

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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UNITED STATES OF AMERICA

v.

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

HATIM NAJI FARIZ
_____ /

MOTION FOR SEVERANCE AND CONTINUANCE
AND MEMORANDUM OF LAW IN SUPPORT

COMES NOW, Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, pursuant to 18 U.S.C. § 3161(h)(8)(A) and Federal Rules of Criminal Procedure 12(b)(3)(D) and 14, and requests that this Honorable Court sever and continue his trial in this case. As grounds in support, Mr. Fariz states:

I. Background Facts

1. Mr. Fariz, along with Sami Al-Arian and six other co-defendants, is charged in a 121-page indictment which accuses the defendants with a total of 50 counts, including conspiracy to commit racketeering, in violation of 18 U.S.C. § 1962; conspiracy to murder, maim, or injure persons at places outside the United States, in violation of 18 U.S.C. § 956; conspiracy to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B; conspiracy to make and receive contributions of funds, goods, or services, to or for the benefit of specially designated terrorist organizations, in violation of 50 U.S.C. § 1701 et seq., 31 C.F.R. § 595 et seq., and 18 U.S.C. § 371; and travel in interstate or foreign commerce or use of the mail or any facility in interstate or

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foreign commerce with intent to commit crimes of **violence** or to promote and carry on specified unlawful activity, in violation of 18 U.S.C. § 1952.

2. The **racketeering** conspiracy alleged in **Count One** alleges criminal activity beginning in about 1984 and continuing to the date of **the indictment** in February of 2003.

3. From the time of the initial appearance and **detention** hearing in this case, the government has put the Court and defense counsel on **notice that** the primary evidence in this case consists of more than 21,000 hours of **telephone conversations** allegedly between the charged defendants and alleged co-conspirators. These **conversations** were intercepted by the government in 152 separate wiretap applications **obtained** pursuant to the Foreign Intelligence Surveillance Act. Virtually all of the **conversations** are reportedly in Arabic, which will make it incumbent upon the defense to **employ interpreters** to translate the calls from Arabic to English. Consistent with evolving **recording technology**, the first recordings are on approximately 1,000 reel-to-reel recordings, **each eight** hours long. Subsequent recordings are on magnetic optical discs (m.o.d.'s) and on **compact** discs.

4. With respect to these recorded conversations, **to date**, the government has only provided cassette tapes of the approximately 250 **telephone calls** to which the indictment refers and which the government intends to introduce **in its case** in chief at trial. However, these telephone calls probably account for less than **1% of all** calls recorded. It will be necessary for the defense to review and to translate **all telephone** calls in order to identify other calls which may put the government's calls into **perspective** and which may prove exculpatory.

5. At a discovery status conference on May 29, 2003, before U.S. Magistrate Judge Thomas B. McCoun III, the government represented that it is seeking approval to have the telephone conversations which were recorded in the reel-to-reel mode converted to electronic formatting on compact discs. The government estimated that it will take thirty-two weeks from start to finish for this process to be completed. It will be necessary for the government to convert the reel-to-reel conversations in this manner in order to provide a workable medium with which to handle the conversations, as well as to preserve the integrity of the government's evidence on the degrading reel-to-reel recording tape.

6. The government has informed defense counsel that but for the estimated 250 calls which it intends to use at trial, the balance of the recordings remain classified. While the government has represented that it is making efforts to declassify the calls, defense counsel has been encouraged by the government, and by the Court at the status conference on May 1, 2003, to seek security clearance in the event the calls are not declassified. The undersigned counsel, as well as their investigator, have obtained, and are in the process of preparing the lengthy applications for such clearance.

7. With respect to the interpreters which will be necessary for the translation of audio recordings and documents, the Federal Public Defender is in the process of preparing a budget proposal to the Administrative Office of the United States Courts, which includes a proposed budget for interpreters to be used by all court-appointed counsel. In this manner, interpretation services will be organized and shared, rather than piecemeal and submitted on an ad-hoc basis.

