UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN,
SAMEEH TAHA HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATEM NAJI FARIZ

RESPONSE OF THE UNITED STATES
IN OPPOSITION TO DEFENDANT HAMMOUDEH'S
MOTION TO SUPPRESS SEARCH WARRANT EVIDENCE

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby submits its Response in Opposition to Defendant Hammoudeh's Motion to Suppress Search Warrant Evidence:

Defendant Hammoudeh seeks wide-ranging relief in his motion to suppress, yet he provides legal arguments solely addressing the suppression of physical evidence seized pursuant to the search warrant executed at his residence.[1] Since the defendant advances no arguments regarding the validity of the indictment, the arrest warrant issued from that indictment, or the circumstances surrounding the execution of the arrest warrant, the government will not respond here to his unsubstantiated request for

[1]At the conclusion of his brief, the defendant makes a fleeting reference to the search of his office, but he fails to include any facts or argument to support a motion to suppress evidence seized from his office at IAF. Such a motion would be futile because there was a valid search warrant for that location, and on the morning he was arrested, the defendant executed a consent to search his office at IAF. A copy of that consent has been attached to the government's response to defendant Al-Arian's motion to suppress.

suppression of “statements and admissions of the defendant or any and all observations of law enforcement officers.” Doc. 810, Def’s brief at 1.[2]

Although it is difficult to ascertain the point of many of his assertions, defendant Hammoudeh appears to present two separate grounds for suppression of evidence seized in February, 2003, as a result of the search executed at his residence at 6004 Soaring Avenue in Tampa, Florida. First, the defendant contends that Special Agent Myers of the Federal Bureau of Investigation deliberately, or with reckless disregard for the truth, included false statements and omitted material facts from his affidavit in support of the search warrant. The defendant therefore claims he is entitled to an evidentiary hearing and suppression of evidence in accordance with Franks v. Delaware, 438 U.S. 154 (1978). Next, the defendant claims that the law enforcement officers who executed the search exceeded the scope of the warrant by seizing items not specifically named in the warrant, thereby conducting an unlawful general exploratory search. The defendant, however, fails to analyze his assertions pursuant to the relevant case law and makes conclusory and confusing leaps of logic in his bid to suppress evidence. As set forth below in detail, his rambling and disorganized claims fall far short of what is required to warrant the suppression of evidence.

The defendant presents scant evidence in support of his Franks argument--evidence which does not satisfy his burden of making a concrete preliminary showing that Agent Myers deliberately or recklessly included false statements or failed to include material information in his affidavit. Nor does the defendant explain how the Court's

[2]The defendant also neglects to specify the admissions, statements and observations which would ostensibly be the object of his unsubstantiated request.

probable cause finding would be undermined if the disputed portions of the affidavit were disregarded. Furthermore, the record shows that the seizing agents conducted a proper search and made reasonable seizures of evidence. Indeed, the record allows defendant Hammoudeh's claims to be analyzed and resolved without an evidentiary hearing. Defendant Hammoudeh's motion to suppress should therefore be summarily denied.

A. Procedural History

On February 19, 2003, a federal grand jury returned a fifty-count indictment charging Defendant Hammoudeh and seven co-defendants with a variety of offenses relating to their activities on behalf of the Palestinian Islamic Jihad, a designated foreign terrorist organization. Hammoudeh was charged with: Count One–Conspiracy to Commit Racketeering; Count Two–Conspiracy to Murder and Maim Abroad; Count Three–Conspiracy to Provide Material Support to a Foreign Terrorist Organization; Count Four–Conspiracy to Violate IEEPA; Counts Five through Nine, Eleven through Thirteen, Fifteen, Thirty-Three, Thirty Four and Thirty-Nine–"Travel Act" Violations; and Count Forty-Six–Making a False Statement in an Immigration Application.

That same day, the Court also issued a warrant to search the defendant's residence at 6004 Soaring Avenue, Tampa, Florida. The grounds for this warrant were set forth in the lengthy and detailed affidavit of FBI Special Agent Kerry L. Myers. A copy of the indictment returned by the grand jury was attached and incorporated into Agent Myers' affidavit. A search was executed at the premises on February 20, 2003, and evidence was seized. That evidence is the subject of this motion.

B. The Law Regarding the Legal Sufficiency of Warrants

1. The Standard of Review for Warrants

The first principle to be applied to an after-the-fact review of the legal sufficiency of search warrants issued by judicial officers is that a reviewing court must pay great deference to the decisions made by issuing magistrate judges. Reasonable minds may differ on the question whether a particular affidavit establishes probable cause, so a preference for warrants is best effectuated by according "great deference" to a magistrate's determination. United States v. Leon, 468 U.S. 897, 914 (1984); Spinelli v. United States, 393 U.S. 410, 419 (1969). This standard of review forecloses an endless after-the-fact debate about probable cause determinations. As specifically stated by the Supreme Court:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts" (citation omitted). "A grudging or negative attitude by reviewing courts toward warrants" (citation omitted) is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant (sic) "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner (citation omitted).

Illinois v. Gates, 462 U.S. 213, 236 (1983). Applying this deference standard, the Supreme Court explained that so long as the magistrate had a "substantial basis for conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. Id. at 236, quoting Jones v. United States, 362 U.S. 257, 271 (1960). In doubtful or marginal cases, the existence of probable cause will be determined largely by the preference accorded to warrants. United States v. Ventresca, 380 U.S. 102, 109 (1965).

2. The Probable Cause Standard

The "probable cause" standard for issuing warrants can be defined as follows: (1) probable cause is determined by the totality of circumstances; (2) probable cause is a practical, nontechnical conception; (3) probable cause deals with probabilities involving factual and practical considerations of everyday life; (4) probable cause is a fluid concept -- turning on the assessment of probabilities in particular factual contexts; (5) the quanta of proof required in criminal proceedings is not applicable to a finding of probable cause for a warrant; (6) technical requirements of elaborate specificity once required for common law pleadings have no place in affidavits and warrants; and (7) the magistrate has the authority to draw such reasonable inferences as he will from the material supplied to him by the applicant for the warrant. Gates, 462 U.S. at 231-235, 240. In evaluating the legal sufficiency of a warrant, the reviewing court must be mindful of the following:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 462 U.S. at 238-39, quoting Jones, 362 U.S. at 271. On the other hand, a "bare bones" affidavit or one based wholly on conclusory statements is not adequate. Gates, 462 U.S. at 239; United States v. Marmolejo, 89 F.3d 1185, 1198 (5th Cir. 1996), cert. denied, 522 U.S. 1014(1997). (An affidavit that contains only conclusions and lacks facts and circumstances from which a magistrate can independently determine probable cause is considered "bare bones.").

