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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 DEFENDANT UNITED STATES, FILED ON DECEMBER 21, 2011 (Dkt. No. 308)

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INTRODUCTION

The issues have now been narrowed significantly given the government's concessions in its response brief. First, the government has effectively conceded its discretionary function argument, recognizing that it is subsumed within its merits arguments. The government has also effectively acknowledged that prosecutorial immunity does not shield law enforcement officers seeking a warrant, and indeed, its response brief does not cite a single case in support of the novel argument that a *police* officer should receive absolute *prosecutorial* immunity.

On the merits of plaintiff's false imprisonment claim, the government has now conceded the critical fact that Mr. al-Kidd was fully cooperative and never disobeyed a single directive from the FBI. Thus, as the government's own brief makes clear, the United States' FTCA argument reduces to a single proposition: that it could arrest and detain Mr. al-Kidd based *solely* on the fact that he was travelling to Saudi Arabia to study and had not scheduled a specific date for his return. But that is not the law. At bottom, the government's probable cause arguments suffer from one overriding flaw. The arguments conflate the material witness context involving innocent (and, in Mr. al-Kidd's case, cooperative) individuals with the criminal context, where the ability to detain a charged individual is far greater. An innocent U.S. citizen simply cannot be arrested for traveling, especially one who has cooperated with past requests for assistance.

Finally, the government argues that the Court *must* grant it summary judgment on plaintiff's abuse of process claim because its officers state that they arrested Mr. al-Kidd for the purpose of securing his testimony, and Mr. al-Kidd has no *direct* testimonial proof to the contrary. But plaintiffs are not required to show direct proof of an officer's

motives; indeed, if plaintiffs were required to produce such evidence, summary judgment would be guaranteed in virtually every FTCA case because there is rarely a "smoking gun." Mr. al-Kidd has pointed to more than enough objective evidence to merit summary judgment in his favor.

ARGUMENT

I. THE DISCRETIONARY FUNCTION EXCEPTION IS INAPPLICABLE TO THIS CASE.

Plaintiff's opening brief noted that, under settled Ninth Circuit law, the FTCA's discretionary function exception does not apply where the government's actions violate a *legal mandate* imposed by the constitution or statute, such as the requirement that there must be probable cause for a material witness arrest. Pl. FTCA Br. at 5 (citing, *e.g.*, *Galvin v. Hay*, 374 F.3d 739, 758 & n.13 (9th Cir. 2004)). The government now concedes the point and acknowledges that it "is not arguing that the discretionary function exception shields the United States from liability for unlawfully seeking a warrant," but only that "there is simply no evidence of unlawful conduct." U.S. Opp. Br. at 2. Accordingly, as both parties now agree, the issue here is the merits question: was Mr. al-Kidd's arrest supported by probable cause and otherwise lawful.

II. ABSOLUTE PROSECUTORIAL IMMUNITY IS NOT AVAILABLE.

The government now concedes that generally "law enforcement officers are *not* entitled to prosecutorial immunity for procuring an arrest warrant." U.S. Opp. Br. at 3 (emphasis added). The government argues, however, that prosecutorial immunity should be available *in this case* because Agent Gneckow consulted with an Assistant U.S. Attorney and the warrant involved a witness for a prosecution. But as plaintiff explained in his opening brief, Pl. FTCA Br. at 3-4, the mere involvement of a prosecutor

somewhere in the chain of events does not convert *all* the actions in that chain to prosecutorial ones. *See, e.g.*, *Wright v. United States*, 719 F.2d 1032, 1035 (9th Cir. 1983) (although prosecutor's decision to prosecute plaintiff was a discretionary function, the conduct of an IRS agent in implementing the decision to prosecute was not; therefore, the United States was not immune from liability under the FTCA for a claim of malicious prosecution arising out of the IRS agent's actions).