8. In addition to audio interceptions, the **government has** represented that it is in possession of 550 videotapes, the audio portion of **which are in** Arabic, and a number of foreign documents, obtained from Israel, which are in **Hebrew**. Thus, the defense will require a Hebrew interpreter as well.

9. While the primary evidence is in the form of **audio recordings**, the government also has at least a couple hundred boxes of **documentary evidence**. Eleven of those boxes consist of bank account records. The office of the **undersigned counsel** has begun the process of electronically scanning the bank account records. It **has taken** approximately eight hours to scan approximately two-thirds of one full box of the **records**. The defense intends to scan all documentary evidence possessed by the government.

10. The government also possesses 30 **computers which** it seized in searches. The defense will provide **blank hard-drives to the government so that** clones of each of those seized computer hard-drives may be made for **defense use and inspection**.

11. Considering the indictment alleges extensive **overseas** contact in the Middle East, it will likely be necessary to take a number of depositions of **those** witnesses who are beyond the jurisdiction of the United States Courts and who, **consequently**, will be unavailable to testify live at trial.

12. At the arraignment on March 25, 2003, **Mr. Fariz** and co-defendants Sameeh Hammoudeh and Ghassan Ballut waived speedy trial **under the Speedy Trial Act**, based upon the recognition that in order to provide the effective **assistance of counsel** in the preparation and trial of this extensive, complex case, it will be **essential for counsel** to have an adequate

amount of time, estimated to be at least 18 months, **in order to**, among other things: (1) research legal issues involving attacking the sufficiency of **the** charges in the indictment, many of which are of first impression, (2) research and **prepare** possible motions to suppress the audio recordings and documentary evidence seized, (3) **obtain** security clearance for any evidence which is not ultimately declassified, (4) **obtain Arabic** and Hebrew interpreters (who will also have to obtain security clearance), (5) **have** the thousands of hours of telephone calls interpreted into English, (6) scan the **documentary** evidence into an organized electronic format which may be used for pre-trial **preparation and** for use by the defense at trial, (7) take foreign depositions necessary to the **defense, and**, (8) prepare for trial. The undersigned counsel cannot overstate the mammoth **undertaking** which the preparation of the defense in this case will entail. The government has not **disagreed** with the defense estimate of a minimum of 18 months being necessary for defense **preparation** and estimates that the trial in this case will take from six to twelve months.

13. Notwithstanding the extensive discovery **and the** time necessary to both a meaningful review of the discovery and the **preparation of the** defense case for trial, co-defendant Sami Al-Arian, at his arraignment on April 7, 2003, announced that he will not waive speedy trial in this case. As of the filing of this **motion, Mr.** Al-Arian has maintained that position.

14. At the first scheduled status conference on **May 1, 2003**, this Honorable Court, in discussing Mr. Al-Arian's demand for a speedy trial, **indicated** that it was not inclined to

sever him and that either Mr. Al-Arian was going to **go to trial** in June (of 2003) with everybody else, or he was going to waive speedy trial and **proceed** to trial later.

15. While the undersigned counsel can only **speculate** about the reason(s) that Mr. Al-Arian wishes to maintain his speedy trial rights, and **does not** pass judgment upon Mr. Al-Arian's demand (indeed, perhaps Mr. Al-Arian perceives a **tactical** advantage in proceeding to trial sooner, rather than later), the Federal Public Defender, **charged** with the responsibility of effectively representing the interests of Mr. Fariz to **the best of his ability**, whole-heartedly disagrees with the notion that a speedy trial (or a trial set **any** sooner than within the time necessary to effectively review the evidence in this case) is **appropriate**. If this Court were to set a joint trial any sooner than necessary for the **defense** to meaningfully review the evidence and prepare for trial, Mr. Fariz will be denied **the fundamental** rights to the effective assistance of counsel and to a fair trial, both of which **are guaranteed** him by the Sixth Amendment to the United States Constitution.

