

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

UNITED STATES OF AMERICA

v.

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

HATEM NAJI FARIZ
_____ /

**RESPONSE OF MR. FARIZ TO GOVERNMENT’S MOTION FOR
CONSIDERATION OF REQUEST MADE BY UNITED STATES SENIOR
DISTRICT JUDGE SHADUR, NORTHERN DISTRICT OF ILLINOIS**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, hereby respectfully submits his response to the government’s motion for consideration of the request made by the Honorable Milton I. Shadur, United States Senior District Judge, Northern District of Illinois (Doc. 673), in *United States v. Hatem Fariz*, Case No. 04-CR-633 (N.D. Ill.) (hereinafter referred to as the “Chicago case”).

I. Background

On February 19, 2003, the grand jury returned an indictment against Mr. Fariz and seven co-defendants in the instant case, alleging numerous charges concerning the defendants’ alleged support for the Palestinian Islamic Jihad. (Doc. 1). The volume of discovery and complexity of the charges are well understood. Indeed, in response to Mr. Fariz’s motion to continue the case filed in June 2003, the Court indicated that 18 months was the minimum time needed to prepare for the trial in this matter if defense counsel worked diligently. (Doc. 162 at 11 n.16). On September 21, 2004, the grand jury returned a Superseding Indictment, requiring further preparation in advance of the trial. (Doc. 636).

Nonetheless, Mr. Fariz has no intention of moving to the continue the trial which is scheduled in January 2005. Mr. Fariz faces up to life in prison if he is convicted of these charges.

On July 7, 2004, nearly seventeen months after the instant case began, and nearly thirteen months after this Court set the trial date of January 10, 2005, the “Special March 2004 grand jury” in the Northern District of Illinois indicted Mr. Fariz, charging him with wire fraud and money laundering with respect to the food stamp program. (Chicago Case No. 04-CR-633, Doc. 1). These charges are based on alleged acts that occurred four to five years ago; the latest allegation in the indictment is from December 2000. While the indictment alleges a “scheme” to defraud, no other individuals have been indicted in connection with these charges. The government has indicated that the Chicago and Tampa cases are unrelated substantively, yet counsel for Mr. Fariz reasonably believe that these charges have been brought to adversely affect Mr. Fariz’s ability to prepare for the January 2005 trial in Tampa and, equally significantly, in an attempt to prejudice his ability to testify in his own defense in the present case.

On September 8, 2004, counsel for Mr. Fariz in Chicago filed a motion to continue the Chicago case, citing the volume of work remaining in the Tampa case leading up to the January 2005 trial and Mr. Fariz’s Sixth Amendment rights to a fair trial and effective assistance of counsel. (Chicago Case No. 04-CR-633, Doc. 22). In response, the government claimed that Mr. Fariz was willing to plead guilty in Chicago, and therefore (1) a continuance was not warranted, and (2) the only impact of continuing this case would be

to allow Mr. Fariz to deny with impunity the conduct alleged in Chicago if he chose to testify in Tampa. (Chicago Case No. 04-CR-633, Doc. 24).

On September 28, 2004, Judge Shadur held the latest hearing in the Chicago case and addressed the motion to continue. In discussing the government's response, Judge Shadur stated:

I found the government's position troublesome because as I understand the government's response, what it is targeted at is effectively trying to affect a decision by Mr. Fariz as to whether he is going to testify or not. And as I say, that's troublesome. If – well, let me put it differently.

What the government is saying that because of the fact that the charges here would [be] pending rather than the possibility of his acknowledging them, that he would be free to testify falsely. Now to my knowledge nobody is free to [testify] falsely. . . . [W]hat I gather is the thrust of the government's argument – that is, that even though there may be an intention to be plead guilty to these present[] charges, that defense counsel doesn't want to have a conviction on his record that would somehow put a thumb on the scales in connection with the Florida case.

(Doc. 673, Attachment A, Tr. at 5). The Court then indicated:

And the concern that I have is, I had thought of this [as] sort of an interest of justice kind of approach. And that is, that if Mr. Fariz were to choose to testify in the Florida case . . . whether as I say there should [be] an added thumb put on the scales to affect that decision by reason of the fact he would then have a conviction here. Now that[] strikes me as a kind of potential interest of justice concern under 3161(h)(8).

(*Id.* at 6-7).

