

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

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

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

SAMI AMIN AL-ARIAN, *et al.*,

Defendants.

OPPOSITION OF SAMI AL-ARIAN TO THE GOVERNMENT'S
MOTION FOR RECONSIDERATION OF RULING ON SCIENTER

COMES NOW the Accused, Dr. Sami Amin Al-Arian, and submits the following memorandum in opposition to the government's Motion for Modification of Ruling on Scienter Under 18 U.S.C. § 2339B(a)(1).¹

INTRODUCTION

This case raises unique and interesting questions concerning a statute that ascribes criminal liability to an Accused for actions performed by others on foreign soil against a violent²

¹ The Accused also relies upon and herein incorporates his previous briefs and argument concerning his Motion to Dismiss Counts 1 – 4 of the indictment as well as the Court's reasoning in its March 12, 2004 Order.

² According to the U.S. State Department's Bureau of Democracy, Human Rights and Labor, "Israel's overall human rights record in the West Bank and Gaza remained poor and worsened in the treatment of foreign human rights activists. . . Israel's security forces killed at least 573 Palestinians and one foreign national and injured 2,992 Palestinians and other persons during the year. Israeli security units often used excessive force in their operations that resulted in numerous deaths. Israel carried out policies of demolitions, strict curfews and closures that directly punished innocent civilians. Israeli forces often impeded the provision of medical assistance to Palestinian civilians by strict enforcement of internal closures, harassed and abused Palestinian pedestrians and drivers at the approximately 430 Israeli-controlled checkpoints in the occupied territories and conducted mass, arbitrary arrests in the West bank. Israel restricted the freedom of the Palestinian media and placed strict limits on freedom of assembly and movement for Palestinians. From "Supporting Human Rights and Democracy: The U.S. Record 2003-

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and illegal occupation of the Accused's historic and cultural homeland. The Palestinian people have engaged in a 56 year battle to end the illegal occupation of their land by Israel,³ and by all accounts, Sami Al-Arian was engaged in and committed to that struggle. Indeed, some of the Palestinian people over those 56 years have resorted to violence against the occupying power. But there is no allegation that Dr. Al-Arian conducted, planned, or organized any violent acts in the United States or elsewhere. As the attorney for the government has stated: "I said it before, I'll say it again, there's no allegation that any of these defendants personally participated in the commission of violent crimes. We don't have that." (Al-Arian Bond Hearing Transcript, March 25, 2003, Page 127, lines 10-13).

In analyzing this case, the Court should also be mindful of the following finding of magistrate in its April 10, 2003 Order concerning bond:

All [defendants] are prominent leaders and models of civic involvement in their respective communities...Family members, friends, associates, and community leaders presented glowing testimonials and letters about each Defendant's good character and high reputation. Al-Arian's record of civic achievement, both on the local level and national stage, is particularly outstanding...All publicly preach and practice the ideals of good citizenship, tolerance, morality, and devotion to their religious faith. Echoing Al-Arian's lawyer's comments about Al-Arian, but which seemingly apply to all the Defendants, their public achievements embody the proud history of our nation's immigrants living the American dream and contributing to our national mosaic. (Doc. 74, p.19).

As such, the specific intent requirement is particularly important in this case, where a well-regarded intellectual and political figure took a moral stand against a hostile state that continues to oppress his people in the West Bank and Gaza. While he may not have agreed in many ways with this country's Middle East policy, Dr. Al-Arian's struggle was with Israel, not

2004," by the Bureau of Democracy, Human Rights and Labor.
<http://www.state.gov/g/drl/rls/shrd/2003/31022.htm>

³ See, e.g., United Nations Security Council Resolutions 242, 605, 673, 681, 694, 726, 794 and United Nations General Assembly Resolutions 1397 and 3236.

