IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 04-385-A
	)	
ALI AL-TIMIMI,	)	
	)	
Defendant.	)	

MOTION IN LIMINE REGARDING ITEMS FOUND IN SEARCH OF MASOUD KHAN'S HOUSE

COMES NOW Ali Al-Timimi, by counsel, and for his Motion in Limine Regarding Items Found in Search of Masoud Khan's House, states as follows:

The government conducted a search of Masoud Khan's house on or about May 8, 2003 and among the items seized were an AK-47-style rifle, a document entitled "The Terrorist's Handbook" which contained instructions on how to manufacture and use explosives and chemicals as weapons and "fatwa" from Osama Bin Laden from October 2001. (Overt Act 26, page 9 of the Superseding Indictment)

As indicated in the defendant's Motion in Limine Regarding Expert Witnesses Proffered by the United States, the government intends to call John Miller to testify to a videotape which contains Osama Bin Laden making a statement in October 2001 and then intends to introduce a document found during a search of Masoud Khan's parents' house in May 2003 which purports to be a translation of the Bin Laden statement which

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the government incorrectly labels as a "fatwa"[1] in the Superseding Indictment.

There is no basis for the admission of the videotape of Bin Laden making a statement when the video tape was not found in Masoud Khan's parents' house. Nor is there any basis for the admission of the AK-47, "The Terrorist's Handbook" or the document containing the purported translation of the Bin Laden "fatwa." There is no indication whether the items belonged to Masoud Khan or, if they did belong to him, when he obtained them.

There is no indication that Dr. Al-Timimi knew or should have known that Masoud Khan possessed the items. Furthermore, possession by Masoud Khan of the Bin Laden videotape and translation of the statement does not mean that Dr. Al-Timimi agreed with the contents of the statement. Again, the government is attempting to tie Dr. Al-Timimi to Bin Laden through introduction of this tape and this purported "fatwa" of Bin Laden. The weapon, "Terrorist's Handbook , videotape and the translation are irrelevant, extremely prejudicial and inflammatory to Mr. Al-Timimi pursuant to Rules 403 and 404.

For the record, the defendant renews his Rule 403 objection to any evidence

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[1] To call the Osama Bin Laden statement made in October 2001 a "fatwa" is to mischaracterize "fatwas." This statement is clearly not a "fatwa" but a speech available to anyone with access to the internet. A "fatwa" is defined as an "authoritative legal opinion given by a mufti (legal scholar) in response to a question posed by an individual or court of law. A fatwa is typically requested in cases not covered by fiqh literature and is neither binding nor enforceable. Its authority is based on the mufti's education and status within the community. If the inquirer is not persuaded by the fatwa, he is free to go to another mufti and obtain another opinion; but once he finds a convincing opinion, he should obey it." The Oxford Dictionary of Islam 85 (John L. Esposito, ed. 2003).

about Bin Laden or Al Qaeda being admitted in this case.

For these reasons, the defendant asks the Court to grant his Motion in Limine to rule that the government may not introduce or refer to the AK-47-style weapon, the "Terrorist's Handbook and the Bin Laden videotape and translation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was hand-delivered to the U.S. Attorney's box located in the U.S. District Court Alexandria Clerk's Office this 7th day of March 2005 to Gordon Kromberg, Esq., Assistant United States Attorney, 2100 Jamieson Ave., Alexandria, Virginia, 22314.

Alan Yamamoto

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:04cr385
	)	
ALI AL-TIMIMI	)	Hon. Leonie M. Brinkema

GOVERNMENT'S RESPONSE TO AL-TIMIMI'S MARCH 2005 MOTIONS

Between March 7 and 9, 2005, defendant Al-Timimi filed six motions. This pleading responds to each of those motions.

I. Renewed Motion to Exclude Evidence Relating to Paragraph 25 of the Superseding Indictment

In 2004, Al-Timimi moved to strike from the original indictment the allegation that, on the occasion of the crash of the Space Shuttle in January 2003, he disseminated an article in which he called for the destruction of the United States. On December 3, 2004, this Court denied that motion. After the Court denied the motion, Mr. Yamamoto asked the Court whether the Court's ruling constituted merely a holding that the allegation would not be struck from the indictment, or also a ruling under F.R.E. 403 and 404 that evidence to prove that allegation was not barred as irrelevant or unduly prejudicial. Undersigned counsel recalls this Court notifying the parties that the evidence to prove the allegation would not be barred as irrelevant or unduly prejudicial.

In the hopes of obtaining a different result, Al-Timimi raises the same issue again this month, but it should be resolved the same way that it was last time. As we stated last time, the probative value of a defendant's expression of hope for the destruction of America might well be

small in a prosecution for false statements, bank robbery, immigration fraud, or other common offenses. In this case, however, the grand jury alleged that Al-Timimi solicited and induced his followers to levy war against the United States. As a result, *in this prosecution*, his communication to his followers that the United States was their greatest enemy and should be destroyed is highly probative.

Proof that Al-Timimi communicated to his followers that the United States was the greatest enemy of Muslims and his wish that it be destroyed is relevant and material to the charge that he was engaged in counseling and inducing others to levy war against the United States as late as May 2003. Proof at trial will show that those that Al-Timimi counseled his listeners to help terrorists seeking to destroy the United States long past the fall of the Taliban in Afghanistan.

The Court will recall from the *Khan* trial that, even a year after Lashkar-e-Taiba was designated a terrorist organization (and long after it provided safe havens to Al-Qaeda personnel and proclaimed its solidarity with the terrorists fighting against American forces in Afghanistan), Khan and Chapman helped Lashkar official Abu Khalid acquire parts with military applications for an unmanned aerial vehicle. Proof at trial will show that, during the visit of Abu Khalid to the United States (in which he was assisted by Khan and Chapman), he visited Al-Timimi in the company of another unindicted conspirator that also assisted in Abu Khalid's procurement activities for Lashkar.

The grand jury indicted Al-Timimi for, between September 16, 2001, and May 2003, aiding and abetting in the commission of various offenses, including a conspiracy to levy war against the United States. The co-conspirators' provision of services and equipment to Lashkar -

- a terrorist organization that was an avowed enemy of the United States - - in December 2002 is irrefutable evidence that the conspiracy to levy war against the United States alleged in Count 3 continued throughout 2002. Al-Timimi's statement to his followers in February 2003 that the United States was the greatest enemy of Islam and should be destroyed was another way of counseling and inducing his followers to conspire to levy war against the United States. The message reiterated to his followers Al-Timimi's analysis that the United States was the enemy, and signaled them to keep up the fight.

We expect the proof at trial to show that Al-Timimi's followers chose to fight against American forces because he counseled them to do so, because he told them that they owed no loyalty to the United States, and because he told them that the United States was the enemy of Muslims. We expect the proof at trial to show that Al-Timimi's followers were encouraged by his words to engage in activities that supported terrorists that brazenly declared their intention to destroy America. Al-Timimi's February 2003 message calling for the destruction of America not only showed his motive to counsel his followers to aid Islamist terrorists seeking to destroy the United States, but also proves that his advice and counseling to Kwon, Hasan, Khan, Royer, and others was not inadvertent, made by mistake, or misheard by his listeners.

