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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, v. ALBERTO GONZALES, Attorney General of the United States; *et al.*, Defendants.	Case No. 1:05-cv-093-EJL-MHW DEFENDANT UNITED STATES'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED ON DECEMBER 21, 2011 (Dkt. No. 308), AND REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT (Dkt. No. 307)

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INTRODUCTION

The United States provided three reasons in its opening brief why the Court should grant summary judgment in its favor. First, Plaintiff's claims are barred by the discretionary function exception. Second, Plaintiff's claims are barred by prosecutorial immunity. Third, Plaintiff's claims fail on the merits, as the evidence does not show either a false imprisonment or an abuse of process. In response, Plaintiff focuses his arguments on what he thinks the law should be, rather than what it actually is. But there is no legal support for Plaintiff's novel legal argument that a person who once cooperated with authorities cannot later be arrested as a material witness without being given the chance to cooperate again. In fact, the Supreme Court has long recognized that material witness laws are so critical to our legal system that they justify jailing people who have committed no crime: "The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Stein v. New York*, 346 U.S. 156, 184 (1953) *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964).

Even if there was a basis for Plaintiff's novel constitutional arguments, the United States has not waived its sovereign immunity for constitutional violations. Rather, the United States is liable under the Federal Tort Claims Act ("FTCA") only when a private individual, in similar circumstances, would be liable under state common law. Here, as evidenced by Plaintiff's response to the Federal Defendants' Statement of Facts, there are no genuine disputes of material fact related to the essential elements of the two tort claims at issue: false imprisonment and abuse of process. These uncontested facts show that FBI Special Agents Michael Gneckow and Scott Mace had probable cause to seek a material witness arrest warrant for Plaintiff, and they did not

abuse the material witness process to gain some collateral advantage over him. Therefore, as explained more fully below, Plaintiff has not made a sufficient showing to overcome the United States's motion for summary judgment, much less show that he is entitled to summary judgment.

ARGUMENT

I. PLAINTIFF'S COMMON LAW CLAIMS ARE BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION.

In the United States's opening brief, it demonstrated that both of Plaintiff's common law claims are barred by the discretionary function exception because the conduct at issue involved an element of judgment that was susceptible to policy analysis. *See* U.S. Summ. J. Mem. at 3-8. In response, Plaintiff points out that this Court rejected similar arguments when it denied the United States's motion to dismiss five years ago. Pl.'s Mem. in Opp'n to Def. U.S.'s Mot. for Summ. J. and Supp. of Pl.'s Cross-Mot. for Summ. J. at 7 (hereinafter "Pl.'s U.S. Opp'n"). But now that discovery has occurred, the Court can and should reevaluate whether it retains subject matter jurisdiction in light of the undisputed facts. Contrary to Plaintiff's suggestion, the United States is not arguing that the discretionary function exception shields the United States from liability for unlawfully seeking a warrant. Rather, as detailed in the United States's opening brief, there is simply no evidence of unlawful conduct.

Plaintiff makes no substantive rebuttal to the United States's arguments regarding the discretionary function exception. In fact, Plaintiff agrees that "[a]gents may have discretion whether to seek a material witness warrant once probable cause is established," Pl.'s U.S. Opp'n at 5, and he does not dispute that such a decision is grounded in policy considerations. Thus, if this Court concludes that the agents had probable cause to seek the material witness warrant, then

the Court must find that Plaintiff's false imprisonment and abuse of process claims are barred by the discretionary function exception.

II. PLAINTIFF'S COMMON LAW CLAIMS ARE BARRED BY PROSECUTORIAL IMMUNITY.

In response to the United States's argument that Plaintiff's claims are barred by prosecutorial immunity, Plaintiff cites several cases holding that law enforcement officers are not entitled to prosecutorial immunity for procuring an arrest warrant. Pl.'s U.S. Opp'n at 3. Again, the United States does not disagree with this basic proposition. But Plaintiff's brief is replete with challenges to inherently prosecutorial decisions, and he argues that he should not have been considered a witness in the first place. For example, Plaintiff argues that his testimony was "clearly cumulative" because "there is little question Mr. al-Kidd's testimony was not necessary given all of the other information (including documentary evidence) the government possessed about Al-Hussayen's employment and activities." Pl.'s U.S. Opp'n at 13. This argument, however, directly implicates prosecutorial decision-making regarding what evidence to present at trial, which is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Likewise, Plaintiff's argument that he has shown an abuse of process based on decisions by prosecutors to request a detention hearing and not to call him as a witness at trial, Pl.'s U.S. Opp'n at 19, also implicate the judicial phase of the criminal process.

Plaintiff's arguments highlight that the material witness statute is intertwined with prosecutorial decisions regarding the presentation of evidence at trial. In this case, Assistant United States Attorney Kim Lindquist (1) made the final decision to seek the warrant, (2) advised Agent Mike Gneckow to make sure Plaintiff had left his home before proceeding, (3) told Agent Gneckow what the affidavit supporting the warrant application should say regarding Plaintiff's

material testimony, (4) filed the government's request for a detention hearing (in part on the ground that the government would introduce evidence that Plaintiff "pose[d] a danger to another person or the community," *see* Pl.'s Ex. 1 at 1795-97), (5) negotiated Plaintiff's release conditions with his counsel, and (6) chose not to call Plaintiff has a witness at al-Hussayen's trial. On these facts, as the United States explained in its opening brief, the doctrine of prosecutorial immunity bars Plaintiff's common law claims.

III. PLAINTIFF FAILS TO SHOW HIS ARREST WAS NOT SUPPORTED BY PROBABLE CAUSE.

The facts upon which Agent Gneckow concluded there was probable cause to seek Plaintiff's arrest as a material witness are not in dispute. The only question to be resolved is whether those undisputed facts, "viewed from an objective standpoint," *State v. Julian*, 922 P.2d 1059, 1062-63 (Idaho 1996), established probable cause to believe (1) that it may become "impracticable" to secure Plaintiff's presence at al-Hussayen's trial by subpoena, and (2) he had testimony material to the prosecution of al-Hussayen. 18 U.S.C. § 3144. The following undisputed facts show that Gneckow had probable cause to seek a material witness warrant:

(1) Gneckow had evidence of money being transferred from al-Hussayen's bank account to Plaintiff, *see* Defs.' Statement of Undisputed Mat. Facts at ¶ 1 and Pl.'s Response at ¶ 1;

(2) Plaintiff worked with al-Hussayen at an Islamic charity and al-Hussayen paid Plaintiff for this work, *id.* ¶¶ 6;

(3) al-Hussayen's trial was initially scheduled to start on April 15, 2003, *id.* ¶¶ 13;

(4) Plaintiff purchased a ticket to Saudi Arabia on March 6, 2003, and moved out of his apartment in Kent, Washington in early March, *id.* ¶¶ 14;

(5) on March 13, 2003, ICE Agent Robert Alvarez informed Gneckow that Plaintiff had

purchased a one-way, first-class ticket to Saudi Arabia that was scheduled to depart in a few days, *id.* ¶¶ 20;

(6) unbeknownst to Gneckow, that ticket was actually coach-class and was an "open" round-trip ticket that did not have a scheduled return date, *id.* ¶¶ 21;

(7) Gneckow recommended to AUSA Lindquist that the government seek a material witness warrant for Plaintiff, *id.* ¶¶ 23;

(8) Lindquist advised Gneckow to make sure Plaintiff had left his home before proceeding, and Gneckow followed this advice, *id.* ¶¶ 24;

(9) Gneckow called an FBI agent at Dulles International Airport to confirm Plaintiff was in fact booked on a flight to Saudi Arabia, *id.*;

(10) Gneckow consulted with Lindquist regarding what his affidavit should say about Plaintiff's material testimony, *id.* ¶¶ 25;

(11) Gneckow included information in the affidavit regarding Plaintiff's ties to al-Hussayen and the Islamic Assembly of North America, as advised by Lindquist, *id*;

(12) FBI Agent Scott Mace wholly relied on information provided to him by Gneckow when he presented the warrant application to the magistrate, *id.* ¶¶ 28-29.

Because these facts are undisputed, and establish probable cause, Plaintiff resorts to making the same argument this Court has already rejected—that probable cause was lacking because the affidavit failed to show that Plaintiff had refused to comply with a subpoena, or would refuse to comply if served with one. *See* Pl.'s U.S. Opp'n at 8-10. As the Court observed when it rejected this argument at the motion to dismiss stage:

Mr. al-Kidd relies on dicta in [*Bacon v. United States*, 449 F.2d 933 (9th Cir.

> 1971)] where the court, after finding the affidavit submitted in support of the arrest warrant failed to show that Bacon was likely to flee, distinguished the case from the situation where a witness was served with a subpoena. . . . This language and reasoning does not, as Mr. al-Kidd contends, stand for the proposition that all potential witnesses must be given the opportunity to appear to testify prior to a material witness arrest warrant being sought and executed.

Dkt. No. 79 at 14 (quotations marks and citation omitted). Moreover, under Idaho law, the question is not limited to whether the affidavit established probable cause. Rather, the question to be answered is whether Plaintiff's arrest occurred "without probable cause." *Clark v. Alloway*, 170 P.2d 425, 428 (Idaho 1946). This question requires the court to determine whether "the facts available" to Agent Gneckow "warranted a person of reasonable caution to believe that the action taken [seeking the material witness warrant] was appropriate." *State v. Gomez*, 172 P.3d 1140, 1145 (Idaho 2007). As shown, the facts available to Gneckow at the time he recommended that the government seek a material witness warrant would have led "a person of reasonable caution" to conclude that there was probable cause to believe the elements of the statute were satisfied. *Gomez*, 172 P.3d at 1145.

