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-30-TBM**
	)	**The Honorable James S. Moody, Jr.**
SAMI AMIN AL-ARIAN, *et al*.	)	
	)	
Defendants.	)	

DEFENDANT SAMI AMIN AL-ARIAN'S MOTION TO EXCLUDE THE GOVERNMENT'S PURPORTED "EXPERT" TESTIMONY OF SPECIAL AGENT KERRY MYERS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, Sami Amin Al-Arian, by undersigned counsel, and, pursuant to Federal Rules of Evidence 104, 403, 702, 703, 704 and the Sixth Amendment to the United States Constitution, moves this Honorable Court for the entry of an Order, after a hearing on the matter, excluding the testimony of Special Agent Kerry Myers as an "expert" in this case. In support of the foregoing, counsel states as follows:

1. On April 18, 2005, the government provided the defense with a summary of Special Agent Myers's qualifications to testify as an "expert" in this case.[1] (Attached hereto as Exhibit A.)

2. The government seeks to adduce testimony from Special Agent Myers concerning the following:

   (a) "a summary and interpretation of the context of FISA intercepts;"

   (b) "the cause and effect of the financial dispute of the Palestinian Islamic Jihad (PIJ);"

[1] The Defendant reserves his right to object on any other grounds to Special Agent Myers's testimony and that of any other "expert" called by the government.

(c) "the effect that a lack of funds had on the PIJ;"

(d) "the in-fighting the financial problems caused;"

(e) "the proposed solutions to the dispute;"

(f) "the voting on the proposed solutions;"

(g) "the proposed meeting to discuss and adopt the solutions;"

(h) "the implementation of the solutions;"

(i) "the organization and membership of the PIJ Shura Council and how each reacted to the varying solutions;"

(j) "the organizational structure and management of the PIJ;"

(k) "the media reporting concerning the defendants and the PIJ;"

(l) "how each defendant and the PIJ organization reacted to the media disclosures;"

(m) "the PIJ plans for response to the media disclosures;"

(n) "how PIJ members responded to the media;"

(o) "how the PIJ, ICP and other associates of the PIJ enterprise facilitated, promoted, and supported the PIJ through communications, distribution, marketing, propaganda and other publications;" and

(p) "how these defendants and organizations promoted the affairs of the PIJ enterprise."

6. The government asserts that the bases for Special Agent Myers's "expert" testimony are:

(a) He "has been with the FBI for approximately 15 years."

(b) "He has been assigned to the Joint Terrorism Task Force since 1988 where he presently works International Terrorism, Bombing and Weapons of Mass Destruction Matters."

(c) "He has received extensive training in Terrorism in general and he specializes in studying the Palestinian Terrorists Groups [sic] which includes the Palestinian Islamic Jihad."

(d) "He has taught numerous [unspecified] classes to law enforcement, intelligence and military officers in Washington D.C. and central Florida."

(e) "In 2001, he was designated as an international terrorism expert by FBI Tampa for the purpose of training other FBI agents in [unspecified] Terrorism matters."

The government further asserts that Special Agent Myers is a certified Bomb Technician and Hazardous Materials Operator, and provides additional detail about his training and experience in these capacities. Such training and experience has no relevance whatsoever to this case, and no connection at all to the "potential testimony" the government sets forth for Special Agent Myers. No mention is made of the principles and methods upon which Special Agent Myers's testimony would be based or the reliability thereof.[2]

---

[2] Indeed, none of Special Agent Myers's relevant qualifications are in any way verifiable. There are no dates, times, or places or topics cited regarding the "numerous classes" he supposedly taught, nor is there detail with respect to his audience. Special Agent Myers purports to be an "expert" on the PIJ, yet his purported "extensive training" is unspecified and is apparently in the area of "terrorism in general." The assertion that he "specializes in studying" the PIJ is broad and entirely unsupported. Counsel cannot even verify that the agent has taken any courses, because they are not listed, and there is no way to know how recent the training

7. In further support of Special Agent Myers's purported credentials as an expert, the government notes that he "testified against both Tim McVeigh and Terry Nichols during the Oklahoma City Bombing trials." There is no assertion that the agent testified as an expert in those trials, and any knowledge he may have regarding bombing and/or hazardous materials is irrelevant in Dr. Al-Arian's case. Moreover, the Oklahoma City bombing trials had nothing whatsoever to do with the PIJ; even if the agent had been qualified as an expert in that case, which his credentials do not assert, such expertise is entirely irrelevant to his proposed testimony here.

