UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

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

SAMI AMIN AL-ARIAN
SAMEEH HAMMOUDEH
GHASSAN ZAYED BALLUT
HATIM NAJI FARIZ

ORDER

This cause came on for consideration without oral argument upon:

1. Defendant Fariz's Motion to Quash Extortion Allegations in Counts 35-38 and 40-44, Motion to Dismiss Counts One, 35-38, and 40-44, or Alternatively for Review of Grand Jury Transcripts as it Relates to Extortion and Memorandum of Law in Support (Dkt. #549) and the government's response (Dkt. #558) thereto;

2. Defendant Al-Arian's Motion for Reconsideration of the Magistrate's Order Concerning Defendant's Motion to Compel (Dkt. #555) and the government's response (Dkt. #575) thereto; and

3. Defendant Fariz's Motion to Dismiss Based on the Selective Nature of the Prosecution and/or for Discovery on the Selective Prosecution Claim (Dkt. #571) and the government's response (Dkt. #581) thereto.

I. BACKGROUND

This is a criminal action against alleged members of the Palestinian Islamic Jihad-Shiqaqi Faction (the "PIJ") who purportedly operated and directed fundraising and other organizational activities in the United States for almost twenty years. The PIJ is a foreign organization that uses violence, principally suicide bombings, and threats of violence to pressure Israel to cede territory to the Palestinian people. The PIJ has been designated a foreign terrorist organization ("FTO") and a specially designated terrorist ("SDT") by the United States government. Both designations create potential legal consequences (including criminal liability) to those people in the United States that support or are associated with the PIJ. On February 19, 2003, the government indicted eight defendants in a 50 count indictment.

On June 12, 2003, this Court granted Defendants'[1] oral motion to extend time to file motions to dismiss and gave Defendants sixty (60) days from June 4, 2003, to file a motion to dismiss. This Court gave Defendants a longer time for "factual challenge[s] based on information that was neither available nor could have been available in the exercise of reasonable diligence at the time that the original deadline passed." Order of June 12, 2003 at 17. Subsequently, on August 1, 2003, this Court extended the deadline to file motions to dismiss until September 5, 2003. Finally, the motion to dismiss deadline was continued until October 14, 2003, for Defendant Hammoudeh. Between August 1, 2003, and September 5,

[1]For purposes of this Order, this Court is only referring to Defendants Al-Arian, Hammoudeh, Ballut, and Fariz, when it uses the word "Defendants."

2003, all Defendants filed motions to dismiss on multiple bases (some of them including Fariz filed multiple motions). On March 12, 2004, this Court entered an Order, denying most of Defendants' motions to dismiss. This Court did grant Defendant Fariz's motion to quash paragraph 26(b) of the Indictment.

Defendant Fariz has now filed two additional motions out of time without leave of this court seeking to dismiss or quash all or portions of the Indictment. First, Fariz moves to quash parts of multiple paragraphs contained in the Indictment that utilize the word extortion. As a result of the striking of this language, Fariz seeks dismissal of those Counts or a review of the grand jury transcripts to determine the role that the "extortion" allegations played before the grand jury. Second, Fariz moves to dismiss the Indictment, claiming that the government has engaged in selective prosecution.[2]

Defendant Al-Arian has filed a motion seeking reconsideration of a discovery order entered by Magistrate Judge McCoun that granted in part and denied in part various discovery motions. Al-Arian seeks reconsideration of: (1) the timing and extent of the government's Roviaro[3] obligation; (2) Al-Arian's request for access to translators and all translations under Brady;[4] and (3) Al-Arian's request for disclosure of any electronic surveillance from any other investigation on which he was overheard.

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[2]All the other Defendants have adopted the motion to dismiss based on selective prosecution.

[3]Roviaro v. United States, 353 U.S. 53 (1957).

[4]Brady v. Maryland, 373 U.S. 83 (1963).