Plaintiff also challenges his arrest on the ground that his testimony was cumulative to "other information (including documents) the government possessed about Al-Hussayen." Pl.'s U.S. Opp'n at 13. Plaintiff's argument that his testimony was cumulative is irrelevant, because the only question is whether there was probable cause to believe Plaintiff had material testimony. Moreover, Plaintiff's argument is premised on the Fourth Amendment's reasonableness provision, not Idaho law. *See* Pl.'s U.S. Opp'n at 13-14. As the United States has not waived its sovereign immunity for constitutional tort claims, *see FDIC v. Meyer*, 510 U.S. 471, 477-78

(1994), these arguments are wholly irrelevant.[1]

Because Plaintiff's arrest was supported by probable cause, the United States cannot be held liable for false imprisonment. This Court has ruled that under Idaho law, the existence of probable cause is a complete defense to Plaintiff's false imprisonment claim. *See* Dkt. No. 78 at 8 ("[R]egardless of any alleged misrepresentations or omissions on the arrest warrant, if the arrest warrant was supported by probable cause, [Plaintiff] does not have a claim for false imprisonment."). Despite this Court's prior ruling, Plaintiff continues to argue that the Unites States may be held liable on a "procurement" theory because the affidavit contained incorrect details regarding Plaintiff's flight and lacked certain information regarding Plaintiff's ties to the United States and his prior cooperation with law enforcement. Pl.'s U.S. Opp'n at 10-12. Discovery has shown that Plaintiff cannot prevail on a procurement theory because it is undisputed that Agent Gneckow was unaware of any defect in the affidavit submitted with the warrant application. As the United States explained in its opening brief, Agent Gneckow obtained Plaintiff's admittedly incorrect flight information from ICE Agent Robert Alvarez and he took steps to ensure that Plaintiff was in fact leaving the country before he submitted the affidavit to the court. *See* U.S. Summ. J. Mem. at 14-15.

Because Plaintiff cannot dispute these facts, he faults Gneckow for not asking Alvarez or the FBI agent at Dulles International Airport for documentation. Pl's U.S. Opp'n at 12 n.6. But Plaintiff cites no Idaho law that imposes such a duty on Gneckow. Indeed, Plaintiff's argument is

[1] Even if Plaintiff's contention regarding cumulative testimony was relevant, the contention lacks factual support as he does not cite to any evidence that another witness could have presented the same testimony as Plaintiff. Moreover, Plaintiff's argument reinforces that he is challenging prosecutorial decisions regarding what evidence to present at trial, decisions that are subject to both the discretionary function exception and prosecutorial immunity.

contrary to Idaho law, which does not require an officer to "have personal knowledge of all the items of information used to assess the probable cause to arrest." *See State v. Rubio*, 771 P.2d 537, 540 (Idaho Ct. App. 1989). "[T]he collective knowledge and information of all the officers involved in the investigation, when taken together" may supply probable cause. *Id.* Moreover, Agent Gneckow was entitled to rely on information provided to him by Alvarez and the FBI agent at Dulles.[2] *See* U.S. Summ. J. Mem. at 12, 15. As this Court stated in its prior ruling denying the United States' motion to dismiss, "Idaho law only shields officers from liability if they are unaware of any defect in the warrant." Dkt. No. 78 at 7. Because Gneckow was unaware that the flight information listed in his affidavit was incorrect, the United States may not be found liable on a "procurement" theory.[3] *See id.*; *Hanson v. Lowe*, 100 P.2d 51, 55 (1940).

Plaintiff lists several "omissions" from the affidavit that he contends are relevant to the probable cause analysis. Pl.'s U.S. Opp'n at 10-11. But Plaintiff never explains how this information negates probable cause to believe Plaintiff would be unavailable to testify at al-Hussayen's trial by subpoena, which at the time the government sought the warrant was scheduled to start in thirty-two days. Importantly, Plaintiff has not presented any evidence that when Gneckow drafted the affidavit he was aware of some fact indicating Plaintiff might return

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[2] Plaintiff contends there was "confusion surrounding the details of the ticket," Pl.'s U.S. Opp'n at 12 n.6, but this assertion is not supported by the record. *See* Defs.' Gneckow and Mace's Opp'n to Pl.'s Mot. for Summ. J. and Reply in Supp. of Their Mot. for Summ. J. at 13-14.

[3] Contrary to Plaintiff's assertions, the United States is not arguing for summary judgment in its favor because Gneckow and Mace "simply executed a warrant issued by a magistrate," nor is the United States' argument "identical" to the argument it made at the motion to dismiss stage. Pl.'s U.S. Opp'n at 7 n.5. Two key facts—that Gneckow was unaware of the incorrect flight information and he called Dulles to confirm Plaintiff was leaving the country—were not before the Court at the motion to dismiss stage.

to the United States prior to the start of al-Hussayen's trial. Only this type of omission would enable Plaintiff to prevail on a procurement theory. Moreover, even if the Court were to conclude the identified omissions were relevant to the probable cause question, Idaho law recognizes that "the principle of probable cause must allow room for some mistakes by the arresting officer." *Julian*, 922 P.2d at 1063 (quoting *Kingler v United States*, 409 F.2d 299, 304 (8th Cir. 1969)). As the Idaho Supreme Court has observed:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusion of probability.

Id. Here, even if it was a "mistake" for Agent Gneckow to not include information in his affidavit regarding Plaintiff's ties to the United States and his past cooperation with law enforcement, it was not unreasonable for him to conclude that there was probable cause to believe Plaintiff would not be available to testify at al-Hussayen's trial. Not only was there no indication Plaintiff would return to the United States before al-Hussayen's trial started, but in Gneckow's experience, as well as that of Agent Mace, neither citizenship nor familial ties guarantees that a person will appear in court. *See* Defs.' Ex. 16, Gneckow Dep. at 193-94; Ex. 18, Mace Dep. at 47-48. Under Idaho law, "in passing on the question of probable cause, the expertise and the experience of the officer must be taken into account." *State v. Ramirez*, 824 P.2d 894, 898 (Idaho Ct. App. 1991). Under the totality of the circumstances, it was reasonable for Gneckow to conclude probable cause existed to arrest Plaintiff. Accordingly, the United States is entitled to summary judgment on Plaintiff's false imprisonment claim.

IV. PLAINTIFF FAILS TO PRESENT SUFFICIENT EVIDENCE TO PROCEED ON HIS ABUSE OF PROCESS CLAIM.

In his motion for summary judgment, Plaintiff makes no effort to defend what used to be the crux of his abuse of process claim: that he was arrested pursuant to a national policy to use the material witness statute to arrest and detain criminal suspects without probable cause. The abandonment of this central allegation shows how much the factual landscape has changed since the Court last considered these allegations over five years ago on a motion to dismiss. As the United States detailed in its opening brief, the evidence developed during discovery now confirms that Plaintiff was arrested to secure his testimony in al-Hussayen's trial, the exact purpose of the material witness statute. U.S. Summ. J. Mem. at 16-22.

In response to the evidence developed during discovery, Plaintiff offers a series of speculative inferences drawn from a smattering of separate incidents, which is insufficient to overcome the United States's summary judgment motion. In addition, Plaintiff's legal arguments rest in large measure on his assertion that the material witness law is unconstitutional, but the United States has not waived its sovereign immunity for constitutional violations. Finally, in focusing on what he believes the law should be, instead of what it currently is, Plaintiff cannot prove the essential element of an abuse of process claim—that the conduct at issue was not part of the standard process.

A. Plaintiff Has Not Presented Any Concrete Evidence That Shows He Was Arrested For an Improper Purpose Or That Agents Gneckow and Mace Wilfully Misused the Material Witness Statute.

Where, as here, the nonmoving party bears the burden of persuasion at trial, "the burden on the moving party may be discharged by 'showing'-that is, pointing out to the district court-

that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In its opening brief, the United States made this "showing" that Plaintiff cannot prove an abuse of process because the undisputed facts show that the material witness law was used for a proper purpose—to secure the material testimony of a witness who was a flight risk. U.S. Summ. J. Mem. at 16-22. To support this showing, the United States relied on sworn testimony of the FBI agents who sought the arrest and the Assistant United States Attorney who led the al-Hussayen prosecution, as well as numerous documents.

In his opposition brief, Plaintiff effectively asks the Court to ignore the unanimous and uncontested testimony of all government witnesses, characterizing their sworn statements as "self-serving." Pl.'s U.S. Opp'n at 16. But "'self-serving' is not a proper objection" to a summary judgment motion. *Mintun v. Peterson*, No. CV06-447-S-BLW, 2010 WL 1338148, *26 (D. Idaho March 30, 2010). As the Supreme Court has long held, a party cannot defeat a summary judgment motion merely by asserting that "the jury might, and legally could, disbelieve" the witnesses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *see also Mason v. United States*, 120 Fed. App'x 40, 43 (9th Cir. 2005) ("simply attack[ing] the credibility" of affiants is insufficient to defeat summary judgment). To defeat a motion for summary judgment, parties must provide "concrete evidence from which a reasonable jury could return a verdict in their favor." *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1543 (9th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 256).