There must also be a nexus between the materials to be seized and the location to be searched. A nexus between objects to be seized and the place to be searched is established when the probable cause circumstances set out in the affidavit would justify belief by a person of reasonable caution that the objects to be seized would probably be found at the place to be searched. United States v. Hargas, 128 F.3d 1358, 1362 (10th Cir. 1997), cert. denied, 523 U.S. 1079 (1998). Beyond that, there need not even be direct evidence or personal knowledge that the objects to be seized are located at the place to be searched. Magistrate judges often and permissibly rely on the opinion of police officers as to where seizable objects may be kept. Id. at 1362. The standard is "probable cause" (that is, "probably"), not "more-likely-than-not." United States v. Heldt, 668 F.2d 1238, 1257 n. 27 (D.C. Cir. 1981), cert. denied, sub nom. Hubbard v. United States, 456 U.S. 926, 1982.

3. The Franks Analysis

In Franks v. Delaware, 438 U.S. 154 (1978), the United States Supreme Court addressed the question of whether a defendant ever has the right, under the Fourth and Fourteenth Amendments, to challenge the truthfulness of factual statements made in an affidavit in support of a search warrant. In its holding, the Court first reaffirmed the presumption of validity–the deference--accorded to such an affidavit. Id. at 171. Given this presumption, and other policy considerations, see id. at 167, the Franks Court issued a rule of "limited scope" regarding (i) the circumstances under which exclusion of evidence is mandated when an affidavit in support of a search warrant contains a "deliberately or recklessly false statement" and (ii) when a hearing on allegations of such misstatements is warranted. Id. at 165-67. As set forth below, Franks and its

progeny have imposed a substantial burden on the defendant in making an adequate showing in both of these situations to prevent the misuse of evidentiary hearings for purposes of discovery or obstruction.

Indeed, the Supreme Court was careful to describe what the Constitution demands with respect to the veracity of an affidavit in support of a search warrant:

> "When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

438 U.S. at 165, quoting United States v. Halsey, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966), aff'd, Docket No. 31369 (2d Cir. June 12, 1967) (unreported decision). Thus, with respect to the assertions raised by defendant Hammoudeh, the case law is clear that an unsupported, conclusory allegation that an affiant has demonstrated an intentional or reckless disregard for the truth will not suffice. Rather, to prevail, the defendant must "make a *concrete preliminary showing* that: (1) the affiant deliberately or recklessly included false statements, or failed to include material information in the affidavit; and (2) the misrepresentation was essential to the finding of probable cause." United States v. Cross, 928 F.2d 1030, 1040 (11th Cir.), cert. denied, 502 U.S. 985 (1991) (emphasis added). Negligent misrepresentations or negligent omissions will not undermine the affidavit. Franks, 438 U.S. at 171; moreover, "[i]nsignificant and immaterial misrepresentations or omissions will not invalidate a warrant." United States v. Sims, 845 F.2d 1564, 1571 (11th Cir.), cert. denied, 488 U.S. 957 (1988), quoting

United States v. Ofshe, 817 F.2d 1508, 1513 (11th Cir.), cert. denied, 484 U.S. 963 (1987). Recklessness should be inferred from the omission of information only when the omission results from flagrant police actions. See United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979), cert. denied, sub nom. Celestino v. United States, 445 U.S. 967 (1980). Even intentional or reckless omissions will invalidate a warrant only if inclusion of the omitted facts would have prevented a finding of probable cause. United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir.), cert. denied, 498 U.S. 901 (1990).

Moreover, the defendant is not entitled to an evidentiary hearing on the Franks allegation simply because he asks for one. To the contrary:

> [t]o mandate an evidentiary hearing, the challengers attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. . . . Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks, 438 U.S. at 171.

The Eleventh Circuit has applied this reasoning in a number of cases that are instructive here. In United States v. Jenkins, 901 F.2d at 1079, the defendant argued that evidence seized from his residence, pursuant to a search warrant, should have been suppressed because the affidavit failed to mention certain facts, the inclusion of which he contended would have precluded a finding of probable cause. The defendant, who was convicted of bank larceny, proffered a list of alleged “omissions” to the court,

including arguably exculpatory details about the defendant's work schedule at the bank, his criminal history, and circumstances of the bank larceny. The district court denied the motion to suppress, finding that the alleged omissions were not material. 901 F.2d at 1080.[3]

On appeal, the Eleventh Circuit reiterated that "insignificant and immaterial misrepresentations or omissions will not invalidate a warrant," quoting Sims, 845 F.2d at 1571, and affirmed the magistrate's conclusion that the alleged omissions were not material. Continuing its Franks analysis, the court noted that the defendant did not produce any "offers of proof" indicating that the affiant had deliberately excluded the alleged omissions from the affidavit in support of the search warrant. Id. at 1080. Moreover, the court held that inclusion of the allegedly omitted facts would not have precluded the finding of probable cause. Id.

In United States v. Cross, 928 F.2d at 1040, the defendant appealed to the Eleventh Circuit, claiming that the district court had erred in failing to conduct a pretrial evidentiary hearing on his Franks allegation that the affiant intentionally or recklessly included false information and misleadingly omitted material facts from the search warrant affidavit. The defendant, Robert Lodge, and co-defendant Mervyn Cross, were both convicted of conspiracy to persuade a minor to engage in sexually explicit conduct

[3]Although the Eleventh Circuit's opinion does not explicitly state that the District Court declined to conduct an *evidentiary* hearing on the defendant's Franks claim, we assume that such a hearing did not occur for the following reasons: (1) the only "evidence" reviewed in the Franks analysis was the affidavit in support of the search warrant; (2) there was no mention of testimony by the affiant or any defense witnesses; and (3) the Court set forth the reasons why the defendant would not be entitled to an evidentiary hearing, 901 F.2d at 1080.

in order to produce pornography. Id. at 1034. During the course of the investigation, law enforcement officers searched Lodge's home. Id. at 1036. Defendant Lodge proffered several "facts" to the district court which he claimed mandated a pretrial hearing, including the affiant's failure to contact Cross to verify Lodge's involvement in the scheme; that Cross denied making statements attributed to him in the affidavit; and that information about the statements came from several prisoners of unknown veracity. Id. The district court, however, found that even if all the allegedly false information were removed and the omitted information added, the revised affidavit would still contain allegations sufficient to support a finding of probable cause. Id. at 141. The Eleventh Circuit affirmed, holding that the revised affidavit demonstrated a fair probability that contraband or evidence of a crime would be found in the defendant's home. Id. For that reason, the Court held that the defendant was not entitled to an evidentiary hearing on his Franks motion.

C. Argument

1. The Defendant Has Not Made Any Showing, Much Less a "Concrete Preliminary Showing," that the Affiant Deliberately or Recklessly Included False Statements or Omitted Material Facts from the Search Warrant Affidavit.