16. Considering that Mr. Al-Arian's demand for a **speedy** trial and Mr. Fariz's fundamental rights to the effective assistance of counsel **and** to a fair trial are mutually exclusive, due to the clear extensive period of time **which will** be necessary to afford Mr. Fariz his rights, Mr. Fariz respectfully submits that it is **appropriate** for this Honorable Court to sever and to set a separate trial of Mr. Fariz upon **the completion** of counsel's review of the discovery and of the pre-trial preparation in this case. A **joint** trial before that time will result in substantial prejudice to the rights of Mr. Fariz to **the effective** assistance of counsel

and to a fair trial; a severance will ensure that Mr. Fariz's fundamental rights remain inviolate.

II. Argument

A. Mr. Fariz's Trial Should be Severed In Order to Avoid Substantial Prejudice to Mr. Fariz's Right to a Fair Trial and to Effective Assistance of Counsel

Federal Rule of Criminal Procedure 8(b) provides for the joinder of defendants "if they are alleged to have participated in the same act or **transaction**, or in the same series of acts or transactions, constituting an offense or offenses." As the Supreme Court has expressed, "[t]here is a preference in the federal system for **joint trials** of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). The rationale for this preference is that joint trials promote efficiency and "**serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.**" *Id.* (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)).

Where such a joinder appears to prejudice the **defendant** or the government, Federal Rule of Criminal Procedure 14(a) permits a district court to **sever** the defendants' trials or to "provide any other relief that justice requires." The **Supreme** Court has directed that "a district court should **grant a severance** under Rule 14 **only if there** is a serious risk that a joint trial would compromise a specific trial right of one of **the defendants**, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539; *see United States v. Schlei*, 122 F.3d 944, 984 (11th Cir. 1997) ("**The burden** is on the defendant to 'demonstrate that a joint trial will result in **specific and compelling** prejudice to the

conduct of his defense.”) (citation omitted). The risk of **prejudice** and remedy to be afforded under Rule 14 is left to the sound discretion of the **trial court**. *Zafiro*, 506 U.S. at 541.

In this case, co-defendant Sami Al-Arian has **indicated** to the Court that he will not waive his right to a **speedy trial**, notwithstanding the **extensive** discovery and the time necessary to review the discovery and to prepare a **defense for trial**. As outlined above, in light of the volume of the discovery and the complexity of the **case**, defense counsel estimate, and the government has not disagreed, that at least **18 months** will be required in order to take all of the necessary steps to prepare effectively for **trial**.

Setting a joint trial sooner than necessary for the **defense** to review meaningfully the evidence in this case and to prepare for trial would deny **Mr. Fariz** the fundamental right to an effective assistance of counsel and to a fair trial, both of **which** are guaranteed him by the Sixth Amendment to the United States Constitution. **Moreover**, in the absence of a meaningful opportunity to receive and review the **evidence in this case**, Mr. Fariz may also be denied his due process right to receive and examine **evidence** favorable to his case. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). It would **therefore** be unreasonable to subject Mr. Fariz to a trial without adequate time to receive and **review** the discovery and to prepare his defense. As the Supreme Court and the Eleventh **Circuit have** recognized, the “inability of a defendant adequately to prepare his case skews the **fairness** of the entire system.” *United States v. Adkinson*, 135 F.3d 1363, 1373 (11th Cir. 1998) (**quoting** *Doggett v. United States*, 505 U.S. 647, 654 (1992) (citations omitted)). **Mr. Al-Arian’s** demand for a speedy trial

should not come at the price of sacrificing Mr. Fariz's **right to a fair trial** and to effective assistance of counsel.

Moreover, the rationales for a joint trial expressed in other cases – efficiency and consistent verdicts – do not overcome Mr. Fariz's **rights to a fair trial** and to effective assistance of counsel in this case. *See, e.g., Zafiro*, 506 U.S. at 537 (noting rationales). While the preference in federal courts is to conduct a **joint trial**, the Supreme Court has indicated that such “proceedings are exceptional to our **tradition** and call for use of every safeguard to individualize each defendant in his relation to **the mass.**” *Kotteakos v. United States*, 328 U.S. 750, 773 (1946) (discussing joint trial of **numerous** separate and distinct crimes, with only nexus that one man participated in all). **Conducting** a trial before defense counsel have received and meaningfully reviewed the **evidence** in the case and have had sufficient time to prepare a defense would certainly **undermine any** confidence in the jury's verdict and could hardly be the “efficiency” desired in the **criminal** justice system. In this respect, the prejudice to Mr. Fariz outweighs the **public's interest** in a joint trial.