Plaintiff points to eight pieces of evidence that he claims are sufficient to defeat the United States's motion for summary judgment. *See* Pl.'s U.S. Mem. at 16-20. The first item on Plaintiff's list is that he was the subject of an FBI investigation at the time of his

arrest—something the Unites States has always acknowledged and never disputed. *See* Defs. Gneckow and Mace's Summ. J. Mem. (Dkt. No. 306-1) at 2; Fed. Defs.' Response to Pl.'s Statement of Undisputed Mat. Facts at ¶5. But the fact that Plaintiff was under investigation does not lead to a reasonable inference that he was arrested *because of* that investigation. Plaintiff deposed the lead FBI agent assigned to his intelligence investigation, Special Agent Joe Cleary, yet Plaintiff does not point to any testimony that Agent Cleary suggested that the FBI seek a material witness warrant to enable further investigation of Plaintiff. In fact, Agent Cleary testified unequivocally that it was not his idea to seek the material witness warrant. *See* Ex. 25, Dep. of J. Cleary at 182-83, 190. He further testified that he agreed with the decision to seek the warrant not because he viewed it as a vehicle to further investigate Plaintiff, but because "[Gneckow] needed [Plaintiff] to testify against Sami [al-Hussayen]." *See* Ex. 13 at 192-93. In sum, after fourteen months of discovery, not a single witness has testified that Plaintiff was arrested to investigate him and not a single document exists stating Plaintiff should be or was arrested to investigate him.

The seven other pieces of evidence that Plaintiff cites to support his claim all involve actions by individuals other than Agents Gneckow and Mace, such as FBI Director Robert Mueller (Pl.'s U.S. Mem. at 16), the FBI agents who questioned him at Dulles airport (*id.* at 18), the correctional officers who strip-searched him (*id.*), and the prosecutors who opposed his release and did not call him at trial (*id.* at 19). Specifically, Plaintiff contends these collective actions show "that the government viewed Mr. al-Kidd as more than a mere witness." Pl.'s U.S. Mem. at 20; *see also id.* at 18 ("the government wanted him detained"); 21 ("the way he was treated and the conditions under which he was held after his arrest are certainly indicative of how

the government viewed him"). But as this Court previously recognized, Plaintiff's claims rise or fall based on the individual actions of Agents Gneckow and Mace. Doc. No. 78 at 13 ("Mr. al-Kidd's allegations here are only based on the actions of the investigative officers Mace and Gneckow"); *see also* Pl.'s U.S. Mem. at 4 ("the United States' liability in this case is premised on the actions of its FBI agents"). This is because the Federal Tort Claims Act does not waive sovereign immunity for the way "the government" views someone, but only when a private *individual*, under similar circumstances would be liable under state tort law. *See* 28 U.S.C. § 1346(b)(1); *see also United States v. Olson*, 546 U.S. 43, 45-47 (2005) (emphasizing that FTCA liability exists only if a "private person" would be liable under state law). Actions of *other* federal employees, taken after Plaintiff was arrested, have no bearing on whether Agents Gneckow and Mace used the material witness law for an improper purpose.

But even if conduct by government personnel other than Gneckow and Mace could be considered in determining whether the United States is liable on an abuse of process theory, Plaintiff's claim would still fail. First, except for AUSA Lindquist, none of the individuals identified by Plaintiff had any involvement whatsoever with the decision to arrest Plaintiff, and thus none of their actions is relevant to whether the government had an improper purpose in seeking the arrest warrant. Second, almost all of the actions cited by Plaintiff–such as the congressional testimony by Director Mueller, the decision by prosecutors and a different FBI agent not to arrest another witness, the treatment of Plaintiff by correctional officials, and the determination by prosecutors not to call Plaintiff as a witness–do not involve investigative activity and thus are not relevant to whether the government committed a willful act to investigate Plaintiff.

Although Plaintiff was questioned by two FBI agents at Dulles airport after he was arrested, there is no evidence to show that the material witness warrant was sought for this purpose. In fact, it is undisputed that neither Gneckow nor Mace contacted the FBI Field Office in Washington before seeking the warrant to ensure agents from that office interviewed Plaintiff after his arrest. *See* Defs.' Ex. 16 at 189-90; *cf. Brown v. Savage,* No. CV-08-382, 2011 WL 4584771, *8 (D. Idaho Sept. 30, 2011) ("Just because a secondary reason exists that law enforcement officers want to interview a person of interest does not mean a valid arrest warrant supported by probable cause cannot legally be issued."). Likewise, although Plaintiff points to a draft of an affidavit for a warrant to search the laptop computer Plaintiff was carrying at the time of his arrest, Plaintiff concedes the affidavit was never filed nor was a search warrant ever sought–hardly a "willful" act.

Even when viewed collectively, as Plaintiff suggests, the disparate facts cited in Plaintiff's opposition do not create a genuine dispute for trial. At most, the evidence shows that an "incidental benefit" accrued to the FBI in that it was able to interview Plaintiff after his arrest, but an incidental benefit is not sufficient to prove an abuse of process. *See Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 305 (3d Cir. 2003) ("there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive or spite or an ulterior purpose of benefit to the defendant.") (citing Restatement (Second) of Torts, § 682, cmt. b).[4] The "relevant *objective* evidence in the record," to use

[4] Contrary to Plaintiff's contention (Pl.'s U.S. Mem. at 15 n.7), the United States is not trying to redefine the legal standard for abuse of process. As the United States explained in its opening brief at 17-18, the Ninth Circuit and Idaho courts use the Restatement to define the tort, and as shown above, even the Third Circuit case cited by Plaintiff supports Defendant's

(continued...)

Plaintiff's words, shows that there is no genuine issue of material fact regarding why Plaintiff was arrested. The pertinent officials—FBI Agents Gneckow and Cleary, and AUSA Lindquist—testified consistently with each other that they viewed Plaintiff as a witness, and the warrant was sought to secure his presence at al-Hussayen's trial. *See* Def.'s Summ. J. Mem. at 18-20.

In light of the uncontradicted affirmative evidence, the fact that Plaintiff was also the subject of an FBI investigation and was interviewed by FBI agents after his arrest does not lead to a reasonable inference that Agents Gneckow and Mace had "an ulterior, improper purpose" in seeking the warrant, nor does it show that they engaged in "a wilful act in the use of the process not proper in the regular conduct of the proceeding." *Beco Constr. Co. v. City of Idaho Falls*, 865 P.2d 950, 954 (Idaho 1993). Summary judgment for the United States on Plaintiff's abuse of process claim is therefore appropriate because Plaintiff has failed to make a "showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322; *see also Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986) ("[S]ome metaphysical doubt as to the material facts" will not defeat a summary judgment motion; "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

B. Plaintiff Offers No Legal Support For His Argument That Arresting a Cooperative Witness Violates the Constitution and Constitutes an Abuse Of Process.

The last section of Plaintiff's brief reveals that his abuse of process argument is, at

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[4](...continued)
argument that Plaintiff may not satisfy his burden by showing further investigation was an incidental benefit to obtaining the warrant.

bottom, a constitutional challenge to the government's ability to seek a material witness warrant for a person who has previously cooperated with the government. Plaintiff's attempt to turn his abuse of process claim into a constitutional challenge to the material witness statute fails for two reasons. First and foremost, the FTCA does not waive the United States's sovereign immunity from damages for constitutional torts. *See Meyer*, 510 U.S. at 477-78. This alone forecloses Plaintiff's effort to bring a constitutional challenge to the material witness statute under the guise of an abuse of process claim.

Second, even if Plaintiff is correct that the statute is unconstitutional when applied to witnesses like him—a position the United States strongly disputes—that does not mean there has been an abuse of process. *See* Pl.'s U.S. Opp'n at 23-25. As Plaintiff implicitly acknowledges, no court has ever adopted his novel constitutional argument during the over 200 years that material witness laws have been in effect. *See* Judiciary Act of 1789, Ch. 20 §§ 30, 33, 1 Stat. 73, 88-91. Because no court has adopted the constitutional standard Plaintiff is pressing, there cannot have been an abuse of process based on a "violation" of that standard. Moreover, "[t]he usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." Restatement (Second) of Torts § 682 (1978). Plaintiff's theory simply does not fit within this tort.

To be clear, though, there is no merit to Plaintiff's argument that the Constitution prohibits the arrest of so-called cooperative witnesses. To the contrary, Plaintiff's argument conflicts with Supreme Court precedent. *See Barry v. United States*, 279 U.S. 597, 616-617 (1929). In *Barry*, the Senate ordered the arrest and detention of a witness in an election fraud

matter, but the Court of Appeals held that the arrest was invalid because the witness had not been served with a subpoena first. *Id.* The Supreme Court reversed:

> The decision of the Circuit Court of Appeals is that, as a necessary prerequisite to the issue of a warrant of arrest, a subpoena first should have been issued, served, and disobeyed. And undoubtedly the courts recognize this as the practice generally to be followed. But undoubtedly also, a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena when there is good reason to believe that otherwise the witness will not be forthcoming.

Id.

The Supreme Court in *Barry* compared the Senate's actions to the then-existing federal law that allowed the arrest and detention of material witnesses, concluding that "[t]he constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question." *Id.* at 617. Eighty years later, the same holds true. In fact, courts in recent years have consistently upheld arrests of material witnesses who have previously cooperated with authorities. *See, e.g.,United States v. Awadallah,* 349 F.3d 42 (2nd Cir. 2003); *United States v. McVeigh,* 940 F. Supp. 1541 (D. Col. 1996); *White v. Gerbitz*, 892 F.2d 457 (6th Cir. 1989). Thus, there is no merit to Plaintiff's arguments that the "historical backdrop" of the material witness law means that witnesses may only be arrested after they have been uncooperative.

