

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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UNITED STATES OF AMERICA

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

vs.

SAMEEH HAMMOUDEH

**RESPONSE TO THE GOVERNMENT'S MOTION FOR RECONSIDERATION
OF THE COURT'S MARCH 12, 2004 ORDER**

COMES NOW, the Defendant, SAMEEH HAMMOUDEH, by and through his undersigned counsel, respectfully submits his Response to the Government's Motion for Reconsideration as it Pertains to the Scienter Requirements of a Section 2339B Prosecution and Memorandum of Law in Support (Docs. 519, 520).

INTRODUCTION

Count Three alleges that Mr. Hammoudeh conspired to knowingly provide material support and resources to a designated foreign terrorist organization, the Palestinian Islamic Jihad ("PIJ"), in violation of 18 U.S.C. Section 2339B. In response to the Defendants motions to dismiss, this Court held that in order to prove a violation of 18 U.S.C. Section 2339B, "the government must prove beyond a reasonable doubt that the defendant knew that: (a) the organization was a FTO or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was 'material support.'" (Doc. 479 at 25). In addition, the Court held that "[t]o avoid Fifth Amendment personal guilt problems, . . . the government must show more than a defendant knew something was within a category of 'material support' in order to meet (b). In order to meet (b), the government must show that the defendant knew (had a

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specific intent) that the support would further the illegal activities of a FTO.” *Id.*

On April 26, 2004, the government filed its motion to reconsider the scienter requirement as it pertains to 18 U.S.C. Section 2339B, the statute underlying Count Three of the Indictment.

(Docs. 519, 520).¹ Section 2339B provides, in pertinent part:

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

While the government agrees with this Court’s conclusion, based on *United States v. X-Citement Video*, 513 U.S. 64 (1994), that “knowingly” applies to both the elements of “material support or resources” and foreign terrorist organization (“FTO:”) status or activities warranting FTO status.

(Doc. 520 at 2-3 (“Thus, we propose that the statute requires that a defendant knowingly provide ‘material support,’ and that he know that the recipient of his support has been designated as an FTO or is an entity that engages in the type of terrorist activity sufficient to merit designation.”))

(footnote omitted)), they disagree with the Court’s conclusion that the specific intent requirement is necessary to avoid Fifth Amendment personal guilt and vagueness problems. The government contend that the Court’s interpretation converts Section 2339B from a general intent statute.

Nevertheless, the government does not really question the Court’s ruling that a scienter requirement is necessary to satisfy Fifth Amendment due process concerns. It is important to note tha the government has ignored that the Court’s interpretation of Section 2339B to include a specific intent requirement as essential to the conclusion that the statute withstood First

¹ The government did not seek to reconsider the Court’s ruling on the scienter requirement as it relates to Count Four.

Amendment challenges. Specifically, this Court held that “[t]his Court’s construction of AEDPA and IEEPA (requiring proof of a specific intent to further the unlawful activities of a SDT or FTO) reinforces this Court’s conclusion that the prohibitions in AEDPA and IEEPA are closely drawn to further the governmental interest.” (Doc. 479 at 34; *see also id.* at 30). Sameeh Hammoudeh submits that this Court has not basis to, nor should it reconsider the ruling on the scienter requirement as it relates to Count Three.

STANDARD OF REVIEW

In its motion for reconsideration, the government failed to set forth the standard of review. A motion seeking reconsideration “must demonstrate why the court should reconsider its prior decision and ‘[s]et forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.’” *Villaflores v. Royal Venture Cruise Lines*, No. 96-2103-Civ-T-17B, 1997 WL 728098, *2 (M.D. Fla. Nov. 17, 1997) (attached) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294 (M.D. Fla 1993)). Such motions “generally serve a very narrow function; they are designed solely to correct manifest errors of law or fact or to present newly discovered evidence that could not have been discovered at the time of the original motion.” *United States v. Wilkerson*, 992 F. Supp. 1358, 1363 (M.D. Fla. 1998), *rev’d on other grounds*, 170 F.3d 1040 (11th Cir. 1999); *United States fv. Gross*, No. 98 CR 0159 SJ, 2002 WL 32096592, *3-*4 (E.D.N.Y. Dec 5, 2002) (attached) (discussing the “very strict standard” for motions for reconsideration; *United States v. Watkins*, 200 F. Supp. 2d 489, 490-91 (E.D. Pa. 2002) (indicating that reconsideration “is an extraordinary remedy to be ‘granted sparingly because of the interest in finality and conservation of scarce judicial resources’”), *rev’d on other grounds*, 339 F.3d 167 (3d Cir. 2003), *cert. denied*, 124 S.Ct. 1505 (2004). New arguments are not

