

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

v.

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ

CASE NO.: 8:03-CR-77-T-30-TBM

**RESPONSE OF THE UNITED STATES TO
DEFENDANT FARIZ'S MOTION TO QUASH
PARAGRAPH 26(b) OF COUNT ONE OF THE INDICTMENT**

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following response to Defendant Fariz's Motion to Quash Section (b) of Paragraph 26 of Count One of the Indictment for Failure to State a Legal Basis for Relief. Doc. 302.

Defendant Fariz has moved to "quash" Paragraph 26(b) of the RICO conspiracy charged in Count One of the Indictment on the grounds that elsewhere in Count One the government has failed to allege a factually sufficient basis. Note that the defendant does not allege that Count One fails to set forth all the essential elements of the crime or that it fails to track the RICO conspiracy statute appropriately. Instead, he argues that Count One is factually inadequate. For the reasons stated below, the motion should be denied.

A. General Legal Standards

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires only that “(t)he indictment . . . must be a plain, concise and definite written statement of the essential facts constituting the offense charged.” It is well established that an indictment is sufficient when it charges a crime with sufficient precision to inform the defendant of the charges the defendant must meet with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events. United States v. Hamling, 418 U.S. 87, 117 (1974); United States v. Yonn, 702 F.2d 1341, 1348 (11th Cir. 1983). Courts have consistently upheld indictments that merely track the language of the statutory charge and state the approximate time and place of the alleged crime. Hamling, 418 U.S. at 117; United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1991); Yonn, 702 F.2d at 1348. The indictment need not set forth evidence negating every defense or explaining how the crime was committed. United States v. Blinder, 10 F.2d 1468, 1476 (9th Cir. 1993); United States v. Carrier, 672 F.2d 300, 303 (2d Cir. 1982).

It is also black letter law that the validity of an indictment must be determined by practical, not technical considerations, and in assessing its meaning, a court must read the indictment as a whole. United States v. Gallipolli, 599 F.2d 100, 103 (5th Cir. 1979); United States v. Palumbo Brothers, Inc., 145 F.3d 850, 860 (7th Cir. 1998). The indictment must be “read to include facts which are necessarily implied,” and “construed according to common sense.” Blinder, 10 F.3d at 1471. Thus, although an indictment which tracks the statutory language is legally sufficient, the law does not require that an indictment track the statute. United States v. Fern, 155 F.3d 1318, 1325 (11th Cir. 1998), citing United States v. Stefan, 784 F.2d 1093, 1101 (11th Cir. 1986). If the

indictment specifically refers to the statute on which the charge is based, the reference to the statute adequately informs the defendant of the charge. Fern, 155 F.3d at 1325. Moreover, an indictment is not fatally deficient if it fails to allege an essential element in haec verba, so long as it alleges the essential element in substance. United States v. McGough, 510 F.2d 598, 602-03 (5th Cir. 1975).

On a pretrial motion to dismiss, the court must accept the factual allegations contained in the indictment as true and determine only whether the indictment is “valid on its face.” Costello v. United States, 350 U.S. 359, 363 (1956); Critzer, 951 F.2d at 307. The Eleventh Circuit has held that a pretrial motion to dismiss the indictment cannot be based on sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue. See, e.g., United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987). The defendant must wait until the close of the government’s case or the jury’s verdict before he may argue evidentiary sufficiency.

These standards apply to all indictments, including RICO prosecutions. There is no requirement that the details of the proof or the intricacies of the government’s legal or factual theories be laid out in any more detail in a criminal RICO indictment than in any other indictment, so long as the statutory elements are alleged.

B. Defendant Fariz’s Argument

Defendant Fariz argues that the Indictment fails to state a factually sufficient basis which, if proven, would establish extortion as alleged in paragraph 26(b). Doc. 302 at 2. The flaw in this argument is that it fails to distinguish between what the government must allege in an indictment and what it must prove at trial. Although

couched in terms of legal sufficiency, defendant Fariz's argument with respect to Paragraph 26(b) is more in the nature of an anticipatory attack on the sufficiency of the government's evidence. The implicit thrust of defendant Fariz's sufficiency claim - that the government will not be able to prove the matters he claims are lacking in the Indictment - is not cognizable on a motion to dismiss or strike. It is axiomatic that a defendant may not challenge a facially valid indictment prior to trial for insufficient evidence. Critzer, 951 F.2d at 307.

