



conversations; dozens of intercepted facsimile messages, and voluminous bank and other business records; all showing the defendants' involvement in the support and management of the PIJ. All of the defendants are captured on videotape and audiotape speaking about PIJ business.

Defendant Fariz moves to dismiss Count One of the indictment against him pursuant to Rule 12(b)(3)(B), Federal Rules of Criminal Procedure, alleging that Count One is unconstitutionally vague in violation of his right to due process under the Fifth Amendment and his right to be informed of the accusations he faces under the Sixth Amendment. Fariz's pending motion has been adopted by co-defendants Ballut (see D-299, granted --10/20/03) and Hammoudeh (see D-313, 314, granted --10/20/03).

#### **B. General Legal Standards**

As a general matter, on a motion to dismiss an indictment before trial, review of an indictment is governed by Rule 7 (c)(1) of the Federal Rules of Criminal Procedure, which requires that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." As the Eleventh Circuit has repeatedly held: "An indictment is sufficient 'if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution of the offense.'" United States v. Steele, 147 F. 3d 1316, 1320 (11<sup>th</sup> Cir. 1998) (quoting United States v. Dabbs, 134 F.3d 1071, 1079 (11<sup>th</sup> Cir. 1998)). If an indictment sets forth the essential elements of the crime and includes a reference to the statute being charged, the indictment will sufficiently inform the defendant of the nature and cause of

the accusations against him, as required by the Sixth Amendment of the Constitution (the so-called "notice" requirement). See United States v. Fern, 155 F.3d 1318, 1325 (11<sup>th</sup> Cir. 1998); United States v. Chilcote, 724 F.2d 1498, 1505 (11<sup>th</sup> Cir. 1984); United States v. Mosquera, 192 F. Supp 2d 1334, 1338 (M.D. Fl. 2002). When adjudicating challenges to the validity and sufficiency of the indictment, courts construe the indictment as a whole. See United States v. Strauss, 285 F.2d 953, 955 (5<sup>th</sup> Cir. 1960).

The defendants advance two arguments: First they argue that the RICO conspiracy charge, which alleges that the defendants agreed to the commission of types of specific racketeering activity, fails to provide actual notice of an essential element of the offenses. Second, they argue that the failure to plead specific racketeering acts to which the defendants agreed that a conspirator would commit fails to provide them with notice of the possibility of an enhanced sentence under Apprendi v. New Jersey, 530 U.S. 466 (2000) and Jones v. United States, 526 U.S. 227 (1999)

### **C. The Indictment Correctly Charges Conspirator Liability**

The RICO conspiracy statute provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). To establish a RICO conspiracy violation at trial, the government must prove that the defendant objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise. United States v. Shenberg, 89 F.3d 1461, 1471 (11<sup>th</sup> Cir. 1996). The government can prove the existence of this agreement in one of two ways:

The government may either prove (1) that a defendant agreed to the overall objective of the conspiracy or (2) that the defendant personally committed two predicate acts, thereby participating in a single objective conspiracy.

Id. (citing United States v. Starrett, 55 F.3d 1525, 1543 (11<sup>th</sup> Cir. 1995)).

In 1997, a split existed in the Circuits as to whether 1962(d) liability could be predicated upon a conspirator's agreement to the overall objective of the conspiracy.

The Supreme Court answered this issue in the affirmative, stating:

The RICO conspiracy statute, §1962(d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts.

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A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.

Salinas v. United States, 522 U.S. 52, 64-65 (1997).

The indictment here alleges, in substance, that from in or about 1984, and continuing until in or about the date of the indictment (February 2003), in the Middle District of Florida and elsewhere, the defendant and seven others, being persons employed by and associated with the enterprise (the PIJ), knowingly, willfully and unlawfully did combine, conspire, confederate and agree together and with each other

and with other persons to violate 18 U.S.C. §1962 (c); that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise, through a pattern of racketeering activity, as defined in the United States Code and consisting of seven types of specific racketeering activity. D-1, Ct. 1 ¶¶ 26. The indictment further alleges that the activities of PIJ affected interstate commerce and that it was 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. *Id.* Ct. 1 ¶¶ 27.

It is that language, “[i]t 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”, that the defendants are challenging. The defendants argue that because the indictment does not allege that each defendant “personally” intended to commit two predicate offenses, the government will have to prove that at the time each defendant knowingly and willfully agreed to join in the conspiracy, he specifically intended to participate in the affairs of the enterprise with the knowledge and intent that any co-conspirator would commit two or more predicate acts as part of a pattern of racketeering activity.

