

1 PATRICK K. O'TOOLE  
United States Attorney  
2 BARBARA L. MAJOR  
Assistant U.S. Attorney  
3 California State Bar. No. 131812  
Federal Office Building  
4 880 Front Street, Room 6293  
San Diego, California 92101-8893  
5 Telephone: (619) 557-5558

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SOUTHERN DISTRICT OF CALIFORNIA  
BY: *[Signature]* DEPUTY

6 Attorneys for Plaintiff  
United States of America  
7

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) Criminal Case No. 00cr1242JM  
12 Plaintiff, )  
13 v. ) DATE: June 18, 2002  
14 KIMBERLY BAILEY (1), ) TIME: 9:00 a.m.  
15 Defendant. ) GOVERNMENT'S TRIAL MEMORANDUM  
16

17 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and  
18 through its counsel, Patrick K. O'Toole, United States Attorney,  
19 and Barbara L. Major, Assistant United States Attorney, and files  
20 the attached trial memorandum of facts and law relating to this  
21 case.

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STATUS OF THE CASEA. INDICTMENT

Defendant Kimberly Bailey, aka Kimberly Davis, aka Janet Fleming, is charged with one count of conspiracy to murder, kidnap and maim a person in a foreign country in violation of 18 U.S.C. §956(a)(1), one count of kidnaping in violation of 18 U.S.C. §1201(a)(1), and one count of use of interstate commerce facilities in the commission of murder for hire in violation of 18 U.S.C. § 1958(a).

B. TRIAL STATUS

A jury trial is scheduled for Tuesday, June 18, 2002 at 9:00 a.m. before the Honorable Jeffrey T. Miller, United States District Court Judge. The estimated length of the trial is three weeks; the Government's case-in-chief is expected to last eight days.

C. CUSTODY STATUS

Defendant Bailey is being held in custody without bail.

D. INTERPRETER

A Russian interpreter will be required for one of the Government witnesses. No other interpreters will be required for Government witnesses.

E. JURY WAIVER

No jury waiver has been filed.

1 F. PRE-TRIAL MOTIONS

2 Defendants Bailey and Krueger filed numerous pre-trial  
3 motions. In March 2001, the Court issued two written orders  
4 denying the majority of defendants' motions to suppress evidence.  
5 The Court severed the trial of defendant Bailey from that of  
6 defendant Krueger and set defendant Bailey's trial to begin on  
7 September 5, 2001.

8 On August 24, 2001, the Court granted defendant Bailey's  
9 motion to continue the trial. On September 6, 2001, Philip  
10 DeMassa substituted in as defendant Bailey's attorney of record  
11 and the Court scheduled trial to begin on February 12, 2002.

12 On October 17, 2001, defendant John Krueger pleaded guilty to  
13 a superseding information charging him with one count of  
14 conspiring to kidnap an individual in a foreign country in  
15 violation of 18 U.S.C. §956(a)(1). Defendant Krueger also pleaded  
16 guilty to an information in criminal case number 01cr3024JM  
17 charging him with conspiracy to introduce unapproved medical  
18 devices into interstate commerce in violation of 18 U.S.C. §371.

19 On November 16, 2001, defendant Bailey confirmed in court  
20 that she was not going to present an insanity defense or a defense  
21 based upon mental disease or defect.

22 On January 18, 2002, the Court granted defendant Bailey's  
23 request to continue the trial date and set a new trial date of  
24 June 18, 2002.

25 On May 31, 2002, the Court heard motions in limine. The  
26 Court denied defendant Bailey's motions to sever counts, exclude  
27

1 use of the term "black box" and exclude statements to establish  
2 corpus delicti. Defendant withdrew her motion to exclude  
3 statements due to lack of trustworthiness. The Court also denied  
4 the Government's motions to limit cross-examination and to exclude  
5 unsubstantiated "sightings" of victim Richard Post, provided there  
6 is admissible evidence to support such allegations. The Court  
7 granted the Government's motion to exclude evidence relating to  
8 the legality and effectiveness of defendant's machines except to  
9 the extent it is relevant to impeach John Krueger.

