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MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

HATIM NAJI FARIZ,
GHASSAN BALLUT, and
SAMEEH HAMMOUDEH,

Defendants.

ORDER

THIS CAUSE is before the court on Defendant Hatim Naji Fariz's Motion for Grand Jury Transcripts (Doc. 254), Defendant Ghassan Ballut's Motion to Adopt Defendant Hatim Fariz's Motion for Grand Jury Transcripts (Doc. 297)¹, Defendant Sameeh Hammoudeh's Motion for Grand Jury Transcripts (Doc. 311), and Defendant Sameeh Hammoudeh's Amended Motion for Grand Jury Transcripts (Doc. 331).² By their motions, the Defendants seek an Order allowing them to inspect those portions of the grand jury transcripts that pertain to the charges against them. Pursuant to Rule 6(e)(3)(E)(ii), the Defendants contend that the grand jury transcripts are needed to substantiate motions to dismiss the Indictment for lack of probable cause. The government has filed responses in opposition (Docs. 307, 325).

¹Defendant Ballut's motion to adopt (Doc. 297) is hereby **GRANTED**.

²Because Defendant Hammoudeh's motions appear to copy that of Defendant Fariz's, compare (Doc. 254) with (Docs. 311, 331), the Defendants' arguments are discussed as one.

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The Supreme Court has recognized that “the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings.” Douglas Oil Co. of Ca. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958). In some situations, justice may require that portions of grand jury proceedings be made available for use in subsequent judicial proceedings. Douglas Oil, 411 U.S. at 219-220. The party seeking disclosure of grand jury materials must also demonstrate a “particularized need” for them. Proctor & Gamble, 356 U.S. at 683; United Kingdom v. United States, 238 F.3d 1312, 1320 (11th Cir. 2001) (citing United States v. Cole, 755 F.2d 748, 758-59 (11th Cir. 1985)). Whether a particularized need is demonstrated requires the court to determine whether the materials sought are needed to avoid possible injustice, whether the need for disclosure is greater than the need for continued secrecy, and whether the request is structured to cover only those materials needed. Douglas Oil, 441 U.S. at 222. “Particularized need is not shown by a general allegation that grand jury materials are necessary for the preparation of a motion to dismiss.” United States v. Burke, 856 F.2d 1492, 1496 (1988) (citing Thomas v. United States, 597 F.2d 656, 658 (8th Cir. 1979)). Even when a party has demonstrated a particularized need for grand jury materials, access is limited and covers only those materials actually needed. In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1562 (11th Cir. 1989) (citing United States v. Liuzzo, 739 F.2d 541, 544 (11th Cir. 1984)). Rule 6(e) of the Federal Rules of Criminal Procedure allows for such disclosure by the court “at the request of the defendant who shows

that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.” Fed. R. Crim. P. 6(e)(3)(E)(ii).³

Defendants contend that they satisfy the requirement of Rule 6(e)(3)(E)(ii) and that disclosure of the grand jury transcripts is needed in order to file a motion to dismiss the Indictment for lack of probable cause. They claim that they have demonstrated a particularized need to inspect portions of the grand jury transcript because (1) an injustice would result if they were required to stand trial on an indictment that lacked probable cause, (2) their need for disclosure is greater than the need for continued secrecy because the indicting grand jury is no longer impaneled and, even if it was, the court could restrict the dissemination of the transcripts it disclosed, and (3) their motions are narrowly tailored to include only material needed to support a motion to dismiss.

The Government urges the court to deny the Defendants’ motions. It claims that Defendants have not established that they need the grand jury transcripts to support motions to dismiss and they have not met the showing of particularized need under Douglas Oil. More specifically, the Government claims that (1) absent evidence of an abuse of the grand jury process, the Defendants cannot challenge the Indictment based on the sufficiency or quality of the evidence, (2) the Defendants already are in possession of the information they claim may

³The Government asserts that Defendants must demonstrate a “compelling necessity” for the grand jury transcripts. It notes that the “particularized need” standard has been applied in cases involving motions under Rule 6(e)(3)(E)(i) (former Rule 6(e)(3)(C)(i)), but not motions under Rule 6(e)(3)(E)(ii) (former Rule 6(e)(3)(C)(ii)). The Government acknowledges, however, that several appellate courts have explicitly applied the “particularized need” standard to cases involving Rule 6(e)(3)(E)(ii), and that the Eleventh Circuit has suggested that it applies in this context.

be incorrect, namely, the taped conversations, and (3) in any event, the Defendants request for wholesale disclosure of all grand jury transcripts is overbroad and a mere fishing expedition.

