

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

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CLERK OF COURT  
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

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

HATIM NAJI FARIZ  
\_\_\_\_\_ /

**RESPONSE TO THE GOVERNMENT'S MOTION FOR RECONSIDERATION  
OF THE COURT'S MARCH 12, 2004 ORDER  
AS IT PERTAINS TO THE SCIENTER REQUIREMENTS  
OF A SECTION 2339B PROSECUTION**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, respectfully submits his Response to the Government's Motion for Reconsideration as it Pertains to the Scierter Requirements of a Section 2339B Prosecution and Memorandum of Law in Support (Docs. 519, 520).

**INTRODUCTION**

Count Three alleges that Mr. Fariz conspired to knowingly provide material support and resources to a designated foreign terrorist organization, the Palestinian Islamic Jihad ("PIJ"), in violation of 18 U.S.C. § 2339B. In response to the Defendants' motions to dismiss, this Court held that in order to prove a violation of 18 U.S.C. § 2339B, "the government must prove beyond a reasonable doubt that the defendant knew that: (a) the organization was a FTO or had committed unlawful activities that caused it to be so designated; and (b) what he was furnishing was 'material support.'" (Doc. 479 at 25). In addition, the Court held that "[t]o avoid Fifth Amendment personal guilt problems, . . . the

government must show more than a defendant knew something was within a category of ‘material support’ in order to meet (b). In order to meet (b), the government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.” *Id.*

On April 26, 2004, the government filed its motion to reconsider the scienter requirement as it pertains to 18 U.S.C. § 2339B, the statute underlying Count Three of the Indictment. (Docs. 519, 520).<sup>1</sup> Section 2339B provides, in pertinent part:

Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

18 U.S.C. § 2339B(a)(1). The government agrees with the Court’s conclusion, based on *United States v. X-Citement Video*, 513 U.S. 64 (1994), that “knowingly” applies to both the elements of “material support or resources” and foreign terrorist organization (“FTO”) status or activities warranting FTO status. (Doc. 520 at 2-3 (“Thus, we propose that the statute requires that a defendant knowingly provide ‘material support,’ and that he know that the recipient of his support has been designated as an FTO or is an entity that engages in the type of terrorist activity sufficient to merit designation.”) (footnote omitted)). The government’s disagreement is with the Court’s conclusion that the specific intent requirement is necessary

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<sup>1</sup> The government did not seek to reconsider the Court’s ruling on the scienter requirement as it relates to Count Four.

to avoid Fifth Amendment personal guilt and vagueness problems. The government further contends that the Court's interpretation converts Section 2339B from a general intent statute.

None of the government's arguments call into question the Court's ruling that a scienter requirement is necessary to satisfy Fifth Amendment due process concerns. Moreover, it is important to note that the government has ignored that the Court's interpretation of Section 2339B to include a specific intent requirement was also essential to the Court's conclusion that the statute withstood First Amendment challenges. Specifically, the Court held that "[t]his Court's construction of AEDPA and IEEPA (requiring proof of a specific intent to further the unlawful activities of a SDT or FTO) reinforces this Court's conclusion that the prohibitions in AEDPA and IEEPA are closely drawn to further the governmental interest." (Doc. 479 at 34; *see also id.* at 30). Mr. Fariz therefore respectfully submits that the Court should not reconsider its ruling on the scienter requirement as it relates to Count Three.<sup>2</sup>

### **STANDARD OF REVIEW**

In its motion for reconsideration, the government failed to set forth the standard of review. A motion seeking reconsideration "must demonstrate why the court should reconsider its prior decision and '[s]et forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Villaflores v. Royal Venture Cruise Lines*,

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<sup>2</sup> Mr. Fariz reasserts, re-adopts, and incorporates by reference the pretrial motions to dismiss filed by the Defendants in this case, including Docs. 200, 245, 246, 273, 301, 425, and 444. Mr. Fariz also adopts the co-defendants' responses to the government's motion for reconsideration, to the extent not contrary to his interests.

No. 96-2103-Civ-T-17B, 1997 WL 728098, \*2 (M.D. Fla. Nov. 17, 1997) (attached) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294 (M.D. Fla. 1993)). Such motions “generally serve a very narrow function; they are designed solely to correct manifest errors of law or fact or to present newly discovered evidence that could not have been discovered at the time of the original motion.” *United States v. Wilkerson*, 992 F. Supp. 1358, 1363 (M.D. Fla. 1998), *rev’d on other grounds*, 170 F.3d 1040 (11th Cir. 1999); *United States v. Gross*, No. 98 CR 0159 SJ, 2002 WL 32096592, \*3-\*4 (E.D.N.Y. Dec. 5, 2002) (attached) (discussing the “very strict standard” for motions for reconsideration); *United States v. Watkins*, 200 F. Supp. 2d 489, 490-91 (E.D. Pa. 2002) (indicating that reconsideration “is an extraordinary remedy to be ‘granted sparingly because of the interests in finality and conservation of scarce judicial resources’”), *rev’d on other grounds*, 339 F.3d 167 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 1505 (2004). New arguments are not appropriate grounds for reconsideration. *Wilkerson*, 992 F. Supp. at 1363 (citing *Villaflores*, 1997 WL 728098, at \*2). A court’s decision to decline to reconsider is reviewed for abuse of discretion. *Villaflores*, 1997 WL 728098, at \*2 (citations omitted).

## ARGUMENT

### **I. The Specific Intent to Further the Unlawful Objectives of an FTO Is Necessary to Satisfy the Due Process Requirement of “Personal Guilt” for Prosecutions Under 18 U.S.C. § 2339B**

#### **A. Fifth Amendment Personal Guilt**

The government contends that 18 U.S.C. § 2339B imposes criminal liability only for personal actions, rather than on association with others, and therefore does not raise the

“personal guilt” concerns addressed in *Scales v. United States*, 367 U.S. 203 (1961). In *Scales*, the Supreme Court considered the membership clause of the Smith Act, 18 U.S.C. § 2385, which prohibited becoming or being a member of any group that teaches, advocates, or encourages the overthrow or destruction of the government by force or violence, knowing the purposes thereof. The Supreme Court determined that the Smith Act’s requirements that an individual be an active member and have the specific intent to bring about the violent overthrow of the government satisfied the due process concern of ensuring that a person is not convicted for mere sympathy or association with a criminal enterprise. 367 U.S. at 220, 224-28.

