

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

SAMEEH HAMMOUDEH
_____ /

**AMENDED
MOTION TO PRESERVE TESTIMONY BY WAY
OF FOREIGN DEPOSITION AND FOR PAYMENT
OF EXPENSES UNREDACTED VERSION**

Defendant, Sameeh Hammoudeh, by and through undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 15, respectfully requests that the Court order the taking of foreign depositions. As grounds in support, Mr. Hammoudeh states:

Trial in this case is currently set for April 4, 2005. As part of his investigation in this case, the undersigned has located and contacted several individuals whose testimony is material and necessary to Sameeh Hammoudeh. These individuals are Taha Hammoudeh, Bahiyya Hammoudeh, Ma'an Hammoudeh, Abdel-lateet Abu-Hashim, Abdel-fattah Zahaliqa, Sheikh Hayyan Al-Idrisi, Sheikh Yacoub Qirrish, Azmi Al-Khateeb, Dr. Khalil Shikaki, Wafa Shikaki, Dr. Rasim Khamaisi, Adel Abdelal, Ibrahim O'tawi, Iliyan Al Hindi, Said Abu Kharma, Tawfeeq Al-Sharif, Dawoud Mikawi, Dr. Atef Alawna, Dr. Ali Jirbawi, Suzan Awad, Qasim Abu Harb, Hussein Gheith, Dr. Saleh Abdel-Jawad, Ishaq Budeiri, Saleem Al Bastt, Khalid Al-Hulu, Abbas Nimr, Ajjouli. Each of these witnesses reside in the Occupied Territories

of the West Bank and Gaza Strip or Israel and are not subject to subpoena.¹ The above named individuals are willing to testify on behalf of Mr. Hammoudeh, but are not available or willing to testify in person in the United States. Even were they willing to come to the United States, they are prevented by the Israeli authorities from applying for a visa at a United States consulate within Israel or East Jerusalem, due to the severe restrictions on movement in place for residents of the Occupied Territories. Further, the sole crossing point in the Gaza Strip open to Palestinians, which is located in Rafah, is frequently closed by the Israeli military, which arbitrarily shuts down the border crossing for lengthy periods of time at will.

1. Taha Hammoudeh is the Defendant's father and he will testify about charitable contributions that the Defendant made on multiple allegations set out in Overt Acts in the Indictment. He also will described the family charitable gift giving history and his own professional connection with charitable distribution of donations in Israel and the Middle East.

2. Bahiyya Hammoudeh is the Defendant's mother and also will provide explanation of the distribution of funds and particular explain a \$15,000.00 transaction and her recorded statements and the wire tap that "everything had to be clean" and will describe exactly what she meant as opposed to the Government's argument about that statement.

3. Ma'an Hammoudeh is the Defendant's brother and he will describe the families support of the Defendant and in particular an investment of \$15,000.00 the Defendant sent to him

¹ See *United States v. Samaniego*, 345 F.3d 1280, 1283 (11th Cir. 2003), quoting *United States v. Drougoul*, 1 F.3d 1546, 1553 (11th Cir. 1993) ("foreign nationals located outside the United States ... are beyond the subpoena power of the district court").

in June of 2000 and will describe the specific details of that transaction.

4. Abdel-lateet Abu-Hashim will describe the distribution of funds to orphans and he also will describe his position as the Defendant's business partner in a book distribution operation and he would pay money in the Middle East for the Defendant and he would collect money in the United States.

5. Abdel-fattah Zahaliqa is the Defendant's partner in a book distribution business and will describe many of the Overt Acts allegations as involving legitimate transactions in the distribution of those books and specific detail he will provide information about \$1,000.00 which was sent to the Defendant's father and that \$1,000.00's was particularly for him and to pay for the distribution of a specific piece of literature.

6. Sheikh Hayyan Al-Idrisi. He is the chairman of the Blind Girls Association and will confirm the receipts provided that the Defendant made charitable donations to that association.

7. Sheikh Yacoub Qirrish is a Spiritual Leader and Advisor to the Defendant and will testify as to the Defendant's connection in the Palestinian Authority as opposed the PIJ and the Defendant's history of supporting the Peace Process in the Middle East and when he was in the United States. There is a specific Overt Act where the Government claims that the Defendant was told by this witness that he should contact the PIJ and this witness will testify that is completely untrue and will explain the conversation which was recorded during the wire tap.

8. Azmi Al-Khateeb will explain the distribution of funds to the institution of funding for the Deaf and Mute Children in the Middle East in which he is a significant operator of that fund.

