IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

UNITED STATES OF AMERICA

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

SAMI AMIN AL-ARIAN, et al.

Defendants.

SAMI AMIN AL-ARIAN'S MOTION TO SUPPRESS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by counsel, and moves this Honorable Court for the entry of an Order suppressing all evidence seized by the United States Government pursuant to searches conducted on November 20 and 21, 1995, December 19, 1995 and February 20, 2003. As grounds for the aforesaid, the Accused avers the following to wit:

Destruction of Documents

At the outset, before discussing the merits of the Accused's Fourth Amendment claims with respect to the 1995 and 2003 searches and seizures, the Accused Dr. Sami Al-Arian objects to the utilization of any materials which were seized pursuant to the 1995 searches and seizures. The grounds for the Accused's objection stems from the destruction of the original search documents by the Court Clerk's office in Tampa.

On December 12, 2003, counsel received a letter from Magistrate Judge McCoun. This letter revealed for the first time that the original Magistrate files containing the search warrants and applications for the 1995 searches no longer existed. The letter described a procedure whereby in March of 1998 clerks began shredding Magistrate files more than five years old. Attached to the Magistrate's letter was a letter from A. Shirley Loesch, Clerk of the Court. Her letter was dated June 18, 2002. Her letter discussed that in March of 1998 all closed Magistrate

Judge files for the years 1987-1993 were shredded. (The search in question was in 1995). Her letter further revealed that in 2002 closed Magistrate files beginning in 1996 were shredded. The letter did not disclose what happened to the files dated 1995. In the Magistrate's letter, he suggested a procedure that he would follow regarding an attempted reconstruction of the search documents in question (a copy of the letter attached and made a part hereof).[1]

December 8th letter of L. Moreno and W.B. Moffitt

On December 8, 2003, counsel responded to Magistrate McCoun's letter. Counsel expressed their concerns about the Magistrate and the Clerk's letters and requested a clarification.

> With regards to the request for a clarification, your letter discloses a 1998 destruction of documents, which purportedly involves the destruction of documents more than five years old. Ms. Loesch's letter reports that this destruction involved documents from the years 1987-1993. Ms. Loesch's letter then discloses a second destruction of documents begun in April of 2002, which involved documents relating to the year 1996. It is unclear when exactly the documents relating to the searches of Dr. Al-Arian were destroyed. Certainly, if the Dr. Al-Arian files were destroyed in 1998, the rationale (i.e., that the clerks were destroying files more than 5 years old) would not support their destruction. If the files were destroyed in 2002, it would appear that this was about the same time that the Grand Jury was concluding its investigation in the now pending matter, which is disturbing to the defense to say the least.

In counsel's letter of December 8, 2003, counsel noted an objection to the Magistrate's proposal to remedy the situation of the lost documents.

> The destruction of these documents raises numerous issues. Our preliminary research has disclosed only one case, which discusses the destruction of a court file. This case, however, does not deal with the loss of documents concerning a search and seizure, nor

[1] Perhaps a better procedure, inasmuch the Magistrate who conducted this process was as much a witness as the agents involved, would have been for the Court to appoint a Special Master to take testimony of the agents and Magistrate to determine the accuracy of any allegedly copied paperwork.

> does it appear to deal with a situation involving the passage of this much time. Depending on exactly what is missing, our concerns extend to all parties' compliance with Rule 41. With all due respect to the Court's suggestion of a procedure to follow in the instant matter, we believe that the only way to protect the rights of Dr. Al-Arian at this point is to assert an objection to the procedure suggested in your letter, at least until we have a complete and full understanding of what has been destroyed and how this happened.

The government was likewise informed of counsel's concern and their objection inasmuch as they were copied on counsel's letter to the Magistrate.

Despite counsel's objection, the Magistrate undertook his suggested procedure ex parte and without notice to Dr. Al-Arian's counsel. It appears that the Magistrate relied entirely on the Affidavits of Agents West and Carmody without cross-examination regarding events that occurred nine years prior at the time of the search. It appears clearly that not only were Special Agents West and Carmody relying on nine year old memories, but so was this Magistrate. To not involve the defense in the process denied the defendant his rights of due process in violation of the Fifth Amendment and assistance of counsel in violation of the Sixth Amendment.

INTRODUCTION TO ACCUSED AL-ARIAN'S MOTION TO SUPPRESS

This Motion will discuss all the searches and seizures that resulted from warrants issued in 1995 and 2003. The Motion first discusses the Accused Dr. Al-Arian's standing with respect to each of the searches. Then it discusses the 1995 Affidavit In Support of the Search for Dr. Al-Arian's home, WISE and his office at U.S.F. Then, the Motion discusses the overbreadth of the warrant issued and finally its execution. Next, the Motion discusses the 1995 search of 12225 North 56th Street, Tampa, Florida, Box D-20. The Motion discusses the probable cause, the overbreadth of the warrant issued and finally the execution of this search. Then, the Motion discusses the 2003 searches and concerns regarding the overbreadth nature of the warrants and the execution of the searches. With respect to the 2003 searches, the accused also raises question regarding material omission pursuant to *Franks v. Delaware*.

WARRANTLESS SEARCH

The search warrant in 2003 authorized the search of 5903 130th Avenue, Tampa. Florida. This was purported to be the address of Dr. Al-Arian's office at I.C.P. The actual address of Dr. Al-Arian's office was 5901 130th Avenue, Tampa, Florida. As such, the search of 5901 was a warrantless search. The Government bears the burden of justifying a warrantless search. Warrantless searches and seizures, like the instant one, "are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

The government has the burden of demonstrating that a warrantless seizure and/or search was legal. *Chimel v. California*, 395 U.S. 752, 762 (1969). Absent such a showing, the seizure is deemed illegal and all evidence obtained as a result must be suppressed. *Wood*, 981 F.2d at 541; Wong Sun v. United States, 371 U.S. 471 (1963).

Standing: 1995 Searches

Dr. Sami Al-Arian has standing to assert the Fourth Amendment rights with respect to all premises searched. In 1995 the following premises were searched (1) 5207 East 127th Avenue, Tampa, Florida, the residence of Dr. Al-Arian; (2) 5620 East Fowler Avenue, Tampa, Florida, the offices of WISE, (3) Room 318 New Engineering Building, University of South Florida, the office of Dr. Al-Arian on the campus of U.S.F.; and (4) People's Storage 12225 North 56th Street, Tampa, Florida.

2003 Search

Likewise, Dr. Al-Arian has standing to assert this Fourth Amendment rights with respect to 7901 Sanctuary Cove, Apartment 224, Temple Terrace, Hillsborough County, Florida and with respect to his office at I.C.P. at 5903, 130th Avenue, Tampa, Florida.

To assert an individual's Fourth Amendment rights, that individual must have an expectation of privacy in the area searched. The individual must show a subjective expectation of privacy in the area searched and that expectation must be one that society is prepared to accept. The 1995 searches here involved the search of the accused home, his offices and a storage locker leased to him. The 2003 searches involved the search of his home and offices. Each of these "areas" is an area where the accused has an expectation of privacy recognized by the Fourth Amendment.

> "In *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed 2d 387, 99 S. Ct. 421 (1978) the Supreme Court abandoned a separate analysis of "standing" for claims of violations of the fourth amendment in favor of an analysis focusing on the "substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Id.* at 133, n4. *See Rawlings v. Kentucky*, 448 U.S. 98, 104, 65 L. Ed. 2d 633, 100 S. Ct. 2556 (1980); *United States v. Hansen*, 652 F.2d 1374, 1379 n.2 (10th Cir. 1981). "Whether a person has standing to contest a search on fourth amendment grounds turns on whether the person had a legitimate expectation of privacy in the area searched, not merely in the items seized." First, the claimant must show a subjective expectation of privacy in the area searched, and second, that expectation must be one that "society is prepared to recognize as 'reasonable.' *Hudson v. Palmer*, 468 U.S. 517, 525, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984) (quoting in part *Katz v. United States*, 389 U.S. 347, 361, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Harlan, J., concurring)); *see also United States v. Owens*, 782 F.2d 146 150 (10th Cir. 1986). The "ultimate question" is "whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances." *Rakas* 439 U.S. at 152 (Powell, J., concurring).

United States v. Leary, 846 F.2d 592 at 595 (10th Cir. 1988).

With respect to corporate offices, corporate officers or employees have a right to assert a reasonable expectation of privacy in their offices.

> There is no doubt that a corporate officer or employee may assert a reasonable or legitimate expectation of privacy in his corporate office. *Cf. Mancusi v. DeForte*, 392 U.S. 364, 369, 20 L. Ed. 2d

> 1154, 88 St. Ct. 2120 (1968) ("It has long been settled that one has standing to object to a search of his office, as well as one of his home."); *United States v. Lefkowitz*, 464, F. Supp. 227, 230 (C.D. Cal. 1979) (corporate officers had sufficient privacy interest in corporate office suite), *aff'd* 618 F.2d 1313 (9th Cir.), *cert. denied* 449 U.S. 824, 66 L.Ed. 2d 27, 101 S. Ct. 86 (1980); *See also* 4 W. LaFave, *Search and Seizure* § 11.3(d) (2d ed. 1987). *See also United States v. Leary*, 846 F.2d 592 at 595 (10th Cir. 1988).

ANALYSIS OF 1995 AFFIDAVIT

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10 13-17 (1948).

On November 17, 1995, William West then a Special Agent of the United States Immigration and Naturalization Service (I.N.S.) caused an affidavit in support of the search of (1) 5207 E. 127th Avenue, Tampa, Florida, the residence of Dr. Sami Al-Arian (2) 5620 E. Fowler Avenue, Tampa, Florida, the offices of WISE and (3) Room 318 New Engineering Building, University of South Florida, and the office of Sami Al-Arian at the University, to issue.