The government argues that *Scales* has no application where the statute does not “predicate guilt on association,” but instead “proscribes personally providing material support.” (Doc. 520 at 5-6). The personal guilt doctrine, recognized by the Supreme Court, is much broader than the government claims; it extends not only to “status” but also to “conduct” that is criminalized because of its relation to others’ criminal activities. As the Supreme Court explained in *Scales*:

In our jurisprudence guilt is personal, and when the imposition of punishment on a status *or on conduct* can only be justified by reference to the relationship of that status *or conduct* to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

367 U.S. at 224-25 (emphasis added). The personal guilt doctrine, “one of the most fundamental principles of our jurisprudence,” functions to “prevent[] the persecution of the

innocent for the beliefs and actions of others.” *Bridges v. Wixon*, 326 U.S. 135, 163 (1945) (Murphy, J., concurring).

The concern regarding personal guilt is of equal force in this case. Section 2339B prohibits the provision of items, such as money, transportation, and lodging, that would normally be wholly innocent. The Defendants are not alleged themselves to have engaged in any violent activity. The “evil sought to be prevented” are the alleged acts of violence in the Middle East. Providing material support or resources is only the subject of a criminal statute based on its alleged connection to an organization that the U.S. government has designated as a foreign terrorist organization. *See Scales*, 367 U.S. at 226 (“In this instance it is an organization [the Communist Party] which engages in criminal activity . . .”). Thus, it is the alleged connection to others’ criminal activities that give rise to this criminal prosecution. In the words of the Supreme Court in *Scales*, when the imposition of punishment on status or conduct (provision of material support or resources) can only be justified by reference to its relationship to other criminal activity (acts of violence in the Middle East), “that relationship must be sufficiently substantial to satisfy the concept of personal guilt.” *Id.* at 225.

The government also takes an overly narrow view of what Section 2339B prohibits by claiming that statute “does not proscribe association with any other organization.” (Doc. 520 at 6). Each of Defendants in this case are being subjected to criminal prosecution as alleged members of the PIJ. The first time that each of the Defendants are named in the Indictment, they are alleged to be members of the PIJ. (Doc. 1, Indictment, at 3-5 ¶¶ 7-13,

15). In the case of Mr. Fariz, he is alleged to be “a PIJ member and close associate of SAMI AMIN AL-ARIAN, SAMEEH HAMMOUDEH and GHASSAN ZAYED BALLUT.” *Id.* at 5 ¶ 15. Section 2339B prohibits providing money and things that a person, if a member, would give to an organization.<sup>3</sup> As the Court has recognized, the “term ‘material support’ is broadly defined in AEDPA” to include “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” (Doc. 479 at 6) (citing 18 U.S.C. §§ 2339A(b), 2339B(g)(4)). The types of support and resources prohibited ranges from human resources (“personnel” and “expert advice and assistance”), to meeting halls and modes of communication (“facilities” and “communications equipment”), to financial support and membership dues (“currency and financial and monetary instruments”).

The statute thus bans a wide-range of material support or resources, substantially interfering with the freedom of association. In this respect, the government’s attempt to distinguish Section 2339B on a membership basis is illusory. Congress has in the past attempted to equate affiliation or association to proscribed groups (specifically the Communist

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<sup>3</sup> To the extent that what the government is saying is that an individual need not be a member to be prosecuted under 18 U.S.C. § 2339B, this point serves to reinforce the conclusion that the statute casts a wide net that includes those who are even further removed from a connection to a designated organization, and therefore further supports the conclusion that a specific intent requirement is necessary to ensure personal guilt for others’ criminal activity.

Party) with giving money or things of value. In *Bridges v. Wixon*, 326 U.S. 135 (1945), the Supreme Court examined a statute that subjected aliens to deportation based on affiliation “with any organization, association, society, or group, that believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States.” *Id.* at 138 n.1. Congress defined affiliation to include that “the giving, loaning, or promising of money or any thing of value to any organization, association, society, or group of the character above described shall constitute affiliation therewith.” *Id.* at 141. In reviewing the statute, the Supreme Court expressed that “the act or acts tending to prove ‘affiliation’ must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere co-operation with it in lawful activities,” where the “act or acts must evidence a working alliance to bring the [proscribed] program to fruition.” *Id.* at 143-44; *id.* at 146. The Supreme Court indicated that the imposition of sanctions, in that case deportation, must be based on the individual’s aid to the unlawful objectives of the organization, rather than to its legitimate functions. *Id.* at 143-47; *id.* at 163 (Murphy, J., concurring) (expressing that the statute, on its face and as applied, violates the doctrine of personal guilt).<sup>4</sup>

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<sup>4</sup> In other words, simply because the U.S. government has made the judgment that a group is banned, an individual’s association, affiliation, or support of this group cannot be the reason for criminal sanctions, or for restrictions on an individual’s liberty, without a showing that the individual himself had a criminal purpose. See *Aptheker v. Secretary of State*, 378 U.S. 500, 511-12, 514 (1964) (considering liberty interest of right to travel and holding that “[t]he broad and enveloping prohibition [against applying for a passport for a member of a registered Communist organization] indiscriminately excludes plainly relevant considerations such as the individual’s knowledge, activity, commitment, and purposes in and places for travel,” where an individual’s

The government contends, alternatively, that even if there is a *Scales* concern, the statute's knowingly requirement is sufficient to satisfy personal guilt concerns. In the government's view, "[a] contributor who knowingly provides material support to an organization that he knows is an FTO provides that organization with something that can further its terrorist goals directly or indirectly (by freeing up other resources) – whether he specifically intends to further those activities or not." (Doc. 520 at 7). The government's argument only serves to underscore the need for the specific intent requirement in order to satisfy personal guilt. As the former Fifth Circuit explained, "*knowing* association with a group cannot be made a punishable act just because some of the group members are engaged in criminal conduct." *Sawyer v. Sandstrom*, 615 F.2d 311, 317 (5th Cir. 1980).<sup>5</sup> In *Sawyer*, the Court found the statute prohibiting knowingly loitering in any place with others knowing that drugs are being unlawfully used or possessed was unconstitutionally overbroad. *Id.* at 316-17. The Court concluded that "[a] more artfully drawn ordinance would reach only those persons who are active participants in illegal narcotics transactions or who aid and abet the primary offender, without chilling the first amendment rights of persons engaged in essentially innocent associational conduct." *Id.* at 317-18.