Several RICO cases illustrate the distinction between legal sufficiency and factual sufficiency. In United States v. Palumbo Brothers, Inc., 145 F.3d 850 (7th Cir. 1998), with respect to the "continuity" aspect of the pattern of racketeering, the Seventh Circuit stated:

"We agree that an indictment does not have to allege continuity with particularity to survive a motion to dismiss . . . although continuity is an element of proof necessary at trial to conclusively establish [a defendant's] pattern of racketeering activity, . . . we agree that it is not an essential element of a RICO offense that must be clearly and specifically established in the indictment."

Id. at 877-78. Similarly, in United States v. Mavroules, 819 F. Supp. 1109, 1110-11, 1117-19 (D. Mass. 1993), a RICO prosecution of a public official for extortion and other crimes, the court denied a motion to dismiss which was based on the argument that the indictment did not allege the elements of "continuity" or "relatedness." See also United States v. Nabors, 45 7.3d 238, 240-41 (8th Cir., 1995); United States v. Perholtz, 842 F.2d 343, 351 n.12 and 352-53 (D.C. Cir. 1988).

This Court, therefore, should deny Fariz's motion out of hand because it challenges the factual sufficiency of the government's anticipated proof, not the indictment on its face.

C. The Indictment Is Legally and Factually Sufficient

To the extent that Fariz's motion can be interpreted as challenging the legal sufficiency of the RICO conspiracy charge as it relates to acts of extortion, it fails.

Paragraph 26(b) of Count One of the Indictment in this case adequately alleges a legally sufficient basis for extortion. Paragraphs 24 and 25 allege the "enterprise;" paragraphs 26 and 27 allege the legal elements of the RICO conspiracy. Paragraphs 26(a) through (g) allege the crimes forming the pattern of racketeering activity.

Paragraph 26(b) alleges that the pattern of racketeering consisted of "multiple acts involving extortion in violation of Florida Statutes 836.05, 777.011 and 777.04."

Paragraph 26(b) is based on Title 18, United States Code, Section 1961(1)(A). Title 18, United States Code, Section 1961(1)(A) defines "racketeering activity" in relevant part to mean "any act or threat involving murder . . . (or) extortion, which is chargeable under state law and punishable by imprisonment for more than one year."

Although somewhat inarticulately stated in the indictment because it employs the actual words used by the members of the enterprise, paragraphs 3, 29 and 31 (together with numerous overt acts, especially 111, 112, 114, 120, 126, 146, 147, 153, 157, 185, 193, 233, 238, 239, 2470, 249, 255) do allege a true extortionate scheme. Through repeated acts of murder and threats of murder against individuals including Israeli citizens, the Palestinian Islamic Jihad (PIJ) was attempting to obtain the land presently constituting Israel from the current owners and inhabitants. While this type of

extortionate scheme may depart from the traditional one-on-one extortion scheme, it can be an actionable theory. In fact, in a slightly different context, at least one court has found this theory to be sound. See United States v. One 1997 E35 Ford Van, 50 F. Supp 2d. 789, 802 (N.D. Ill. 1999) (case involving forfeiture of assets relating to HAMAS, another designated foreign terrorist organization with goals and methods similar to those of the PIJ).

D. The Impact of Scheidler v. National Organization of Women (NOW)

The principal issue to be resolved is the impact of the Supreme Court's civil RICO decision in Scheidler v. National Organization of Women (NOW), 537 U.S. 393, 123 S. Ct. 1057 (2003), has on this case as it pertains to the extortion charged in paragraph 26(b). Scheidler is dispositive of the issue in the government's favor notwithstanding defendant Fariz's reliance on it.

To place Scheidler into context, it is necessary to discuss prior case law involving RICO and the Travel Act. Both federal offenses refer to state law. In RICO, 18 U.S.C. § 1961(1)(A) provides that an "act or threat involving . . . extortion . . . which is chargeable under State law" can be a racketeering act. In 18 U.S.C. § 1952(b)(2), "unlawful activity" is defined to include "extortion . . . in violation of the laws of the State in which committed" In United States v. Nardello, 393 U.S. 286, 295 (1969), in interpreting the state law reference in the Travel Act, the Supreme Court held that Congress intended that "extortion" should refer to those acts prohibited by state law which would be generically classified as extortionate. The Supreme Court rejected the argument that the term should be limited to its old common law definition, and it rejected the argument that the state's classification or labeling of the conduct should

control. “[T]he inquiry is not the manner in which States classify their criminal prohibitions but whether the particular State involved prohibits the extortionate activity charged. Id. at 295. Accord, Taylor v. United States, 495 U.S. 575, 598 (1990) (“burglary” in 18 U.S.C. § 924(e) is used in a generic sense). The Supreme Court in Scheidler was concerned with the generic definition of extortion as it pertains to “obtaining property.”