Franks and its progeny are clear: Allegations of negligence or innocent mistake are not sufficient to warrant a hearing or suppression of evidence. Franks, 438 U.S. at 172; United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980) ("[T]he accused bears the burden of showing by a preponderance of the evidence that the omission was more than a negligent act.") Thus, the Supreme Court mandates that the defendant mounting a challenge pursuant to Franks must specifically allege deliberate falsehoods or

omissions *and* support those allegations with an offer of proof, through affidavits or otherwise reliable statements of witnesses. Franks, 438 U.S. at 172. Defendant Hammoudeh has failed on both counts.

An initial reading of the defendant's memorandum might suggest that the defendant has attempted to satisfy the first prong of the Franks analysis–to identify specific falsehoods and misleading omissions in the affidavit. Upon closer scrutiny, however, the defendant's brief reveals that he has failed to shed any light whatsoever on Agent Myers' state of mind when he executed the affidavit; rather, the defendant attempts to meet his substantial burden under Franks by baldly asserting that Agent Myers "must have known" that certain information was false when he included it and that other information was central to the determination of probable cause, and its omission therefore misled the magistrate. See Martin, 615 F.2d at 329 (holding that accused did not meet burden under Franks because, inter alia, there was not evidence illuminating the state of mind of the affiant). While it is true that a defendant may rely on circumstantial evidence to show a deliberate intent to misstate the facts and/or to mislead the magistrate, defendant Hammoudeh has not offered this type of evidence for the Court's review. At best, his unsupported allegations show that Agent Myers made immaterial, innocent mistakes in his affidavit. The defendant's allegations therefore do not satisfy the demanding burden mandated by Franks and accordingly, he is not entitled to an evidentiary hearing to explore those claims.

a. The Affiant Did Not Intentionally Omit Material Facts from his Affidavit.

Defendant Hammoudeh's first argument on his Franks claim is that Agent Myers failed to include sufficient information in his affidavit about the defendant's "charitable" activities. In asserting this argument, the defendant reveals that he has missed the point made repeatedly throughout the indictment and affidavit–that he and his co-defendants have been accused of using "charitable" activities as fronts for the PIJ and have used coded language to carry out their fund-raising and support activities on behalf of the PIJ and its fronts. The defendant's argument therefore does not raise a Franks challenge, but rather a premature attack on the government's theory of the case–an attack more suitable for trial than pretrial motion.

Specifically, the government alleged in the indictment that the enterprise members (one of whom is Defendant Hammoudeh) "would and did actively solicit and raise monies and funds and support for the PIJ and PIJ goals" including "conducting and attending fund-raising conferences and seminars." Doc. 1, Indictment, Count One, ¶ 32. The government also alleged that the enterprise members "would and did utilize codes in conversations and communiques to conceal and disguise the enterprise's true activities and identities of members." Id. at ¶ 41. The government further included several allegations in Count Three bearing on the government's theory that the defendants used fund-raising for "charities" as a cover for their criminal activities. Specifically, at the following subsections of paragraph 3, Count Three, the indictment alleged that:

(a) The members of the conspiracy would and did use the WISE, ICP, and IAF offices as the North American base of support for the PIJ and to raise funds and provide support for the PIJ and their operatives in the Middle East. . . .

(d) In their communications with each other and with other people, the defendants frequently relied on code words. For instance, they referred to the PIJ as "the family," its operatives as "the youth" and the "brothers," HAMAS as the "Club" . . . .

(s) Throughout the remainder of the 1990's to the present, [the defendant and several co-defendants] and others would and did continue to engage in fund-raising and support activities in a manner designed to conceal the nature of what they were doing and the source and recipients of the support. . . .

(u) . . . . Following [the designation of PIJ as an FTO in 1997] SAMI AL-ARIAN and others would and did continue with fund-raising activities and their efforts to conceal what they were doing.

(v) During this period, in an effort to take away attention from himself, SAMI AL-ARIAN increasingly relied on SAMEEH HAMMOUDEH, HATIM NAJI FARIZ and GHASSAN ZAYED BALLUT and others to continue the fund-raising activity he had conducted himself in the past. SAMI AMIN AL-ARIAN also relied on other members of the conspiracy to carry out the logistical efforts necessary to transfer PIJ funds in and out of the United States.

Similarly, Count Four recited an allegation that is central to the defendant's Franks argument: The government explained that in 1995, the Department of the Treasury promulgated regulations that prohibited, among other things, "making a 'charitable contribution or donation of funds, goods, services, or technology' to or for the benefit of a Specially Designated Terrorist." Indictment, Count Four, at ¶ 6. There is no dispute that co-defendants RAMADAN SHALLAH and ABD AL AZIZ AWDA, deceased co-conspirator Fathi Shiqaqi, and the PIJ have all been designated by the United States government as "Specially Designated Terrorists" since 1995. A reasonable inference to be drawn from this undisputed, well-known fact, is that subsequent to these

designations, members of PIJ in the United States had to send support to, or channel support through, someone other than the designated individuals–family members or less well-known PIJ operatives overseas.

In addition to the allegations in the indictment, the affidavit also recited information consistent with these allegations. Agent Myers described the defendants as operating terrorist cover organizations to "raise funds and transfer money to support the" PIJ. Affidavit, ¶ 4. Paragraphs 62-64, 66-67 and 72 all recite additional information about defendant Hammoudeh's activities not found in the indictment. Suffice to say, the indictment and affidavit lay out in substantial detail the government's theory that the defendant and his co-conspirators used fund-raising for so-called charitable organizations as a cover for their criminal activities.[4]

Viewed from this perspective, the so-called misleading "omitted" allegations proffered by the defendant merely serve to *bolster* the government's theory.[5] The defendant acknowledges that the government disclosed much of the relevant information in Agent Myers' affidavit. Doc. 810, Def's brief at 6. The defendant therefore appears to argue that the government has not included a *sufficient quantum* of

---

[4]Agent Myers also informs the Court in his affidavit that it "does not set forth all the information and evidence in the government's possession supporting probable cause. Indeed, due to the length of this investigation and the substantial volume of evidence, it is fair to say that this affidavit contains a relatively small portion of all relevant information." Affidavit, ¶ 2.