Indeed, if the government's argument were correct, law enforcement agents and the United States would routinely receive absolute prosecutorial immunity, since a prosecutor will almost invariably be involved at some level in these types of suits. In fact, the FTCA specifically recognizes tort liability for "abuse of process" and "malicious prosecution" arising from acts or omissions of investigative or law enforcement officers. *See* 28 U.S.C. § 2680(h). By definition, both of those torts involve some sort of judicial process—*i.e.*, the issuance of a warrant, or the initiation of a prosecution—in which a prosecutor will inevitably have been involved. The government's argument would read this provision out of the FTCA.[1] In short, there is no support for the government's theory that its *law enforcement* agents are entitled to complete *prosecutorial* immunity for their role in seeking the warrant. And, not surprisingly, the government's response brief does not cite to a single case supporting its novel argument.

[1] Plaintiff does not base his claim for abuse of process on prosecutors' decisions "to request a detention hearing and not to call him as a witness at trial," U.S. Opp. Br. at 3, but rather cites those facts as evidence of the improper purpose behind the law enforcement agents' decision to seek a warrant for his arrest.

III. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HIS FALSE IMPRISONMENT CLAIM BECAUSE PROBABLE CAUSE OF IMPRACTICABILITY AND MATERIALITY WERE LACKING.

THE IMPRACTICABILITY PRONG

A. Traveling To Saudi Arabia Did Not Establish Probable Cause.

Significantly, the parties agree that a claim for false imprisonment depends upon showing that there was no probable cause—not based solely on the face of the affidavit, but rather, based upon all of the available facts. *See State v. Julian*, 922 P.2d 1059, 1062 (Id. 1996); U.S. Opp. Br. at 6. Thus, the question on the merits is whether there was probable cause to arrest Mr. al-Kidd in light of all of the facts omitted from the affidavit and the plane ticket's correct information.

Equally critical, there is no longer any dispute about the central facts underlying plaintiff's false imprisonment claim. Specifically, the government does not dispute any of the following:

1. Mr. al-Kidd had been fully cooperative in never refusing to meet with the FBI and never having missed a scheduled meeting with the FBI;
2. Mr. al-Kidd was a native-born U.S. citizen;
3. Mr. al-Kidd had U.S. citizen family members residing in the United States;
4. Mr. al-Kidd was never told he might be needed as a witness;
5. Mr. al-Kidd was never asked not to travel, nor asked to surrender his passport;
6. Mr. al-Kidd was never asked to inform the FBI if he intended to travel;
7. Mr. al-Kidd had not heard from the FBI for roughly 8 months at the time of his arrest; and
8. Mr. al-Kidd had a coach class, roundtrip ticket with an open-ended return.

Moreover, the record demonstrates beyond dispute that all these facts were available to the FBI agents. *See* Pl. Facts ¶ 31. Indeed, Agent Gneckow specifically admitted that, at the time he submitted the affidavit, he was affirmatively aware of facts 1 through 7, *see* Pl. Facts ¶ 31(a)-(g), and fact 8 (the plane ticket) was easily verifiable. *See* Pl. Bivens Opp. Br. at 5, 9-10. Given this, the government's argument hinges entirely on one proposition: that it was permissible to arrest Mr. al-Kidd because he was traveling to Saudi Arabia and did not have a specific date for his return (exactly what one would expect when a student goes abroad to study).

The implications of the government's proposition are staggering. There are numerous countries that do not have an extradition treaty with the United States, including countries that American citizens, students and tourists routinely visit for lengthy periods of time, including China and Russia.[2] Yet, under the government's theory, all of these individuals could be arrested and detained *solely* because they were traveling to one of these countries and had not yet chosen a specific date for their return trip.

Moreover, under the government's theory, U.S. citizens have no way to protect themselves from being arrested. *Perhaps* the government could establish probable cause if an uncooperative individual chose to leave the country after being told that he was needed as a witness and that he should inform the FBI if he intended to travel, especially in a case where the FBI had very recently been in contact with the individual and reiterated its need for the individual's testimony. Here, however, Mr. al-Kidd—an

[2] *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.

innocent and cooperative U.S. citizen—had no way to avoid being arrested. If he had been asked not to travel, to surrender his passport, or to alert the FBI of his travel, he could then have taken steps to avoid his arrest. Or, if he had been told his testimony might be needed, he then could have at least been on notice that traveling might be of concern to the FBI. But none of that occurred. Instead, he was blindsided at the airport, without any warning. That is the crux of this case: There was nothing Mr. al-Kidd could have done to avoid his arrest, since the government never told him his testimony may be needed or that he should not travel.

