

The Facts

After the indictment was returned in this case, the government announced to the Court and the defense that it was in possession of thousands of hours of FISA Arabic-language intercepts spanning a nine year period of time. Counsel for defendant Fariz apparently decided that the appropriate defense strategy was to translate and transcribe all such intercepts and sought funding to hire translators to perform the task. At that time, the FISA intercepts were classified, which created obvious complications. Shortly thereafter, the government discovered that most of the FISA intercepts had been recorded on defectively manufactured magnetic tape, and advised the Court that it would take up to 32 weeks to convert the tapes to a medium which would allow for the safe handling of the communications. The government also informed the Court that most of the rest of the FISA intercepts had been captured on a unique medium in the possession of the FBI, which meant that the information on these devices also had to be converted to another medium usable by the general public. Back at this time, defendant Fariz showed no interest in any government translations. Indeed, the dominant defense theme was (and is) that the government's translations are wrong. As this Court stated in the Order at issue: "Previously, all defense counsel had maintained that they could not rely on the Government's translators." (Doc. 437 at page 2, n2.)

The government also revealed that it had in its possession several boxes of witness statements, police reports, and medical reports in the Hebrew language, relating to the acts of violence alleged in the overt acts in Count One. Although most of these documents are more in the nature of Jencks Act statements than materials

governed by Fed. R. Crim. P. 16, the government agreed to make these available in discovery as well. Virtually no written translations exist. These documents are also subject to the defendant's current motion.

To initiate discovery, the Court ordered the government to create an inventory of the discoverable items in its possession. In compliance, the government devoted considerable resources to this task. After approximately three weeks of work, the government completed and disseminated an inventory over 400 pages in length and containing over 17,000 entries. With revisions, the portion devoted to the Hebrew-language documents now exceeds 100 pages.

Creeping into defendant Fariz's latest motion is the claim that the government has not been forthcoming with discovery, and has been disingenuous and less than candid in these proceedings with regard to discovery. Given that this latest motion is merely a legal challenge to the Court's Order and not to any action by the government, such a theme seems misplaced. Of course, the government disputes such claims, and stands on the record created during the course of the numerous status conferences held in this case. In any event, the issue here is simply whether the Court erred in denying the challenged portions of defendant Fariz's motion.

Before turning to the legal analysis, it is appropriate, and apparently necessary, to further explain the process by which the FISA intercepts were obtained. Given that the FISA statute has been around since 1978, and there have been numerous criminal cases prosecuted using FISA intercepts as evidence, counsel for defendant Fariz should be aware of this process. See, e.g., In Re: Sealed Case, 310 F.3d 717

(U.S.F.I.S.C.R. 2002) (and cases cited therein); United States v. Thomson, 752 F.Supp. 75 (W.D.N.Y. 1990) (and cases cited therein). The process involving foreign language interceptions is similar to that employed in Title III wire-tap cases. See, e.g., United States v. David, 940 F.2d 722, 730 (1st Cir. 1991).

In this case, the FBI employed translators skilled in Arabic and English. These translators were knowledgeable of the goals of the foreign intelligence investigation. All communications on all facilities subject to the FISA orders were intercepted and recorded. Shortly thereafter, the translators listened to each conversation and reviewed each facsimile to determine if it was pertinent to the objectives of the foreign intelligence investigation. If it was, the translator prepared a summary in the English language and noted the date, time, telephone number, etc. If the translator determined that the communication was not pertinent, no summary or record of any kind was prepared. No log of each communication was contemporaneously prepared. Nevertheless, the non-pertinent conversations themselves were preserved on the magnetic tape along with the pertinent conversations. Pertinent facsimiles were preserved in physical form.