The Salinas court reaffirmed that “[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense.” *Id.* at 64. “One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.” *Id.* at 65. Salinas did not alter the law of conspiracy in the Eleventh Circuit because “[r]egardless of the method used to prove the agreement, the government does not have to establish that each conspirator

explicitly agreed with every other conspirator to commit the substantive RICO crime described in the indictment, or knew his fellow conspirators, or was aware of all the details of the conspiracy.” Castro v. United States, 248 F.Supp.2d 1170, 1178-79 (S.D. Fla. 2003), quoting United States v Starrett, 55 F.3d 1525, 1544 (11th Cir. 1995).

The language contained in the indictment, “that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise” encompasses the ruling in Salinas because the word “conspirator” includes the defendant. In other words, to prove that a defendant is guilty of RICO conspiracy, the government must show that the defendant agreed that a conspirator, which would include any of his co-defendants as well as himself, would commit at least two racketeering acts. The indictment properly tracks the Supreme Court’s holding in Salinas. The language contained in the indictment also encompasses both prongs in Starrett because it covers a circumstance when a defendant joins the conspiracy knowing others will commit predicate offenses as well as when he joins the conspiracy with the intent to commit predicate offenses himself. <sup>1</sup>

**D. The Indictment Need Not Allege Specific Racketeering Acts**

The defendants next allege that the indictment fails to specify any “predicate offenses” in violation of his constitutional rights. In Castro, the court considered the claim that the RICO conspiracy charge was insufficient because it failed to allege any predicate acts, causing the indictment to be legally insufficient. 248 F.Supp.2d at 1180-

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<sup>1</sup>This language in the indictment also encompasses both prongs of the Eleventh Circuit pattern jury instruction for RICO conspiracy. Offense Instruction 71.2, Eleventh Circuit Pattern Jury Instructions, 2003.

81. The Castro court rejected this argument. In determining that the indictment was sufficient, the Castro court looked to the Seventh Circuit which has stated:

[t]o list adequately the elements of section 1962(d), an indictment need only charge--after identifying a proper enterprise and the defendant's association with that enterprise--that the defendant knowingly joined in a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity . . . Neither overt acts, nor specific predicate acts that the defendant agreed personally to commit, need be alleged or proven for a section 1962(d) offense.

248 F.Supp.2d at 1181, quoting United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991). "If the government were required to identify, in indictments charging a violation only of section 1962(d), specific predicate acts in which the defendant was involved, then a 1962(d) charge would have all of the elements necessary for a substantive RICO charge. Section 1962(d) would thus become a nullity, as it would criminalize no conduct not already covered by sections 1962(a) and (c)." Glecier, 923 F.2d at 501. See also United States v. Crockett, 979 F.2d 1204, 1208-1210 (7th Cir. 1992); United States v. Bagaric, 706 F.2d 42, 61 (2nd Cir. 1983); United States v. Sutherland, 656 F.2d 1181, 1197 (5th Cir. 1981). Therefore, Castro and Glecier make it clear that a RICO conspiracy charge need not allege specific racketeering (or predicate) acts.

The indictment sets forth details of the "enterprise"--the PIJ--which includes a statement that the activities of the enterprise constituted an "ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objects of the enterprise." D-1, Ct. 1 ¶ 25. Count One also articulates the "Means and Methods of the Conspiracy", id. Ct. 1, ¶¶ 28-42, and contains the 256 Overt Acts describing the RICO conspiracy. Id. Ct. 1, ¶ 43. As in the Castro and Glecier cases,

the indictment before this court is legally sufficient because it more than adequately sets forth the essential elements of §1962(d), apprizes each defendant of the charges against him, and protects each defendant from any risk of double jeopardy arising from a judgment in this case.

Moreover, even though such authority above supports the view that the jury is not required to unanimously agree on which specific racketeering acts the defendants agreed would be committed by a member of the conspiracy in the conduct of the affairs of enterprise, the government will request that the jury be instructed that in order to convict a defendant of the RICO conspiracy offense, the jury's verdict must be unanimous as to which type or types of racketeering activity the defendant agreed would be committed. For example, acts indictable under 18 U.S.C. § 956 (conspiracy to kill maim or injure persons or damage property in a foreign country), and acts involving murder under Florida State law. This will therefore require the jury to unanimously agree on which type of racketeering activity the particular defendants agreed would be committed.

#### **E. The Indictment Complies with Apprendi**

The defendants next allege that contrary to Jones v. United States, 526 U.S. 227 (1999) and Apprendi v. New Jersey, 530 U.S. 466 (2000), the indictment fails to provide sufficient notice of the potential penalties they would face if convicted of a specific predicate act, or here, specific type of racketeering activity.