An example demonstrates the implications of the government's argument. Suppose a U.S. citizen businessperson with U.S. citizen family members innocently witnessed a robbery. He cooperated with the police investigation, but then never heard from the police for 8 months. Suppose also that he was never told he might be needed as a witness or that he should contact the police if he intended to travel. If he then prepared to leave on a long-scheduled business trip to China without a specific return date, it is implausible that the government would believe it had probable cause to ambush the person at the airport and lead him away in handcuffs, as if he were a criminal defendant fleeing bond. And, indeed, Agent Gneckow effectively admitted as much when asked whether he would arrest a cooperative businessman. Def. Response to Pl. Facts ¶ 33. Yet that is precisely what occurred to Mr. al-Kidd.

Conceivably, the government might attempt to distinguish that scenario by arguing that, unlike the innocent businessman, Mr. al-Kidd was viewed as a potential suspect with connections to Al-Hussayen. But if that is the government's argument, then it would effectively be admitting that it engaged in an abuse of process by using the

material witness statute to arrest a suspect whom it could not arrest on criminal charges. And, if that is not what the government would argue, then it is incumbent upon the government to distinguish Mr. al-Kidd's case from the scenario in which a businessman witnesses a robbery. Otherwise, the government is left with two choices: admitting that anyone flying to a country like China or Saudi Arabia without a return date could be arrested without any warning, or admitting that Mr. al-Kidd's arrest was really for the impermissible investigative purpose of detaining a suspect. Neither choice is tenable under the law.

B. The Government's Theory Finds No Support In Ninth Circuit Law.

Given the implications of the government's position that it can arrest someone merely for taking an innocent trip, including a fully cooperative witness, it is not surprising that the United States' position finds no support in Ninth Circuit law. In fact, the Ninth Circuit has specifically rejected the very theory on which the government relies: that a witness may be arrested merely because it is possible he might avoid testifying and he had the means of doing so.

Indeed, the Ninth Circuit has rejected the government's use of the material witness statute under circumstances where the witnesses had the ability to avoid a subpoena and had actually taken *affirmative* steps to reveal how uncooperative they intended to be—unlike Mr. al-Kidd. Pl. FTCA Br. at 8-10. In *Bacon*, the Ninth Circuit found a lack of probable cause even though the witness had "access to large sums of money" and "personal contacts with fugitives" and had fled to an adjoining rooftop when the FBI initially sought to arrest her. *Bacon v. United States*, 449 F.2d 933, 944-45 (9th Cir. 1971). Yet, as the Court explained, the facts merely "show[ed] that *if* Bacon wished

to flee, she might be able to do so successfully. [They did] not support the conclusion that she would be *likely* to flee or go underground." *Id*. Thus, the government's "showing failed to support probable cause to believe that Bacon could not practicably be brought before the grand jury by a subpoena." *Id.* at 945. And in *Arnsberg,* the Court held that a material witness warrant was invalid even after *multiple* attempts to locate the witness and serve a subpoena upon him. *Arnsberg v. United States*, 757 F.2d 971, 976-77 (9th Cir. 1985).

Here, Mr. al-Kidd did not take affirmative steps to avoid the FBI, much less flee when the FBI called upon him. To the contrary, he met with the FBI whenever they requested and talked with them at length. Nor did he ignore a directive from the FBI; indeed, he was never told he might be needed as a witness or not to travel. If the facts in *Bacon* and *Arnsberg* were not enough to establish probable cause for arrest, there is no way that the facts in Mr. al-Kidd's case could suffice.

C. The Government's Reliance On Ancillary Facts Is Unpersuasive.

Ultimately, the government appears to recognize that it cannot arrest a cooperative U.S. citizen, without any warning, simply for taking a long-planned trip to Saudi Arabia to study. The government thus seeks to argue that there was more to support a showing of impracticability than merely Mr. al-Kidd's travel plans. U.S. Opp. Br. at 5.