II. DISCUSSION

Before reaching the merits of these motions, no party shall file any further motions to dismiss or other similarly titled pretrial motions (e.g. motions that are motions to dismiss but are titled motion to quash or some other similar name) without obtaining leave of this Court. The deadline for filing such motions has long since expired. Further, this Court would urge counsel to spend their time preparing for trial, which will begin in January 2005, instead of on motions that have little, if any, chance of success.

A. MOTION TO QUASH

This Court concludes that the motion to quash should be granted in part and denied in part without prejudice. The motion to dismiss may be renewed at the close of the government's case or the close of trial if the government does not supercede the indictment. This Court may resolve a motion to dismiss in a criminal case when the "infirmity" in the indictment is a matter of law and not one of the relevant facts is disputed. See United States v. Korn, 557 F.2d 1089, 1090 (5th Cir. 1977);[5] United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam). In deciding a motion to dismiss, this Court must deny the motion if the factual allegations of the indictment taken in the light most favorable to the government are sufficient to charge an offense as a matter of law. See United States v.

[5]In Bonner v. City of Prichard, the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Devegter, 198 F.3d 1324, 1327 (11th Cir. 1999) (quoting United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987)).

In the Travel Act Counts (Counts Five through Forty-Four) of the Indictment, the government has alleged generally that: (1) Defendants (the particular Defendants charged in each count) knowingly and willfully; (2) used a facility in interstate commerce; (3) with the intent to (a) "commit any crime of violence to further any unlawful activity, that is, extortion and money laundering, . . . and (b) otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, namely, extortion and money laundering . . . ." Indictment at 100 (emphasis added). The Indictment then contains a chart with a row for each of the forty Travel counts, naming the particular Defendants charged, the particular facility used in interstate commerce in that count, and incorporating an overt act from Count I.

Defendant Fariz seeks this Court to strike the word "extortion" from the general language of the Travel Counts (at least as is incorporated in the particular Travel Act Counts against him). Then, Fariz seeks dismissal of those Counts or, alternatively, a review of the grand jury transcripts to determine the role that the "extortion" allegations played before the grand jury.[6] The government responds that this Court need not strike "extortion" from the Indictment at this time, but can wait to see if extortion should be redacted after the government rests its case. Alternatively, the government argues that this Court should not

[6]Defendant Ballut has adopted Fariz's motion and extended it to an additional Travel Act Count.

dismiss the Travel Counts because redaction of the word "extortion" does not broaden the possible bases for conviction. Similarly, the government argues that this Court should not review and should not allow Defendant's review of the grand jury transcripts to challenge the sufficiency of the indictment.

This Court concludes that the word "extortion" should be stricken from the Indictment for the reasons stated in its March 12, 2004 Order (Dkt. #479). However, this Court agrees with the government that striking "extortion" makes the Indictment more narrow, not broader, and therefore dismissal is inappropriate at this stage. The government, if it chooses not to supercede, will have to show an intent to commit money laundering. Similarly, this Court's decision to strike "extortion" does not alter this Court's March 3, 2004 Order (Dkt. #472) or the Magistrate's prior decision on grand jury transcripts (Dkt. #338). This Court denies Fariz's request on that ground.

B. DISCOVERY ORDER

This Court denies Defendant Al-Arian's motion for reconsideration of the Magistrate's discovery order (Dkt. #544) because the Order is not clearly erroneous or contrary to law. Under 28 U.S.C. § 636(b), this Court can designate to a magistrate judge most pre-trial matters, including pre-trial criminal matters. This Court may "reconsider any [such] pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). In this case, like with most of its criminal cases, this Court has designated criminal discovery motions to the Magistrate.

