

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

04 APR 16 PM 2:00

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

UNITED STATES OF AMERICA,

v.

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

SAMI AMIN AL-ARIAN, *et al.*,

Defendants.

DEFENDANT AL-ARIAN'S MOTION TO DISMISS
FOR ABUSE OF THE GRAND JURY
AND INCORPORATED MEMORANDUM IN SUPPORT THEREOF

The Accused, SAMI AMIN AL-ARIAN, by counsel, hereby moves this Honorable Court for the entry of an Order dismissing the instant indictment due to the government's abuse of the grand jury. As support for this Motion, counsel states as follows:

1. Counsel has learned that the government has subpoenaed witnesses to a grand jury empanelled for the purpose of investigating Dr. Al-Arian, who is currently under indictment in the above-captioned matter.
2. It is improper for the government to utilize the grand jury to investigate a pending indictment or to seek discovery.

We believe that the government is engaging in this type of misconduct.

This motion/petition/stipulation has been duly considered and is hereby denied, this 20 day of April, 2004.

James S. Moody, Jr.
JAMES S. MOODY, JR.
U.S. DISTRICT JUDGE

FILED

2004 APR 20 AM 9:43
CLERK U.S. DISTRICT COURT
TAMPA, FLORIDA

SCANNED

510

MEMORANDUM OF LAW

I. THIS COURT HAS THE POWER TO STOP GOVERNMENTAL ABUSE OF THE GRAND JURY.

“Grand Juries are subject to judicial control...” Branzburg v. Hayes 408 U.S. 665, 708 (1972). The power of the district court to regulate the grand jury has been recognized time and again. See Gravel v. United States, 408 U.S. 606 (1972) (affirming the district court’s granting of protective relief precluding the asking of certain questions at the grand jury); In Re Grand Jury Investigation of Hogle, 754 F.2d 863 (9th Cir.1985)(affirming the district court’s granting of a protective order in a grand jury proceeding). The power to supervise the conduct of the grand jury is not limited to protected statutory or constitutional privileges, but extends to curbing the grand jury from subject matter irrelevant to the crimes investigated. See United States v. R. Enterprises, 498 U.S. 292 (1991)(stating that district court may quash grand jury subpoena on relevance grounds); In Re Grand Jury Matters, 751 F.2d 13, 17-18 (1st Cir. 1984)(holding that the district court may exercise its supervisory powers to limit the grand jury’s investigation even when privilege is not an issue.) Moreover, the Court’s power to supervise the grand jury includes the power to stay grand jury proceedings until a related dispute is resolved. See In Re Federal Grand Jury Proceedings, 975 F.2d 1488 (11th Cir. 1992)(District court stayed grand jury proceedings pending appeal of denial of motion to quash grand jury subpoenas); In Re Grand Jury Proceedings, 875 F.2d 927 (1st Cir.1989)(District court stayed grand jury proceedings pending hearing and resolution of motion to recuse prosecutors).

II. THE GOVERNMENT MAY NOT ABUSE THE GRAND JURY TO CONDUCT AN IMPROPER INVESTIGATION RELATING TO DR. AL-ARIAN.

The principle that the district court may confine the grand jury to its proper duties begs the question of what those duties are. The answer is simple: the grand jury investigates for the purpose of indictment. “The grand jury’s mission is to determine whether to make a presentation or return an indictment.” United States v. Mandujano, 425 U.S. 564, 573 (1976) “The principle that the powers of the grand jury may be used only to further its investigation. . .[is] well recognized. Thus, practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. (United States v. Under Seal, 714 F.2d 347, 349 (4th Cir.) (1983) (emphasis added.); See also, In Re Grand Jury Proceeding (Johanson), 632 F.2d 1033 (3d Cir. 1980); (United States v. Woods, 544 F.2d 242, 249 (6th Cir. 1976); United States v. Fisher, 455 F.2d 1101, 1104-05 (2d Cir. 1972); United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972); In Re National Glass Workers, 287 F. 219 (N.D.Ohio 1922).