[5]Indeed, additional allegations in the superseding indictment support the notion that the government's theories of conspiratorial activity included the use of front organizations for fund-raising, and/or the use of unconventional money transfer methods to avoid law enforcement scrutiny. See Superseding Indictment, Count One, Overt Acts 253; 262; 271; 272; 286; 310; 313; 314; 316; 317; 318; 319; 320; 323.

information. This is a surprising allegation given the length of both the indictment and affidavit and the amount of detail regarding the defendant's so-called charitable activities contained therein. In any event, the defendant's proffered "omissions" are not material to the Court's probable cause inquiry. For instance, in support of his argument, the defendant explicitly refers to a conversation on December 27, 1999 between himself and an individual named Khader. In that conversation, however, the defendant gives an example of his unorthodox fund-raising methods; defendant Hammoudeh advises Khader that Khader could make a donation by writing out a check to ICT (Islamic Community of Tampa) or by leaving the payee line blank, because the defendant and others were going to distribute cash to some people. Def's brief at 3.[6] The defendant also suggests that Agent Myers misled the Court when he omitted the description of a translation in which the defendant's father told the defendant not to send any more money for an orphan at that time, to which the defendant replied that he would send the money to his father and his father could deal with it as he saw fit. Def's brief at 6. The government contends that a reasonable interpretation of this conversation would suggest that the defendant and his father were not speaking of a poor orphan desperately in need of aid, because the defendant's father told him not to send any more money at that time. Rather, by telling his father he could spend the money as he wished, the defendant revealed the true nature of the funds–that they were not exclusively designated for true charitable purposes. In other words, this conversation

[6]Despite filing an amended brief, the defendant nevertheless fails to include pagination for his brief. The government has supplied the page numbers for convenience.

shows that the defendant and his father were not overly concerned with maintaining the integrity of the disposition of funds contributed by unsuspecting donors in the Tampa area. Other alleged "omissions" describe telephone calls in which the defendant discusses sending money to his father in the West Bank, via *personal courier*, instead of using the banking system to get the money more quickly and safely to those in need overseas. See Def's Brief, at 3-7, ¶¶ c, f, g, and l. These calls are consistent with the government's theory that defendant Hammoudeh was PIJ himself and his co-conspirators used techniques to conceal to the transfer of funds intended for the PIJ. These calls also establish probable cause to believe that a PIJ member was gathering funds for the PIJ in the United States but sent them to a person in the Middle East who was not publicly associated with PIJ in order to evade detection.

The defendant also asserts that, in light of the government's allegation that defendant Hammoudeh and Al-Arian were confidantes, it was improper for Agent Myers to omit a conversation in which the defendant complains about the treatment he is receiving from Sami Al-Arian. Def's brief at 7-8. Again, this argument amounts to nothing more than a premature, and not particularly persuasive, attempt to challenge the government's theory. Indeed, the very calls which the defendant claims show that Hammoudeh and Al-Arian were not getting along, also show how intertwined their lives were. The import of these so-called "omissions" to the Court's determination of

probable cause is ambiguous at best and clearly do not rise to the level of a misleading material omission as required by Franks.[7]

The remainder of the alleged omissions are of a similar nature and we need not discuss each one in detail here. Since inclusion of the "allegedly omitted facts . . . would not have precluded the finding of probable cause," the defendant has not met his burden under Franks. See Jenkins, 901 F.2d at 1080. Even assuming *arguendo* that one of the alleged omissions was truly inconsistent with the government's theory, the defendant has nevertheless failed to show that Agent Myers omitted that paragraph recklessly or with an intention to mislead the Court, or that a particular omission was so material that it would require the Court essentially to disregard the remaining information and reverse its probable cause finding. Indeed, one could argue that Agent Myers presented the Court with so much information about the fund-raising and material support allegations that it would be practically impossible to mislead the Court by omission. In sum, because the alleged omissions are consistent with, and corroborative of, the government's explicit legal theory, the defendant does not make out a Franks claim with respect to the alleged misleading omissions.

---

[7]Defendant Hammoudeh curiously contradicts his own "theories." First, he argues that defendant Al-Arian complained because Hammoudeh wanted a higher salary; several paragraphs later, however, he notes that Hammoudeh called his father about investing money ($15,000) overseas. Def's brief at 7-8. This acknowledged disparity between defendant Hammoudeh's salary and his ability to save sufficient funds for an overseas investment, supports the government's theory that the defendants used charitable fund-raising as a front and diverted funds raised for charitable purposes to his own personal benefit. The evidence will show, for example, that defendant Hammoudeh received funds from ICP and the Muslim Women's Society which he converted to his own use.

b. The Affidavit Does Not Contain Deliberately or Recklessly False Statements.

The defendant makes a brief nonsensical argument to the effect that Agent Myers improperly included a reference in his affidavit to the wills of three PIJ terrorists found in a computer that was seized from the WISE office in 1995. Def's brief at 9-10. As a threshold matter, the defendant fails even to allege the Franks standard with respect to this argument; he merely states in conclusory fashion that information that was not true was known by the FBI when it was included in the indictment and affidavit. The defendant also incorrectly states that this allegation has been removed from the superseding indictment.

It is axiomatic that a representation must be false if it is to be evidence of a Franks violation. Franks, 438 U.S. at 171 ("there must be allegations of deliberate falsehood or of reckless disregard for the truth"). The information that the defendant claims is false, however, cannot be characterized as such. Overt Act 185 alleges that on November 20, 1995, defendant Hammoudeh and others at WISE possessed in a computer the wills of three PIJ terrorists. To the government's knowledge now, and at the time Agent Myers swore out his affidavit, this statement is true. It is undisputed that defendant Hammoudeh was present in Tampa in November 1995, and that he had been employed at WISE from January 1993 until some point in 1995. Whether or not the defendant was physically located at WISE in Tampa, Florida in 1992, when the wills were created or stored on the computer has no bearing on what was subsequently retained and possessed in the WISE computer in 1995.

In sum, this argument fails at the outset and does not merit further discussion.

The defendant's tortured logic is then directed at an argument consisting of the following assertions and necessary assumptions: a) Agent Myers attached and incorporated the indictment in his affidavit; b) Agent Myers must have been a witness in the Grand Jury; c) there are differences between the original and superseding indictments; and therefore, c) Agent Myers therefore must have done something wrong. Def's brief at 10. Needless to say, this argument is fatally flawed. Essentially, the defendant is contending that Agent Myers made misrepresentations to the grand jury. He provides absolutely no support for this reckless claim other than the fact that there are differences between the original and superseding indictments. As a threshold issue, the government does not concede—nor is there any other supporting authority--- that an allegation in the original indictment was false *simply* because it was omitted from the superseding indictment. There are a number of reasons, other than mistake, for an allegation to be omitted from a superseding version of an indictment. The defendant's claim, therefore, is not a proper challenge under Franks, but a thinly-veiled attack on the indictment. The time is long past for the defendant to move to dismiss the indictment based on grand jury abuse. Assuming, *arguendo*, that his bare-bones allegation could be interpreted as an attempt to make out a Franks challenge, the defendant nevertheless fails in his bid. The indictment was an instrument issued by the grand jury, not Agent Myers. Moreover, the defendant does not allege that Agent Myers deliberately, or with reckless disregard for the truth, incorporated the so-called "factual errors" in the original indictment into his affidavit. The defendant therefore fails to meet his substantial burden under Franks. See United States v. Rodriguez, 367 F.2d 1019, 1025 (8th Cir. 2004) (district court did not err in denying defendant's request for a Franks

hearing based on allegation of factual discrepancies between investigator's affidavit and indictment).