MEMORANDUM OF LAW

INTRODUCTION

Agent Myers's testimony should be excluded because it is unreliable, because it will not assist the jury, and because its probative value is far outweighed by the danger of unfair prejudice. Indeed, Agent Myers is being offered as the government's "guilt expert." That is, in addition to general inquiries concerning the PIJ, he will be asked to consider certain items of evidence, including the FISA wiretaps, and then to testify that the evidence proves the defendant's guilt and that the defendant's response to the media and interactions with each other are "consistent with" guilt. Indeed, the government hopes Special Agent Myers will be permitted to state that the Defendant's actions, combined with is insight into the PIJ, demonstrate his guilty intent. Because Special Agent Myers has experience studying suspected and actual terrorist organizations and the average juror does not, the government's hope is that the jury will

---

was.

assume that Special Agent Myers knows more about these organizations than they do and will accordingly adopt his opinions as their verdict.

The use of "guilt experts" creates an unfair evidentiary advantage for the government, since the Defendant is not in a position to counter the "expert in terrorism" with an "expert in non-terrorist innocent behavior." At closing, defense counsel is left to argue a counter-interpretation of the facts, while the government points directly and repeatedly to the "expert's" testimony that neatly and convincingly summarizes the government's version of the evidence. It is this inherent unfairness that the Defendant asks this Court to preclude from this trial. In short, the Defendant asks this Court to hold the government to its burden of proof without affording it the unfair advantage of an unopposed "guilt expert" from the prosecution team.

I. THE TESTIMONY BY SPECIAL AGENT MYERS IS UNRELIABLE.

Fed. R. Evid. 702 provides in part that expert testimony must be reliable. Such testimony is inadmissible unless three requirements are met: "(1) the testimony [must be] based upon sufficient facts or data, (2) the testimony [must be] the product of reliable principles and methods, and (3) the witness [must have] applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. Fed. R. Evid. 703 provides, in pertinent part, that the facts or data upon which the expert's opinion is based must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Thus, even in a "field" such as narcotics enforcement, in which "experts" may rely on the same types of "facts and data" from case to case, the principles and methods they use to draw conclusions must be articulable and reliable, they must be free from bias, and they must be applied reliably. The mere fact that others have relied on the same "facts or data" does not render the facts reliable. For

example, "facts and data" that amount to stereotypes and racial profiles are inherently unreliable even though police officers routinely rely upon such information in making guilt assessments. At any rate, the government has yet to articulate or justify legitimate and reliable principles and methods that Special Agent Myers has relied upon to form his "expert" opinion.

The Supreme Court has held that the district court has a duty to make a preliminary assessment of the reliability and relevance of all expert testimony, including "non-scientific" expert testimony. Kumho Tire Company, Ltd., v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999). At a hearing, the trial court must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." United States v. Daubert, 509 U.S. 579, 589 (1993). See Fed. R. Evid. 104(a) and 702. The Kumho decision "raised the bar for the admissibility of expert testimony" and "focused a great deal of attention on the judge's role as gatekeeper for expert testimony." United States v. Hines, 1999 WL 412847, *2 (U.S.D. Mass. 1999). This "gatekeeping requirement" is designed "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho, 526 U.S. at 152.

Testimony regarding criminal *modus operandi* such as terrorism does not meet the standards of relevancy and reliability set out in Kumho/Daubert. Intellectually rigorous scrutiny of the reliability of the principles and methods underlying a purported expert's opinions is particularly necessary in the case of organizational and *modus operandi* testimony offered by a law enforcement officer who is necessarily "engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948).