Apprendi and Jones do not entitle the defendant to dismissal of the indictment. The defendants argue that because the indictment does not specify which predicate offenses they allegedly committed, they cannot determine any potential penalty they

may face should they be convicted by the jury. According to the defendants, this flaw results in a lack of notice which violates Apprendi and Jones. Pursuant to United States v. Sanchez, 269 F.3d 1250 (11th Cir.2001), cert.denied, 535 U.S. 942 (2002), Apprendi does not entitle the defendants to dismissal of the indictment. In Sanchez, the Court analyzed whether there was Apprendi error in an indictment involving narcotics offenses, stating that:

Both before and after Apprendi, in any § 841 case, an indictment charging that a defendant violated §841 properly charges a complete federal crime without any reference to either drug type or quantity. While under Apprendi the allowable maximum sentence for a §841 violation may differ depending on how drug quantity was handled at the plea, trial, or sentencing phases, and on the timeliness of an Apprendi-based objection, Apprendi has no effect whatsoever on whether a complete federal crime under §841 is charged in an indictment that does not specify drug quantity.

269 F.3d at 1275.

The defendants' argument regarding Apprendi error appears to be premature. Apprendi errors--whether arising from the indictment or a jury instruction--are errors in criminal procedure that do not occur or ripen until the time of sentencing and affect at most the permissible sentence but do not invalidate the criminal conviction or materially change the theory of the case (so as to amend the underlying indictment). See McCoy v. United States, 266 F.3d 1245, 1253 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002). This is why the defendants' reliance on United States v. Nguyen, 255 F.3d 1335, 1343-44 (11th Cir. 2001) is misplaced. The Nguyen opinion found Apprendi error following the defendants' sentencings for RICO conspiracy because the jury failed to find that any of the defendants had committed a predicate act that had a potential

penalty of life imprisonment. Notably, however, the Nguyen court did not find Apprendi error in the indictment which charged the defendants with various predicate acts including murder and attempted murder.

The government acknowledges, however, that the rule announced in Apprendi applies to RICO sentencings, because the RICO penalty provision in section 1963 provides for a prescribed statutory maximum penalty of 20 years imprisonment, and also provides for life imprisonment if the violation is based on racketeering activity for which the maximum penalty includes life imprisonment. Therefore, proof of a fact could increase the penalty beyond the prescribed 20 year statutory maximum. Accordingly, for both RICO conspiracy and substantive offenses, to qualify for a sentence beyond 20 years' imprisonment, the jury must return a special verdict indicating that it unanimously found the defendant liable for whatever "fact" or "facts" necessary to increase the sentence beyond 20 years' imprisonment even though such fact or facts are not necessary to obtain a conviction of the defendant on the RICO conspiracy charge.

Here, the Indictment sufficiently alleges facts in the numerous overt acts necessary to support a sentence in excess of 20 years' imprisonment. At the conclusion of the trial, the government will ask for a special verdict so that the jury can separately find whatever facts necessary to support a sentence in excess of 20 years' imprisonment, and whether a defendant committed, or agreed to the commission of such offenses. Such a special verdict will safeguard any RICO conviction in case the jury finds that the additional facts necessary for the life sentence, which are not necessarily required for the conviction, were not committed.

In conclusion, contrary to the defendants' motion, the indictment is not unconstitutionally vague and adequately protects both their due process under the Fifth Amendment and their right to be informed of the accusations under the Sixth Amendment. Therefore, the United States respectfully requests that this Court deny defendant Fariz's Motion to Dismiss Count One of the Indictment for the reasons discussed above.

Respectfully submitted,

PAUL I. PEREZ  
United States Attorney

By:



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WALTER E. FURR  
Assistant United States Attorney  
Criminal Division  
Florida Bar Number 288470  
400 N. Tampa Street, Suite 3200  
Tampa, Florida 33602  
Telephone: (813) 274-6324  
Facsimile: (813) 274-6108

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail this 27<sup>th</sup> day of October, 2003, to the following:

Mr. Sami Amin Al-Arian  
Register No. 40939018  
Federal Correctional Institute  
846 NE 54th Terrace  
Coleman, Florida 33521-1029  
*Pro Se*

Stephen N. Bernstein, Esq.  
Post Office Box 1642  
Gainesville, Florida 32602  
*Counsel for Sameeh Hammoudeh*

Bruce G. Howie, Esquire  
5720 Central Avenue  
St. Petersburg, Florida 33707  
*Counsel for Ghassan Zayed Ballut*

Kevin T. Beck, Esquire  
Federal Public Defender's Office  
400 North Tampa Street  
Suite 2700  
Tampa, Florida 33602  
*Counsel for Hatim Naji Fariz*

  
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WALTER E. FURR  
Assistant United States Attorney