In particular, the government relies on its assertion that Agent Gneckow attempted to check whether Mr. al-Kidd was still living in Kent, Washington, before the FBI sought the warrant, and that he did so because AUSA Lindquist told him that doing so was important. But that point cannot help the government for two reasons.

First, and dispositively, the supposed fact that Mr. al-Kidd could not have been located in Kent is irrelevant. The FBI could have asked Mr. al-Kidd to postpone his trip when agents encountered him at the airport, or they could have seized his passport. Thus, it is irrelevant whether the government attempted to locate Mr. al-Kidd in Kent, because that does not establish that he would have been unlikely to respond to a subpoena or comply with other methods to guarantee his testimony short of arrest.

Second, in any event, the record does not support the claim that the government made any meaningful efforts to locate Mr. al-Kidd. If Agent Gneckow attempted to determine whether Mr. al-Kidd was still living in Kent, then one would expect him to mention in his affidavit that he attempted to locate Mr. al-Kidd. Yet, remarkably, that point appeared nowhere in the affidavit. Further, one would expect that there would be a record of such an attempt in the FBI's notes. Yet there are no notes, and Agent Gneckow could recall only that he believes someone—whom he could not identify—made a "call" or perhaps did a "drive-by" of Mr. al-Kidd's home. Pl. Ex.2, Gneckow Dep. at 144. The government also fails to explain why the FBI could not have contacted Mr. al-Kidd by other means—especially since Mr. al-Kidd had always been cooperative and met with the FBI on prior occasions, and nothing in the record indicates the FBI had ever before had difficulty reaching him.

In short, the government cannot defeat plaintiff's summary judgment motion on the ground that it could not locate Mr. al-Kidd in Kent. At a minimum, the government cannot be awarded summary judgment in its favor by relying on the assertion that some unidentified individual may have done a "drive by" or made a call at some unspecified and unrecorded time.

D. The United States Cannot Avoid FTCA Liability In This Case By Claiming That Their Agents Consulted With An AUSA Or Were Unaware Of The Relevant Facts.

1. AUSA Lindquist: The government attempts to make much of the fact that Agent Gneckow briefly consulted with AUSA Lindquist about the warrant application. The record shows, however, that Agent Gneckow could not "recall specifically" what revisions he made in response to speaking with AUSA Lindquist, Pl. Ex. 24, Gneckow Dep. at 140, nor could AUSA Lindquist recall giving any advice beyond stating that "the affidavit needed to clearly show [Mr. al-Kidd's] connection with Sami Al-Hussayen and the Islamic Assembly of North America." Pl. Ex. 26, Lindquist Dep. at 34.

In any event, the government's argument fails for a more fundamental reason. AUSA Lindquist was not made aware of the basic facts by Agent Gneckow, including that: Mr. al-Kidd had been fully cooperative in attending every meeting requested by the FBI; Mr. al-Kidd was never told he might be needed as a witness; Mr. al-Kidd was never told not to travel; Mr. al-Kidd was never told to stay in contact with the FBI; Mr. al-Kidd did not have a one-way flight; and Mr. al-Kidd had not heard from the FBI for roughly 8 months. Pl. Facts ¶ 38; Pl. Ex. 2, Gneckow Dep. at 201 (Q: "So you didn't provide [Lindquist] with additional facts beyond those in the affidavit? A. Right."); Pl. Ex. 26, Lindquist Dep. at 17, 43-44, 65-66, 104 (admitting that at the time of the warrant request, he had no knowledge of whether Mr. al-Kidd was a U.S. citizen, whether he had been cooperative with the FBI in the past, whether he was ever informed that he might be needed as a witness, whether he was asked not to travel outside the United States, or whether he was asked to inform the FBI if he intended to travel). The government cannot therefore argue

that AUSA Lindquist somehow authorized the affidavit when he was acting without the necessary facts. *See also* Pl. Bivens Opp. Br. at 14-15.

2. The Agents' Knowledge: The government also contends that even if probable cause of impracticability was objectively lacking, the United States should be insulated from FTCA liability because its agents did not know the affidavit was incorrect, specifically that Mr. al-Kidd did not have a one-way plane ticket.

