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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

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AGAINST INDIVIDUAL FEDERAL DEFENDANTS, FILED ON DECEMBER 21, 2011 (Dkt. No. 310)

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INTRODUCTION

In their opposition brief, defendants have disclaimed any suggestion that Mr. al-Kidd has done anything wrong. They do not argue that he was anything less than fully cooperative with the FBI, and they no longer imply that he was fleeing because he wished to avoid testifying. *Compare* Fed. Defs. Opp. Br. at 17-18 *with* Fed. Defs. Opening Br. at 20. With these distractions swept away, the true stakes of defendants' argument become clear: They propose that an innocent, cooperative U.S. citizen may be arrested and imprisoned as a material witness simply because he is going on a trip abroad and has not yet scheduled a return leg. Fed. Defs. Opp. Br. at 5-6.

Defendants contend that Mr. al-Kidd's U.S. citizenship, his family ties, his past cooperation with the FBI, and the FBI's failure to tell him his testimony might be needed, were all irrelevant. All those factors, defendants argue, should be considered *after the fact* at the detention hearing stage, but they need not be presented to the court when seeking the arrest warrant. According to defendants, they may arrest an innocent U.S. citizen—no matter how cooperative, no matter how deep his ties to the United States—simply by showing that he is traveling out of the country to Saudi Arabia without a specific return date. This is not a reasonable understanding of the law.

ARGUMENT

I. MR. AL-KIDD IS ENTITLED TO SUMMARY JUDGMENT ON HIS *MALLEY* CLAIM.

A. The Affidavit Patently Failed To Establish Impracticability.

The affidavit falls far short of establishing probable cause to believe it would be impracticable to secure Mr. al-Kidd's testimony by subpoena. Its only assertions pertaining to impracticability were that Mr. al-Kidd was taking a one-way trip to Saudi

Arabia, and that he was flying first class on a ticket that cost $5000. *See* Pl. Bivens Br. at 8-9; *see also* Pl. Ex. 1. These assertions were untrue, as defendants now admit. But even taking them as true, they do not come close to establishing probable cause.

In essence, defendants are asking this Court to *assume* impracticability whenever the government can show that a potential witness has a one-way plane ticket abroad; they argue there is no need for particularized facts showing that the witness would likely refuse to comply with a subpoena. Defendants' argument is entirely contrary to the Ninth Circuit's settled case-law, which requires that the affidavit make a particularized showing not only that the witness *could* refuse to comply with a subpoena, but that he is "*likely*" to do so. *Bacon v. United States*, 449 F.2d 933, 944 (9th Cir. 1971); *see also id.* at 942 ("[A] judicial officer must be provided with information of sufficient specificity and apparent reliability to permit him to determine independently the existence *vel non* of probable cause.").

In *Bacon*, the Ninth Circuit held that the FBI failed to establish impracticability even though the witness had "access to large sums of money" and "personal contact with fugitives from justice," and even though she had fled to an "adjoining rooftop" when the FBI initially sought her arrest. *Id*. at 944-45. Similarly, in *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1985), the Ninth Circuit held a material witness arrest invalid despite police officers' multiple attempts to serve a subpoena on the witness, and after the witness told the officers that he would not testify voluntarily. *Id.* at 974, 976-77. If the facts in *Bacon* and *Arnsberg* were not enough to establish impracticability, then surely the impracticability-related assertions made in the affidavit here—all of which boil down to the fact that Mr. al-Kidd was traveling abroad—could not suffice.

Defendants erroneously accuse Mr. al-Kidd of substituting a standard of "certainty" for that of probable cause. *See* Fed. Defs. Opp. Br. at 4-5. But Mr. al-Kidd's argument is simply that, under controlling Ninth Circuit case law, the affidavit did not remotely establish *probable cause* of impracticability. The affidavit contained no assertions that Mr. al-Kidd had done anything to suggest he would be uncooperative. The mere fact that he was traveling abroad is not enough to show that he would "likely" refuse to honor a subpoena if one were issued. *Bacon*, 449 F.2d at 944.[1]

B. The Affidavit Patently Failed to Establish Materiality.

The affidavit also failed to explain how Mr. al-Kidd's testimony would be germane to the visa and false statement charges pending against Al-Hussayen. As explained in plaintiff's opening brief, the affidavit asserted a handful of disparate facts and asked the Court to assume that Mr. al-Kidd had material information about the pending charges. *See* Pl. Bivens Br. at 12-13; *see also Illinois v. Gates*, 462 U.S. 213, 239 (1983); *cf. Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) (holding that search warrant affidavit must establish a "nexus . . . between the item to be seized and [the suspected] criminal behavior."). That is plainly insufficient.[2]

[1] Defendants also accuse Mr. al-Kidd of re-litigating the question of whether a material witness warrant can ever be issued without first serving the witness with a subpoena. Fed. Defs. Opp. Br. at 3-4. But Mr. al-Kidd's argument—discussed in more detail below, *see infra* Part II.A—is simply that a witness's prior cooperation is relevant to the court's impracticability determination, and not that he must be served with a subpoena first.

