

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA**

UNITED STATES)	
)	
v.)	Case No. 8:03-CR-77-T-TBM
)	The Honorable James S. Moody, Jr.
SAMI AMIN AL-ARIAN)	
)	
<u>Defendant.</u>)	

MEMORANDUM OF LAW

Dr. Sami Al-Arian, by and through undersigned counsel, hereby files this Memorandum of Law as requested by the Court to address whether introducing an expert affidavit that the affiant believed was true but which the Government contends Dr. Al-Arian knew to be false constitutes an obstruction of justice under the omnibus clause of 18 U.S.C. § 1503. As discussed below, finding that Dr. Al-Arian obstructed justice on the facts of this case undermines the fundamental underpinnings of our entire adversarial system of justice, in particular, the Fifth and Sixth Amendments.

Background

The facts surrounding the preparation of the affidavit at issue are straight-forward. In 1994, Dr. Al-Arian contacted Dr. Ziad Abu-Amr, a recognized expert on the PIJ, to ask if Mr. Amr would come to the United States to be an expert witness in Mazen Al-Najjar’s case. (Tr. at 48.) When Dr. Amr expressed concerns about his availability to come to the United States, Dr. Al-Arian asked him to prepare an affidavit about his knowledge of the PIJ by answering questions that would be sent to him by Mr. Najjar’s attorney; Dr. Amr agreed to prepare an affidavit. (Tr. at 48, 60.) Dr. Amr’s conclusion

was ultimately favorable to Dr. Al-Arian, and Dr. Al-Arian offered Dr. Amr's affidavit into evidence during his detention hearing in 2003.

Significantly, there is no evidence that Dr. Al-Arian pressured Dr. Amr to prepare an affidavit. There is no evidence Dr. Al-Arian otherwise influenced the substance of the affidavit. There is no evidence Dr. Al-Arian had any involvement at all in the preparation of the affidavit. Finally, there is no evidence Dr. Al-Arian provided Dr. Amr with any of the underlying information on which he relied to reach his conclusions.

To the contrary, Dr. Amr testified that his discussions about the substance of the affidavit were with Mr. Najjar's counsel David Cole, not with Dr. Al-Arian. (Tr. at 108.) Additionally, Dr. Amr repeatedly testified that he believed his conclusions in the affidavit were correct (see, e.g., Tr. at 94, 96) and explained that the information on which he based his statements came from his own knowledge and research sources (see, e.g., Tr. at 94 ("my primary source [in Palestine] was Abd al Aziz Awda."), Tr. at 96.) Dr. Amr unequivocally testified that he prepared the affidavit of his own volition, that he relied entirely on his own research and expertise to come to his own conclusions, and that he fully believed all of the statements in his affidavit were true to the best of his knowledge:

[Defense Counsel]: All right. Did Dr. Al-Arian attempt to influence in any way what you said in that affidavit?

[Dr. Amr]: I don't think so, because the transcript of the phone call is there, and people can examine the text and see if there was any attempts to influence me, and I – you know, I don't think I'm – I would allow anybody to manipulate me in that way.

Q: Your credibility as an academic is important to you?

A: Very much so, sir.

Q: Was it important to you at the time the call was made?

A: The what?

Q: Was it important to you at the time you had the conversation with Dr. Al-Arian?

A: Always; and it's a matter of integrity, too, not only academic stature.

Q: Okay. So, is it fair to say that Dr. Al-Arian didn't influence your creation of this affidavit?

A: No. I did that willingly, and I am responsible for it.

* * *

Q: All right. Then it is fair to say that whatever was written in the contents – that appear in the contents of the affidavit were your own words?

A: And I take full responsibility for it, sir.

Q: All right. With respect to the affidavit, did you tell the truth in the affidavit?

A: Did I tell the truth?

Q: In the affidavit, is the affidavit true to the best of your knowledge?

A: Yes, to the best of my knowledge.

Q: Was it true at the time you wrote it?

A: To the best of my knowledge.

(Tr. at 107-109.)

Consistent with Dr. Amr's testimony, the Government has never accused Dr. Amr of committing perjury, has never accused Dr. Al-Arian of suborning perjury,¹ and

¹ See, e.g., U.S. v. Silverman, 745 F.2d 1386, 1394 (11th Cir. 1984) ("In order to constitute the offense of subornation of perjury, 18 U.S.C. § 1621 (1982), perjury must have been actually committed."). Perjury is particular to the testifying witness -- if the witness did not perjure himself, there cannot be subornation of perjury for offering the witness's testimony in defense of a criminal case.

has never accused Dr. Al-Arian of tampering with a witness in any way. Instead, the Government accuses Dr. Al-Arian of obstructing justice solely because, in the Government's view, Dr. Al-Arian had independent knowledge or a belief that Dr. Amr's conclusions were incorrect. As discussed below, to find that Dr. Al-Arian obstructed justice or had a corrupt motive on these facts would wholly undermine our adversarial judicial system.

