

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)
)
v.) Case No. 1:11-cr-561-LO
)
SYED GHULAM NABI FAI,)
)
Defendant.)

**OPPOSITION TO GOVERNMENT’S MOTION TO CORRECT JUDGMENT
AND TO REINSTATE APRIL 4, 2014 HEARING**

Syed Ghulam Nabi Fai, (“Syed Fai”), by counsel, requests this Honorable Court deny the government’s motion to correct the written judgment entered in this case, or in the alternative, to amend the written judgment in a manner that does not impermissibly infringe upon his First Amendment rights, or involve a greater deprivation of liberty than is reasonably necessary for the purposes set forth in 18 U.S.C. § 3553(a). More particularly, the defendant submits that (1) the written judgment accurately reflects the terms of supervision that were actually imposed at the sentencing hearing; and (2) the government’s requested “Correction” is overbroad in violation of the First Amendment right of free association, and is not reasonably related to deterrence, protection of public, and rehabilitation.

Background

On March 20, 2012, this Court sentenced Syed Ghulam Nabi Fai to 24 months imprisonment and three years of supervised release. On November 22, 2013, this Court granted the government’s motion to reduce Syed Fai’s sentence for substantial assistance, reducing his term of imprisonment to time served. The remaining terms of the sentence remain unchanged.

Syed Fai's supervised release is governed by the terms specified by this Court at his sentencing on March 30, 2010, which are accurately reflected in the written judgment, also entered on March 30, 2010.

As noted by the government, the parties have disagreed about the individuals with whom Syed Fai is permitted to have contact. In the government's view, the Court intended to prohibit Syed Fai from having contact with "any agent, employee or representative of the ISI or the government of Pakistan, or any individual that the defendant has identified to the FBI as supported by or in regular contact with the government of Pakistan," irrespective of whether that individual was a co-conspirator in the case. Gov't Mot., Dkt. 76, p. 3. To the contrary, the special condition as imposed by the Court only prohibits Syed Fai from having contact with his co-conspirators. That same prohibition was included in the written judgment order.

At the sentencing hearing, the government argued that:

"And, Judge, we hope that the supervised release term includes a special condition that he have no contact with any agent, employee or representative of the ISI or the government of Pakistan or any individual that the defendant has identified to the FBI as supported by or in regular contact with the government of Pakistan."

Transcript of Sentencing Hearing, ("Tr.") at 15-16. (Attached as Ex. 1).

When the Court imposed its sentence, it imposed the following special condition which was limited only to contact with co-conspirators:

"I will direct that you not have any contact with co-conspirators in the case, including unnamed straw donors, and persons involved with the Pakistani government and intelligence service or their agents."

Tr. at 29. There were two categories of co-conspirators in this case, the unnamed straw donors, and the Pakistani government officials and ISI agents who provided the funds used to reimburse

the straw donors, and who requested the defendant advocate for their positions on the dispute over control of Kashmir.

The written judgment contains the following special condition which repeats the gist of the orally imposed sentence:

“The defendant shall have no contact with any conspirators in this case, including all of the unnamed straw donors and cohorts in other countries who were assisting him in the conspiracy.”

Judgment Order, Dkt. 66, page 4. (Attached as Ex. 2).

At the conclusion of the sentencing hearing, the Court conveyed its hope the defendant continue to advocate on behalf of the Kashmiri people while in prison and stated its view that although the Kashmiri American Council was presently dormant, “there may be an opportunity to arrange conferences through other people in the future . . .” Tr. at 30.

Argument

I. The Written Judgment Reflects The Sentence That Was Actually Imposed.

The government contends that there is a discrepancy between the oral sentence pronounced by the Court and the written judgment. To the contrary, the written judgment does not conflict with the Court’s orally pronounced sentence. The Court simply rejected the government’s overly broad request to limit the defendant’s associational rights. The written judgment mirrors the Court’s oral sentence which only prohibited the defendant from having contact with his co-conspirators and is consistent with the Court’s closing comments concerning Syed Fai’s future activities. Since there was no clerical error which may be corrected pursuant to Fed.R.Crim.Pro. 36, the Court should deny the government’s motion.