[2] At the motion to dismiss stage, defendants argued that, under *Bacon*, "'a mere statement by a responsible official, such as the United States Attorney, is sufficient to satisfy' the materiality criterion." Mem. Order at 14 (citing *Bacon*, 449 F.2d at 943). But *Bacon*'s holding on this point was limited to the grand jury context, as the Ninth Circuit in this case noted. The Ninth Circuit "s[aw] no reason that the showing of materiality as to the witness in a trial . . . should be any different from the showing required for

Plaintiff's opening brief also made the additional (and independent) argument that the material witness statute must be construed consistently with the Fourth Amendment to permit only reasonable arrests, and that it would be unreasonable to allow the arrest of an innocent U.S. citizen purely for the sake of testimony that is cumulative and unnecessary to the prosecution. *See* Pl. Bivens Br. at 13-15. Defendants protest that Mr. al-Kidd is proposing a "novel" constitutional standard, Fed. Defs. Opp. Br. at 6, 8, but this is a mischaracterization. Mr. al-Kidd simply argues that, to establish probable cause of materiality, the government must show a "fair probability" that the need for this particular witness's testimony is great enough to justify the deprivation of his liberty. *Gates*, 462 U.S. at 246. Otherwise, the material witness statute would violate the Fourth Amendment's "ultimate touchstone" of reasonableness. *Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (citation omitted). Nor does reading the statute to permit only reasonable arrests force courts to examine all the government's evidence and intrude on the prosecutor's pre-trial decision-making process, as defendants suggest. *See* Fed. Defs. Opp. Br. at 7. A simple statement in the affidavit explaining what knowledge this particular witness has, and how that knowledge relates to the pending charges, may well be enough. But the affidavit here contained no such statement.

II. MR. AL-KIDD IS ENTITLED TO SUMMARY JUDGMENT ON HIS *FRANKS* CLAIM.

Mr. al-Kidd has made a "substantial showing" that defendants intentionally or recklessly made false statements and omissions in the affidavit they submitted to this Court, and he has shown that the corrected affidavit is "insufficient to establish probable

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impracticability."). *Al-Kidd v. Ashcroft*, 580 F.3d 949, 967 n.18 (9th Cir. 2009). The Supreme Court's decision cast no doubt on the Ninth Circuit's reasoning on this point.

cause." *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995). Mr. al-Kidd has made the requisite showing for both impracticability and materiality,[3] although only one is needed to prevail on his *Franks* claim.

A. Reckless and Intentional Omissions

Defendants omitted the following facts from the affidavit: (1) Mr. al-Kidd had voluntarily cooperated with the FBI on multiple occasions in the past; (2) Mr. al-Kidd was a native-born U.S. citizen, with U.S. citizen family members living in the United States; and (3) the FBI never told Mr. al-Kidd his testimony might be needed or asked him not to travel, and they had not contacted Mr. al-Kidd in over 8 months. *See* Pl. Bivens Br. at 17-18. As explained in Mr. al-Kidd's opening brief, the record—including Gneckow and Mace's own deposition testimony—establishes that these omissions were all intentional or reckless. *See id.*; *see also* Pl. Facts ¶ 31 (citing record evidence showing Gneckow's awareness of the omitted facts and his intentional decision not to include them), ¶ 41 (showing Mace's recklessness).

Defendants take the extraordinary position that these omissions were not "relevant" to impracticability. Fed. Defs. Opp. Br. at 17-18. They admit that these are relevant considerations for the judge at the detention hearing—*after* the individual has been arrested on a material witness warrant—but they contend that they need not be presented to the judge at the arrest warrant stage. Fed. Defs. Opening Br. at 27-28. Yet the applicable statutes make clear that flight risk is a relevant consideration at *both* the arrest warrant stage and the detention hearing stage. *See* 18 U.S.C. §§ 3144, 3142. Unlike in the criminal context, where officers may sometimes make warrantless arrests

[3] To avoid repetition, Mr. al-Kidd will not repeat his arguments regarding materiality. *See also* Pl. Bivens Br. at 25-26.

subject to an after-the-fact probable cause determination by a judge, the material witness statute does not allow for warrantless arrests. Instead, it specifically requires a judicial finding of probable cause *prior* to arrest. *See* 18 U.S.C. § 3144 (providing that "a judicial officer may order the arrest" of a material witness upon the filing of an affidavit); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011) (noting that the "federal material-witness statute authorizes *judges* to order the arrest" of a material witness) (emphasis added) (citation omitted). Congress therefore required that officers provide the judicial officer with all available information relevant to probable cause up front, rather than at a later detention hearing.