But even assuming Agents Gneckow and Mace could be excused for the affidavit's false statements, it would not legally matter. As discussed, the flaw in the government's probable cause argument is that a plane ticket alone is not sufficient to arrest an innocent and cooperative U.S. citizen—even if the ticket was a one-way flight. The critical facts omitted from the affidavit—which Agent Gneckow fully admits he knew at the time he sought the warrant—were that Mr. al-Kidd was a U.S. citizen with U.S. citizen family members, who had attended meetings requested by the FBI and had never been told he may be needed as a witness or that he should alert the FBI if he intended to travel. Thus, even assuming that Agent Gneckow and the United States could be excused for the blatant error regarding the plane trip, the lack of probable cause of impracticability is established by all of the facts available to Agent Gneckow that he *knowingly* omitted from the affidavit.

Moreover, even if the error regarding the plane ticket was necessary to establish a lack of probable cause, it is plain from the record that Agent Gneckow cannot distance himself from the errors. As explained in plaintiff's opening brief and in his *Bivens* response brief, Agent Gneckow was well aware that there was confusion about the nature of the ticket and specifically told the other government agents that *he* would take over the

investigation. *See* Pl. FTCA Br. at 12 n.6; Pl. Bivens Opp. Br. at 9, 12; Pl. Ex. 2, Gneckow Dep. at 166-70, 182; Pl. Facts ¶¶ 27-30. Yet Agent Gneckow never bothered to verify whether the ticket was roundtrip or one-way, a basic fact that could have been easily discovered. He cannot now blame others for the erroneous information provided to this Court. [3]

Additionally, the FTCA does not focus only on the agents who submitted the warrant, but rather on all of the United States' agents, since the suit is against the United States for the acts of all its employees. It simply cannot be the case that no one could have verified whether the ticket was one-way or roundtrip. The same is true for the completely inexplicable error in the affidavit that Mr. al-Kidd had a first-class ticket costing approximately $5,000, when in fact he had a coach class ticket costing less than $2,000.

Finally, the government's argument regarding the plane ticket makes little overall sense. On the one hand, the government suggests that the nature of the ticket was of little importance. In the entire affidavit, however, there were only two substantive sentences concerning flight risk. Yet the government chose to use those sentences to inform the Court (erroneously) that Mr. al-Kidd had a first-class, expensive, one-way ticket.

The government also suggests that there is little difference between a one-way flight and a roundtrip ticket without a specific return date. It blinks reality, however, to believe the government included the one-way information for no reason and that the government

[3] The government protests that "Plaintiff cites no Idaho law that imposes such a duty on Gneckow." U.S. Opp. Br. at 7. But no special duty of care is needed to establish liability for false imprisonment. Under Idaho law, the probable cause element encompasses a reasonableness standard—that of a "person of ordinary care and prudence." *Julian*, 922 P.2d at 1062. Given the confusion about Mr. al-Kidd's ticket, a person of ordinary care and prudence would have made some inquiry into the ticket's cost, class, and two-way nature before swearing to those facts in an affidavit for Mr. al-Kidd's arrest.

believed its affidavit would have been equally forceful if it had informed the Court that the witness simply had not scheduled his return trip yet. Moreover, the government has never explained why it would have mattered to the FBI if Mr. al-Kidd had in fact scheduled a date for his return trip. A witness who truly did not want to cooperate could always choose to stay longer or even cancel the return altogether once in Saudi Arabia. Conversely, what if Mr. al-Kidd or some other witness had not purchased a ticket at all and was then served with a subpoena? The witness could simply choose at that point to leave the country.