ARGUMENT

After an exhaustive search of case law, statutes and ethics rules, we have found no support whatsoever to suggest that Dr. Al-Arian's conduct in this case amounted to an obstruction of justice. This is not surprising, as such a finding would undermine the very core of our adversarial system of justice, as well as the fundamental rights afforded the accused in every criminal case. Indeed, finding that Dr. Al-Arian obstructed justice on the facts of this case amounts to a frontal attack on his fundamental right to present a defense.

I. Dr. Amr's Expert Opinion Cannot Constitute False Testimony.

Dr. Amr repeatedly and consistently testified that the statements in his affidavit were based on his own knowledge, expertise and research. When asked for the basis of his opinions, he readily gave them. (See, e.g., Tr. at 91, 94, 96.) When asked whether the statements in his affidavit were truthful, he repeatedly stated that they were truthful to the best of his knowledge. (Tr. at 107-109.) Moreover, when Dr. Amr did not have sufficient information to form an opinion, he readily acknowledged his inability to do so: "Q: Were you trying to say the Palestinian Islamic Jihad didn't have any presence in the

United States? A: I did – I can't prove that, or I don't have any established knowledge of that." (Tr. at 76.)

Dr. Amr's expert opinion is just that – an opinion. To the extent Dr. Al-Arian is charged with obstructing justice by offering a "false" affidavit into evidence, there is no basis for the charge because the opinions therein cannot be "false," even if they were mistaken. Again, there are no allegations in this case that Dr. Amr committed perjury or that Dr. Al-Arian suborned perjury. Because Dr. Amr's expert opinion is not the product of witness tampering and was not perjurious, it is simply an opinion with which the Government disagrees. That opinion cannot constitute false testimony to form the basis of an obstruction of justice charge against a criminal defendant who did nothing more than offer it as exculpatory evidence in his affirmative case.

This conclusion is even more evident in light of the nature of our adversarial system of justice. The Government was able to cross-examine Dr. Amr and confront him with evidence it believed was contrary to Dr. Amr's conclusions. As the Supreme Court stated in Watkins v. Sowders, 449 U.S. 341, 349 (1981), "under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth." (citing 5 J. Wigmore, Evidence § 1367 (Chadbourn rev. 1974) ("[cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth.")).

II. Even if Dr. Amr's Expert Opinion was Incorrect, Finding that Dr. Al-Arian Obstructed Justice On These Facts Deprives Him of His Fundamental Right to Present a Defense.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the*

defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.” Washington v. Texas, 388 U.S. 14, 19 (1967) (emphasis added).

Implicit in this often-cited passage is the recognition that one side or the other will ultimately be presenting evidence (testimony or otherwise) that the jury finds to be “false.” It does not follow, however, that by exercising his fundamental right to put on a defense, the defendant was “obstructing justice” or “suborning perjury” if the jury ultimately chooses to disbelieve that evidence.

The right of a defendant to present a defense includes the right to present witnesses on his behalf. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed. 297 (1967) (“Few rights are more fundamental than that of an accused to present witnesses in his own defense.”). While those rights do not extend to suborning perjury or procuring false evidence, there is no limitation on a defendant’s right to present testimony from a truthful witness, even if he knows the witness may be mistaken in his beliefs. To hold otherwise would effectively preclude all defendants who know they are guilty from presenting any affirmative evidence in their own defense, as it is necessarily being offered to persuade the finder of fact that he is not guilty of the offense charged.

Thus, for example, a defendant on trial for murder who knows he committed the crime would be obstructing justice if he introduced testimony of a character witness who would truthfully testify that, based on a long-standing relationship with the defendant, the defendant is a non-violent individual. As in the case at bar, the murder defendant in this example would be introducing into evidence the truthful opinion of a witness (that the defendant is non-violent) which the defendant knows is incorrect for the purpose of

influencing the finder of fact. Similarly, a defendant in a vehicular homicide case accused of running a red light could face obstruction of justice charges for calling in his defense an eyewitness who truthfully believes that the light was green.

Not only are these scenarios patently absurd, they also unconstitutionally lessen the burden of proof that rests on the Government in criminal cases by eliminating the defendant's ability to offer into evidence truthful but mistaken testimony in his defense. Again, taken to its logical conclusion, a criminal defendant who knows he is guilty of the crime charged could never introduce truthful, affirmative evidence in his defense in an effort to influence the fact finder and argue that a reasonable doubt exists as to his guilt.