On page (2), the affidavit states the crimes that the agent is allegedly investigating.

> Among the possible criminal violations that your affiant is investigating are false statements to a department of the United States in violation of 18 U.S.C. § 1001; false statements relating to naturalization, citizenship or registry of aliens in violation Title 18 U.S. Code 1015; the unlawful procurement of citizenship or naturalization in violation Title 18 U.S. Code § 1425 fraud and misuse of visa permits and other documents. In violation of Title 18 U.S. Code 1546 and aiding or assisting certain aliens to enter in violation of Title 8 U.S. Code 1327."

The affidavit begins by stating that the affiant began the investigation after reading a series of published news articles about Dr. Al-Arian. The affidavit does not state where these articles were published, nor does it state who the author or authors of these articles were, nor

does it give any basis to suggest that the articles were based on reliable sources/or that anything in the articles can be relied upon as being true. We do not even know from the affidavit whether the articles were of local or foreign origin.[2] The articles are alleged to have identified Dr. Al-Arian as the founder of two organizations in Tampa that provide support to terrorist groups (llamas or the Islamic Jihad). The word 'support' is never defined in the affidavit; for all we know 'support' could mean virtually anything. From there, the affiant purports to check Dr. Al-Arian's "A" file and determines that Dr. Al-Arian was a permanent resident alien of the United States and that Dr. Al-Arian submitted an application for naturalization in December of 1993. The application was received by the I.N.S. in January of 1994. Next, the affidavit authenticates the signature on the application for naturalization as that of Dr. Al-Arian. The affidavit then states that Dr. Al-Arian failed to list WISE and ICP as organizations that he was either a member of or affiliated with in his application for naturalization. Upon gathering this information, the affiant checked with Florida Corporate Records and determined that Dr. Al-Arian was a founding officer of both organizations. The ICP was incorporated on October 20, 1988 and WISE was incorporated on February 21, 1991, both prior to Dr. Al-Arian making his application for naturalization. Despite procuring the articles of incorporation for each corporation, the affiant did not list either corporation's corporate purpose.

The affiant then turns once again to news articles for information. Yet again, the author or authors of the news articles are not identified nor is any basis established in the affidavit for the belief that these news articles are reliable. These "News Accounts", as they are identified in the affidavit, relate to Ramadan Abdullah Shallah as the new leader of the Islamic Jihad. In this regard the affidavit states:

> Those reports further described Ramadan Abdullah Shallah as a former professor at the University of South Florida and colleague

[2] None of the articles are attached to the affidavit nor are they incorporated by reference in the affidavit.

> of Dr. Sami Al-Arian. Your affiant knows based upon his training and experience concerning terrorist organizations as well as common sense that individuals do not become leaders of world wide terrorist organizations unless the individual has been a member of that organization for a considerable period of time and the individual has established himself within the organization.

There are several issues with this portion of the affidavit. First and foremost, the affiant has never established any expertise regarding terrorist organizations much less the P.I.J. In discussing his expertise, the affiant states in the second paragraph of the affidavit the following:

> "As a Special Agent with the INS, I have the authority to conduct criminal investigations, execute searches and make arrests in cases involving violations of federal law. I have had extensive training and experience investigating violations of the Immigration and Nationality Act and other federal laws. In my experience, I have participated in the execution of numerous search warrants to search premises for documentary evidence relating to the commission of federal criminal violations."

Nowhere, prior to the paragraph relating to Shallah does the affiant suggest or explain his expertise with respect to terrorism or terrorist organizations. Nor is the magistrate informed how exactly the affiant developed his alleged expertise. Thus, the magistrate has no independent basis to believe that affiant indeed has the expertise claimed. Assuming some general expertise in the area of terrorism or some particular expertise with respect to the P.I.J. one would expect that information to be cited in the affidavit. Additionally, the affiant either fails to determine or omits the fact that Shallah actually served on faculty as a professor at the University of South Florida and was evaluated satisfactorily. A simple investigation would have revealed that fact. From there the affiant again turns to "media accounts" and once again, the affiant fails to establish the reliability or accuracy of the "media accounts". This time the "media accounts" purport to show Shallah attending the funeral of the former leader of the Islamic Jihad and once again, we do not know what media and how exactly Shallah is identified in these media accounts.

The exact same problem exists regarding the allegations involving Basheer Nafi; with respect to Nafi, the media sources are identified as Al-Urdun, apparently a minor newspaper in

Amman, Jordan. Interestingly, the article referred to in the affidavit speaks to an unidentified "Islamic Jihad official" who provides information about Nafi. In summation, some unidentified individual alleged to be a member of the P.I.J. stated in a Jordanian newspaper that Basheer Nafi is a member of the P.I.J. None of this is supported by anything that would allow the magistrate to determine the reliability and or veracity of the information. In an attempt to bolster and corroborate this information the affiant produces information from what is described as a reliable "C.W.", unnamed, who is purported to have `extensive knowledge' of Basheer Nafi and the P.I.J. Nothing is stated from which the magistrate can determine C.W.'s reliability.

The nature of the C.W.'s extensive knowledge' is not set out in the affidavit and is left completely to the imagination of the issuing magistrate. Then the affiant again relies on his unspecified training regarding terrorist organizations to conclude that Nafi is a significant member of the P.I.J.

The affidavit moves from Nafi to telephone records. It seems that someone made phone calls from Dr. Al-Arian's home to Fawaz Damra and Siraj El-Din, who were allegedly subjects identified in the world trade bombing investigation and associates of people convicted in that case. Neither Damra nor El-Din were ever convicted of anything with respect to the World Trade Center bombing nor is the magistrate provided with any explanation of the words "subject" or "associate". Additionally, counsel is certain that not all of the associates of those convicted of the World Trade Center bombing were involved in the bombing and there simply is no allegation of that here. The affiant is unable to identify who is speaking on the phone. For all we know it could have been these gentlemen's wives talking to Dr. Al-Arian's wife. This at best is an attempt at probable cause by reliance on speculation and conjecture. Finally, neither Damra nor El-Din is identified as engaging in any illegal conduct. The specific timing of these phone calls is also omitted from the affiant's discussion.

The affidavit then discusses that many of "these" phone calls were made to the embassy of Sudan and the Iranian interest section in the United States. Once again, it is difficult to determine what the affiant means here. Counsel is particularly curious with regard to the use of the word "these" in this paragraph. It seems to refer directly to the alleged phone calls from the Al-Arian residence to Damra and or El-Din. How would the United States know that the phone calls to Damra and El-Din were actually made to the Iranian interest section or the Sudanese embassy? Is there a wiretap here that we have not been told about? The affidavit goes on to state that the Sudan and Iran have been officially designated as terrorist sponsoring states by the United States State Department. Nevertheless, the affidavit fails to describe how many phone calls were made, when or what was discussed, and, as such, its contribution to probable cause here is negligible. These phone calls may have been made before Sudan was designated by the Department of State as a terrorist state; however, the magistrate could not draw that conclusion since the dates of the phones calls has been omitted.

The affidavit moves to the affiant's discussions with alleged terrorism experts at the F.B.I., State Department and other Federal Agencies. None of these so-called experts is identified. The conclusion of whether or not they are, in fact or indeed, experts rest solely with the affiant and not appropriately with the magistrate. The affidavit supplies nothing to understand the nature of their expertise or how they acquired their so-called expertise. As result, the magistrate is left with only the conclusion of the affidavit with respect to these individuals' expertise.

Another C.W. is then discussed and once again, it is concluded without any factual showing or assertions that this C.W. has extensive training, education, and knowledge of Islamic militant organizations, including the P.I.J. and llamas. The extensive training, education, and knowledge of this alleged C.W. is never detailed in the affidavit. The conclusion of extensive

training, education, and knowledge is solely that of the affiant. The magistrate has simply no basis to make any conclusions regarding the C.W.'s knowledge other then the conclusions of the affiant. With respect to the C.W.'s reliability, we know only that it was in the past; the magistrate has not even a scintilla of information as to what he/she was reliable about. There is nothing from which the magistrate could conclude that the C.W. was actually reliable or that the information reported and utilized in the affidavit had any veracity.

The C.W. states that Dr. Al-Arian and Shallah have spoken espousing and encouraging support for Islamic militant movements.[3] The dates of these public statements are not reported in the affidavit. The alleged statements are not given or detailed. The situation is further exacerbated by the next line, which alleges that Dr. Al-Arian indicated to attendees that ICP and WISE provided support to various Palestinian causes. Once again, the support and, critically, the time frame remain undefined. Political causes are equally undefined. This seems simply to be an appropriate exercise of First Amendment Rights, nothing alleged here is criminal. The affiant then makes an effort to expand the scope of the search by including the following language regarding what he is seeking to seize:

> Any records of I.C.P or WISE, which relate to Sami Al-Arian and his relationship to those organizations are evidence of a criminal offense that is, inter alia, 18 U.S.C. Sections 1001 1015 and 1425.
>
> Further any records of I.C.P which reveal the unlawful activities of these organizations also constitutes evidence of the commission of a crime that is 18 U.S.C. 1015-1425, 1546 as well as 8 USC 1327.

Of particular concerns is the language "further any records which would reveal the unlawful activities of these organizations." The unlawful activities are unexplained.

Thus, what ostensibly is a focused inquiry into documents that might show criminal activity on Dr. Al-Arian's part becomes an authorization to seize any piece of paper relating to

[3] The so-called Islamic conferences as alluded to in the affidavit, are not described with any particularity whatsoever and were not described as sponsored by WISE or ICP See West Affidavit, Page 10. 12

WISE or I.C.P regardless of when it was created or what it states. The term "unlawful activity" is never defined or limited in any way in the affidavit. It is clear just from these terms alone that what the government was seeking was authority to conduct a general rummaging through of Dr. Al-Arian's home and offices.