appropriate grounds for reconsideration. *Wilkerson*, 992 F. Supp. at 1363 (citing *Villaflores*, 1997 WL 728098, at *2). A court’s decision to decline to reconsider is reviewed for abuse of discretion. *Villaflores*, 1997 WL 728098, at *@ (citations omitted).

ARGUMENT

I. The Specific Intent to Further the Unlawful Objectives of an FTO Is Necessary to Satisfy the Due Process Requirement of “Personal Guilt” for Prosecutions Under 18 U.S.C. Section 2339B.

A. Fifth Amendment Personal Guilt

The government contends that 18 U.S.C. Section 2339B imposes criminal liability only for personal actions, rather than on association with others, and therefore does not raise the “personal guilt” concerns addressed in *Scales v. United States*, 367 U.S. 203 (1961). In *Scales*, the Supreme Court considered the membership clause of the Smith Act, 18 U.S.C. Section 2385, which prohibited becoming or being a member of any group that teaches, advocates, or encourages the overthrow or destruction of the government by force or violence, knowing the purposes thereof. The Supreme Court determined that the Smith Act’s requirements that an individual be an active member and have the specific intent to bring about the violent overthrow of the government satisfied the due process concern of ensuring that a person is not convicted for mere sympathy or association with a criminal enterprise. 367 U.S. at 220, 224-28.

The government argues that *Scales* has no application where the statute does not “predicate guilt on association,” but instead “proscribes personally providing material support. (Doc. 520 at 5-6). The personal guilt doctrine, recognized by the Supreme court, is much broader than the government claims; it extends not only to “status” but also to “conduct” that is criminalized because of its relation to others’ criminal activities. As the Supreme Court

explained in *Scales*:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or *on conduct can* only be justified by reference to the relationship of that status *or conduct* to other conceitedly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

367 U.S. at 224-25 (emphasis added). The personal guilt doctrine, “one of the most fundamental principles of our jurisprudence,” functions to “prevent[] the persecution of the innocent for the beliefs and actions of others.” *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring).

The concern regarding personal guilt is of equal force in this case. Section 2339B prohibits the provision of items, such as money, transportation, and lodging, that would normally be wholly innocent. The Defendants are not alleged themselves to have engaged in any violent activity. The “evil sought to be prevented” are the alleged acts of violence in the Middle East. Providing material support or resources is only the subject of a criminal statute based on its alleged connection to an organization that the U.S. government has designated as a foreign terrorist organization. *See Scales*, 367 U.S. at 226 (“In this instance it is an organization the Communist Party] which engages in criminal activity . . . l”). Thus, it is the alleged connection to others’ criminal activities that give rise to this criminal prosecution. In the words of the Supreme Court in *Scales*, when the imposition of punishment on status or conduct (provision of material or resources) can only be justified by reference to its relationship to other criminal activity (acts of violence in the Middle East), “that relationship must be sufficiently substantial to satisfy the concept of personal guilt.” *Id.* at 225.

The government also takes an overly narrow view of what Section 2339B prohibits claiming that statute “does not proscribe association with any other organization.” (Doc. 520 at 6). Each of Defendants in this case are being subjected to criminal prosecution as alleged members of the PIJ. Section 2339B prohibits providing money and things that a person, if a member, would give to an organization.² As the Court has recognized, the “term ‘material support’ is broadly defined in AEDPA” to include “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” (Doc 479 at 6) (citing 18 U.S.C. Sub-Section 2339(A)(b), 2339(B)(g)(4)). The types of support and resources prohibited ranges from human resources (“personnel” and “expert advice and assistance”), to meeting halls and modes of communication (“facilities” and “Communications equipment”), to financial support and membership dues (“currency and financial and monetary instruments”).

