

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

v.

PANKESH PATEL, et al.,

Defendant.

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Criminal No. 09-335 (RJL)

**DEFENDANT PANKESH PATEL’S MOTION *IN LIMINE* TO EXCLUDE
ENHANCEMENTS AND SUBTITLES FOR RECORDINGS EVIDENCE**

In this case, the Court should not allow the government to use artificially enhanced recordings to distort the jury’s perception of the audibility and clarity of conversations, particularly where certain of the conversations involving Mr. Patel occurred in settings and under circumstances that made it inherently difficult for him to hear what was being said. Nor should the Court permit the government to use subtitles or scrolling text to add visibility and emphasis to words that the government attempted to obscure when the recorded conversations took place.

If the goal of a trial is to arrive at the truth, *see Tehan v. Shott*, 382 U.S. 406, 416 (1966), then the Court should endeavor to create an atmosphere that closely approximates reality. And if the original recordings reflect that certain words were difficult to discern, then the jury should appreciate that fact. The only way to ensure that Mr. Patel and other defendants are not unfairly deprived of the evidence of that ambiguity is to require the government to rely on unaltered versions of its recording evidence, which will allow the jury to fairly and accurately judge which words were conveyed clearly in settings conducive to audibility, and which words were garbled amid considerable background noise and buried under a heap of platitudes.

I. ALLOWING THE GOVERNMENT TO ARTIFICIALLY ENHANCE THE RECORDINGS EVIDENCE WOULD MISLEAD THE JURY.

The admission of recordings evidence lies within the sound discretion of the Court. *See United States v. Maze*, 382 Fed. Appx. 462, 467 (6th Cir. 2010) (“Broad discretion is given to district courts in determinations of admissibility based on considerations of relevance and prejudice, and those decisions will not be lightly overturned.”); *see also* Advisory Committee Notes to Fed. R. Evid. 611(a) (“The ultimate responsibility for the effective working of the adversary system rests with the judge.”). In considering the admissibility of such enhancements, commentators have emphasized the dangers of presenting enhanced video evidence as a form of “ultra-realism” that unfairly alters the jury’s perception of events. *See, e.g.*, 2 McCormick on Evid. § 216 (6th ed.) (noting “the capacity of video and film evidence to distort the substantive information that they appear to present as ultra-realism”).

Those dangers are especially acute in this case, given that certain conversations recorded by the government occurred in settings, such as busy streets and crowded restaurants, where background noise and other distractions made it difficult for Mr. Patel to hear what was said. *See, e.g.*, Recording ID Nos. 1D504: 105_001 at 2:14:00 to 2:15:00 (audio) (busy street) and 1D597: 128_004 at 56:30 to 58:00 (audio) (same); *see also* Recording ID Nos. 1D302: ALTERN~1 at 1:30:00 to 1:39:00 (audio) (crowded restaurant); 1D303: 56_002 at 2:02:00 to 2:08:00 (same); and 1D347: 70_008 at 10:00 to 14:00 (same). If certain words or verbal exchanges reflected in the recordings are difficult to hear or otherwise ambiguous, the evidence of that inaudibility and ambiguity is itself highly relevant to establishing that Mr. Patel did not hear words that the government will point to as evidence of corruption.

Allowing the government to use enhancement technology to cleanse these recorded conversations of their organic inaudibility is no different than manipulating percentages in a lab

report or wiping away fingerprints. In all three cases, the alterations fundamentally transform the nature of the evidence and deprive defendants of potentially exculpatory evidence. For this reason alone, the government should be precluded from introducing artificially enhanced audio and video recordings at trial. *See* Fed. R. Evid. 611(a) (requiring courts to exercise reasonable control over the mode of presenting evidence so as to make presentation “effective for the ascertainment of the truth.”)

If the Court, however, permits the government to introduce artificially enhanced recordings, the defense will have no choice but to counter those demonstrations of “ultra-realism” with the reality of the unaltered recordings, resulting in the jury hearing each tape twice. Playing the undoctored recordings would be the only way for the defense to effectively illustrate to the jury how difficult it actually was for Mr. Patel to hear what was being discussed at times. There is simply no other way to objectively prove that point.

And while the introduction of dueling recordings would undoubtedly lengthen the trial, result in the presentation of cumulative evidence, and generally serve as a waste of time for all concerned (*see* Fed. R. Evid. 403), the only way to avoid that unfortunate inefficiency without unduly prejudicing defendants is to require the government to rely on the original, unaltered recordings at trial. *See* Fed. R. Evid. 611(a) (“The court shall exercise reasonable control over the mode and order of . . . presenting evidence so as to . . . avoid needless consumption of time.”). Moreover, whereas the defendants would be severely prejudiced by the introduction of artificially enhanced recordings, the government would not suffer any corresponding prejudice if forced to rely on the original recordings. As the government presumably will seek to admit the recordings into evidence, the jury will have the opportunity to revisit the recordings during its

deliberations to resolve any lingering questions about what the recordings contain, and just as importantly, what they do *not* contain.