The government acknowledges, however, that it was mistaken at the time the original indictment was returned regarding two items mentioned by the defendant: a) the precise date in 1992 when defendant Hammoudeh entered the country; b) and the location of a particular fax number. Def's brief at 10-11. These were innocent, insignificant mistakes clearly outside the scope of Franks; there is no evidence whatsoever to the contrary. Franks, 438 U.S. at 171 ("allegations of negligence or innocent mistake are insufficient"). In any event, if these allegations are excised from the affidavit, there remain plenty of undisputed allegations establishing probable cause to search the defendant's home. The defendant therefore cannot satisfy the second prong of Franks.

Defendant Hammoudeh wraps up his Franks arguments with a half-hearted, curious attack on Agent Myers' inclusion of pen register/trap and trace information in his affidavit. Again, the point of the defendant's assertion is somewhat elusive, but he appears to argue that it was improper for the agent to include summarized telephone contact information between numbers associated with the defendant and co-conspirator Mazen Al-Najjar because Al-Najjar had been deported. As best we can tell, the defendant's argument amounts to a complaint that the government used a shorthand method of relating the quantity of telephone contact information between co-conspirators; he suggests, without evidence, that an agent acts improperly when he includes in his affidavit pen register information for a period when a wiretap was ongoing. First, the defendant fails to set forth a proper attack under Franks; he neither

makes a concrete showing that the information was false (a point which he totally ignores in his brief), nor that Agent Myers included the pen register information in order to mislead the Court, nor does he explain how the Court's probable cause showing would be undermined if the pen register information was excised from the affidavit. Moreover, the defendant's painfully simplistic assertion ignores the traditional, standard relevance of pen register information–that defendant Hammoudeh was in telephonic contact with two separate numbers (residential and cellular) associated with a co-conspirator.[8] As the Court is well aware, pen register/trap and trace information is commonly incorporated into affidavits in support of search warrants (both for physical locations and electronic surveillance) to show fresh, recent contacts between numbers associated with various co-conspirators. Agent Myers did not allege that the pen register information was proof that defendant Hammoudeh communicated with Al-Najjar personally.

Furthermore, the government specifically alleged in the indictment the fact that Mazen Al-Najjar had been deported. Indictment at 5, ¶ 14. There was no intent to deceive the Court with respect to his whereabouts. The Court reasonably could have considered evidence of contact between the defendant's numbers and Al-Najjar's numbers as providing one more source of information showing that there was probable cause to believe that these two men were co-conspirators. As such, the Court could have included this information into its probable cause determination.

---

[8]The affidavit also recites pen register/trap and trace information showing contact between numbers associated with defendant Hammoudeh (both residential and work numbers) and numbers associated with co-defendants AL-ARIAN, FARIZ, and NAFI.

c. The Defendant cannot obtain relief under Franks because the undisputed portions of the Affidavit and Indictment establish probable cause to search his residence.

Although the defendant has not met his burden under Franks of showing that the affiant deliberately or recklessly misled the Court with false statements or material omissions, his claim would nevertheless fail because he cannot show that if the disputed portions of the affidavit and indictment were excised, the magistrate would not have found probable cause to search defendant Hammoudeh's residence. Franks, 438 U.S. at 171-72. First, the Court issuing the search warrant could properly consider that the grand jury had returned an indictment charging the defendant with the crimes enumerated at page 2, supra. Thus, the Court could review the detailed, lengthy indictment and give considerable weight to the grand jury's finding that there was probable cause to believe the defendant had committed those crimes. See Gerstein v. Pugh, 420 U.S. 103, 117 n. 19 (1975); United States v. Apker, 705 F.2d 293, 303 (8th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). The Court could also consider that the grand jury found probable cause to believe that defendant Hammoudeh was a member of PIJ in the Tampa area (Indictment at 4, ¶10). Given that many of the crimes alleged in the indictment are conspiracies, the Court consequently would not be limited strictly to a review of those allegations concerning only the defendant; to the contrary, the Court could have considered all allegations against all co-conspirators once it was persuaded that there was probable cause to believe that the defendant had joined one of the specified conspiracies.

The defendant, in any event, challenges relatively few of the allegations directed against him and his co-conspirators in the indictment and affidavit. For instance, the

defendant has failed to challenge the veracity of the following allegations in the indictment, *which pertain specifically to him*:

(a) That in December 1992, the defendant attended the Fifth Annual ICP conference with co-defendants Al-Arian and Shallah (Count One, Overt Act 17);

(b) That in January 1994, co-defendants Al-Arian and Awda discussed whether the PIJ would pay the defendant and others a salary, and that former PIJ leader Fathi Shiqaqi had sent the defendant and others in the United States $50,000 during the previous year (Overt Act 31);

(c) That in April 1994, co-defendants Al-Arian and Nafi discussed the defendant's and others' inability to efficiently raise funds. Al-Arian also mentioned that Fathi Shiqaqi should send $19,000 in back pay to the defendant (Overt Act 89);

(d) That one week after the previous call, Fathi Shiqaqi wire transferred $19,984.50 to the defendant's bank account in Florida (Overt Act 93);

(e) That in May 1994, the defendant wrote a check for $16,000 payable to WISE (Overt Act 100);

(f) That in July 1994, co-defendants Al-Arian and Nafi discussed obtaining money for the defendant and another co-conspirator (Overt Act 103);

(g) That in January 1995, the defendant and others at WISE received a fax about a PIJ terrorist attack, the two dead bombers, and how money and resources spent on Arab Armies could be better spent to support PIJ (Overt Act 123);

(h) That in February 1995, the defendant wire transferred slightly more than $3,000 from his bank account to an individual in Israel who apologized for the delay in publishing due to, among other things "security concerns" (Overt Act 136);

(i) That on the very day he learned of Fathi Shiqaqi's death, October 30, 1995, co-defendant Al-Arian called Mazen Al-Najjar and told him that he wanted to meet with Al-Najjar and the defendant (Overt Act 181);

(k) That in November 1995, various incriminating documents were seized at WISE, including a PIJ manifesto and a Pact of Brotherhood and Cooperation between PIJ and HAMAS (Overt Act 185);

(l) That in July 1998, the defendant called Al-Arian to request money for a trip he was making to Chicago on behalf of Al-Arian (Overt Act 202);

(m) That from October 1999 through May 2000, the defendant engaged in a number of conversations regarding sending money overseas via courier, despite prior evidence showing that he was familiar with using more traditional methods of transferring funds by wire transfer and check;

(o) That in May 2000, the defendant spoke with a relative about sending $15,000 overseas for an investment and then a month later, the defendant told Al-Najjar that his salary did not cover his living expenses (Overt Acts 216, 218);

(p) That in October 2000, the defendant questioned his brothers about an interview the FBI had conducted of them that day (Overt Act 228);

(q) That in February 2001, the defendant had a discussion with another individual about funds to be paid out in Tampa, Gaza, the West Bank, Syria and Iraq (Overt Act 231);

(r) That in March 2001, the defendant spoke with Fawaz Damra (unindicted coconspirator One) about a fund-raising opportunity for the IAF. Fawaz Damra had assisted Al-Arian and others with fund-raising for PIJ in the past (Overt Acts 232, 5, 6, 62); and

(s) That in September 2002, the defendant had a discussion with co-defendants Fariz and Al-Arian about fund-raising and avoiding law enforcement scrutiny of IAF (Overt Act 246).

