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From the Courts: Justice Watch

No defense for USF prof a no-brainer, but why?

As soon as they read the indictment, attorney William B. Moffitt and co-counsel Linda Moreno made the call to present no witnesses, evidence or documents to refute the federal government's charges that his client financed terrorism.

They didn't have to listen to the government's 20,000 hours of taped conversations involving their client, former University of South Florida professor Sami Al-Arian, to know that "the government didn't have a case," Moffitt said.

The two defense lawyers decided to simply rely on the First Amendment as their only argument at the trial of Al-Arian, a Kuwaiti-born Palestinian who was indicted in Tampa with three co-defendants on 51 counts of using Islamic charities as fronts in a conspiracy to finance terrorist acts by the Palestinian Islamic Jihad on Israel.

Their decision not to put on a case worked stunningly well. Al-Arian was acquitted last week of nearly half the charges against him; the jury deadlocked on the rest. The verdict in the case, which was the first real test of the powers granted to the government under the Patriot Act, was an enormous blow to the Justice Department, which is still considering whether to retry parts of the case.

During the five-month trial, Paul Perez, the U.S. attorney for the Middle District of Florida and four prosecutors, including two from the Department of Justice, presented 80 witnesses, 1,800 faxes and a variety of e-mails, excerpts of phone conversations and videotapes of Al-Arian.

The jury, made up of seven men and five women (including three blacks), heard taped phone calls that featured Al-Arian calling suicide bombers "martyrs" and referring to Jews as "monkeys and swine" who would be damned by Allah.

As distasteful as those remarks might have been to the panel, the jurors agreed with Moffitt's and Moreno's central argument that Al-Arian was simply engaging in protected speech under the First Amendment and that the government failed to prove that Al-Arian financed terrorism.

"Years ago I was very involved in the civil rights movement, and if the government had taped me they probably would have heard conversations mentioning the Black Panthers," Moffitt said. "None of us would want to be taped on a bad day."

Last Tuesday, after deliberating for 13 days, the jury acquitted Al-Arian of eight of 17 charges brought against him, including the charge of conspiring to kill people overseas.

The jury deadlocked on the other nine charges, including three of the other most serious terrorism charges and a federal racketeering charge. The U.S. attorney's office in Tampa is considering whether to refile charges on those counts, said Steve Cole, a spokesman for that office. Co-defendant Hatem Fariz was acquitted on 25 counts, with mistrials on eight counts. Co-defendants Ghassan Ballut and Sameeh Hammoudeh were found not guilty on all counts.

In an interview last week from his Washington law office, Moffitt said, "It seemed wrong that [the government] would charge people with terrorism who were talking about a political event, especially when they felt that their homeland was occupied."

He said he didn't have to hear any of the government's 20,000 hours of tapes of conversations to know "they didn't have much of a case." Moffitt and Moreno did listen to 70 hours of excerpted tapes, the most inflammatory ones presented by the government.

"Some of the comments [Al-Arian] made I was not happy with and he should not have been said," Moffett said. "But there was no imminent action of violence. That was the standard that should have been applied."

The case against Al-Arian and his co-defendants was the first brought under the Patriot Act. That law was passed soon after the Sept. 11 terrorist attacks to allow the government to secretly tape and surveil terrorism suspects.

Many observers saw the government's loss in Tampa as an enormous blow to the Bush administration's Justice Department, and to U.S. Attorney Perez and his staff, who spent years putting together the case.

But department officials defended the government's prosecution record.

"The Justice Department has a strong track record of success in prosecuting terrorists and those who support terrorist activities, as evidenced by the convictions in recent weeks in the Abu Ali and Paracha cases," said Tasia Scolinos, director of public affairs. "We remain

focused on the important task at hand, which is to protect our country through our ongoing vigorous prosecution of terrorism cases. While we respect the jury's verdict, we stand by the evidence we presented in court against Sami Al-Arian and his co-defendants."