First, this Court would note that most of Al-Arian's motion does not argue that the Magistrate's decision was clearly erroneous or contrary to law. Instead, Al-Arian appears to be arguing that the time frame the Magistrate has imposed on the governement violates some undefined notion of due process owed to Al-Arian. The Magistrate has been extremely mindful of the due process concerns raised by this case, especially the need for each defendant to be effectively represented by counsel. This Court has commented in a prior order that:

> As an initial matter, this Court would compliment the Magistrate for his handling and organization of discovery in this complex case. While clearly not reversible, this Court likely would not have exercised the same amount of discretion had it been placed in the Magistrate's shoes. The Magistrate has already granted Defendants more discovery than Rule 16, the Fifth or Sixth Amendment require in this Court's opinion.

Order of March 3, 2004 (Dkt. #470).

This Court will not reconsider the Magistrate's decision on the timing of the government's discovery obligations because defense counsel lacks "confidence" in and wishes to speculate on the government's ability to timely produce discoverable information. First, the government has timely complied with most of, if not all, the deadlines placed upon it and turned over or made available to these Defendants a tremendous amount of discovery well in advance of trial. Second, the material that the government has turned over includes material that normally would not be discoverable by Defendants to aid in preparation of their cases. Although this turnover was not completely voluntary (as most of it was ordered by the Magistrate), the government has never sought relief from the Magistrate's orders in this

Court and has often capitulated to the Magistrate's requests without much resistance. Third, and most importantly, Al-Arian's argument is premature and purely speculative at this point. If the government attempts to bury Defendants thirty days or less before trial with newly found discovery, this Court expects that Defendants will file the appropriate motion. This Court will deal then with whatever issue is raised. Therefore, this Court denies Al-Arian's motion for reconsideration on the timing of the government's discovery obligations.

Next, this Court denies Al-Arian's motion on the government's obligations under Brady and its progeny to provide: (a) the names and credentials of all translators; and (b) all translations that differ in any way from those used to obtain the Indictment or will be used at trial. Under Brady and its progeny, the government must disclose only "material" evidence favorable to the accused. See United States v. Jordan, 316 F.3d 1215, 1250-52 (11th Cir. 2003). Materiality has been equated to mean evidence that has a "'reasonable probability'" of causing a different result. Id. at 1252.

This Court would echo the Magistrate's words that minor discrepancies between translations that in no way alter the intent or idea spoken are not Brady material. Indeed, even larger translation discrepancies may not cause Brady issues if they do not concern matters that have a "reasonable probability" of causing a different result. In this case, like in every case that involves tape recordings of a defendant's statements in a foreign language, it will be for the jury to determine which translation is accurate. See United States v. Nixon, 918 F.2d 895 (11th Cir. 1990); United States Court of Appeals for the Eleventh Circuit

Pattern Jury Instructions at 433 (1997). Without more of a showing by Al-Arian, the Magistrate's decision on Al-Arian's overbroad request for all translations that differ in any way and for all translators names and credentials was not clearly erroneous or contrary to law.

C. MOTION TO DISMISS BASED ON SELECTIVE PROSECUTION

A selective prosecution analysis requires two slightly different, separate analyses. First, this Court must consider if Defendants have proffered sufficient evidence, so that the government should be compelled to produce discovery concerning Defendants' selective prosecution claim. Second, this Court must determine whether Defendants have met the ultimate and heavier burden of demonstrating that the prosecution was undertaken for an invidious reason. This Court concludes that Defendants have not come close to alleging facts or offering evidence sufficient to support either dismissal of the Indictment or discovery on their selective prosecution claim.

To obtain discovery, the United States Supreme Court has required a "rigorous standard" of "credible" proof before it will allow discovery on a selective prosecution claim. See United States v. Armstrong, 517 U.S. 456, 468-70 (1996). The Supreme Court approved the approach that a defendant must "produce some evidence that similarly situated defendants

of other races could have been prosecuted, but were not."[7] Id. In Armstrong, the Supreme Court explained the policy and constitutional reasons behind such a high standard:

> Judicial deference to the decisions of these executive officers [prosecutors] rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. . . . Examining the basis of prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Id. at 465.