It is most certainly not the grand jury’s role to investigate at the behest of the Government possible defenses to be asserted at trial, or otherwise engage in post-indictment, pre-trial discovery. “It is a misuse of the grand jury to use it as a substitute for discovery.” Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972). See also, United States v. Star, 470 F.2d at 1217 (where the Court condemned the government for subpoenaing witness for the purpose of investigating defendant’s alibis.) See also United States v. Williams, 504 U.S. 36, 51-52 (“[I]t is the grand jury’s function not ‘to inquire upon what foundation [the charge may be] denied’ or otherwise to try the suspect’s

defenses, but only to examine ‘upon what foundation [the charge] is made’ by the prosecution.”) The Government has agreed that the grand jury does not have the power to investigate defenses, and that the manipulation of the grand jury for this purpose is an abuse. United States Attorney’s Manual, 9-11.120 (1990) (“[T]he grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted...nor can it be used solely for pre-trial discovery or trial preparation...”)

Thus, the function of the grand jury with regard to a particular matter terminates with issuance of the indictment. As the Sixth Circuit has noted, the grand jury should play no role in discovery or the trial itself. United States v. Doss, 563 F.2d 265, 276 (6th Cir.1977)(en banc)(“[w]e find no constitutional, statutory or case authority for employment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already indicted defendant. Such a use of the grand jury would pervert its constitutional and historic function.”)

The abuse of the grand jury in this instance is significant. It denies Dr. Al-Arian the ability to defend himself fairly at trial in violation of his Constitutional rights to due process. This Court should look beyond the Government’s pre-textual averments, whatever they may be, and see this tactic for what it is: an attempt to further investigate an ever-weakening case. The law, justice, and fairness demand that the government be stopped from misusing the grand jury in this manner.

CONCLUSION

WHEREFORE, for the foregoing and such other reasons as may appear to the Court, the Accused requests that the Court set a hearing on the matter, and, if it is discovered after the hearing that the government has abused the grand jury process, the Accused further requests that the instant indictment be dismissed.

Dated: 15 April 2004

Respectfully submitted,



LINDA MORENO, ESQ.
1718 E. 7th Avenue; Ste. 201
Tampa, Florida 33605
Telephone: (813) 247-4500
Telecopier: (813) 247-4551
Florida Bar No: 112283

WILLIAM B. MOFFITT, ESQ.
(VSB # 14877)
Cozen O'Connor
1667 K Street, NW
Suite 500
Washington, D.C. 20006
Telephone: (202) 912-4800
Facsimile: (202) 912-4830

CERTIFICATE OF SERVICE

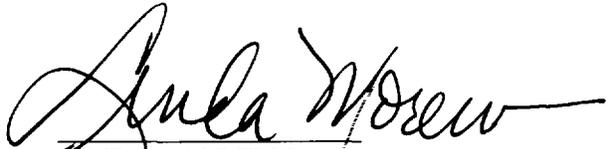
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 16th day of April, 2004 upon:

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

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
1718 E. 7th Avenue; Ste. 201
Tampa, Florida 33605
Telephone: (813) 247-4500
Telecopier: (813) 247-4551

F I L E C O P Y

Date Printed: 04/21/2004

Notice sent to:

— Walter E. Furr, Esq.
U.S. Attorney's Office
Middle District of Florida
400 N. Tampa St., Suite 3200
Tampa, FL 33602

8:03-cr-00077 jlh

— Daniel W. Eckhart, Esq.
U.S. Attorney's Office
Middle District of Florida
501 W. Church St., Suite 300
Orlando, FL 32805

8:03-cr-00077 jlh

— Sami Amin Al-Arian
FCI Coleman
P.O. Box 1033
Coleman, FL 33521-1033

8:03-cr-00077 jlh

— Ghassan Zayed Ballut
8018 Nottingham
Tinley Park, IL 60477

8:03-cr-00077 jlh

— Kevin T. Beck, Esq.
Federal Public Defender's Office
Middle District of Florida
400 N. Tampa St., Suite 2700
Tampa, FL 33602

8:03-cr-00077 jlh

— Wadie E. Said, Esq.
Federal Public Defender's Office
Middle District of Florida
400 N. Tampa St., Suite 2700
Tampa, FL 33602

8:03-cr-00077 jlh

— Naji Ahmad
6509 W. 81st Place
Burbank, IL 60459

8:03-cr-00077 jlh

— Raba Ahmad
6509 W. 81st Place
Burbank, IL 60459

8:03-cr-00077 jlh

— Ayman Ramadan
9413 S. Oketo Ave.
Bridgeview, IL 60455

8:03-cr-00077 jlh