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intent to travel could be for a "wholly innocent purpose").

<sup>5</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

## B. First Amendment Implications

In asking the Court to reconsider its ruling, the government has ignored the implications of its arguments to the First Amendment issues at stake. The Supreme Court has repeatedly recognized that although the First Amendment does not expressly include a freedom of association, the First Amendment protects this freedom as a derivative of the rights of speech and assembly. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The freedoms of speech and association include the right to make financial contributions or donations to political groups and charitable causes. *See, e.g., Buckley*, 424 U.S. at 15-16, 22-25; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493-95 (1985); *Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980). As the Supreme Court has explained, the “freedom of association ‘is diluted if it does not include the right to pool money through contributions, for funds are often essential if ‘advocacy’ is to be truly or optimally ‘effective.’” *Citizens Against Rent Control*, 454 U.S. at 296 (quoting *Buckley*, 424 U.S. at 65-66).

Under the “closest” scrutiny standard set forth in *Buckley*, if the government demonstrates a sufficiently important interest for the regulation, a significant interference with protected associational rights is permissible so long as the means used are “closely drawn to avoid unnecessary abridgment of associational freedoms.” 424 U.S. at 25 (citations omitted).

In response to the Defendants' First Amendment arguments in this case, the Court concluded that "a congressional decision to stop the spread of global terrorism by preventing fundraising and prohibiting support is closely drawn to further this interest. This Court's construction of AEDPA and IEEPA (requiring proof of a specific intent to further the unlawful activities of a SDT or FTO) reinforces this Court's conclusion that the prohibitions in AEDPA and IEEPA are closely drawn to further the governmental interest." (Doc. 479 at 34).

Without a specific intent requirement, Section 2339B is a total ban on contributions, regardless of amount of the contribution, the intention of the contributor, or whether the contribution was ever used for any unlawful activity. A specific intent element is necessary, however, to avoid holding a contributor liable for an action that another does or may do. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982); *Healy v. James*, 408 U.S. 169, 186 (1972); *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1290 (3d Cir. 1994); *see also* H.R. Rep. No. 104-383, 178 & n.6 (1995) (dissenting view) ("The Supreme Court has repeatedly held that contributing money to political groups is protected conduct under the First Amendment unless it can be proved that the contribution is intended to further an unlawful activity."). As the Supreme Court explained in *Scales*:

If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with the "substantive evils that Congress has a right to prevent." . . . The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant "specifically intend(s) to accomplish (the aims of the organization) by resort to violence."

367 U.S. at 229 (citing *Noto v. United States*, 367 U.S. 290 (1961)). Thus, without a specific intent requirement, Section 2339B certainly cannot be found to be “closely drawn.” Accordingly, for the reasons expressed herein and in the Defendants’ motions to dismiss reincorporated above, Mr. Fariz respectfully submits that this Court should not reconsider its decision that Section 2339B includes a specific intent requirement.

## **II. Section 2339B Does Raise Vagueness Concerns in this Case**

The government secondly contends that despite the Court’s concern that several types of “material support or resources” are unconstitutionally vague, the Court should not have been concerned because the Defendants “here cannot raise a colorable vagueness claim on the facts of their case.” (Doc. 520 at 8). The government suggests that the Court should not have considered hypothetical situations but instead should have focused on the allegations in this case.

### **A. The Appropriate Standard Where First Amendment Rights are at Stake**

As the Supreme Court has indicated, “the void-for-vagueness doctrine requires that a penal statute define the 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.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). The Supreme Court has explained that the more important of these two considerations is that the legislature establish sufficient guidelines for law enforcement, so

as to prevent police, prosecutors, and juries from following their “personal predilections.” *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974)).

The Supreme Court has stated that “[i]t is well established that vagueness challenges to statutes *which do not involve First Amendment freedoms* must be examined in the light of the facts of the case at hand.” *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (emphasis added); see *United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002) (“Except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand”). This case clearly involves First Amendment freedoms, including the freedom of association.<sup>6</sup>

The government also fails to point out that the Supreme Court applies a different level of scrutiny in evaluating vagueness depending on whether the statute is aimed, for example, at business activity, or at constitutionally protected activity like that at issue in this case. As the Supreme Court has explained:

The degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may

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<sup>6</sup> In addition to the vagueness problems of Section 2339B, Mr. Fariz reasserts that Section 2339B also presents an overbreadth problem under the First Amendment.

mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) (footnotes and citations omitted). The government ignores that Section 2339B's prohibitions substantially interfere with the First Amendment freedoms of speech and association, as explained in Part I.B, *supra*, and therefore a "more stringent vagueness test should apply." *Id.* at 499.

**B. Even With Respect to the Allegations in this Case, Vagueness Concerns Arise**

As the Defendants have previously pointed out, several courts have found that certain of the "material support or resources" included in Section 2339B's prohibition are invalid as vague. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1133-34 (9th Cir. 2000) (holding that the terms "training" and "personnel," are unconstitutionally vague in violation of the First Amendment), *cert. denied*, 532 U.S. 904 (2001)<sup>7</sup>; *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185 (C.D. Cal. 2004) (finding "expert advice or assistance" to be

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<sup>7</sup> The Ninth Circuit's holding was reaffirmed in the court's opinion issued on December 3, 2003. See *Humanitarian Law Project v. Reno*, 352 F.3d 382, 403-05 (9th Cir. 2003) (holding that the court had previously concluded correctly that "personnel" and "training" are unconstitutionally vague, and rejecting the government's argument that its definitions of "training" and "personnel" contained in the U.S. Attorneys' Manual cured the vagueness of the statute).

unconstitutionally vague); *United States v. Sattar*, 272 F. Supp. 2d 348, 357-60 (S.D.N.Y. 2003) (holding that the “provision” of “communications equipment” and of “personnel” were unconstitutionally vague as applied to the defendants). The government’s motion for reconsideration fails to provide any guidance to the Court that would otherwise save the statute and its definition of material support or resources from a vagueness challenge.