Al-Arian's case gained international attention and became a notorious campaign issue in the U.S. Senate race last year between Mel Martinez and Betty Castor, who was president of USF while Al-Arian taught there.

Moffitt said he hopes the outcome of the Tampa trial will cause the government to "start taking a deep breath before charging people with RICO for making speeches."

Moffitt, 56, who specializes in complex criminal defense, is past president of the 10,000-member National Association of Criminal Defense Lawyers. Moreno, 53, has been a criminal defense attorney for the past 23 years. A member of both the Florida and California state bars, she has represented numerous clients accused of everything from misdemeanors to capital murder.

Moffitt said he's relied on the First Amendment as a main argument in past cases, presenting no witnesses or evidence, "but never when there was so much at risk." For this case, he researched major free speech cases of the past — "ones I hadn't looked at since law school."

Stephen Vladek, a professor of national security law at the University of Miami, called the defense approach "bold and unorthodox."

But some South Florida trial lawyers said not calling witnesses was perhaps the defense's only good choice. "That was a no-brainer," said one Florida federal prosecutor who didn't want to be identified. "What were they going to do, call up mosque members?"

"The witnesses probably would not have been helpful to the defense," said Ervin Gonzalez, a prominent Coral Gables litigator. "They would have wound up solidifying the government's case and highlighting the fact that [Al-Arian] was involved with terrorist organizations."

Brian Tannebaum, president of the Florida Association of Criminal Defense Lawyers, agreed. "Maybe they didn't want to put Al-Arian on the stand," he said. "Maybe they thought he would start yelling and carrying on."

Not so, countered Moreno in an interview. "Why would we have to put him on the stand when the government didn't present a good case?" she asked.

The government's case was a political prosecution, she said, "and I think jurors agreed. This case was an indictment on innuendo."

Miami lawyer Lida Rodriguez-Taseff, a national spokeswoman for the ACLU, said the outcome demonstrated that jurors, even in relatively conservative Central Florida, cherish freedom of speech and are not as fond of the Patriot Act as the Bush administration thinks.

"It shows that the Department of Justice is incredibly out of touch with what mainstream Americans are and aren't willing to give up in this so-called War on Terror," Rodriguez-Taseff said. "Everyday Americans are absolutely committed to protecting the core values of the Constitution and the Bill of Rights."

Tannebaum likened the government's defeat to what former U.S. Attorney Kendall Coffey in Miami experienced when his office in 1996 lost the largest cocaine case ever brought by the government, against Miami drug kingpins Willie Falcon and Sal Magluta. "You feel a tremendous sense of loss," Tannebaum said. "This was a colossal embarrassment."

Former U.S. Attorney Marcos D. Jimenez agreed, though he said the Tampa loss wouldn't prompt the Bush administration to back off prosecuting terrorism cases. Instead, he said, the government would take a different approach.

"It's got to be disappointing," said Jimenez, who served as U.S. attorney from 2002 until this year. "This case will be studied carefully for the future. We are in somewhat uncharted territory here. They will learn lessons from it and hopefully improve on the next case."

Cole from the U.S. attorney's office agreed. "In each and every case you learn something new," he said, declining to reveal what that might be in this case.

Vladek worried that the outcome will prompt the government to turn to alternative, secret methods of "catching," interrogating and trying suspected terrorists — through detention at Guantanamo Bay and military tribunals.

"I'm nervous as to what this might mean in the long term," said Vladek, who helped draft briefs as part of the defense team for another terrorism suspect, Jose Padilla, who was indicted in Miami last month.

Nevertheless, the outcome of the Al-Arian case shows that defense lawyers and their clients should not allow themselves to be pressured

into plea deals, that they should trust juries and take their cases to trial, said David Markus, a Miami lawyer and vice president of the Florida Association of Criminal Defense Attorneys.

“For a jury in this day and age to acquit defendants in a terrorism trial is truly remarkable,” Markus said. “It demonstrates how great our jury system still is.”

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