10 On or about May 28, 2002, defendant Bailey served trial  
11 subpoenas on a number of different entities including Sharp  
12 Hospital, San Diego Police Department, United States Customs  
13 Service, United States Immigration and Naturalization Service, and  
14 United States Probation and Parole Office. Sharp Hospital and the  
15 Police Department produced the requested documents to the Court  
16 and the parties have reviewed them. The United States produced to  
17 defendant records provided by the Customs Service that related to  
18 John Krueger. The Customs Service also provided records relating  
19 to Ben Harroll. Due to privacy considerations, these records have  
20 not been produced and Mr. Harroll has been told about the subpoena  
21 and the June 14th hearing. The United States has filed a motion  
22 to quash the subpoenas to the INS and Probation and Parole, which  
23 will be heard on June 14, 2002.

24 G. DISCOVERY

25 The Government has produced in discovery thousands of pages,  
26 several computer CDs and disks, numerous audio tapes and CDs, and  
27

1 one video tape. The Government has complied and will continue to  
2 fully comply with the mandate of Rule 16. Further, all evidence  
3 that the Government intends to offer into evidence is available  
4 for inspection by defense counsel. To date, no reciprocal  
5 discovery has been received by the Government although defense  
6 counsel has listed 7 items in a letter dated June 5, 2002 that  
7 defendant is going to provide to the Government. Defendant has  
8 filed numerous motions and requests for discovery. The Government  
9 is not aware of any outstanding discovery disputes.

10 II

11 STATEMENT OF FACTS

12 A. THE KIDNAPING AND MURDER OF RICHARD POST

13 In the 1990's, defendant Kimberly Bailey, aka Janet Fleming,  
14 sold biofrequency devices, also known as "black box" machines,  
15 which she claimed emitted electromagnetic waves that could cure a  
16 variety of diseases. She sold the machines under a variety of  
17 business names, including The Last Seed, Naturetronics, Astropulse  
18 and Nature Tech. The business was very profitable. At some point  
19 in 1997, defendant Bailey became convinced that one or more of her  
20 employees were stealing from her. Bailey hired Richard "Rick"  
21 Post, a local private investigator, to investigate her company and  
22 determine which employees were stealing from her. Post took the  
23 job and quickly gained Bailey's trust in both her business and  
24 personal life. Post began running Bailey's business and the two  
25 of them became romantically involved.

1           In early August 1998, defendant Krueger, who worked for Post,  
2           told defendant Bailey that Post was stealing money from her  
3           business and that Post was romantically involved with other women.  
4           Defendant Bailey became very upset. Defendant Bailey ordered  
5           defendant Krueger to set up a meeting with defendant Humberto  
6           Iribe. This meeting occurred in San Diego, California, in mid-  
7           August 1998. The three defendants developed a plan to get even  
8           with Richard Post.

9           On August 20, 1998, Post and defendant Bailey left the office  
10          around 11 a.m. to meet with an engineer. They did not, however,  
11          attend that meeting. Instead, defendant Bailey lured Post to  
12          Mexico by claiming that she need to conduct banking business  
13          there. While in Mexico, men hired by defendant Iribe kidnaped  
14          Post and took him to a house in Mexico, where he was held against  
15          his will by Iribe and his henchmen.

16          On the evening of August 20th, defendants Iribe, Krueger and  
17          Bailey met at a restaurant in Tijuana Mexico to discuss the  
18          situation. The defendants developed an alibi story for Bailey,  
19          which included the assertion that Post left the United States  
20          voluntarily. To implement the alibi, defendants Krueger and Iribe  
21          crafted two telephone messages for Post to leave. After the  
22          meeting, defendant Krueger returned to the United States and  
23          defendant Iribe returned to the victim. Defendants Krueger and  
24          Iribe forced Post to state and restate the messages until they  
25          decided they were acceptable. Post's voicemail messages, which  
26          were left on the Intellisource work phone and defendant Krueger's  
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1 cell phone, advised that Post had traveled to Mexico City and  
2 would return in a few days and instructed Krueger and the other  
3 employees to remove defendant Bailey's work documents and files  
4 from the Intellisource office.

5 Except for the two recorded phone messages, Post was never  
6 heard from again. Post didn't take any clothes, medicine,  
7 suitcases or personal items with him. He didn't withdraw a large  
8 amount of money. He didn't pay any of his bills. And, he never  
9 contacted any of his children, including the 16 year old son who  
10 was living with him at the time. According to subsequent  
11 statements by defendants Bailey, Krueger and Iribe, Post was held  
12 captive and tortured for approximately five days before he was  
13 killed. His body has never been found.