In this case, the basis for Special Agent Myers's purported testimony is entirely unclear. The government asserts that he has received unspecified training in "terrorism in general," taught unspecified classes, and was designated a terrorism expert in 2001 by the FBI in Tampa "for the purpose of training other FBI agents in Terrorism matters." The government does not specify what "matters" Special Agent Myers spoke about, the basis for his "expert" designation, or even the import of such a designation. Although general "expertise" in the area of terrorism is not susceptible to a precise Daubert analysis,[3] the Supreme Court in Kumho held that district courts must base their reliability determination on "either Daubert factors or any other set of reasonable reliability criteria." Kumho, 526 U.S. at 157. Thus, in its "gatekeeping role" the Court must establish, and the government must satisfy, some "set of reasonable reliability criteria" to apply to the bases of Special Agent Myers's testimony.

While we have not been provided with the basis or specific substance of Special Agent Myers's proposed testimony, historically, terrorism-expert testimony is often obtained from anecdotes, hearsay, and second-hand sources, none of which constitutes "reasonable reliability criteria." Because the bases of the opinion cannot be verified, this type of testimony is inherently susceptible to inaccuracies, while at the same time carrying undue weight with the jury. Neither voir dire nor cross-examination of the so-called "expert" cures this inherent unreliability because the jury automatically attaches a degree of deference to experienced law enforcement officers trained not only in general police work but also courtroom presentation. It is for the Court to

[3] Daubert suggested consideration of the following factors: 1) whether the particular theory or technique could be tested; 2) whether the theory or technique presented had been subjected to peer review; 3) whether the theory or technique had a relatively low rate of error; and 4) whether the theory or technique had gained general acceptance in the relevant scientific community. Daubert, 509 U.S at 593-94.

determine in advance of trial whether that inevitable deference has been earned by the witness. It is simply not enough for a witness to state that he believes the bases of his opinion to be reliable. The law requires that he also demonstrate that his purported principles, methods, and sources are objectively verifiable and reliable. In determining reliability, "the focus, of course, must be solely on principles and methodology, not on the conclusions they generate." Daubert, 509 U.S. at 595.

The government has offered no means by which an objective arbiter can determine that Special Agent Myers's opinions are reliable and are not the result of conjecture, speculation or even bias. There is no indication that his terrorism investigation training has been constrained by scientific principles or that it is susceptible to academic testing. There is no evidence that he has written on the subject, and there is no indication that the "numerous classes" he purportedly taught to other law enforcement officers had anything to do with the PIJ or his proposed testimony in this case. History is replete with instances where individual officers – and even entire units – ascribe to belief-systems based upon a skewed perception of the people whom they investigate. Whereas scientific expert opinions must withstand interdisciplinary scrutiny and objective, competitive peer review, law enforcement opinions are inherently designed to promote law enforcement purposes and are born of institutional experience, warts and all. It is this type of "expertise" – one that is not readily reducible to an articulable set of reliable analytic principles – that Rule 702 and Kumho envision excluding.

II. SPECIAL AGENT MYERS SHOULD NOT BE PERMITTED TO TESTIFY REGARDING ISSUES ON WHICH THE JURY DOES NOT REQUIRE EXPERT ASSISTANCE.

A. **Special Agent Myers Must Not Be Permitted To Interpret Facts that Are Easily Comprehensible By The Jury and are the Sole Province of the Fact-Finder.**

Under Fed. R. Evid.702, the salient question is whether the expert testimony will "assist the trier of fact." Expert testimony is not permitted if the proposed testimony will venture into areas in which the jury needs no aid or illumination or when the testimony purports to resolve the essential facts bearing upon the defendant's guilt or innocence. "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055 (4th Cir. 1986); see also United States v. Arenal, 768 F.2d 263, 269 (8th Cir. 1985) (holding that law enforcement testimony is still subject to exclusion if the subject matter is within the knowledge or experience of the jury, because the testimony does not meet the helpfulness requirement of Rule 702).

Testimony from "terrorism experts" is unnecessary and properly excludable where, as here,

> all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation.