The government claims that the Court should examine the Defendants’ alleged “core” conduct, and if it falls within the “core” of the statute, then the statute is not unconstitutionally vague. Notably, when the government attempts to describe this alleged “core” conduct, it does so with reference to the specific intent and purpose of the alleged conduct:

The majority of the defendants’ alleged activities – the raising and sending of funds for the benefit of the PIJ *in order to assist and promote violent attacks in the Middle East*, and providing logistical assistance *for* terrorist attacks by utilizing communications equipment such as telephones and telephone facsimiles for the PIJ financial transactions and transmittal of information about violent attacks – falls squarely within the heartland of ‘material support’  
.....

(Doc. 520 at 10) (footnotes omitted; emphasis added); *see also* Doc. 346, Government’s Memorandum of Law in Opposition to Defendant Sami Amin Al-Arian’s Amended Motion to Dismiss Counts One Through Four of the Indictment, at 18 (“As noted previously, the principal conduct which gives rise to the defendant’s liability in this case includes managing the financial and logistical operations of the PIJ and soliciting and raising monies and funds to support the PIJ and their operatives in the Middle East, *in order to assist the PIJ’s engagement in, and promotion of, violent attacks. . . .*”) (emphasis added). The government has therefore failed to provide a meaningful alternative to the Court’s decision.

### **III. The Court Has Not Impermissibly Converted Section 2339B from a General Intent Statute**

The government lastly argues that adding a specific intent requirement to Section 2339B converts it from a general intent statute in contradiction of congressional intent. Such an argument misconstrues the nature of the Court's ruling. In the first instance, the government cites cases that "involve statutes that regulate potentially harmful or injurious items," and, as such, are subject to a relaxing of the traditional *mens rea* requirements. *Staples v. United States*, 511 U.S. 600, 607 (1994); see *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994) (drug paraphernalia); *Hamling v. United States*, 418 U.S. 87 (1974) (obscene material). The types of material support that the government is alleging the Defendants conspired to provide to PIJ are clearly not *per se* "dangerous" items such as those regulated in the above cases.

Further, even if the material support allegedly provided is somehow dangerous, "that an item is 'dangerous,' in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent." *Staples*, 511 U.S. at 611. The Court has rightly indicated its concern that individuals who intend that any material support they provide to a FTO be used for lawful purposes would become liable under Section 2339B and be subject to harsh criminal penalties under the government's reading of the statute. In both its written pleadings and at oral argument, the government has maintained its interpretation of the statute in this manner, indicating that such individuals violate Section 2339B, even if they fully intend their material support to be for legitimate ends. The Court

is not requiring the same standard as contemplated by a statute containing a willfulness standard, but rather interpreting the statute in a way that ensures that it does not ensnare individuals engaged in otherwise lawful activity, in violation of the First and Fifth Amendments.

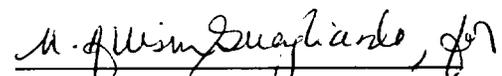
#### **IV. Conclusion**

Based on the foregoing, Mr. Fariz respectfully submits that this Court should not reconsider its ruling concerning the specific intent requirement of a prosecution brought under 18 U.S.C. § 2339B.

Respectfully submitted,

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 11 Fla. L. Weekly Fed. D 358  
 (Cite as: 1997 WL 728098 (M.D.Fla.))

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**H**

United States District Court, M.D. Florida.

Edgar VILLAFLORES, et al., Plaintiffs,  
 v.  
 ROYAL VENTURE CRUISE LINES, LTD., a  
 Florida Corporation, in personam,  
 Commercial Investment Trust Corporation, a New  
 York Corporation, in personam,  
 an the TSS Sun Venture, her engines, tackle,  
 equipment, apparel, appurtenances,  
 etc., in rem, Defendants.  
 Edward Wilkins, et al., Third Party Plaintiffs,  
 Baffin Shipping Co., Inc., The CIT Group/Capital  
 Equipment Financing, Inc., and  
 The CIT Group/Equipment Financing, Inc., Third  
 Party Plaintiffs,  
 v.  
 Sun Travel Investment Trust Corporation, Third  
 Party Defendant.

No. 96-2103-Civ-T-17B.

Nov. 17, 1997.

**ORDER ON PLAINTIFFS' MOTION FOR  
 RECONSIDERATION AND CLARIFICATION**

KOVACHEVICH, J.

\*1 This cause comes before the Court on the following motions and responses:

Dkt. 87 Intervening Plaintiffs' Motion for Clarification and/or Motion for Reconsideration;  
 Dkt. 89 The CIT Defendant's Response to Royal Venture's Motion for Clarification and Reconsideration.  
 Dkt. 90 Royal Venture's Motion for Clarification and Reconsideration;  
 Dkt. 91 The CIT Defendant's Response to Intervening Plaintiffs' Motion for Clarification and/or Motion for Reconsideration;

**BACKGROUND**

This action was initiated by a group of seamen

seeking unpaid wages, thus invoking the Federal Court's admiralty jurisdiction. The seamen's claims were subsequently settled. However, prior to dismissal of the seamen's claims, Intervening Plaintiffs filed and served a Complaint alleging a maritime lien and a maritime tort. The basis for jurisdiction in this action now relates to the allegations contained in the Intervening Plaintiffs' complaint.

Defendant Commercial Investment Trust Corporation (CIT), purchased the TSS SUN VENTURE (the Vessel) at a foreclosure auction, and thereafter began searching for a possible buyer. Negotiations were entered into between CIT and Royal Venture Cruise Lines, Inc. (Royal Venture) for the purchase of the Vessel. Subsequently, the parties entered into a Purchase Agreement (the Agreement) for the sale of the Vessel. As part of the terms of the Agreement, Royal Venture was required to provide a letter of credit to secure their obligations to repair the Vessel, and to avoid maritime liens.

