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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 8:03-cr-77-T-30TBM

HATIM NAJI FARIZ,
GHASSAN ZAYED BALLUT,
SAMEEH HAMMOUDEH, and
SAMI AMIN AL-ARIAN,

Defendants.

/

ORDER

THIS CAUSE is before the court on **Defendant Hatim Naji Fariz's Motion to Compel Production of English Language Transcripts** (Doc. 414), the government's response (Doc. 420), and **Defendant Ghassan Ballut's Motion to Adopt Defendant Hatim Fariz's Motion to Compel Production of Transcripts** (Doc. 426).¹ Also before the court is **Mr. Hammoudeh's Amended Motion And Memorandum For Inclusion Of Participation in Investigative, Expert and Other Services by Defendant Not Represented By CJA Counsel** (Doc. 389). A hearing on discovery matters was conducted January 22, 2004. For the reasons set forth herein and as more thoroughly addressed at the hearing, Mr. Fariz's motion (Doc. 414) is **GRANTED in part** and **DENIED in part**, Mr. Ballut's motion (Doc. 426) is **GRANTED**, and Mr. Hammoudeh's motion (Doc. 389) is **DENIED** without prejudice.

¹The court understands that Mr. Al-Arian and Mr. Hammoudeh also join in the motion.

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By his motion, Mr. Fariz seeks an Order compelling the Government to translate and produce English language transcripts of all foreign language discovery in this cause, including but not limited to wire-tapped telephone calls, surveillance tapes, documents, and facsimiles. In support thereof, Mr. Fariz cites to Fed. R. Crim. P. 16 and the Fifth and Sixth Amendments to the United States Constitution, as well as case law thereunder.² The Government responds that it has met or is meeting its Rule 16 obligations to the Defendants, it is mindful of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and it is under no legal obligation to provide translations and transcripts of the entirety of the estimated 20,000 hours of FISA intercepted communications or of any documentary discovery that is in the Arabic or Hebrew language.³

²As revealed at the hearing, the motion is prompted in large part by economic considerations. Previously, all defense counsel had maintained that they could not rely on the Government's translators. To this end, the Federal Defender planned on retaining a team of translators and transcribers to review the voluminous foreign language discovery. After several months' efforts, the Federal Defender was recently denied his extraordinary budget request to pay for this team of interpreters and transcribers. He avers that he is otherwise without the funds to pay for this work, and now maintains that the Government must bear the costs and perform the necessary work. Mr. Al-Arian and Mr. Hammoudeh have been translating for themselves.

³Regarding the estimated 20,000 hours of FISA intercepted communications, the Government denies that it has translations or transcripts for the vast majority of such communications, which it describes as irrelevant to this litigation. The Government represents that it has culled some 800 of the intercepted communications that it believes may be relevant to the instant prosecution by agents' review of certain analyses of the communications performed previously by FISA interpreters, and it notes that it already has provided copies of these communications to the Defendants. According to the Government, approximately 10% of these communications are in English, and some transcripts of the communications in Arabic do exist. As for the remaining communications in which no transcript exists, interpreters and agents have begun the process of translating and transcribing the calls from within this group that they anticipate using at trial. The Government agrees to make a list of these specific 800 or so communications available and, as indicated at the hearing, the court presently directs the Government to provide this list to the Defendants. As for the transcripts, the Government does not object to providing them to the Defendants,

Upon careful consideration of the arguments of all counsel, Rule 16, the Fifth and Sixth Amendments, and pertinent case law, the court concludes that the Defendants offer neither the authority for nor the directive that the court order the Government to translate and transcribe into English all the foreign language discovery produced in this cause. As evidenced by the court's Order on the Defendants' motions for bill of particulars, the court is intent on assisting the Defendants in narrowing the scope of needed investigation in this matter and, where appropriate, expanding the Government's disclosure obligations. However, the instant motion goes too far. To grant this motion would result in a significant waste of the Government's time and money without a demonstrated benefit to the Defendants.

In the first instance, the Government's production to date has exceeded that required by Rule 16. Early on, the Government provided the Defendants with a detailed index of the discovery matters in its possession, custody and control. At its own expense, it has provided (and will continue to provide) to the Defendants two copies of all the FISA intercepted communications in disc form and hard copies of numerous facsimiles intercepted under this authority. One copy has gone to the two Defendants in pretrial detention and the second copy has gone to the Federal Defender for the use by all. Complete production of the FISA communications will be accomplished in the near future. This production has exceeded that which would be required by Rule 16. The Government has also made available for review and copying all of the foreign documentary evidence, with the exception of the so-called

however, it seeks to have the Defendants reciprocate the production of their transcripts in an orderly and expeditious fashion. Accordingly, the court finds that any transcript(s) made of these "relevant" communications should also be provided to the defense to assist their investigation and trial preparation. The timing for the exchange of these transcripts, including those that are likely to be used at trial, is not further addressed by this Order, nor is the Defendant's request for all copies of draft transcripts.