Al-Timimi now claims that his expert's translation of the Space Shuttle message is different from the government's translation, but identifies no substantive difference.[1] On page 10

[1] Instead of "There is no doubt that Muslims were overjoyed because of the adversity that befell their greatest enemy" (as translated by the government), Timimi finds it significant that his own expert would translate the sentence as "No doubt that the heart of every believer flew in happiness at the calamity that befell their greatest enemy." We do not see any substantive difference between the two versions. In any event, we are presently conferring with our translator to determine if we can agree with Al-Timimi's translation where there are any differences at all.

of his latest motion, he claims that he had no intent to release the Space Shuttle statement as a message to his followers, but on page six he concedes that the reason that he disseminated the message in the first place was to "spread to [his Muslim] brothers" several omens or "glad tidings" - - of the destruction of the United States, the country that is, according to that very message, the greatest enemy of Muslims in the world.

On page 11 of his pleading, Al-Timimi argues that the government's use of the proof of the Space Shuttle message sends the "patently untrue" message that "the defendant was celebrating while the rest of the nation was overwhelmed with grief regarding the shuttle disaster." Yet, on page five, he argues that part of the message, *correctly* translated, was that "No doubt that the heart of every believer flew in happiness at the calamity that befell their greatest enemy." Whether the quoted language recounted on Page 5 of the motion sends a message that was patently untrue is a matter for the jury to determine after hearing the evidence.

Al-Timimi argues that his Space Shuttle message should be excluded because others saw omens in the crash of the shuttle similar to what he wrote about. Whether others saw similar omens is irrelevant to the trial, because what is relevant is not whether omens were *seen* in the crash, but how they were *characterized.* In the face of charges that Timimi solicited others to make war on the United States, it surely is relevant that he characterized the omens as he saw as *glad* tidings that he would like to spread to his Muslim brothers [Al-Timimi's motion at page 6] about the calamity that befell *their greatest enemy* [Al-Timimi's motion at page 5]. The relevance is not that Al-Timimi can see omens that not everyone else can see, but that he disseminated his interpretation of them in the sentence "*No doubt that the heart of every believer flew in happiness at the calamity that befell their greatest enemy*" [Al-Timimi's motion at 5].

Timimi further argues that the translation of the message in the indictment is not a translation of the complete message. This argument is moot, because we plan to introduce the complete message.

II. Motion to Bar Use of Materials Seized at Khan's House

Last year, Al-Timimi moved to strike from the indictment Overt Act 26, which alleged that in May 2003, Masaud Khan possessed in his house an AK-47 style rifle, a terrorist's handbook and the text of a bin Laden statement. On December 3, 2004, this Court denied that motion. Now, Al-Timimi asks the Court to bar the government from proving that Overt Act. For the same reasons as the Court denied the motion to strike the overt act last year, it should now deny the motion to bar the evidence to prove the overt act.

As we argued last year, the evidence from Khan's house is relevant and material to the conspiracy alleged in the indictment as evidence that Khan agreed to join the conspiracy to levy war against the United States and was involved in it as late as May 2003. As noted above, Khan helped Lashkar official Abu Khalid acquire parts with military applications for an unmanned aerial vehicle at least as late as December 2002. Proof at trial will show that, during the visit of Abu Khalid to the United States (in which he was assisted by Khan and Chapman), he visited Al-Timimi in the company of another unindicted conspirator that also assisted in Abu Khalid's procurement activities for Lashkar. Moreover, proof will further show that Al-Timimi possessed in his house in February 2003 an Arabic version of the bin Laden statement found in English translation in Khan's house less than three months later.

Al-Timimi objects to the playing of the videotape of bin Laden making the statement that was found in Khan's house as well as in his own. That objection is moot, because the government is not planning to try to introduce that videotape.

III. Motion to Compel Production of Cellular Telephone Records

Al-Timimi moves the Court to compel the United States to produce to him the cellular telephone records corresponding to the account of Yong Kwon. This motion is moot. Although we are aware of no basis for any entitlement of Al-Timimi to such discovery, we are nevertheless providing him with Sprint records regarding the cellular telephone used by Kwon in September 2001.

IV. Motion to Bar Evidence of Al-Timimi's Statements on 9/11

Al-Timimi moves to bar evidence that, at Dar al-Arqam on September 11, 2001, he expressed approval of the attacks. According to Al-Timimi, such evidence would be overly prejudicial. Al-Timimi's reasoning is incorrect, and the motion should be denied.

As we stated above, Al-Timimi is charged with soliciting others to wage war against the United States as early as September 16, 2001. Moreover, he is charged with inducing others to fight for the Taliban against the United States, even though the Taliban was protecting the terrorists who conducted the 9/11 attacks. The proof will show that he solicited others to wage war, at least in part, because he believed that the attacks of 9/11 were a sign that the day of judgment was near and that the "end of time" battle had begun. Accordingly, *in this prosecution*, his expression of support for the attacks of September 11th is highly probative of whether he endeavored to persuade others to fight to defend Mullah Omar and the Taliban - - and, in his words (as alleged in Overt Act 21), "the Arabs with them."

Indeed, we expect the proof to show that Al-Timimi's reaction to the events of 9/11 was -- as distasteful as that reaction may be for the rest of us to digest - - joy. We expect that the proof will show that in an email sent in December 2001, Al-Timimi noted that Sefer Hawali recounted that the general body of the Muslim world was initially of a single opinion on the attacks of 9/11. Al-Timimi wrote, "[w]hat that opinion was, I will refrain from answering. But I think if everyone notices his initial reaction then he insha'allah will know what the answer is."

The proof also will show that, in the Hawali message referenced by Al-Timimi, Hawali wrote that the initial reaction of everyone [in the Muslim world] to the 9/11 attacks was *rejoicing.* Hawali's *accuracy* in recounting the reaction of "everyone" in the Muslim world is irrelevant to the charges in this case. Nevertheless, the fact that Al-Timimi shared Hawali's reaction of "rejoicing" is highly probative to them.

We expect the evidence of Al-Timimi's reactions to the events of 9/11 - - as recounted by the witnesses on 9/11, 9/16, and 10/14, and as reflected in Al-Timimi's emails in the fall of 2001 - - to tend to establish Al-Timimi's support for the start of what he saw as the battle for the end of time, and for the destruction in war of the United States. Proof of such support corroborates the testimony of the witnesses that on 9/16/01 and 10/14/01 he solicited them to wage war against the United States.

Al-Timimi suggests that the evidence of what he said on September 11th is so conflicting that it should be barred. The evidence may well be conflicting, but it is the jury's role to ascertain the truth from conflicting evidence. Accordingly, the motion should be denied.