Royal Venture was permitted to transport the Vessel to Tampa for repairs and refurbishing necessary to comply with the specifications of the Agreement. Intervening Plaintiff (Wilkins) posted an standing irrevocable letter of credit though North Carolina National Bank (NCNB), pledging his assets as collateral.

The deal for the purchase of the Vessel never closed, allegedly due to Royal Venture's inability to raise necessary capital. CIT was required to draw down on the letter of credit, in its full amount, to cover debts incurred by Royal Venture. Wilkins intervened in the original suit filed by the crew of the vessel for wages, and filed a claim for a maritime lien based on the draw down of the letter. Wilkins also filed a claim for a maritime tort based on CIT's use of the funds.

**STANDARD OF REVIEW**

The proper standard of review for the Court when considering a motion to reconsider is set forth in

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1997 WL 728098  
 11 Fla. L. Weekly Fed. D 358  
 (Cite as: 1997 WL 728098 (M.D.Fla.))

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*Prudential Securities, Inc. v. Emerson*, 919 F.Supp. 415 (M.D.Fla.1996). The Court in *Prudential* held that "[a] Court will not alter a prior decision absent a showing of clear and obvious error where 'the interest of justice' demand correction." *Id.* (quoting *American Home Assurance Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1239 (11th Cir.1985)). Furthermore, the Court held that motions for reconsideration "[s]hould not be used to raise arguments which could, and should, have been made." *Prudential*, 919 F.Supp. at 417.

\*2 A motion for reconsideration must demonstrate why the court should reconsider its prior decision and "[s]et forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294 (M.D.Fla.1993). Courts have recognized three (3) grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10th Cir.1981). Thus, a party who fails to present its strongest case in the first instance generally has no right to raise new theories or arguments in a motion for reconsideration. *See Renfro v. City of Emporia, Kan.*, 732 F.Supp. 1116, 1117 (D.Kan.1990). Moreover, the refusal to grant relief in a motion for reconsideration is reviewed under an abuse of discretion standard. *See Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (the Cir.1988); *see also In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir.1987) (determining the question of whether a lawsuit may proceed as a class action is committed to the sound discretion of the district court.)

Wilkins and RVCL do not argue that there has been an intervening "change" in controlling law or that either party has "newly discovered evidence." Although not phrased in the same manner, both Wilkins and RVCL assert that the Court committed clear error and that reconsideration is necessary to prevent manifest injustice.

## DISCUSSION

### A. MOTION FOR CLARIFICATION OF INTERVENING PLAINTIFFS

Wilkins has moved for clarification and/or reconsideration of this Court's order dismissing this

action for lack of subject matter jurisdiction. The Court entered its Order based on Wilkins' lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1333(1). The Court found that the letter of credit, which is Wilkins' tie to this action, was established in consideration of Royal Venture's prospective purchase of the Vessel.

Wilkins asserts a lack of understanding of this Court's order of dismissal. Although lack of understanding is not a basis for reconsideration, this Court will interpret Wilkins' assertions as allegations of manifest injustice. Wilkins claims that there was not sufficient basis in the pleading to deny admiralty, and that he is entitled to a maritime lien because the letter of credit was drawn down to pay for repairs on the Vessel. He also asserts that the Court failed to make a finding as to the fraud alleged in Count II of the Plaintiff's Intervening Complaint. After a detailed review of these points, this Court finds that there was no manifest injustice in the Order dismissing this action, and therefore the dismissal of this action stands.

The Eleventh Circuit has previously held that "neither contracts for construction nor for the sale of a vessel are maritime in nature ." *See Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir.1988); *citing Jones v. One Fifty Foot Gulfstar Sailing Yacht, Hull No. 01*, 625 F.2d 44, 47 (5th Cir.1980); *see also Richard Bertram & Co. v. Yacht, Wanda*, 447 F.2d 966, 967 (5th Cir.1971) (stating that the prevailing rule is that a contract for the sale of a ship is not a maritime contract.)

\*3 The Eleventh Circuit has also held that the term "necessaries" includes most goods and services that an owner would provide to enable the Vessel to perform the function for which she is engaged. *See Trinidad Foundry and Fabricating, LTD., v. M/V K.A.S. CAMILLA*, 966 F.2d 613, 614 (11th Cir.1992); *see also Espirito Santo Bank of Florida v. M/V Tropicana*, 1992 AMC 1672 (S.D.Fla. May 29, 1990).

This Court's order dismissing the action stated that the underlying purpose of the letter of credit was to facilitate the sale of the Vessel to Royal Venture (Dkt.86). This fact is substantiated by the Agreement for the purchase of the Vessel, which was attached to Wilkins' complaint. The Agreement required a letter of credit be provided by

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Royal Venture, thus making the letter of credit a condition of the sale of the Vessel. Therefore, the underlying purpose for posting the letter of credit was to meet the provision of the Agreement and facilitate the purchase of the Vessel by Royal Venture.

Also contingent to the sale of the Vessel were the repairs to the Vessel. As part of the Agreement, the buyer, Royal Venture, agreed to make certain repairs. Royal Venture also agreed that failure to fund the required repairs would be an event of default. Therefore, the repairs to the Vessel were not necessities in the traditional maritime sense, but were conditions of the sale of the Vessel to Royal Venture.

In *Hirsch v. The San Pablo*, 81 F.Supp. 292 (S.D.Fla.1948), the Court found that money advanced for the purchased of a vessel is not a maritime transaction. "Its only purpose has regard merely to a change in ownership, and not to the use of the vessel in navigation, or the perils of the seal. It creates no maritime lien." *Id.* at 293. The principles applied in *Hirsch* can be applied to this case. The letter of credit posted by Wilkins was a condition of the sales agreement for the Vessel, and therefore it did not create a maritime lien.