Certainly, documents created before the filing of the citizenship application are not in any way related to a crime discussed in the affidavit. Documents related to Dr. Al-Arian's speeches, the substance of which are protected by the First Amendment, are also not related to a crime. The government was in possession of the application for naturalization and the Articles of Incorporation. The government was, in fact, seeking authorization to conduct a general rummaging through of Dr. Al-Arian's home and offices.[4]

The next portion of the affidavit, which discusses unlawful activities of WISE and I.C.P, is even more problematic. The suggestion is also made in the affidavit that the ICP and WISE are front organizations, although the affidavit fails to establish probable cause to believe that WISE and I.C.P indeed are front organizations. The mere association of Dr. Al-Arian and Basheer Nafi with these organizations by itself does not establish that these organizations are fronts. The affiant provides no details, other than references to non-specific "Islamic conferences" and the reliance on dubious press articles, to show probable cause to the magistrate. This is clearly deficient.

The affidavit only speculates that I.C.P and WISE were used to enable individuals to enter the United States unlawfully. The affidavit fails to assert that any of the persons who allegedly entered the United States at the behest of WISE or the I.C.P entered the country illegally or as a result of fraud. INS investigator West presumably had the ability to obtain the

[4] The seizures in this case went well beyond evidence to establish a link between Dr. Al-Arian and I.C.P His children's grades were among the items seized, along with letters to Ramsey Clark, letters to the Tampa Tribune, books, personal diaries and magazines.

entry documents of Shallah, Nafi and any other person who allegedly entered the country under the auspices of WISE or I.C.P, yet at the time of the filing of this affidavit the agent could identify no crime regarding any entry or anything else in connection with WISE or the ICP. Everything suspicious about WISE or the I.C.P is entirely the musings of Agent West.

The Nexus Between the Premise Searched and Items to Be Seized[5]

With respect to the 1995 searches, the same affidavit and search warrants authorize the searches of (1) 5207 E. 127th Ave., Tampa, Dr. Al-Arian's home and the listed address for I.C.P (2) 5620 E. Fowler Avenue, Tampa, the address of WISE and (3) Room 318 New Engineering Building, Building 2, University of South Florida, and (4) Peoples Storage at 12225 North 56th Street, Tampa, Florida. This also creates a problem in this case because the affiant must demonstrate probable cause that he is likely to find evidence of the criminal behavior described in the warrant at these sites, i.e., that there is a nexus between the sites being searched and items to be seized.

Dr. Al-Arian's Home

> But the important principle of *VonderAhe* is that probable cause to believe that some incriminating evidence will be present at a particular place does not necessarily mean there is probable cause to believe that there will be more of the same. *See* 2 LaFave § 3.7(d) ("For example, if it is shown that the occupant of the premises to be searched recently knowingly received two items of stolen property, ... there is probable cause to search for those two items, but this alone does not establish the suspect's ongoing activities as a fence so as to justify issuance of a warrant authorizing search for other stolen property as well.") (citing State v. Sagner, 12 Or. App. 459, 506 P.2d 510 (1973)). In US. v. Weber, 923 F.2d 1338, 1344 (1990)

The Affiant related the following information with respect to the alleged nexus between Dr. Al-Arian's home and the records he was seeking:

[5] An examination of each of the warrants and applications reveals the lack of any such nexus.

> Based upon my training and experience, I know that individuals commonly keep, store and maintain records of organizations in which they are members or officers at their residences and offices. In fact, as has been mentioned herein, Sami Al-Arian has used his residence as the mailing address for ICP. The ICP organizational address, as updated 5/1/95 in Florida state records, is Sami Al-Arian's residence. Basheer Nafi, relative to his 4/14/94 WISE-sponsored "H-1" entry into the U.S., listed Sami Al-Arian's residence as his destination; this is indicative of an organizational link between ICP, WISE and Sami Al-Arian's residence. Therefore, I have probable cause to believe that records relating to ICP will be found at that address. Further, it is common for organizational records to bear identification information relating to the members and officers of those organizations. Additionally, these records will relate to the nature of the activities of the organizations. In your affiant's investigative experience, even organizations involved in illegal activities frequently maintain records, although often secreted, that reveal the true nature of their operations. Any records of ICP or WISE, which relate to Sami Al-Arian and his relationship to those organizations are evidence of the commission of a criminal offense, that is, inter *alia*, 18 U.S.C. sections 1001, 1015, and 1425. Further, any records of ICP or WISE that reveal the unlawful activities of these organizations also constitutes evidence of the commission of a criminal offense, that is, inter alia, 18 U.S.C. sections 1015, 1425, and 1546, as well as 8 U.S.C. 1327.

Just as in Weber the affidavit, consists of a series of boilerplate statements and conclusions by the affiant.

> In this case, the "expert" testimony in the affidavit was foundationless. It consisted of rambling boilerplate recitations designed to meet all law enforcement needs. It is clear that the "expert" portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind. Agent Burke reported that detective Dworin knew the habits of "child molesters," "pedophiles," and "child pornography collectors" and that from his knowledge of these classes of persons he could expect certain things to be at their houses, from diaries to sexual aids to photo developing equipment. There was not a whit of evidence in the affidavit indicating that Weber was a "child molester." <u>*US. v. Weber*</u>, 923 F.2d 1345 (1990).

In the case at bar, the "expert" testimony in the affidavit was likewise foundationless. Thus, the sole nexus relied upon in the affidavit, is the fact that the Articles of Incorporation list

the mailing address for ICP as Dr. Al-Arian's home and Basheer Nafi listed Dr. Al-Arian's address as his destination. Obviously, the words "mailing address" have meaning. The fact that an organization has a "mailing address", does not in and of itself establish that it stores or makes it more probable than not that it stores its records at the mailing address. There is simply nothing in the affidavit other than the affiant's so-called expert opinion to believe that Dr. Al-Arian's home is the repository for records for ICP. The affiant knows nothing about ICP other than it conducts conferences. The affiant does not even aver that Dr. Al-Arian, at the time of the search, remained a corporate officer of ICP. The affiant states nothing regarding the type of records he is expecting to find, only that there might be evidence of criminal conduct, unspecified, that might be on the premises of Dr. Al-Arian's home.

With regard to the records of WISE being stored at Dr. Al-Arian's home, the affiant is aware that WISE has its own office. Thus, his assertions regarding why records would be at Dr. Al-Arian's home is even more speculative. Basheer Nafi listed Dr. Al-Arian's home as his destination on his application for an H-1 Visa. The affiant does not even supply information that Mr. Nafi ever stayed at Dr. Al-Arian's home, if he did, for how long and why. The mere fact that Nafi may have stayed at Dr. Al-Arian's home does not mean that WISE records would be stored there. The absence of any factual showing that there was any real nexus between Dr. Al-Arian's home and ICP and WISE is further evidence of the general exploratory nature of the search contemplated by this affidavit and warrant.

The affiant's view can generally be characterized as expressing his hope that, if permitted to search, if he rummages through enough of the Accused's personal effects, he might find some evidence of criminality with respect to Dr. Al-Arian, WISE or ICP. That hope is insufficient to establish probable cause.

WISE

An examination of the organization of WISE in connection to the alleged illegal conduct asserted in the warrant and affidavit and the nexus between WISE and the items sought by the warrant is even more tenuous.

WISE is a think tank. The only alleged misconduct of WISE is that it co-sponsored[6] four conferences where alleged terrorists were invited. Cosponsorship[7] would normally mean that WISE was one of the Sponsors. It would be more relevant if relevant at all, if we knew who or which organization actually extended the Invitation.[8] The information regarding the so-called terrorists invited is equally telling; once again, there is reliance on media reports without saying what media or even attempting to establish the reliability of the media. The affidavit identifies two individuals as terrorists, Sheik Rashid El-Ghanoushi and Hasan Al-Turabi. All of the information regarding the Sheik comes from an unidentified, undated article in an unknown newspaper. Hasan Abdullah Al Turabi is said to be the "identified" leader of the Sudanese Islamic Militant/Terrorist Movement. The affiant provides absolutely no information upon which to believe the veracity of any of this information; we are not even told who identified Turabi as a militant/terrorist. Why any records regarding any of the illegal activities alleged in the affidavit would be maintained at WISE as opposed to any other place is never explained. There is little or no discussion of what type records are at WISE despite the fact that the Affidavit reveals the following:

> Your affiant was further advised by a second, reliable confidential source that he/she had been told by persons, who had physically been inside the address where WISE is located, that said location

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[6] One wonders why the affiant left out who the other Sponsors or the conference were and which organization or individual actually issued the invitation.

[7] Could it be that the Co-sponsor was a legitimate, well-respected academic organization, the University of South Florida, whose acknowledgement would undermine any P.C. determination and that is why it was not named.

[8] Page (15) of the affidavit identifies the group actually sponsoring the event as an organization other than WISE.

> was established as an office environment and consequently, it contains file cabinets, desks and computer equipment. Your affiant is also aware from published media accounts as well as conversations with Special Agent Barry Carmody, who has interviewed personnel at USF, where Sami Al-Arian teaches computer science at USF and he is considered a computer specialist. - Page 11 Affidavit.

Any suggestion that a search of WISE would provide evidence of illegality was totally speculative and without any support in the Affidavit. Even with a confidential informant, the Affiant is unable to identify what records existed at WISE.