Accordingly, the Court should preclude the government from introducing artificially enhanced recordings evidence at trial.

II. PERMITTING THE USE OF SUBTITLES OR SCROLLING TEXT FOR RECORDINGS EVIDENCE WOULD UNDULY PREJUDICE DEFENDANTS.

Allowing the government to affix subtitles or scrolling text to its video recordings would likewise cause undue prejudice to defendants. Although permitting the use of subtitles to aid the jury in its understanding of video recordings evidence might be appropriate in cases where there is no genuine dispute as to what words were heard, in the context of this case, where the government intends to argue that certain buzz words – e.g., “commissions” – transformed what might otherwise have been a legal transaction from Mr. Patel’s perspective into an illegal one, the use of subtitles and scrolling text would leave the jury the misleading impression that those words were heard, when the recordings themselves, free of any subtitles or enhancements, may well create the opposite impression. *See United States v. Holton*, 116 F.3d 1536, 1540 (D.C. Cir. 1997) (“The principal risk of indiscriminately permitting the use of transcripts by jurors is that in the case of a poor quality or unintelligible recording, the jurors may substitute the contents of the more accessible, printed dialogue for the sounds they cannot readily hear or distinguish on the tape and, in so doing, transform the transcript into independent evidence of the recorded statements.”); *see also United States v. Gonzalez-Maldonado*, 115 F.3d 9, 17 (1st Cir. 1997) (finding reversible error where the government bolstered its arguments “by customizing the transcript to reflect its own theory of the case.”); *United States v. Posada Carriles*, 486 F. Supp. 2d 599, 606-607 (W.D. Tex. 2007) (excluding proffered transcript as unreliable where transcript did not fairly and accurately depict recorded interview).

The tactics used by the government in its “sting” operation provide an illustration of how the use of subtitles and scrolling text would unfairly prejudice the defendants. Throughout its investigation, the government went to considerable lengths to avoid alerting the defendants to the potential illegality of the Gabon deal. For instance, while preparing a script for one of its undercover agents in connection with an October 6, 2009 reception at Clyde’s in Washington D.C., the government strategized with Richard Bistrong on the best way to obscure references to “commissions” in remarks scripted for the undercover agent posing as “Jean-Pierre Mahmadou,” a supposed emissary of Gabon’s Minister of Defense. As a means of minimizing the supposed illegality of the deal, Bistrong emphasized the importance of “sandwiching” any references to “commissions” between innocuous statements. *See* 9/26/2009 Text Message at 16:59 from Mr. Bistrong to SA Forvour and ensuing texts (“Are you ready for jp’s awesome introduction hashed out over 17 miles? I call it the commission sandwhich (sic).”) (attached hereto as Exhibit A); 9/26/2009 Text Message at 21:22 (“I just think its (sic) important to [s]andwhich (sic) the commission statement.”) (attached hereto as Exhibit B). Through its “commission sandwich” strategy and other means, the government hoped to camouflage the supposed illegality of the Gabon deal from defendants, while at the same time accumulating sound bites that the government could later point to on a video monitor as proof that defendants heard the very statements that the government was attempting to obscure.

Given that the government went to extraordinary lengths to bury allegedly incriminating words amongst benign chatter, it would be particularly unfair and prejudicial to defendants to permit the government to now highlight these same words at trial through the use of subtitles or scrolling text. *See Gonzalez-Maldonado*, 115 F.3d at 17 (reversible error to permit the government to emphasize alleged code words in proffered transcript); *see also Posada Carriles*,

486 F. Supp. 2d at 606-607 (invoking Fed. R. Evid. 403 to exclude imprecise transcript); *see also Holton*, 116 F.3d at 1542 (“the district court retains ample discretion to exclude transcripts in circumstances where the prejudice might outweigh their usefulness as an aid.”). Since defendants did not have the benefit of viewing subtitles or scrolling text when the government was busy trying to slip words by the defendants, permitting the government to deploy this mode of emphasis at trial will leave the jury with the false impression that the defendants heard every word captured on tape, when in reality, this is not the case. Accordingly, the government should also be precluded from affixing subtitles or scrolling text to its video evidence.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant Mr. Patel’s Motion *In Limine* to Exclude Enhancements and Subtitles for Recordings Evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2011, the above Defendant Pankesh Patel's Motion *In Limine* to Exclude Enhancements and Subtitles for Recordings Evidence was served electronically via the District Court's electronic filing system on:

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