The substance of Wilkins' complaint clearly involves a contract for the sale of the Vessel, which was not maritime in nature. This Court did not have subject matter jurisdiction in admiralty over this action pursuant to 28 U.S.C. § 1333(1). This Court did not make a clear error resulting in manifest injustice by dismissing this action. Accordingly, the Intervening Plaintiffs' Motion for Clarification and/or for Reconsideration is DENIED.

#### **B. ROYAL VENTURE'S MOTION FOR CLARIFICATION AND RECONSIDERATION**

After the filing the Wilkins' complaint, Royal Venture filed a crossclaim against CIT. Royal Venture asserted four counts against CIT: (1) Maritime Lien for Necessaries, (2) Quantum Meruit (3) Breach of Contract, and (4) Fraudulent Inducement. Royal Venture, like Wilkins, fails to expressly assert claims in the present motion that meet one of the three criteria for granting a Motion for Reconsideration. However, this Court will view the motion to as requesting relief based on the

need to correct clear error or manifest injustice.

\*4 Royal Venture argues in its motion that admiralty jurisdiction for its cross-claims against CIT should be maintained. The basis for Royal Venture's claim is that it has a maritime lien against the Vessel for the provision of necessities, and that CIT fraudulently induced Royal Venture and breached the Agreement.

As with Wilkins, this Court must look at the fact that the Agreement established between the parties was for the purchase of the Vessel. The letter of credit and the repairs to the Vessel were provided as conditions to the purchase. All work done to the Vessel was done pursuant to the Agreement. The repairs to the Vessel were not necessities, but were actually conditions precedent to the sale of the Vessel. As such, they will not support a maritime lien.

The other counts asserted in Royal Venture's complaint all relate back to the Agreement. Since the Agreement was a contract for the purchase of a vessel, subject matter jurisdiction in admiralty could not have been maintained by this Court. This Court did not make a clear error resulting in manifest injustice by dismissing this action. Therefore, Royal Venture's Motion for Clarification and Reconsideration is **DENIED**. Accordingly, it is

**Ordered** that Intervening Plaintiffs' Motion for Clarification and/or for Reconsideration (Dkt.87) and Royal Venture's Motion for Clarification and Reconsideration (Dkt.90) are **denied**.

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Only the Westlaw citation is currently available.

United States District Court,  
E.D. New York.

UNITED STATES OF AMERICA,

v.

Allen I. GROSS, Peter Rebenwurz and David  
Malek, Defendants.

No. 98 CR 0159 SJ.

Dec. 5, 2002.

Defendants moved to dismiss charges of bank fraud and making false statements in connection with mortgage applications. The District Court, Johnson, J., 165 F.Supp.2d 372, granted motion. Government moved for reconsideration. The District Court, Johnson, J., held that government was not entitled to reconsideration of ruling dismissing charges against defendants.

Motion denied.

West Headnotes

**Criminal Law** ⇐ 632(3.1)  
110k632(3.1) Most Cited Cases

Government was not entitled to reconsideration of district court ruling dismissing charges against defendants of bank fraud and making false statements, where government attempted to reargue same points raised in response to initial motion to dismiss, government placed focus on arguments it neglected to focus on previously, and government failed to justify introduction of new witness affidavit when government failed to present witness's testimony previously. Local Rule 6.3.

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Defendants Malek and Rebenwurz.

*MEMORANDUM AND ORDER*

JOHNSON, J.

\*1 On October 2, 2001, this Court issued a Memorandum and Order (the "2001 Order") granting a Motion brought by Allen I. Gross ("Gross"), Peter Rebenwurz ("Rebenwurz") and David Malek ("Malek"), (collectively "Defendants") to dismiss an indictment brought against them on February 12, 1998. *United States v. Gross*, 165 F.Supp.2d 372, 374 (E.D.N.Y.2001). Before this Court is the Government's Motion for Reconsideration of the 2001 Order. For the reasons stated below, the Government's Motion for Reconsideration is DENIED.

*Background*

Familiarity with the prior decision, and the factual background detailed therein, is assumed. *See United States v. Gross et al.*, 165 F.Supp.2d 372, 374-76 (E.D.N.Y.2001). Defendants were indicted on February 12, 1998 on charges of bank fraud and making false statements in connection with mortgage applications in violation of 18 U.S.C. §§ 1344 and 1041. *Id.* The charges stem from activities alleged to have taken place between 1987 and 1989 involving loans obtained by Gelt Funding Corp. ("Gelt"), a mortgage brokerage business owned by Defendant Gross, in which Defendants Rebenwurz and Malek were purchasers of commercial property. *Id.* [FN1]

FN1. Defendants were also defendants in actions brought by First Nationwide Bank

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in the Southern District of New York and in New York State Courts. *Id.* at 376. All previous actions resulted in dismissals. *Id.*

Defendants filed pre-trial motions in January 1999, raising a variety of issues, including allegations of due process violations. This Court held hearings over the course of four days, beginning September 15, 1999 and concluding on March 8, 2000. *Id.* Ultimately, this Court held that Defendants had suffered "actual and severe prejudice" as a result of the Government's delays in bring the indictment, which resulted in missing documents and witnesses. *Id.* at 381-83. Moreover, this Court held that the Government's reason for the delays did not justify the prejudice to Defendants. *Id.* at 383-85. Accordingly, this Court dismissed the indictments.

On November 13, 2001, the Government filed its Motion for Reconsideration, [FN2] and on March 19, 2002, Defendants served their Opposition.

FN2. The Government has not articulated a statutory authority or any other legal basis upon which it brings this Motion. However, the Court presumes that the Motion is appropriate under Rule 47 of the Federal Rules of Criminal Procedure. *See* Fed.R.Crim.P. 47.