V. Motions Regarding Expert Witnesses

Al-Timimi moves to exclude the expert testimony of Evan Kohlmann, John Miller, and Robert Andrews. The United States does not plan to call John Miller, so the motion is moot with respect to him. The motion should be denied with respect to Kohlmann and Andrews.

A. Robert Andrews

The United States plans to call Robert Andrews to testify at the trial to describe the course of the war in Afghanistan from September 12, 2001, through approximately November 30, 2001. From July 31, 2001, through July 31, 2002, Andrews served in the Office of the Secretary of Defense as Principal Deputy Assistant Secretary of Defense and Acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict. As such, he had substantial responsibility for managing and overseeing the war in Afghanistan in the fall of 2001.

We expect Mr. Andrews to testify to essentially the following facts, which are alleged in the general allegations of the Superseding Indictment:

> Immediately after 9/11, the United States demanded that the Taliban turn over Bin Laden. On September 12, 2001, the Bush administration won NATO support for a possible strike against Usama bin Laden and his supporters in Afghanistan, and was pressuring Pakistan for intelligence and logistical backing. That same day, the Taliban was bracing for an imminent attack by the United States and sent its top leader Mullah Mohammad Omar into hiding.
>
> After the Taliban refused those demands, the United States and allied forces entered Afghanistan and engaged the Taliban in combat to prevent it from allowing Al-Qaeda to use Afghanistan as a base for terrorist acts against the United States and around the world. American troops started the ground war against the Taliban on or about October 20, 2001. On or about October 21, 2001, American commandos seized an airfield in southern Afghanistan and then raided a compound of Taliban leader Mullah Mohammed Omar. On or about November 10, 2001, the Taliban lost the key city of Mazar-e-Sharif, and the northern provincial capitals of

> Shibarghan, Aybak, and Maimana. By November 11, 2001, the Taliban was being routed through northern Afghanistan. On or about November 13, 2001, the Taliban withdrew from the Afghan capital of Kabul and Northern Alliance forces allied with the United States took control of the city. By November 15, Taliban forces had retreated to Kandahar.

We believe that Mr. Andrews will testify as a fact witness rather than as an expert. To the extent that his testimony is based on reports that he received as the Acting Assistant Secretary of Defense for Special Operations and Low Intensity Conflict with responsibility for the war in Afghanistan rather than on personal observation, he surely is an expert with respect to the facts set forth above.

In the last trial, Mr. Andrews did not testify because the parties stipulated to the essentially uncontested facts set forth above. We hope that a similar stipulation can be reached for this trial. If one cannot, however, we doubt that there could be a more knowledgeable witness with respect to these facts than Mr. Andrews.

B. Evan Kohlmann

Al-Timimi argues that Evan Kohlmann should be barred from testifying as an expert. In doing so, Al-Timimi mistakenly argues that Kohlmann testified in the Sami al-Husayn trial in Idaho (although in fact he did not) and that Kohlmann was not qualified as an expert before this Court (although in fact he was). Al-Timimi's conclusion that Kohlmann should be barred from testifying is as faulty as the factual premises upon which he constructed his argument

We expect Mr. Kohlmann to testify as an expert on the origins of the Arab-Afghans, Al-Qaeda, the Taliban, and Lashkar-e-Taiba. We expect him to testify as an expert regarding the relationship between jihad fighters in Bosnia, Pakistan, and Afghanistan, and the connections between Lashkar-e-Taiba, the Taliban, and Al-Qaida, and the history of Usama bin Laden and

Al-Qaeda's war against the United States before 9/11. We expect Mr. Kohlmann to testify that, from about 1995 until late 2001, the Taliban was the political/military entity headquartered in Kandahar, Afghanistan, that exercised de facto control over portions of the territory of Afghanistan until its defeat in late 2001 and early 2002 by a multi-national coalition that included the United States.

Mr. Kohlmann is also an expert in accessing and interpreting information found on the internet. We expect him to testify about information released on the internet by Lashkar-e-Taiba between 1999 and 2001, and that certain information located on one website in 2001 (muslimworldnews@yahoogroups.com) was traceable to a second website (markazdawa@hotmail.com). We expect none of his testimony to be controversial.

The Court may recall that, in the *Khan/Chapman/Hammad* trial, Kohlmann was not offered and did not testify as an expert witness. *See* Transcript @ 1147. Instead, he testified only as a fact witness with respect to the contents of several websites that he accessed and copied in 1999 or 2000, and with respect to a "reverse who-is" search that showed that the IP addresses of computers sending emails under the ostensible name of Pal Singh from Coventry, England, were actually located in Pakistan.[2] In the *Benkhala* trial, however, Kohlmann was qualified and testified as an expert witness in modern Afghan politics. As the Court stated, "clearly, he's written enough and studied enough on this, and I'm going to accept him as an expert . . . ." *See U.S. v. Benkhala,* Transcript @ 195. Kohlmann then explained the background of Lashkar-e-Taiba, the Taliban, and al-Qaeda.

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[2] Abu Khalid's email address, johninformation@yahoo.com, was relevant because it connected to the LET official the purchase of remote control airplane parts by Khan and Chapman.

Except with respect to the linkage of the two websites, we are not offering Mr. Kohlmann in this case as an "expert" in the sense that he will offer an opinion on whether a particular fact is established in this particular case. Rather, we offer him as an expert to explain the background of the foreign organizations that are significant to the context of the allegations in this case. We do not believe that the substance of his testimony will be controversial. Instead, we expect that his testimony - - as it was in the *Benkhala* trial - - will be helpful in explaining to the trier of fact the background of and the relationships between the Taliban, al-Qaeda, and Lashkar-e-Taiba - - or, as Al-Timimi described them in October 2001, as alleged in Overt Act 21, Mullah Omar, the Taliban, "and the Arabs with them."

Al-Timimi suggests that Mr. Kohlmann's testimony should not be admitted because the government has produced no information that would indicate that his opinions have been tested, subject to any peer review, whether there are known error rates applicable to his theory or technique, nor whether his technique enjoys general acceptance within any scientific community. In making this argument, Al-Timimi misses the point that the tests he references are irrelevant to Mr. Kohlmann's field of expertise.

The test for admission of expert testimony is reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993). The factors relied upon to test reliability, however, must be "tied to the facts of the particular case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). Moreover, the trial court has "broad latitude" to determine which specific factors are or are not appropriate indicia of reliability in a given case. *Id.* at 153. In the *Benkhala* case, the Court saw Mr. Kohlmann's testimony to be reliable and helpful. There is every reason to expect the same in this case. *See United States v. Damrah*, No. 04-4216 (Sixth Circuit, March

15, 2005) (affirming admittance of expert testimony on the background of the Palestinian Islamic Jihad) (a copy of which opinion is attached to this pleading).