In Armstrong, the Supreme Court reversed a court of appeals decision affirming the grant of discovery to a defendant on a selective prosecution claim. See id. The defendants in Armstrong offered: (a) an affidavit of a public defender's paralegal, indicating that in the 24 crack cocaine cases were brought in that district in 199, all involved African American defendants; (b) an affidavit recounting a conversation with a drug center treatment employee; and (c) an affidavit indicating another attorney's experience in state court.[8] In addition, the

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[7]As to the ultimate burden, the Supreme Court has stated that defendants, alleging a selective prosecution defense, bear a "demanding" burden of showing by "clear evidence" that a prosecutor made a prosecutorial decision based on reasons forbidden by the Constitution. See Armstrong, 517 U.S. at 463-65. In order to meet this heavy burden, the Supreme Court required a defendant to show both a discriminatory effect and a discriminatory purpose. See id. To show discriminatory effect, a defendant must point to similarly situated individuals of a different classification that were not prosecuted. See id. In United States v. Smith, the Eleventh Circuit held that "clear evidence" required a defendant to demonstrate by "clear and convincing evidence" that a prosecutorial decision had a discriminatory effect and purpose. 231 F.3d 800 (11th Cir. 2000).

[8]The Ninth Circuit in Armstrong relied additionally on a sentencing commission study (continued...)

defendants offered a newspaper article discussing the discriminatory effect of the sentencing guidelines with regard to crack cocaine. In reversing the Ninth Circuit and the district court, the Supreme Court stated that the defendants had not identified "individuals who were not black and could have been prosecuted for the offenses for which respondents were charged but were not so prosecuted." Id. at 470. The Supreme Court termed the newspaper and affidavits to be "not relevant," "hearsay," and nothing more than "anecdotal evidence" of discrimination. Id.

More recently in United States v. Bass, the Supreme Court summarily reversed a Sixth Circuit decision allowing for discovery on a selective prosecution claim. 536 U.S. 862 (2002) (per curiam). In Bass, the defendants offered nationwide statistics showing that the government: (a) charged African Americans more than twice as often than Caucasians with death-eligible offenses; and (b) entered into more plea bargains with Caucasians than African Americans. See id. at 863. In reversing the Sixth Circuit, the Court stated that the defendants failed to offer any relevant evidence because statistics alone did not show anything about the charges against "*similarly situated defendants*." Id. (emphasis in original).

The Eleventh Circuit, after Armstrong, considered what showing is necessary before a defendant is entitled to discovery on a selective prosecution claim. See United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997). In Quinn, the Eleventh Circuit affirmed the denial

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[8](...continued)
showing that in a year 90% of the people sentenced for crack cocaine trafficking were black

of discovery to a defendant on a selective prosecution claim. See id. at 1425-26. The defendant in that case offered evidence that no person of Caucasian descent had been charged in that federal district court for a crime involving less than 50 grams of crack cocaine, while the defendant, who was African American, had been charged with that crime. See id. at 1426. The government responded by offering evidence that it only prosecuted people for less than 50 grams of crack cocaine (in federal court) if some additional circumstance was present such as a prior record or a firearm.[9] See id. The Eleventh Circuit concluded that when such additional circumstances were absent from one offender and present in another, the two offenders were not similarly situated and the government was free to treat them differently. See id.

While not dealing with the threshold for discovery, the Eleventh Circuit more recently discussed the standards that apply to a dismissal based on selective prosecution grounds. See United States v. Smith, 231 F.3d 800 (11th Cir. 2000). In that case, the Eleventh Circuit considered a selective prosecution claim brought by two African Americans who were charged and convicted with violation of absentee voter laws. See id. at 804-06. In concluding that the defendants had not met their burden, the Eleventh Circuit held that in order to be similarly situated one must be engaged in the same type of conduct (the same basic crime and in substantially the same manner) with the same or a greater level of

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[9]In Quinn, the district court conducted an evidentiary hearing. See id. Generally, the Eleventh Circuit only requires an evidentiary hearing when a court has a "reasonable doubt about the prosecutor's motive." Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993). Defendant's have failed to raise a reasonable doubt as the prosecutor's motives in this case.

evidence against them than the defendant. See id. at 810-11. The Eleventh Circuit held, however, that the fact that an ongoing investigation existed and future prosecutions of others could occur would not defeat a selective prosecution claim. See id. at 809.