### *Timeliness*

The Federal Rules of Criminal Procedure do not set forth specific guidelines for motions for reconsideration. Rule 47 simply defines, in broad parameters, the manner in which parties will apply to the courts; it provides no explicit instructions or time frames. *See* Fed.R.Crim.P. 47 ("Rule 47"). Furthermore, the Local Rules for the Eastern District do not specify guidelines for motions for reconsideration in criminal cases. *See generally* Local R. Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59(e)"), and Local Civil Rule 6.3 for the Southern and Eastern Districts of New York ("Local Rule 6.3") both articulate procedures for making motions for reconsideration. *See* Fed.R.Civ.P. 59(e); Local Civ. R. 6.3. In both cases, a party must file the appropriate papers "no later than" or "within ten (10) days" of the "entry" or "docketing" of the order being questioned. *Id.*

\*2 For the purposes of the current motion, Defendants argue that the Government's papers are untimely because they were filed 32 days after the docketing of this Court's Memorandum and Order, and a motion for reconsideration is only timely if filed within the 10 days prescribed by Rule 59(e) and Local Rule 6.3. (*See* Def.'s Mem. Opp. Gov't's Mot. for Reconsideration at 3). The Government argues that its papers were timely because, according to *Canale v. United States*, 969 F.3d 13 (2d Cir.1992), a motion for reconsideration in a criminal matter is timely if filed within 30 days of the docketing of the original order. (*See* Gov't's Mem. in Supp. Mot. for Reconsideration at 3). [FN3]

FN3. As Defendants note, the 30th day fell on a Sunday, and the following Monday was a legal holiday, thus the Government's papers are presumed to have been timely filed if this Court accepts the Government's position that a motion for reconsideration is timely if filed within 30 days. (*See* Def.'s Mem. Opp. Gov't's Mot. for Reconsideration at 3); *see also* Fed.R.Crim.P. 45(a) (detailing how to compute time under the Criminal Federal Rules).

The Second Circuit has not ruled directly on this question. [FN4] Several district courts have been faced with the same question, however, and have held that it is proper for a court to look to the civil rules for guidance in the absence of a criminal rule directly on point. *See United States v. Gigante*, 971 F.Supp. 755, 758 (E.D.N.Y.1977) (Weinstein, J.) ("Since the Rules of Criminal Procedure do not speak specifically to this matter, a court conducting a criminal case is permitted to draw from and mirror a practice that is sanctioned by the Federal Civil Rules of Procedure." (*citing* Fed.R.Crim.P. 57(b), which states that "a judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district" where there is no controlling law on an issue)); *see also United States v. El-Gabrowni*, No. 93 Cr. 181, 1994 WL 74072, at \*2 (E.D.N.Y. Mar.9, 1994) (finding that, in a criminal matter, the government's motion for reconsideration was untimely because it was not filed within the 10 days in the analogous civil rules, Rule 59(e) or Local Rule 3(j) (now 6.3)); *United*

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*States v. Nezaj*, 668 F.Supp. 330, 332 (S.D.N.Y.1985) ("although the local Criminal Rules do not establish a specific time in which a party must file a Notice of Motion for reargument, ... to be timely, the government must have filed its Notice of Motion within ten days after the court's decision was docketed").

FN4. The Ninth Circuit has held that motions for reconsideration in criminal matters are timely if brought within thirty days. See *United States v. Nezaj*, 668 F.Supp. 330, 332 (S.D.N.Y.1985) (citing *In re Kiefaber*, 774 F.2d 969, 973-74 (9th Cir.1985)).

The Court notes that the case relied on here by the Government, *Canale*, 969 F.2d 13, does not hold that a motion for reconsideration in a criminal matter is timely if filed within 30 days of the docketing of the original order. See *United States v. Acosta*, No. 92 Cr. 589, 1993 WL 148942 (S.D.N.Y. May 3, 1993), vacated on other grounds, 17 F.3d 538 (2d Cir.1994). As Judge Stanton noted in *Acosta*, "*Canale* ... did not hold (as the government thinks) that the time to file a motion for reconsideration in a criminal matter is thirty days from the date of entry of the order. Rather, it held that the time for filing a notice of appeal ran from the date that district court ... denied the government's untimely motion to reargue." *Id.* at \*2. Thus, *Canale* does not provide any direction for this Court to follow on the timeliness of the Government's Motion.

\*3 Accordingly, although it is likely the Government's Motion for Reconsideration is untimely given the strength of persuasive authority which would require the Motion's filing within ten days of the docketing of the original order, this Court determines that it is unnecessary to so hold, because the Motion will fail under the very high burden imposed on such motions as described below.

#### *Standard of Review*

Regardless of the specific statute under which the Government brings its Motion, the Court notes that, in all circumstances, motions for reconsideration are assessed under a very strict standard. See, e.g., *Virgin Atlantic Airways, Ltd. v. Nat'l Mediation Bd.*,

956 F.2d 1245, 1255 (2d Cir.1992) (noting the very high burden a movant faces on a reconsideration motion in the context of a resubmitted motion to dismiss, analyzed under the "law of the case" doctrine); *United States v. Chiochvili*, 103 F.Supp.2d 526, 528 (N.D.N.Y.2000) (noting that a " 'clearly erroneous' standard of review applies to motions for reconsideration" under the Northern District of New York's Local Rule 7.1(g) (comparable to Local Rule 6.3)); *Pena-Rosario v. Reno*, No. 99- 4652, 2000 WL 620207, at \*1 (E.D.N.Y. May 11, 2000) (Gleeson, J.) (noting that "the requirements of Local Rule 6.3 ... are strictly construed in order to keep the court's docket free of unnecessary relitigation"); *Woodard v. Hardenfelder*, 845 F.Supp. 960, 966 (E.D.N.Y.1994) (Glasser, J.) ("The standards for granting a motion for reconsideration under both Rule 59(e) and Local Rule 3(j) are strict ... 'in order to dissuade repetitive arguments on issues that have already been considered fully by the Court" ' (internal citations omitted)). Accordingly, for purposes of the standard to apply to the Government's Motion, this Court looks to Local Rule 6.3 for the appropriate framework. See *United States v. Berger*, No. 00 Cr. 877, 2002 WL 273114, at \*1 (S.D.N.Y. Feb.26, 2002) (noting that a defendant's motion to reconsider a prior order in a criminal matter was insufficient to meet Local Rule 6.3's requirements).

