

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

FILED

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COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

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

Defendants.

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**ORDER**

THIS CAUSE is before the court on Defendant Sami Amin Al-Arian's **Motion to Compel** (Doc. 487) and the Government's response (Doc. 499), Defendant Hatim Naji Fariz's **Motion for Exculpatory and Impeaching Evidence** (Doc. 511) and the Government's response (Doc. 523), and Defendant Sameeh Hammoudeh's **Motion for Exculpatory and Impeaching Evidence** (Doc. 518) and the Government's response (Doc. 522). A hearing on these and other matters was conducted on May 17, 2004.

I.

By his motion, Mr. Al-Arian seeks an Order compelling the discovery of certain information pursuant to the Government's obligations under Federal Rule of Criminal Procedure 16 and Brady v. Maryland, 373 U.S. 83 (1963) and its progeny.<sup>1</sup> Specifically, Mr. Al-Arian seeks to compel discovery of the following:

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<sup>1</sup>As these matters are argued to the court, all the Defendants use the terms Brady and Giglio in the broadest sense to signify all exculpatory matters which considerations of due process require be disclosed by the Government in this prosecution.

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- (1) whether he was overheard on any electronic surveillance that was conducted on any other targets of any other investigations;
- (2) whether the government intends to utilize any electronic surveillance by any law enforcement or intelligence agency of any foreign government;
- (3) all translations utilized by the government in preparation of the indictment that differ in any way from the translations the government used to obtain the indictment and/or intends to offer at trial;
- (4) the names, credentials, and contact information for all translators involved in the creation and production of the translations utilized in preparation of the indictment;
- (5) all information concerning the utilization of Dr. Al-Arian as an “asset” or “source” for the FBI;
- (6) all email traffic involving or relating to Dr. Al-Arian that was monitored and/or intercepted by any agency of the United States government;
- (7) whether any email traffic was monitored pursuant to the FISA wiretaps;
- (8) all products of the mail cover conducted against Dr. Al-Arian; and
- (9) information related to informants the Government may have utilized while investigating Dr. Al-Arian, consistent with Roviaro v. United States, 353 U.S. 53 (1957).

By their motions, Msrs. Hammoudeh and Fariz also seek an Order compelling the discovery of certain information pursuant to the Government’s obligations under Rule 16 and Brady and its progeny. Their broad general demands seek information concerning co-conspirators who acted as government agents, prior translations of Arabic conversations relied upon to achieve the Indictment that are inconsistent with the currently accepted translations, and “all other” Brady materials. Additionally, Mr. Hammoudeh seeks all information the Government has in its possession, including information possessed by the State Department

relating to the background screening of Dr. Khalil Shakiki (also referred to as “Shiqaqa”).<sup>2</sup>

Mssrs. Hammoudeh and Fariz also specifically seek information from the Government concerning co-defendant Al-Arian’s activity as a “source “ of information to the FBI. As for the general Brady demand, they further specify:

1. all evidence, including statements, 18 U.S.C. § 3503(a) depositions, form 302s, handwritten notes, or documents of any kind that contradict any of the allegations in the Indictment;
2. all documents that contradict the allegations in the Indictment and otherwise:
  - a. relate in any way to the lawful transfer of funds to or from Mssrs. Hammoudeh or Fariz during the relevant periods of the instant investigation and prosecution,
  - b. indicate, record, or demonstrate a lack of knowledge on the part of Mssrs. Hammoudeh or Fariz as to an illegitimate purpose of the transactions at issue,
  - c. indicate a lack of ratification of the actions of the PIJ and/or its agents by Mssrs. Hammoudeh or Fariz concerning the transactions alleged in support of the Indictment,
  - d. indicate, record, or demonstrate a lack of knowledge on the part of Mssrs. Hammoudeh or Fariz as to an illegitimate purpose of transactions or related money transfers alleged or related to the allegations of the Indictment.
3. all witnesses’ statements, testimony, or documents that reveal any oral or written statements or expressions by Mssrs. Hammoudeh or Fariz to the effect that either were unaware that funds were being transferred to entities in violation of those state and federal statutory prohibitions alleged in the Indictment;
4. all witness statements taken from any witnesses as to matters related to the allegations of the Indictment that contradict the eventual

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<sup>2</sup>Contrary to Mr. Hammoudeh’s assertion, his motion does not include attachments regarding the correspondences he has had with the Government regarding this information. In any event, the court need not address the matter at this point as the Government, after initially objecting (Doc. 522), has now advised counsel that it is looking into the matter and will respond to counsel’s inquiry in the near future.

testimony of those witnesses before the grand jury or in any final statement of witnesses, including the initial field notes prior to preparation of Form 302 statements taken by government agents; and

5. all financial and immunity and other arrangements with any potential government witness, including but not limited to domestic and foreign agents, investigators and intelligence personnel, confidential informants and all other fact witnesses, translators and transcriptionists, and expert witnesses.