Factually, Scheidler dealt with the jury instructions and sufficiency of proof in a civil RICO case involving “extortion” predicate acts charged pursuant to federal law, Title 18, United States Code, Section 1951, and various state extortion laws. The Supreme Court held that the plaintiffs had failed to prove the extortion predicate acts because they did not prove that the defendants “obtained property” as required by Title 18, United States Code, Section 1951. For purposes of criminal RICO law, however, Scheidler stands for the following proposition: In order for a RICO indictment to charge a violation of a state extortion law as a racketeering act, the state extortion law must encompass activity generally recognized as extortionate. Id. at 1068, citing United States v. Nardello, 393 US. 286, 290 (1969). Relying on the definition of extortion in the Model Penal Code, the Supreme Court held that the state extortion law must require a defendant (1) to obtain or attempt to obtain; (2) property (3) from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear. Scheidler 123 U.S. at 1069.

In Scheidler, the civil plaintiffs failed to prove an "obtaining" of "property." They had alleged that the defendants unlawfully made threats of violence against abortion clinics in an effort to shut them down. The Supreme Court noted that the defendants were not attempting to obtain any property, tangible or intangible, from the plaintiffs, but were merely trying to interfere with, or disrupt, the plaintiffs' rights to exercise their property rights. Id. at 1065.

To conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion.

Id. at 1066. Such proof will not be lacking in the evidence to be presented in this case. This case involves allegations that the defendants used murder and the threats of murder with the intent to obtain from Israel and its inhabitants the physical land now constituting Israel.

**E. In Accordance with Scheidler,
Florida State Extortion Law Charges Generic Extortion**

As stated previously, Scheidler requires that for a state offense to be an "act or threat involving . . . extortion . . . which is chargeable under State law," pursuant to Title 18, United States Code, Section 1961(1)(A), the conduct made criminal must generically be classifiable as extortionate. Scheidler v. National Organization of Women (NOW), at 1069. Based on the holding in Scheidler, such generic extortion statute must contain the requirement of obtaining, or attempting to obtain, property from another with his consent induced by the wrongful use of force, fear or threats. Id., citing United States v. Nardello, 393 U.S. 286, 290 (1969).

Thus, under Scheidler, the government will be obligated to show that Florida Statute 836.05 alleged in paragraph 26(b) is the type of generic extortion required by the Supreme Court in Scheidler and Nardello, i.e., that it criminalizes the obtaining of property. The government will be able to do so. Florida Statute 836.05 provides in relevant part:

Whoever, either verbally or by a written or printed communication . . . maliciously threatens an injury to the person, property or reputation of another, . . . with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will, shall be guilty of a felony . . .

Section 836.05, Florida Statutes. This statute contains the basic elements of a classic extortion: (1) a threatening communication against another; (2) with the intent to extort; (3) money or any pecuniary advantage. Read logically and in context, to "extort" is synonymous with "to obtain" and "money or any pecuniary advantage" certainly includes "property." Land is the quintessence of "property," and taking it from the Israelis is the quintessence of "obtaining." Thus, the Florida extortion statute satisfies the Scheidler requirements and can be charged as a RICO Racketeering Act. While it may be true that the Florida extortion statute also contains other provisions which might exceed the parameters imposed by Scheidler, those provisions can simply be omitted from the instructions submitted to the jury.

F. The Law of This Circuit Has Recognized Florida Extortion Law as a RICO Racketeering Act

Following Nardello and prior to Scheidler, the law in this circuit has supported the proposition that the references to state law in the RICO statute were generic in nature, and that the Florida extortion law encompassed activity generally recognized as extortion. The language “chargeable under state law” means that the offense must be one that “generically” was chargeable at the time it was committed. United States v. Salinas, 564 F.2d 688, 689-91 (5th Cir. 1977). State law is incorporated into RICO for definitional purposes, and merely serves to indicate “the type of serious conduct contemplated by the RICO statute as actionable as an act of racketeering.” United States v. Welch, 656 F.2d 1039, 1058 (5th Cir. 1981). In Welch, the court stated that although the RICO statute defines racketeering activity in part, by making reference to state law violations, the gravamen of the racketeering charge is a violation of federal law. The reference to state law is not meant to incorporate state statute of limitations or procedural rules. United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977).

In United States v. Watchmaker, 761 F.2d 1459, 1469 (11th Cir. 1985), the Eleventh Circuit affirmed the conviction of several defendants who were members of the Outlaws Motorcycle Club on RICO charges which included predicate acts based on extortion. The trial court defined extortion by referring to the Florida extortion statute.