Dr. Al-Arian's USF Office

Dr. Al-Arian's office on campus provides another example of the speculation as a nexus between the criminal activity alleged and a place that the Affiant alleges evidence of that criminal activity will be found. The only theory, upon which the Affiant asserts that Dr. Al-Arian's office on campus should be the target of the search here, is that it is Dr. Al-Arian's office. Presumably, this office is where Dr. Al-Arian conducts the business of being a professor. Nothing in the Affidavit contradicts this.

The suggestion that he keeps the alleged evidence of illegal activity at home or at WISE undermines the notion that Dr. Al-Arian is keeping this evidence in this office. There is no evidence that any person saw anything irregular in the doctor's office. There is simply very little evidence in the Affidavit regarding Dr. Al-Arian's office at all.

There is simply no averment about the office other than the bald assertion of the affiant. This is insufficient to establish that the items sought will be found where the affiant suggests.

These types of blanket assertions are most often found in search warrant affidavits involving narcotics. In those, the affiant establishes a history of involvement in drug investigations where hundreds of searches, conversations with drug dealers or agents and/or participation in hundreds of investigation. In the instant case, the affidavit is totally devoid of an

allegation that the affiant has ever participated in any investigation regarding terrorism, spying, espionage, or counter intelligence. It would seem that individuals involved with these types of activities would secrete evidence of this conduct much differently than those involved in more pedestrian criminal activities and while counsel is not an expert, neither apparently is Agent West.

In the instant case, the affidavit in support of the search warrant is devoid of any reference that would make it probable that the instrumentalities or evidence of any crime would be located at the targeted premises. Instead, the affidavit relies on the bare conclusions of the affiant drawn from a series of "media accounts" to attempt to support a finding of probable cause. The affiant fails to establish the requisite nexus between the places to be searched and the items to be seized.

Unlike an arrest warrant, which requires probable cause to believe that a person has committed a crime, the Fourth Amendment dictates that before a search warrant may issue there must be probable cause to believe that a legitimate object of a search will be found at a particular place. Steagald v. United States, 101 S.Ct. 1642, 1648 (1981). As stated in United States v. Lalor, 996 F.2d 1578 (4th Cir 1993):

> In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.

Id. at 1582, citing Zurcher v. Stanford Daily, 436 U.S. 547, 556 & n.6 (1978).

In United States v. Gomez, F.Supp. 461 (E.D.N.Y.) 1987), a warrant was issued for the search of the defendant's residence based almost solely on the fact that the defendant was a suspected drug dealer. The court, although recognizing that there was sufficient evidence to suspect that a co-defendant was keeping evidence of illegal activity in her home, found that this was not sufficient to support probable cause as to this defendant's residence:

> While [evidence that the co-defendants were in contact with each other] indicates that [the defendant] was involved in drug deals with Newbold, it does not give reason to believe that she too would keep records or that those records, if they existed, would be found in her apartment.

Id. at 462. The court continued by addressing the affiant's "expert opinion" concerning the practices of narcotic traffickers:

> Finally, the affiant proffered his expert opinion that narcotics traffickers often keep records in their residences. While the magistrate is certainly entitled to consider and credit this specialized knowledge, it does not alone provide probable cause to search. Indeed, where as here, there is nothing to connect the illegal activities with the arrested person's apartment, to issue a warrant based solely on the agent's expert opinion would be license virtually automatic searches of residences of persons arrested for narcotics offenses. This would effectively eviscerate the fourth amendment's requirement that there be probable cause to believe "that contraband or evidence of a crime will be found at a particular place."

Id. at 463 (citations omitted) (emphasis added). See also *United States v. Benevento*, 836 F.2d 60 (2d. Cir. 1987) (expert opinion alone concerning the habits of drug dealers is not enough to establish a link between a defendant's home and his criminal activity).

In *United States v. Corral*, 702 F. Supp 1539 (D. Wyo. 1988), the defendant was stopped in his car and consented to a search. This search yielded a small quantity of drugs and a large quantity of money. Believing the items found to be indicative of a large drug conspiracy, the police obtained a warrant to search the defendant's house. The court found that the warrant had been improperly issued and held there was no nexus established or individual tie to the defendant's residence. As explained in *Corral*, the affiant cannot merely offer a "hunch that [contraband] may have been on the premises ..." a magistrate must have a substantial basis to believe that probable cause existed." *Id*. at 1547-48. See *Illinois v. Gates*, U.S. 213, 239 (1983).

The Search Warrant

> The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. Accordingly, a warrant must 'clearly state what is sought,' and its scope must 'be limited by the probable cause on which the warrant is based."' *United States v. Towne*, 997 F.2d 537, 544 (9th Cir. 1993) (quoting *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 856-57 (9th Cir. 1991)). In assessing whether a warrant passes constitutional muster, a court therefore is obliged to make two inquiries: first, whether the scope of the search authorized by the warrant was justified by probable cause and, second, whether the warrant was sufficiently particular to limit the discretion of the officers executing it. *In re Grand Jury Investigation Concerning Solid State Devices*, 13 F.2d 853, 856.

In a document entitled Attachment B, the items to be seized as a result of the search warrants in question are set out. Attachment B authorizes a wholesale rummaging through of the property of the accused. One need only to look at the 21 categories of items to be seized, each without limitation, to realize that what was issued here was a classic general warrant.

ATTACHMENT B[9]

1) Articles of Incorporation for ICP and WISE

2) Corporate/Organizational minute books ICP and WISE

3) Membership rosters for ICP and WISE

4) Lease agreements and applications signed by or on behalf of ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

5) Telephone bills and statements for ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

6) Travel records - including itineraries and tickets/ticket copies related to ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

[9] Attachment B items to be seized.

7) Correspondence documents - letterhead and plain paper, both incoming and outgoing relating to ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

8) Stock certificates related to ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

9) Personal correspondence from/to Sami AL-ARIAN, which relate to WISE, ICP, Ramadan SHALLAH and Basheer NAFI.

10) Organizational tax returns/applications/statements Business tax forms related to ICP, WISE, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

11) Immigration documents related to WISE, ICP, Ramadan Abdullah SHALLAH and Basheer NAFI.

12) Pamphlets, leaflets, booklets, video and audio tapes related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI and the Islamic Jihad.

13) Bank/financial institution account statements/applications related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

14) Bank/financial institution account deposit tickets/receipts related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

15) Copies of bank/financial institution deposit items related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

16) Canceled checks/cashier checks/money orders/wire transfer records related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

17) Financial ledgers/journals related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

18) Financial statements related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

19) Invoices/source documents for purchases related to WISE, ICP, Sami ALARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

20) Credit card statements/applications/receipts related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI.

21) Computer data related to WISE, ICP, Sami AL-ARIAN, Ramadan Abdullah SHALLAH and Basheer NAFI to include the following:[10]

A) Any and all information and/or data stored in the form of magnetic or electronic coding on computer media or on media capable of being read by a computer or with the aid of computer-related equipment. This media includes floppy diskettes, fixed hard disks, removable hard disk cartridges, tapes, laser disks, video cassettes and other media which are capable of storing magnetic coding.

B) Any and all instructions or programs stored in the form of electronic or magnetic media which are capable of being interpreted by a computer or related components. The items to be seized include operating systems, applications software, utility programs, compilers, interpreters and other programs or software used to communicate with computer hardware or peripherals either directly or indirectly via telephone lines, radio or other means of transmission.

C) Any and all electronic devices which are capable of analyzing, creating, displaying, converting or transmitting electronic or magnetic computer impulses or data. These devices include computers, computer components, computer peripherals, word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners, external hard drives and other computer-related electronic devices.

D) Any and all written or printed material which provides instruction or examples concerning the operation of a computer system, computer software and/or any related device.

There is not a single statutory limitation mentioned or proposed in any portion of Attachment B.

> "As the warrants stand, however, they authorize wholesale seizures of entire categories of items not generally evidence of criminal activity, and provide no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Spilotro*, at 964 (9th Cir. 1986).

As such, attachment B resembles the warrant the Ninth Circuit held invalid in *United States v. Spilotro*, 800 F.2d 959.

The executing officers armed only with the search warrant had authority to take anything with Dr. Al-Arian's name on it. The affidavit was so wholly lacking information and devoid of

[10] *See United States v. Leary*, 846 F.2d 592, 600 (1988) for similar affidavit.

P.C., that apparently the magistrate gave the police the authority to go look and take whatever struck their fancy. This ultimately included items such as children's report cards and homework assignments. Attachment B is strikingly similar to the warrant examined in *In re Grand Jury Proceedings*, 716 F.2d 793.

> "Plaintiffs argument that the search warrant authorized an improper general "exploratory" search of his office has considerable merit on the facts of this case. The warrant authorized the FBI to seize all records pertaining to his bail bonding business for the period January 1, 1976, to the present. The scope of the search was otherwise unlimited: The warrant did not indicate that the documents sought pertained to any specific transactions, did not identify the offenses on which evidence was sought, and did not confine the search to any particular files or categories of documents. In the absence of any clearly demonstrated necessity, the seven-year period covered by the search warrant is excessive and unreasonable. Indeed, it is difficult to imagine a search warrant stated in more general terms." *In re Grand Jury Proceedings*, at 497-98 (8th Cir. 1983).
>
> "This language is highly applicable to this case. There is much force to Young's contention that the search warrant authorized the FBI to go into his office and rummage through all his business files seeking any information pertaining to any federal crime, or at least any information pertaining to the generic crime of interstate fraud that was under investigation. Thus, the warrant created the very risk of excessive intrusions by law enforcement authorities into private affairs that the fourth amendment was intended to guard against. The warrant did not confine the search to documents relating to fraud in charges, collections, and reporting of specific bail bond premiums, but authorized the seizure of all documents in Young's bail bond operations without any enumeration or specificity. *See* *In re Grand Jury Proceedings*, 716 F.2d 493, 498 (8t Cir. 1983). *See also* *United States v. Roche*, 614, F.2d 6, 7 (1st Cir. 19801." *In re Grand Jury Proceedings*, at 497-98 (8'' Cir. 1983).