In response to Mr. Al-Arian's motion, the Government generally argues that the motion is overbroad and seeks matters not discoverable under Rule 16. Additionally, the Government maintains that it has and will meet its disclosure obligations under Brady, Giglio v. United States, 405 U.S. 150 (1972), and this court's Second Amended Pretrial Discovery Order (Doc. 152). More specifically, the Government responds that it has previously answered Mr. Al-Arian's request whether it intends to utilize electronic surveillance by a foreign government, and it "will be" producing computer communications and the email traffic intercepted by the FISA intercepts<sup>3</sup> as well as the mail cover conducted against Mr. Al-Arian.<sup>4</sup> Additionally, the Government maintains that it has previously notified Mr. Al-Arian's counsel that he was a source of information for the FBI and has provided to counsel summaries of statements made to agents. In all other aspects, the Government urges the court to deny Mr. Al-Arian's motion.

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<sup>3</sup>At arguments, the Government indicated that almost all of the email intercepted under the FISA intercepts has been provided. The remainder will be provided once technical problems have been solved.

<sup>4</sup>Accordingly, based on the Government's representation and to the extent it is necessary to do so, Mr. Al-Arian's motion (Doc. 487) is granted with respect to request numbers two, six, seven, and eight.

The Government responds generally to Msrs. Hammoudeh and Fariz that their motions are unwarranted because the appropriate timetable for disclosure of Brady and Giglio material was prescribed in the court's Second Amended Pretrial Discovery Order, and due process requires no more than that the information be provided thirty days before trial.<sup>5</sup> With respect to the Defendants' request for information about co-conspirators who acted as government agents, except as discussed below regarding Mr. Al-Arian, the Government opposes the disclosure under the informant privilege, citing Roviaro.<sup>6</sup> Regarding the matter of erroneous or inconsistent transcripts of Arabic communications, the Government maintains the request is overbroad as it seeks disclosure of prior transcripts even where later translations have identified only minor discrepancies. Citing United States v. Zambrana, 841 F.2d 1320 (7th Cir. 1988), the Government contends that only prior translations that failed to reasonably convey the intent or idea of the thought spoken or that misidentified a speaker are sufficiently material to fall under the disclosure requirements of Brady. As for any translations used by

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<sup>5</sup>As to the timing of the Government's disclosure of Brady and Giglio matters, the Government has assured the court and the Defendants that it fully understands its disclosure obligations under those authorities and will respond in accordance with the court's Pretrial Order. It further has assured that, for those matters so required to be disclosed and for which it appears additional investigation by the Defendants may be required, earlier disclosure will be made. At a minimum, Brady requires the prosecution to disclose exculpatory evidence in time for its effective use by the defense. United States v. Coppa, 267 F.3d 132, 142-44 (2nd Cir. 2001). It goes without saying that Brady does not contemplate or permit the government to sandbag defendants to the last possible moment before making the required disclosures. Given the voluminous discovery in this case and the burden it imposes on the defense to adequately prepare, the Government is encouraged to begin making its Brady disclosures well in advance of the court imposed deadline. The deadline established by the court's pretrial discovery order for disclosure of Giglio type matter appears more than adequate to protect the Defendants' needs and interests. See United States v. Montes-Cardenas, 746 F.2d 771, 781 (11th Cir. 1984).

<sup>6</sup>The Government also asserts that Mr. Fariz's reliance on Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965), is misplaced because that case only applies where the sole alleged co-conspirator is a government agent.

the Government to prepare the Indictment, the Government claims the work-product privilege pursuant to Rule 16(a)(2). Nevertheless, the Government assures the Defendants that erroneous or inconsistent translations that are material will be revealed if discovered.

Pertaining to the Defendants' particularized requests, the Government essentially objects to the extent that the matters sought are not required to be produced pursuant to Brady or Giglio. Claiming that it is cognizant of its responsibility under these cases to assure the due process rights of these Defendants, the Government pledges appropriate disclosure.