The government's failure to explain these anomalies is not incidental. These anomalies go to the heart of this case. As the Ninth Circuit stressed, the government must show that it is "likely" that a witness will not cooperate, and not that the witness may have the capability of fleeing if he chooses to do so. *Bacon*, 449 F.2d at 944. At the end of the day, there is little to stop anyone from going underground or flying off to China if they are absolutely intent on avoiding testifying. That cannot give the government the right to arrest anyone who it decides might be needed as a witness. There must be something the witness does to demonstrate, or at least suggest, he would not be cooperative. Here, the exact opposite was true—everything pointed to someone who was cooperative, who had not disobeyed a single directive from the FBI, and who would have postponed his trip or relinquished his passport should the FBI have felt that necessary. Mr. al-Kidd did not disobey a request, let alone a subpoena, and he did not flee to a rooftop. *Cf. Bacon*, 449 F.2d at 944-45. Nothing in the facts of this case remotely suggests that it was appropriate for the FBI to publicly humiliate a cooperative

U.S. citizen by handcuffing and arresting him in front of scores of onlookers, and to deprive him of his liberty without warning or any opportunity to comply.

THE MATERIALITY PRONG

FBI agents Gneckow and Mace had no concrete information at the time they sought the warrant about what testimony Mr. al-Kidd could offer at Al-Hussayen's trial. They knew only that Mr. al-Kidd had been in contact with members of IANA and had received money from Al-Hussayen and his associates. Contrary to the government's suggestion, this meager information does not suggest that Mr. al-Kidd had any knowledge about Al-Hussayen's activities on behalf of IANA, how much time Al-Hussayen spent developing al-Multaqa's website, or anything else relevant to the visa fraud or false statement charges pending against Al-Hussayen. *See* Pl. Ex. 2, Gneckow Dep. 157-159; Ex. 12, Indictment, *U.S. v. Al-Hussayen*, No. 3:03-cr-0048 (Dkt. #1) (no mention of al-Multaqa in the indictment against Al-Hussayen). This is far from sufficient to establish that Mr. al-Kidd could offer testimony "material" to Al-Hussayen's trial. 18 U.S.C. § 3144. If it were, *anyone* who worked for the same employer as a criminal defendant would satisfy the materiality requirement. *Cf. State v. Gibson*, 108 P.3d 424, 430 (Id. Ct. App. 2005) ("A person's mere proximity to people who are suspected of criminal activity . . . does not give probable cause to search that person" for evidence of the suspected criminal activity). All the other reasons Agent Gneckow and AUSA Lindquist offered in their depositions are irrelevant to the visa fraud and false statement charges. Terrorism-related charges were not pending against Al-Hussayen at the time of Mr. al-Kidd's arrest, so any suggestions that Mr. al-Kidd was involved in criminal activity or was dangerous—aside from being incorrect—are irrelevant to materiality.

IV. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HIS ABUSE OF PROCESS CLAIM.

Contrary to the government's claim, *see* U.S. Opp. Br. at 10, Mr. al-Kidd's abuse of process argument has not changed since this Court denied the government's motion to dismiss. The existence of a national policy on material witness arrests after September 11th was necessary to establish the *supervisory* liability of various policymaking officials, who are no longer defendants in the *Bivens* action. But whether such a national policy existed is in no way determinative of the question before the Court now: whether the FBI procured Mr. al-Kidd's arrest for an improper purpose.

Mr. al-Kidd has set forth numerous facts establishing the government's improper purpose, facts from which a jury could easily find an improper purpose: (1) Mr. al-Kidd was the subject of an FBI investigation at the time of his arrest; (2) FBI Director Robert Mueller testified before Congress that Mr. al-Kidd's arrest was an example of the FBI's success in combating terrorism, without mentioning that Mr. al-Kidd was supposedly only a witness; (3) Mr. al-Kidd was arrested without ever being served with a subpoena, or being asked to postpone his trip or relinquish his passport, despite having never failed to meet with the FBI; (4) after his arrest, Mr. al-Kidd was interrogated by two FBI agents, with Agent Gneckow's knowledge and consent, about Mr. al-Kidd's own activities, including his personal religious beliefs; (5) after his interrogation, Mr. al-Kidd was subject to harsh incarceration conditions, including repeated strip searches and full shackling; (6) after the arrest, the FBI drafted an affidavit seeking a warrant to search Mr. al-Kidd's laptop for evidence of possible criminal activity; (6) in opposing Mr. al-Kidd's release, the government took the position that he was "dangerous," even though dangerousness is not one of the factors that should be considered in the detention of a

witness; (7) the government did not call Mr. al-Kidd as a witness at the Al-Hussayen trial and did not even move for his release from his draconian release restrictions at the end of trial, forcing Mr. al-Kidd to move for his release himself after close to 14 months of those restrictions. Pl. FTCA Br. at 16-22.

