THE COURT: Three weeks from today, that's the 22nd.

6/1/2010 Motion Hearing

1 Proposed findings of fact and conclusions of law, and we'll just
2 do them as cross submissions rather than with responses, so that
3 will give me an opportunity to turn it around a little faster.

4 MR. MARTIN: Very good. Thank you, Your Honor.

5 THE COURT: Thank you, counsel.

6 MR. FARAJ: Thank you.

7 THE COURT: All right.

8 (Proceedings concluded.)

9 - - -

10
11
12 CERTIFICATE OF COURT REPORTER

13
14
15 I certify that the foregoing is a correct transcript
16 from reported proceedings in the above-entitled matter.

17
18
19 _____
20 SUZANNE JACQUES, RMR, CRR
21 Official Court Reporter
22 Eastern District of Michigan

_____ Date