## II.

Pertinent to these motions, Rule 16 requires the government to permit a defendant to inspect and copy any relevant written or recorded statement by the defendant if the statement is within its possession, custody or control and the prosecutor knows, or through the exercise of due diligence could know, that it exists. Fed. R. Crim. P. 16(a)(1)(B)(i). Rule 16 also requires the government to permit a defendant to inspect and copy books, papers, documents, data, photographs, or tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the government, if the requested items are material to preparing the defendant's defense, were obtained from the defendant, or are intended by the government for use in its case-in-chief at trial. Id. at 16(a)(1)(E); U.S. v. Jordan, 316 F.3d 1215, 1250 (11th Cir. 2003). Under this provision, the defendant must request the specific item at issue and demonstrate that the item requested will be helpful to his defense, i.e., the pretrial disclosure of the item will enable him to significantly alter the quantum of proof in his favor. Jordan, 316 F.3d at 1250-51. However, the Rule does not require the disclosure of internal investigative material of the prosecutor or investigating agents, and it does not permit

the discovery of statements made by prospective government witnesses except as provided by 18 U.S.C. § 3500. Further, the Rule does not apply to the discovery of a grand jury's recorded proceedings except as otherwise provided by the Rules. Fed. R. Crim. P. 16(a)(2) and (3).

Regarding the government's disclosure obligations under Brady and its progeny, this court has previously cited to the statement in Strickler v. Greene, 527 U.S. 263 (1999), which succinctly sets forth the government's obligation to do justice and assure due process in this cause. See (Doc. 437 at 5-6). It is unnecessary to repeat this language here. Additionally, the government is required to produce for the defense impeachment evidence against government witnesses. See U.S. v. Bueno-Sierra, 99 F.3d 375, 379 (11th Cir. 1996) (citing U.S. v. Bagley, 473 U.S. 667 (1985) and Giglio).

While the government holds a recognized privilege to withhold from a defendant the identity of its informants, the privilege is limited. Thus, where the disclosure of an informer's identity is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the identity of the informer must be revealed. Roviaro, 353 U.S. at 60-61; United States v. Rutherford, 175 F.3d 899, 901 (11th Cir. 1999). In Roviaro, the Supreme Court prescribed the circumstances that warrant disclosure to a defendant of the identity of a confidential informant. Thus, a defendant's right to the identity of a confidential informant depends upon the (1) extent of the informant's participation in the criminal activity, (2) directness of the relationship between the defendant's asserted defense and the probable testimony of the informant, and (3) government's interest in non-disclosure. Rutherford, 175 at 901; United States v. McDonald, 935 F.2d 1212, 1217 (11th Cir. 1991); United States v. Gutierrez, 931 F.2d 1482, 1490 (11th Cir. 1991); United States v. Tenorio- Angel, 756 F.2d 1505, 1509 (11th Cir. 1985).

### III.

Addressing Mr. Al-Arian's motion, his first numbered request seeks disclosure by the Government of whether he was overheard on electronic surveillance conducted on any other targets of any other investigation. The request itself is overbroad and the answer to the request is not necessarily required by Rule 16. The motion as to this inquiry is denied.<sup>7</sup>

Similarly, the court concludes that Mr. Al-Arian's request at number three (as well as the similar requests of all other Defendants) for *all* translations utilized by the Government in preparing the Indictment that have been proven upon later translation to differ *in any way* is overbroad. Here, all the Defendants maintain that Brady requires the disclosure of *any* prior inconsistent or inaccurate translations used by the Government to obtain the Indictment. In response, the Government urges that the requests go too far and overlook the materiality standard of Brady. As the measure of its obligations under Brady to disclose inconsistent translations, the Government cites Zambrana, contending that only translations that do not reasonably convey the intent or idea of the thought spoken or that misidentify the speaker come within the dictates of Brady and require disclosure.<sup>8</sup> Thus, the mere fact that a later

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<sup>7</sup>As the Government acknowledges in its response, if it were in knowing possession of a *relevant* statement intercepted during such electronic surveillance, Rule 16 would require its disclosure. Alternatively, in circumstances where such intercepted statement might invoke disclosure requirements under Brady, the Government would be obliged to reveal the statement. It is not shown that either circumstance pertains at present. In the event such a statement should surface, the court would expect the Government to timely notify the appropriate Defendant(s) of the existence of such statement.