The government does not dispute a single one of these facts.[4] Instead, the government argues that none of these facts directly show that the FBI arrested Mr. al-Kidd for the purpose of investigating or preventively detaining him. U.S. Br. at 12. But such "smoking gun" admissions of improper motive are exceedingly rare, and unnecessary. As the Ninth Circuit has emphasized, "[d]irect evidence of improper motive . . . will only rarely be available. . . . [I]t will almost always be necessary to infer such agreements from circumstantial evidence." *Mendocino Envtl. Ctr. v. Mendocino Cnty*., 192 F.3d 1283, 1302 (9th Cir.1999).

The government ultimately appears to recognize that plaintiff need not produce direct, smoking gun evidence and thus seeks to minimize plaintiff's facts. First, the

[4] In its response to plaintiff's statement of facts, the government does not dispute that Mr. al-Kidd was the subject of an FBI investigation at the time of his arrest. U.S. Resp. to Pl. Facts at ¶ 5. Rather, the government attempts to distinguish between "criminal" and "intelligence" investigations, but this distinction is both irrelevant and undermined by testimony and documents in the record. *See* Pl. FTCA Br. at 21-22; Pl. Facts ¶¶ 5-7.

The government also argues that Pl. Ex. A, U.S. Docs 666 (filed under seal), a docketing document showing that the FBI referred Mr. al-Kidd to the U.S. Attorney's Office for possible criminal prosecution, "is inadmissible for lack of foundation and hearsay," and that Lindquist's testimony about the document is "inadmissible for lack of foundation." U.S. Resp. to Pl. Facts at ¶ 5. But as an official document from the U.S. Attorneys' office that the government itself produced in discovery, the document speaks for itself and is submitted for its existence. Fed. R. Evid. 801(c), 803(6). Moreover, Lindquist stated that although he had not seen "this particular document" before, it "looks to me like it's a docketing document from the U.S. Attorney's Office"; he then proceeded to explain what a docketing document was, from his experience as an Assistant U.S. Attorney. Both the document and Lindquist's testimony are thus admissible.

government argues that plaintiff's evidence largely focuses on actors other than Mace, Gneckow, Cleary, and Lindquist, and that the Court must ignore the actions of these other actors. *See* U.S. Opp. Br. at 12-13, 15. That argument is legally and factually wrong.

Contrary to the government's implication, the record does contain strong evidence of the motives of both *Gneckow* and *Lindquist*, and reveals that Mr. al-Kidd would not have been arrested *but for* their interest in investigating and detaining him as a possible dangerous suspect. Agent Gneckow, for instance, stated that he would not have arrested a "cooperative businessman." Def. Response to Pl. Facts ¶ 33. And AUSA Lindquist personally opposed Mr. al-Kidd's release, *see* Pl. Ex. 1, Pl. Docs 1795, 1797, and testified that one of his concerns about Mr. al-Kidd was dangerousness, even though that is not a proper consideration when deciding whether detention of a material witness is warranted under the statute. *See* S.Rep. No. 98–225, at 28 n.100 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3211 (legislative history of Bail Act). Moreover, and importantly, under the FTCA, the actions taken by *all* United States officials, and the overall circumstances surrounding Mr. al-Kidd's arrest, can plainly illuminate the purpose of Mr. al-Kidd's arrest.

Here, in fact, the record shows other officials had been in express communication with Agent Gneckow or were otherwise acting under his direction. For example, the government's claim 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," U.S. Opp. Br. at 14, is highly misleading. It is undisputed that the FBI agents who executed the arrest warrant contacted Agent Gneckow and, with his prior permission, interrogated Mr. al-Kidd immediately after his arrest. Pl. Facts ¶ 15.

The government also fails to explain FBI Director Mueller's congressional testimony:

> On March 16, Abdullah al-Kidd, a U.S. native and former University of Idaho football player, was arrested by the FBI at Dulles International Airport en route to Saudi Arabia. The FBI arrested three other men in the Idaho probe in recent weeks. And the FBI is examining links between the Idaho men and purported charities and individuals in six other jurisdictions across the country.