“Israeli evidence,” and evidence from the 1995 and 2003 searches, with the exception of certain hard drives. Although the Israeli evidence is likely not required to be produced under Rule 16, the court has ordered its production in order to expedite the Defendants’ investigation of this significant part of the Government’s case. The computer hard drives seized from the Defendants will be copied and produced in the near future as well. To date, it appears that the Government has more than met its disclosure obligations under Rule 16.

The court does not find that the provisions of Rule 16 require such an order as is sought by the Defendants on Mr. Fariz’s motion. While counsel for Mr. Fariz are correct that they are duty bound to adequately investigate the case on Mr. Fariz’s behalf, and this includes an obligation to prepare a defense against the FISA intercepted communications to be introduced by the Government, the Government has already identified those communications most likely to be used in its case-in-chief based on its agents’ review of earlier FISA analyses. As noted above, transcripts of those communications to be used at trial will be produced. Additionally, as set forth below, the court has ordered the Government to produce the FISA interpreters’ written analyses. This disclosure, while not required by Rule 16, will likely identify other relevant communications and information necessary for the Defendants’ review. This disclosure should also help narrow or at least better focus the defenses’ investigation of the FISA intercepted communications.⁴ While the court recognizes that it has some discretion

⁴While the Government debunks the relevance of thousands of hours of the FISA intercepted communications and urges that the only communications of relevance are those 800 or so identified by its agents, it is apparent that some larger body of communications was identified from the original intercepted communications by FISA interpreters and identified by this analyses. Obviously, at the time the communications were reviewed by these interpreters, they appeared of sufficient significance to warrant the FISA interpreters’ analyses and further review by the FISA agents. In the court’s view, communications identified by the analyses are potentially material to the defense and necessary for the Defendants’ review. Thus, their

to enlarge the scope of production required by Rule 16,⁵ and while the court has done so here, the court declines to exercise such discretion to the extent here sought absent any showing by Mr. Fariz or the other Defendants that such additional imposition on the Government is necessary *and* either likely to lead to material evidence for the Defendants or to result in the Defendants' prejudice if it is not ordered.

The court also can not find that considerations of due process under the Fifth Amendment and *Brady v. Maryland* and its progeny impose a duty on the Government to translate and interpret all the foreign language discovery in this case. A succinct restatement of the due process principles underlying *Brady* and its progeny is set forth in *Strickler v. Greene*, 527 U.S. 263 (1999). There, the Court stated:

In *Brady*, this Court held “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.” *Id.* at 682; *see also* *Kyles v. Whitley*, 514 U.S. 419, 433-34. Moreover, the rule encompasses evidence “known only to police investigators and not to the prosecutor.” *Id.* at 438. In order to comply with *Brady*, therefore, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” *Kyles*, 514 U.S. at 437.

specific identification, even if not required by Rule 16, is appropriate as it will assist the Defendants in their preparation for trial, if not the development of exculpatory evidence.

⁵*See* *United States v. Cannone*, 528 F.2d 296, 298-99 (2d Cir. 1975); *but cf.* *United States v. Baggett*, 455 F.2d 476 (5th Cir. 1972); *see also* *United States v. Campagnuolo*, 592 F.2d 852, 857 n.2 (5th Cir. 1979); *United States v. Carrigan*, 804 F.2d 599, 602-03 (10th Cir. 1986).

These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935).

Strickler, 527 U.S. at 280-81. By Mr. Fariz’s argument, in order for the Government to fulfill its obligations under these principles, the Government must review and interpret the content of all the foreign language discovery and produce English language transcripts so that it may identify any material favorable to him or the other Defendants. This reading of these principles is overbroad. Further, the court already has ordered the Government to reveal to the Defendants and make available for inspection and copying all information and material known to the Government that may be favorable to the Defendants on the issue of guilt or punishment within the scope of Brady, Agurs, Bagley, and Kyles. See (Doc. 152). While these due process considerations and the court’s order impose upon the Government and its law enforcement agents weighty and significant obligations to disclose favorable information to all the Defendants, these principles do not require that the Government translate and transcribe into English all the discovery as here requested, nor do they authorize this court to order the Government to do so upon the showing made by defense counsel to date.⁶