<sup>8</sup>While the case is instructive, the issue in Zambrana differs from that presently before the court. In Zambrana, the Seventh Circuit addressed a defendant's claim on appeal challenging the accuracy of Spanish-to-English translations introduced at the trial. In rejecting the claim, the court found the translations sufficiently clear, accurate and intelligible to assist the jury while it listened to the Spanish conversations. The court's rationale was founded upon the view that a translation of most foreign languages to English can never convey exactly the same idea and intent comprised in the original text. Thus, it is unrealistic to impose an impossible requirement of exactness before allowing the jury to consider the

translation prepared for use by the Government has differed in some way from one used before the Grand Jury is, in and of itself, insignificant and does not invoke Brady considerations.

While this court does not disagree with the views on foreign language translations expressed by the Seventh Circuit,<sup>9</sup> it is Brady, rather than Zambrana which dictates the applicable standard to guide the Government in its disclosure obligations at this stage of the proceedings. The Jordan court's discussion of the requirements under Rule 16 and Brady is instructive:

. . . Brady obligates the government to disclose only favorable evidence that is "material." The "touchstone of materiality is a 'reasonable probability' of a different result." Accordingly, under Brady, the government need only disclose during the pretrial **discovery** (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings. Not infrequently, what constitutes Brady material is fairly debatable. In such cases, the prosecutor should mark the material as a court exhibit and submit it to the court for an in camera inspection."

Jordan, 316 F.3d at 1252 (emphasis in original) (citations omitted).

This court has previously expressed the view that discrepancies between translations relied upon by the Government in obtaining the Indictment and later translations may raise Brady concerns and will require the prosecutors' close attention. However, minor

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translation. By the standard adopted, "a foreign language translation is sufficiently accurate to assist the jury if the translation reasonably conveys the intent or idea of the thought spoken." Zambrana, 841 F.2d at 1337.

<sup>9</sup>Indeed, the court's citations to expert authority on the difficulty, if not impossibility, of creating exact translations will resonate throughout later proceedings in this case. Here, it is most probable that the challenge of producing accurate Arabic to English translations of the evidence will result in a number of disagreements. At such time, Zambrana may well provide the appropriate guidance.

discrepancies or inconsistencies between translations that do not alter the substance of the communication or the parties thereto will present no reasonable probability of causing a different result and need not be disclosed. Already in this matter, the Government has demonstrated that it is cognizant of its duty under Brady to disclose matters material to the accuracy of its translation of the FISA intercepted communications. See (Doc. 71). On these motions, the Defendants do not demonstrate that a further order of the court is required.

Mr. Al-Arian also requests the names, credentials, and contact information for *all* translators involved in the creation and production of translations utilized in the preparation of the Indictment. By his argument, many of the translations are flawed and it is necessary that he learn the identity and purported credentials of the interpreters so that they may be investigated and perhaps called by him as witnesses at later hearings or at trial. This aspect of the motion is denied without prejudice. It is possible that the defense may need the identity of particular interpreters to assist in the presentation of their case or at a motion hearing. However, the instant motion lacks sufficient particulars to warrant an order requiring the Government to make a general listing of those interpreters used in the preparation of the Indictment and each of their credentials.<sup>10</sup>

Regarding the matter of Mr. Al-Arian's request for all information concerning his use as an "asset" or "source" for the FBI, it appears the Government has already provided to his counsel summaries of statements made to agents of the FBI. Beyond these statements, he

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<sup>10</sup>This request would conceivably extend to every FISA interpreter employed to assist with identifying pertinent calls during the lengthy period of the intercepts and every other interpreter who assisted the Government in preparing translations ultimately used before the grand jury. Before the court will again entertain a similar motion, the defense must narrow the request to particular intercepted communications or translations and demonstrate that the identity of the interpreter is necessary to the defense at trial or at a hearing.