This process generated thousands of English language summaries, and it is these summaries which the government has been ordered to produce. The government initially considered these summaries to be "internal government documents made by (a) . . . government agent in connection with investigating . . . the case," and thus believed them to be non-discoverable under Rule 16(a)(2) of the Federal Rules of Criminal Procedure. However, at the same time, the government also recognized the

difficult situation the Court and the parties found themselves in upon learning that the Federal Defender's budgetary request for translators had been rejected, and thus the government did not object to the release of otherwise non-discoverable material. The government also offered to provide the defense with a list of the FISA intercepts its attorneys thought were relevant to the criminal case (fewer in number than the ones deemed pertinent to the foreign intelligence investigation). These conversations comprise approximately one percent of the FISA intercepts. The Court accepted the government's offer. The purpose of providing these items to the defense was to help the defense focus on the significant information so that they could employ translators more efficiently. Nevertheless, in spite of these efforts to assist the defense in focusing on the criminal-case aspect of the FISA foreign intelligence investigation, defendant Fariz still challenges the Court's Order and unfairly and inappropriately castigates the government at the same time.

The Law

Although defendant Fariz criticized the government for failing to cite any "legal authority in counterpoint to any of the cases cited by Mr. Fariz in his motion," (Doc. 459 at page 10, n.5), and seems to believe this fact makes some point, there were no cases cited specifically in support of defendant Fariz's specific request which required a counterpoint by the government. The Court asked for specific authority at the status conference and counsel provided none. The Court Order states that there is no case authority in support of defendant's specific request. Defendant Fariz cites general Brady platitudes with which the government has no quarrel. The government fully

comprehends its Brady obligation. After all, it was the government who brought to Magistrate Judge Pizzo's attention during the initial detention hearing the misidentification of the individual with whom defendant Fariz was speaking in Overt Act 253. The government is constantly on the look out for Brady information. If it comes across Brady information, the government realizes that it has an affirmative obligation to provide it to the defendant. It is not finding any. In fact, as it digs into communications not currently alleged in the indictment, the government discovers more and more inculpatory ones as to all defendants.²

Without legal authority, defendant Fariz contends that the government has a Brady-imposed duty to create English language transcripts of all Arabic, Hebrew and English language recorded communications in its possession between any two or more participants, regardless of the subject matter of the communication, analyze it for Brady

²In reliance upon Brady, several co-defendants have made a specific request for translations which "differ in any way" from translations which were used to prepare the communications described in the overt acts in the indictment. This request is overly broad as a matter of law. In United States v. Zambrana, 841 F.2d 1320, 1337 (7th Cir. 1988), with regard to the accuracy of translations, the Seventh Circuit held:

In our view, a foreign language translation is sufficiently accurate to assist the jury if the translation reasonably conveys the intent or idea of the thought spoken. It is axiomatic that a translation of most foreign languages to English (and vice versa) can never convey precisely and exactly the same idea and intent comprised in the original text, and it is unrealistic to impose an impossible requirement of exactness before allowing a translation to be considered by a jury

Id. at 1337. Applying this standard of accuracy to Brady determinations, it becomes clear that only a translation which does not reasonably convey the intent or idea of the thought spoken (or misidentifies the speaker) can truly be considered potentially Brady, not a transcript which merely "differs in any way" with another.

information, and then turn over all the transcripts to defendant Fariz so that he can do an independent review. The Court disagreed and denied the motion. The Brady doctrine is a constitutional due process requirement intended to insure fairness during a trial. It is not a rule of criminal procedure. The government may discharge its Brady obligation as it sees fit. Defendant Fariz posits the existence of a single, correct procedure in this case, which, of course, if followed, results in the creation of tens of thousands of translations and transcripts without regard to relevancy to anything. This procedure would result in the creation of a transcript of a conversation in Arabic between a child of one of the targets of the FISA intercept and another child discussing a friend's boyfriend. This procedure would result in the creation of a transcript of a conversation involving a user of the telephone facility calling Pizza Hut to place an order for the delivery of a pepperoni pizza. (These are but two hypothetical examples of countless non-pertinent communications which were legally minimized in accordance with FISA requirements.) This procedure would result in the creation of a transcript of a statement given by a shopkeeper in Israel who observed nothing in the vicinity of a bombing. (This is a hypothetical example of something which might be found in the Israel documents.) No reasonable interpretation of the Brady doctrine could require such results. All that the Brady doctrine requires the government to do is to bring to a defendant's attention any exculpatory information it finds, and that is what the government intends to do.

While there are no cases in defendant Fariz's favor, there are several cases against him, one of which describes his argument as "frivolous." In United States v.

