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TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA CASE NO.: 8:03-CR-77-T-30TBM

vs.

SAMEEH HAMMOUDEH
_____/

AMENDED
DEFENDANT SAMEEH HAMMOUDEH'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT

Defendant, SAMEEH HAMMOUDEH, by and through undersigned counsel, files this motion to dismiss Count One of the Indictment (Conspiracy to Commit Racketeering in violation of 18 U.S.C. section 1962(d)), pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), on the ground that Count One is unconstitutionally vague in violation of Mr. Hammoudeh's right to due process under the Fifth Amendment to the Constitution, and in violation of his right to be informed of the accusations against him under the Sixth amendment to the Constitution, and in support of this motion states:

1. Count One alleges Conspiracy to Commit Racketeering (RICO) in violation of 18 U.S.C. section 1962(d).

2. As stated by the Eleventh Circuit Court of Appeals: "In order to be guilty of a RICO conspiracy, a defendant must either agree to commit two predicate acts or agree to participate in the conduct of the enterprise with the knowledge and intent that the other members of the conspiracy would commit at least two predicate acts in furtherance of the enterprise." *United States v. Nguyen*, 255 F.3d 1335, 1341 (11th Cir. 2001), citing *United States v. Carter*, 721 F.2d

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1514, 1531 (11th Cir. 1984).

3. Consistent with the above legal principle, the Eleventh Circuit Pattern Jury Instruction for a Conspiracy to Commit RICO (Offense Instruction 71.2) provides that the third element to be proven beyond a reasonable doubt is:

> That at the time the Defendant knowingly and willfully agreed to join in such conspiracy, the Defendant did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined in these instructions, or that the Defendant specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as part of a "Pattern of racketeering activity."

4. The terms "predicate offenses" and "Pattern of racketeering activity" are not defined in the pattern jury instruction of Conspiracy to Commit RICO. It is apparent that the definitions for those terms are to be borrowed from the Eleventh Circuit Pattern Instruction for a substantive RIC charge (Offense Instruction 71.1), which state: "The term 'pattern of racketeering activity' requires at least two acts of 'racketeering activity,' sometimes called predicate offenses, which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970."

5. In paragraph 27 of the Conspiracy to Commit RICO count (Indictment, Doc. 1, at page 10) the Grand Jury alleges: "It was further part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise." Because the Grand Jury does not allege that each defendant "personally"

intended to commit two predicate offenses, the government will have to prove the second alternative in the above third element of the jury instruction: that at the time Mr. Hammoudeh knowingly and willfully agreed to join in the conspiracy, he specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy could commit two or more "predicate offenses" as part of a "pattern of racketeering activity."

6. Count One does not allege any specific "predicate offenses." Rather, subsection "C." (Indictment, Doc. 1 page 10) alleges a "pattern of racketeering activity" which describes, in general terms, seven different general categories of Florida and Federal crimes, including "multiple acts of murder in violation of Florida Statutes 782.04; 777.04(3)." Subsection "E" enumerates 255 separate "overt acts," and incorporates (in paragraph 256) the acts alleged in Counts Two through fifty as additional "overt acts," without specifying which overt acts Mr. Hammoudeh should be on notice as constituting specific "predicate offenses" which the government will attempt to prove he agreed would be committed by another conspirator in this alleged RICO conspiracy. As it sands, the indictment is useless in providing notice to Mr. Hammoudeh and to the Court as to which specific "predicate acts" should be submitted to the jury for its consideration as to whether the government will have proven the third element of this Conspiracy to Commit RICO charge, namely, which of at least two "predicate offenses" have been proven beyond a reasonable doubt. At this point, Mr. Hammoudeh and the Court are left to speculate as to those "predicate offenses"' and the specific state or federal statutory provisions they purport to violate, as well as the maximum penalties attendant to such violations (the significance of which is explained below).

7. The failure of the indictment to specify "predicate offenses" such that Mr. Hammoudeh is put on notice of neither a particular "predicate offense," nor its penalty, violates the due process requirements established by the Supreme Court in Jones v. United States, 526 U.S. 227, 119 S.Ct 215, 153 L.Ed.2d 311 (1999), and *Apprendi v. new Jersey*, 530 U.S. 466, 120 S.Ct 2348 (2000). The prison term for a violation of Conspiracy to Commit RICO is "not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)." 18 U.S.C. section 1963. The various statutes cited in subsection "C." of the Indictment carry different penalties amongst each other, and, in some instances, within the same statute. For example, the penalties for murder, in violation of Florida Statute 782.04 range from a maximum of 15 years (if the murder is a second degree felony in violation of 782.04(4)) to the death penalty (if the murder is in violation of 782.04(1)(a). See, Florida Statutes 775.082(3)(c) and 775.082.(1), respectively. Therefore, without further specificity as to which subsection of Florida Statute 782.05 the government intends to prove, Mr. Hammoudeh is not on notice of whether the penalty to be imposed on the Conspiracy to Committ RICO charge will be increased from the normal 20 year maximum if the jury should find beyond a reasonable doubt that he is guilty of knowing and intending that another conspirator would commit a certain murder.