The Myers affidavit also sets forth detailed information obtained from pen register/trap and trace devices showing defendant Hammoudeh continued to communicate with phone numbers associated with co-conspirators Mazen Al-Najjar, Hatem Fariz, Bashir Nafi, and Sami Al-Arian from his residential phone lines until shortly before the execution of the search warrant. Affidavit at 52-53. These allegations, considered in conjunction with the remaining undisputed allegations in the indictment and affidavit, provide ample probable cause to believe that the defendant committed the

crimes charged and that there was a “fair probability that contraband or evidence” of the crime would be found at his residence. Illinois v. Gates, 462 U.S. at 238.

These allegations show probable cause to believe that the defendant was a paid member of a foreign terrorist organization; that he spoke with other co-conspirators by telephone from his house; that he was involved in suspicious fund-raising; that he was able to send $15,000 overseas for an investment despite not earning enough money to support his family; that he had received a wire transfer into his *personal bank account* from the worldwide leader of the PIJ as back pay for his salary as a member of PIJ; and that he had taken funds from his personal bank account and transferred them to one of the alleged front organizations. Based on these findings, the Court reasonably could have concluded that there was a fair probability that several types of evidence might be found at the Hammoudeh residence; for example, bank records and other financial documents, indicia of membership in and/or association with PIJ/WISE/ICP/IAF, address books, telephone bills, documents regarding immigration status, travel records, passports, and visas.

D. The Law Regarding Execution of Warrants

Defendant Hammoudeh’s second ground for suppression is that the agents exceeded the bounds of the warrant when they executed the search at the defendant’s residence. The defendant thus seeks suppression of all evidence obtained as a result of the searches in question. As stated in United States v. Wuagneux, 683 F.2d 1343, 1353 (11th Cir.), cert. denied, 464 U.S. 814 (1982), however, a party seeking suppression "must go forward with specific evidence demonstrating taint." Instead of doing this, the defendant argues that all items seized from his residence must be

suppressed because some portion of what was seized was allegedly outside the scope of the warrant. In other words, defendant Hammoudeh contends, as did the defendant in Wuagneux, that the government turned the search into a "general exploratory rummaging" during the execution of the warrant. Id. at 1351. It is important to note that defendant Hammoudeh is not arguing for the suppression of items taken which were outside the scope of the warrant. Rather, he makes the broad argument that if a search exceeds the scope of a warrant, the entire fruits of the search must be suppressed. His argument is not valid.

Defendant Hammoudeh provides the Court with a list of specific documents, which he has gleaned from the discovery index. The discovery index to which he refers was prepared by the government in May, 2003 (followed by updates), at the direction of the Court. The index includes a detailed listing of the documents and tangible objects taken in the various searches in 1995 and 2003. The discovery index for the 2003 searches is 307 pages long. By virtue of retaining the numbering system employed in the execution of each search, the index reveals the location of items as found and their relationship with each other.[9] As such, it uniquely represents the best statement as to what occurred during each search, and the Court should be able to rely on it to resolve any factual issues about the execution of any particular search without the need of an evidentiary hearing. The Court can simply compare the discovery index with the terms of each warrant and determine whether the search itself was reasonable. Of course,

[9]We have noted additional information concerning the index in our response to Defendant Al-Arian's motion to suppress, which challenged the 1995 and 2003 searches, and the searches at IAF. That information, however, is not relevant to the search of defendant Hammoudeh's residence and has not been repeated here.

the discovery index was not available to the seizing agents in February 2003 because it did not yet exist. The labels and descriptions contained in the index were placed there by the government employees who prepared the index in May, 2003.

1. Factors Governing the Reasonableness of a Search

The Fourth Amendment requires that warrants "particularly describe the place to be searched, and the person or things to be seized." U.S. Const. Amend. IV. This requirement is aimed at preventing "general, exploratory rummaging in a person's belongings." United States v. Wuagneux, 683 F.2d at 1348, quoting Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The issue presented is to determine under what circumstances does the execution of a facially valid search warrant become an unreasonable search in violation of the Fourth Amendment.

The magnitude of the search is not sufficient by itself to establish a violation of the Fourth Amendment. United States v. Sawyer, 799 F.2d 1494, 1509 (11th Cir. 1986), cert. denied, sub. nom. Leavitt v. United States, 479 U.S. 1069 (1987); Wuagneux, 683 F.2d at 1352. The relevant inquiry is whether the search and seizures were reasonable under all the circumstances. Wuagneux, 683 F.2d at 1352; United States v. Heldt, 668 F.2d 1238, 1254 (D.C. Cir. 1981), cert. denied, sub nom. Hubbard v. United States, 456 U.S. 926, 1982. Many of the same considerations that govern the sufficiency of the particularity of the description of the items to be seized also affect the reasonableness of the search itself. For example, the reasonableness of the search depends upon the complexity of the crime under investigation and the difficulty involved in determining whether certain documents reflect evidence of the crime. Sawyer, 799 F.2d at 1509. See also United States v. Schandl, 947 F.2d 462, 465 (11th Cir. 1991),

cert. denied, 504 U.S. 975 (1992). The scope of the warrant, the conditions at the search site, and the nature of the evidence to be seized are also factors to be considered in determining the reasonableness of the search. Basically, the execution of a search warrant must be conducted in a manner appropriately limited to the scope and intensity called for by the warrant. Heldt, 668 F.2d at 1256; Terry v. Ohio, 392 U.S. 1 (1968). A search for canceled checks within a group of documents requires a more intense effort than a search for a stolen automobile. Harris v. United States, 331 U.S. 145, 152 (1947). Contrary to defendant Hammoudeh's suggestion, the end result of the search is not always the best indicator of reasonableness of the search. Heldt, 668 F.2d at 1268-69.

Although the factors governing the reasonableness of searches are interrelated, an attempt will be made here to analyze them separately. The first factor is the factual complexity of the investigation and the legal complexity of the crimes under consideration. Where the investigation involves complex crimes which would be detected primarily through analysis and synthesis of a large number of documents, an extensive search could reasonably be expected. Wuagneux, 683 F.2d at 1352. Moreover, the search "may be as extensive as reasonably required to locate and seize items described in the warrant." Sawyer, 799 F.2d at 1509. By February 2003, the Tampa PIJ cell investigation had evolved into one involving a sophisticated RICO conspiracy (and three other conspiracies) involving numerous persons. Thus, it was crucial to the investigation to obtain: (1) evidence which showed a relationship between and among the individual subjects; (2) evidence which showed a relationship or affiliation between the subjects and the PIJ and its various parts; and (3) evidence of

terrorist activities on the part of the PIJ enterprise and the subjects' association with those activities, including such things as management of the affairs of PIJ and providing financial support to it. Not surprisingly, the warrant specified principally documents to be seized. Thus, an extensive search of a primary conspirator's residence could have been anticipated in 2003.