9. Dr. Khalil Shikaki will testify about the distribution of funds to orphans in the Middle East by the Defendant through Dr. Shikaki and others. He will also describe the Defendant's scholarship to the University of South Florida and is a witness to the legitimate studies that the Defendant began in the Middle East at the University there as well as his continued studies in the United States.

10. Wafa Shikaki is Dr. Shikaki's wife and can testify about the charitable donations that she was the founder of the Muslim Women's Society and Orphans Sponsorship Program and can detail the Defendant's participation in charitable distribution of donations between those two organizations.

11. Dr. Rasim Khamaisi can describe the distribution through his participation of funds in the Middle East by the Defendant in 1995 and in 1995 he made a specific loan to the Defendant to aid his living expenses and studies while in the United States and an independent source of income unconnected to any terrorist organization.

12. Abdel Abdelal is an orphan in Americamp that the Defendant supported and he can describe the Defendant's participation in the charitable donation to needy orphans in the Middle East.

13. Ibrahim O'tawi will describe the Defendant's participation in the distribution of funds to orphans.

14. Iliyan Al Hindi will describe the Defendant's participation in the distribution of funds to orphans

15. Said Abu Kharma will describe the Defendant's participation in the distribution of

funds to orphans.

16. Tawfeeq Al-Sharif will describe the Defendant's participation in the distribution of funds to orphans.

17. Dawoud Mikawi, an individual who is described in Overt Act 36 of the original Indictment and will explain the activity of the Defendant described in that Overt Act and the Defendant's participation in the disbursement of funds. He also is responsible for reprinting the WISE Journal in the West Bank which is the contribution by the Defendant and something that he sent to the Middle East specifically for that project and not for any terrorist activity.

18. Dr. Atef Alawna is an official in the Palestinian Authority and can verify funds that were provided by the Palestinian Authority to the Defendant to facilitate his studying in the United States and to authenticate the document which sets out those specific funds in the specific years they were awarded to the Defendant as a scholarship.

19. Dr. Ali Jirbawi is a professor at Bier Leidt University and can testify as to the Defendant's political activity while a legitimate student, is voicing of a view supporting the Peace Process and being a student who always opposed terrorist activities and the use of terrorism as a solution for the problems in the Middle East contrary to the position of the PIJ.

20. Suzan Awad. He is in charge of the orphanage house and will testify that he received funds from the Defendant and from the Muslim Women's Society and will describe the ultimate destination of those funds and their charitable usages.

21. Qasim Abu Harb is an individual who was sent a fax about three books sent to the Arab Study Society and he will testify that this was not code for any terrorist activity but for the

three books which was specifically requested and sent by the Defendant to the Arab Study Society.

22. Hussein Gheith is the librarian at the Arab Study Society who actually received the three books which the Defendant provided and will describe the academic importance of these volumes and why they were sent and received.

23. Dr. Saleh Abdel-Jawad is a professor of the Defendant's at Beir Leidt University and will describe the Defendant's participation through the benefit of the Palestinian Authority and he will describe the differences between the Palestinian Authority and its antagonism with the PIJ.

24. Ishaq Budeiri is the head of the Arab Study Society where the Defendant used to work. He can describe the role of the Arab Study Society and participating in the Peace Negotiation Process and the Defendant's support of that Society while employed there.

25. Saleem Al Bastt sent a fax to the Defendant in 1994 asking for donations for the Americamp and he will testify as to who actually received the funds provided by the Defendant for that charitable purpose.

26. Khalid al-Hulu is a physician at the Americamp Clinic and will testify that he solicited funds from the Defendant and that the Defendant provided funds used at that particular clinic.

27. Abbas Nimr is an individual who assisted Khalil Shikaki in cashing a check from the Defendant in 1992 and will testify as to where the check was cashed and how it was cashed and why certain information relating to a Swish account would be on the document while it had

no application to the Defendant or Dr. Shikaki.

28. Ajjouli is a money broker in the Middle East who actually received the Shikaki check in 1992 and will testify as to how checks were cashed in the Middle East at his particular exchange and will speak to the allegations made by the Government as to this being a suspicious financial transaction. He will give the specific detail as to who cashed the check and whose account was verified and what the Defendant's limited participation was.

Memorandum of Law

In a criminal case, the Court may order the taking of a foreign deposition, “[w]henever due to exceptional circumstances of the case it is in the interest of justice,” to do so. Fed. R. Crim. P. 15(a)(1). The proponent of the deposition bears the burden of establishing “exceptional circumstances.” *Drogoul*, 1 F.3d at 1552. In *Drogoul*, the Eleventh Circuit fashioned a three-part test to determine whether “exceptional circumstances” exist. First, the witness must be unavailable to testify at trial. Second, the absence of testimony material to the movant's case would result in injustice. Third, whether there are countervailing factors render taking the deposition unjust to the nonmoving party. *Id.*; see also *United States v. Ramos*, 45 F.3d 1519 (11 Cir. 1995) (following the reasoning of *Drogoul*). “When a prospective witness is unlikely to appear at trial and his testimony is critical to the case, simple fairness requires permitting the moving party to preserve that testimony. . . .” *Drogoul*, 1 F.3d at 1552.