In *Damrah*, the defendant objected to testimony from the government's expert witness. Damrah's primary objection to the testimony was that it relied heavily on inadmissible hearsay in violation of Federal Rule of Evidence 703, and that it did not satisfy the requirements of Federal Rule of Evidence 702, which dictates that an expert may offer an opinion "if (1) the testimony is based upon sufficient facts of data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The district court admitted the testimony, on the grounds that "[g]iven the secretive nature of terrorists, the Court can think of few other materials that experts in the field of terrorism would rely upon. Indeed, Damrah himself failed to suggest any." Slip op. at 11. On appeal, the district court's ruling was affirmed.

The reasoning of the district court in *Damrah* applies equally to Mr. Kohlmann's testimony. Al-Timimi's counsel obviously will have the opportunity to cross-examine Mr. Kohlmann at trial and challenge his qualifications. We are confident that, upon questioning Mr. Kohlmann, Al-Timimi's counsel will find him to be an expert in modern Afghan politics and the history of the Taliban, Al Qaeda, and Lashkar-e-Taiba (as well as in internet research), and withdraw their objections to his status as one. In light of the Court's finding in the *Benkhala* case, there can be no basis to bar his testimony as an expert on the same issues in this case.

VI. Motion to Bar Testimony Regarding Willingness to Lie

Al-Timimi told interviewing FBI agents that, as a Muslim, he is obligated to lie to his non-Muslim enemies when he is at war. The proof will show that Al-Timimi believes that the

United States is the greatest enemy of Muslims in the world, and that Al-Timimi has been at war with the United States. Al-Timimi argues that, by application of F.R.E. 610, his stated willingness to lie to his enemies when he is at war cannot be proven because that willingness to lie to his enemies is a religious belief. In making this argument, Al-Timimi mischaracterizes the nature of religious beliefs - - as opposed to political ones - - and misapplies F.R.E. 610. In any event, the evidence is admissible on other grounds, including as proof of bias, interest, intent, plan, and absence of mistake.

First, F.R.E. 610 governs impeaching or enhancing the credibility of a witness. That rule does not apply where the evidence is presented as part and parcel of a defendant's admissions made to investigators in the government's case-in-chief. Here, the government will present evidence of Al-Timimi's statements regarding his willingness to lie as part of the admissions that he made to government agents simultaneously with the exculpatory statements he made to them. Al-Timimi hardly is entitled to prevent the government witnesses from recounting with his exculpatory story a significant factor indicating that the exculpatory story was a false one.[3] In any event, the evidence is not introduced for the purpose of impeaching the credibility of a *witness*, for at the time it will be presented, Al-Timimi will not *be* a witness (if ever he would become one).

More substantively, even if Al-Timimi *were* a witness, Rule 610 would not prevent the government from proving that he will lie to his enemies when he is at war with them. Rule 610

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[3] In *United States v. Wills*, this Court admitted the defendant's admission that he had been in jail for ten years as part and parcel of his taped inculpatory statement (made from prison to his brother) that was relevant to his knowledge, intent, and plan, even though the evidence of incarceration would not otherwise have been admissible.

is designed to prevent religious witnesses from being unduly discredited before secular juries, secular witnesses from being unduly discredited before religious jurors, and witnesses from one religion being discredited or humiliated on the basis of tenets of a religion that may not be shared by the members of the jury.

Thus, as a result of the rule, a litigant cannot introduce evidence that a witness believes in reincarnation (before people who think it a fantasy) for the purpose of showing that by reason of the strange nature of that belief, the witness's credibility is impaired. Similarly, a litigant cannot introduce evidence that a witness believes (or disbelieves) that Joseph Smith found and translated the tablets that founded Mormonism (before people who think otherwise); that a witness believes (or disbelieves) in the Immaculate Conception (before people who think otherwise), or that the Earth was (or was not) created in seven days (before people who think otherwise), for the purpose of showing that by reason of the "strange" nature of those beliefs (at least to those who think otherwise), the witness's credibility is impaired.

The statement that Al-Timimi will lie to his enemy in time of war, however, is not a religious belief (about the origin of the world or the afterlife), but a political belief showing bias about how to act in *this* world. We are aware of no case in which Rule 610 has been construed to bar proof of a witness's willingness to lie in *this* world completely separate from any ramifications to him for doing so in the next.

Here, proof of Al-Timimi's belief that he is entitled to lie to a non-Muslim when such non-Muslim is at war with Muslims is not a protected religious belief, but merely proof of interest and bias. Timimi's statements are proof of his interest ("I as a Muslim have an interest in deceiving you when I'm at war with you because my interest is in you losing this war") and

bias ("I as a Muslim will lie to you because I want to destroy you"). Moreover, the commentary to F.R.E. 610 explicitly explains that the rule should not be interpreted to bar a party from showing a witness's interest or bias.

Indeed, in *United States v. Abel*, 469 U.S. 45 (1984), the Supreme Court ruled that, regardless of any provision of the Rules of Evidence, proof of bias is *always* admissible. In *Abel*, the Supreme Court ruled that a witness's membership in the Aryan Brotherhood that required its members to lie to protect each other was sufficiently probative of a witness's possible bias to warrant its admission into evidence. *Abel* applies directly here.

That Al-Timimi would cloak that same requirement to lie to an infidel to protect a Muslim in time of war as a tenet of his version of the Muslim religion does not make inadmissible for him the very evidence that the Supreme Court ruled *was* admissible with respect to a member of the proto-Christian Aryan Brotherhood that had the very same tenet. Unfortunately, it is not unusual for terrorists and hate groups today to claim religious authority for their actions. *See e.g.*, *Wiggins v. Sargent*, 753 F.2d 663, 665 (8th Cir. 1985) ("The Church of Jesus Christ Christian has some affiliation or connection with an organization known as Aryan Nations"). If proof is admissible that a white supremacist like Matthew Hale of the World Church of the Creator will lie to protect his fellow believers, then similar proof is admissible against those members of Al Qaeda, Palestinian Islamic Jihad, or Lashkar-e-Taiba ("Army of the Pure") who espouse the same willingness to lie. No one, including Al-Timimi, can prevent the jury from learning of his own stated willingness to lie to his enemies merely by asserting that his willingness to lie (and his selection of his enemies) to be a religious imperative.

We do not care whether Al-Timimi's beliefs about lying to unbelievers in time of war are part of Islam or not. A defendant cannot take a political belief and cloak it is a religious one to attain a safe harbor in F.R.E. 610. Otherwise, Rule 610 would bar all impeachment of the credibility of people whose make no distinction between secular and religious, and all of whose beliefs are governed by religion, because they could attribute every principle as having a religious underpinning.

As the Supreme Court stated in *Abel*:

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness's like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of act and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness's testimony.

Id. at 52.