In sum, although Plaintiff may have suffered a hardship by the government's actions, that hardship does not evidence a constitutional violation, nor does it entitle him to damages for abuse of process. As the Supreme Court has recognized, detention of material witnesses "'may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood,'" but that sacrifice does not necessarily evidence a constitutional violation. *Hurtado v. United States*, 410 U.S. 578, 589 (1973) (finding that material witness detentions do not violate the Fifth Amendment's takings

clause) (quoting 8 J. Wigmore, Evidence § 2192, p. 72 (J. McNaughton rev. 1961)). "The giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned . . . . The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." *Blair v. United States*, 250 U.S. 273, 281 (1919). Thus, compelled testimony, even through an arrest of a cooperative witness, does not involve a willful act outside the regular course of proceedings, and consequently cannot constitute an abuse of process.

V. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGEMENT.

As the discussion above demonstrates, the evidence in this case shows that FBI Agents Gneckow and Mace had probable cause to seek Plaintiff's arrest and did not use the material witness law for an improper purpose. Yet even if the Court disagrees that the evidence entitles the United States to summary judgment, it does not follow that Plaintiff has established his entitlement to judgment as a matter of law. As the party bearing the burden of proof at trial, Plaintiff has a different and higher burden than the United States to succeed on a Motion for Summary Judgment. *See* 11 James William Moore et al., Moore's Federal Practice § 56.13[1], at 56-166 (3d ed.2010) (stating that, if the moving party bears the ultimate burden of persuasion at trial, the moving party's initial summary judgment burden is "higher in that it must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it."). *See also Celotex Corp.*, 477 U.S. at 325. Because Plaintiff has not met his burden, his motion for summary judgment must be denied.

CONCLUSION

For the reasons stated above and in our opening brief, the United States's motion for summary judgment should be granted, and Plaintiff's denied.

Dated: February 6, 2012

Respectfully submitted,

C. SALVATORE D'ALESSIO, JR.
Acting Director, Torts Branch

/s/
BRANT S. LEVINE
J. MARCUS MEEKS
Trial Attorneys
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Torts Branch
P.O. Box 7146
Washington, D.C. 20530
Tel: (202) 616-4176
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel for Plaintiff to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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J. Marcus Meeks
U.S. Department of Justice

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UNITED STATES DEPARTMENT OF JUSTICE
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Attorneys for Defendants the United States, Michael Gneckow and Scott Mace

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, v. ALBERTO GONZALES, Attorney General of the United States, *et al.*, Defendants.	Case No. 1:05-cv-093-EJL-MHW FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS FILED ON DEC. 21, 2011 (Dkt. Nos. 308-2 & 310-2)

Pursuant to Fed. R. Civ. P. 56(c) and Dist. Idaho Loc. Civ. R. 7.1(c)(2), the Federal Defendants submit this response to Plaintiff's Statement of Undisputed Material Facts that was filed in support of his motions for summary judgment against the United States (Dkt. No. 308) and Defendants Michael Gneckow and Scott Mace (Dkt. No. 310). The numbered paragraphs below correspond to the paragraphs in Plaintiff's Statement of Undisputed Material Facts.

1-2. Defendants do not dispute these facts.

3. Defendants object to Plaintiff's generalized assertion that a terrorism investigation began in Idaho following September 11, 2001, because the record citations do not indicate when

the investigation began. Defendants do not dispute the remaining facts in this paragraph.

4. Defendants do not dispute this fact.

5. Defendants do not dispute that Plaintiff was the subject of an intelligence investigation from December 2001 until at least 2004. Defendants dispute the statement that Plaintiff was a "co-subject in the criminal investigation of Sami Al-Hussyen." Plaintiff relies on FBI documents that contain his name in the "Title" to support this asserted fact, but the undisputed testimony shows that the appearance of a person's name in the title of an FBI document does not mean the person was suspected of engaging in criminal activity. *See* Pl.'s Ex. 2 at 41-42, 47; Defs.' Ex. 27, Dep. of M. Gneckow at 35-37, 85; Ex. 24, Dep. of N. Brown at 134-35; Ex. 26, Dep. of E. Dezihan at 110; Ex. 28, Dep. of S. Mace at 86-87. FBI Special Agent Gneckow specifically testified that al-Kidd remained in the title of FBI documents concerning the al-Hussayen investigation because he was an associate of al-Hussayen, not because he was the subject of a criminal investigation. *See* Defs.' Ex. 16 at 75; Ex. 27, Gneckow Dep. at 85; *see also* Defs.' Ex. 16 at 73-75, 78; Defs.'s Ex. 17 at 25-28.

Defendants object to Plaintiff's assertion that an unidentified FBI agent sent Plaintiff's name to the U.S. Attorney's office as a proposed defendant. First, the document Plaintiff cites to support this statement, Pl. Ex. A, U.S. Docs 666, is inadmissable for lack of foundation and hearsay. Second, the testimony from AUSA Kim Lindquist regarding that document is inadmissible for lack of foundation. *See* Pl.'s Ex. 7 at 48-53 (Lindquist testified he was unfamiliar with US 666 and defense counsel objected to questions regarding the document's contents on foundation grounds). Finally, there is no other evidence in the record that Plaintiff's name was sent to the U.S. Attorney's Office as a proposed defendant. Indeed, Agent Gneckow

stated in response to an interrogatory that "Al-Kidd was never considered a possible subject for indictment by the United States." Ex. 29, M. Gneckow Response to Pl.'s Interrog. No. 22.

6. Defendants object to Plaintiff's generalized assertion that an intelligence investigation could lead to criminal charges, as the record citations do not support that assertion. *See also* Defendants' Statement of Facts, ¶ 3.

7. Defendants object to Plaintiff's statement that FBI Headquarters provided "guidance" on the al-Kidd investigation because the record citations do not support that assertion. Defendants do not dispute that FBI Headquarters received updates on the al-Kidd investigation.

8-10. Defendants do not dispute these facts.

11-13. Defendants object to these statements on relevance grounds, as there is no evidence cited to show that Agents Gneckow or Mace–or any other federal officer–was aware of any of these facts at the time the arrest warrant was issued for Plaintiff. *See Franklin v. Fox*, 312 F.3d 423, 437 (9th Cir. 2002) (whether "a reasonable officer could have believed that probable cause existed . . . is an objective [inquiry], based on what a reasonable officer would believe if faced with the facts and circumstances *actually known to the officer in question*.") (emphasis added) (internal citation and quotes omitted)).

14-23. Defendants do not dispute these facts.

24. Defendants do not dispute these facts, although Defendants note that Agent Gneckow relied on AUSA Kim Lindquist to determine whether the legal standard for obtaining a material witness warrant had been met. *See* Defs.' Ex. 16 at 187.

25-27. Defendants do not dispute these facts.

28. Defendants do not dispute these facts, except that the record does not support Plaintiff's assertion that Agent Gneckow was "confused" about Plaintiff's departure date.

29. Defendants dispute Plaintiff's vague assertion that Agent Gneckow's "concern" about Plaintiff's flight information related to the veracity of the information ICE Agent Alvarez provided to Agent Gneckow. Agent Gneckow's "concern" related to the fact that Plaintiff was scheduled to leave the country in a matter of days. *See* Defs.' Ex. 16 at 165-66.

30. Defendants do not dispute these facts.

31. Defendants object to the legal conclusion that Agent Gneckow "knowingly omitted numerous facts from the affidavit." Defendants do not dispute that the facts listed in subparagraphs (a)-(g) were not included in the affidavit.

32. Defendants do not dispute these facts, except that Agent Gneckow testified he did not characterize the payments listed in the affidavit as salary because though he suspected they were salary, he was not absolutely sure at the time he drafted the affidavit. *See* Ex. 16 at 180.

33. Defendants object to this statement for two reasons. First, it is irrelevant whether Agent Gneckow would have sought a material witness warrant based on a hypothetical situation involving a "cooperative businessman." Second, the record cited does not support the statement; Agent Gneckow's complete response to that question was: "No, No. Well, I think I was going to say that in that particular case, again, it boils down to the cooperative nature of the traveler." Pl.'s Ex. 2, Gneckow Dep. 220.

34. Defendants do not dispute these facts.

35. Defendants admit that the affidavit stated that al-Kidd had information "crucial" to the al-Hussayen prosecution. Defendants object to the statement that "al-Kidd had little

knowledge of Al-Hussayen" because the deposition testimony cited does not support this statement. *See also* Defs. Ex. 2 at 3 (Plaintiff told Seattle Post-Intelligencer reporter he "did Web design for Al Moultaqua and attended many conferences on behalf of it"); Defs.' Ex. 16 at 156-59 (Gneckow's testimony regarding Plaintiff's knowledge of al-Hussayen and al-Multaqua, including that Plaintiff could "say that Al-Hussayen was an officer of IANA . . . talk about salary that he received from Al-Hussayen . . . [and] talk about Al-Multaqua and the website"); Defs.' Ex. 17 at 35-37 (Lindquist's testimony that Plaintiff "was associated with Mr. Al-Hussayen in a business way at the University of Idaho"); Defs.' Ex. 22, Pl.'s Responses to Fed. Defs.' Interrog. Nos. 6, 10 and 11 (Plaintiff worked with al-Hussayen at al-Multaqua, received payments from al-Hussayen for this work, and received a payment from al-Hussayen that was as act of charity).