The second factor to consider are the conditions confronting the searching agent at the location. In a search warrant for documents, agents may examine each document encountered to determine whether it falls within the parameters of the warrant. United States v. Slocum, 708 F.2d 587, 604 (11th Cir. 1983). In executing a warrant which calls for the seizure of certain documents, those documents may be part of other documents, they may be commingled with other documents, or they may be labeled in such a way as to obscure their true character. See, e.g., Slocum, 708 F.2d at 602 (specified documents in a folder with other incriminating documents); United States v. Hargus, 128 F.3d 1358, 1363 (10th Cir. 1997), cert. denied, 523 U.S. 1079 (1998) (specified documents in a filing cabinet commingled with personal items such as birthday cards); United States v. Hill, 19 F.3d 984, 987 (5th Cir.), cert. denied, 513 U.S. 929 (1994) (specified documents in a different form than specified in warrant but considered the functional equivalent). The place to be searched might also be in shambles and there may be no filing system at all. See, e.g., Slocum, 708 F.2d at 601-02. In this case, the agents were also confronted with two more obstacles: many of the documents and objects were expected to be in the Arabic language and many of the documents were expected to be stored in computers, or both. This prediction turned out to be all too true.

In confronting these conditions, seizing agents have often been forced to employ unconventional and controversial methods to conduct the search. Faced with the prospect of intruding on the privacy of those living or working on the premises for hours or days, many seizing agents choose to move the actual examination back to the office. That was done in this case and is a reasonable course of action. In Wuagneux, the Eleventh Circuit held that it was reasonable for the agents to remove intact files, books and folders, when a particular document within the file was identified as falling with the scope of the warrant. To do otherwise "would substantially increase the time required to conduct the search, thereby aggravating the intrusiveness of the search." Wuagneux, 683 F.2d at 876-77; Slocum, 708 F.2d at 606; United States v. Beusch, 596 F.2d 871, 876 (9th Cir. 1979). In Hargus, the Tenth Circuit upheld a search warrant against a claim that the search exceeded the scope of the warrant where the agents seized many records, including the contents of two entire file cabinets which contained items not specified in the warrant (such as birthday cards). Hargus, 128 F3d at 1363. In Schandl, against the same claim, the Eleventh Circuit upheld the execution of a search warrant involving numerous documents and information stored on computers where agents seized irrelevant personal documents, and noted:

> In this case, the vast majority of the documents seized were within the scope of the warrants. It was inevitable that some irrelevant materials would be seized as agents searched through numerous documents for evidence of tax evasion and failure to file, crimes that are generally only detected through the careful analysis and synthesis of a large number of documents.

Schandl, 947 F.2d at 465-66. Next, in Santarelli, against the same claim, the Eleventh Circuit upheld the execution of a search warrant involving numerous documents where

the seizing agents removed boxes of documents and examined them later. Santarelli, 778 F.2d at 615. Finally, in Sawyer, against a claim that the agents "simply seized everything existing on the premises," the Eleventh Circuit upheld the execution of a search warrant for documents. Sawyer, 799 F.2d at 1509.

Another factor is the degree of difficulty involved in determining whether any particular document falls within the scope of the warrant. The warrants in this case were not limited to simple discrete items such as firearms or controlled substances. See, e.g., United States v. Foster, 100 F.3d 846 (10th Cir. 1996). The warrants in this case set forth various categories of documents and tangible objects to be seized as they related to certain criminal activity. As such, the seizing agents had to examine and interpret numerous documents, or in the case of documents in the Arabic language, the translators had to perform that same analytical function. Seizing agents executing a search warrant may be required to interpret it, but they are "not obliged to interpret it narrowly." United States v. Stiver, 9 F.3d 298, 302 (3d Cir. 1993), cert. denied, 510 U.S. 1136 (1994), quoting, Hessel v. O'Hearn, 977 F.2d 299, 302 (7th Cir. 1992). The crimes under investigation in this case included conspiratorial activity, and the search warrants called for the seizure of documentary evidence related to these crimes. There is no rule which requires a seizing agent to know with certainty in advance the exact contours of the conspiracy when conducting a search. Determining the formation, nature, scope and duration of a conspiracy is part of every conspiracy investigation, and these aspects are generally not known with precision at the time of the search. Thus, the relevancy of a particular document to the conspiracy may not be immediately apparent to the seizing agent, and he or she must exercise some judgment in

evaluating the seizability of each item encountered during the course of the search. Cf. Slocum, 708 F.2d at 605.

What all these cases have in common is the recognition that a reasonable search under the Fourth Amendment does not have to be a quick, clean, neat and perfect search, as defendant Hammoudeh would have it. As stated previously, neither the magnitude of the search nor the results of the search is necessarily the best measure of the reasonableness of the search. The factors governing the reasonableness of a search for documents allow, depending on the circumstances, for an imperfect search, one in which documents are seized before they are individually examined, documents are seized which may not fall within the scope of the warrant, and documents seized are examined at a separate location at a later time.

2. The Legal Standard Which Must Be Met to Justify Total Suppression

Including the Eleventh Circuit, appellate courts have consistently held that absent a "flagrant disregard" of the terms of the search warrant, the seizure of items outside the scope of a warrant will not affect the admissibility of items properly seized. Wuagneux, 683 F.2d at 1354, citing Heldt, 668 F.2d at 1259-60. See also Hargus, 128 F.3d at 1363 (only improperly seized evidence is suppressed); Marmolejo, 89 F.3d at 1199 n.24 (5th Cir. 1996) (Under the severability doctrine, evidence that is illegally seized has no effect on the admissibility of legally seized evidence); United States v. Tamura, 694 F.2d 591, 597 (9th Cir. 1982) (Generally, the exclusionary rule does not require the suppression of evidence within the scope of a warrant simply because other items outside the scope of the warrant were unlawfully taken as well).

The Second Circuit has defined a "flagrant disregard of the terms of the search warrant" to mean when agents effect a widespread seizure of items not within the scope of a warrant and do not act in good faith. United States v. Shi Yan Liu, 239 F.3d 138, 140 (2d Cir. 2000), cert. denied, sub nom. Jie Hu v. United States, 534 U.S. 816 (2001). To satisfy this test, the search the government agents conduct must actually resemble a general search in form and intent. Id. at 141 n.3. The Second Circuit in Shi Yan Liu described a "general search" as a "wide-ranging, exploratory" and "indiscriminate" search. Id. at 140. In Shi Yan Liu, the defendant claimed that the search was conducted in flagrant disregard of the terms of the search warrant because the agents seized files without individually examining the documents contained therein. The Second Circuit disagreed, holding that the search bore none of the hallmarks of a general search.