Finally, other measures cannot satisfy both Mr. Al-Arian's right to a speedy trial and Mr. Fariz's right to adequate time to prepare his **defense and** to effective assistance of counsel, since these positions are diametrically opposed. *See, e.g., Zafiro*, 506 U.S. at 539 (indicating that “less drastic measures, such as limiting **instructions**, often will suffice to cure any risk of prejudice”). While Mr. Al-Arian's motivation **behind** his insistence on a speedy trial is not fully known to undersigned counsel, his **detention** during these proceedings undoubtedly contributes to his concerns that he be **brought to trial** relatively quickly. Mr.

Fariz, however, needs additional time to receive and review **the voluminous** discovery in this case, to prepare pretrial motions, and to prepare for trial. As a result, the only remedy available under Rule 14 in light of the prejudice to Mr. Fariz is that his trial be severed and continued. See *United States v. Ailsworth*, 873 F. Supp. 1450, 1454-56 (D. Kan. 1994) (granting defendant's motion for severance and continuance where new defense counsel was appointed shortly before trial, case was voluminous and complex, and all but one of the co-defendants was incarcerated pending trial). Accordingly, Mr. Fariz respectfully requests that this Court sever and continue his trial.

B. Mr. Fariz's Case Should be Certified as Complex and this Court Should Continue the Pretrial and Trial Proceedings to Ensure Adequate Time to Prepare Mr. Fariz's Defense

Additionally, Mr. Fariz requests that this Court certify this case as "complex" for purposes of the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(B)(ii), and continue the pretrial and trial proceedings. Section 3161(h)(8)(B)(ii) permits the Court to schedule the trial beyond the seventy-day time limit of the Speedy Trial Act when:

... the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

As indicated above, based on the government's representations concerning the quantity of discovery, including that a vast amount of the discovery consists of materials that are classified and in Arabic and Hebrew, defense counsel estimate that at least 18 months will be necessary to receive and review the discovery and to prepare for trial. Additionally, in

light of the complex and novel issues of law involved in **this case**, defense counsel estimate that at least 120 days are needed to research and prepare **pretrial** motions.¹

Mr. Fariz would therefore request a continuance **in order** to ensure adequate time to prepare pretrial motions and his defense for trial in **light of the** complex nature of the case and the amount of discovery involved. Mr. Fariz contends, **and** the government appears to agree,² that the “ends of justice [in granting this motion] **outweigh** the best interest of the public and defendant in a speedy trial.” 18 U.S.C. § 3161(h)(8)(A); see *United States v. Twitty*, 107 F.3d 1482, 1489 (11th Cir. 1997) (indicating that an “open-ended continuance may be granted to serve the ends of justice”); *United States v. Mathis*, 96 F.3d 1577, 1580-81 (11th Cir. 1996) (indicating that court appropriately **took into** account factors under § 3161(h)(8)(B), including the scheduling of “adequate **preparation** and trial time for this complex narcotics case involving multiple defendants” **when court** set trial date one year in future); *United States v. Hayes*, 40 F.3d 362, 364 (11th Cir. 1994) (indicating that district court had granted request that the case be certified as complex pursuant to § 3161(h)(8)(B)(ii) and defendant had waived his Speedy Trial Act rights “**in the interest** of allowing [defendant] time to adequately prepare a defense”). Moreover, as **Mr. Fariz** has previously indicated to this Court, **Mr. Fariz** has waived his right to a **speedy trial under** the Speedy Trial Act, to

¹ Mr. Fariz has separately filed an Unopposed **Motion** to Adopt Defendant Ballut’s Motion for Extension of Time to File Motions to Dismiss **and to Request** a Bill of Particulars.