America. Thus, this case is worlds apart from the case of John Walker Lindh who fought in Afghanistan on behalf of the Taliban and Al-Qaeda "knowing that America and its citizens were the enemies of Bin Laden and al-Qaeda and that a principal purpose of al-Qaeda was to fight and kill Americans." See United States v. Lindh, 212 F. Supp. 2d 541 (E.D.Va. 2002). Likewise, this case is unlike United States v. Sattar, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) where Sheikh Abdul-Rahman and his associates in the "Islamic Group" expressly advocated violence against American citizens within the continental United States:

At all relevant times, the Islamic Group, [] ("IG"), existed as an international terrorist group dedicated to opposing nations, governments, institutions, and individuals that did not share IG's radical interpretation of Islamic law. IG considered such parties "infidels" and interpreted the concept of "jihad" as waging opposition against infidels by whatever means necessary, including force and violence. IG regarded the United States as an infidel and viewed the United States as providing essential support to other infidel governments and institutions, particularly Israel and Egypt. IG also opposed the United States because the United States had taken action to thwart IG, including by the arrest, conviction, and continued confinement of its spiritual leader Omar Ahmad Ali Abdel Rahman, [otherwise known as "The Blind Sheikh"]. . . According to the Indictment, IG's objectives in the United States include (1) the establishment of the United States as a staging ground for violent acts against targets in the United States and abroad; (2) the recruitment and training of members; and (3) fundraising for jihad actions in the United States and overseas.

Sattar, 272 F. Supp. 2d at 353.

In short, given the non-violent nature of Dr. Al-Arian's struggle, his prominence as a Palestinian intellectual and community leader, the novelty of the charges against him, and the severe punishment he faces, the scienter requirement in this case is of extreme importance.

I. The Government Asserts that the Absurd Results Possible Under the Plain Language of 18 U.S.C. § 2339B(a)(1) Are In Fact Proper Results.

In its March 12, 2004 Order, the Court held that, absent a specific intent requirement, 18 U.S.C. § 2339B(a)(1) is impermissibly vague on its face and is therefore unconstitutional. The Court's ruling is based in part upon the "absurd results" that inevitably arise from a facial

reading of the statute. The Court's imposition of a scienter requirement in this matter avoids a constitutional confrontation and is in accordance with Supreme Court precedent including, *inter alia*, United States v. X-Citement Video, Inc., 513 U.S. 64 (1999). Surprisingly, the government agrees with the Court that such absurd results will occur but argues that those results are appropriate. Moreover, the government does not assert that X-Citement Video was wrongly decided or that this Court's analysis of that case was in error. Instead, the government relies on congressional intent to shield Section 2339B from constitutional scrutiny. In sum, the government offers nothing new to the debate, arguing that the constitutionality of a statute is governed by congressional intent.

In its March 12 Order, the Court expressed concern, for example, that "a cab driver could be guilty for giving a ride to a FTO member to the UN, if he knows that the person is a member of a FTO or the member of his organization at sometime conducted an unlawful activity in a foreign country." (Doc. 479, p.22). On a facial reading of the statute, the Court and the government agree that such a result is possible. The difference is that the Court finds the result absurd in that it constitutes punishment of innocent conduct. The government, however, deems the result properly within the scope of the statute. (Doc. 519, p.20). In response to any concerns regarding the cab driver's conviction, the government flippantly suggests that jury nullification would protect him. (Doc. 519, p.20).

The government's core contention is that the material support provision is properly construed as one of strict liability, where the actor's intent is immaterial so long as his conduct somehow assists a FTO. According to the government, Congress intended to create a statute with extraordinary breadth in order to fight terrorism by proscribing "all support," even "naïve" support, for FTO's. (Doc. 519, p.20). Consequently, even if the statute ensnares innocents – like

the unlucky cab driver – it was Congress’ intent to do so, and this Court has no power to interfere with the realization of that intent.

The words of Chief Justice Marshall bear repeating here:

It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. . .

It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Marbury v. Madison, 5 U.S. 137, 176-177, 180 (1803). This cornerstone principle, that legislative intent is not the *sine qua non* of constitutional analysis, has apparently been lost on the prosecution in this case. But, as was so eloquently stated in Marbury, absent a repeal of the Fifth and First Amendments, Congress simply does not have the power to criminalize innocent, constitutionally protected conduct. Indeed, in times of national crisis, Courts must be (and have been) especially vigilant of broad-stroke prohibitions that are initiated by legislative bodies that exploit the passions and fears of the populace. See e.g., United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961); Hellman v. United States, 298 F.2d 810 (9th Cir 1961); see also NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). Perhaps the government is correct that Congress intended to grant the Department of Justice virtually limitless power to prosecute anyone who is even remotely connected to a FTO. But, such power is repugnant to the Constitution and to the core values of a nation built upon resistance to tyranny.