Pl. Facts ¶ 17; Pl. Ex. 1 at 3-4. Specifically, the government has not explained why the Director of the FBI would list Mr. al-Kidd directly after he mentioned the arrest of "Khalid Shaikh Mohammed . . . the mastermind of the September 11th attack," *id.*, without even noting that Mr. al-Kidd was supposedly arrested only as a witness, and not as a criminal suspect. The government also fails to offer any explanation for why, in the age of computers, the nation's top law enforcement agency can locate no record whatsoever of who worked on Director Mueller's testimony, much less any notes or prior drafts of the testimony, all of which might illuminate why Mr. al-Kidd was featured so prominently in the Director's congressional testimony.

The government nonetheless suggests that the Court should ignore the Director's testimony because it does not bear on what Agent Gneckow or other Idaho actors were thinking. But the Director specifically referred to Mr. al-Kidd's arrest as part of the "Idaho probe." *Id.* If the Director viewed Mr. al-Kidd as a suspect (as he plainly suggested in his congressional testimony), then that impression would certainly have been informed from information supplied by those in Idaho. And Agent Gneckow, as lead agent on the Al-Hussayen investigation, was at the center of the "Idaho probe." *See* Pl. Ex. 2, Gneckow Dep. at 217.

In short, all of this evidence—singularly and cumulatively—is strongly probative of why Mr. al-Kidd was arrested despite his cooperation with the FBI. The government thus falls back on the argument that even if plaintiff's evidence is probative, it does not establish that an investigative motive was the primary reason for the arrest, but may only have been an "incidental" or "secondary" purpose. U.S. Opp. Br. at 14. But Idaho law requires only "'*an* … improper purpose'" and not that such purpose was the primary one. Pl. FTCA Br. at 15 n.7 (quoting *Beco Constr. Co., Inc. v. City of Idaho Falls*, 865 P.2d 950, 954 (Id. 1993) (emphasis added)). The only case the government cites for its contrary position is *Brown v. Savage*, No. CV-08-382, 2011 WL 4584771 (D. Id. Sept. 30, 2011), but that case involved a Fourth Amendment probable cause analysis, not an abuse of process analysis. Thus, even assuming that the primary or exclusive motive for the arrest was not investigatory, there is more than sufficient evidence to find an abuse of process under Idaho law.

Finally, the government repeatedly mischaracterizes Mr. al-Kidd's abuse of process argument, arguing that it "is, at 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." U.S. Opp. Br. at 15-16; *see also id.* at 10. But, as explained above, Mr. al-Kidd's abuse of process argument is that the FBI agents used the material witness statute to preventively detain and investigate him—purposes that this Court has held are improper under the statute. *See* Dkt. No. 78, Mem. Order at 15-16. Mr. al-Kidd's constitutional discussion simply provides one additional reason why the agents' use of the material witness statute in this case was improper. *See* Pl. FTCA Br. at 15 ("Second, even if the purpose of Mr. al-Kidd's arrest had in fact been to obtain his

testimony, there would have been an abuse of process, because the material witness statute may not constitutionally be used to arrest a *cooperative* witness."). The Court need not decide this constitutional question, however, if it finds that the government had an improper purpose in using the material witness statute to arrest Mr. al-Kidd. Because the record evidence demonstrates that officials involved in the arrest and detention of Mr. al-Kidd were motivated by both investigation and preventive detention purposes, Mr. al-Kidd is entitled to summary judgment on his abuse of process claim.

* * *

This Court was led to believe that Mr. al-Kidd was a well-funded Saudi national fleeing permanently to his home country to avoid trouble and deny information to the prosecution. Nothing could have been further from the truth. This Court should have been provided the correct information.

CONCLUSION

Plaintiff should be granted summary judgment on his FTCA claims.

Dated: March 7, 2012 Respectfully submitted,

/s/
Lee Gelernt

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* *Admitted in New York*

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
marcus.meeks@usdoj.gov

/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?

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