² See United States’ Motion to Exclude Time **From the** Speedy Trial Calculation and Memorandum of Law, at pages 12-15 (filed June 3, 2003).

further ensure that he may have sufficient time to **prepare his** defense with the effective assistance of counsel. *See Twitty*, 107 F.3d at 1487-88 (**noting** waiver of defendants' rights to a speedy trial); *Hayes*, 40 F.3d at 364.

Mr. Fariz requests a continuance of these **proceedings**, consistent with his request above that his trial be severed, in order to ensure **Mr. Fariz's** rights to a fair trial with effective assistance of counsel. Therefore, Mr. Fariz **requests a** continuance in conjunction with a severance. If the Court denies Mr. Fariz's **severance request**, Mr. Fariz still requests a continuance in order to provide him with **sufficient time** to receive and review the discovery meaningfully and to prepare pretrial motions **and for trial**. Under 18 U.S.C. § 3161(h)(7), the continuance would also be applicable to **Mr. Al-Arian**. *See Schlei*, 122 F.3d at 985 n.15 (indicating in response to one defendant's **Speedy Trial Act** violation argument that where co-defendants had waived speedy trial, **Congress in** adopting § 3161(h)(7) had "determined that the efficiency and economy of **multi-defendant** criminal trials far outweigh the granting of a severance where the reason was **simply the passage** of time") (citing *United States v. Varella*, 692 F.2d 1352, 1359 (11th Cir. 1982)); *United States v. Davenport*, 935 F.2d 1223, 1236-37 (11th Cir. 1991) (holding that **delay caused** by continuance of co-defendants was reasonable and properly attributed to **defendant**); *cf. Twitty*, 107 F.3d at 1490 (holding that defendant had not asserted right to **speedy trial in a** timely fashion, and noting that defendant had not requested a severance to **proceed to trial more** speedily). Accordingly, even if this Honorable Court does not sever **Mr. Fariz's** trial, Mr. Fariz requests a continuance in order to **prepare pretrial motions and for trial**.

III. Conclusion

For the foregoing reasons, Mr. Fariz requests that **this Honorable Court** sever his case for trial, pursuant to **Federal Rule of Criminal Procedure 14**. **Mr. Fariz** additionally requests that this Court grant him a continuance to prepare **pretrial motions** and for trial, pursuant to 18 U.S.C. § 3161(h)(8)(A), (B). If this Honorable Court **does not** sever Mr. Fariz for trial, Mr. Fariz moves to continue the trial under 18 U.S.C. § 3161(h)(8)(A), (B).

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

By: 

Donald E. Horrox
Florida Bar #348023
Assistant Federal Public Defender
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Ph. 813-228-2715
FAX: (813) 228-2562
Attorney for Defendant

By: 

M. Alison Guagliardo
Assistant Federal Public Defender
400 N. Tampa Street, Suite 2700
Tampa, Florida 33602
Ph. 813-228-2715
FAX: (813) 228-2562
Attorney for Defendant

CERTIFICATE OF SERVICE

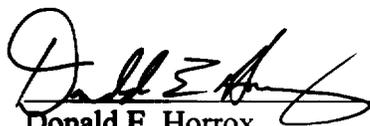
I hereby certify that on this 4th day of June, 2003, a **copy** of the foregoing has been furnished by hand delivery to Walter E. Furr, III, Assistant United States Attorney, United States Attorney's Office, 400 N. Tampa Street, Suite 2700, Tampa, Florida 33602 and by U.S. Mail to the following:

Bruce G. Howie, Esquire
5720 Central Avenue
St. Petersburg, Florida 33707

Frank Louderback, Esquire
150 2nd Avenue North, Suite 840
St. Petersburg, Florida 33701

Jeffrey Brown, Esquire
777 Alderman Road
Palm Harbor, Florida 34683

Daniel M. Hernandez, Esquire
902 N. Armenia Avenue
Tampa, Florida 33609


Donald E. Horrox
Assistant Federal Public Defender