The statute thus bans a wide-range of material support or resources, substantially interfering with the freedom of association. In this respect, the government’s attempt to distinguish Section 2339B on a membership basis is illusory. Congress has in the past attempted to equate affiliation or association to proscribed groups (specifically the Communist Party) with giving money or things of value. In *Bridges v. Wixon*, 326 U.S. 135 (1945), the Supreme Court

² To the extent that what the government is saying is that an individual need not be a member to be prosecuted under 18 U.S.C. Section 2339B, this point serves to reinforce the conclusion that the statute casts a wide net that includes those who are even further removed from a connection to a designated organization, and therefore further supports the conclusion that a specific intent requirement is necessary to ensure personal guilt for others’ criminal activity.

examined a statute that subjected aliens to deportation based on affiliation “with any organization, association, society, or group, that believes in , advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States.” *Id.* at 138 n.1. Congress defined affiliation to include that “the giving, loaning, or promising of money or anything of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith.: *Id.* at 141. In reviewing the statute, the Supreme Court expressed that “the act or acts tending to prove ‘affiliation’ must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere co-operation with it in lawful activities,” where the “act or acts must evidence a working alliance to bring the [proscribed] program to fruition.” *Id.* at 143-44; *Id.* at 146. The Supreme Court indicated that the imposition of sanctions, in that case deportation, must be based on the individual’s aid to the unlawful objectives of the organization, rather than to its legitimate functions. *Id.* at 143-47; *id.* at 163 (Murphy, J., concurring (expressing that the statute, on its face and as applied, violates the doctrine of personal guilt)).³

The government contends, alternatively, that even if there is a *Scales* concern, the statute’s knowingly requirement is sufficient to satisfy personal guilt concerns. In the government’s view, “[a] contributor who knowingly provides material support to an organization

³ In other words, simply because the U.S. government has made the judgment that a group is banned, an individual’s association, affiliation, or support of this group cannot be the reason for criminal sanctions, or for restrictions on an individual’s liberty, without a showing that the individual himself had a criminal purpose. See *Aptheker v. Secretary of State*, 378 U.S. 500, 511-12, 514 (1964) (considering liberty interest of right to travel and holding that “[t]he broad and enveloping prohibition [against applying for a passport for a member of a registered Communist organization] indiscriminately excludes plainly relevant considerations such as the individual’s knowledge, activity, commitment, and purposes in and places for travel,” where an individual’s intent to travel could be for a “wholly innocent purpose”).

that he knows is an FTO provides that organization with something that can further its terrorist goals directly or indirectly (by freeing up other resources) - whether he specifically intends to further those activities or not.” (Doc. 520 at 7). The government’s argument only serves to underscore the need for the specific intent requirement in order to satisfy personal guilt. As the former Fifth circuit explained, “*knowing* association with a groups cannot be made a punishable act just because some of the group members are engaged in criminal conduct.” *Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir.1980).⁴ In *Sawyer*, the Court found the statute prohibiting knowingly loitering in any place with others knowing that drugs are being unlawfully used or possessed was unconstitutionally overbroad. *Id.* at 316-17. The Court concluded that “[a] more artfully drawn ordinance would reach only those persons who are active participants in illegal narcotics transactions or who aid and abet the primary offender, without chilling the first amendment rights of persons engaged in essentially innocent associational conduct.” *Id.* at 317-18.

B. First Amendment Implications

In asking the Court to reconsider its ruling, the government has ignored the implications of its arguments to the First Amendment issues at stake. The Supreme Court has repeatedly recognized that although the First Amendment protects this freedom as a derivative of the rights of speech and assembly. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP vs. Alabama*, 357 U.S. 449, 460 (1958). The freedoms of speech and association include the right to

⁴ In *Bonner g. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

make financial contributions or donations to political groups and charitable causes. *See, e.g., Buckley*, 424 U.S. at 15-16, 22-25; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984); *FEC v. national Conservative Political Action Comm.*, 470 U.S. 480, 493-95 (1985); *Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (5th cir. 1980). As the Supreme Court has explained, the “freedom of association ‘is diluted if it does not include the right to pool money through contributions, for funds are often essential if ‘ advocacy’ is to be truly or optimally ‘effective.’” *Citizens Against Rent Control*, 454 U.S. at 296 (quoting *Buckley*, 424 U.S. t 65-66).

