

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO.: 8:03-CR-77-T-30-TBM

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

**RESPONSE TO DEFENDANTS' MOTIONS
FOR CLARIFICATION AND OBJECTIONS TO THE COURT'S ORDER
REGARDING PRODUCTION OF ENGLISH LANGUAGE TRANSCRIPTS**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby responds to Defendant Al-Arian's (Dkt. # 629) and Fariz's (Dkt. # 626) Motion for Clarification and Objections to the Magistrate Judge's Order Regarding Production of English language transcripts (Dkt. # 605).¹

Defendants Fariz and Al-Arian have lodged several complaints with respect to the Magistrate's Order regarding production of transcripts. This order requires the government to begin producing transcripts no later than October 1, and to complete such production by December 1. The Court then ordered that the defendants produce any counter-translations, or translations they intend to introduce at trial, no later than December 31. In essence, the defendants complain about the timing and order of the production specified by the Court. As set forth below, however, the Court's Order is

¹Defendant Ballut also filed an Objection and Motion for Reconsideration regarding the Magistrate's Order (Dkt. # 627), but the Court denied his requests on September 23, 2004. (Dkt. # 643).

consistent with the case law governing discovery of transcripts, as well as Fed. R. Crim. P. 16, 17.1 and Fed. R. Evid. 611(a).

In United States v. Onori, 535 F.2d 938, 946-49 (5th Cir. 1976), the Court addressed the production and use of transcripts and recordings at trial. The Fifth Circuit emphasized that the trial court should first attempt to have the parties agree on a stipulated, official transcript. Id. at 948. Indeed, the Court suggested that a pretrial meeting in chambers might sometimes be necessary to determine if such an agreement is possible. Id. In the event the parties cannot agree, then the jury may be given one transcript containing both disputed versions, or two transcripts containing the disputed portions, and each party may present the evidence to support its version. Id. at 949. Several years later, in United States v. Llinas, 603 F.2d 506 (5th Cir. 1979), the Court applied Onori to transcripts of translations of foreign language conversations. In both cases, the Court recognized that the transcript becomes evidence. Id. at 509-510; 535 F.2d at 947. In United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985), the Eleventh Circuit confirmed that Llinas had applied Onori to transcripts of translations of foreign language conversations and that the jury can rely on these transcripts as substantive evidence because they are a form of expert evidence.

Defendant Al-Arian's Objections (Dkt. # 629)²

Defendant Al-Arian's complaint focuses on the Order's provision regarding the timing of production of defense transcripts, maintaining that he cannot be required to produce his own statements or testimony or that of defense witnesses prior to trial. The

²Defendant Al-Arian also moved to adopt Defendant Fariz's Motion for Clarification and Objections to the Court's Order (Dkt. # 628).

case law, however, along with Fed. R. Crim. P. 16 and 17.1, clearly gives the district court legal authority to request that the parties try to agree on an official transcript prior to trial. Indeed, according to Onori, the district court can order the parties to meet and the court itself may participate in an initial meeting to determine whether any agreement is possible. In any event, the defense can respond in two ways. If the defense intends to present its own *expert* counter-translation, then it is obligated to produce it under the reciprocal discovery provision of Fed. R. Crim. P. 16(b). On the other hand, if the defendant intends to offer his own version, based on his participation in a conversation and his fluency in the subject language, he is not required to produce that testimony prior to trial. He cannot, however, withhold a written exhibit (transcript) which he intends to introduce in connection with his testimony. Fed. R. Crim. P. 16(b)(1)(A).

Regardless of which method the defendant chooses to challenge the government's translation, the fact remains that the district court can inquire of each defendant at a pretrial conference whether or not he intends to contest the accuracy of the government's translations. The court may also inquire as to which method the defendant plans to use in challenging the translations. In addition, the court may wish to inquire as to nature of the defense objections; for instance, the court may inquire whether the objection is to the literal translation of a particular word or phrase, or to the interpretation of the meaning of that word or phrase. See Cruz, 765 F.2d at 1023. If the defense objects only to the interpretation of the meaning of the word, the parties should nevertheless be able to agree on the literal translation of the word. This procedure, which would narrow the universe of disputed translations, is consistent with the provision in Fed. R. Evid. 611(a)(2), allowing the court to exercise reasonable control

over the mode and order of presenting evidence so as to avoid needless consumption of time. Indeed, given the quantity of translations to be used as evidence in this case, the Court has properly focused the parties at this time on reducing the amount of time necessary to present those translations to the jury.