36. Defendants do not dispute this fact.

37. Defendants object to this paragraph because it is not a factual assertion, but rather a critical judgment of how the prosecutors in *USA v. al-Hussayen* contemplated presenting their evidence at al-Hussayen's trial. To the extent this paragraph may be viewed as a factual assertion, Defendants also object because the record citations do not support the conclusion that documentary evidence gathered during the investigation into al-Hussayen's activities "[made] al-Kidd's testimony redundant."

38. Defendants do not dispute this fact.

39. Defendants dispute that Gneckow could not recall what efforts were made to determine whether Plaintiff had left his home in Kent, Washington. *See* Pl.'s Ex. 2 at 144 (Gneckow recalled certain "specifics about the effort to locate Mr. Al-Kidd" but that information was not disclosed as it was privileged law-enforcement information).

40-41. Defendants do not dispute these facts.

42. Defendants do not dispute these facts, except to the extent they imply that the United States purposefully "delayed" transferring Plaintiff from Virginia to Idaho. The record does not support such an assertion.

43-44. Defendants do not dispute these facts.

45. Defendants object to this statement because it is irrelevant to Plaintiff's claims whether a Saudi national was served with a summons and asked to surrender his passport. To the extent the statement is relevant, Defendants note that the Saudi national was not scheduled to leave the country for another month at the time the government sought the summons. *See* Pl.'s Ex. 12, M. Martin Aff. at 6-7.

46-47. Defendants do not dispute these facts.

Respectfully submitted,

C. SALVATORE D'ALESSIO
Acting Director, Torts Branch

/s/
BRANT S. LEVINE
J. MARCUS MEEKS
Trial Attorneys
UNITED STATES DEPARTMENT OF JUSTICE
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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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/s/
J. Marcus Meeks
U.S. Department of Justice

Exhibit 24

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, vs. ALBERTO GONZALES, Attorney General of the United States, et al., Defendants.	)	No. 05-CV-093-EJL-MHW

DEPOSITION UPON ORAL EXAMINATION

OF

NORMAN C. BROWN

1:05 p.m.

December 13, 2007

100 South King Street 360
Seattle, Washington 98104

JACQUELINE L. BELLOWS
CCR 2297

APPEARANCES

For the Plaintiff:

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American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111

For the Defendants:

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HENRY R. FELIX
Federal Bureau of Investigation
Assistant General Counsel
935 Pennsylvania Avenue NW, PA-400
Washington, D.C. 2054535

Court Reporter: JACQUELINE L. BELLOWS
VAN PELT, CORBETT, BELLOWS
100 South King Street, Ste. 360
Seattle, WA 98104

* * * * * * * * * * *

NORMAN C. BROWN, having been first duly sworn by the Notary Public, appeared and testified as follows:

E X A M I N A T I O N

BY MS. GOLDFADEN:

Q Good afternoon. I know we introduced ourselves, but let me formally introduce myself for the record. My name is Robin Goldfaden. I'm one of the attorneys representing the plaintiffs in this matter.

Would you state your name and address for the record.

A Norman C. Brown. I reside in Spokane, Washington.

Q Can you give the street address, please.

MR. LEVINE: Your can just use your business address.

A It's 316 West Boone, Suite 250, Spokane.

Q (By Ms. Goldfaden) Have you been deposed before?

A No.

Q Okay. Well, basically you're under oath as if you were in a courtroom; and everything that we say while we're on the record is going to be taken down. I will be asking you questions; and, if at any point you don't understand something that I'm saying, please let me know and I'll try

Q (By Ms. Goldfaden) I believe the question was whether or not Mr. Aljughaiman was the subject of an investigation.
A And my answer was he was in the title of the Sami Al-Hussayen case.
Q What did that mean?
A Just what I said: That he was listed as a subject with others in that investigation.
Q Did that mean that he was a suspect in the activity being investigated?
A Individuals who are in the title block of a case can be a subject. They can be a victim. They can be an associate of the subject. It doesn't necessarily mean that they are the subject of the case.
Q Can you tell me what it meant in this case?
A I honestly don't know.
Q Who would know?
A The case agent, Mike Gneckow.
Q Would there be anything in these EC's that would tell the reader whether or not the people listed in the subject -- I'm sorry -- the title line were or were not subject -- I'm sorry -- subjects of the investigation or suspects or witnesses or victims or whatever else you might put there?
A Typically the victim is identified in the subject line or subject block. However, an associate may not necessarily be defined as such in the text of the document.

Q When you said that the witness is typically identified in the subject block did you mean -- I'm sorry, victim. Did you mean typically, when there's a crime involving a victim, the victim's listed in the title line; or did you mean, when it's the victim being listed in the title line, that is typically noted in the title line, that they're a victim?

A Yes, it's the second.

Q The latter. Okay.

And I didn't quite follow what you were saying about associates. Associates might be in the title line; but there might be nothing, typically, to identify them in one way or another?

A In the text, correct.

Q Are witnesses typically put in the title line?

A Not, not typically, no.

Q Are there any protocols or guidelines for what does or doesn't go in the title line of an EC?

A Not other than what I just explained in terms of who can be in the title line or subject block.

Q Is there any difference in the significance between a check going from Mr. Al-Hussayen versus a check going from Mr. Aljughaiman?

A It's still financial transactions between these three individuals.

Q So they were viewed as one and the same?

C E R T I F I C A T E

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Jacqueline L. Bellows, a Notary Public in and for the State of Washington, do hereby certify:

That the foregoing deposition was taken before me at the time and place therein set forth;

That the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; and that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, and thereafter transcribed under my direction;

That the foregoing transcript is a true record of the testimony given by the witness and of all objections made at the time of the examination, to the best of my ability.

I further certify that I am in no way related to any party to this matter nor to any of counsel, nor do I have any interest in the matter.

Witness my hand and seal this 3rd day of January, 2008.

_____

Jacqueline L. Bellows, Notary Public in and for the State of Washington, residing at Arlington. Commission expires October 19, 2010.

Exhibit 25

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD,	)	
	)	Case No.
Plaintiff,	)	05-CV-093-EJL-MHW
	)	
vs.	)	
	)	
ALBERTO GONZALEZ, Attorney General of the United States; et al.,	)	
	)	
	)	
Defendant.	)	
	)	

DEPOSITION OF JOSEPH CLEARY

TAKEN ON BEHALF OF THE PLAINTIFF

AT COEUR D'ALENE, IDAHO

NOVEMBER 28, 2007, AT 10:00 A.M.

REPORTED BY:

PATRICIA L. PULLO, CSR
Notary Public

A P P E A R A N C E S

MR. LEE GELERNT, Attorney at Law, of the American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York, New York, 10468, appearing for and on behalf of the Plaintiff;

MR. BRANT S. LEVINE and MR. J. MARCUS MEEKS, Attorneys at Law, of the United States Department of Justice, Torts Branch, Civil Division, P.O. Box 7146, Ben Franklin Station, Washington, D.C. 20044, appearing for and on behalf of the Federal Defendants.

ALSO PRESENT: Mr. Henry R. Felix
Ms. Sonia Kumar
Mr. Patrick Toomey

THE DEPOSITION OF JOSEPH CLEARY, was taken on behalf of the plaintiff on this 28th day of November, 2007, at the offices of M & M Court Reporting Service, Inc., 816 Sherman Avenue, Suite 7, Coeur d'Alene, Idaho, before M & M Court Reporting Service, Inc., by Patricia L. Pullo, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the United States District Court, for the District of Idaho, said cause being Case No. 05-CV-093-EJL-MHW in said Court.

AND THEREUPON, the following testimony was adduced, to wit:

JOSEPH CLEARY,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION

QUESTIONS BY MR. GELERNT:

Q. Good morning. Could you please state your name for the record.

A. Joseph Cleary, C-l-e-a-r-y.

Q. I'm Lee Gelernt. I'm one of the lawyers for the plaintiff. I'll be taking your deposition today.

You know you're not a defendant in this case?

A. Yes.

that had a case that that was used.

Q. Were you ever trained on the criteria for seeking a material witness warrant?

A. Was I personally?

Q. Yes.

A. Not that I recall, no.

Q. Have you ever seen any policy, guidance or memoranda about the criteria for an FBI agent seeking a material witness warrant?

A. May have been. I don't recall seeing any.

Q. Okay.

A. But if I have, I don't want to misstate.

Q. You're just not sure?

A. I'm not sure.

Q. Okay. Did you know in March 2003 what the criteria was for seeking a material witness warrant?

A. No.

Q. Do you now know?

A. Not really.

Q. Okay. When you were a state prosecutor, did you ever seek a material witness warrant?

A. No.

Q. Do you know whose idea it was to seek a material witness warrant for Mr. al-Kidd?

A. I don't know.

Q. Okay. Do you recall when you learned that someone was going to seek -- the FBI was going to seek a material witness warrant from Mr. al-Kidd?

A. I don't know specifically. I believe I heard it from Mike.

Q. Okay.

A. Gneckow.

Q. And I assume it was prior to him actually going to court to seek the warrant -- to seek the arrest warrant?

MR. MEEKS: I'm just going to object, because an FBI agent can't seek a material witness warrant. Only a U.S. attorney can.

MR. GELERNT: Okay. That's fine. I'm fine with counsel's objection. I was not using it in the technical term. So I can -- we can just get on the same page one time, and I think we can probably talk more loosely.