Unavailability need not be established conclusively, but need only be probable. *Id.* at 1553. In the instant case, all the prospective witnesses have stated that they are unwilling

and unable to appear at trial. Moreover, they are foreign nationals residing outside the United States in militarily occupied territory and, as such, have extremely limited ability to travel abroad. It is clearly probable that they will be unavailable for trial.

The prospective witnesses' testimony also qualifies as material evidence, the absence of which would cause an injustice at trial. As stated above, the proposed testimony of all the prospective witnesses will directly rebut the government's contentions that Mr. Hammoudeh was active on behalf of or provided material support to PIJ. An injustice will result if the jury cannot hear the proposed testimony.

Finally, there are no countervailing factors that would make taking this deposition unjust to the government. The Eleventh Circuit has found "neither the possibility of inaccurate translations," nor a party's inability to confront witnesses called only by deposition to be an unjust countervailing factor to the taking of foreign depositions. *Ramos*, 45 F.3d at 1523-24 (citing *Drogoul*, 1 F.3d at 1554-56). Nor is delay an issue here. Mr. Hammoudeh is moving adequately in advance of the April 4, 2005 trial date to request the taking of the foreign depositions; as soon as the undersigned was able to locate and contact the prospective witnesses, this request was made. While the prospective witnesses are located in areas currently under military occupation and the site of considerable unrest, the United States has governmental officials who could attend such foreign depositions. *Id.* If deposing such witnesses in person proves too logistically difficult, the Eleventh Circuit has upheld the validity of preserving testimony via other measures, such as written interrogatories. *Id.* at

1524.²

With regard to the payment of costs, Fed.R.Crim.P. 15(d) provides:

If the deposition was requested by the government, the court may - or if the defendant is unable to bear the deposition expenses, the court must - order the government to pay:

- (1) any reasonable travel and subsistence expenses of the defendant and defendant's attorney to attend the deposition; and
- (2) the costs of the deposition transcript.

Fed. R. Crim. P. 15(d).

Where, as here, the defendant has been found to be indigent previously in this case before retaining counsel and in a separate new case scheduled for trial in March 2005, while the Defendant has been denied bail and is unable to generate income, an order requiring the government to pay the costs and expenses related to the depositions is sought. *See* Rule 15, Advisory Committee Notes, 2002 Amendments (setting forth that the Rule, as amended, mandates that “[i]f the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs - regardless of who requested the deposition”) (emphasis in original).

WHEREFORE, Defendant Sameeh Hammoudeh respectfully requests that the Court order the taking of the foreign depositions of Taha Hammoudeh, Bahiyya Hammoudeh, Ma'an Hammoudeh, Abdel-lateet Abu-Hashim, Abdel-fattah Zahaliqa, Sheikh Hayyan Al-Idrisi, Sheikh

² Since Mr. Hammoudeh is mindful of the extremely volatile political conditions in the Middle East, he is also open to the possibility of conducting the proposed depositions from Tampa via alternative methods, such as, for example, a satellite link, depending on the viability and availability of such methods.

Yacoub Qirrish, Azmi Al-Khateeb, Dr. Khalil Shikaki, Wafa Shikaki, Dr. Rasim Khamaisi,
Adel Abdelal, Ibrahim O'tawi, Iliyan Al Hindi, Said Abu Kharma, Tawfeeq Al-Sharif, Dawoud
Mikawi, Dr. Atef Alawna, Dr. Ali Jirbawi, Suzan Awad, Qasim Abu Harb, Hussein Gheith, Dr.
Saleh Abdel-Jawad, Ishaq Budeiri, Saleem Al Bastt, Khalid Al-Hulu, Abbas Nimr, Ajjouli as

soon as practicable, and that the government be required to bear all related costs and expenses.

Dated this 9th day of February 2005.

Respectfully submitted,

LAW OFFICE OF STEPHEN N. BERNSTEIN

/s/ Stephen N. Bernstein _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of February, 2005, a true and correct copy of the foregoing has been furnished by regular U. S. mail delivery, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Kringsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al- Arian; Bruce Howie, counsel for Ghassan Ballut; and to Wadie E. Said, counsel for Hatem Naji Fariz.

/s/ Stephen N. Bernstein

Stephen N. Bernstein
Counsel for Defendant Hammoudeh