Under the “closest” scrutiny standard set forth in *Buckley*, if the government demonstrates a sufficiently important interest for the regulation, a significant interference with protected associational rights is permissible so long as the means used are “closely drawn to avoid unnecessary abridgment of associational freedoms.” 424 U.S. at 25 (citations omitted). In response to the Defendant’s First Amendment arguments in this case, the Court concluded that “a congressional decision to stop the spread of global terrorism by preventing fundraising and prohibiting support is closely drawn to further this interest. This Court’s construction of AEDPA and IEEPA (requiring proof of a specific intent to further the unlawful activities of a SDT or FTO) reinforces this Court’s conclusion that the prohibitions in AEDPA and IEEPA are closely drawn to further the governmental interest.: (Doc. 479 at 34).

Without a specific intent requirement, Section 2339B is a total ban on contributions, regardless of amount of the contribution, the intention of the contributor, or whether the contribution was ever used for any unlawful activity. A specific intent element is necessary, however, to avoid holding a contributor liable for an action that another does or may do. *See*

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916-17 (1982); *Healy v. James*, 408 U.S. 169, 186 (1972); *In re Asbestos Sch. Litig.*, 46 F. 3d 1284, 1290 (3d Cir. 1994); *see also* H.R. Rep. No. 104-383, 178 & n.6 (1995) (dissenting view) (“The Supreme Court has repeatedly held that contributing money to political groups is protected conduct under the First Amendment unless it can be proved that the contribution is intended to further an unlawful activity.”) As the Supreme Court explained in *Scales*:

If there were a similar 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, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with the “substantive evils that Congress has a right to prevent.” The 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.”

367 U.S. at 229 (citing *Noto v. United States*, 367 U.S. 290 (1961)). Thus, without a specific intent requirement, Section 2339B certainly cannot be found to be “closely drawn.”

II. Section 2339B Does Raise Vagueness Concerns in this Case

The government secondly contends that despite the Court’s concern that several types of “material support or resources” are unconstitutionally vague, the Court should not have been concerned because the Defendants “here cannot raise a colorable vagueness claim on the facts of their case.” (Doc. 520 at 8). The government suggests that the Court should not have considered hypothetical situations but instead should have focused on the allegations in this case.

A. The Appropriate Standard Where First Amendment Rights are at Stake

As the Supreme Court has indicated, “the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can

understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). The Supreme Court has explained that the more important of these two considerations is that the legislature establish sufficient guidelines for law enforcement, so as to prevent police, prosecutors, and juries from following their “personal predilections.” *Id.* (citing *Smith v. Goeguen*, 415 U.S. 566, 574-75(1974)).

The Supreme Court has stated that “[i]t is well established that vagueness challenges to statutes *which do not involve First Amendment freedoms* must be examined in the light of the facts of the case at hand.” *United States v. Mazuire*, 419 U.S. 544, 550 (1975) (emphasis added); *see United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002) (“Except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand”). This case clearly involves First Amendment freedoms, including the freedom of association.

The government also fails to point out that the Supreme Court applies a different level of scrutiny in evaluating vagueness depending on whether the statute is aimed, for example, at business activity, or at constitutionally protected activity like that at issue in this case. As the Supreme Court has explained:

The degree of vagueness that the Constitution tolerates - - as well as the relative importance of fair notice and fair enforcement - - depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. 455 U.S. 489, 498-99 (1982)

(footnotes and citations omitted). The government ignores that Section 2339B's prohibitions substantially interfere with the First Amendment freedoms of speech and association, as explained in Part I.B, *supra* and therefore a "more stringent vagueness test should apply." *Id.* at 499.

