

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

04 APR -9 AM 9:34
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

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

v.

SAMI AMIN AL-ARIAN, et al.,

Defendants.

**MOTION OF SAMI AMIN AL-ARIAN FOR LEAVE
TO RESPOND TO GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO COMPEL**

COMES NOW the Accused, Dr. Sami Amin Al-Arian, by and through undersigned counsel, pursuant to Local Rule 3.01 (b), and hereby moves this Honorable Court for the entry of an Order permitting the Accused to file a responsive pleading to the Government's pejorative and misleading Response to Defendant Al-Arian's Motion to Compel. The Accused also requests a hearing in order to adequately rebut the government's contentions and to clarify the issues. The grounds for this motion necessarily reference the Accused's Motion to Compel and are as follows:

1. The Government is currently in violation of two previous Pretrial Discovery Orders, Documents #55 and 152. The Magistrate Judge, in Section IV: Additional Obligations of the Government, No. 6, ordered the Government to "...advise the Defendant whether a confidential informant was used in this case within twenty (20) days of the date of this Order."

2. In its current Response, Doc. 499, Page 17, the government refuses to provide this information, claiming that the Court should not entertain this motion “as it is premature”. As of the date of this writing, by the terms of the Court’s Order, the Government should have produced this information, at the earliest, by *April 15, 2003*, and at the latest, by *June 24, 2003*. The defense submits that the Government’s failure to produce discovery in a timely fashion continues to be an ongoing concern.
3. On page 16, Paragraph 9, of the Government’s Response, Mr. Zitek writes that the defense never asked for specific information about confidential informants. “Its first appearance in this case is in this motion.” Mr. Zitek is mistaken. In a letter faxed to him on January 27, 2004, defense counsel specifically requested the following information:

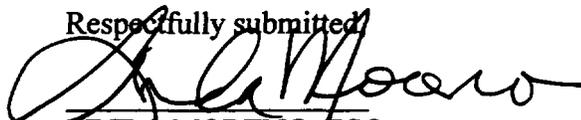
“The defense further requests any information concerning whether any individuals, either named or unnamed in the indictment, have acted as informants as described in Roviaro v. United States, 353 U.S. 53 (1957) with respect to any aspect of this investigation.” (Letter attached hereto as Exhibit A).
4. In a responsive letter signed by Mr. Zitek, dated March 10, 2004, which was handed to defense counsel moments before the discovery conference commenced, the government specifically declined to answer any requests about confidential informant information. (Letter attached hereto as Exhibit B).

5. The Government's Response, Doc. 499, which also attempts to mischaracterize Brady material as "work product". Apparently, the government is taking the position that Brady material can be exempted from disclosure if it can be characterized as work product. This issue also requires a responsive brief from the defense.
6. The discovery issues at stake here go to the heart of the Accused's Due Process rights and must be carefully briefed to maintain the integrity of this process and to preserve confidence in the outcome of the impending trial. See United States v. Bagley, 473 U.S. 667.

WHEREFORE, for the foregoing reasons, the Accused's Motion for Leave to Respond to the Government should be granted.

Dated: 4/8/04

Respectfully submitted,



LINDA MORENO, ESQ.

1718 E. 7th Avenue
Suite 201

Tampa, Florida 33605

Telephone: (813) 247-4500

Telecopier: (813) 247-4551

Florida Bar No: 112283

WILLIAM B. MOFFITT, ESQ.

(VSB #14877)

Asbill Moffitt & Boss, Chtd

1615 New Hampshire Avenue, N.W.

Washington, D.C. 20009

Telephone: (202) 234-9000

Telecopier: (202) 332-6480

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

Sent via U. S. Mail this 8th day of April 2004.

