

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :  
  
v. : 02 CR 395 (JGK)  
  
AHMED ABDEL SATTAR, :  
MOHAMMED YOUSRY, and :  
LYNNE STEWART, :  
  
Defendants. :  
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REPLY MEMORANDUM OF LAW FOR THE NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF  
DEFENDANT STEWART'S MOTION TO DISMISS COUNT FIVE

Preliminary Statement

The National Association of Criminal Defense Lawyers respectfully submits this Reply Memorandum of Law as *Amicus Curiae* in further support of defendant Lynne Stewart's pre-trial motion to dismiss Count Five of the Indictment against her, to the extent that Count Five is based on the allegation that she violated 18 U.S.C. § 1001 by having no intent to keep a promise she allegedly made to the United States Attorney's Office and its agent, the Bureau of Prisons (see Gov't Br. at 179, Indictment ¶ 30).<sup>1</sup>

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<sup>1</sup>*Amicus* does not address [or expresses no view concerning] the government's alternative theory that Ms.

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Stewart violated Section 1001 by making a false statement on May 26, 2000, that she had not previously violated an alleged promise between May 16, 2000, and May 26, 2000, because such a charge would apparently not be based on an alleged false promise and *Amicus* does not have access to the facts relevant to this alternative theory. See Gov't Br. at 193.

## Argument

### COUNT 5 MUST BE DISMISSED BECAUSE 18 U.S.C. § 1001 DOES NOT PROSCRIBE FALSE PROMISES

In *Williams v. United States*, 458 U.S. 279 (1982), the Supreme Court ruled that a false promise is not a false statement. The government claims that *Williams* contains no such holding. See Gov't Br. at 186. However, the Court in *Williams* held not only that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false,'" but also that a check "contains an unconditional promise or order to pay a sum certain in money," which in that case the defendant never intended to honor. 458 U.S. at 284-85. Likewise, in *United States v. Rothhammer*, 64 F.3d 554, 557 (10<sup>th</sup> Cir. 1995), the Tenth Circuit held that "a promise to pay in a promissory note is not a factual assertion." In sum, both courts held that a promise is not a factual assertion and cannot constitute a false statement.

The government also dismisses *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963), as holding nothing more than that the government must prove that a statement charged as false under Section 1001 is false. See Gov't Br. at 183, n. 81. However, even if a false promise were a factual assertion, it could not be prosecuted under the Second Circuit's holding in *Diogo* that a statement that is literally true cannot be charged as a false statement as a matter of law. In *Diogo*, the defendants

were charged with falsely representing, in violation of Section 1001, that they were married. The government proved that the marriages at issue were shams. The Second Circuit reversed the convictions, holding that a prosecution for false representations cannot be grounded upon the omission or concealment of facts other than those stated. 320 F.2d at 905.

In other words, as applicable here, a prosecution for a false representation cannot be based on a promise as a matter of law because it would necessarily be based on the omission or concealment of the fact that the defendant did not intend to keep the promise - the only way the statement could be charged as false.

The government instead relies almost exclusively on *United States v. Shah*, 44 F.3d 285 (5<sup>th</sup> Cir. 1995), in asking this Court to uphold Court 5 of this indictment. However, the underpinning of the decision in *Shah* is directly contrary to the Second Circuit's decision in *Diogo*, a holding reaffirmed by the Second Circuit in *Mandacini*, 729 F.2d 914, 921 (2d Cir. 1984), and is contrary to the Supreme Court's decision in *Williams*. In *Shah*, the Fifth Circuit held that "it could not ignore the plain *but implicit* meaning of the promise" (emphasis added), because a statement that is literally true may be the basis for a false statement prosecution in the Fifth Circuit:

In *United States v. Clark*, 546 F.2d 1130, 1134 (5<sup>th</sup> Cir. 1977), the defendant submitted a form on which he had made a statement assigning payments

“said to be due” to a third party even though that third party was due nothing. *Though the statement on the form was thus literally true, we went beyond these words to consider what the defendant in effect represented, namely, that he had something to assign. Id. See United States v. Thomas, 593 F.2d 615, 620 n. 17 (5<sup>th</sup> Cir. 1979) (ruling that the statement was in effect false even if literally true), cert. denied, 449 U.S. 841 (1980).*

44 F.3d at 292 n. 11 (emphasis supplied). The holding in *Clark*, relied upon by the court in *Shah*, is directly contrary to the holding of the Second Circuit in *Diogo*. *Amicus* respectfully submit that because the decision in *Shah* relied upon Fifth Circuit law directly contrary to the law of this Circuit, this Court may not apply *Shah*. See also Initial Memo of Law of *Amicus* at 11-12.