This Court's ruling is neither novel nor disposable. The Supreme Court has traditionally recognized a presumption for scienter requirements in criminal statutes. For example, the Supreme Court in Morrisette v. United States, 342 U.S. 246, 250 (1952) stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Clearly, as this Court has recognized in its ruling, scienter is a bedrock principle in American jurisprudence that cannot be tossed aside to facilitate mass roundups of people who might be guilty of a broadly defined crime that implicates due process as well as freedom of thought, expression, and association.⁴

II. The Government Fails to Distinguish Applicable Case Law.

The government does not argue that the cases underlying this Court's holding were wrongly decided or that the Court's constitutional analysis was off the mark. Rather, it claims that the major cases in this area of law are limited to their facts and do not espouse principles relevant to this case.

⁴ For example, in Liparota v. United States, 471 U.S. 419 (1985), the government asserted that "no *mens rea*, or 'evil-meaning mind,' was necessary for conviction" of unlawfully acquiring or possessing food stamps in violation of 7 U.S.C. 2024(b)(1). The Court rejected the government's interpretation of the statute stating "the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from this background assumption of our criminal law" that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" Id. at 440.

A. **United States v. X-Citement Video, Inc., 513 U.S. 64 (1999)**

Whereas the Court correctly perceived X-Citement Video as facing “almost the same statutory interpretation issues faced in this case,” (Doc.479, p.18) the government confines the case to its facts and casts it aside in a footnote as completely irrelevant:

It is only in the context of offenses prohibiting the distribution of obscene matter, which might be protected by the First Amendment, that the [Supreme] Court has suggested constitutional considerations require imputing to Congress an intent to include a scienter requirement.

(Doc. 519, p.16, fn.16, citing X-Citement Video.) The government’s footnote ignores the import of this noteworthy Supreme Court case and, by doing so, evidences its refusal to acknowledge the First Amendment implications of Section 2339B. (See Section III *infra*.)

The X-Citement Video analysis was directly on point. In that case, the Supreme Court was concerned that absurd and unconstitutional results would result from the application of the statute. (Doc.479, p.18). For example, a Federal Express driver could be convicted for transporting a video depicting child pornography despite having no knowledge as to the images recorded on the tape he was transporting. X-Citement Video, 513 U.S. at 69. To prevent such absurd results and to interpret the statute as constitutional, the Court added a *mens rea* component to each element of the offense, stating that “the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” X-Citement Video, 513 U.S. at 72. Here, because of Section 2339B’s harsh penalty – *life imprisonment* – it is even more critical to import a scienter requirement. Id.; accord

Humanitarian Law Project v. United States Department of Justice, 352 F.3d 382, 400 (9th Cir. 2003).⁵

The government is content to permit the same kinds of absurd results that compelled the Supreme Court in X-Citement Video to act by narrowing the reach of the statute in that case. In response to this Court's examples of the unlucky cab driver or hotel clerk, the government states:

The government would have to prove not only that the cab driver or the clerk interacted with a member of an FTO, but that he both knew that he was providing material support for the member's organization and not simply for the individual acting on his own behalf and that he knew the United States actually had added the organization to the extremely short list of FTO's (or that the organization as a whole had engaged in the type of terrorist activity that merited it a spot on that list), not merely that "the member or his organization at sometime conducted an unlawful activity in a foreign country" (Al-Arian at 9). Once it did, however, those individuals technically would fall within Congress's reach under the statute. Whether a jury might convict on a "*de minimis*" showing of support is, of course, another matter.

(Doc. 519, p.20).

Viewing the harms sought to be prevented by both Section 2339B and the statute in X-Citement Video proscribing the sexual exploitation of children, it is hard to say that one harm is worse than the other. Clearly, Congress wanted to give the statute proscribing the evils of sexual exploitation of children the broadest possible scope, just as it sought to do in the arena of terrorism. But, the Supreme Court has recognized that even where Congress intended to create a broad proscription, if there are constitutional implications to the broad enforcement of the statute, specific intent must be proven. In sum, the government makes no principled argument that X-Citement Video should not control the analysis in this case.

⁵ It is important to note that both Humanitarian and Boim v. Quranic Literacy and Holy Land Foundation, 291 F.3d 1000 (2002) were civil cases in which money was at stake, not life imprisonment as is the case here.