BY MR. GELERNT:

Q. The U.S. attorney is seeking a material witness warrant.

A. Right.

Q. Are you aware that in this case a material witness warrant was sought for Mr. al-Kidd's arrest?

A. Yes.

Q. Are you aware that Agent Gneckow provided an affidavit in support of the application for an arrest warrant?

A. Yes.

Q. You said you weren't sure when you learned that an arrest warrant -- material witness arrest warrant was going to be sought for Mr. al-Kidd; is that correct?

A. Yeah -- yes.

Q. But you believe you learned of it from Agent Gneckow?

A. Right.

Q. And he informed you that that was going to happen?

A. Yes.

Q. Okay. Do you recall whether it was the day before the warrant was sought in court, two days before, three days before?

A. I don't know. I can't recall when.

Q. Is it possible that it was more than a week before?

A. I don't know when it was. I hate to speculate on when.

Q. Okay. Did you ever see a draft of Agent Gneckow's affidavit in support of the material witness

Q. Okay. When is the first time you learned about the ticket?

A. First time I learned about the ticket?

I don't -- I believe Alvarez called me. I'm trying to remember. This is the best of my recollection. I believe Alvarez called me with information about al-Kidd and departure.

Q. To Saudi Arabia?

A. Yeah.

Q. Is that prior to your conversation with Agent Gneckow about the material witness warrant?

A. I believe so. It's my recollection I told him to call Mike or get in touch with Mike.

Q. Why did you tell him to do that?

A. I don't know. Maybe it was after the material witness warrant. I'm not sure.

Yeah. All I -- I told -- I think -- I remember telling Rob call Gneckow.

Q. So you didn't have a view on -- it wasn't your idea to seek a material witness warrant?

A. No.

Q. Did you ask Agent Alvarez any questions about the ticket?

A. Did I ask him questions? I may have. Or he told me.

REPORTER'S CERTIFICATE

I, Patricia L. Pullo, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of December, 2007.

_____
PATRICIA L. PULLO, C.S.R. #697
Notary Public
816 Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814

My Commission Expires 11/13/2012.

Exhibit 26

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 05-CV-093-EJL-MHW
	)	
ALBERTO GONZALES, Attorney	)	
	)	
General of the United States,	)	
	)	
et al.,	)	
	)	
Defendants.	)	

DEPOSITION UPON ORAL EXAMINATION

OF

EGON DEZIHAN

9:54 a.m.

December 14, 2007

100 South King Street 360
Seattle, Washington 98104

JACQUELINE L. BELLOWS
CCR 2297

APPEARANCES

For the Plaintiff:

ROBIN GOLDFADEN
American Civil Liberties Union Foundation
Immigrants' Rights Project
39 Drumm Street
San Francisco, California 94111

For the Defendants:

BRANT S. LEVINE
U.S. Department of Justice
Constitutional & Specialized Torts
P.O. Box 7146
Washington, D.C. 20044

HENRY R. FELIX
Federal Bureau of Investigation
Assistant General Counsel
935 Pennsylvania Avenue NW, PA-400
Washington, D.C. 2054535

Court Reporter: JACQUELINE L. BELLOWS
VAN PELT, CORBETT, BELLOWS
100 South King Street, Ste. 360
Seattle, WA 98104

* * * * * * * * * *

EGON DEZIHAN, having been first duly sworn by the Notary Public, appeared and testified as follows:

E X A M I N A T I O N

BY MS. GOLDFADEN:

Q Good morning. I'm Robin Goldfaden. I'm one of the attorneys for the plaintiff in this case, and I'll be taking your deposition today. Have you been deposed before?

A No.

Q Well, the basic ground rules are: I'll be asking you questions, and you'll be giving me answers. Your attorney may object from time to time. And unless you're instructed not to answer, you can still answer the question even if there's an objection. If you don't understand something I'm asking you, please let me know; and I'll try to rephrase it.

The court reporter is going to be taking down everything that we say while we're on the record. So it's important that you give verbal answers as opposed to nods and gestures. And it's important that we try not to speak over each other.

Do you understand everything I've said so far?

A Yes.

Q If there's anything that you want to correct that you

Q Of?
A Mr. Al-Hussayen.
Q Was there one of Mr. Al-Kidd?
A "One" what?
Q Criminal investigation.
A No.
Q Was he at any time part of the criminal investigation of Mr. Al-Hussayen?
A I believe his name may have been in the title of the document. That doesn't mean that he's the subject of the investigation. He's just related to the investigation.
Q But he would be investigated in some manner through that investigation, correct?

MR. LEVINE: Objection, vague. And assumes facts not in evidence.

A Can you give me more of a basis? I mean I'm not quite sure how to answer that question for you.
Q (By Ms. Goldfaden) If Mr. Al-Kidd's name was appearing in the title documents that were coming out of the investigation of Mr. Al-Hussayen, did you consider that part of the subject matter of this deposition?
A I would consider it within the context of the overall investigation.
Q So is it something that you looked into prior to the deposition or had knowledge of prior to this deposition?

C E R T I F I C A T E

STATE OF WASHINGTON)
) SS
COUNTY OF KING)

I, Jacqueline L. Bellows, a Notary Public in and for the State of Washington, do hereby certify:

That the foregoing deposition was taken before me at the time and place therein set forth;

That the witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth; and that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me, and thereafter transcribed under my direction;

That the foregoing transcript is a true record of the testimony given by the witness and of all objections made at the time of the examination, to the best of my ability.

I further certify that I am in no way related to any party to this matter nor to any of counsel, nor do I have any interest in the matter.

Witness my hand and seal this 3rd day of January, 2008.

_____

Jacqueline L. Bellows, Notary Public in and for the State of Washington, residing at Arlington. Commission expires October 19, 2010.

Exhibit 27

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLA AL-KIDD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 05-CV-093-EJL-MHW
	)	
ALBERTO GONZALES, Attorney General of the United States; et al.,	)	
	)	
	)	
Defendant.	)	

DEPOSITION OF MICHAEL J. GNECKOW

TAKEN ON BEHALF OF THE PLAINTIFF

AT COEUR D'ALENE, IDAHO

DECEMBER 1, 2007, AT 9:00 A.M.

REPORTED BY: Charlotte R. Crouch, CSR NO. 192

Notary Public

A P P E A R A N C E S

Mr. Lee Gelernt, Attorney at Law, American Civil Liberities Union Foundation, 125 Broad Street, 18th Floor, New York, N.Y. 10468, appearing for and on behalf of the Plaintiff.

Mr. J. Marcus Meeks, Attorney at Law, U.S. Department of Justice, Civil Division, Ben Franklin Station, P. O. Box 7146, Washington, DC 20004 appearing for and on behalf of Defendant.

Mr. Henry R. Felix, Attorney at Law, Federal Bureau of Investigation, Assistant General Counsel, 935 Pennsylvania Avenue N.W., PA-400, Washington, DC 20535, appearing for and on behalf of the Defendant.

Mr. Brant S. Levine, Attorney at Law, United States Department of Justice, Civil Division 1425 New York Avenue N.W., P. O. Box 7146, Washington, DC 20005, appearing for and on behalf of the Defendant.

ALSO PRESENT: Ms. Alicyn Cooley, and Mr. Zac Hudson, assisting Mr. Gelernt.

THE DEPOSITION OF MICHAEL J. GNECKOW, was taken on behalf of the Plaintiff, on this 1st day of December 2007, at The Coeur d'Alene Resort, 115 S. Second Street, 7th Floor, Boardroom No. 4, Coeur d'Alene, Idaho, before M & M Court Reporting Service, Inc., by Charlotte R. Crouch, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the United States District Court for the District of Idaho, said cause being Case No. 05-cv-093-EJL-MHW in said Court.

AND THEREUPON, the following testimony was adduced, to wit:

MICHAEL J. GNECKOW,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION

BY MR. GELERNT:

Q. Good morning. Would you state your name for the record?

A. Michael James Gneckow. Last name spelled G-N-E-C-K-O-W.

Q. Thanks. My name is Lee Gelernt. I'm one of the lawyers for the Plaintiff in this case. I'm going to be asking you questions.

subject -- of a criminal investigation if their name appears in the subject block. Now, a subject block in a criminal investigation could have dozen of names.

Q. Let me stop you for one second. By "subject block," do you mean title block?

A. Title block. Title block, subject block. Those are interchangeable.

Q. Sorry. I didn't mean to interrupt.

A. So, and like I said before, a criminal investigation is initiated because we have allegations of criminal activity. And so when the allegations are presented to the FBI, the first order of business is trying to find out if there is any substance to the allegations, and if there is apparently substance to the allegations, who might be our possible perpetrators. And so, people are identified, and it's the purpose of the investigation to determine are these people involved in these allegations. And so, someone can be the subject of an investigation, and yet never ever reach the point of being the focal point as they would say in the intelligence investigation.

Q. And so then if they're in the subject block or the title block -- I think you said you can use those interchangeably?

A. Yes.
Q. If they're in there, then they're being looked at as a possible perpetrator of criminal activity?
A. It depends. It's kind of subjective.
Q. Well, when you write -- strike that.
Would there be ECs for a criminal investigation?
A. Yes.
Q. When you would write an EC, who would you put in the title block?
A. Again, it depends.
Q. Okay.
A. If a person were to call the FBI and say John Smith robbed the bank on First Street, John Smith's name appears in the title block. If someone were to call us with information that there are suspicious activities at this dam where I saw five people carrying video cameras, well, we don't know who those people are. But, if through investigation we can identify twenty people who were at the dam during this particular time period, those twenty people could appear in that title block, and as we conduct our investigation we look at these people and see if any of these people perhaps were our suspicious

person out there.