On defendants' view, FBI agents may knowingly withhold facts from a judge when seeking an arrest warrant—facts that they know are relevant to the judge's assessment of whether detention is needed to secure testimony. Such a rule would give the government a free hand to procure material witness warrants even where no flight risk exists, securing two days of preventive detention before being put to its proof at the detention hearing. This would be a remarkably inefficient rule for the courts, and a profoundly unjust one for the witness.[4]

Because the affidavit failed to mention Mr. al-Kidd's past cooperation with the FBI, his U.S. citizenship, his family ties to the United States, or the FBI's failure to advise him that his testimony might be needed, defendants failed to put this Court "on

[4] Relatedly, defendants suggest that the availability of a detention hearing *after* a witness's arrest is sufficient to render the intrusion on the witness's liberty interests *per se* reasonable. *See* Fed. Defs. Opp. Br. at 7-8 n.3. This argument is baseless. That an innocent U.S. citizen witness can be released from jail sometime after his arrest cannot eliminate the need to have probable cause for the arrest in the first place; otherwise, the requirement that the government establish probable cause of materiality and impracticability to justify the issuance of a warrant would be rendered meaningless.

notice," *Liston v. County of Riverside*, 120 F.3d 965, 974 (9th Cir. 1997), of vital information that would have called into question the affidavit's assertion that it would be impracticable to secure Mr. al-Kidd's presence without an arrest. Indeed, Gneckow himself conceded at his deposition that a "cooperative businessman" could not be arrested on a material witness warrant simply because he had a plane ticket to Saudi Arabia, Pl. Facts ¶ 33, and yet he knowingly failed to include any mention of Mr. al-Kidd's prior cooperation with the FBI in the affidavit.

Defendants also reiterate their argument that the material witness statute does not require the government to serve a witness with a subpoena before an arrest warrant can be sought. *See* Fed. Defs. Opp. Br. at 17. But Mr. al-Kidd's argument is not that the failure to serve a subpoena is a *per se* violation. Rather, Mr. al-Kidd's argument, under settled Ninth Circuit law, is that government must show why it would have been impracticable to secure the testimony by subpoena. And that determination takes into account all of the factors discussed above, including past cooperation.[5]

Awadallah and the other out-of-circuit cases defendants cite are consistent with this principle and fully support plaintiff's position. *See* Fed. Defs. Opp. Br. at 4. In *Awadallah*, the Second Circuit noted that the plaintiff revoked consent for the FBI to

[5] That past cooperation is relevant to the impracticability determination is a matter of common sense. When trying to determine whether the government has made a sufficient showing that a witness would be unlikely to cooperate in the future, a decision-maker would want to know whether the witness had been given similar opportunities in the past, and if so, how he responded (or if not, why not). In *Bacon*, for example, the Ninth Circuit specifically noted the FBI's failure to make any "showing of past attempts by Bacon to evade judicial process" as one of the reasons why the FBI fell short of showing "that Bacon would be *likely* to flee." 449 F.2d at 944. In *Barry v. United States*, 279 U.S. 597, 619 (1929), the Supreme Court noted that the Senate "reasonably believ[ed]" evidence would be lost in light of the witness's "repeated refus[al]" to answer questions when subpoenaed.

search his car, and refused to appear for a polygraph test without a lawyer. *United States v. Awadallah*, 349 F.3d 42, 46 (2d Cir. 2003). In light of these twin refusals, the Second Circuit expressed doubts about his "ostensibl[e] cooperative[ness]." *Id*. at 47; *see also id.* at 46, 67 n.19, 68 n.20. Similarly, in *United States v. McVeigh*, 940 F. Supp. 1541 (D. Colo. 1996), factors strongly suggested that the witness would likely evade a subpoena, including that the witness "had publicly renounced his [U.S.] citizenship." *Id.* at 1550. And in *Swafford ex rel. White v. Gerbitz*, 892 F.2d 457 (6th Cir. 1989), the Court relied heavily on the plaintiff's statement to officers that he did not want to be a "snitch" and "did not want to testify about the [murder] in later court proceedings." *Id.* at 459.

Here, in stark contrast, defendants do not argue that Mr. al-Kidd had been anything but cooperative with the FBI on all prior occasions. And defendants have no answer for why the FBI could not have asked Mr. al-Kidd to postpone his trip when agents encountered him at the airport, or why they could not have seized his passport.[6]

B. Reckless and Intentional False Statements

The knowing omissions from the affidavit are enough, on their own, to negate probable cause and establish liability under *Franks*. But, in addition, the affidavit was also marred by false statements. Defendants now admit that the affidavit contained three false statements about impracticability: It stated (1) that Mr. al-Kidd's ticket was a one-

[6] Al-Hussayen's trial did not begin for more than a year after Mr. al-Kidd's arrest. *See* Fed. Defs. Facts ¶ 34. Defendants note, however, that it was originally scheduled for approximately thirty days from al-Kidd's arrest. Fed. Defs. Opp. Br. at 5. But insofar as that fact is relevant, it cuts *against* defendants' argument. With the trial scheduled to start in the relatively near future, it would have been that much more feasible for defendants to request that Mr. al-Kidd postpone his trip and surrender his passport until after he had testified. Moreover, defendants' argument completely ignores Congress's requirement that the government take the deposition of a material witness wherever possible, so as to avoid the hardship of unnecessary detention. *See* 18 U.S.C. § 3144.

way ticket, when in fact it was a round-trip open-return ticket; (2) that Mr. al-Kidd's ticket was first-class, when in fact it was coach class; and (3) that Mr. al-Kidd's ticket cost approximately $5000, when in fact it cost approximately $1700. As explained in plaintiff's opening brief, defendants included these false statements in the affidavit in reckless disregard for their truth or falsity. *See* Pl. Bivens Br. at 23-25.

