

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 TAHA HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATEM NAJI FARIZ

**Response of the United States to Defendant Al-Arian's
Motion to Continue the Trial Date**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby responds to Defendant Al-Arian's Motion to Continue the Trial Date as follows:

As a general legal proposition, a motion to continue a trial is a matter within the Court's discretion. United States v. Beasley, 2 F.3d 1551, 1557 (11th Cir. 1993), cert. denied, 512 U.S. 1240 (1994). There are no mechanical tests for deciding whether a particular decision is appropriate; the answer is found in the circumstances of the particular case. United States v. Verderame, 51 F.3d 249, 251 (11th Cir.), cert. denied sub nom. Coffey v. United States, 516 U.S. 954 (1995), citing Ungar v. Sarafite, 376 U.S. 575, 589 (1964). See also United States v. Lingo, 740 F.2d 667, 668 (8th Cir. 1984) (listing five factors the trial court must consider); United States v. Fisher, 10 F.3d 115, 117 (3d Cir. 1993), cert. denied, 512 U.S. 1238 (1994) (listing four factors the trial court must consider).

There are a variety of reasons which could be offered by a defendant. One of the most common is the need for adequate time to prepare a defense. In United States v. Darby, 744 F.2d 1508, 1521-22 (11th Cir. 1984), cert. denied sub nom. Yamanis v. United States, 471 U.S. 1100 (1985), the Eleventh Circuit listed several factors the trial court should take into account in analyzing such a motion: (1) quantum of time available to prepare; (2) likely prejudice from a denial; (3) the defendant's role in shortening the effective preparation time; (4) the complexity of the case; and (5) the availability of discovery material. Id. at 1522, citing United States v. Uptain, 531 F.2d 1281, 1286-87 (5th Cir. 1976). In this case, defendant Al-Arian has basically presented the Court with an argument that he needs more time to adequately prepare a defense. In his motion, defendant Al-Arian has offered in justification numerous potential grounds: (1) large volume of discovery materials; (2) difficulties encountered in attempting to review discovery material between attorney and client; (3) the existence of a superseding indictment; (4) obstacles to filing motions to suppress; (5) inability to access computer evidence; (6) difficulties in launching and completing the Pegasus copying project; (7) the existence of prejudicial pretrial publicity; (8) the inability to prepare an affirmative defense; (9) a possible severance; (10) outstanding discovery; and (11) the need for time to file additional motions to dismiss the indictment.¹ For the

¹Although defendant Al-Arian has not mentioned the need to take depositions pursuant to Fed. R. Crim. P. Rule 15, at a previous hearing before the Magistrate Judge co-defendant Hammoudeh announced that he might make such a request. No Rule 15 motion has yet been filed. If such a motion is filed and granted, and the witnesses are in the Middle East, it is doubtful that the depositions could be completed by January 10, 2005.

most part, the government is not in a position to evaluate or comment upon the amount of time a defendant needs to accomplish any particular pretrial task. Most of the defendant's justifications for a continuance fall into this category, and thus the government can take no position. We presume that the request for additional time is based on a professionally-determined need. We do, however, offer some observations on the situation.

As a general statement, in the ordinary criminal case, there is a natural progression from indictment to trial with distinct phases. First, there is the discovery phase. Next, there is the legal motions phase. Finally, there is the trial preparation phase. The last phase is crucial to the trial itself because it is at that time the parties determine exactly how the trial will proceed and with which witnesses and which exhibits. Adequate trial preparation ensures that the trial will proceed smoothly and efficiently and without a needless consumption of time. These same principles also apply to the extraordinary case, although one would expect an elongation of the time for each phase to be completed. This is the extraordinary case.

A. Discovery

As defendant Al-Arian correctly points out, the current trial date of January 10, 2005, was set by the Court on June 12, 2003, based on estimates by the defense attorneys then involved in the case as to the amount of time needed to prepare for trial. Doc. 162. The production of discovery materials had barely begun. However, it was well understood by everyone that there was a massive quantity to be produced, reviewed and analyzed.

The Magistrate Judge assigned to this case developed and implemented a plan for the production of discovery materials. The government agreed to provide copies of all the FISA intercepts to the defense at government expense. The government made the remaining documents and tangible objects available to the defense attorneys for inspection and copying in accordance with Fed. R. Cr. P. Rule 16. Later, the Magistrate Judge decided to allow the two incarcerated defendants to personally view all the discovery material, which necessitated bringing the two defendants to Tampa.

Given that the materials to be shown to the defense were originals, that complicated the discovery process. As the custodians of the original items responsible for their safekeeping, the Federal Bureau of Investigation has a legal obligation to protect these items. Thus, the Federal Bureau of Investigation had to impose restrictive conditions on the handling of the materials by others.