In light of *Abel,* proof of Al-Timimi's conscious bias in favor of his type of Muslims and against the United States (as well as his dislike of the United States) surely is relevant and admissible so that the jury can assess all evidence which might bear on the accuracy and truth of Al-Timimi's testimony - - assuming, of course, he *were* a witness so that proof of his admissions to the agents properly triggered consideration of the applicability of Rule 610 in the first place. In any event, the government is willing to divorce the admission that Al-Timimi will lie to infidels when he is at war with them from the admission that he will do so because he is authorized to do so by the rules of Islam. Therefore, his political belief - - that he will lie to

infidels when he is at war with them - - can be admitted without touching upon whether his willingness to do so was motivated by any religious belief.

Finally, the statements that Al-Timimi made regarding his authority to lie to unbelievers in time of war is admissible on wholly separate grounds. They also are admissible because they show intent, plan, and absence of mistake in connection with the allegations of the indictment that Al-Timimi advised his listeners in September 2001 never to reveal the substance of his words to them regarding fighting in Afghanistan, and later advised Kwon and Hasan about how to reach the Lashkar camps undetected.

The proof will show that several of the individuals that Al-Timimi solicited for war against the United States on September 16, 2001, repeatedly lied to investigators regarding the contents of Al-Timimi's advice. As Royer said to Kwon in a taped telephone call, he "swore" that he would never reveal what Al-Timimi said. The proof further will show that, after the 9/16/01 meeting, Al-Timimi discussed with Kwon and Hasan their cover stories to provide to American authorities on their way to the Lashkar camps, and advised them on what they should say to those authorities to deceive them. The fact that Al-Timimi admits that he will lie to unbelievers to protect Muslims in time of war will corroborate that proof, and is admissible regardless of its effect on Al-Timimi's credibility.

As the Supreme Court stated in *Abel*:

> It seems clear to us that the proffered testimony with respect to Mills' membership in the Aryan Brotherhood sufficed to show potential bias in favor of respondent; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that

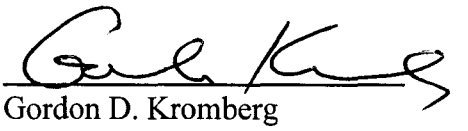
> relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

469 U.S. at 55.

Al-Timimi's admissions to investigators that, in his view, Muslims are allowed to lie to unbelievers in time of war are not only proof of bias, but also probative of a plan (and absence of mistake) reflected in his advice to the listeners he solicited for war against the United States. Accordingly, the motion should be denied.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: 
Gordon D. Kromberg
Assistant United States Attorney

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 05a0191n.06
Filed: March 15, 2005

No. 04-4216

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee; v. FAWAZ MOHAMMED DAMRAH, a/k/a FAWAZ DAMRA, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: NORRIS and GIBBONS, Circuit Judges; TODD, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Fawaz Mohammed Damrah was found guilty of unlawfully obtaining citizenship in violation of 18 U.S.C. § 1425 by making false statements in a citizenship application and interview. Damrah was sentenced to two months of incarceration, four months of home confinement with electronic monitoring, and three years of supervised release. The district court also ordered Damrah's citizenship revoked pursuant to 8 U.S.C. § 1451(e). Damrah now appeals, asking this court to overturn his conviction.

I.

*The Honorable James D. Todd, Chief United States District Judge for the Western District of Tennessee, sitting by designation.

Fawaz Mohammed Damrah, a/k/a Fawaz Damra, entered the United States on a visa in 1984. Approximately two years later he became the Imam, or religious leader, of the Al-Farooq Mosque in Brooklyn, New York. Damrah left New York City in 1990 and moved to Cleveland, Ohio, where he became the Imam of the Islamic Center of Cleveland, the position he held at the time of his June 2004 trial. Damrah filed an application for naturalization on October 18, 1993. A naturalization interview was conducted on December 17, 1993, and he was naturalized on April 24, 1994.

Damrah was involved in establishing the New York office of Afghan Refugee Services, Inc., ("ARS") an organization created to support fighters in Afghanistan attempting to expel the Russians in the late 1980's. Specifically, Damrah approached the Board of Directors of the Al-Farooq Mosque and obtained approval to open an ARS office within the Mosque. Additionally, Damrah was an initial director of ARS and traveled around the United States with the leader of ARS raising money for the organization. Damrah's 1990 departure from the Al-Farooq Mosque resulted from a dispute over the use of contributions to ARS after the Soviets were expelled from Afghanistan in February 1989.

Damrah was also involved with the Palestinian Islamic Jihad ("PIJ") and the Islamic Committee for Palestine ("ICP"). The PIJ opposes the existence of the State of Israel and is committed to eliminating it. Terrorist attacks orchestrated by the PIJ have resulted in its designation as a Specially Designated Global Terrorist Organization by the United States Department of State and its inclusion, since 1989, as a major terrorist group in the Department of State publication, Patterns of Global Terrorism. The ICP was used to raise funds for the PIJ in the United States. Damrah's own characterization of the ICP, captured on video at a fund-raising event, is instructive: "A brief note about the Islamic Committee for Palestine: It is the active arm of the Islamic Jihad

Movement in Palestine. We preferred to call it the 'Islamic Committee for Palestine' for security reasons."[1] Videotapes containing footage showing Damrah speaking at fund raisers for the ICP and PIJ were seized in 1995 during a search of the home and offices of Sami Al-Arian, the president of the ICP.

Damrah submitted his application for naturalization, INS Form N-400, to the Cleveland Immigration and Naturalization Service ("INS") office on October 18, 1993. Question 3, Part 7 asked: "Have you at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion?" Damrah answered no. Part 9 of Form N-400, captioned "Memberships and organizations," instructed the applicant to:

> List your present and past memberships in or affiliation with every organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other place. Include any military service in this part. If none, write "none." Include the name of the organization, locations, dates of membership and the nature of the organization.

Damrah listed only the "Islamic Council of Ohio" and the "Islamic Center of Cleveland" in response to this question; he did not list ARS, the PIJ, or the ICP. Damrah signed Part 11 of Form N-400, which requires that the applicant "swear or affirm, under penalty of perjury under the laws of the United States of America, that this application, and the evidence submitted with it, is all true and correct."

Kim Adams, an INS examiner, interviewed Damrah on December 17, 1993. The interview was a naturalization requirement and was intended to permit the INS to make a determination about

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[1]Damrah made this statement at a fund-raising event in 1991 when introducing Sami Al-Arian, the president of the ICP.

Damrah's qualifications for naturalization. Adams had the authority to deny the application based on information provided in the interview. Adams reviewed each of Damrah's answers on the INS Form N-400, noting any changes Damrah wished to make. Adams testified that a "yes" response to the persecution question "could render [the applicant] ineligible for naturalization." A dishonest answer to the persecution question would permit the INS to deny the application, as could providing information about organizations that might have been involved in persecution. Adams also testified that if an applicant reported a membership or affiliation with a suspect organization in response to Part 9 of Form N-400, she would elicit more information, request documentation, or "forward the application over to the investigative section for further inquiry." Intentionally providing false answers on Part 9 of the form could result in a denial of the application. Damrah signed the form, under penalty of perjury, at the conclusion of the interview. Damrah was granted naturalization on April 29, 1994. The omissions from Damrah's naturalization application were discovered in 1995 when videotapes were seized from Al-Arian's home and offices.