Local Rule 6.3 authorizes motions for reconsideration when accompanied by "a memorandum setting forth concisely the matters or controlling decisions which [a moving party] believes the court has overlooked." Local R. 6.3; see also *Eisemann v. Greene*, 204 F.3d 393, at 395 n. 2 (2d Cir.2000) ("To be entitled to reargument, a party 'must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.'" (quoting *Shamis v. Ambassador Factors Corp.*, 187 F.R.D. 148, 151 (S.D.N.Y.1999)). Various factors courts have considered in granting a motion to reconsider include, 1) an intervening change of controlling law, 2) the availability of new evidence not previously available, and 3) the need to correct a clear error or prevent manifest injustice. *Brown v. J.F.H. Mak Trucking*, No. 95-2118, 1999 WL 1057274, at \*1 (E.D.N.Y. Nov.8, 1999).

\*4 Reconsideration will be denied unless the moving party can point to matters "that might

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reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 256-67 (2d Cir.1995) (citations omitted). A party may not use a motion to reconsider as an opportunity to reargue the same points raised previously. *PAB Aviation, Inc. v. United States*, No. 98-5952, 2000 WL 1240196, at \*1 (E.D.N.Y. Aug.24, 2000) ("Nor may the party merely reiterate or repackage an argument previously rejected by the court; that argument is for appeal."). A motion for reconsideration cannot advance a new argument, as it is deemed waived, *see PAB Aviation*, 2000 WL 1240196, at \*1, nor can such a motion be used as a vehicle to introduce new evidence "that should have been set forth during the pendency of the prior motion or could have been discovered in the exercise of due diligence." *Brown*, 1999 WL 1057274, at \*1 (*quoting Issacson v. Keck, Mahin & Cate*, 875 F.Supp. 478, 480 (N.D.Ill.1994)); *see also United States v. Wilson*, 120 F.Supp.2d 550, 553-54 (E.D.N.C.2000) ("if the evidence forming the basis for a motion for reconsideration is in the movant's possession at the time of the initial hearing, the movant must provide a legitimate reason for failing to introduce that evidence." (citations omitted)).

The decision to grant or deny a motion for reconsideration "is within the sound discretion of the district court." *United States v. United States Currency in the Sum of Ninety Seven Thousand Two Hundred Fifty-three Dollars*, No. 95-3982, 1999 WL 84122, at \*2 (E.D.N.Y. Feb.11, 1999). Moreover, in no case should a motion to reconsider be used as a substitute for an appeal. *See Brown*, 1999 WL 1057274, at \*1.

The Government has failed to meet its heavy burden under any interpretation of its argument. The main thrust of the Government's Motion is an attempt to reargue the same points raised in its response to the initial motion to dismiss, throughout the hearing, and in the post-hearing briefs. In fact, at numerous points in the Government's Memorandum of Law accompanying its current Motion, the Government refers the Court to one of those sources for a more thorough explication of its current argument. (*See Gov't's Mem. in Supp. Mot. for Reconsideration* at 5, 7-8, 10, 11). The Government does present new arguments, primarily in the form of supplementation to arguments made in response to Defendants' Motion to Dismiss. In

such cases, the Government places emphasis on points it neglected to focus on previously, merely to buttress the arguments already rejected by this Court's 2001 Order. (*See Gov't's Mem. in Supp. Mot. for Reconsideration* at 2-3 (justifying the submission of an affidavit to support a point previously rejected by this Court)). A motion for reconsideration is an improper platform upon which to make such an argument. *See, e.g., PAB Aviation*, 2000 WL 1240196, at \*1.

\*5 Furthermore, the Government fails to justify the introduction of new evidence--here, the Affirmation of Debra Ann Pucci. As the Defendants make clear in their papers opposing the current Motion, the Government was well aware of Ms. Pucci's existence prior to the hearings, yet failed to present her testimony at that time. The Government's justification for presenting Ms. Pucci's testimony illustrates its improper intent:

Although we did not previously submit this official's evidence--largely because of our position that the claimed prejudice was not of paramount concern given the lack of improper prosecutorial intent--we believe that, in light of the Court's finding, this additional evidence places the defendants' claim of prejudice in the correct factual context.

(*See Gov't's Mem. in Supp. Mot. for Reconsideration* at 2-3). This argument essentially amounts to a claim that "our original estimation of what was important was wrong, and now, knowing how the Court will decide, we want another attempt to make our case." This is a luxury most parties before federal courts would want. As the caselaw makes clear, however, in the context of motions for reconsideration, it is inappropriate, both to the parties against whom the movant is advocating, and the efficient operations of the courts. *See, e.g., Danielson v. United States*, No. 01-1182, 2001 WL 1646164, at \*1 (S.D.N.Y. Dec.20, 2001) ("Rule 6.3 is intended ... 'to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters.'" (citations omitted)); *Chiochvili*, 103 F.Supp.2d at 528 ("A simple difference of opinion, no matter how deep it runs, will not warrant reconsideration. '[A]ny litigant considering bringing a motion for reconsideration must evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant.'" (*quoting In re C-TC 9th Ave. Partnership*, 182 B.R. 1, 3 (N.D.N.Y.1995)).

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Finally, the Government directs the Court's attention to no controlling caselaw or statutory authority which the Court ignored. The Government's various arguments illustrate a disagreement with the Court's interpretation of Second Circuit precedent. This fact alone, however, does not warrant a motion for reconsideration; rather, it defines the very reason the federal courts have an appellate process.

Furthermore, the Government fails to convince the Court that, barring a reversal, the Court's prior Order would result in a "clear error," or perpetuate some "manifest injustice." To the contrary, as the Court noted in its Order dismissing the indictments against Defendants, the "prosecution of Defendants would violate fundamental notions of fair play and decency." *Gross*, 165 F.Supp.2d at 385. Accordingly, this Court's prior Order stands, and the Government's Motion is denied.

#### *Conclusion*

For the foregoing reasons, the Government's motion for reconsideration is DENIED. The Clerk of the Court is directed to enter judgment for the Defendants, and to close the case.

**\*6 SO ORDERED.**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24<sup>th</sup> day of May, 2004, a true and correct copy of the foregoing has been furnished by hand delivery to Terry Zitek, Assistant United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and to the following by U.S. Mail:

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