Q. So you might rule out people as the investigation went on of those twenty people in your example?

A. Correct. And it would be fair to say that those twenty people are possible subjects. But the investigation -- during the course of the investigation you would figure out if any of them are, and you may discover that none of them are. So you could have all those people identified in the title block or the subject block when in fact none of them are really the subjects of that activity.

Q. So, is it fair to say you'd be listing suspects, but you might ultimately rule some or all of them out?

A. Yes. That's correct.

MR. MEEKS: Objection to the extent you're using the term suspect and we've been using the term subject.

MR. GELERNT: Well --

MR. MEEKS: I think his testimony speaks for itself. I don't want you to mischaracterize it.

BY MR. GELERNT:

Q. So, in your example, all twenty of those people would be investigated for potential criminal

Q. Just for the record, this is US 2724 to US 2731.

Now, here in the Case ID there's actually typed 265C-SU-55418?

A. Yes.

Q. That suggests that there was actually a case open by the Salt Lake City office, a criminal case in relation to Mr. Al-Hussayen?

A. Correct.

Q. And his name appears in the title, and Mr. Al-Kidd's name appears in the title. And the synopsis says, "Addition of Abdulla Al-Kidd, aka Lavoni T. Kidd, to list of subjects." Do you recall why he was put in -- strike that.

Do you recall why Mr. Al-Kidd was put into the title at this point?

A. I mean it was common practice for us to -- for me to identify Al-Hussayen's associates in that title block, in that subject block.

Q. And would it have been based on the money transfers?

A. Yes.

Q. Any other reason that you can recall?

A. I would -- not that I recall. Not at this time.

"Caution, known radical Islamic extremist" wouldn't necessarily provide a law enforcement official with concern on reading that?")

MR. MEEKS: My objection is noted, I believe.

THE WITNESS: Again, you'd have to put yourself -- you'd have to ask each individual law enforcement officer how they would interpret this. I can't answer for everybody.

MR. GELERNT: We'll mark this as Plaintiff's 17.

(Deposition Exhibit Number 17 was marked for identification.)

BY MR. GELERNT:

Q. For the record, this is US 1580 to 1583. Have you ever seen this document before?

A. I don't think I've seen this, no.

Q. Do you know if it was ever submitted to a court?

A. I'm fairly certain that there was never a search warrant for that lap top; fairly certain.

Q. Would you have been advised if there was a search warrant and material was uncovered?

A. I suspect that I would have been, yes.

Q. Paragraph 16, on Page -- well, it's US

1583, it says, "I believe the foregoing information establishes probably cause" -- I think that a typo -- "probably cause that the black IBM ThinkPad laptop computer," and then it goes on for awhile and says, "probably contains evidence relevant to the ongoing investigation of Al-Hussayen for violations of Title 18, Section 1001, False Statements, Title 18, Section 1546, Visa Fraud, as well as evidence in support of Title 18, Section 2339(A) and/or (B), Providing material Support Terrorism, as to both Al-Hussayen and Al-Kidd."

Was Mr. Al-Kidd under investigation for material support violations?

A. Not in my case, he wasn't.

Q. In some other case, was he?

A. I don't know.

Q. Were you aware that when Mr. Al-Kidd was arrested on March 16, 2003 the FBI seized certain property of his?

A. Yes. I was aware of that.

Q. Did you -- were you of the opinion that the evidence seized from him probably contains evidence relevant to bring the material support charges against Al-Kidd?

MR. MEEKS: Objection; foundation.

THE WITNESS: I don't know. I didn't specifically review the information, so I don't know.
BY MR. GELERNT:
Q. Was Agent Cleary working on the criminal investigation of Al-Hussayen?
A. Not specifically, but there was a lot of bleed-over. There's overlap.
Q. Why would he have been doing the search warrant affidavit for the criminal case? If you could take a look at that -- I mean if you want to look at the last Plaintiff's exhibit, it's a draft of an affidavit; is that correct?
MR. MEEKS: Objection; foundation.
BY MR. GELERNT:
Q. Does it appear to be a draft of an affidavit?
A. It's obviously a draft because there are spaces. There are blanks in here.
Q. And there's no signature?
A. Right.
Q. Whose name is at the bottom?
A. It's Joe Cleary's.
Q. Would that have been uncommon for him to have be providing the search warrant affidavit in a criminal matter?

A. You know, it's difficult to say. I mean if we were in the throws of trial prep in the Al-Hussayen matter, I would have been busy doing other things. So it's entire I possible that he may have done something like this, but I mean it was never -- nothing ever came out of this. It was just a draft, so I don't know what the purpose of it is.

Q. Would he have drafted it without your input?

A. Well, I've never seen this document.

Q. Do you recall that he was thinking about possibly submitting an affidavit in support of a search warrant?

A. I do recall that there were conversations about that, but I don't know where that ever led, other than I know that was never a warrant obtained.

MR. MEEKS: Are you okay? It's 12:30.

(A discussion off the record.

(A lunch recess was taken.)

BY MR. GELERNT:

Q. In March of 2003, did you still have some lingering suspicion about whether Mr. Al-Kidd was involved in criminal activity?

A. No, I don't think so. I mean in March of 2003 we had arrested Sami Al-Hussayen, and the

investigation was all about him. I mean and for a period of -- a long period of time up to that even.

Q. Prior to March 14, 2003, had you ever received any training on how to use material witness law?

A. No.

Q. How about subsequent to that?

A. I don't think so.

Q. No training on how to seek a material witness warrant?

A. No.

Q. Under what circumstances to seek one?

A. No.

Q. Do you know the standard for obtaining a material witness warrant?

A. No, I don't. I mean --

Q. Did you know in March of -- did you know on March 14, 2003 what the standard was?

A. No.

Q. Other than in the Al-Kidd matter, had you ever sought a material witness warrant?

A. No.

Q. Subsequent to the Al-Kidd matter, have you?

A. No.

Q. Were you the one who made the decision to

and overseas, things thing like that.
BY MR. GELERNT:
Q. When you say the Idaho investigation was significant, which indictments came out of that? Al-Hussayen?
A. Al-Hussayen. However, he was connected to other investigations.
Q. Outside of Idaho?
A. Correct.
Q. And were the ones outside of Idaho all referred to as the Idaho Probe, all encompassed within the words Idaho probe?
A. I wouldn't refer to it in that way, but I've heard others refer to it in that way.
Q. If someone were going to Saudi Arabia who was an individual whom the FBI wished to have testify in a criminal matter, would that alone be sufficient to arrest them on a material witness warrant?
MR. MEEKS: Objection; speculation.
THE WITNESS: It depends on the circumstances.
BY MR. GELERNT:
Q. Meaning?
A. Meaning that a businessman cooperating in an investigation who plans to travel to Saudi Arabia

on a business trip and return a week later, that does not concern me. An uncooperative witness who is leaving the country with no apparent return date on the eve of trial, that concerns me.

Q. On the Idaho Probe, how many people were convicted?

A. I don't use the Idaho Probe, so can you tell me what it is that you're referring to?

Q. If you want to look at the Mueller testimony, does he use that phrase?

A. Something like that. The Idaho Probe.

Q. Do you know who he's referring to?

A. I would have to speculate.

Q. Okay. Presumably Al-Hussayen?

A. Certainly Al-Hussayen.

Q. But beyond that, you'd have to speculate?

A. Right.

Q. You said earlier that you had only -- the only material witness warrant you've been involved with was the one in the Al-Kidd matter?

A. That's correct.

Q. I gather from your affidavit -- strike that.

I gather from the Mace affidavit, which you supplied facts, that you've gotten search warrants in

REPORTER'S CERTIFICATE

I, CHARLOTTE R. CROUCH, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of December, 2007.

_____

CHARLOTTE R. CROUCH, C.S.R. #192
Notary Public
816 Sherman Ave., Suite 7
Coeur d'Alene, ID 83814

My Commission Expires January 18, 2013.

Exhibit 28

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD,	)	
	)	Case No.
Plaintiff,	)	05-CV-093-EJL-MHW
	)	
vs.	)	
	)	
ALBERTO GONZALES, Attorney General of the United States; et al.,	)	
	)	
Defendants.	)	
	)	

DEPOSITION OF SCOTT MACE

TAKEN ON BEHALF OF THE PLAINTIFF

AT COEUR D'ALENE, IDAHO

NOVEMBER 29, 2007, AT 9:30 A.M.

REPORTED BY:

PATRICIA L. PULLO, CSR
Notary Public

A P P E A R A N C E S

MR. LEE GELERNT, Attorney at Law, of the American Civil Liberties Union Foundation, Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York, New York 10468, appearing for and on behalf of the Plaintiff;

MR. BRANT S. LEVINE and MR. J. MARCUS MEEKS, Attorneys at Law, of the United States Department of Justice, Torts Branch, Civil Division, P.O. Box 7146, Ben Franklin Station, Washington, D.C., 20044 appearing for and on behalf of the Federal Defendants.

ALSO PRESENT: Mr. Henry R. Felix
Ms. Sonia Kumar
Mr. Patrick Toomey

THE DEPOSITION OF SCOTT MACE, was taken on behalf of the plaintiff on this 29th day of November, 2007, at The Coeur d'Alene Resort, 115 South Second Street, Coeur d'Alene, Idaho, before M & M Court Reporting Service, Inc., by Patricia L. Pullo, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the United States District Court for the District Idaho, said cause being Case No. 05-CV-093-EJL-MHW in said Court.