Salem v. United States Lines Co., 370 U.S. 31, 35, (1962) (quoting United States Smelting Co. v. Parry, 166 F. 407, 415 (8th Cir. 1909)). In United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991), the court reversed convictions for drug offenses because a detective was improperly permitted to testify to operating methods of drug dealers. The court stated that a New York jury hardly needs expert assistance to inform them of the functions of a scale or index card in a drug deal or that dealers, in order to flush out undercover police officers, threaten customers with guns

to make them snort cocaine. See also United States v. Young, 745 F.2d 733, 760 (2d Cir. 1984). (court questioned the need to have expert police testimony that "25 to 30 people milling around outside a building" indicated presence of heroin den). One year after deciding Castillo, the Second Circuit again reversed a drug conviction for the erroneous admission of expert testimony concerning the behavior of drug dealers from a specific area and the *modus operandi* of dealers in that area. United States v. Cruz, 981 F.2d 659 (2d Cir. 1992) (holding that the trial judge erred in admitting an agent's testimony that the events described by the witness were typical of drug deals in the area).

In this case, the government is attempting to adduce, through expert testimony, evidence of, *inter alia*: the financial dispute of the PIJ and the proposed solutions; "voting on the proposed solutions," media reporting concerning the defendants; and the defendants' and PIJ's response to the media disclosures. None of these subjects is a proper subject for expert testimony because such testimony would not assist the trier of fact or would interfere with the fact-finding duty of the jury. An expert is not needed to explain to a jury the factual allegations in the case or what the media reported about the defendants. By introducing Agent Myers's opinion that the defendants' reactions to media reports or general testimony about PIJ's financial dispute, it is the government's true purpose to tie together its evidentiary "loose ends" in the voice of an "expert."

The jury need not be informed concerning stereotypes and generalizations cloaked in an air of "expertise" concerning terrorism because there is nothing unique or complex about the government's version of the conspiracy, other than the sheer lack of evidentiary support. Even though the subjects of Special Agent Myers's testimony are readily comprehensible by any juror, if he is permitted to testify as a "guilt expert," the jury will certainly defer to the aura of "experience and training" and adopt his interpretations of the facts in rendering the verdict.

B. Special Agent Myers Should Not Be Permitted to Render an Opinion Concerning the Defendant's Intent.

Special Agent Myers must not be permitted to testify as to his opinion of the defendants' supposed intent to commit the crimes with which they are charged based on his interpretations of, *inter alia*, the defendants' reactions to media coverage and proposed solutions to the PIJ's financial dispute. Fed. R. Evid. 704(b) provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. (Emphasis added.)

Dr. Al-Arian is charged with entering into a conspiracy. Accordingly, one element the government must prove concerns his mental state, i.e., that Dr. Al-Arian knowingly entered the conspiracy with others. It is for the jury to decide whether the government's evidence indicates that Dr. Al-Arian's statements to certain people or actions in certain circumstances signal his intent to join or further the conspiracy or not. Special Agent Myers's conclusions in this regard would directly usurp the jury's function as the fact-finder by telling the jury directly what the Defendant's intentions were. It is the jury's duty to determine which facts indicate guilt (if any) and the weight to attribute to those facts. As Courts have noted in similar circumstances, an expert may not offer explanations of facts that "embrace the ultimate question of whether [the defendant] did in fact intend to engage in the crime charged." United States v. Mitchell, 996 F.2d 419, 422-23 (D.C.Cir. 1993), quoting United States v. Dotson, 817 F.2d 1127, 1132 (5th Cir. 1987).

C. Special Agent Myers Should Not Be Permitted To Interpret FISA Intercepts.

Special Agent Myers should not be permitted to "provide . . . an interpretation of the context of FISA intercepts," as the government proffers in its summary of his potential

testimony. In United States v. Gibbs, 190 F.3d 188 (3d Cir. 1999), the court concluded that the lower court had abused its discretion in admitting the testimony of an agent who explained what "tonight's the night," "we're going to be on that tonight," and "got to do it tonight" allegedly meant to the speakers. Gibbs,190 F.3d at 213. The court held that it "was the function of the jury, which heard all of the relevant tape recordings, to determine what these phrases meant in the context of the surrounding sentences." Gibbs, 190 F.3d at 213. Moreover, the court stated that the testimony of the agent was not helpful to the jury and its sole purpose was to "to bolster the government's allegation that Brown [the defendant] was the enforcer." Gibbs, 190 F.3d at 213.