The Eleventh Circuit has also evaluated the execution of a search following a claim that the execution was in flagrant disregard of the terms of the warrant and concluded there was no constitutional violation. In Wuagneux, the Eleventh Circuit held that despite the seizure of documents outside the scope of the warrant, the execution of the warrant was conducted within constitutional parameters and was performed in a manner intended to minimize the intrusiveness of the search under the circumstances. Wuagneux, 683 F.2d at 1354. The Eleventh Circuit saw no grounds to justify the total suppression of the fruits of the search, even assuming that a number of documents seized were outside the scope of the warrant. Similarly, in United States v. Lambert, 887 F.2d 1568, 1572 (11th Cir. 1989), the Eleventh Circuit held that the search

conducted by the agents did not amount to a flagrant disregard of the terms of the warrant even if some improper seizures occurred.

E. Argument: The Defendant Fails to Show That the Agents Improperly Exceeded the Scope of the Warrant When They Executed the Search at His Residence.

Here, the defendant relies *entirely* on references to materials contained in two evidence containers to support his argument that the agents exceeded the scope of the warrant. In his brief, defendant Hammoudeh refers to the discovery index and offers a *partial list* of the contents of *one box* of documents, Box 1B-226, and *one box* of video cassettes[10] to make out his challenge. Def's brief at 13-17. His argument fails for several reasons.

As indicated in the discovery index, the documents contained in Box 1B-226 were seized as two separate bundles of documents. The index shows that the box itself, with documents inside, was seized intact near a door leading to the garage, while another bundle of documents contained in a blue plastic bag (subsequently placed in Box 1B-226) was seized near the circuit breaker box in the garage. We assume that since the defendant did not identify *all* documents in Box 1B-226 as being outside the scope of the warrant, he would acknowledge that some of the documents were the type specified in the warrant. Thus, as in Slocum, 708 F.2d 587, the agents were faced with the task of seizing documents that were part of other documents, commingled with other documents, or labeled in an ambiguous fashion. As in Wuagneux, the relevant

[10]The government assumes that this is a reference to container 1B-227. The discovery index does not specify either the number of tapes in the container or the language used in the tapes. The defendant, however, describes the tapes as containing Arabic language material. Def's brief at 17.

documents were apparently within files or folders containing other documents. 683 F.2d at 1353. In both those cases, the Court found that the searches were reasonable.

Second, it is undisputed that many of the documents in Box 1B-226 were written in the Arabic language. The defendant's brief, however, is misleading on this point because it contains *translated descriptions* of the Arabic language documents–translations which were completed *subsequent* to the search, presumably by the defendant or a defense translator. As the discovery index indicates (and which the government asserts is obvious), when the agents seized these documents, they could not reasonably be expected to distinguish immediately between an Arabic language article on the history of Islam or an Arabic language document containing a PIJ claim of responsibility, a PIJ manifesto, or a diary of the defendant's activities. Similarly, the agents could not have analyzed the Arabic language videotapes in a timely manner. The seizing agents were apprised of the potential relevance of Arabic language videotapes in the Myers affidavit, which stated that items seized during the 1995 searches included "videotapes and audiotapes of PIJ and ICP fund-raising events." Affidavit at 32. The seizure of items written or recorded in a foreign language was therefore reasonable in light of all the circumstances, because a requirement that the agents independently review each of these items at the residence with a translator would "substantially increase the time required to conduct the search, thereby aggravating the intrusiveness of the search." Wuagneux, 683 F.2d at 1353.

Third, the defendant neglects to advise the Court that his "partial list" of the contents of Box 1B-226 (set forth on pages 13-17 of his brief) *excludes* the majority of documents in *that box* that were, *on their face,* within the scope of the documents

described in the warrant. For instance, the defendant fails to advise the Court that documents 704741; 704743; 704745 through 704791; 704793-704799; 704810; 704814; 704818-704850; 704852-704856; 704860-704866; and 704868-704870 all appear to be documents that could reasonably be determined by a seizing agent as falling within one of the categories of documents described in the warrant (primarily financial documents). The overwhelming majority of the remainder of the documents are in Arabic and could not have reasonably been reviewed and returned at the search location in a timely manner. Contrary to establishing that the agents overstepped the bounds of the warrant, an accurate and thorough review of the contents of Box 1B-226 shows that the agents in fact complied with the warrant as required by the Constitution and case law.

Fourth, a review of the total quantity of material seized from his residence starkly demonstrates the relative insignificance of the few documents seized which might have been outside the scope of the warrant. The discovery index reflects that 27[11] evidence containers were seized from defendant Hammoudeh's residence. These containers held various quantities of different items, including hundreds of documents, dozens of photos and tapes, a computer, CDs and floppy disks, credit and identification cards and notebooks. The items identified by the defendant amount to a relatively insubstantial number of items seized overall. Thus, the defendant can hardly characterize the search as a general exploratory rummaging of his belongings. In sum, when all the circumstances of the search are analyzed, the defendant's claim cannot survive; the

[11]The discovery index identifies the following evidence containers seized from defendant Hammoudeh's residence: IB-126; 1B-127; 1B-210 through 1B234.

agents acted appropriately and did not impermissibly exceed the scope of the warrant in seizing items from the defendant's residence.[12]

F. Conclusion

As set forth above, defendant Hammoudeh's motion can be addressed and resolved without an evidentiary hearing. The legal sufficiency of the warrant and the Franks issues can be determined by a review of the papers; indeed, the case law overwhelmingly supports a denial of an evidentiary hearing here. Moreover, the reasonableness of the execution of the warrant can be determined by a review of the warrant and the discovery index. For all these reasons, defendant Hammoudeh's motion should be summarily denied.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: */s Cherie L. Krigsman*

Cherie L. Krigsman
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6108
E-mail: Cherie.Krigsman@usdoj.gov

[12] For additional authority, see United States v. Maali, 2004 WL 2656865 (MD FLA 2004). In Maali, District Court Judge Antoon upheld a group of search warrants structured very similarly to those in this case, and which presented many of the same problems, such as documents in Arabic, computer-based information and voluminous business records. The defendants launched an attack on those warrants and the execution of the searches themselves, making most of the same arguments presented here. The judge rejected virtually all the arguments in that case which have been made here.

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Kevin T. Beck
Stephen N. Bernstein
M. Allison Guagliardo
Bruce G. Howie
William B. Moffitt
Linda G. Moreno
Wadie E. Said

/s Cherie L. Krigsman
Cherie L. Krigsman
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6108
E-mail: Cherie.Krigsman@usdoj.gov