Of equal importance, Attachment B imposes no time limit on any one of the 21 categories of items to be seized. It is important to note in this regard that it was not until January 23, 1995 that there was a prohibition against providing support to the P.I.J. The citizenship form that formed the basis of the investigation was not signed until December 30, 1993. ICP was

incorporated in October 20, 1988 and WISE was incorporated on February 21, 1991. The affidavit does not allege any event with regard to Dr. Al-Arian, WISE or ICP occurring post the executive order. Yet the search warrant the magistrate authorized was an unlimited search and seizure of items with respect to the time.

> Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad. United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982); United States v. Abrams, 615 F.2d 541, 545 (1st. Cir. 1980) ("A time frame should also have been incorporated into the warrant."); *In re Application of Lafayette Academy*, 610 F.2d 1, 6 (1st. Cir. 1979). We have held as much in an unpublished case. United States v. Nagalingam, 1998 U.S. App. LEXIS 24980., No. 97-6433, 1998 WL 739822, at (6th Cir. Oct. 6, 1998); *see also* United States v. Sissler, 1992 U.S. App. LEXIS 14041, No. 91-2113, 1992 WL 126974, at 6-7 (6th Cir. June 10, 1992), cert. denied, 506 U.S. 1079, 122 L. Ed. 2d 353, 113 S.Ct. 1044 (1993). United States v. Ford, 184 F.3d 566, 576.

Affidavit for 1995 Search of People's Storage: D 20

In the first two pages of this affidavit Agent Carmody lists his 35 year experience. It goes on to outline that his investigation involves an investigation of criminal conduct by Sami Al-Arian, Ramadan Shallah, the Islamic Committee of Palestine and Islamic Concern Project, The World Islamic Studies Enterprise and he then next lists the crimes he is investigating.

> Among the possible criminal violations that your affiant is investigating are False Statements to a Department of the Untied States Government, in violation of Title 18, United States Code, Section 1001; False Statements Relating to Naturalization, Citizenship or Registration of Aliens, in violation of Title 18, United States Code, Section 1015; the Unlawful Procurement of Citizenship or Naturalization, in violation of Title 8, United States Code, Section 1425; Fraud and Misuse of Visas, Permits and other Documents, in violation of Title 18, Untied States Code, Section 1546; and Aiding and Abetting or Assisting Certain Aliens to Enter the United States, in violation of Title 8, United States Code, Section 1327; Title 18, United States Code, Section 1341, Mail Fraud; and Title 42, United States Code, Section 1973, False Information in Registering or Voting.

Again the word "among" is utilized in this affidavit. What would normally be a paragraph of limitation is not now because of the use of the word "among".

Agent Carmody then notes the lease for his storage space was found in Dr. Al-Arian's home during the November 20th search. In the next two paragraphs the affidavit discusses Ramadan Shallah and Mazen Al-Najjar, their relationship with WISE, and the fact that Shallah is now the head of P.I.J. There is no discussion of where this information comes from and the only source disclosed in the affidavit is the affiant's knowledge. The magistrate is not informed whether this was his own knowledge or how the affiant was informed re this information. The next page of the affidavit sets forth the affiant's discussions with the general manager of the storage facility; from these discussions it is determined that storage space D-20 is leased to Dr. Al-Arian and that the entry to D-20 was made on November 20th and 24th 1995. The next paragraph of the affidavit refers to a letter found in Dr. Al-Arian's home that is alleged to solicit funds for the Islamic movement in Palestine.

The date of the letter is not disclosed in the affidavit. It is further not disclosed whether the letter was written before or after the designation of the "Jihad" as an international terrorist organization, which is the subject of the next sentence in the affidavit.

Page 5 of the affidavit begins with the accusation that in November 28, 1995 that Dr. Al-Arian along with Mrs. Al-Arian swore that they were citizens of the United States and they were not. With regard to the conclusion that the Al-Arians were not citizens, the affidavit provides the magistrate with no information from which the magistrate could make his own conclusion. The affidavit simply asserts it with no underlying basis for its belief. The affidavit does not even state that investigation reveals that they were not citizens. Once again, as seems to be the practice in this case, the affiant substitutes his judgment for that of the magistrate and without any concern the magistrate accepts the judgment or conclusions.

Next is a conclusory series of paragraphs which sets in general terms and without any specifics that based on his experience that individuals keep, store and maintain records other than in their homes and offices. These paragraphs make reference to the affiant's experience but do not particularize any of this information to Dr. Al-Arian or his wife. Of equal importance regarding the storage of information at this facility is the quantum of material removed from the Al-Arian home and offices on November 20th and 21st. It would seem likely that the more material concerning the illegality that this officer is investigating that was removed during that search, the less likely things they are searching for would be in the storage facility. Yet the affiant makes no mention of the product of their search of Dr. Al-Arian's premises on November 20th and 21st". The letter found at Dr. Al-Arian's home does not in any way relate to the storage facility and as such does not establish P.C. to search it. Other than the alleged experience of the affiant the affidavit makes no effort to tie any illegal conduct in the storage facility. The affiant then incorporates by reference Agent West's affidavit and search warrant. See our prior discussion of search warrant and affidavit of Agent West.

With respect to the organizations that Mr. Carmody is investigating, his Affidavit does little more than name them. Despite the November 20th and 21st searches of Dr. Al-Arian's home and offices, Mr. Carmody's Affidavit provides no factual additional information regarding WISE or ICP nor does his Affidavit discuss any information regarding Mr. Shallah. Thus, his Affidavit relies entirely on Mr. West's Affidavit to support the search of the storage facility with respect to the organizations being investigated and Mr. Shallah and as a result these searches suffer the same maladies that are described in the defense's analysis of Mr. West's Affidavit.

The single additional fact disclosed in the Affidavit is the letter found in Dr. Al-Arian's home. Since the Affidavit fails to disclose when the letter was written, the Magistrate is left in the position of not being able to discern whether it discloses criminal conduct or not and as such

it cannot contribute to probable cause. What we are left with is an Affidavit that says nothing about what is likely found in the storage facility and which relies only on the so-called expert opinion of the Affiant to establish a nexus.

Search Warrant

12225 North 56th Street

Tampa, Florida 33617

The Items to be seized pursuant to the Search Warrant for the Storage Facility can be found in Attachment A. Attachment A consists of 8 categories of items. Like each of the similar Attachments and Warrants involved in this case Attachment A is neither limited by any of the statutory authority listed in the Affidavit In Support of the Search Warrant or by any time or date limitations. Items #1 in Attachment A deals with Articles reflecting membership and minutes of the ICP and WISE. The Affidavit In Support of this Warrant does not even reflect whether the ICP and/or WISE are membership organizations. There is simply nothing to reflect in any of the Affidavits filed in 1995 to permit the search of Dr. Al-Arian's effects that either the ICP or WISE are membership organizations. What an Article reflecting membership in the ICP or Wise comprises is not described in either the Affidavit or the Warrant and if such is left entirely to the executive officers to determine.

Item #2 addresses itself to lease agreements showed by and or on behalf of ICP, WISE, Sami Al-Arian, Ramadan Shallah and Basheer Nafi. The simple problem of a nexus first to criminal conduct and second as to why anyone would expect to find lease agreements for Shallah and Nafi in this storage facility is unexplained. The Court need be mindful to the time this warrant had been issued that law enforcement had spent two days searching Dr. Al-Arian's home and offices. Yet, the officers here leave the magistrate blind to what they have found in those searches. Why after their generous rummaging through the possessions of Dr. Al-Arian's home

and the offices of WISE and the University they had any expectation of finding any additional materials of this type is unexplained.

The above is also true with respect to #3, which requests financial documents. Why financial documents for Ramadan Shallah and Basheer Nafi would be in a storage locker for Sami Al-Arian is never explained and appears to be based solely on an unsubstantiated hunch by the officers.

Item 5 relates to correspondence and documents relating to ICP, WISE, Ramadan Shallah and Basheer Nafi – obviously correspondence relating to ICP and WISE . There are First Amendment implications such as the correspondence that the police seized involved invitations to conferences, participants, written contributions to conferences, papers presented, areas of discussion and agenda. Thus, by the time of this application for a Warrant , the First Amendment implications of this Request should have been clear to the Affiant.

Item 6: Nexus is clearly an issue with respect to Item #6. Nothing in either Mr. West's Affidavit or Mr. Carmody's Affidavit, indicates why anyone would believe any immigration documents of Shallah or the Al-Arians would be in a storage bin. Particularly since immigration documents were seized in the two-day search of Dr. Al-Arian's home; curiously, the affiant did not inform the Magistrate of this fact.

Item #7 of Attachment A, raises precisely the same concerns of Item #4. Here these items are being seized for their contents. Once again this would apply to newspaper and magazine articles -- the mere possession of which is not a crime. The First Amendment implications of such a seizure are clear. Yet, the absence of the exactitude required is likewise clear.

Again, the overbreadth of Item #8 – Any information regarding any purchase of any item is the target of Item #8. Thus, grocery receipts, medical information and information regarding

the most intimate of personal purchases are subject to seizure, all in violation of the Fourth Amendment.

2003 WARRANT

Attachment "B": Items to be Seized

In Attachment B, Items to be Seized, the arrest warrant for the 2003 search suffers from all, if not more, of the same vices that Attachment B of the 1995 search suffers.