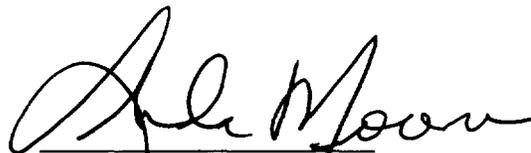
Walter Furr, Esq. &
Terry A. Zitek, Esq.
Office of the U.S. Attorney
400 N. Tampa St., Suite 3200,
Tampa, Florida, 33602;

Daniel W. Eckhart, Esq.
Office of the U.S. Attorney
80 N. Hughey Ave., Suite 201
Orlando, Florida, 32801

Kevin Beck, Esq. &
M. Allison Guagliardo, Esq.
Assistant Federal Public Defenders
400 N. Tampa St., Suite 2700,
Tampa, Florida, 33602;

Steven Bernstein, Esq.,
P.O. Box 1642,
Gainesville, Florida, 32602; and,

Bruce Howie, Esq,
Piper, Ludin, Howie & Werner, P.A.
5720 Central Ave.
St. Petersburg, Florida
33707



LINDA MORENO, ESQ.
1718 E. 7th Ave.; Suite 201
Tampa, Florida 33605
Telephone: 813-247-4500
Facsimile: 813-247-4551
Florida Bar No. 112283

**ASBILL MOFFITT & BOSS
CHARTERED**

ATTORNEYS AT LAW

THE PACIFIC HOUSE

SECOND FLOOR

1615 NEW HAMPSHIRE AVENUE, N.W.

WASHINGTON, D.C. 20009-2520

OF COUNSEL
WILLIAM J. MERTENS*
W. LOUIS HENNESSY*

HENRY W. ASBILL
WILLIAM B. MOFFITT*
L. BARRETT BOSS*
PETER B. PARIS**

* ALSO ADMITTED IN MD.
- ADMITTED IN VA. ONLY
** ADMITTED IN MD. ONLY

202-234-9000

FAX: 202-332-6480

info@ambdc.com

http://www.ambdc.com

January 27, 2004

VIA FACSIMILE

Paul I. Perez, Esq.
Terry Zitek, Esq.
Walter Furr, Esq.
Office of the United States Attorney
Middle District of Florida
400 North Tampa Street, Suite 3200
Tampa, FL 33602

Re: United States v. Dr. Sami Al-Arian
Discovery Matters

Gentlemen:

We are writing regarding discovery in the Al-Arian matter in an effort to clarify some issues that became apparent after the hearing on January 22.

In the hearing, Mr. Zitek referenced 800 "relevant" conversations as "minimized" conversations. Should we take that to mean that the recorded conversations are edited, i.e., that the recorded conversations are not recordings of the entire conversation that took place at that time on that date, but only that portion of the conversation that whomever was monitoring it thought was relevant to whatever intelligence investigation was ongoing at that time? Please explain.

We would also like clarification as to the exact nature of the FISA surveillance in this matter. While it appears obvious that telephone and fax lines were monitored, we are requesting information on whether any other types of surveillance authorized by either FISA or Title III were undertaken. Were there any surreptitious entries that involved the placement of any type of monitoring devices in the home, office or any place in which Dr. Al-Arian had a possessory interest? Further, we are requesting information as to whether, during the course of this investigation, Dr. Al-Arian was overheard on any electronic surveillance that the government had conducted on any other targets of any other investigation(s).

— EXHIBIT A —

We are further requesting whether the government is seeking to utilize any electronic surveillance of Dr. Al-Arian by any law enforcement or intelligence agency of any foreign government. If so, please provide all information in your possession concerning such surveillance, including but not limited to the dates, times and places of the surveillance, the exact nature of the surveillance (i.e., wiretap, etc.) and what government and what agency of that government maintained the surveillance.

Additionally, we are requesting the date that FISA surveillance was initiated on Dr. Al-Arian, the dates of all extensions, and when, if ever, the surveillance terminated. We are further requesting whether any of the surveillance of Dr. Al-Arian involved the monitoring of any arguably privileged matters. If so, we request that the product of such surveillance be produced immediately. We are also requesting information concerning how any privileged material was handled during the course of the investigation. In particular, we would like to know what, if any, precautions were instituted to wall off the utilization of privileged materials from the agents or prosecutors in this matter, and whether any arguably privileged conversations were in any way utilized in the preparation of the indictment.