14 B. THE COVERUP

15 When Post failed to contact any of his friends or family,  
16 they became very concerned. On the morning of Monday, August 24,  
17 1998, two of Post's children went to Post's office, where they met  
18 with defendant Krueger. Defendant Krueger played for them the two  
19 telephone messages left by Post. Neither message contained any  
20 directions about contacting his family or children.

21 Defendant Bailey initially refused to meet with anyone to  
22 discuss what happened but eventually she agreed to do so. On  
23 August 25, 1998, defendants Bailey and Krueger met with two of the  
24 Post children and provided the following story. Bailey said that  
25 she and Post went to Tijuana to do some banking and have lunch.  
26 While at lunch, two men came up to their table and started talking  
27

1 to Post. Bailey said that she was busy eating her lunch and  
2 reading her book and didn't hear anything the men said. After  
3 lunch, Bailey and Post left alone in Post's vehicle. Bailey said  
4 that Post told her that he had to go to Mexico City unexpectedly,  
5 so she dropped him off at the Tijuana airport and returned to the  
6 United States alone. Bailey said she drove to Post's house, left  
7 the keys in the mailbox, walked to a nearby convenience store,  
8 called a cab and took the cab to her home. Bailey said that she  
9 subsequently became concerned for Post, that she had "missing"  
10 posters prepared, and that she went to Tijuana and plastered them  
11 everywhere, including the airport.

12 C. DEFENDANT CONFESSES

13 In the summer of 1999, defendant Bailey met a woman named  
14 Svetlana Ogorodnikova. As they became friends, defendant Bailey  
15 learned that Ms. Ogorodnikova was a Russian spy, that is, that she  
16 had been convicted of espionage and had spent a significant number  
17 of years in jail. Despite this fact, or perhaps because of it,  
18 defendant Bailey became close friends with Ms. Ogorodnikova and  
19 shared personal secrets with her. One of the secrets that  
20 defendant Bailey confided to Ms. Ogorodnikova was that she had  
21 paid approximately \$60,000 to have Richard Post kidnaped and  
22 murdered.

23 Specifically, defendant Bailey told Ms. Ogorodnikova that an  
24 old boyfriend, Richard Post, had cheated on her with other women  
25 and had stolen money from her business. She said that John  
26 Krueger introduced her to Humberto Iribe and that the three of  
27



1 them developed a plan to kidnap Richard Post and to find the  
2 stolen money. She explained that she took Post to Tijuana, Mexico  
3 and that a couple of men kidnaped him there. Defendant Bailey  
4 said that Iribe held Post captive in Mexico and that she and Iribe  
5 interrogated Post about the missing money. Defendant Bailey  
6 informed Ms. Ogorodnikova that she (Bailey) used pliers to torture  
7 Post by crushing his fingers in order to get him to disclose the  
8 location of the stolen money. According to defendant Bailey, Post  
9 denied stealing the money.

10 Defendant Bailey further explained that after several days,  
11 Humberto Iribe asked her what he should do with Post. Defendant  
12 Bailey recounted that she told Iribe that she wanted him to build  
13 an underground house to keep Post alive but captive and that Iribe  
14 refused to do it. Defendant Bailey stated that Iribe said he  
15 thought they should kill Post and that she (Bailey) told Iribe to  
16 do what he had to do.

17 During these conversations, defendant Bailey also told Ms.  
18 Ogorodnikova that she knew the FBI was investigating Post's  
19 disappearance and murder and that they suspected her. Defendant  
20 Bailey shared her concern that several people, including Ken  
21 Pearson, John Krueger, Gabino Palafox and Humberto Iribe were a  
22 danger to her because they knew too much about what happened to  
23 Richard Post. Defendant Bailey asked Ms. Ogorodnikova whether she  
24 knew anyone from her past life (the espionage world) who would be  
25 willing to kill these individuals for money. Ms. Ogorodnikova did  
26 not want to participate in such an operation but she was afraid to  
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1 decline due to her concern that defendant Bailey might find  
2 someone else who was willing to arrange the murders. So, Ms.  
3 Ogorodnikova delayed her response.