All of the problems associated with the 1995 search warrant also described as Attachment B are also extant with regard to the warrant issued in 2003. The 2003 search warrant lists 13 large categories of items to be seized. Many of these large categories list a series of sub categories, see for instance category (1). Again as in the 1995 search this search is directed at a number of premises and entities. Thus, with respect to Dr. Al-Arian, the search is directed at his home 7901 Sanctuary Cove, Apt. 224, and the business office of Dr. Al-Arian at the Islamic Academy of Florida. A view of the 13 categories of the items to be seized establishes that there were no time frame limitations on any of these categories.

Item (1) seeks "Indicia of Membership or any association with…" Association with the P.I.J. is not now nor ever been a crime nor has mere membership. This goes directly to the Accused's First Amendment rights. It is neither limited as to scope or time. What exactly "indicia of membership or association" is not specified, a list of items is specified; but the sentence which begins the list begins with the term "includes but is not limited to" - what exactly is indicia of membership is left entirely up to the executing officers to determine.

Item (2) lists addresses and/or telephone books, along with fax numbers of co-conspirators. No individuals are named or identified as co-conspirators. Likewise, the document seeks fax numbers of other members of the P.I.J. and other individuals in association with the P.I.J. HAMAS, WISE, ICP and IAF. The warrant gives the executing officers no methodology to

determine who a co-conspirator, member or other individual in association with the P.I.J. is; nor does the warrant define individuals in association with P.I.J. HAMAS, etc. with the necessary degree of exactitude to satisfy First Amendment concerns. And, again, there is no suggestion that any of this is limited by any statutory authority.

Item (3) requests photos, negatives, films undeveloped film and the contents therein, audiotapes in particular photos videos and audiotapes of co-conspirators and individuals in association with the PIJ, HAMAS, etc. Once again the problems are manifest. Co-conspirators remain unidentified. Other members of the P.I.J., HAMAS, ICP and WISE are unidentified. No methodology is disclosed to the executing agent to make any of these determinations; that is left to their discretion to determine what photos must disclose this information. The category "other individuals in association with the Palestinian Jihad and HAMAS WISE, ICP and IAF" is so broad and unlimited that it would include a plumber who came to fix a toilet at the school. The absence of any limitation on the agent's discretion is truly remarkable. The category of "undeveloped film" perhaps goes directly to the intention to conduct a general rummaging through of the possessions of the Accused. It is impossible for most people lacking in clairvoyant skills to know what is on the undeveloped film.

Unless the executing officers of this search had developed powers beyond those of mere mortals, they would be equally ill equipped to determine whether any undeveloped film would be in any way relevant to anything they were looking for. This is an example of the grab and run type search that is proposed by the warrant and was executed by the police. This simply characterizes the mindset of the issuing Magistrate and the officials who were going to execute this warrant. That mindset is simply inconsistent with the protections of the Fourth Amendment.

Item (4) requests items to be seized include books, magazines, videotapes, audiotapes, newspaper which display or mention the P.I.J. Hamas, Wise, ICP, and I.A.F. The New York

Times, Newsweek, Time Magazine, and The Economist have all mentioned either Hamas or the P.I.J. in the last several years; even the Tampa Tribune and the St. Petersburg Times have had the temerity to mention the P.I.J. or Hamas. Possession of these books or magazines is simply not evidence of a crime. Nor can the government criminalize possession of these materials. But this is clearly an example of the overbreadth nature of this search warrant and the search conducted pursuant to it. Once again, the First Amendment is implicated here. Books and magazines are being seized for their content. Here, the content need not be even supportive of the P.I.J. or Hamas. The books or magazines need only to mention them.

This request clearly does not meet the scrupulous exactitude test formulated in *Stanford.* With regard to the Islamic Academy of Florida (IAF), the agents know that the IAF is an academic institution. It is therefore likely that, like in most schools, the school administration might indicate in each textbook that it is owned by I.A.F. Under this provision of this search warrant, any textbook that depicts in some way indicia of ownership by I.A.F. is subject to seizure.

Item (5) discusses financial records. As a result of item (5) all financial records found on the premises are subject to seizure regardless of who they belong to or how the money was obtained; airline tickets regardless of who traveled or where they might have traveled are to be seized. This request also seeks evidence of the obtaining, secreting and transfer or concealment or expenditure of money.

What this evidence is of concealment of assets is, is not explained and left entirely to the discretion of the agents. Evidence of expenditure of money would exclude grocery bills, a wife's doctor's bills, children's pediatric care, and dental bills. With respect to expenditures of money, there's simply no attempt at any limitation whatsoever in the warrant.

Item (6) discusses the seizure of all U.S. and foreign currency. Thus, the magistrate gave the authority to seize any currency that was in the home. There was no statutory or commonsense limitation imposed on this category of items to be seized. There was no limitation with respect to whether the money to be seized was derived from the proceeds of unlawful activity. The warrant authorized to take all the currency, beggar the accused, render his family destitute. This is a blatant example of the utilization of a search warrant to punish the accused before the trial. If the government had probable cause to believe all the money that the accused or IAF possessed were proceeds of unlawful activity, it was certainly not alleged or established in the affidavit. Yet the warrant authorizes the seizure of all U.S. currency.

Items (7) through (11) deal with corporate and electronic storage of information. Any computer was subject to these seizures whether they belonged to Dr. Al-Arian or IAF. There simply is no limitation in the warrant with respect to these servers.

Item (12) involves travel documents and, again, we see no limitations are imposed at all.

Item (13) involves passports, any passports; therefore, the agents felt they could seize the passports even belonging to the Accused's minor children, again without limitation.

Just as in 1995 the items to be seized authorized by the warrant issued in 2003 authorized a prohibited general search. The breadth of the warrant here is staggering and in no way limited either by common sense, statutory authority, and/or time. The seizures of books, papers, and research is authorized for merely mentioning the P.I.J., HAMAS, ICP WISE or I.A.F. Thus test papers of students, letters to parents, textbooks and the like were subject to seizure. Expenditures of money authorize inquiry and the seizure of information regarding the most intimate details of the accused family life. How many times the accused went to Publix's, his purchases, his toiletries, his wife's purchases of medicine, physician appointments were all subject to seizure. More a general rummaging could not have been authorized. This general rummaging comes after

an initial general rummaging through the possessions of the Accused in 1995 and after law enforcement returned many of the items originally seized in 1995 and then seized again.

The purpose of both these searches was not merely to search, the purpose here was to punish the Accused. How else does the government explain the seizure of the photos of the accused with Presidents Bush and Clinton, photos with Hillary Clinton and other congress people? Perhaps the seizing agents concluded these were photos of co-conspirators. Perhaps the apologetic correspondence to Abdullah Al-Arian from the U.S. Secret Service was deemed a communication between co-conspirators. This warrant authorized a search whose purpose was to punish and intimidate, prior to conviction; it was clearly not a search that was limited in any way to the fruits and instrumentalities of crime. Just as in 1995 the examples of the items seized by the government shows that the execution of this search, if there was any limitation established in the warrant, went clearly well beyond such limitation.

PARTICULARITY AND OVERBREADTH

The seizures resulting from the various 1995 searches against Dr. Al-Arian run for 242 single spaced type written pages of the discovery index in this case. Among the items that the officers seized pursuant to the search warrant as authorized by the magistrate include textbooks written 30 years ago, a personal book of poetry written when Dr. Al-Arian was 17 years old (designated by the F.B.I. as "terrorist writings")[11], a karate membership from Southern Illinois University at Carbondale dated 1976, home videos labeled Niagara Falls, and the minor children's diaries.

These are only some of the highlights of the seizure and are offered to show the breath and depth of the search that the agents conducted. For more information on the nature of the

[11] Under what authority in either the affidavit or search warrant to the executing officers derive the authority to seize poetry. The determination that these writings were "terrorist writings" was that of the police and not the magistrate.

search conducted, one need only examine with some care the discovery index prepared by the government in this matter.

It is clear from any examination of the discovery index, that either the search warrants authorized a prohibited general rummaging through of the offices, home and storage facility of the accused or that the searching officers made no effort to be bound by any limitations allegedly imposed by the affidavit. Anything not bolted down was seized with little if any regard as to what it was or whether it was relevant to a crime or whether it was produced by Dr. Al-Arian, WISE or ICP The list is unending and remarkable.

Textbooks, placards, magazines articles, anything written in Arabic, letters to newspapers, correspondence with academic institutions, including Harvard, Yale, and Princeton, video tapes, pictures, there is simply not a category of item that could be invented by use of the English language that was not seized as a part of this search. Most of the items seized were on their face evidence of innocent behavior such as grocery receipts. An examination of the items seized establishes that this was a seizure without limitations in violation of the most fundamental principles of the Fourth Amendment.

> The Supreme Court has stated time and again that this clause prohibits the "general warrant." *Boyd v. United States*, 116 U.S. 616, 625, 29 L.Ed. 746, 6 S. Ct. 524, 3 A.F.T.R. (P-H) 2488 (1886); *Andersen v. Maryland*, 427 U.S. 463, 478, 49 L. Ed. 2d 627, 96 S. U. 2737 (1976). And we have held, "The requirement that a warrant not be a general one is in part a function of the probable cause rule and is in part derived from the fourth amendment requirement that warrants be ones particularly describing the place to be searched, and the persons or thins to be seized." *United States v. Hillyard, 677 F.2d 1336, 1339 (9 Cir. 1982)*
> To satisfy the demands of the Warrant Clause, a warrant must comply with two related but distinct rules. First, it must describe the place to be searched or things to be seized with sufficient particularity, taking account of "the circumstances of the case and the types of items involved. *United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986)*. Second, it must be no broader than the

> probable cause on which it is based. *Yonder Ahe v. Howland, 508 F.2d 364 (9th Cir. 1974)*. The particularity rule and the probable cause rule serve a common purpose: to protect privacy by prohibiting "a general, exploratory rummaging in a persons belongings." *Id.* at 369 (citations and internal quotations omitted). Although the two rules serve the same ultimate purpose, they achieve the purpose in distinct ways. *United States v. Weber, 923 F.2d 1338*, *see also United States v. Ford, 84 F.3d 566, 575*.