This inherent discovery problem was exacerbated by the conditions under which the parties had to work, as described in defendant Al-Arian's pleading. (Doc. 689, Al-Arian Motion at ¶¶ 25-40).

The solution to this dilemma is for the defense to copy the discovery material. This solution was recognized by the defense back in December, 2003. (Doc. 689, Al-Arian Motion at ¶ 64). For whatever reasons, this plan was not launched until October, 2004. However, instead of alleviating the problem of viewing original records, the situation has become worse.

The Federal Bureau of Investigation is still transporting original discovery material to the local jail for review by the defendants and counsel. At the same time, the Federal Bureau of Investigation is delivering other original discovery material to Pegasus, the

copying service selected by the defense. At a time when discovery should have been completed, the Federal Bureau of Investigation is committing agent resources to discovery on two different fronts, and precious investigative resources continue to be diverted from trial preparation. Moreover, there is no end in sight to either of these procedures.

B. Motion Practice

As stated previously, in the ordinary case there is a natural progression from indictment to trial. In this case, again for whatever reasons, the natural progression has been disrupted. Basic legal motion practice has not been completed. The reason the motion practice phase needs to precede trial preparation phase is so that the government and the defense will know what portions of the indictment will be tried and the evidence available to prove those charges. For a trial which is expected to take six months to try, at least the last three months should be devoted to trial preparation. Yet, the defense has not filed the first motion to suppress any evidence despite previously announced plans to do so. The government notes that imbedded within defendant Al-Arian's motion to continue the trial is an implied motion for an additional thirty days to file legal motions. (Doc. 689, Al-Arian motion at ¶ 88). Once these motions are filed, if they are filed, the government will again be diverted from trial preparation to respond.

While the government did file a superseding indictment on September 21, 2004, it doubts this fact alone would justify a continuance. At the arraignment of the defendants on October 5, 2004, the prosecutors explained the differences between the superseding indictment and the original indictment. Most of the new allegations (substantive counts or overt acts) came from information previously provided in

discovery. Portions of the superseding indictment set forth corrected or modified language (such as the extortion allegations in paragraph 29 of Count One). The major legal issues have previously been briefed.

C. Production of Translations

As defendant Al-Arian points out, the parties are involved in a procedure to exchange translations of Arabic (and to a much lesser extent Hebrew) language documents and communications. The government has been ordered to produce its translations by December 1, 2004, and the defense has been ordered to produce its counter-translations by December 31, 2004. The government now expects to produce over 400 such translations. Assuming the government can even meet this schedule, it is highly unlikely that the defense will be able to respond by December 31, 2004. The purpose for this exchange is to follow the recommended procedure established by the Eleventh Circuit in United States v. Onori, 535 F.2d 938, 949 (5th Cir. 1976), United States v. Llinas, 603 F.2d 506, 508 (5th Cir. 1979), cert. denied, 444 U.S. 1079 (1980), and United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985). The objective is to save trial time by shifting the discussion and resolution of disputes regarding translations into pretrial conferences. Given the production schedule and the current trial date, this whole procedure will be fruitless. What is gained by starting the trial on January 10, 2005 will be lost as the Court and the parties wrestle with translations disputes during trial.

D. Prejudicial Pretrial Publicity

The government doubts that anyone could have predicted the direction the Florida United States Senatorial campaign has taken and the associated publicity. In any event, the campaign advertisements are in the public domain. Come January 2005, we will not know whether the potential jurors paid close attention to campaign advertisements or whether their ability to be a fair and impartial juror has been impacted. The only way to measure the effect such publicity has on potential jurors is to ask them. However, our experience with issues such as this is that jurors' memories fade quickly over time. Whether the residual memories of the jurors remain strong on January 10, 2005 is unknown.

E. Summary

The government is not in a position to evaluate or comment on the professionally-determined trial preparation needs of the defense. The government has pointed out that there are at least four factors presently at work which the government thinks may affect the current starting date of January 10, 2005: (1) basic discovery is still on-going and is interfering with trial preparation; (2) there are still defense legal motions to be filed and the time needed to respond to those motions will interfere with trial preparation; (3) the translation-exchange procedure likely will fail to accomplish its objective given the current schedule; and (4) the effects of the Senatorial campaign advertisements may still be strong as of January 10, 2005, during jury selection.

As the government stated previously, a request for a continuance is directed to the sound discretion of the Court. If the Court is inclined to grant defendant Al-Arian's

motion, the government estimates that a continuance of at least three months would be required to satisfactorily resolve the concerns raised in this response.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 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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