Defendants argue that Gneckow was not reckless because he "took steps to ensure that Plaintiff was in fact leaving the country." Fed. Defs. Opp. Br. at 13. In particular, they point to his phone call to an FBI agent stationed at Dulles Airport, who told Gneckow that Mr. al-Kidd's name appeared on an upcoming flight manifest. But is undisputed that Gneckow never—during that phone call or at any other time—attempted to ascertain the three facts at issue here.

Indeed, the record shows that Gneckow accepted Alvarez's oral statements about Mr. al-Kidd's flight without ever asking to see any documentation, *even though he was aware of the confusion concerning Mr. al-Kidd's ticket*. Defendants argue that Gneckow "never testified" that he was confused about the ticket, Fed. Defs. Opp. Br. at 13, but that is not the question. The question is whether Gneckow was *aware* of his informants' confusion over Mr. al-Kidd's ticket, and the record shows beyond any doubt that he was. Alvarez testified that he knew Alvarado "was not 100 percent sure of himself on the ticket information," was uncertain of the class of the ticket, and "was uncertain[] whether [the outbound flight] was going to be the 13th or the 16th." Pl. Ex. 25, Alvarez Dep. at 44. Alvarez testified that he told Gneckow about this uncertainty. *Id*. at 53 ("Q. Did you tell [Gneckow] there was uncertainty about what date he was departing? A. I believe it was—yes.").

Alvarez and Alvarado's uncertainty about these basic facts would have put a reasonable officer on notice that more investigation was needed into the details of Mr. al-Kidd's flight. At the very least, a reasonable officer would have acknowledged such uncertainty in the affidavit so that this Court could give the information appropriate weight when deciding whether to issue the warrant. *See, e.g.*, *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1086 (9th Cir. 2011) (inclusion of omitted facts would have put magistrate judge "on notice" of affiant's uncertainty and "prompted . . . [him to] require[] additional information") (internal quotation marks omitted); *Liston*, 120 F.3d at 974 (same). But Gneckow did none of this.

He did not bother to check the information he put into the affidavit about the cost, class, and round-trip nature of the ticket—even though he easily could have done so, either through Alvarez or the FBI agent at Dulles. *See* Pl. Bivens Br. at 24; Pl. Facts ¶¶ 27-30. *See also* Pl. Ex. 2, Gneckow Dep. at 166-67 (Gneckow did not ask Alvarez "to do any follow-up," but rather "took [it] upon [him]self" to verify the information by calling the FBI agent at Dulles); *id*. at 169-70 (Gneckow did not ask FBI agent at Dulles to confirm the price, class, or one-way nature of the ticket); *id*. at 184 (testifying that he "wasn't upset" when he learned that the flight information was incorrect because "it made no difference to me whether it was a one-way ticket, first class, or whether it was economy class, round-trip, open-ended ticket.").

Defendants also assert that AUSA Lindquist "advised Gneckow to make sure Plaintiff had left his home before proceeding, and Gneckow followed this advice." Fed. Defs. Opp. Br. at 9. But when asked, Gneckow could not recall what steps had been taken to determine whether Mr. al-Kidd had left his home. *See* Pl. Facts ¶ 39. Gneckow

testified only that he may have asked another agent to do a "drive-by" or make a "telephone call." *Id*. In any event, Gneckow's vague assertion that he took some undefined steps to ensure that Mr. al-Kidd had left his home is simply irrelevant in the face of the strong record evidence showing that defendants made no effort to verify the cost, class, or round-trip nature of the ticket before including those facts in the affidavit.

In sum, the undisputed record evidence shows Gneckow's reckless disregard for the truth of the statements he put before this Court. Mace, too, acted recklessly in signing the affidavit; he admitted that he did not know the standard for seeking a material witness warrant, and that he made no effort whatsoever to determine whether the facts to which he was swearing were true. Pl. Facts ¶¶ 40-41; *cf. United States v. Whitley*, 249 F.3d 614, 624 (7th Cir. 2001) (warrant invalid where, among other things, officers made "no effort . . . to verify the accuracy of information").[7]

The Ninth Circuit has repeatedly emphasized that "[a]lthough a police officer is entitled to rely on information obtained from fellow law enforcement officers, . . . this in no way negates a police officer's duty to reasonably inquire or investigate these reported facts." *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1293 n.16 (9th Cir. 1999). Indeed, "[a]ll officers . . . have an ongoing duty to make appropriate inquiries regarding the facts received or to further investigate if insufficient details are relayed." *Motley v. Parks*, 432 F.3d 1072, 1081 (9th Cir. 2005).