⁶However, the court agrees with defense counsel that the Government may not satisfy its obligations under Brady by merely disclosing all of the evidence to the Defendants and urging that the Defendants must look for the exculpatory information. See United States v. Hsia, 24 F. Supp. 2d 14, 29-30 (D.D.C. 1998) (stating that, “[t]he government cannot meet its Brady obligations by providing [the defendant] with access to 600,000 documents and then claiming that [he] should have been able to find the exculpatory information in the haystack”). To the extent that the Government or its agents are aware of such exculpatory information,

Mr. Fariz and Mr. Ballut (who also has CJA appointed counsel), urge an equal protection argument as well based upon their alleged lack of resources and inability to retain interpreters. This argument is without merit. In the first instance, these gentlemen are no less able to listen to the intercepted communications and interpret them for their counsel as Mr. Al-Arian and Mr. Hammoudeh are doing for their retained counsel. Secondly, the record reflects that despite prodding by the court, they have not sought relief from the court under the CJA for funds to hire one or more interpreters. As the court has previously indicated, it stands ready to assist these Defendants in obtaining the necessary funds for interpreters and, if necessary, additional equipment to facilitate the process. As for the argument that Mr. Fariz's Sixth Amendment right to a fair trial would be denied if he were unable to locate critical exculpatory evidence in the voluminous discovery, the argument is not compelling at present as neither Mr. Fariz nor any other Defendant has urged or demonstrated that such exculpatory evidence exists or that the Government has ignored its obligations under Brady.

As discussed at the hearing, the Government denies that it possesses a log of all the FISA intercepted communications. It does acknowledge that it has custody of the written analyses by FISA interpreters of intercepted communications deemed worthy of further consideration by agents conducting the FISA investigations. As discussed in the court's Order on the Defendants' motions for bill of particulars (Doc. 428), exceptional temporal and geographic scope and the sheer volume of discovery in a given case may warrant orders requiring disclosures by the Government beyond the norm in order to fairly and expeditiously advance the case toward trial. See Fed. R. Crim. P. 16(d); United States v. Bin Laden, 92 F.

they are bound to reveal it to the Defendants in a reasonably timely manner.

Supp. 2d 225, 234 (S.D.N.Y. 2000). The communications addressed in these written analyses and the circumstances of the creation of the analyses itself suggest that both are material to the Defendants' preparation. Thus, in order to advance the Defendants' identification and investigation of these calls, copies of these written analyses should be provided to defense counsel.

Accordingly, Mr Fariz's **Motion to Compel Production of English Language Transcripts** (Doc. 414) is **GRANTED in part** and **DENIED in part**. Within thirty (30) days from the date of the hearing, the Government shall provide to defense counsel a list specifically identifying the 800 communications it has determined to be relevant. Further, within thirty (30) days from the date of the hearing, the Government shall provide defense counsel with copies of the written analyses made by the FISA interpreters. In producing such copies, the Government may redact extraneous notations or comments reflecting work product or other privileged information added to the analysis. In all other respects, the motion is denied.

As the court urged at the hearing, each defense counsel should be mindful of the constitutional obligation to provide his or her client with the effective assistance of counsel. In this case, this obligation clearly cannot be fulfilled without an adequate investigation of the FISA intercepted communications. It is apparent that counsel for Mr. Fariz and Mr. Ballut have fallen woefully behind the other Defendants in their review of these matters. It is not an acceptable explanation to urge upon the court that this is due to a lack of funds, especially when no request has been made to the court for an authorization of expert assistance under the

CJA.⁷ Accordingly, counsel for Mr. Fariz and Mr. Ballut shall promptly address with the court their needs for the assistance of an Arabic interpreter to assist each in their investigation

Mr. Hammoudeh's Amended Motion And Memorandum For Inclusion Of Participation in Investigative, Expert and Other Services by Defendant Not Represented By CJA Counsel (Doc. 389) is DENIED without prejudice. As addressed at the hearing, the court will authorize the expenditure of some funds (\$ 699.96) to purchase additional equipment to be used at F.S.P. Coleman, which will further facilitate Mr. Hammoudeh's and Mr. Al-Arian's review of the FISA intercepted communications. This equipment is the property of the court and shall be returned to the court at the conclusion of the case or as otherwise directed.

Done and Ordered in Tampa, Florida, this 30th day of January 2004.



THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Terry Zitek and Terry Furr, Assistant United States Attorneys
Counsel of Record

⁷While this court respects the considerations of the budget committee of the Federal Defender Program and its prerogative to decline to authorize the sums requested by the Middle District Federal Defender, this court must assure that the defendants before it receive effective assistance of counsel. In the present context, this requires the expenditure of funds to hire expert interpreters to assist CJA counsel in understanding the Government's evidence; preparing the defense, including defense transcripts for use at trial; and defending against the Government's interpretations, where appropriate. This will be costly, but it is required.

F I L E C O P Y

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