

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

**UNITED STATES OF AMERICA**

v.

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

**HATIM NAJI FARIZ**  
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**MOTION FOR CLARIFICATION AND OBJECTIONS TO  
THIS COURT’S ORDER OF AUGUST 18, 2004,  
REGARDING THE PRODUCTION OF ENGLISH-LANGUAGE TRANSCRIPTS**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, respectfully submits his objections to and requests for clarification of the Magistrate Judge’s Order of August 18, 2004 (Doc. 605). Mr. Fariz states:

**I. Introduction**

On August 18, 2004, this Court ordered the government to produce to the defense its transcripts containing the English-language translations of communications that it intends to use in its case-in-chief, with increments of 100 to be produced by October 1, 2004, November 1, 2004, and the balance by December 1, 2004. Doc. 605 at 2. The Court then ordered that the defense must produce, by December 31, 2004, two sets of translations: (1) “any counter translations which the Defendants will seek to offer in rebuttal to the government’s translations,” and (2) “all other transcripts reflecting English language translations of intercepted communications which any Defendant seeks or may seek to introduce in his case-in-chief.” *Id.* at 2-3.

The Eleventh Circuit has outlined the procedure to be used when transcripts are to be introduced at trial. *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976)<sup>1</sup> (establishing procedure); *United States v. Wilson*, 578 F.2d 67 (5th Cir. 1978); *United States v. Llinas*, 603 F.2d 506 (5th Cir. 1979) (applying procedure to foreign-language recordings); *United States v. Cruz*, 765 F.2d 1020 (11th Cir. 1985) (foreign-language case); *United States v. Le*, 256 F.3d 1229 (11th Cir. 2001) (foreign-language case). First, the parties should attempt to arrive at a “stipulated” or “official” transcript. *Onori*, 535 F.2d at 948. The Eleventh Circuit has indicated that “a pretrial meeting in chambers may sometimes be necessary to determine if this is possible.” *Id.*

If no official transcript can be produced, then “the jury is entitled to consider the divergence in two transcripts of the same conversation, with the recording of it, as a problem of fact to be resolved in the traditional manner.” *Id.* at 948. The Eleventh Circuit has suggested a number of ways in which these divergent transcripts may be introduced at trial: (1) “[a] transcript can be prepared containing both versions of disputed portions,” (2) “the jury can be given two transcripts, given the reasons for the disputed portions, and instructed that they are to determine for themselves which, if either, transcript accurately reflects particular portions of the recording,” or (3) “explain to the jury that there is a disagreement about the accuracy of the government’s transcript and to allow the tape, or disputed portions

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

of the tape, to be played twice, one with each transcript.” *Id.* at 948-49. Finally, “[i]n any of the procedures in which the jury is told that a disagreement exists with respect to the transcripts, each party should be allowed, of course, to present additional evidence supporting the accuracy of its version.” *Id.* at 949.

With this as the anticipated procedure in the Eleventh Circuit, Mr. Fariz respectfully seeks clarifications from the Court and submits his objections concerning this procedure for the exchange of transcripts.<sup>2</sup> First, Mr. Fariz respectfully requests that the Court compel the government to disclose the FISA intercepts that it intends to use at trial, and the order in which the transcripts will be produced, in order to allow the defense to prioritize which intercepts to review and translate. Second, Mr. Fariz reserves the right to produce English-language transcripts of communications (1) whose relevance or necessity becomes apparent during trial, or (2) that may not be translated until after December 31, 2004, in light of the volume of FISA intercepts in this matter. Third, Mr. Fariz would ask that a deadline be set for the government to produce any counter-transcripts to the defense transcripts. Finally, Mr. Fariz respectfully requests clarification of whether this same procedure will apply to all English translations of any foreign-language evidence that will be used at trial, and not only to the FISA intercepts.

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<sup>2</sup> Counsel for Mr. Fariz has attempted to address the defense’s concerns and objections in this motion at this stage of the process. Mr. Fariz would request leave to raise objections should issues arise during the course of this process, including under the U.S. Constitution or Federal Rule of Criminal Procedure 16.

## **II. Objections and Requests for Clarification**

### **A. Identification of the Intercepts Intended to be Introduced by the Government and the Order in Which they Will be Produced**

From the large universe of FISA intercepted conversations and facsimiles, including 21,000 hours of conversations, the government identified for the defense approximately 800 calls and facsimiles that it deemed “pertinent” to the case. This list was produced to the defense in March 2004, when the government also produced 29,000 pages of English-language summaries, or “tech cuts,” of the intercepts. The efforts to organize and review this vast amount of discovery has been herculean and is ongoing.