[7] Defendants incorrectly assert that Mr. al-Kidd has "fail[ed] to argue that Mace's conduct was not objectively reasonable." Fed. Defs. Opp. Br. at 15 n.7. That is incorrect. *See* Pl. Bivens Br. at 8 n.4 (arguing that "[b]y signing and submitting the affidavit, Mace is responsible for its contents (and omissions)"); *see also* Pl. Facts ¶¶ 40-41.

Here, it was incumbent upon both Gneckow and Mace to "make appropriate inquiries" into the facts on which they were relying for probable cause before submitting those facts to this Court. *Id*. This is most obviously true of Gneckow: He was affirmatively aware of Alvarez and Alvarado's confusion about Mr. al-Kidd's flight details, and yet he did not ask Alvarez "to do any follow-up research," but instead "took [it] upon [him]self" to verify the information. Pl. Facts ¶¶ 29, 41.[8]

In arguing that they had no duty to ascertain whether the facts they presented to this Court were true, defendants cite only two cases, *see* Fed. Defs. Opp. Br. at 14, both of which actually support plaintiff's position. In *Ewing*, the Ninth Circuit held that officers were not liable for seeking a warrant based on what turned out to be mistaken eyewitness identifications. The Court held that it was not reckless for the officers, after conducting a "reasonable" investigation that had *already* established probable cause, to stop interviewing additional potential witnesses and to apply for a warrant. *Ewing v. City of Stockton*, 588 F.3d 1218, 1227 (9th Cir. 2009). *Ewing* does not suggest that an officer has no duty to ensure that the facts he presents to a magistrate judge are true. On the contrary, *Ewing* specifically recognized that "[a]n officer should pursue reasonable avenues of investigation and may not close his eyes to facts that would clarify the situation[.]" *Id.* at 1227 (internal citations omitted).

[8] *See also Espinosa v. City and County of San Francisco*, 598 F.3d 528, 535 (9th Cir. 2010) ("[O]fficer relying on the information [supplied by another officer] must make reasonable inquiries to determine if there is a sufficient basis for [probable cause to support] arrest and search."); *Beirer v. City of Lewiston*, 354 F.3d 1058, 1071 (9th Cir. 2004); *see generally Maryland v. Garrison*, 480 U.S. 79, 85 (1987) ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, *or had a duty to discover* and to disclose, to the issuing Magistrate.") (emphasis added).

And in *Brown v. Savage*, No. 08-382, 2011 WL 4584771 (D. Id. Sept. 30, 2011), this Court held that a sheriff's detective was not liable for omissions in the warrant affidavit where he personally conducted an extensive investigation (including interviewing witnesses and subpoenaing bank records) to develop probable cause, *id.* at *1-*2, and where he was not on notice that any information might be incorrect or missing. *Id.* at *8. Here, defendants conducted no meaningful inquiry to ensure that their statements were true—despite Gneckow's awareness of his informants' uncertainty—and recklessly included them in the affidavit anyway.

C. The Corrected Affidavit Lacks Probable Cause of Impracticability.

When the affidavit is revised to correct for the numerous omissions, all that remains is this: A U.S. citizen was traveling to Saudi Arabia; he had substantial ties to the United States; he had never failed to cooperate with the FBI; he was never told not to travel or that he might be needed as a witness; and he had not heard from the FBI in roughly 8 months. Those facts are clearly insufficient to establish probable cause to believe Mr. al-Kidd would refuse to comply with a subpoena under Ninth Circuit law. At the very least, the corrected affidavit "would have prompted the issuing judge to require additional information" from the affiants before deciding whether to issue the warrant. *Bravo*, 665 F.3d at 1086 (internal quotation marks omitted). Thus, even if the false statements regarding the plane ticket are left in the affidavit, probable cause was lacking. And, when the false statements are corrected, the affidavit even more plainly lacks probable cause of impracticability.

The fact that Saudi Arabia lacks an extradition treaty with the United States does not change the probable cause determination. Many countries to which American

citizens regularly travel for business and pleasure lack extradition treaties with the United States, including China and Russia.[9] Under defendants' reasoning, *any* American citizen who is taking a trip to any of these countries, and who has not yet scheduled his return flight, would automatically satisfy the material witness statute's impracticability prong—regardless of past cooperation. This flies in the face of common sense, and of Ninth Circuit case law. The lack of an extradition treaty does not mean that a traveler would be "likely" to evade a subpoena. *Bacon*, 449 F.2d at 944.

III. GNECKOW'S CONSULTATION WITH LINDQUIST DOES NOT ENTITLE DEFENDANTS TO QUALIFIED IMMUNITY.

Defendants contend that they are entitled to qualified immunity under both *Malley* and *Franks* because Gneckow "consulted" with AUSA Lindquist before submitting the affidavit to the Court. First, as to the *Franks* claim, defendants cannot claim qualified immunity. As the courts have repeatedly held in *Franks* cases, an officer cannot purport to have immunity where he intentionally or recklessly withheld material facts. Pl. Bivens Br. at 7 n.3. *See Chism v. Washington*, 661 F.3d 380, 393 (9th Cir. 2011); *Ewing*, 588 F.3d at 1228 n.16; *Liston*, 120 F.3d at 973 n.8. Nor does any purported consultation with AUSA Lindquist change that point, because the record in this case makes quite clear that Lindquist's sign-off was based on incomplete information.