Turning to this case, the evidence offered by Defendants is like the evidence proffered in Bass and Armstrong. Defendants have failed to identify any non-Muslim person or person of non-Middle Eastern descent who allegedly engaged in similar activity, over a similar period of time, to which the government has a similar level of proof (quantity and quality). The cases cited by Defendants as involving other Muslim or people of Middle Eastern descent do not describe in any detail the charges against these defendants. Indeed, Defendants' motion is completely silent on the name of any alleged violator belonging to a different race, national origin, or religion. There has been no showing that Kahane or the Real IRA engaged in the same level of violence or threat to the national security interests of the United States that allegedly resulted from Defendants' misconduct. The only evidence offered by Defendants are a series of newspaper articles. The Supreme Court in Armstrong concluded that such evidence is hearsay and not admissible to support a defendant's rigorous burden of credible evidence.

Further, Defendants themselves proffered an example of a Section 2339B prosecution by the government not based on Defendants' racial classification (Middle Eastern descent). John Walker Lindh was prosecuted under Section 2339B. Lindh is Caucasian.[10]

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[10]Though, he arguably is not similarly situated to Defendants.

Additionally, the government has proffered a number of additional cases in which Section 2339B prosecutions have been undertaken and are ongoing that do not involve people of the Islamic faith or of Middle Eastern descent. However, like Defendants, the government has not presented this Court with any information regarding these individuals, but the fact that such individuals exist undermines the Defendants' unsupported assertions of discriminatory effect and purpose.

Next, Defendants challenge the designation of the PIJ as a FTO, arguing that Middle Eastern/Muslim groups have been singled out by the government as FTOs. First, Defendants concede that there are non-Middle Eastern/non-Muslim groups on the FTO list, which undermines any notion that a discriminatory effect exists. Second, this Court has previously held that Defendants lack standing to challenge the designation of the PIJ as a FTO. This Court is not going to allow Defendants to challenge the designation of the PIJ by cloaking that challenge as a selective prosecution claim. The PIJ had and has every incentive to challenge its designation as a FTO. Therefore, this Court denies Defendants' motion to dismiss.

It is therefore **ORDERED AND ADJUDGED** that:

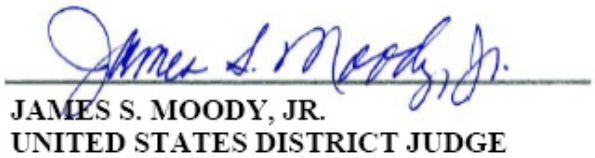
1. Defendant Fariz's Motion to Quash Extortion Allegations in Counts 35-38 and 40-44, Motion to Dismiss Counts One, 35-38, and 40-44, or Alternatively for Review of Grand Jury Transcripts as it Relates to Extortion and Memorandum of Law in Support (Dkt.

#549) is **GRANTED in part** and **DENIED in part**. The word "extortion" is stricken from Counts Five through Forty of the Indictment and the motion is otherwise denied.

2. Defendant Al-Arian's Motion for Reconsideration of the Magistrate's Order Concerning Defendant's Motion to Compel (Dkt. #555) is **DENIED**.

3. Defendant Fariz's Motion to Dismiss Based on the Selective Nature of the Prosecution and/or for Discovery on the Selective Prosecution Claim (Dkt. #571) is **DENIED**.

DONE and **ORDERED** in Tampa, Florida on August 4, 2004.



JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel/Parties of Record

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