Moreover, defendant Al-Arian's objection to producing his own statements does not apply to those conversations that do not involve him. He should therefore be amenable to attempting to work out stipulated translations of conversations involving, for example, Ramadan Shallah and Fathi Shiqaqi, or Ramadan Shallah and Bashir Nafi. The government welcomes such a cooperative effort.

Defendant Fariz's Motion for Clarification and Objections (Dkt. # 626)

Defendant Fariz accurately describes the case law governing this type of discovery. He then seeks certain clarifications and makes several objections. We will address each of these below.

The defendant asks the Court to order the government to specify which conversations, among the 800 previously listed as "pertinent," it intends to use at trial. The Court need not issue such an order, because the defendant's request has already been satisfied. First, the grand jury has recently returned a superseding indictment which sets forth in great detail the conversations the government intends to use at trial. This indictment provides the defendant with a much better road map to the government's case than he could reasonably expect in other cases. Second, the government will comply with the Court's order and produce translations of all materials it intends to use at trial, including FISA conversations. The defendant's request is therefore moot.

The defendant further seeks an order requiring the government to specify its order of proof with respect to translations. On Friday, September 17, 2004, the Magistrate Judge dealt with this issue, and denied the defendant's request, at a hearing called to address an emergency motion filed by defendant Fariz. The Court denied this request. Nevertheless, to the extent that defendant Fariz is concerned that he will not receive transcripts of conversations in which he is involved until the latest deadline on December 1 (because the FISA interception of facilities he used did not begin until 2002), the government will make an effort to produce some transcripts of later conversations early on in the production.

In advancing his objections to the Court's order, defendant Fariz complains at length about the volume of materials in this case and states that the government did not provide the list of the 800 pertinent calls until March 2004. See Def.'s Motion at 5-6. Defendant Fariz's complaint is without merit. His concerns must be considered in light of the relative volume of materials that directly concern him, and the history of the government's production of those materials. Of the 323 Overt Acts alleged in Count One, fewer than 40 involve Fariz as a party to a conversation. Even fewer involve defendant Ballut as a party to the conversation, with many of those being conversations with Fariz. These defendants purportedly have two translators employed to work on approximately **50** separate Arabic-language overt acts. Furthermore, most of these conversations were set forth in the original indictment--and the defendants were provided in the Spring of 2003 with cassette tapes for each of these separate

conversations.³ The government provided the list of 800 calls to the defendants on or about March 5, 2004. On April 2, 2004, defendant Fariz's counsel sent a letter to the government mistakenly complaining that the government had not provided the list. On April 7, 2004, the government informed defendant's counsel that the list, and the first group of boxes containing summaries of intercepted conversations, were provided to the defendant's paralegal five weeks earlier. The government also offered to help the defense find the FISA communications among the 1500 CD's. This offer was declined. The defendant's failure to focus on the relevant evidence and to retain translators in a timely fashion is a disingenuous basis upon which to complain about the generous and timely discovery provided by the government in this case.

Defendant Fariz also asks that it be given some latitude in producing translations after the December 31 deadline in the event that they only become relevant or necessary after that date. The government has no objection to this request and believes that all parties should have the opportunity to produce some translations after the specified dates on a good faith basis.

Nor does the government object to the court setting a deadline for it to provide counter-translations to those provided by the defense. The government suggests that such a deadline be premised upon the date upon which the translation was served on the government (for instance, within 10 days of service).

³Part of defendant Fariz's complaint is the time required to isolate a given conversation within a CD. This effort is not required for those conversations specifically alleged in the original indictment.

Defendant Fariz's last objection pertains to the production for all English-language translations, not only the Arabic language FISA intercepts. The government agreed in open Court on May 17, 2004 that the Court's proposed procedure and deadlines should apply to all translations. This objection is therefore moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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