Lastly with regard to FISA monitoring, we would like to know whether any of the monitored conversations were multiple-party conversations in English. We seek production of any monitored conversations in English.

As we have requested previously, pursuant to Brady v. Maryland and its progeny, we request all translations of any conversations that differ in any way from translations utilized in the preparation of the indictment, including the current translations, any previous translations, and the translation(s) used for the indictment. We are now formally requesting the same information regarding the faxes. Additionally, we are once again requesting the names and addresses of any translators involved in the initial phases of the investigation where the government is intending to offer a translation that in any way differs from an earlier translation.

We are also requesting any information as to whether any person named in the indictment has ever been listed by the FBI or any intelligence or law enforcement agency of the United States as an "informant" or an "asset" of any kind. This request includes, but is not limited to, Dr. Al-Arian or any member of his family. Additionally, we request that the government provide any and all written reports concerning such listings. The defense further requests any information concerning whether any individuals, either named or unnamed in the indictment, have acted as informants as described in Roviero v. United States, 353 U.S. 53 (1957) with respect to any aspect of this investigation.

With respect to the affidavit in support of the search warrant that was authorized on February 19, 2003 (the Myers affidavit), we have only been provided with 86 of the 113 pages. We specifically request pages 87 to 113 of the affidavit or, in the alternative, an explanation as to why we have yet to receive the complete affidavit.

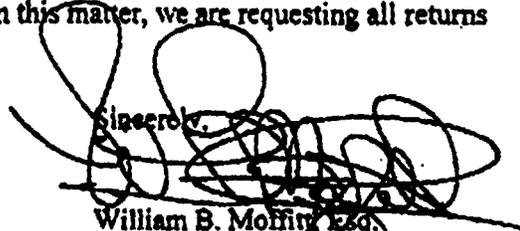
With request to the searches, we are requesting all information regarding the seizure of privileged information, including what, if any, arguably privileged materials were seized, how they were handled; what, if any, precautions were taken to avoid the seizure of privileged materials; how any arguably privileged materials were maintained; whether any arguably privileged materials were in any way utilized in the preparation of the indictment in this matter; and whether these materials were in any way walled off from the prosecutors or agents involved in this prosecution.

We are also requesting information concerning whether the government monitored the Dr. Al-Arian's e-mail communications. If there was any monitoring of e-mails, the defense requests information concerning whether the monitoring occurred in real time. We also request that all monitored e-mails be produced as discovery in this matter. We are also seeking the authority under which such monitoring occurred.

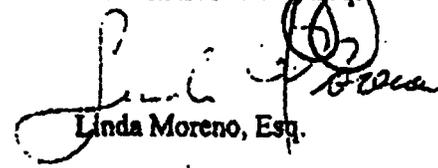
Additionally, we are requesting all information regarding the existence of any "mail cover(s)" on any member of the Al-Arian family. Specifically, we are requesting any list made regarding the origin of any mail and whether the mail cover involved the surreptitious opening of any mail. If so, the defense is seeking all information concerning such mail cover and the authority upon which the government proceeded.

Finally, with respect to all searches in this matter, we are requesting all returns that were filed by any agent.

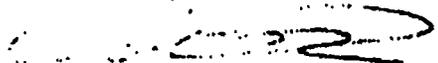
Sincerely,



William B. Mohr, Esq.



Linda Moreno, Esq.



Peter B. Paris, Esq.