Critically, Gneckow admitted in his deposition that he gave Lindquist limited information. *See* Pl. Facts ¶ 38, Pl. Ex. 2, Gneckow Dep. 201 ("Q. So you didn't provide [Lindquist] with additional facts beyond those in the affidavit? A. Right."). And Lindquist himself testified that, at the time of the arrest, he had no knowledge of whether

[9] *See* Congressional Research Service, *Extradition To and From the United States: Overview of the Law and Recent Treaties* 43 (Mar. 17, 2010), *available at* http://www.fas.org/sgp/crs/misc/98-958.pdf.

Mr. al-Kidd was a U.S. citizen, *see* Pl. Ex. 26, Lindquist Dep. at 17, whether he had been cooperative with the FBI in the past, *id*. at 43-44, whether he was ever informed that he might be needed as a witness, *id*. at 104, whether he was asked not to travel outside the United States, *id*. at 43, or whether he was asked to inform the FBI if he intended to travel. *Id*. Lindquist therefore was in no position to assess the existence of probable cause or the adequacy of the affidavit, and his sign-off—as Gneckow had reason to know, having given him incomplete information—was meaningless.

Nor is qualified immunity appropriate as to plaintiff's *Malley* claim. Defendants cite *Messerschmidt v. Millender*, --- S.Ct. ----, 2012 WL 555206 (2012), for the proposition that consultation with a prosecutor may be "pertinent" to qualified immunity—at least on the *Malley* claim. *Id.* at *12; *see also* Dkt. No. 326, Fed. Defs. Fed. R. App. P. 28(j) Letter (Feb. 27, 2012). But the facts of *Messerschmidt* could not be further afield from this case. The Supreme Court concluded that qualified immunity was proper in *Messerschmidt* because the police officers "prepared a *detailed* warrant application that *truthfully* laid out the pertinent facts" with no material omissions, and submitted the application to a deputy district attorney. *Id.* at *12 (emphasis added). Based on these facts, the Court concluded that the officers in *Messerschmidt* "took every step that could reasonably be expected of them" to ensure that their affidavit established probable cause. *Id.* The facts here could not be more different. Thus, far from supporting defendants' arguments, *Messerschmidt* illustrates why Gneckow's consultation with Lindquist is wholly insufficient to merit qualified immunity protection.

Finally, defendants reiterate their argument that they deserve qualified immunity because Mr. al-Kidd's *Malley* and *Franks* arguments are premised upon a "novel"

constitutional theory. Fed. Defs. Opp. Br. at 10-12, 19.[10] This argument lacks merit. Mr. al-Kidd's arguments do not rest on novel constitutional theories, but rather on straightforward applications of longstanding Ninth Circuit case law. Indeed, *Bacon* and *Arnsberg* have long been the precedents in this Circuit, spelling out what is needed to establish probable cause for a material witness arrest. In any event, as explained in Plaintiff's opening brief, courts do not apply the "clearly established" test when deciding *Malley* or *Franks* claims, because the standard for liability in both kinds of cases already incorporates immunity protection. Pl. Bivens Br. at 7 n.3.

CONCLUSION

Defendants ask this court to hold that a cooperative, innocent U.S. citizen may be arrested and detained on a material witness warrant solely for taking a trip abroad with no specific return date. This Court should reject that assertion and, in light of the undisputed evidence, grant summary judgment in favor of Mr. al-Kidd on both his *Malley* and *Franks* claims.

Dated: March 7, 2012

Respectfully submitted,

/s/
Lee Gelernt

[10] Defendants assert that it is "not 'obvious' that a neutral magistrate would not have issued the warrant." Fed. Defs. Opp. Br. at 19 (citing *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1126-27 (9th Cir. 1997)). To the extent defendants are implying that the applicable standard is "obviousness," they misread *Lombardi*. *Lombardi* was simply commenting that in *Hervey*, the materiality of the missing information was "obvious," making it an especially easy case. *Lombardi*, 117 F.3d at 1126 ("The facts in *Hervey* made the materiality inquiry easy . . . . But whether the magistrate would not have issued the warrant with false information redacted, or omitted information restored, is not always so obvious."). The rule remains that liability attaches if the court concludes that the affidavit would not make out probable cause with the omissions added and the false statements corrected. *Liston*, 120 F.3d at 973.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of March, 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:

Brant S. Levine
brant.levine@usdoj.gov

J. Marcus Meeks
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/s/ Lee Gelernt
Attorney for Abdullah al-Kidd

TABLE OF ADDITIONAL EXHIBITS

Exhibit 24. Deposition of FBI Special Agent Michael Gneckow

Exhibit 25. Deposition of ICE Agent Robert Alvarez

Exhibit 26. Deposition of AUSA Kim Lindquist

Exhibit 24

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

to court, putting aside the opening preamble, which I obviously know Agent Mace added?