4 In November 1999, FBI agents contacted Ms. Ogorodnikova and  
5 asked about her relationship with defendant Bailey. Ms.  
6 Ogorodnikova told them the above story. Due to her criminal  
7 history, the FBI agents were unwilling to accept Ms.  
8 Ogorodnikova's story without corroboration. Ms. Ogorodnikova  
9 agreed to record several phone conversations that she had with  
10 defendant Bailey and to wear a body wire during a meeting with  
11 defendant Bailey. Defendant Bailey repeated the above story to  
12 Ms. Ogorodnikova during the recorded conversations. During these  
13 conversations, defendant Bailey again asked Ms. Ogorodnikova to  
14 introduce her to a hit man. With the assistance of the FBI, Ms.  
15 Ogorodnikova introduced defendant Bailey to an undercover FBI  
16 agent posing as a hit man.

17 Defendant Bailey also confessed to several other friends that  
18 she paid defendant Iribe to kidnap and kill Richard Post.

19 D. THE SECOND MURDER FOR HIRE BY BAILEY

20 On December 22, 1999, defendant Bailey met an undercover FBI  
21 agent at a hotel in San Diego. Bailey explained to the undercover  
22 agent that she believed defendant John Krueger and others were  
23 trying to kill her. Bailey told the agent that she had to be  
24 careful because she was being investigated for Rick Post's  
25 disappearance. She then made several incriminating statements  
26 about Rick Post's disappearance and murder. Eventually, the agent  
27

1 said that he needed to know exactly what she wanted done. Bailey  
2 responded

3 [i]f there is a natural way for John to have an  
4 accident, that cannot be traced to anyone else, this is  
5 the way to do it. I am under the microscope now for the  
6 disappearance of Rick. If anything happened that  
7 indicates that Krueger was killed I would be the first  
8 natural suspect. If there is a natural way to do it, it  
9 should be done that way. I don't know if he drinks. I  
10 know very little about his personal habits. All I know  
11 is that there are three people out to get me and it's a  
12 survival contest and I was strong enough to tell you  
13 that I will do whatever has to be done to survive. I  
14 deserve to live. They don't.

15 Afterwards, Bailey gave the agent \$10,000 cash and the agent  
16 reminded her that this money was just a down payment and that he  
17 expected to receive \$10,000 per body. Bailey agreed and again  
18 stated that the order for execution was Krueger, Belamontes, and  
19 then Palafox.

### 20 III

#### 21 PERTINENT LAW

22 The Superseding Indictment charges defendant Bailey with  
23 three crimes. In Count 1, defendant is charged with conspiracy to  
24 murder, kidnap and maim a person in a foreign country in violation  
25 of 18 U.S.C. §956(a)(1). Count 2 charges her with kidnaping in  
26 violation of 18 U.S.C. §1201(a)(1). Count 5 charges defendant  
27 Bailey with the use of an interstate commerce facility in the  
28 commission of murder for hire in violation of 18 U.S.C. §1958(a).

#### 29 A. CONSPIRACY TO MURDER, KIDNAP AND MAIM A PERSON 30 IN A FOREIGN COUNTRY

31 Title 18, United States Code Section 956(a)(1) provides that  
32 "[w]hoever, within the jurisdiction of the United States,  
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1       conspires with one or more other persons, regardless of where such  
2       other person or persons are located, to commit at any place  
3       outside the United States an act that would constitute the offense  
4       of murder, kidnapping, or maiming if committed in the special  
5       maritime and territorial jurisdiction of the United States shall,  
6       if any of the conspirators commits an act within the jurisdiction  
7       of the United States to effect any object of the conspiracy, be  
8       punished as provided in subsection (a) (2).

9               To prove this crime, the Government must prove that (1) the  
10       defendant, who was located within the United States, (2) conspired  
11       with another person or persons to commit the murder, kidnaping or  
12       maiming of Richard Post, who was located outside the United  
13       States, and (3) at least one act in furtherance of the conspiracy  
14       was committed by any one of the conspirators within the  
15       jurisdiction of the United States.

16               B.       KIDNAPING

17               Title 18, United States Code, Section 1201(a) (1) makes it  
18       illegal to "unlawfully seize[], confine[], inveigle[], decoy[],  
19       kidnap[], abduct[], or carry[] away and hold[] for ransom or  
20       reward or otherwise any person ... when the person is willfully  
21       transported in interstate or foreign commerce." To prove this  
22       crime, the Government must prove that (1) the defendant seized,  
23       confined, inveigled, decoyed, kidnaped, abducted, or carried away  
24       Richard Post, (2) the defendant held Richard Post for ransom,  
25       reward or other benefit, and (3) the defendant intentionally  
26       transported Richard Post across state lines.