Main Office
300 North Tampa Street, Suite 3700
Tampa, Florida 33602
813/274-6000
813/274-6100 (Fax)



300 North Hogan Street, Suite 700
Jacksonville, Florida 32202-0270
904/301-6300
904/301-6310 (Fax)

2110 First Street, Suite J-137
Fort Myers, Florida 33901
239/461-2200
239/461-2219 (Fax)

U.S. Department of Justice
United States Attorney
Middle District of Florida

500 West Church Street, Suite 100
Orlando, Florida 32805
407/648-7500
407/648-7643 (Fax)

Reply to: Tampa, Florida
Telephone: 813/274-6336
Facsimile: 813/274-6108

March 10, 2004

William B. Moffitt, Esquire
Asbill Moffitt and Boss, Chtd.
The Pacific House
1615 New Hampshire Avenue, N.W.
Washington, DC 20009

Linda Moreno, Esquire
1718 E. 7th Avenue, Suite 201
Tampa, Florida 33605

Re: United States v. Sami Amin Al-Arian, Case No. 8:03-CR-77-T-30TBM
Discovery Letters dated January 27, 2004 and February 3, 2004

Mr. Moffitt and Ms. Moreno

Letter of January 27, 2004

1. The 800 relevant conversations and faxes discussed by the government at the hearing on January 22, 2004 were not minimized. They are available in their entirety within the discovery being provided by the government. They were all obtained pursuant to FISA intercept orders.

2. In addition to monitoring telephone and fax lines, the government utilized FISA orders on Al-Arian's computer and an external microphone at WISE. No surreptitious entry was involved to place any monitoring device. We decline to answer, at this time, whether Al-Arian was overheard on any electronic surveillance that the government conducted on any other targets of any other investigations. We are aware of our obligations under Rule 16(a)(1)(B)(i) of the Federal Rules of Criminal Procedure and the Brady doctrine, and will proceed accordingly.

3. At this time, the government is not seeking to utilize any electronic surveillance by any law enforcement or intelligence agency of any foreign government.

Letter to William E. Moffitt, Esquire and Linda Moreno, Esquire
Dated March 10, 2004

4. The labels on each disk provided in discovery indicate the dates of electronic surveillance for each target and for each communications facility. If any privileged material was intercepted, no tech cut was produced. This material, if it exists, is included in the recorded information being provided in discovery. This material was minimized. If it exists, the prosecution and agents are unaware of this information. Therefore, it was not utilized in the preparation of the indictment.

5. The written analysis created by the translators of the non-redacted FISA communications indicate whether the communication was in English. They have been provided with the other conversations on the disks you have received.

6. A Brady 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 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.

7. Sami Al-Arian was a source of information for the FBI for a brief time. We decline to answer any other request in this paragraph.

8. From Page 87 onward, the affidavit contains a copy of the indictment in this case. The affidavit has been unsealed and should be available for your review at the courthouse.

9. Arguably privileged matters, if seized, were minimized and walled off from the prosecutors and agents in this case.

Letter to William E. Moffitt, Esquire and Linda Moreno, Esquire
Dated March 10, 2004

10. The government monitored e-mail communications of Sami Al-Arian pursuant to a FISA order. This material is on disks which we are holding until we obtain the software to enable you to view them. When the software arrives, it will be provided to you with the disks.

11. A mail cover was used during this investigation. The mail cover did not involve the surreptitious opening of mail

12. The court and government are still attempting to rebuild the court file regarding the search warrants

Letter of February 3, 2003

1. Any note or report in our possession of the INS examiner who conducted the interview of Sami Al-Arian is available in the discovery.

2. We have no information whether Sami Al-Arian has been an asset of agencies such as the CIA or NSA. After discussing the matter with your client, if you have specific information regarding an agency, please let us know and we will investigate it.

3. We have no materials in our possession that were the result of a security investigation of Sami Al-Arian

4. If we possess any photographs or documents regarding a meeting with the President or his staff, they are available in the discovery.

Sincerely,

PAUL I. PEREZ
United States Attorney


TERRY A. ZITEK
Executive Assistant U.S. Attorney

cc: James Livingston, Supervisory Special Agent
Federal Bureau of Investigation