Although prior to Daubert, expert testimony has been permitted to assist the jury in understanding "code-like" conversations in tape recordings, interpretations of clearly audible conversations are not admissible. See United States v. Montas, 41 F.3d 775, 783-84 (1st Cir. 1994). Such testimony carries a serious risk of prejudice because by "appearing to put the expert's stamp of approval on the governments theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged." See United States v. Gonzalez-Maldonado, 115 F.3d 9, 18 (1st Cir. 1997). The Gonzalez court found that the district court erred in allowing an FBI agent to comment that the participants in the recorded conversation, "appeared relieved when they – when they—when they discussed the fact that apparently they'd been able to make the delivery of money and nothing happened. They were both relieved and I believe one of them even chuckles a bit about that." Gonzalez, 115 F.3d at 18. The court stated that whether or not the speakers on the tape were or were not in fact "relieved" is for the jury to decide, and the testimony of the FBI agent does not assist them in making this decision. Id.

III. THE PROPOSED TESTIMONY BY SPECIAL AGENT MYERS IS MORE

PREJUDICIAL THAN PROBATIVE AND SHOULD BE EXCLUDED.

As Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses." *Weinstein, Rule 702 of the Federal Rules of Evidence is Sound*, 138 F.R.D. 631, 632 (1991). In this case, the prejudicial nature of introducing interpretations of generalized activities, such as responses to media disclosures, that are linked by a supposed "expert" with terrorist activity outweighs the probative value of its applicability to this case. Fed. R. Evid. 403. The government's case will undoubtedly consist of a plethora of intercepted communications that contain no mention of illegal activity. By introducing Special Agent Myers's testimony, the government merely seeks to "clean up" the multitudes of meaningless conversations by bolstering them with an "expert's" imprimatur. Not only is the agent's testimony cumulative, there is a clear danger that Special Agent Myers's interpretations will be granted more weight than they deserve. Because all the facts necessary to the government's case can be presented and understood without Special Agent Myers's interpretations and because his opinions are likely to be afforded undue weight, his testimony is more prejudicial than probative in this case.

IV. AT A MINIMUM, SPECIAL AGENT MYERS'S TESTIMONY MUST BE LIMITED TO PROPER SUBJECTS OF EXPERT TESTIMONY.

While we maintain that Special Agent Myers's testimony should be excluded in its entirety as unreliable, improper, and overly prejudicial, and that he cannot qualify as an expert in the area of his proffered testimony, if the Court decides to permit him to testify as an expert the Defendant requests that it impose specific restrictions on the scope and content of the testimony

consistent with the Federal Rules of Evidence. Most importantly, the agent's testimony should be limited to general information about the PIJ which may be beyond the experience of the average juror. Under no circumstances should Special Agent Myers be permitted to offer his interpretation of facts readily comprehensible by the jury, his belief that information reported in the media or the defendants' reaction to media coverage is indicia of terrorist activity, his belief in Dr. Al-Arian's guilt, or his opinion with regard to the satisfaction of any element of the offense, including, but not limited to, the Defendant's intent.

V. A HEARING PURSUANT TO FED. R. EVID. 104 AND 702 IS REQUIRED TO DETERMINE THE ADMISSIBILITY OF SPECIAL AGENT MYERS'S TESTIMONY.

Finally, Dr. Al-Arian is entitled to a hearing in advance of trial pursuant to Fed. R. Evid. 104 and 702 to determine the propriety of Special Agent Myers's testimony. See Daubert, 509 U.S. at 591 (holding that when expert testimony is proffered, the trial court must determine the witness's qualifications as a witness pursuant to Fed. R. Evid. 104(a).)

CONCLUSION

WHEREFORE, for the foregoing reasons and such others as may appear to the Court after a hearing on the matter, Dr. Al-Arian requests that the testimony of Special Agent Myers be excluded in its entirety or, in the alternative, strictly and explicitly circumscribed to ensure that any such testimony meets the standards of relevancy and reliability under the Federal Rules of Evidence and applicable case law.

Dated: June 3, 2005

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 3rd day of June, 2005, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Linda Moreno
Attorney for Sami Al-Arian