1 C. MURDER FOR HIRE

2 Title 18, United States Code, Section 1958(a) sets forth the  
3 federal murder-for-hire statute. It provides that "[w]hoever  
4 travels in or causes another (including the intended victim) to  
5 travel in interstate or foreign commerce, or uses or causes  
6 another (including the intended victim) to use the mail or any  
7 facility in interstate commerce, with intent that a murder be  
8 committed in violation of the laws of any State or the United  
9 States as consideration for the receipt of, or as consideration  
10 for a promise or agreement to pay, anything of pecuniary value, or  
11 who conspires to do so" shall be guilty of a felony.

12 To prove this crime, the Government must establish that (1)  
13 the defendant traveled or caused another to travel in interstate  
14 or foreign commerce or used or caused another to use the mail or  
15 any facility in interstate or foreign commerce; (2) with the  
16 intent that a murder be committed; and (3) as consideration for  
17 the receipt of or promise to pay anything of pecuniary value.

18 IV

19 LEGAL ISSUES

20 A. MEXICAN EVIDENCE IS ADMISSIBLE

21 In May 2000, the United States sent an official request to  
22 Mexico for telephone subscriber and toll information on two  
23 telephone numbers. The request was made pursuant to the terms of  
24 the Mutual Legal Assistance Treaty (MLAT) between the United  
25 States and Mexico. In August 2001, the United States received a  
26 formal response from Mexico, again in accordance with the terms of  
27

1 the MLAT. The relevant portions of the response, including the  
2 English translation, were produced to defendant Bailey.

3 The terms of the MLAT specifically provides that evidence  
4 provided pursuant to the MLAT is admissible in court without  
5 further certification or authentication. Article 10(1) and (2)  
6 provides that the Requested State (Mexico in this case) shall  
7 provide any publicly available records of government departments  
8 and agencies and "may provide any record or information in the  
9 possession of a government office or agency, but not publicly  
10 available, to the same extent and under the same conditions as it  
11 would be available to its own law enforcement or judicial  
12 authorities." Article 10(3) then states that "[d]ocuments,  
13 records or copies thereof shall be certified or authenticated in  
14 accordance with the procedures specified in the request. If  
15 certified or authenticated in such manner, they shall be  
16 admissible in evidence as proof of the truth of the matters set  
17 forth therein." The response received from Mexico was certified  
18 and authenticated and stated that the records were accurate public  
19 records. Accordingly, the evidence received from Mexico  
20 (telephone subscriber and toll information) should be admitted  
21 into evidence without any further foundation. See, also,  
22 Fed.R.Evid. 902(3) and 902(4); United States v. Real Property, 264  
23 F.3d 860, 871 (9<sup>th</sup> Cir. 2001) (bank records obtained from  
24 Switzerland pursuant to MLAT properly admitted into evidence).

25 The Mexican telephone records also are admissible hearsay.  
26 First, as described above, the records are either business or  
27

1 official records maintained in the normal course of business.  
2 Fed.R.Evid. 803(6) and 803(8). Second, the records are admissible  
3 under the residual exception to the hearsay rule. Federal Rule of  
4 Evidence 803(24) permits the Court to admit hearsay evidence when  
5 (a) the statement is offered as evidence on a material fact; (b)  
6 the statement is more probative on the point than any other  
7 evidence which the proponent can produce by reasonable means; (c)  
8 the general purposes of the Rules of Evidence and the interests of  
9 justice will be served by admission of the statement; and (d) the  
10 adverse party has sufficient notice of the intent to introduce the  
11 statements so as to allow time for rebuttal at the hearing. All  
12 of these requirements are met here.

13 The evidence is offered on a material fact, that is to show  
14 that the defendants were in telephone contact before, during and  
15 after the kidnaping of Richard Post. The evidence also  
16 corroborates defendant Krueger's testimony and defendant Bailey's  
17 statements about the commission of the crime. The evidence is  
18 also the best (and only) evidence available, in that the original  
19 telephone records are in Mexico and outside the subpoena power of  
20 the United States Attorney. The records are certified and  
21 authenticated as accurate copies of the original telephone records  
22 maintained in Mexico. The Government provided the documents to  
23 defendant months ago and defendant has indicated that she will  
24 stipulate to the admission of the telephone records. Lastly, the  
25 purposes of the Rules of Evidence will be served by the admission  
26  
27  
28

1 of the documents as it is in the interest of justice to allow  
2 circumstantial evidence that will help lead to the truth.