B. Scales v. United States, 367 U.S. 203 (1961)

Likewise, the government dismisses Scales v. United States, 367 U.S. 203 (1961) as inapposite because Section 2339B does not contain provisions that expressly prohibit “membership, without more” in an organization. (Doc. 519, p.5, citing Scales, 367 U.S. at 225). The government argues that Scales stands only for the proposition that scienter is necessary only in situations where a statute seeks to make “membership” in an organization a crime. Ignoring the most critical element of the offense, the government then states that Section 2339B “does not proscribe association with any other organization; it proscribes personally providing material support. Thus, there is no Scales concern.” (Doc. 519, p.6). What the government conveniently ignores is that membership in or association with a FTO is a critical component of 18 U.S.C. § 2339B. Put simply, providing “material support” is not unlawful *per se*. It is only when such support (including advocacy) is provided by a member or associate of a particular organization that it becomes illegal. Thus, Scales is important here if for no other reason than freedom of association is implicated by any application of the statute.

The government refuses to acknowledge that, as this Court aptly noted, a “purely grammatical reading of the plain language” (Doc. 479, p.21) of the material support statute is unconstitutionally vague because it would have the effect of “impinging on advocacy rights” (Doc. 479, p.23), *i.e.*, the First Amendment. That same grammatical reading renders a person who professes sympathy to a cause through speaking, writing, or lobbying – as well as the unlucky cab driver – criminally liable for lawful conduct that they knew happened to support a FTO in some way. Concerning an organization having both legal and illegal aims, Justice Harlan addressed these very concerns in Scales:

If there were a [] blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or

association would be impaired. . .The [membership] clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant specifically intend[s] to accomplish the aims of the organization by resort to violence.

Scales, 367 U.S. at 229 citing Noto v. United States, 367 U.S. 290, 299 (1961)(internal quotation marks omitted). (Emphasis added.) Thus, contrary to the government’s dismissal of the case as irrelevant, Scales expressly supports this Court’s conclusion that a specific intent requirement is appropriate where there exists a concern regarding the punishment of constitutionally protected activity and expression.

III. The Government’s Interpretation of the Statute Includes Virtually Limitless Authority to Prosecute Constitutionally Protected Activity.

Not content with the breadth of the material support statute as it was written, the government seeks to increase the statute’s reach even further by interpreting material support to include conduct that “frees up resources” of a FTO even if the actor had no intent whatsoever to further the goals of the FTO. (Doc.519, p.7) Under this construction, virtually any expression of sympathy or minor act of support for a FTO or its goals would constitute a crime. Indeed, we expect that the government will attempt to apply this theory to prove that financial support was provided to the PIJ, even though money went to individuals not connected to the PIJ who were victims of violence at the hands of Israeli aggression.

Throughout this litigation, the government has insisted that something more than mere membership in a FTO is required for conviction under Section 2339B. Now, however, through the novel “freeing up” doctrine, the government advances the notion that something far less than membership is sufficient. Under the “freeing up” doctrine, any association no matter how benign, *de minimis*, or naively entered into is sufficient to exact punishment under Section 2339B. Articles written and lectures uttered by independent scholars whose sympathies lie with

the Palestinian cause could fall within the reach of Section 2339B. Writing, casually speaking, lobbying, or just expressing sympathy for the Palestinian cause frees up assets and resources of the PIJ to be utilized in other ways.

Perhaps the suggestion here is to arrest them all, try them all, and let the juries sort them out. The chilling effect of a statute with such extraordinary reach – in the absence of a scienter requirement – should be readily apparent to all. And, the fact that the government’s definition vitiates both the First and Fifth Amendments should cry out to anyone with a legal education.

CONCLUSION

The government has provided no compelling reason for this Court to revisit its March 12 holding that the government must prove, *inter alia*, that Dr. Al-Arian “knew (had a specific intent) that the support [he allegedly provided] would further the illegal activities of a FTO.” (Doc. 479, p.24). Indeed its unwavering defense of the extraordinary breadth of the statute, despite the absurd results it would create, demonstrates the need for such a limitation, not a reason to dispense with it. Without the scienter requirement, the statute is impermissibly vague on its face and as applied in this case. Consequently, the government’s motion to modify the scienter requirement should be denied.

Dated: 20 May 2004

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Moreno".

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 20th day of May, 2004 upon:

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