On December 16, 2003, a single count indictment was returned in the United States District Court for the Northern District of Ohio charging Damrah with unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a) and (b). Specifically, Damrah was charged with (1) knowingly procuring naturalization contrary to law and to which he was not entitled by failing to disclose membership in or affiliation with ARS, the PIJ, and the ICP; (2) falsely stating that he had never ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion; and (3) failing to disclose that he had been arrested and charged with assault in January of 1989 in New York City.

On April 26, 2004, the United States filed a Notice of Intent to Use Foreign Intelligence Surveillance Act ("FISA") Information pursuant to 50 U.S.C. 1801 *et seq.* The intended evidence included audio tapes of phone conversations and two faxes. On the same day, Damrah filed a motion to suppress the evidence obtained from FISA surveillance of Al-Arian as well as a motion to compel production of FISA applications, orders, and related documents.[2] The trial court denied both of Damrah's motions on June 9, 2004. A jury trial began on June 15, 2004. At the conclusion of the government's case, the district court granted Damrah's motion to dismiss the portion of the indictment regarding Damrah's arrest in 1989. The jury returned a guilty verdict on June 17, 2004. On September 20, Damrah was committed to the Bureau of Prisons for two months, followed by four months home confinement with electronic monitoring and three years of supervised release. On September 23, 2004, the district court ordered Damrah's citizenship revoked pursuant to 8 U.S.C. § 1451(e). Damrah filed a timely notice of appeal.

II.

A.

The indictment in this case was a one-count indictment charging Damrah with violating 18 U.S.C. § 1425(a) and (b). Damrah argues that the indictment was duplicitous because § 1425(a) and (b) are separate offenses, rather than different means of committing the same offense, and as such must be charged in separate counts in an indictment. *See* Fed. R. Crim. P. 8(a); *United States v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002) (holding that a count charging two or more offenses is impermissibly duplicitous). Damrah further argues that the indictment was duplicitous because 18 U.S.C. §§ 1001 (making a false statement in a matter within the jurisdiction of the federal

[2]The motion to suppress is not included in the joint appendix.

government) and 1015(a) (making a false statement relating to naturalization) were predicate offenses to the charged violation of § 1425. The crux of Damrah's argument is that the jury was instructed to consider four different statutes with different elements under a one-count indictment. Damrah asserts that this violated his rights to due process, jury unanimity, and to be informed of the nature of the accusations against him as guaranteed by the Fifth and Sixth Amendments.

Whether an indictment is duplicitous is a legal question that is reviewed *de novo*. *Campbell*, 279 F.3d at 398. "In determining whether there is duplicity or multiplicity [in an indictment] the decisive criteria are legislative intent and separate proof." *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988). Rather than defining two crimes, § 1425(a) and (b) provide two means by which unlawful naturalization can be obtained. Under the statute, one can procure naturalization "contrary to law" (§ 1425(a)) or naturalization to which one is not entitled (§ 1425(b)). It is not duplicitous to allege in one count that multiple means have been used to commit a single offense. Fed. R. Crim. P. 7(c)(1). The distinction between means and elements is illustrated by *Schad v. Arizona*, 501 U.S. 624 (1991), and *Richardson v. United States*, 526 U.S. 813 (1999). As the government points out:

> In *Schad*, the Supreme Court considered a one-count indictment for first-degree murder. The statute defined first-degree murder as "murder which is . . . premeditated . . . or which is committed . . . in the perpetration of . . . robbery." *Schad*, 501 U.S. at 628. The Court held that "premeditation" and "in the perpetration of . . . robbery" were not *elements* of the crime; they were *means* of satisfying the *mens rea element*. . . . *Schad* went on to hold that it was not necessary for the jury to be unanimous as to whether Schad had engaged in premeditated murder or felony murder, as they are not elements of the crime. *See also Richardson*, 526 U.S. at 817 ("Calling a particular kind of fact an 'element' carries certain legal consequences. . . . [A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.").

The district court, assuming duplicity without deciding the issue, concluded that any possible harm to Damrah would be cured by a special unanimity instruction and a special jury form. *See United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981) ("The rules about multiplicity and duplicity are pleading rules, the violation of which is not fatal to an indictment."). The court did deliver a special unanimity instruction explaining § 1425 and the predicate offenses, 18 U.S.C. §§ 1001, 1015(a).[3] The district also prepared and presented to the parties a special verdict form which the defense counsel declined "in light of the unanimity instruction." The district court also noted that, even if parts (a) and (b) constitute different crimes, Damrah was well aware he was being charged under both. Therefore, even if the indictment was duplicitous, it was harmless. *See United States v. Kimberlin*, 781 F.2d 1247, 1250-51 (7th Cir. 1985) (noting that duplicity is harmless in a case where none of the concerns raised by duplicity exist); *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir. 1980) ("Ultimately, the indictment must be measured in terms of whether it exposes the defendant to any of the inherent dangers of a duplicitous indictment.").

While we do not believe that the indictment was duplicitous, we also agree with the district court that any duplicity was harmless. We affirm the district court's denial of Damrah's motion to dismiss the indictment as duplicitous and find no error in the jury instructions.

B.

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[3]The jury instructions initially proposed by the district court defined the elements of § 1425 without differentiating between (a) and (b). At the charging conference, the parties and the court agreed that the instructions would be clearer if there was "more of a separation between 1425(a) and (b)." The instructions given to the jury recited the three elements of the crime using the language from part (a) – "contrary to law" – and then recited the elements using the language in part (b) – "not entitled to."

Damrah filed motions to compel the production of FISA applications, orders, and related documents and to suppress FISA obtained evidence. The district court denied the motions, and during the trial the government admitted audio tape recordings obtained as a result of FISA surveillance of Al-Arian under 50 U.S.C. §§ 1806(a), (e), and (g).[4] The relevant statute provides that a defendant challenging a FISA application may be permitted to review the application and order when disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f). The statute also provides that if the Attorney General files an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States" the court must consider the application and order in camera to determine if the surveillance was lawful. *Id.* An affidavit was filed by the Attorney General in this case, and Damrah's motions to compel and suppress were denied without an adversarial hearing. Damrah does not argue that the district court failed to follow the statutorily prescribed procedures applicable when a district court reviews the "legality of the [FISA] surveillance." *See id.* Instead, he asserts that the procedures themselves violated his constitutional rights.