B. Even With Respect to the Allegations in this Case, Vagueness Concerns Arise

As the Defendants have previously pointed out, several courts have found that certain of the "material support or resources" included in Section 2339B's prohibition are invalid as vague. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (of the First Amendment), *cert. denied*, 532 U.S. 904 (2001)⁵; *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (finding "expert advice or assistance" to be unconstitutionally vague); *United States v. Sattar*, 272 F. Supp. 2d 348, 357-60 (S.D.N.Y. 2003) (holding that the "provision" of "communications equipment" and of "personnel" were unconstitutionally vague

⁵ The Ninth Circuit's holding was reaffirmed in the court's opinion issued on December 3, 2003. *See Humanitarian Law Project v. Reno*, 352 F.3d 382, 403-05 (9th Cir. 2003) (holding that the court had previously concluded correctly that "personnel" and "training" are unconstitutionally vague, and rejecting the government's argument that its definitions of "training" and "personnel" contained in the U.S. Attorneys' Manual cured the vagueness of the statute).

as applied to the defendants). The government's motion for reconsideration fails to provide any guidance to the Court that would otherwise save the statute and its definition of material support or resources from a vagueness challenge.

The government claims that the Court should examine the Defendants' alleged "core" conduct, and if it falls within the "core" of the statute, then the statute is not unconstitutionally vague. Notably, when the government attempts to describe this alleged "core" conduct, it does so with reference to the specific intent and purpose of the alleged conduct.

The majority of the defendants' alleged activities - - the raising and sending of funds for the benefit of the PIJ *in order to assist and promote violent attacks in the Middle East*, and providing logistical assistance *for* terrorist attacks by utilizing communications equipment such as telephones and telephone facsimiles for the PIJ financial transactions and transmittal of information about violent attacks - - falls squarely within the heartland of 'material support'

(Doc. 520 at 10) (footnotes omitted; emphasis added); *see also* Doc. 346, Government's Memorandum of Law in Opposition to Defendant Sami-Amin Al-Arian's Amended Motion to Dismiss Counts One Through Four of the Indictment, at 18 ("As noted previously, the principal conduct which gives rise to the defendant's liability in this case includes managing the financial and logistical operations of the PIJ and soliciting and raising monies and funds to support the PIJ and their operatives in the Middle East, *in order to assist the PIJ's engagement in, and promotion of, violent attacks . . .*") (emphasis added). The government has therefore failed to provide a meaningful alternative to the Court's decision.

III. The Court Has Not Impermissibly Converted Section 2339B from a General Intent Statute

The government lastly argues that adding a specific intent requirement to Section 2339B converts it from a general intent statute in contradiction of congressional intent. Such an

argument misconstrues the nature of the Court's ruling. In the first instance, the government cites cases that "involve statutes that regulate potentially harmful or injurious items," and, as such, are subject to a relaxing of the traditional *mens rea* requirements. *Staples v. United States*, 511 U.S. 600, 607 (1994); see *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994) (drug paraphernalia); *Hamling v. United States*, 418 U.S. 87 (1974) (obscene material). The types of material support that the government is alleging the Defendants conspired to provide to PIJ are clearly not *per se* "dangerous" items such as those regulated in the above cases.

Further, even if the material support allegedly provided is somehow dangerous, "that an item is 'dangerous,' in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent." *Staples*, 511 U.S. at 611. The Court has rightly indicated its concern that individuals who intend that any material support they provide to a FTO be used for lawful purposes would become liable under Section 2339B and be subject to harsh criminal penalties under the government's reading of the statute. In both its written pleadings and at oral argument, the government has maintained its interpretation of the statute in this manner, indicating that such individuals violate Section 2339B, even if they fully intend their material support to be for legitimate ends. The Court is not requiring the same standard as contemplated by a statute containing a willfulness standard, but rather interpreting the statute in a

way that ensures that it does not ensnare individuals engaged in otherwise lawful activity, in violation of the First and Fifth Amendments.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Stephen N. Bernstein', written over a horizontal line.

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I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to

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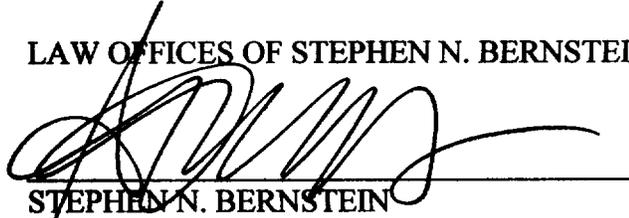
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