Not only has the Second Circuit repeatedly held that a statement that is literally true may not be the basis for a false statement prosecution in this Circuit, the above-quoted language in *Shah* is also contrary to the reasoning of the Supreme Court in *Williams*. In *Williams*, the Supreme Court found that a check was a promise to pay that might or might not be fulfilled and that the absence of current funds in the account with which to honor the check did not create a false statement at the time the check was written. In *Shah* and *Clark*, the Fifth Circuit engaged in contrary reasoning, as it said, looking “beyond” the words to find a representation. If the Supreme Court had engaged in such reasoning in *Williams*, the result would obviously have been different; the Supreme Court would instead have found a representation that

sufficient funds were either in the account or would be placed in the account in time for the check to be honored, and the conviction would have been affirmed. Instead, the Supreme Court found no crime had been charged as a matter of law

Moreover, as noted above, in *Mandanici*, 729 F.2d at 921, the Second Circuit reaffirmed the holding of *Diogo* that a statement that is literally true, although misleading, cannot be the basis for a conviction under § 1001, requiring a thorough analysis of the facts of *Mandanici*, which are strikingly different from the facts in this case. In *Mandanici*, the defendant submitted a proposal for construction work estimated to cost \$88,000. In November 2000, his application was approved, reaffirming that a minimum investment of \$88,000 was required. *Mandanici* was required to complete the work by January 30, 1981. On July 1, 1981, *Mandanici* completed and filed a document representing that he had complied with the contract, including its January 1981 deadline. However, *Mandacini* admitted in his trial testimony that as of July 1, 1981, he had not spent \$88,000 on the required rehabilitation. Thus, *Mandacini* was a false statement case, not a false promise case.

The government also asks this Court to ignore entirely a body of supervening law by asking this Court to apply the Second Circuit's 1945 holding in *United States v. Uram*, 148 F.2d 187 (2d Cir. 1945), decided decades before both *Diogo*

and *Williams*. See Gov't Br. at 182-83. The government's reliance on *Mandanici* and *Shah* in support of this position is unfortunate.. The government ignores the fact that the convictions of both Shah and Mandanici would have been reversed if they had been convicted after 1995. Both convictions were affirmed applying law later reversed by the Supreme Court. The Second Circuit later acknowledged that Mandanici was convicted under an erroneous legal standard when the trial judge made a finding of materiality using the preponderance-of-the-evidence standard, instead of submitting the issue of materiality to the jury to find materiality beyond a reasonable doubt. *United States v. Mandanici*, 205 F.3d 519, 531 (2<sup>nd</sup> Cir. 2000). The Fifth Circuit likewise later acknowledged that materiality must be determined by the jury, even though the trial judge had failed to submit the element of materiality to the jury in *Shah*. *United States v. Shunk*, 113 F.3d 31 (5<sup>th</sup> Cir. 1997).

These decisions underscore the importance of applying principles of statutory construction that require a thorough analysis of the plain language of a statute, its legislative history and the rule of lenity, as did the Supreme Court in *Williams*. Both the Fifth Circuit in *Shah* and the government, relying solely on *Shah*, dismiss the need for any such analysis by engaging in circular reasoning.<sup>2</sup> By

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<sup>2</sup>While the government appears to fully embrace the decision in *Shah*, the government also states that “[s]pecific intent is not necessary to a false statement

declaring that the language of a statute that does not include the words "false promises" in its text nevertheless "plainly" includes such language, the government denies the need to look beyond the statute's "plain" language. See Gov't Br. at 192-93. *Amicus* respectfully submits that the plain language of this statute does not include the words "false promises," as do other statutes. See *United States v. Handakas*, 286 F.3d 92, 101-111 (2d Cir. 2002) (a penal statute must define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement).

In addition, both the statute's legislative history and the rule of lenity wholly refute the government's reading of the statute, and both were ignored by the Fifth Circuit in deciding *Shah*. Indeed, the government cites nothing - nor

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prosecution" (Gov't Br. at 190), even though the court in *Shah* lists "specific intent" as one of the 5 elements of a violation of Section 1001. 44 F.3d at 289.

could it - from the statute's legislative history to support its broad interpretation of the statute.<sup>3</sup>

Where, as here, the legislative history of a statute fails to support a broad reading of the statute, and a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [choosing] the harsher alternative to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). Congress did not clearly and definitely include language in Section 1001 demonstrating an intent to criminalize false promises - which were generally not included in criminal false statement statutes at the time Section 1001 was enacted. In the absence of false promise language in the statute and any legislative history demonstrating an intent to criminalize false promises in Section 1001, it is respectfully submitted that this Court should apply the rule of lenity to Section 1001 instead of expanding it to include false promises.

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<sup>3</sup> The government also relies exclusively on a selective history of *civil* false promise cases (see gov't Br. at 191), wholly ignoring the difference between those cases and the history of *criminal* false promise statutes, as did the court in *Shah*. *Amicus* respectfully refers the Court to the Initial Memo of Law of *Amicus*, at 10, for the history of criminal false promise statutes.

Conclusion

For all of the foregoing reasons, as well as those set forth in the Initial Memo of Law of *Amicus*, it is respectfully submitted that Count Five of the Indictment should be dismissed.

Dated: April 25, 2003  
New York, New York

Respectfully submitted,

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