AND THEREUPON, the following testimony was adduced, to wit:

SCOTT MACE,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

EXAMINATION

QUESTIONS BY MR. GELERNT:

Q. Can you state your name for the record.

A. Scott Mace.

Q. My name is Lee Gelernt, and I'm one of the attorneys for the plaintiff in this case. Have you ever had your deposition taken before?

A. In this matter?

Q. In any matter.

A. Yes.

would say because I didn't deal with that kind of thing.

Q. Okay. Can you tell whether -- I'm sorry. Is this an E.C. --

A. Yes.

Q. -- Plaintiff's 4?

A. Yes, sir.

MR. GELERNT: Just for the record, this is U.S. 2803 to 2807.

BY MR. GELERNT:

Q. Is this an E.C.?

A. Yes, sir.

Q. Okay. Are there multiple people in the title?

A. I see two.

Q. Al-Hussayen and al-Kidd; is that correct?

A. Yes, sir.

Q. Can you tell whether this is a criminal investigation?

A. No. I can make assumptions, but ...

Q. What are those assumptions?

A. I see that it's got the caveat "grand jury material," which would lead me to believe it's probably a criminal investigation or else they wouldn't be using a grand jury.

Q. And does that mean that everybody, therefore, in the subject -- I mean in the title would be the

subject of a criminal investigation?

MR. MEEKS: Objection, vague, calls for speculation.

THE WITNESS: My understanding of the way that I structured the titles of my cases was that people in the title -- well, generally in the FBI we have two categories of people that are involved in an investigation, main subjects and references. And I don't believe it would be impossible for a reference to make their way into the title.

Q. And what is a reference?

A. It's someone that's not a main subject, so someone that's not the main target of the investigation.

Q. But they would still be a subject?

MR. MEEKS: Objection, vague.

THE WITNESS: I don't believe so.

Generally, a reference would be more like a witness or something like that and I don't believe would make -- normally would make their way into the title. But, again, the title in protocol -- you know, I know the way that I did it. But I don't know how well defined that protocol really is or how it's followed in different offices.

BY MR. GELERNT:

Q. So you would not put anybody who was not a

REPORTER'S CERTIFICATE

I, Patricia L. Pullo, Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time any witnesses were placed under oath;

That the testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me or under my direction;

That the foregoing is a true and correct record of all testimony given, to the best of my ability;

That I am not a relative or employee of any attorney or of any of the parties, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of December, 2007.

_____
PATRICIA L. PULLO, C.S.R. #697
Notary Public
816 Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814

My Commission Expires 11/13/2012.

Exhibit 29

Brant S. Levine
brant.levine@usdoj.gov
D.C. Bar 472970
J. Marcus Meeks
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D.C. Bar No. 472072
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Torts Branch
Tel: 202-616-4176
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P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044

Attorneys for the Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, v. ALBERTO GONZALES, Attorney General of the United States; *et al.*, Defendants.	Case No. CV:05-093-S-EJL RESPONSE OF DEFENDANT MICHAEL GNECKOW TO PLAINTIFF'S THIRD SET OF INTERROGATORIES

Pursuant to Federal Rules of Civil Procedure 26 and 33, and Local Civil Rule 26.1, Federal Defendant Michael Gneckow hereby responds to Plaintiff's Third Set of Interrogatories.

GENERAL OBJECTIONS

Defendant Gneckow states the following General Objections to Plaintiff's Third Set of Interrogatories, which are hereby incorporated in and made part of each of the following specific interrogatory responses.

1. Defendant objects to Plaintiff's Third Set of Interrogatories to the extent that they

seek to impose obligations that exceed the scope of the Federal Rules of Civil Procedure.

2. Defendant objects to Plaintiff's Third Set of Interrogatories to the extent that they require answers that are not relevant to Plaintiff's claims or Defendant's defenses nor reasonably calculated to lead to the discovery of admissible evidence.

3. Defendant objects to Plaintiff's Third Set of Interrogatories to the extent that they require the disclosure of grand jury information that may not be disclosed absent a court order under Rule 6(e) of the Federal Rules of Criminal Procedure.

4. Defendant objects to Plaintiff's Third Set of Interrogatories to the extent that they require the disclosure of information protected from disclosure by the law enforcement privilege, the investigation files privilege, or the official information privilege.

5. Defendant's responses to Plaintiff's Third Set of Interrogatories are made without waiving:

(a) The right to object to the competence, relevance, materiality, or admissibility as evidence of any information, or the subject matter thereof, in any aspect of this civil action or any other matter;

(b) The right to object at any time and upon any grounds to any other discovery requests;

(c) The right at any time and for any reason to revise, supplement, correct, add or to clarify these responses;

(d) The right to amend or supplement these responses if the Federal Defendants discover additional information; and

(e) Any applicable privilege, including the but not limited to the attorney/client privilege, the law enforcement privilege, the investigation files privilege and the official information

privilege.

INTERROGATORIES

INTERROGATORY NO. 22: Please explain the basis or bases for the Government's change in position regarding Abdullah al-Kidd's status as a "possible co-subject of a criminal investigation," such that al-Kidd was considered a "possible co-subject of the criminal investigation into the activities of Sami Omar Al-Hussayen" as of February 1, 2002, but was not the subject of an investigation into whether he was involved in criminal conduct and was not considered a possible subject for indictment by the Government as of March 14, 2003.

OBJECTIONS: Defendant objects to this interrogatory as vague and conjectural. Defendant answers this interrogatory subject to this specific objection and the General Objections noted above.

ANSWER: In early 2002, Abdullah al-Kidd was considered a "possible co-subject of the criminal investigation into the activities of Sami Omar Al-Hussayen" because it was unclear to SA Gneckow the significance of the money flow to al-Kidd from Al-Hussayen's bank account and the accounts of his associate, Abdulla Aljughaiman. Later, after extensive financial analysis of al-Kidd's bank accounts, it became clear that the payments to al-Kidd from Al-Hussayen and Aljughaiman were likely in the nature of salary and were probably related to his employment at al-multaqa. No "change of position" ever took place, rather the investigation revealed that the money received by al-Kidd did not appear to have a specific tie to criminal activity other than how it related to criminal violations committed by Al-Hussayen. Al-Kidd was never considered a possible subject for indictment by the United States.

INTERROGATORY NO. 23: Please identify all persons having participated in or having been advised of the Government's change in position regarding Abdullah al-Kidd's status as a "possible co-subject of a criminal investigation," such that al-Kidd was considered a "possible co-subject of the criminal investigation into the activities of Sami Omar Al-Hussayen," as of February 1, 2002, but was not the subject of an investigation into whether he was involved in criminal conduct and was not considered a possible subject for indictment by the Government as of March 14, 2003.

OBJECTIONS: Defendant objects to this interrogatory as vague and conjectural. Defendant answers this interrogatory subject to this specific objection and the General Objections noted above.

ANSWER: No persons, *per se*, participated or were involved in any decision to change position regarding al-Kidd's status, since no "change of position" ever took place. Al-Kidd's "possible" co-subject status was related to understanding the significance of the money flow to him from Al-Hussayen and Aljughaiman. Any "change" was directly related to a better understanding of why al-Kidd was receiving regular payments from Al-Hussayen and is a normal development in the evolution of any criminal investigation. Due to the fluid nature of investigations such as this one, several individuals who received money from Al-Hussayen were identified as "possible co-subjects" until the significance of the financial transactions to or from them could be discerned.

Dated: December 7, 2007

Signed as to the objections by:

BRANT S. LEVINE
J. MARCUS MEEKS
United States Dept. of Justice
Torts Branch, Civil Division
P. O. Box 7146
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4176 (voice)
(202) 616-4314 (fax)

Attorneys for Michael Gneckow

Signed as to the answers by:
SEE ATTACHED VERIFICATION OF SA MICHAEL GNECKOW

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2007, I caused the foregoing RESPONSE OF DEFENDANT MICHAEL GNECKOW TO PLAINTIFF'S THIRD SET OF INTERROGATORIES to be served on Plaintiff's and Defendant's counsel, via first class mail, as follows:

Lee Gelernt, Attorney for Plaintiff
ACLU Immigrants' Rights Project
125 Broad St, 18th Floor
New York, NY 10004

Robin Goldfaden, Attorney for Plaintiff
ACLU Immigrants' Rights Project
39 Drumm Street
San Francisco, CA 94111

Cynthia Jane Woolley, Attorney for Plaintiff
Law Offices of Cynthia J. Woolley, PLLC
P.O. Box 6999
180 First Street West, Suite 107
Ketchum, ID 83340

R. Keith Roark, Attorney for Plaintiff
The Roark Law Firm, LLP
409 North Main Street
Hailey, ID 83333

Kathleen J. Elliott and Teresa A. Hampton, Attorneys for Plaintiff
Hampton & Elliott
912 North 8th Street
Boise, ID 83302

Sherry A. Morgan, Attorney for Defendant Killeen
Ada County Prosecutors
200 W. Front Street, Room 3191
Boise, ID 83702

J. Marcus Meeks
U.S. Department of Justice

VERIFICATION

I, Michael Gneckow, declare that I have read the responses to Plaintiff's Third Set of Interrogatories to Defendant Gneckow. Based upon reasonable inquiry and my knowledge, information, and belief, these responses are true and correct.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true.

Executed this 6th day of December, 2007, in Coeur d'Alene, Idaho.

Michael Gneckow
Special Agent
Federal Bureau of Investigation
U.S. Department of Justice