Parks, 100 F.3d 1300, 1307-08 (7th Cir. 1996), the government charged several defendants with drug trafficking offenses. Part of the government's evidence consisted of four hours of electronic surveillance culled from 65 hours. Due to the circumstances, the conversations were very difficult to hear. Solely on the basis of the Brady doctrine, the trial court ordered the government to prepare transcripts of the remaining 61 hours. The government appealed. The Seventh Circuit held that the trial court erred in imposing that burden on the government. The appellate court noted that the record disclosed that it was mere speculation that there was any Brady information in the remaining 61 hours, and that there were irrelevant and useless conversations. The appellate court reasoned that there was no logical or practical reason to require the government to perform an act not required by law.

In United States v. Zavala, 839 F.2d 523, 527 (9th Cir.), cert. denied, 488 U.S. 831 (1988), the defendant complained on appeal that the government should have been required to provide translated transcriptions of all 11,000 Spanish conversations intercepted. The government provided the defense with tapes of all 11,000 conversations, but with translated transcriptions of only 1,800 relevant ones. The defendant argued that this procedure violated his due process and equal protection rights, claiming that the failure to provide translations of the other tapes prejudiced his ability to prepare a defense, namely, that the phrases the government alleged were code words actually had an innocent explanation. In rejecting his claim on appeal as frivolous, the Ninth Circuit noted that the defendant could have employed a translator who could have identified any helpful tapes, which then could have been fully translated and transcribed.

While defendant Fariz is seeking to impose on the government a burden the Brady doctrine does not require, the defendant is not doing other things contemplated by the Brady doctrine. Some of the co-defendants have sent the government letters making specific Brady requests; defendant Fariz has not. While defendant Fariz has acknowledged that he has reviewed some of the FISA intercepts, these efforts have generated no specific Brady requests. While a defendant's pretrial preparations and strategies are certainly privileged, a defendant also has the opportunity to alert the government to the possible existence of specific Brady information so that the government is put on notice and can look for it. In the absence of specific Brady requests, the government's ability to identify exculpatory information is confined to its understanding of the evidence and limited by its own view of the case. Put another way, if there is Brady information in the placing of an order for a pizza, defendant Fariz had better give the government a clue what to look for.

The consequences of a "general" request were recently discussed in United States v. Jordan, 316 F.3d 1215, 1252 n. 81 (11th Cir. 2003):

Where, as here, the defendant only makes a general request for exculpatory material under Brady, the government decides which information must be disclosed . . . Additionally, we observe that a general request for "all" Brady material . . . does not help the prosecutor determine which information in the government's possession might constitute Brady evidence . . . (a) general request for all Brady evidence places an onerous, if not impossible, burden on the prosecutor to identify correctly all "material" items.

Id. at 1252 n. 81. Defendant Fariz simply has not followed the Eleventh Circuit's advice in Jordan. Instead, defendant Fariz persists in pushing an argument the Ninth Circuit in Zavala found to be frivolous.

The solution to the current "translator" problem is found in Zavala itself. In that case, the trial court offered to supply the defendant with a single translator to assist in a review of the recorded conversation. Neither defendant Fariz nor defendant Ballut has proposed this obvious solution: one translator per foreign language for each indigent defendant. First, defendant Fariz asked for a large team of translators, and that was denied. Second, defendant Fariz made the request to compel the government to perform the translations, and that was denied. Third, defendant Ballut has renewed the old request for a large team of translators (Doc. 463), which is pending. The defendants keep missing the mark.

However, if he persists in this motion, counsel for Fariz should be required to state, based on the review of the FISA intercepts conducted by the defendants collectively thus far, (1) that there are no irrelevant communications, (2) that it is necessary to fully translate and transcribe each communication regardless of content, and (3) that every single communication must be translated and transcribed. It is doubtful counsel for Fariz could in good faith make such representations. In reality, this extravagant procedure is not necessary for the preparation of an adequate defense. But, if counsel for Fariz is unwilling to rely on the government's definition of Brady, is unwilling to rely on the government's translations, and is unwilling to rely on defendant's Fariz's own translations, then it is time for counsel to make a less extravagant request for translation services.

Wherefore, for the foregoing reasons, defendant Fariz's motion for reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent
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