8. This lack of notice violates *Jones* and *Apprendi*. In *Jones*, the Supreme Court stated the principle: "...under the Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." *Jones supra*, at 243, 119 S.Ct. 1215, n.6. In *Apprendi* the Court

applied the same principle in construing a state statute. *Aprendi, supra*, at 476.

In Nguyen, *supra*., the Eleventh Circuit applied *Apprendi* to a conviction for Conspiracy to Commit RICO. In applying *Apprendi*, the *Nguyen* court essentially found that before a penalty of more than 20 years can be imposed upon a conviction for Conspiracy to Commit RICO, the jury must find beyond a reasonable doubt that the defendant intended to participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit a predicate act that has a potential penalty of life imprisonment. Nguyen, *supra*, at 1342-43. The indictment fails to allege any specif "predicate offenses." It thus fails to advise Mr. Hammoudeh of: 1) which specific "predicate offenses" the government will attempt to prove, and 2) the potential penalties he would face on the Conspiracy to Commit RICO count if the jury found beyond a reasonable doubt that it was agreed that a specific predicate act would be committed. As a result, the indictment fails to provide Mr. Hammoudeh with sufficient notice of the penalty to be imposed against him, in violation of *Jones* and *Apprendi*.

9. Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. Furthermore, an indictment must contain every element of the charged offense to pass constitutional muster. *United States v. Fern*, 155 F.3d 1318 (11th Cir. 1998). This is so because the Sixth Amendment guarantees every defendant the right to be informed of the government's accusations against him. *United States v. Chilocote*, 724 F.2d 1498 (11th Cir 1984). Moreover, due process requires an indictment to provide notice sufficient to allow the defendant to prepar an adequate defense. *United States v. Odom*, 252 F.3d 1289, 1298 (11th Cir. 2001), citing *United*

States v. Lehder-Rivas, 955 F.2d 1510, 1519 (1th Cir. 1992). Mr. Hammoudeh respectfully submits that by *generally* describing the *types* of offenses which constitute a "pattern of racketeering activity," the indictment fails to state a "plain, concise and *definite* written statement of the essential facts constituting the offense charged," in violation of Rule 7 This failure results in a lack of notice to Mr. Hammoudeh as to the *specific* predicate offenses which the government may prove. Without such notice, Mr. Hammoudeh cannot prepare an adequate defense and is not on notice of the potential penalty which may be imposed depending upon which two ro more predicate acts the jury may find beyond a reasonable doubt were intended to be committed during the RICO conspiracy.

10. In making this argument, Mr. Hammoudeh is aware that the Eleventh Circuit has held that "[p]redicate felonies do not need to be listed in the indictment *so long as the defendant has actual notice of the charge*," and that "[e]ven an inadequate indictment satisfies due process if the defendant has *actual* notice of the charge." *Odom*, supra, at 1298 (cites omitted) (emphases added). However, *Odom* is distinguished for a number of reasons. First, Odom, unlike the instant case, was not a complex RICO Conspiracy involving 7 different general categories of crimes constituting the alleged "pattern of criminal activity," and more than 200 over acts. Rather, *Odom* involved a conspiracy to burn down *one* church. Odom and others were charged with a number or related crimes, including a violation of 18 U.S.C. section 844(h), which makes it a federal crime to use fire to commit another federal crime. Secondly, 1) a conspiracy count set forth all of the underlying facts concerning the *three* felonies which the government charged the defendants with conspiring to commit by use of fire in violation of 18 *U.S.C. section* 844*h)(1); 2) a different count charged one predicate felony as a separate

substantive count; and 3) another count specified two of the predicate felonies. Consequently, the Eleventh Circuit, in finding that the indictment was not unconstitutionally vague, opined that the complaining appellant "knew that she was charged with conspiring to set fire to St. Joseph's Baptist Church." *Odom*, at 1298. Thirdly, unlike the instant case, *Odom* did not invoke *Apprendi* concerns. In fact, the cases cited by the Court in *Odom* (for the proposition that the predicate felonies do not need to be listed in the indictment so long as the defendant has actual notice of the charge) were all pre-*Apprendi*, making those cases distinguishable from the instant case.

11. In short, unlike the appellants in the simple case presented in *Odom*, Mr. Hammoudeh has not been provided actual notice of an essential element (the "predicate offenses") of the Conspiracy to Commit RICO charge which has been lodged against him. In vaguely referring to the "pattern of racketeering" in terms of seven different general categories of statutes violated, the indictment fails to provide Mr. Hammoudeh with actual notice of the specific predicate acts and the possibility of an enhanced sentence as a result of any specific "predicate offense." Accordingly, Count One violates Mr. Hammoudeh's right to due process under the Fifth Amendment and his right to be informed of the nature of the allegations against him in violation of the Sixth Amendment. Based upon these violations, Count One should be dismissed against Mr. Hammoudeh.

WHEREFORE, the Defendant SAMEEH HAMMOUDEH, respectfully moves this Honorable Court to dismiss Count One as unconstitutionally vague.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to

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by regular U.S. mail delivery on this 15 day of September 2003.

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