The Supreme Court recognized the unconstitutional nature of lessening the Government's burden of proof in a criminal case in United States v. Cool, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972). In Cool, the defendant introduced exculpatory testimony of his alleged accomplice. The trial court instructed the jury that if they were convinced the accomplice's exculpatory testimony was true beyond a reasonable doubt, they should give it the same effect as testimony of an unimplicated witness. The Supreme Court held that this instruction constituted reversible error for two reasons: (1) it suggested that the jury should reject the evidence if they had a reasonable doubt as to its veracity, which interfered with defendant's Sixth Amendment right to present exculpatory testimony of an accomplice and (2) it substantially reduced the Government's burden of proof. Id. at 102-103 ("Such an instruction places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt.").

Finding Dr. Al-Arian guilty of obstructing justice for introducing Dr. Amr's truthful but mistaken expert opinion would have the same effect of reducing the Government's burden of proof, as the Government would not have to answer to truthful but mistaken testimony of exculpatory witnesses.

III. Finding Dr. Al-Arian Guilty of Obstruction of Justice On the Facts of This Case Would Violate His Fifth Amendment Right Against Self-Incrimination.

In the context of this case, Dr. Al-Arian's involvement with Dr. Amr's affidavit ended after Dr. Amr agreed, of his own volition, to prepare an affidavit about the PIJ. Ultimately, Dr. Amr's conclusions proved to be exculpatory to Dr. Al-Arian's defense. The Government contends that for Dr. Al-Arian to introduce that exculpatory evidence, which Dr. Amr believed to be truthful, constituted obstruction of justice on Dr. Al-Arian's part because he had independent knowledge that Dr. Amr's opinion was incorrect. This contention creates an untenable and unconstitutional scenario in which the burden is placed on the defendant to prevent incorrect testimony from going before the fact finder, or to correct incorrect testimony if it has been presented by his attorneys in good faith. Where the witness is testifying truthfully and the attorneys are acting in good faith by seeking to introduce that testimony, the burden should not be on the defendant to confess his crimes either before or after the introduction of that evidence. Such a scenario flies in the face of the defendant's fundamental Fifth Amendment right against self-incrimination.

IV. Dr. Amr's Affidavit Is Inadmissible Because it is Immaterial.

Although Dr. Amr wrote his affidavit in 2000, Dr. Al-Arian did not introduce the affidavit as evidence until his 2003 detention hearing. Therefore, the opinions contained

in the affidavit were significantly out of date at the time the affidavit was offered in Dr. Al-Arian's detention hearing and could not have materially influenced the finder of fact. For this reason, as well, Dr. Al-Arian could not have obstructed justice when he offered Dr. Amr's affidavit into evidence.

V. Any Evidence that Dr. Al-Arian Obstructed Justice On These Facts is More Prejudicial than Probative, and Its Admission Therefore Violates Rule 403.

The Government's introduction of evidence that Dr. Al-Arian obstructed justice is contrary to Federal Rule of Evidence 403 because the prejudicial nature of the evidence far outweighs any probative value such evidence may have in the context of this case. As discussed above, Dr. Al-Arian could not have been obstructing justice within the meaning of section 1503 when he offered Dr. Amr's expert opinion into evidence. Offering evidence of such an obstruction therefore has no probative value whatsoever, and to the contrary is highly prejudicial to Dr. Al-Arian's case. First, such evidence is prejudicial because the nature of an obstruction charge directly implicates Dr. Al-Arian's credibility. Second, such evidence is prejudicial because the underlying "falsehood" in the affidavit, as contended by the Government, goes to a material issue in this case – namely Dr. Al-Arian's membership in the PIJ. Clearly, the prejudicial nature of obstruction evidence in this case far outweighs its probative value, and such evidence should therefore be excluded under Rule 403.

VI. The Obstruction of Justice Charge Should be Stricken from the Indictment Because the Government Cannot Make its Case.

As discussed above, Dr. Al-Arian could not have obstructed justice within the meaning of section 1503 by offering a truthful affidavit into evidence, even if he knew the affiant was mistaken in his beliefs. Indeed, holding that such conduct constitutes

obstruction of justice would violate Dr. Al-Arian's Fifth Amendment right and his fundamental right to present a defense. Because the Government cannot make its case for obstruction of justice, this charge fails as a matter of law and should be stricken from the indictment.

CONCLUSION

For the foregoing and any other reasons this Court deems appropriate, evidence that Dr. Al-Arian obstructed justice by offering Dr. Amr's affidavit into evidence should not be admitted in this trial and the obstruction of justice charge should be stricken from the indictment.

Dated: September 6, 2005

Respectfully submitted,

/s/ Linda Moreno

LINDA MORENO, ESQ.
P.O. Box 10985
Tampa, Florida 33679
Telephone: (813) 247-4500
Telecopier: (813) 247-4551
Florida Bar No: 112283

WILLIAM B. MOFFITT, ESQ.
(VSB #14877)
Cozen O'Connor
1667 K Street, NW, Suite 500
Washington, D.C. 20006
Telephone: (202) 912-4800
Telecopier: (202) 912-4835

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th of September, 2005, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Attorney for Sami Al-Arian