

No. 04-4216.

Argued: February 1, 2005.

Decided and Filed: March 15, 2005.^[*]

620 *619 *620 ARGUED: S. Michael Lear, Zukerman, Daiker & Lear, Cleveland, OH, for Appellant. Arnold C. Celnicker, Department of Justice, Washington, DC, for Appellee. ON BRIEF: S. Michael Lear, Zukerman, Daiker & Lear, Cleveland, OH, for Appellant. Arnold C. Celnicker, Department of Justice, Washington, DC, James V. Moroney, Asst. U.S. Attorney, Cleveland, OH, for Appellee. Jeffrey M. Gamso, American Civil Liberties Union of Ohio, Cleveland, OH, for Amicus Curiae.

Before NORRIS and GIBBONS, Circuit Judges TODD, District Judge.^[**]

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.

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.

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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 fundraising 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."¹¹ 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 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 suspected organization in his 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 of his naturalization interview were reviewed.

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. 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. 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 tir

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394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (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 Ortiz v. United States, 411 F.3d 1013, 1018 (9th Cir. 2009), 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 Ortiz v. United States, 411 F.3d 1013, 1018 (9th Cir. 2009) governs the case. Ortiz 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. Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997). Damrah argues that erroneous statements and material omissions are difficult to detect without adversarial proceedings. Ortiz does not apply to a challenge of the underlying procedures themselves, but rather to the attempt to sidestep the underlying ⁶²⁵ procedures. Even assuming that Ortiz applies to FISA applications and orders, Damrah's Ortiz attack was non-specific and unsupported. Thus, Damrah failed to meet his threshold burden under Ortiz v. United States, 411 F.3d 1013, 1018 (9th Cir. 2009).

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. Ortiz v. United States, 411 F.3d 1013, 1018 (9th Cir. 2009); Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997); Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997); Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997); Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997); Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997). For the foregoing reasons, we affirm the district court's denial of Damrah's motions to compel FISA materials and suppress FISA evidence.

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, Ortiz v. United States, 411 F.3d 1013, 1018 (9th Cir. 2009); 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Schnepper v. United States, 516 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (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 703⁴¹ 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. Winters v. United States, 107 F.3d 1213, 1216 (6th Cir.1997).

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.

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

[*] This decision was originally issued as an "unpublished decision" filed on March 15, 2005. On May 6, 2005, the court designated the opinion as one recommended for full-text publication.

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

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

[2] 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."

[3] 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.

[4] 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."

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