Defendants' motions are predicated on a disclosure made by the Government during bail/detention proceedings in this cause wherein it revealed that a particular factual allegation in the Indictment against Mr. Fariz was inaccurate and that others were possibly so. Thus, the Government reported that, "On April 7, 2003, . . . the Government was informed that the individual Hatim Naji Fariz spoke with in the conversation described in Overt Act 253 in Count I is a PIJ [Palestinian Islamic Jihad] activist other than Abd Al Aziz Awda.⁴ Accordingly, references to Abd Al Aziz Awda in Overt Acts 236, 240 and 247 in Count I are suspect. To the extent that the Government proffered that Hatim Naji Fariz was in contact with Abd Al Aziz Awda in the above described Overt Acts in Count I, we hereby withdraw that argument." (Doc. 71).⁵ As Defendants' argument goes, because of these inaccuracies, the factual accuracy of the entire Indictment is in question as is the underlying probable cause to support it.

Upon careful consideration, the court concludes that Defendants have failed to make the requisite showing that disclosure of the grand jury transcripts is necessary or appropriate under these circumstances. First, Defendants fail based on their stated reason for seeking disclosure. By requesting disclosure to show a lack of probable cause underlying the

⁴Awda is identified in the Indictment as the founder and spiritual leader of the PIJ. The "activist" referenced hereby was not identified by the Government.

⁵No similar filing has been made by the Government related to any of the other Defendants.

Indictment, Defendants essentially raise a sufficiency of the evidence challenge founded on the Government's concession of their mistaken identification of Awda in Overt Act 253 and suspect identification of him in three other overt acts. This court, however, has extremely limited authority to look beyond the facial validity of an indictment. See United States v. Calandra, 414 U.S. 338, 345 (1974); United States v. Hyder, 732 F.2d 841, 843-44 (11th Cir. 1984). Indeed, absent a showing that an indictment was not returned by a legally constituted and unbiased grand jury, an indictment appearing valid on its face is not subject to challenge, such as attempted here.⁶ Calandra, 414 U.S. 338, 344-45; Costello v. United States, 350 U.S. 359, 363 (1956). No such showing is made here.⁷

While Defendants cite to authority supporting the disclosure of grand jury transcripts in support of motions to dismiss based upon factual irregularities occurring before the grand jury, these cases are inapposite here. Only Defendant Fariz may argue on these motions that his involvement in the alleged conspiracy was possibly misrepresented before the grand jury, but these few inaccuracies hardly cast doubt on the veracity of the balance of the allegations in this Indictment.⁸ Notably, none of the Defendants allege that the presentation of this evidence

⁶Rather, any challenge to the sufficiency of the evidence must be made at trial at the close of the Government's case pursuant to Rule 29.

⁷Additionally, as the Government points out, the Defendants already have filed their Motions to Dismiss the Indictment, thus calling into question their actual need for the grand jury material. See, e.g. (Docs. 200, 250, 255-57, 299, 301, 303, 313-14, 322, 324).

⁸Count One of the Indictment alleges two hundred fifty-five (255) overt acts by the Defendants and co-conspirators in furtherance of the alleged racketeering conspiracy. Needless to say, there are numerous other overt acts alleging conduct by the Defendants which support the allegations and which are not demonstrated (or even suggested) to be inaccurate.

to the grand jury was the result of prosecutorial abuse or misconduct. In particular, Defendant Fariz does not demonstrate that the misidentification was made in bad faith or under such other circumstances as to prompt the court to act in his favor. Given the lack of any allegations of misconduct before the grand jury, the inappropriateness of the court considering the matter of probable cause on a motion to dismiss, and the substantial number of other overt acts attributed to all these Defendants, they fail to show that the grand jury transcripts are necessary to avoid possible injustice in proceedings before this court.

This is especially true here, where the Defendants have already received copies of all the recorded conversations referenced in the Indictment and have or will, through the normal discovery channels, receive copies of the balance of the intercepted communications obtained by the Government in its investigation. Thus, because Defendants have access to this evidence through means other than the grand jury transcripts, they demonstrate little or no prejudice arising from an order maintaining grand jury secrecy in this case. In turn, the Defendants cannot demonstrate that their interest in disclosure of the transcripts outweighs the public interest in the secrecy of grand jury proceedings during this stage of the prosecution.

Finally, even assuming that the above factors did not weight against Defendants' favor, the Defendants' request for disclosure of the grand jury transcripts is not sufficiently limited. Although the Defendants allege that their request is "narrowly tailored to include only those counts and paragraphs of the Indictment in which [he] is allegedly implicated in criminal activity, either directly or through an alleged conspiracy with co-defendants and

others unnamed,” such a request would quite literally involve a review of the transcript in its entirety.

In sum, Defendants have failed to establish a particularized need for disclosure of the grand jury transcripts. This ruling in no ways impedes their defense nor prevents them full opportunity to challenge at trial the sufficiency of the evidence with respect to the Government’s misidentification of Awda and the overt acts that are implicated by such.

Accordingly, it is **ORDERED** that **Defendant Hatim Naji Fariz’s Motion for Grand Jury Transcripts (Doc. 254), Defendant Sameeh Hammoudeh’s Motion for Grand Jury Transcripts (Doc. 311), and Defendant Sameeh Hammoudeh’s Amended Motion for Grand Jury Transcripts (Doc. 331) are DENIED.**

Done and Ordered in Tampa, Florida, this 24th day of October 2003.



THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

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Date Printed: 10/27/2003

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