II. The Government's Proposed "Correction" is Overly Broad in Violation of The First Amendment Right of Free Association.

Syed Fai contends that the special condition proposed by the government is overbroad, not narrowly tailored, and not reasonably related to the statutory factors in 18 U.S.C. § 3583(d).

Under 18 U.S.C. § 3583(d), conditions of supervised release "must: (1) be reasonably related to the goals of deterrence, protection of the public, and/or defendant rehabilitation; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve those goals; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission." *United States v. Wolf Child*, 699 F.3d 1082, 1090 (9th Cir. 2012); see *United States v. Armel*, 585 F.3d 182, 186 (4th Cir. 2009); *United States v. Dotson*, 324 F.3d 256, 260-61 (4th Cir. 2003). The government bears the burden of establishing the necessity of any condition of supervised release. *United States v. Wolf Child*, 699 F.3d at 1090.

A special condition of supervised release may restrict constitutional rights, including a defendant's rights to free association, when the special condition is narrowly tailored and is directly related to advancing the individual's rehabilitation, deterring the defendant and protecting the public. See *United States v. Hendricks*, 69 F. App'x 592, 597 (4th Cir. 2003) (special term of supervised release that "the defendant shall not meet or communicate with co-defendants," is not overbroad, condition is narrowly tailored to meet the ends of rehabilitation and to protect the public, and is not an improper restriction on their First Amendment right of free association). However, a condition of supervised release is substantively unreasonable, and therefore violates the defendant's First Amendment right of free association, if it infringes more on the offender's liberty than is "reasonably necessary" to accomplish these statutory goals – as is the case with the "correction" proposed by the government. "The touchstone of 'reasonableness' is whether the record as a whole reflects rational and meaningful consideration"

of those factors. *United States v. Wolf Child*, 699 F.3d at 1090-91 (9th Cir. 2012). The “correction” proposed by the government unreasonably infringes on Syed Fai’s liberty more than is reasonably necessary because it prohibits him from having contact with all Pakistani officials and agents, and persons in contact with those individuals, without any showing that they were involved in his criminal conduct. See e.g., *United States v. Soltero*, 510 F.3d 858 (9th Cir. 2007) (condition of supervised release, providing that defendant could not associate with any known member of “any disruptive group,” was overbroad in violation of First Amendment and was not reasonably related to deterrence, protection of public, and rehabilitation; “disruptive group” could include not only criminal gang but also labor union on strike, political protesters, or group of celebrating sports fans, and government did not explain how prohibiting such association reasonably related to permissible goals of supervised release).

The defendant’s right to free association for the purpose of political speech is a particularly significant liberty interest. A condition that restricts this fundamental right must be supported with evidence that the condition is necessary to accomplish one or more of the § 3583(d) factors, and involves no greater deprivation of liberty than is reasonably necessary. The government has presented no such evidence, nor has it explained the necessity for prohibiting Syed Fai from having contact with every Pakistani government official, diplomat or political leader interested in the peace process who is not co-conspirators in this case. Prohibiting contact with individuals in regular contact with these individuals could be construed to extend to contact with the U.S. Ambassador to Pakistan.

Syed Fai has expressed his desire to meet with representatives of the U.S. government, foreign embassy officials, including officials of Pakistan, members of the Kashmiri resistance, and representatives of major think tanks who are in contact with the Pakistani government and

who share his interest in advancing the peace process between India, Pakistan and the people of Kashmir. More particularly, the defendant requested permission from his probation officer to have contact with Mirwaiz Umar Farooq and Ali Shahnawaz Khan, both leaders of the Kashmiri resistance who also have contacts in the ISI. That request was denied because Farooq and Khan were included on a list of prohibited contacts that the probation officer received from the government. A special condition prohibiting the defendant from having contact with individuals interested in advancing in the peace process who had no involvement with his criminal conduct is impermissibly overbroad and not reasonably related to the permissible goals of supervised release.

WHEREFORE, for the reasons stated, the government's motion should be denied.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

I also certify that a true and accurate copy was sent by email to Sherylle Gant, U.S. Probation Officer at sherylle_gant@vaep.uscourts.gov

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