The government then suggested that the decision of whether Mr. Fariz could be cross-examined in the instant case about the Chicago case was a decision for this Court. (*Id.* at 7). Ultimately, Judge Shadur agreed that this issue should be referred to this Court to permit the Court the opportunity to address these issues. (*Id.* at 10-13). The government has now filed

the transcript from this latest hearing, indicating that “[t]he question raised in the Chicago case is whether or not that case should be continued in light of the implications it may or may not have on defendant FARIZ’s exposure on cross-examination, should he decide to testify in the instant matter,” and submits to this Court the issue of “whether or not defendant FARIZ should face cross-examination in the instant matter under Rule 608 or 609.” (Doc. 673 at 1-2).

II. Response

A. The question of when a trial in Chicago should be scheduled should be decided by the Court in Chicago.

Mr. Fariz initially posits that the government’s potential ability to cross-examine him on the Chicago allegations should not be the primary focus in deciding whether to continue the case in Chicago. Rather, the focus should be on the time needed to prepare for the Chicago trial, *see* Affidavit of Luis Galvan, attached as Attachment A, and the time and effort needed by Mr. Fariz and his counsel to adequately prepare for the January 2005 trial in Tampa. Mr. Fariz moved to continue the case in Chicago to allow him to continue to prepare for the serious charges he faces in Tampa. Mr. Fariz and his counsel have been working toward ensuring that Mr. Fariz is prepared for the January 2005 trial in this matter, consistent with this Court’s continued statements that the trial will begin in January. *See, e.g.,* Doc. 593 at 4.

Mr. Fariz cannot simultaneously prepare for the Tampa case (in which the question of whether Mr. Fariz will spend the rest of his life in prison will be determined) and the

Chicago case (in which Mr. Fariz faces a potential term of imprisonment of several years), without jeopardizing his rights to a fair trial and to effective assistance of counsel, both of which are guaranteed to him by the Sixth Amendment. Mr. Fariz's motion to continue the Chicago case focused on the vast amount of work remaining in the Tampa case leading up to trial. Indeed, 18 U.S.C. § 3161(h)(1)(D) allows for the exclusion of time for "delay resulting from trial with respect to other charges against the defendant." Were Mr. Fariz required to stand trial in Chicago before the Tampa case, the required preparations in that case would substantially interfere with Mr. Fariz's ability to be ready for trial in Tampa.¹

Moreover, there are additional independent reasons to continue the Chicago case that should be addressed in Chicago. Mr. Fariz will require adequate time to prepare for the trial in Chicago, which includes not only issues of guilt or innocence but issues under *Blakely v. Washington*, __ U.S. __, 124 S. Ct. 2531 (2004).² Accordingly, even if this Court chooses

¹ Practical concerns further prevent Mr. Fariz from being able to defend himself in two different federal cases in two different cities under the circumstances of these cases. The government has placed Mr. Fariz on the no-fly list. Therefore, for Mr. Fariz to meet with his counsel in Chicago, he must drive over the course of two days from Tampa to Chicago. Mr. Fariz will then need to be able to meet with his counsel for a sufficient length of time to prepare his defense. During this time, Mr. Fariz will not be available to counsel in Tampa, despite that Mr. Fariz is personally needed to complete the review of the FISA intercepts, other discovery, the government's transcripts that it intends to use at trial, and to complete the other tasks that are necessary to be ready for the trial in Tampa. While defense counsel will continue to prepare with Mr. Fariz in Tampa, defense counsel is also sensitive to the possibility of requiring Mr. Fariz to stand trial during the Islamic holy month of Ramadan, which begins on October 15.

² On September 1, 2004, the government superseded the Chicago indictment to include sentencing factors. (Chicago Case No. 04-CR-633, Doc. 19). The Seventh Circuit, the jurisdiction which includes Chicago, has held that *Blakely* invalidates the federal sentencing guidelines, at least to the extent that sentencing enhancements are at issue. *United States v.*

to rule on the evidentiary issue presented to it, it simply will not be possible, nor constitutionally permissible, to require Mr. Fariz to prepare for and stand trial in Chicago while he is preparing for the trial in Tampa.

B. This Court should decline to rule on the cross-examination issue, since it is premature.

The government has suggested that the determination of whether Mr. Fariz should be cross-examined under Federal Rule of Evidence 608 or 609 based on the Chicago allegations is for this Court to make. While the decision of whether Mr. Fariz would be subject to cross-examination ultimately resides in this Court, Mr. Fariz respectfully submits that this issue at the present time is premature. Rule 609 concerns whether an individual may be impeached based on prior convictions. The government's focus on this issue, however, is based on the mistaken premise that Mr. Fariz is necessarily pleading guilty to the Chicago charges. *See* Affidavit of Luis Galvan, Attachment A. The resolution of the Chicago case is still an open question; it is not possible to know at this point whether Mr. Fariz would be convicted. Accordingly, this issue is premature, and any opinion this Court would render would be advisory.