The Fourth Amendment's particularity requirement is designed to prevent exactly what happened in this case, a general exploratory rummaging in a person's belongings as to what is to be seized; for Fourth Amendment purposes, nothing is to be left to the discretion of the officer executing the warrant.

> The fourth amendment requires that warrants "particularly describe[e] ... the persons or things to be seized." U.S. Const. amend. IV. This requirement prevents a "general, exploratory rummaging in a person's belongings," *Coolidge v. New Hamsphire, 403 u.s. 443, 467, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971)* and "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas 379 U.S. 476, 485, 13 L. Ed. 2d 431, 85 S. Ct. 506 (1965) (quoting Marron v. United States, 275 U.S. 192, 196, 72 L. Ed. 231, 48 S. Ct. 74 (1927)). See Andresen v. Maryland, 427 U.S. 463, 480, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976); United States v. Medlin, 842 F.2d 402, 404 (10th Cir. 1985).* "The particularity requirement [also] ensures that a search is confined in scope to particularity described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss, 774 F.2d at 404.*
>
> The test applied to the description of the items to be seized is a practical one. "A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized." *United States v. Wolfenbarger, 696 F.2d 750, 752 (10t` Cir. 1982) (quoting United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982))). n12 United States v. Leary, 846 F.2d 592, 600 (1988).*

In this case, the government agents seized, allegedly pursuant to the warrant, items that directly implicate this Accused's First Amendment rights, his speeches, his writings, his research that led to these writings, his correspondence with sources, his correspondence with other

scholars, and bookstores of books, all of this seized purportedly for their content.[12] To the extent that the warrant contemplated the seizure of First Amendment material,[13] the particularity requirement of the Fourth Amendment requires that the items to be seized be set forth in the warrant with scrupulous exactitude, a higher degree of particularity than normal.

> In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. n16 See *Marcus v. Search Warrant, 367 U.S. 717; A Quantity of Books v. Kansas, 378 U.S. 205*. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case. n17 *Stanford v. Texas, 379 U.S. 476 511, 512*.

The material that was seized here is exactly the type of material referenced in *Stanford.*

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States, 275 U.S. 192, at 196*. We need not decide in the present case whether the description of the things been weapons, narcotics or "cases of whiskey." See *Steele v. United No. 1, 267 U.S. 498, 504*. n18 The point is that it was not any contraband of that kind which was ordered to be seized, but literary material - "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party ofTexas, and the operations of the Communist Party in Texas." The indiscriminate sweep of the language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history. Stanford at 512.

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[12] Some were seized simply because they were there. The agents exhibited a `seize first, determine relevance later attitude.

[13] Either the warrant contemplated the seizure of the First Amendment materials or the agents seized this type material without any direction from the warrant.

There was simply no attempt to describe this type of material in the warrant. Here the warrant authorize seizures which were boundless, virtually every seizing decision was an improper discretionary call made by law enforcement in violation of the Fourth Amendment.

Execution

> The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. See generally Seibert, Freedom of the Press in England, 1476-1776; Hanson, Government and the Press, 1695-1763.

Not only did the warrant in question authorize an overbroad search not bound by any of the recognized notions of the type of particularity demanded by Fourth Amendment jurisprudence. The manner of execution of this search and the items seized establish that law enforcement executed this search with the intent to conduct a prohibited general rummaging through the offices, home and storage facility of Dr. Al-Arian. The warrant in this case authorized a virtually unbounded search. Whatever bounds that can be ascribed to the warrant were clearly exceeded by the scope of the execution of this search. It is important to note that the 1995 search occurred 9 years ago. Whatever briefings that occurred are probably obscured by the passage of time. Counsel does not know at this juncture whether any of the searching officers kept any of the notes that may have been taken pursuant to those briefings. What we are left with currently is the returns made the day of the search and the discovery index. Any examination of the return established beyond peradventure that whole categories of items were taken without the law enforcement officers having any idea what they were seizing or whether the items had any relevance to the search authorized by this warrant. Curiously, it appears the returns that were executed were executed in a manner to obscure the nature, extent, and depth of the search. One

need only compare the returns to the Discovery Index B, which runs for 242 typed pages to establish this fact.

Nowhere on the returns of any of these searches does it show that Mrs. Al-Arian's report cards were taken. Nor do the returns establish that examination papers for children at the Muslim School were taken or the world economic summary or letters to the editors of newspapers were taken. It appears that because the Agents were not proficient in Arabic any document with Arabic writing was taken even if it was in the children's room. Counsel is at a loss as to how letters to President Clinton and Senator Graham, although not listed on the returns are evidence of a crime or more pertinent any crime listed in the affidavit since no crimes are listed in the warrant. Equally compellingly interesting is a letter seized to various congresspersons from the American Muslim Counsel. The key words appear to be Muslin, Islam or Arabic. These words seem to have set off a feeding frenzy in these officers. The watchwords of the search and seizure appear to be 'seize now examine and determine relevance later'. The most frustrating aspect of this search is that nothing was beyond the scope of the search as interpreted by these officers. In one instance, they seized sixteen copies of the same book.

> "Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books [v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964),] and *Marcus [v. Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961),] are fully met... .
>
> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." Id.,at 491-492, 93 S.Ct. at 2794-2795.

If the real interest was searching for evidence or criminality, why would law enforcement take sixteen copies of exactly the same book? What really appears to be at work here is an effort

to intimidate the accused and shut down WISE and ICP This search had nothing to do with the carefully drawn strictures of the Fourth Amendment. This search was about intimidation and instilling fear and punishing the accused for supporting an unpopular cause. The type of search conducted here is more appropriate in some of the more well known regimes that have little or no respect for human rights and dignity.

Of equal importance in this matter is the fact that the affidavit relied on by magistrate was not incorporated by reference in the search warrant. Nor does it appear that the executing officers were aware of the affidavit or possessed it at the time of the search. *See* *U S. v. Spilotro*, at 800.

Thus, here the execution of this warrant was left entirely up to the officers with no guidance from the warrant or affidavit.

> The court concluded that the warrant and subsequent search were unlawful because "it left to the executing *officers* the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally produced." *Id.* at 1322-23. The warrant in this case is no better simply because the related affidavit specifies one type of recording, Motown, which was probably illegal since the warrant and seizure were not limited to that type of recording. *Montilla Records v. Morales*, 576 F.2d 324, 327.

Here left to their own devices the executing officer seized such items as (5) New York Times bills, Publix's receipts for groceries, individual tax records and student examinations, newspaper articles and a myriad of other materials having nothing to do with any criminality or anything specified in the affidavit in this matter. When one examines the list of seizures, which resulted from these searches it is clear that the agents executing this search clearly believed that their authority to search for and seize items was unbounded either by the warrant or any briefings. Alternatively, the executing agents never intended to be bound by any "limits" imposed by this warrant. In either case, the actions of these agents were inimical to the rights of the targets of these searches as expressed in the Fourth Amendment.

Severability of the Warrant and the Good Faith Exception

> In sum, were the seizure to be upheld, we would signal a rule allowing general warrants with only general descriptions to issue solely on evidence that particular and easily differentiated contraband of that generic class was to be found on the premises to be searched. This would be an unnecessary and dangerous dilution of search warrant requirements. *Montilla Records at Puerto Rico v. Morales*, 575 F.2d 321, 326.

These searches raise the question of whether portions of the warrants can be severed out and thereby the product of those portions or the severed warrant be utilized by the government at trial despite the exclusionary rule.

In *United States v. Kow*, 53 F.2d 423, the Ninth Circuit faced similar questions - neither the notion of severability nor the good faith exception saved the search. Regarding severability the Kow court stated:

> "The government maintains that even if some categories of the warrant were overbroad, certain sections of the warrant were valid and evidence seized pursuant to these sections should not be suppressed. *See* *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9 Ch..), cert. denied, 466 U.S. 977 (1984). However, "severance is not always possible." *Cardwell*, 680 F.2d at 78. In particular, "if no portion of the warrant is sufficiently particularized to pass constitutional muster, then total suppression is required. Otherwise the abuses of a general search would not be prevented." *Id*
>
> * * * * * * * * *
>
> Here, none of the fourteen categories of seizable documents was limited by reference to any alleged criminal activity. Only Category G, authorizing seizure of tax returns since 1983, was limited as to time. Although Category M, authorizing the seizure of all documents related to HK Video's dealings with other businesses sublicensed by HK T.V., arguably was not overbroad," severance is not available when the valid portion of the warrant is `a relatively insignificant part' of an otherwise invalid search." In *re Grant Jury Subpoenas*, 926 F.2d at 858 (quoting *Spilotro*, 800 F.2d at 967). Kow at 428.
>
> In the instant case the 1995 warrants lack of particularity authorized a general search and acting pursuant to the warrant the executing officers conducted a general search. Based upon the

> character, depth and scope of the searches conducted at the home, offices and storage facility of Dr. Al-Arian, it is clear that what took place here was that which is prohibited by the Fourth Amendment, a general rummaging through the possessions of the accused. *See* *Spilotro* at 967. Under these circumstances neither the doctrine of severability nor the good faith exception should be applied to save these searches.

Two additional cases similar with respect to execution point to the fact that severance is inappropriate and to the absence of good faith. In *United States v. Foster*, 100 F.3d 846 the lot" Circuit held at 831.