3 There are few cases that involve the issue of whether foreign  
4 documents can be admitted under the residual exception, but those  
5 that do provide for admissibility. In Karme v. Commissioner of  
6 Internal Revenue, 673 F.2d 1062, 1064 (9th Cir. 1982), the tax  
7 court admitted records of a Netherlands Antilles bank, which the  
8 Government used to trace the flow of funds creating the disputed  
9 tax deduction. The records were placed into evidence through the  
10 testimony of the IRS Agent who microfilmed the documents with the  
11 assistance of two Netherlands Antilles government officials. The  
12 court discussed the admissibility of these foreign records as  
13 follows:

14 Taxpayers correctly claim that the documents were not  
15 brought within the Federal Rules of Evidence 803(6)  
16 'business records' exception to the hearsay rule because  
17 Lynch was not a 'custodian or other qualified witness'  
18 capable of testifying that the records were kept in the  
19 course of a regularly conducted business activity.

20 However, Federal Rules of Evidence 803(24) provides  
21 another exception to the hearsay rule when the statement  
22 is material, probative, and when 'the interests of  
23 justice will best be served by admission of the  
24 statement into evidence.' The records were both  
25 material and probative. Given the circumstantial  
26 guarantees of trustworthiness which were present here,  
27 the distant location of the bank, and the lack of any  
28 evidence in the record to suggest that the bank records  
are anything other than what they purport to be, we  
conclude that there was no abuse of discretion in  
admitting them under 803(24). United States v.  
Friedman, 593 F.2d 109, 118-19 (9th Cir. 1979).

See also, United States v. Friedman, 593 F.2d 109, 117-119 (9th  
Cir. 1979) (original Chilean immigration records would be  
admissible as public records under Rule 803(8); a summary of the



1 immigration records is admissible under the "catch-all" exception  
2 to the hearsay rule, Rule 803(24)); United States v. Bachsian, 4  
3 F.3d 796, 798 (9th Cir. 1993) (shipping documents admissible under  
4 the residual exception to the hearsay rule).

5 The Mexican telephone records obtained pursuant to the Mutual  
6 Legal Assistance Treaty between the United States and Mexico are  
7 admissible without further foundation or testimony.

8 B. ADMISSIBILITY OF TAPE RECORDINGS AND TRANSCRIPTS

9 The United States will be introducing into evidence audio and  
10 video tape recordings of defendant Bailey talking with Svetlana  
11 Ogorodnikova and FBI Special Agent Nicholas McKean, who was acting  
12 in an undercover capacity. The tapes are in English and have been  
13 transcribed. The tapes and transcripts were provided to defendant  
14 Bailey months ago.

15 "A recorded conversation is generally admissible unless the  
16 unintelligible portions are so substantial that the recording as  
17 a whole is untrustworthy." United States v. Rrapi, 175 F.3d 742,  
18 746 (9th Cir., cert denied, 528 U.S. 912 (1999) (quotations  
19 omitted). The foundation which must be laid for the introduction  
20 into evidence of tape recordings is a matter largely within the  
21 discretion of the trial court. There is no rigid set of  
22 foundational requirements. United States v. Hollingshead, 672  
23 F.2d 751, 755 n.3 (9th Cir. 1982). A witness may competently  
24 testify as to the identification of a voice on a tape recording.  
25 Fed.R.Evid. 901(b)(5).

1           Transcripts of taped conversations are admissible to assist  
2 the court and the jury in identifying speakers and following the  
3 tapes while they are being played. Rrapi, 175 F.3d at 746.  
4 Objections by defendant to the accuracy of tape transcripts do not  
5 preclude their admission. Defendants are permitted to introduce  
6 their own transcripts or argue to the jury that the Government's  
7 transcripts are inaccurate. Id; United States v. Armijo, 5 F.3d  
8 1229, 1234 (9<sup>th</sup> Cir. 1993).

9           In the instant case, the tape recordings are audible,  
10 intelligible and trustworthy. Although defendant whispers during  
11 many of her important conversations, the dialogue can be heard  
12 when the volume is increased. To date, defendant has no objected  
13 to any of the transcripts. Accordingly, the audio and video tape  
14 recordings should be admitted into evidence and the jury should be  
15 permitted to use the transcripts as an aid when the tapes are  
16 played.