"When reviewing the denial of a motion to suppress, we review the district court's findings of fact for clear error and its conclusions of law *de novo.*" *United States v. Foster*, 376 F.3d 577, 583 (6th Cir. 2004) (quoting *United States v. Hurst*, 228 F.3d 751, 756 (6th Cir. 2000)). However, an abuse of discretion standard is used when reviewing a district court's refusal to disclose the substance of affidavits and certifications that accompanied applications for surveillance under FISA,

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[4]Damrah asserts that the FISA obtained evidence included "several audio tape telephone intercepts and video tapes." The video tapes referred to were seized pursuant to a search of Al-Arian's home and offices in 1995 and were not FISA-obtained evidence. Rather, the FISA obtained evidence included excerpts from six telephone conversations and two facsimile transmissions.

and there is no abuse of discretion absent a showing of misrepresentation of the facts or any other presentation warranting disclosure. *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984). The result is the same regardless of the standard used.

Damrah relies on *Mathews v. Eldridge*, 424 U.S. 319 (1976), to argue that the Due Process Clause required an evidentiary hearing on this issue. Damrah's reliance on *Mathews* is misplaced, however, because FISA's requirement that the district court conduct an ex parte, in camera review of FISA materials does not deprive a defendant of due process. *See United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987). There is likewise no merit to Damrah's argument that *Alderman v. United States*, 394 U.S. 165 (1969), mandates that surveillance materials and an adversarial hearing be conducted before a district court can determine whether the surveillance was authorized and lawfully conducted. In *Alderman*, the issue was whether surveillance materials should be produced and an adversarial hearing conducted where the prosecution planned to use evidence from surveillance that had already been deemed unlawful. *Id.* at 182-83.

Damrah also asserts that *Franks v. Delaware*, 438 U.S. 154 (1978), governs the case. *Franks* held that a search warrant is subject to attack if it is based on an affidavit containing material false statements (and/or omissions), knowingly and intentionally made, or made with a reckless disregard for the truth. *Id.* at 155-56; *see United States v. Atkin*, 107 F.3d 1213, 1216 (6th Cir. 1997). Damrah argues that erroneous statements and material omissions are difficult to detect without adversarial proceedings. *Franks* does not apply to a challenge of the underlying procedures themselves, but rather to the attempt to sidestep the underlying procedures. Even assuming that *Franks* applies to FISA applications and orders, Damrah's *Franks* attack was non-specific and unsupported. Thus, Damrah failed to meet his threshold burden under *Franks*. 438 U.S. at 155-56.

Finally, Damrah suggests that the procedures dictated by FISA violate the Fourth Amendment. This argument also lacks merit, as FISA has uniformly been held to be consistent with the Fourth Amendment. *E.g., In re Sealed Case*, 310 F.3d 717, 742-47 (F.I.S.C.R. 2002); *United States v. Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787, 790-92 (9th Cir. 1987); *Duggan*, 743 F.2d at 73, 73 n.5. For the foregoing reasons, we affirm the district court's denial of Damrah's motions to compel FISA materials and suppress FISA evidence.

C.

Damrah objected to expert testimony from the government's witness Matthew Levitt. Damrah sought an order excluding Levitt's testimony, or, in the alternative, a hearing to determine the admissibility of Levitt's proposed testimony under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). After conducting a hearing, the district court denied Damrah's motion. Damrah's primary objection to Levitt's testimony was that it relied heavily on inadmissible hearsay in violation of Federal Rule of Evidence 703[5] and that Levitt's testimony did not satisfy the requirements of Federal Rule of Evidence 702, which dictates that an expert may offer an opinion "if (1) the testimony is based upon sufficient facts of data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." A district court's evidentiary rulings will not be reversed absent a clear showing of abuse of discretion. *United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990).

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[5]Damrah bases this objection on Levitt's testimony that he relied in part on certain books on the PIJ, press releases and newspaper articles, and the U.S. government publication, "Patterns of Global Terrorism." The only one of these sources revealed to the jury was "Patterns of Global Terrorism," which the court determined was "not inadmissible."

Damrah's arguments are without merit. Levitt did not present any inadmissible hearsay to the jury, and the materials he relied on met the requirements of Rule 702. The district court stated: "Given the secretive nature of terrorists, the Court can think of few other materials that experts in the field of terrorism would rely upon. Indeed, Damrah himself failed to suggest any." The district court also described Levitt's methodology as "the gold standard in the field of international terrorism." The district court did not abuse its discretion in allowing Levitt's testimony.

D.

Damrah contends that the evidence presented at trial was insufficient to support his conviction for violating 18 U.S.C. § 1425(a) and (b). The standard of review for insufficient evidence claims is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Damrah argues that the evidence at trial was insufficient to prove that his statements regarding membership, affiliation, and persecution were false.

Damrah alleges that he was not a member of ARS, ICP, or PIJ because he never paid dues to any of the organizations nor was he listed on any membership list. He also asserts that the government failed to establish affiliation under the district court's definition – "a mutual understanding or recognition that the organization can rely and depend on [Appellant] to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis." Specifically, Damrah argues that there was no evidence that he would work for the benefit of the organizations indefinitely into the future or on a fairly permanent basis. Damrah next argues that there was no evidence of incitement or assistance in the persecution of Jews, though he concedes

that he "encouraged support for Palestinians engaged in resistance against the Israeli occupation of land the Palestinians consider theirs." Finally, Damrah argues that, under 18 U.S.C. § 1425(b), the government did not present sufficient evidence to establish that Damrah was not entitled to naturalization, and, under 18 U.S.C. § 1425(a), the government failed to prove that Damrah knew his statements concerning membership, affiliation, and persecution were false, thus failing to satisfy the knowledge requirement.

In addition to these arguments, Damrah asserts that the persecution and affiliation questions were fundamentally ambiguous or without meaning "about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it [was] sought and offered as testimony." *United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1987) (quoting *United States v. Lighte*, 782 F.2d 367, 375 (2d Cir. 1986)). The persecution question asked, "Have you at any time, anywhere, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion?" Damrah argues that the term "persecution" was ambiguous and that because the preceding question on the N-400 form asked a question about Nazis, the word "persecution" was associated with a "systematic, state-sponsored effort to oppress and eradicate a comparatively weaker group on the basis of religion, race, or some similar distinctive feature." Damrah concludes that, based on that understanding of "persecution" as it was used in the question, his answer was truthful. *See United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978) (holding that government must "negative any reasonable interpretation that would make the defendant's statement factually correct").

Damrah argues that "affiliation" was also ambiguous because the request for affiliations was separate from the requests for memberships; therefore, the two terms must have different meanings. Because of alleged "arguable ambiguity," Damrah argues that the district court erred in denying Damrah's motions for judgment of acquittal. *See United States v. Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998) (noting that when a question is arguably ambiguous, a defendant's "understanding of the question is for the jury to resolve in the first instance").