A. Yes.

Q. Who did you show that to?

A. That would have been Assistant U.S. Attorney Kim Lindquist.

Q. Did you revise the affidavit in response to Assistant U.S. Attorney Lindquist?

A. I believe I did, yes.

Q. Do you know how many revisions it went through?

A. Not specifically, but there had to have been at least one revision.

Q. And you would have saved the prior version?

A. I doubt that I would have saved the draft.

Q. You would have just revised over it?

A. Correct.

Q. Do you recall what revisions he suggested you make?

A. I don't recall specifically. There was a particular paragraph I believe he wanted added to the affidavit.

Q. Okay. Do you recall generally what that paragraph was about?

A. I might be able to recall if I had the

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 25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CASE NO.: 05-cv-093-EJL-MHW

ABDULLAH AL-KIDD,

Plaintiff,

VS.

ALBERTO GONZALES, Attorney General of the United States; et al.,

Defendant.

/

The Laws Group
44 West Flagler, Suite 1100
Miami, Florida 33130
November 9, 2007
10:40 a.m. to 4:00 p.m.

DEPOSITION OF ROBERT ALVAREZ

Taken on behalf of the Plaintiff before Dale W. Tice, RPR, Notary Public in and for the State of Florida at Large, pursuant to Notice of Taking Deposition.

understanding was that the price of the ticket was $5,000.

Q. And he gave you that information?

A. That's what my understanding was after our conversation.

Q. He told you it was a $5,000 ticket?

A. That was my understanding after talking to him, that it was a -- that it would have cost $5,000.

Q. And what specifically do you recall about the conversation with respect to the class of the ticket?

A. What I recall is, I don't think that he understood -- it seemed like he wasn't, when he read the ResMon, that he was not 100 percent sure of himself on the ticket information. But I don't know what led me to believe that. It's just, it was a first-class ticket, the second one wasn't. For whatever reason, that was my impression.

Q. Okay. I understand.

Was he uncertain, as far as you can tell, about what day Mr. Al-Kidd was actually leaving the country, as best you recall?

A. It seemed like there was uncertainty whether it was going to be the 13th or the 16th, as best as I can remember and recall.

Electronically signed by Dale Tice (501-021-913-5179)

Q. Did you tell him there was uncertainty about what date he was departing?

A. I believe it was -- yes.

Q. Did you tell him there was uncertainty about the price of the ticket?

MR. MEEKS: Objection. Foundation.

A. I don't remember -- no, not on that first conversation. Because when I gave him the information, he asked me to find out how much the ticket cost.

Q. Did you advise Agent Gneckow of what class of ticket it was?

A. At some point I did. I believe it was after that first conversation. I don't remember exactly when I advised.

Q. Did he ask you to find out what class of ticket it was?

A. I don't remember him asking me that.

Q. Did you advise Agent Gneckow of whether Mr. Al-Kidd had a round-trip ticket?

A. Can you repeat the question, sir.

Q. In this first conversation with Agent Gneckow, did you mention one way or the other whether Mr. Al-Kidd had a return ticket?

A. Whether he had -- no. Wait a minute. I

Electronically signed by Dale Tice (501-021-913-5179)

REPORTER'S DEPOSITION CERTIFICATE

STATE OF FLORIDA
COUNTY OF DADE

I, DALE W. TICE, RPR, do hereby certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true and correct transcription of the testimony given by the witness; and that the reading and signing of the deposition were not waived.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 9th day of November, 2007.

_____
DALE W. TICE, RPR

Electronically signed by Dale Tice (501-021-913-5179)

Exhibit 26

DEPOSITION OF KIM LINDQUIST
CONDUCTED ON WEDNESDAY, JANUARY 9, 2008

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 OF KIM LINDQUIST

Wednesday, January 9, 2008

Washington, D.C.

1:04 p.m.

Job No. 1-117718

Pages: 1 - 119

Reported by: Janet A. Hamilton, RDR

A. Probably.

Q. Can you recall anything about that circumstance?

A. No.

Q. Do you know whether Mr. Al-Kidd is a United States citizen or not?

A. I personally do not know.

Q. You had mentioned earlier that one of the general circumstances you can recall using a material witness statute was in relation to illegal aliens or aliens; is that correct?

A. Yes.

Q. Can you recall any other circumstances in which you used the material witness statute other than Mr. Al-Kidd's case?

A. Not offhand.

Q. Do you know what the statutory standard is for seeking a material witness warrant without the statute in front of you?

A. I'm not sure what you mean by statutory standard.

Q. Well, let me rephrase it. Do you know what the standard is for obtaining a material witness warrant?

A. I can't quote you the statutory standard, no.

Q. Okay. Do you have a general sense of what it is?

happened. I don't recall.

Q. If you had made suggestions to change the affidavit, would there have been a standard protocol that you personally would have used to change it on the document, fax, hand changes, tell them over the phone?

A. Not a standard protocol. I would have communicated the information over the phone probably.

Q. All right. You don't recall whether you did that or not?

A. I don't have a specific recollection of doing that. The thing that I have -- what I do recall is I believe in that initial conversation was just telling whoever that was, and I think it was Mike Gneckow that the affidavit needed to clearly show his connection with Sami Al-Hussayen and the Islamic Assembly of North America.