seeks the names of the investigating agents he spoke with and full disclosure of any file kept by the FBI concerning his use as a “source” or “asset,” including any evaluations by the FBI as to the usefulness or reliability of such information or work as he may have provided. As more thoroughly addressed at the hearing, Mr. Al-Arian’s motion on this request is granted to the extent that the Government shall reveal to Mr. Al-Arian the identity of any agents to whom he provided information. Additionally, an attorney for the Government shall review any such source file or other compilation kept regarding the use of Mr. Al-Arian as a “source” or “asset” to determine if it contains any information favorable to the matter of his guilt or innocence, including conclusions about his credibility and reliability. Because matters within such a file may relate to Mr. Al-Arian’s assertion of a public authority defense under Rule 12.3, the Government shall conduct its review of any such file and disclose to him favorable information as may be contained in the file within thirty (30) days of the date of this Order.<sup>11</sup>

Regarding Mr. Al-Arian’s request for particulars related to *any* informants utilized by the Government in its investigation of him, and information as to the identity and other particulars of *any* informant to be called as a witness for the Government, the motion is overbroad. Although the Government initially signaled to defense counsel that there were no informants used in the investigation of this case, it now concedes that was incorrect and that informants were used in the investigation of Mr. Al-Arian. As for the disclosure of the identity of these informers, the Government asserts the informant’s privilege to decline to voluntarily reveal the identity of any informants. It urges, correctly, that Mr. Al-Arian makes

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<sup>11</sup>As set forth above, Mr. Al-Arian’s co-defendants have likewise requested disclosure of information concerning his use as a government “source” or “asset.” At the hearing, the Government agreed to provide copies of the FBI’s 302s and such additional information as may be provided to Mr. Al-Arian to these Defendants as well. Accordingly, it is so Ordered.

no effort on this motion to address those factors deemed appropriate for consideration under Roviaro's balancing test and it denies that Roviaro is authority to require the broad-ranging disclosure sought by the motion.

Defense counsel argues, in effect, that Roviaro establishes both the standard for resolving disputes over the Government's assertion of the informant's privilege and the affirmative duty of the prosecutor to disclose the identity of its informants as well as other particulars about their activities.<sup>12</sup> However, the court can find no case in this Circuit that reads Roviaro to require the broad pretrial disclosures urged in this motion absent a showing sufficient to tip the balance in favor of such disclosure. The Supreme Court itself has made clear that Roviaro did not impose an absolute rule requiring the disclosure of an informer's identity or the particulars of his use by the government. See United States v. Valenzuela-Bernal, 458 U.S. 858, 871 (1982) ("What Roviaro thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity, despite the fact that criminal defendants otherwise have no access to such informers to determine what relevant information they possess"). Here, Mr. Al-Arian seeks disclosure of the identity of and particulars about *any* informer used in the investigation, including those who may be witnesses at trial and otherwise. He makes no showing on any of the factors deemed pertinent for deciding Roviaro's balancing test. See Tenorio-Angel, 756 F.2d at 1509. Absent any

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<sup>12</sup>As authority for this assertion, Mr. Al-Arian cites to United States v. LaRouche Campaign, 695 F. Supp. 1290 (D. Mass.1988).

demonstration that such disclosure is relevant and helpful or necessary to a fair trial, this aspect of the motion is appropriately denied at this time.<sup>13</sup>

Regarding the motions of Mssrs. Hammoudeh and Fariz, to the extent that the court has granted relief to Mr. Al-Arian, similar relief is granted to these Defendants. However, beyond this, the court finds it unnecessary to enter any additional directives at this time. As discussed above, the court has previously ordered the Government to comply with its obligations under Brady and Giglio by way of a standing discovery order. By that Order, as well as through subsequent orders, the court has stated that the Government's Rule 16 disclosure obligations, as well as those imposed by considerations of due process, are continuing obligations. While the enumerated requests set forth in Mr. Fariz's motion raise matters required to be disclosed under Brady and Giglio, there is no showing on this motion that the Government has not or will not meet its disclosure obligations regarding these matters or that further order of the court is presently necessary. Accordingly, to the extent not granted herein, the motions of Mssrs. Hammoudeh and Fariz are denied without prejudice.

**Done and Ordered** in Tampa, Florida, this 26th day of May 2004.



THOMAS B. McCOUN III  
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:  
United States District Judge  
Counsel of Record

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<sup>13</sup>As urged by the Government, the Defendants will ultimately be advised of significant information about any informers who will be called as witnesses in this cause. By the court's Second Amended Pretrial Discovery Order, the Government is obliged to disclose to the Defendants the existence and substance of any "payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective Government witnesses, within the scope of Giglio . . ." at least thirty days prior to the start of trial. Implicit in this directive is the disclosure of the identity of the informer as well.

F I L E C O P Y

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