17           C. CHAIN OF CUSTODY

18           The test of admissibility of physical objects connected with  
19 the commission of a crime requires a showing that the object is in  
20 substantially the same condition as when the crime was committed  
21 (or the object seized). Factors to be considered are the nature  
22 of the article, the circumstances surrounding its preservation and  
23 custody, and the likelihood of an intermeddler tampering with it.  
24 There is, however, a presumption of regularity in the handling of  
25 exhibits by public officials. United States v. Kaiser, 660 F.2d  
26 724, 733 (9th Cir. 1981), cert. denied, 445 U.S. 856 (1982),  
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1 overruled on other grounds, United States v. DeBright, 730 F.2d  
2 1255, 1259 (9th Cir. 1984) (en banc). If the trial judge finds  
3 that there is a reasonable possibility that the piece of evidence  
4 has not changed in a material way, he has discretion to admit the  
5 evidence. United States v. Kaiser, 660 F.2d 724, 733 (9th Cir.  
6 1981), cert. denied, 455 U.S. 956 (1982), overruled on other  
7 grounds, United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir.  
8 1984). The Government is not required, in establishing chain of  
9 custody, to call all persons who may have come into contact with  
10 the piece of evidence. Gallego v. United States, 276 F.2d 914,  
11 917 (9th Cir. 1960).

12 V

13 JURY INSTRUCTIONS

14 The Government's requested jury instructions will be  
15 submitted prior to trial. The court is hereby requested to give  
16 whatever general instructions it deems appropriate. The  
17 Government reserves the right to submit additional instructions at  
18 the Rule 30 conference.

19 VI

20 WITNESSES

21 The Government may call the following witnesses in its case-  
22 in-chief. The Government, however, makes no representation  
23 regarding the order in which they may be called or that all the  
24 listed witnesses actually will be called. Further, the Government  
25 reserves the right to call additional witnesses, if necessary.  
26  
27

1 Terry Bowers  
2 FBI Special Agent Leonard Davey, Jr.  
3 FBI Special Agent Patrick Mark George  
4 Alan Herr  
5 Sandra Armendariz Lopez  
6 FBI Special Agent Nicholas McKean  
7 Robert "Skip" Moschetti  
8 FBI Special Agent Henry Nembach  
9 Svetlana Ogorodnikova  
10 Gabino Palafox  
11 Ken Pearson  
12 Ian Post  
13 Orion Post  
14 Karen Snow  
15 Leticia Villareal  
16 Elaine Winans

17 VII

18 STIPULATIONS

19 Defendant Bailey has agreed to stipulate to the admissibility  
20 of all of the telephone records.  
21  
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VIII

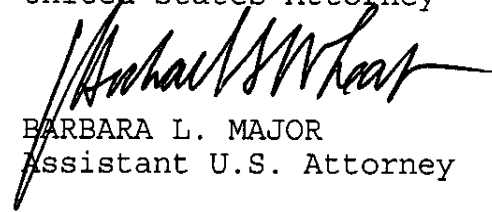
EXHIBIT LIST

An exhibit list will be provided at the time of trial. The Government requests that defense counsel examine the exhibits before trial to expedite the proceedings. The Government also requests an opportunity pretrial to examine defendant's exhibits.

DATED: June 12, 2002.

Respectfully submitted,

PATRICK K. O'TOOLE  
United States Attorney

*for* 

BARBARA L. MAJOR  
Assistant U.S. Attorney

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UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Criminal Case No. 00CR1242JM
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
KIMBERLY BAILEY,	)	<u>CERTIFICATE OF SERVICE</u>
	)	<u>BY U.S. MAIL</u>
Defendant.	)	
	)	
	)	

IT IS HEREBY CERTIFIED THAT:

I, Tammy M. McFadden, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 880 Front Street, San Diego, California 92101-8893. I am not a party to the above-entitled action; and subsequent to filing with the Clerk of the Court, I have deposited in the United States mail at San Diego, California, a copy of the following: **Government's Trial Memorandum** address to:

Phillip A. DeMassa  
2356 Moore Street, Ste. 201  
San Diego, CA 92110

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12<sup>th</sup> day of June, 2002.

Tammy M. McFadden  
TAMMY M. MCFADDEN