Q. Do you recall giving the agent any other advice?

A. I don't recall.

Q. Did you know where Mr. Al-Kidd was at that time when you received the call from the agent?

A. I don't recall having knowledge as to where he was at that particular time.

Q. Do you recall whether you asked the FBI agent where

A. I believe one of the agents told me. That's my recollection.

Q. Do you recall in what context they told you that?

A. I don't.

Q. You earlier said you inferred that the agents had spoken with Mr. Al-Kidd. Do you know whether or not Mr. Al-Kidd spoke to the agents voluntarily?

A. I have no knowledge of that.

Q. Do you know -- at the time you sought the warrant did you know whether the FBI had ever told Mr. Al-Kidd that he could not travel outside the United States?

A. I have no knowledge of that.

Q. Do you know whether they ever told him they should, that Mr. Al-Kidd should instruct -- at the time the government sought the warrant did you know whether the FBI had ever told Mr. Al-Kidd he should inform them if he intended to travel outside the United States?

A. I had no such knowledge.

Q. Did the FBI agents who gave the information to you about Mr. Al-Kidd say that they had specifically talked to him?

A. I have no rec -- I have no knowledge of that. I

have no recollection of them telling me that.

Q. So you have no recollection then I assume of them characterizing the interview one way or the other?

A. I have no recollection of them characterizing any verbal contact with him.

Q. Okay. So I assume at the time the government sought the warrant you had no knowledge of whether Mr. Al-Kidd had up until that point been cooperative or uncooperative?

A. I have no knowledge.

Q. At the time the government sought the warrant did you know when Mr. Al-Kidd made the decision to travel to Saudi Arabia?

A. No. I never had any such knowledge.

Q. Did you know at the time the government sought the warrant why Mr. Al-Kidd was traveling to Saudi Arabia?

A. No.

Q. At the time the government sought the warrant did you know when Mr. Al-Kidd had actually booked his ticket to Saudi Arabia?

A. No.

Q. Do you know whether Mr. Al-Kidd prior to his arrest had ever spoken with any members of the media?

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A. To availability.

Q. And how about the price of the ticket? Does that reflect on availability, relevant to availability?

A. As I sit here right now, and even then, again, I don't recall that figure. Not particularly, no.

Q. So I gather from your testimony the relevant factor is whether it was a one way ticket to Saudi Arabia?

A. Yes, sir.

Q. And if it was a one way ticket to New York, would that have been sufficient on its own?

MR. MEEKS: Objection; speculation.

A. Well, on its own as far as availability?

Q. Yes.

A. Possibly. Just it probably would have prompted more inquiry on my part as far as our ability to locate him in New York. That's why I say it wouldn't have been -- it wouldn't have screamed as loudly as a one way ticket out of the country, but it would have -- it still would have prompted inquiry.

Q. But just so I'm clear, because I think you've been absolutely clear, I just want to make sure I'm clear. The only factors you based -- the only factors on which you

considered relevant for availability at the time you sought the warrant were the one way ticket to Saudi Arabia?

A. That I recall at this point in time. That's what I recall really screaming out to me, this witness is not going to be available.

Q. Okay. And you don't recall basing your availability assessment on any other factors?

A. I don't recall at this point in time.

Q. And when you say if he had a one way ticket, if the individual had a one way ticket to New York, it would have prompted inquiry; is that correct?

A. On my part, yes.

Q. Okay. And what kinds of questions would you have wanted to ask in that situation?

MR. MEEKS: I'm going to object to speculation. I'm not sure we're talking about just changing that fact for this particular instance or in general.

Q. Well, let's deal with Mr. Al-Kidd. In this situation if the FBI had said Mr. Al-Kidd had a one way ticket to New York.

A. I would say I would like to know what additional information the agents might have as to where in New York, the

witness.

Q. Okay. It would have been -- do you know whether the FBI ever told Mr. Al-Kidd that he may be needed as a witness?

A. I don't.

Q. If the FBI had not told him he may be needed as a witness, would it have been unusual in your experience for Mr. Al-Kidd to have affirmatively contacted the FBI after learning about Hussayen's indictment?

A. Say that again. I'm sorry. If --

Q. Strike that. I'm sorry. I want to show you -- I want to mark this as Plaintiff's 8.

(Plaintiff's Deposition Exhibit No. 8 was marked for identification.)

A. Okay.

Q. Earlier I had mentioned a man named Al-Kraida. Does this refresh your recollection?

A. You know, I'm embarrassed to say it really doesn't. I still do not -- I just do not recall who this fellow is. I apologize. I just do not recall.

Q. That's okay. Al-Hussayen was indicted on February 26, 2003; is that correct?

A. I don't recall the exact date, I'm sorry.

CERTIFICATE OF SHORTHAND REPORTER

I, Janet A. Hamilton, Registered Diplomate Reporter, before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of January, 2008.

Registered Diplomate Reporter