The government has indicated that it will seek to introduce at trial approximately 200 to 300 calls and facsimiles from this list of 800. On or before October 1, 2004, the government has been ordered to produce its first set of English-language transcripts to the defense, with the requirement that the government provide at least 100. In response to the Court’s Order outlining this process, on September 1, 2004, Mr. Fariz requested in writing that the government disclose (1) which calls and facsimiles among the 800 it intends to use at trial, and (2) in which order the government will produce its English-language transcripts.<sup>3</sup> The purpose of this request to the government was to allow the defense to prioritize its translation efforts and to determine any disputes in a timely fashion. This issue has not yet been resolved between the parties.

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<sup>3</sup> Counsel for Mr. Al-Arian similarly asked the government to provide notice of the order in which it will produce the transcripts during the discovery conference on August 17, 2004. The government was not responsive to this request.

In particular, with the rate at which the government has to produce its transcripts (approximately 100 per month over three months), the defense will have to review approximately five government transcripts per day in order to indicate disputed portions or provide counter-translations by December 31, 2004, the deadline outlined in the Court's Order. This process will be possible only if the defense is provided, in advance of the production, notice of which intercepts will be produced and in which order. For example, if the government produces calls and intercepts in chronological order, Mr. Fariz will not be provided the government's transcripts until later in the process because most of Mr. Fariz's alleged intercepts occur more recently. Accordingly, Mr. Fariz will require notice of which intercepts are at issue, and in what order, so that his translators may focus on those intercepts prior to the government's production.

This request is made in light of several logistical issues that arise in this case based on the sheer volume of the discovery, distinguishing this case from the average case in which the Eleventh Circuit procedure for transcripts is used. In order to translate one phone call, the interpreter must first locate the call. For those calls in the indictment, this process was easy since the government had provided each of the calls on a separate cassette tape. Once the government began its production of the remaining intercepts, which consist of approximately 1,500 CDs, the process of identifying phone calls became time-consuming. In particular, without the government's list of "pertinent calls" and the English-language tech cuts, the government literally provided a guideless volume of intercepts. As mentioned above, this list and the English-language summaries were not provided to the defense until

March 2004. Even with these identifiers, however, significant time is spent simply isolating a particular call on a CD, since each CD contains several hours of calls. Finally, once the call has been located, the process of translating the call is especially time-consuming, taking anywhere from 15 to 40 hours per one hour of taped conversation. For these reasons, Mr. Fariz respectfully requests that this Court order the government to provide to the defense a list of which FISA intercepts it intends to use at trial and the order in which it will be producing its English-language transcripts. For this information to be useful, Mr. Fariz would respectfully ask that the government be compelled to provide this information prior to the October 1, 2004 deadline.

**B. Certain Communications May Be Translated after December 31, 2004, or Become Relevant or Necessary to the Defense Based on the Government's Presentation of its Case at Trial**

It is very likely that communications that may have not seemed relevant prior to trial may become relevant or necessary for the defense based on assertions and arguments made by the government during trial. Mr. Fariz therefore reserves the right to produce translations of communications that may become relevant or necessary for his defense during the course of the trial, which cannot be anticipated by December 31, 2004. Additionally, in light of the volume of FISA intercepts, and despite the full-time efforts of defense interpreters, it may not be possible for the defense to have all transcripts prepared by December 31, 2004. Mr. Fariz, however, is willing to produce these transcripts to the government at a reasonable period of time prior to seeking to introduce them.

**C. The Government's Deadline for Counter-Translations**

The Court's Order does not provide the government with a deadline by which it must produce any counter-translations to the transcripts that the defense intends to use in its case-in-chief. Mr. Fariz would therefore request that the government be issued a deadline to provide any counter-transcripts.

**D. Whether this Procedure Will be Used for All English-language Translations of Foreign-language Evidence that Will be Introduced at Trial**

On its face, the Court's Order of August 18, 2004, addresses "English language translations of communications." Doc. 605 at 2. The government has produced other discovery in foreign languages, including documents in Arabic and Hebrew and videotapes in Arabic. Mr. Fariz seeks clarification as to whether this procedure will similarly be used to address translations of other foreign-language evidence that will be introduced at trial.

WHEREFORE, the Defendant, Hatim Naji Fariz, by and through undersigned counsel, respectfully submits the foregoing objections to and requests for clarifications of the Magistrate Judge's Order of August 18, 2004 (Doc. 605).

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of September, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; William Moffitt and Linda Moreno, Counsel for Sami Amin Al-Arian; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602.

/s/ M. Allison Guagliardo  
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Assistant Federal Public Defender