Contrary to all of Damrah's assertions, the evidence was sufficient to support the guilty verdict. First, there was a need for secrecy regarding support for the groups that Damrah was involved with; these groups did not have dues paying members or keep membership lists. Furthermore, as the government states, "the lack of membership list and dues pales in light of the evidence adduced at trial concerning the defendant's role in these organizations." Damrah's membership and leadership role in the ICP and PIJ was established by the videotape evidence in which he persuaded sympathetic individuals to donate money to those groups. His membership in the ARS was likewise established through evidence that he cooperated with, and worked for the benefit of the group and served as a founder and director. Because the jury could reasonably conclude that Damrah was a member of the organizations, it could also conclude that he was affiliated with the groups, since affiliation by definition is something less than membership. *See Killian v. United States*, 368 U.S. 231, 257-58 (1961).

Damrah's assertion that the evidence was insufficient to prove that his relationship with any of the organizations was "for an indefinite future period" or on a "fairly permanent basis" is without merit. The evidence shows that Damrah was affiliated with ICP and PIJ from 1989 until at least April 1994, the court-imposed cut off date for trial evidence because Damrah became a United States

citizen that month. The evidence also shows that Damrah worked to establish the ARS in 1987 and was a founder and initial director of the group. There was enough evidence to conclude that Damrah was affiliated with all three organizations "for an indefinite future period" or on a "fairly permanent basis." Damrah's claim that evidence of persecution was insufficient also lacks merit. It is clear that Damrah engaged in fund raising activity for a terrorist organization. Therefore it was reasonable for the jury to conclude that he was inciting or assisting in conduct that led to persecution of Jews. There is likewise no merit to Damrah's claim that the evidence was insufficient to establish that he "knowingly" gave false answers during the naturalization process. As the government points out, the videotape evidence demonstrates that Damrah was a "whole-hearted, enthusiastic, and effective leader of ICP/PIJ, who was closely aligned with other leaders and founders" as opposed to being "subtl[y] or marginal[ly]" involved. The government's brief is compelling on this point: "Indeed the jury had before it graphic evidence from which to infer his state of mind when he falsely answered questions on Form N-400, and again at the naturalization interview, regarding affiliations or memberships, and incitement or assistance in persecution." The reasonable inference is that Damrah was aware that if he answered the questions on the form truthfully he would not be entitled to citizenship. *See United States v. Moses*, 94 F.3d 182, 187 (5th Cir. 1996) ("The jury could infer from Moses's misrepresentation that he knew that the true status of his marital relationship would render him not entitled to citizenship.").

It is only in exceptional cases that a question is so ambiguous, fundamentally ambiguous, such that no answer can be false as a matter of law. If there is no fundamental ambiguity, the jury resolves any ambiguities. *United States v. DeZarn*, 157 F.3d 1042, 1048 (6th Cir. 1998) (perjury charge); *United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983) ("[W]here an answer may or

may not be false depending upon possible interpretations of an ambiguous question, it is for the jury to decide whether the defendant has committed perjury."). Damrah confuses ambiguity with breadth. The persecution question is broad but not ambiguous. Additionally, Damrah's claim that his interview with Adams created ambiguity is disingenuous, because the N-400 form was filled out prior to the interview and the purpose of the interview is to answer any questions the applicant has about the form. Damrah's assertion that "affiliation" was ambiguous also lacks merit. He argues that "affiliation" has many different meanings. That may be true, but the affiliation question was not fundamentally ambiguous; therefore, any arguable ambiguity was left for the jury to decide. The evidence was sufficient to support Damrah's conviction and we affirm the district court.

E.

Damrah argues that the trial court abused its discretion by permitting the government to admit the videotapes and translated DVD's made from the videos over Damrah's objection that the videos had not been authenticated under Federal Rule of Evidence 901. A district court's evidentiary rulings will not be reversed absent a clear showing of abuse of discretion. *Hickey*, 917 F.2d at 904. Damrah concedes that the "evidence at trial (including the parties' stipulations) established that the government preserved the videotapes intact after they were seized from Dr. Sami Al-Arian's home and business premises in November 1995." Damrah does take issue, however, with how the tapes were made and handled prior to the 1995 seizure. Damrah argues that because the government did not present any evidence that the videotapes accurately depicted was said and done or evidence that the videos fairly and accurately depicted the events at issue, the videos were inadmissible.

The key question under Federal Rule of Evidence 901 is whether "the matter in question is what its proponent claims." The claim regarding this evidence is that it depicts Damrah and others

at ICP/PIJ events where Damrah engaged in fund raising for the organizations. Damrah does not question the fact that he and his words are depicted in the videotapes. The Advisory Notes to Rule 901(b)(4), which provides that evidence may be authenticated by distinctive characteristics, state: "The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety." Evidence of how the tapes were made and handled prior to their seizure is not required. *Buziashvili v. Inman*, 106 F.3d 709, 717 (6th Cir. 1997) ("[T]he W-2 forms were sufficiently authenticated in that they appeared to be what they purported to be, and defense counsel was not able to make any serious challenge to their authenticity."); *United States v. Kandiel*, 865 F.2d 967, 973-74 (8th Cir. 1989) (tape recordings authenticated without evidence of origin, method, or time of recording). The district court did not abuse its discretion in holding that the tapes were "self-authenticating, and also to a degree corroborated by some of the other things that counsel for the government referred to."

F.

Damrah objected to the admission of the official New York State Certificate of Incorporation of Afghan Refugee Services, Inc., which listed Damrah as an incorporator, claiming that under Federal Rule of Evidence 403 the probative value of the document was outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Damrah fails to demonstrate any prejudice. The trial court did not abuse its discretion in admitting this evidence.

G.

Damrah requested jury instructions on the definitions of "affiliation" and "persecution." Jury instructions are reviewed to determine if the issues and law were fairly submitted to the jury. *United States v. Zidell*, 323 F.3d 412, 427 (6th Cir. 2003); *United States v. Williams*, 952 F.2d 1504, 1512

(6th Cir. 1991); *United States v. Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984). The trial court did not give part of the requested instruction regarding affiliation. Specifically the court did not instruct the jury that "affiliation means a relationship which is equivalent or equal to that of membership in all but name." Damrah argues that this instruction was approved in *Killian*, 368 U.S. at 254-58, and cited with approval in *Bryson v. United States*, 396 U.S. 64, 69 n.7 (1969). Damrah does not point out that, though the Court in *Killian* found that an instruction including the sentence at issue was not improper, it did find that the specific sentence was contradictory, confusing, and inconsistent. 368 *U.S.* at 257-58.

Damrah also requested that the jury be instructed that "[w]here private discrimination is neither condoned by the state nor the prevailing social norm, it does not amount to persecution." The district court did not include this requested sentence. This case does not involve any claims of discrimination. The jury instructions taken as a whole fairly submitted the issues to the jury and were not confusing, misleading or prejudicial. *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999). The judgment of the district court is affirmed.

III.

For the foregoing reasons, we affirm the judgment of the district court.

CERTIFICATE OF SERVICE

I hereby certify that, this 16th day of March 2005, I caused a copy of the attached GOVERNMENT'S RESPONSE TO AL-TIMIMI'S MARCH 2005 MOTIONS to be served by e-mail and first class mail, postage paid, addressed as follows:

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