> In light of these facts, this court must conclude that Foster's Fourth Amendment rights were violated by the seizure and removal of "anything of value" from his home. Furthermore, it is abundantly clear that the officers' disregard for the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing. n7 Because the officers here flagrantly disregarded the terms of the warrant in seizing property, "the particularity requirement is undermined and [the otherwise] valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *Medlin II*, 842 F.2d at 99.

The facts in Foster were that the police were armed with the search warrant that listed a firearms and marijuana as the items to be seized. The executing officers seized BB guns, drills, televisions, lawnmower, coverall, socket set, clock radio, coins, knives, and things of value. Just like in *Foster*, this search was conducted with an eye to uncovering evidence of additional wrongdoing. This type of search is exactly what the Fourth Amendment sought to disclosure.

In *United States v. Fuccillo*, 808 F.2d 173, 177, 178, the First Circuit held with respect to the good faith exception:

> Applying these principles to the searches and seizures of FAD and the Milford warehouse, it is clear to us that the agents executing the warrants did not act in good faith as that term was explained in *Leon*. Armed with warrants already drawn in the broadest manner, the agents exceeded even that authority. In executing the search warrant at FAD, the agents seized, in addition to the authorized cartons of *women's* clothing, racks of clothing, empty boxes, and most disturbingly, two racks of *men's* clothing. The *entire contents*

> of the Milford warehouse were seized. The good faith exception "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Icy* at 918 n.19. In view of the facts before us, we cannot make that assumption. We decline, therefore, to apply the good faith exception.

Here as in Fuccillo, the agents here armed with warrants already drawn in the broadest manner exceeded even that authority. Nothing in the home, offices, or storage facility was beyond suspicion or not subject to seizure by the terms of the warrant and the execution of the search.

Here the manner of execution by itself destroyed any protection that the warrant might have offered facially. As a result of the combination of circumstances here, Dr. Al-Arian's premises were subject to an assault to his Fourth Amendment Rights that the good faith exception should not excuse.

> Because the warrant in this case was facially invalid, no reasonable agent could have relied on it "absent some exceptional circumstance." *See* *Center Art*. 875 F.2d at 753. The mere fact that the warrant was reviewed by two AUSA's and signed by a magistrate does not amount to "exceptional circumstances." Those exact circumstances were present in *Center Art* and we found them insufficient to meet the test. As we explained in that case when a warrant is facially overbroad, absent *specific assurances* from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails. *Id* ; *see* *also* *United States v. Crozier*, 777 F.2d 1376, 1381-82 (9th Cir. 1985); Spilotro,. 800 F.2d 959, 968 (9th Cir. 1986).

And just as here, the reliance on the affidavit cannot save the search. In Kow:

> The warrant in this case is at least as overbroad as the warrant at issue in *Center Art Galleries*. Moreover unlike the facts in *Luk*, there is absolutely no evidence in this case that the officers who executed the warrant, although instructed to read the affidavit, actually relied on the information in the affidavit to limit the warrant's overbreadth. Indeed, the government concedes that agents seized virtually all of the records and computer files on HK Video's premises. *Cf.* *Luk*

> 859 F.2d at 677 ("agents specifically relied on the affidavit in determining at the scene what items were properly within the scope of the search"). *Kow* at 430

FRANK'S VIOLATIONS WITH RESPECT TO 2003 WARRANT APPLICATION

In the 2003 Application for a warrant, the Government has made material misrepresentations and or omitted information material to the probable cause determination made by the Magistrate in violation of Franks v. Delaware, 438 U.S. 154.

In the 2003 Affidavit In Support of the Search Warrant, the Affiant notes that Dr. Al-Arian's home and office was the subject of a search in November of 1995 on page 4, of 113. The 2003 Affidavit In Support of the Search recites the following information:

> Also presented to the Federal Grand jury was evidence seized in a November, 1995 search of the defendant Sami Al-Arian's home and office at the University of South Florida (USF) Tampa, Florida. Evidence presented to the Federal Grand Jury included documents seized during the 1995 search of the terrorist front organizations WISE and ICP.

Despite the pronouncements of this information, in the Affidavit the Affiant with a reckless disregard for the truth fails to reveal several important fact(s). First, that several months after the first general rummaging in the effects of Dr. Al-Arian and his family, the government returned substantial portions of the documents and items seized to Dr. Al-Arian and his family. Second, that prior to the search in 1995, ICP had become dormant. With respect to WISE it ceased to exist as an active entity just after the search in 1995. Third, that the government was requesting authority to seize documents in this application that it had previously seized and returned.

Essential to this notion that WISE was a front organization for the PIJ was the idea that WISE was a fundraising entity. Essential to the probable cause determination that permitted the search for information concerning WISE was the idea that WISE was a front. Thus, if WISE was doing no fundraising, the probable cause determinations with respect to WISE would fall.

In seeking to search Dr. Al-Arian's home and office as the ICP, the government failed to report any of this information to the issuing Magistrate or to the Al-Arian family.

Additionally, in August 2, 2003, Agent West of the I.N.S. testified as follows with respect to WISE:

A. I believe I may have seen this before, yes.

Q. All right. Isn't it true that Wise regularly published an academic journal called Political Readings.

A. I believe that's correct.

Q. Isn't it true that Mazen Al Najjar's responsibilities were principally to edit and publish this academic journal?

A. I believe that was one of the duties listed on some visa petition documents that was submitted.

Q. Do you have any evidence that he did not edit and publish these, this journal?

A. No.

Q. Isn't it true that Wise sponsored forums and events with the University of South Florida of an academic nature?

A. Yes, it did.

Q. And isn't it true that Wise published the proceedings of those academic conferences, in particular a round table with Hassan Terabi (Phonetic sp.) and a round table with Kershed Ama (phonetic sp.)?

A. I don't know that that was published, I don't know that myself.

Mr. Vara to Judge

Your Honor, we would stipulate that Wise and ICP, other than other activities, their public persona was one; their private one was another. What we're dealing with here is the activities of two individuals that had prominent roles in both Wise and ICP. If they sold Girl Scout cookies on the street corner on Saturdays, it's not relevant to the issues before the Court.

Mr. Cole to Judge

Your Honor, I think we're dealing with one individual here and the individual is Mazen Al Najjar. It's our, it would be our testimony that it is virtually his entire responsibility was with

respect to Wise, that Wise was a totally legitimate organization, that Wise never raised a cent for anybody. And we believe that it's appropriate to establish and, and it's particularly pertinent if Mr. West, the principle agent, is unaware of the perfectly legitimate activities, non-violent academic activities of Wise.

Mr. Vara to Judge

Well, we'll stipulate that they had other legitimate non-threatening activities that Wise did and certainly that evidence can come more appropriately through the respondent.

Mr. Cole to Judge

The respondent, it's fine if they stipulate that. Let me just go with a few further questions with respect to that.

Judge to Mr. Cole

Go ahead.

Mr. Cole to Special Agent West

Isn't it true that you have offered no evidence that WISE raised any money, WISE as distinct from ICP, raised any money for any one.

A. Correct.

Q. Other than WISE.

A. Correct.

Q. WISE was not a fundraising organization. Isn't that correct? Wise.

A. Well, it's public persona, it's legitimate existence, no, correct.

Q. It's private persona.

A. Correct.

Q, It's a private persona.

A. Correct.

Q. There's no evidence of any kind, public or private that WISE raised a single cent of money for any other organization. Isn't that correct? WISE.

A. WISE, as it existed as an upfront legitimate entity, correct.

Q. WISE and I'd like you to answer the following question. Did WISE raise, do you have any open source evidence that WISE raised money for any other organization?

A. No.

None of the above stated information was provided to the Magistrate who issued the 2003 warrant despite the government awareness of it. The failure of the government to provide this information in the Affidavit for 2003 searches violates *Franks v. Delaware*. *Supra*.

> Under Franks if an officer omits critical information from a search warrant application and obtains a warrant the resultants search may be unreasonable under the Fourth Amendment.

U.S. v. Stropes, 387 F.3d 766, 771.

Here, the fact that the Agents were seeking to seize items that they had previously returned to the Accused by the very same people who had seized it previously is clearly relevant to the probable cause finding. This fact alone discloses the harassing nature of the searches and seizures here. Coupled with the Agents' knowledge by 2003 that both the ICP and WISE had ceased to exist as active entities shortly after the 1995 search. Thus, despite the fact that for eight years following the 1995 search, Agents through both their electronic and other surveillance were aware of the lack of activity of WISE and ICP, they lead the Magistrate to believe that both WISE and ICP were ongoing entities currently acting as fronts. Finally, the government was certainly aware of the testimony of Agent West that WISE never raised a penny of money for anything other than WISE. Each of these facts would have an effect on the probably cause determination made in 2003 by the Magistrate and as such constitute material omissions by the government in violation of Franks.

WHEREFORE, the Accused requests oral argument with respect to the probable cause determination in each of the Warrants. Further, the Accused requests an evidentiary hearing with respect to the execution of each of the warrants and the Accused requests an evidentiary hearing with respect to the Franks violations. Ultimately, the Accused requests that all evidence seized

pursuant to the warrants issued in this matter be suppressed. For the foregoing reasons and such others as may appear to the Court, the Accused requests that the motion be GRANTED.

Dated: 22 November 2004

Respectfully submitted,

_/s/Linda Moreno___

LINDA MORENO, ESQ.
1718 E. 7th Avenue
Suite 201
Tampa, Florida 33605
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
Washington, D.C. 20006
Telephone: (202) 912-4800
Telecopier: (202) 912-4835

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd of November, 2004, 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__
Linda Moreno
Attorney for Sami Al-Arian

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