The government contends that the reason they seek the opportunity to obtain a conviction in the Chicago case prior to the Tampa trial is so that Mr. Fariz cannot deny the conduct if he chooses to testify in Tampa. (Doc. 673 at 2). The government is arguing that

Booker, 375 F.3d 508 (7th Cir. 2004). The Supreme Court granted certiorari in *Booker*, No. 04-104, along with *United States v. Fanfan*, No. 04-105 (U.S. Aug. 2, 2004), and held oral argument on October 4, 2004. The Supreme Court has not yet issued an opinion.

because they cannot offer extrinsic evidence of acts under Federal Rule of Evidence 608 (but could for a conviction under Rule 609), that Mr. Fariz would necessarily perjure himself in Tampa if the Court allows questioning about the Chicago allegations. This contention is unfounded and troubling. Mr. Fariz has no prior convictions, and there is no evidence to suggest that he would risk an additional indictment on perjury charges or that defense counsel would knowingly suborn perjury. Moreover, the government cannot assume that even if Mr. Fariz stood trial in Chicago prior to the Tampa case that he will be convicted; instead, he is presumed innocent until proven otherwise. The government's arguments only belie the true intent behind their opposition to the continuance in Chicago: to prejudice Mr. Fariz's trial rights in Tampa.

The government's true intent behind the Chicago indictment is also revealed by the government's argument that they should be permitted to cross-examine Mr. Fariz about the Chicago allegations pursuant to Federal Rule of Evidence 608, whether or not he is convicted in Chicago. Whether cross-examining Mr. Fariz is appropriate based on the Chicago allegations (should he choose to testify) will have to be based on the Court's discretion under Rule 608 and on whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and the other considerations included within Rule 403. *See* Fed. R. Evid. 608 advisory committee notes (applying Rule 403). These issues will have to be weighed by considering the government's proposed questions (which they have not yet provided), the probative value of the questions, and the potential prejudice and confusion that would result. These determinations should be made

at trial when the context of these issues is clear. The government's Rule 608 argument is not dispositive of whether the Chicago case should be continued. Instead, should the Court decide to issue an opinion or ruling, the Court can simply indicate that it will consider whether cross-examination under Rule 608 is appropriate when it is properly before the Court.

III. Conclusion

Mr. Fariz contends that forcing him to trial in Chicago now, while preparations for the Tampa case are still ongoing in earnest, would severely prejudice Mr. Fariz's due process and trial rights in both cases. By filing a motion to continue in Chicago, Mr. Fariz appropriately sought to continue with his preparations in the Tampa case. 18 U.S.C. § 3161(h)(1)(D). Under these circumstances, the government's attempt to manipulate the criminal justice system should be ended.

Indeed, the interests of justice would require that the Chicago case be continued until after the completion of the Tampa case. *See* 18 U.S.C. § 3161(h)(8)(A); (Doc. 673, Attachment A, Tr. at 7). The U.S. government indicted the case in Tampa first. The Tampa case involves much more serious charges; if Mr. Fariz is convicted, he could spend the rest of his life in prison. While this case was pending, the U.S. government sought an indictment against Mr. Fariz on unrelated food stamp charges, based on allegations occurring as long as four or five years ago. If the government was sincerely concerned about the public's right to a speedy trial in the Chicago case, *see* 18 U.S.C. § 3161(h)(8)(A), the government would have indicted the Chicago case much earlier. Instead, the government waited nearly

seventeen months after indicting the Tampa case to indict him in Chicago, after this Court ruled that the government would have to prove the specific intent of the defendants to obtain a conviction under Counts Three and Four. The timing of the Chicago indictment, and the fact that it was brought only against Mr. Fariz despite an alleged “scheme,” reasonably supports the conclusion that the government is attempting to prejudice Mr. Fariz’s trial rights in Tampa. This manipulation is inconsistent with the responsibilities of federal prosecutors:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, Mr. Fariz would respectfully request that this Court decline to rule on what is otherwise a scheduling matter and where the merits of the evidentiary issues are premature. Mr. Fariz will continue to assert his motion to continue in Chicago so that: (1) the Chicago case does not interfere with his preparations and fair trial rights in Tampa, and (2) he is provided adequate time to prepare his defense in Chicago.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of October, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Cherie Kringsman, 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 to Stephen N. Bernstein, Counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
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