In approving this approach, the Eleventh Circuit held:

[The trial court] offered the Florida statute as an illustration of the activities which were considered to fall within the category of “extortion” under state law. This illustrative use of state statutes in connection with RICO charges has been approved by this circuit, which has held that “references to state law serve a definitional purpose to identify generally

the kind of activity made illegal by federal statute.” United States v. Welch, 656 F.2d 1039, 1058 (5th Cir. 1981). Courts have held that the definitional citation of an incorrect or inapplicable part of a state statute, or a statute which the predicate acts of a RICO defendant do not offend (citation omitted) does not require the reversal of a RICO conviction, because the state law reference is not employed to provide the specific terms of the charge.

Watchmaker, 761 F.2d at 1469. (emphasis added and citations omitted). Defendant Fariz grudgingly acknowledges the Watchmaker precedent in his memorandum of law, but he dismisses its applicability by simply saying “the use of the Florida statutes goes beyond what Congress intended in the RICO statute.” Doc. 302 at 7 n.2. Nowhere in his memorandum does he explain what other interpretation of the RICO statute Congress had in mind. Nowhere in his memorandum does he explain how this case is different from Watchmaker.

G. Section 1961(1)(A) Incorporates Conspiratorial and Accessorial Acts in Violation of State Law

Paragraph 26(b) of Count One also cites to Sections 777.011 (principal) and 777.04 (attempts, solicitation and conspiracy) of the Florida Statutes. In addition to the inclusion of state substantive statutes in Title 18, United States Code, Section 1961(1)(A), conspiracies and attempts to commit state crimes can be proper RICO predicates because these crimes also “involve” certain types of actionable conduct. Welch, 656 F.2d at 1048, 1063 n.32 (solicitation of and conspiracy to murder); United States v. Pungitore, 910 F.2d 1084, 1135 (3d Cir. 1990) (conspiracy to murder and attempted murder). United States v. Ruggiero, 726 F.2d 913, 919 (2d Cir. 1984) (conspiracy to murder).

Moreover, an act “involving” a substantive crime such as murder or extortion need not be the actual crime so long as the act directly concerned the crime, so that even facilitation of a crime is also a proper RICO predicate act. See United States v. Miller, 116 F.3d 641, 674-75 (2d Cir. 1997). In Miller, the defendant merely provided information he knew would enable another person to commit murder. Florida statute 777.011 provides that anyone who aids, abets, counsels, hires, or otherwise procures an offense to be committed is liable as a principal. Thus, accessorial conduct in Florida also qualifies as “an act involving” the substantive crime.

H. The Indictment Properly Charges Acts Involving Extortion Cognizable Under Florida Law

Defendant Fariz next argues that “the Indictment fails to state facts which, if proven, would establish a violation of the State of Florida extortion statute.” Doc. 302 at 3. As stated previously, the Indictment need not allege the evidentiary facts which would tend to prove a violation of law. The Indictment alleges the essential elements constituting the crime; the government offers proof of those elements with evidence at trial.

Fariz further argues that “[t]he State of Florida has no jurisdiction over the alleged extortion committed in Israel or the Occupied Territories.” Doc. 302 at 4. The Indictment does not make that allegation. As previously stated, the Indictment alleges that the defendants agreed to participate in the conduct of affairs of the PIJ enterprise through a pattern of racketeering which consisted of, among other things, “multiple acts involving extortion in violation of Florida Statutes 836.05, 777.011 and 777.04.” Indictment Paragraph 26(b) of Count One. Also as previously stated, “acts involving

extortion” can include aiding and abetting, attempts, solicitations and conspiratorial conduct in addition to the actual commission of the substantive crime. In this case, the Indictment alleges 256 Overt Acts committed in furtherance of the RICO conspiracy.

To develop his argument, Defendant Fariz cites Florida Statutes, Section 910.005 pertaining to subject matter or territorial jurisdiction. Doc. 302 at 4. To the extent this statute imposes limits on the reach of the Florida extortion law, at least two provisions apply, or might apply, in this case which would allow a prosecution: (a) [t]he offense is committed wholly or partly within the state; and (d) [t]he conduct within the state constitutes an attempt or conspiracy to commit in another jurisdiction an offense under the laws of both this state and the other jurisdiction. Whether subject matter jurisdiction is established is a trial issue; subject matter jurisdiction is not an element of any crime and thus never needs to be alleged in the indictment.

When defendant Fariz argues “[e]xtortion conspiracy is also not sufficiently alleged to show that Florida would have jurisdiction” (Doc. 302 at 6), defendant Fariz does not explain what he means by this sentence. He simply cites Florida Statute 910.005 again. Doc. 302 at 7. In any event he is incorrect. In interpreting Sections 910.005(1)(a) and (2), the Florida Supreme Court has acknowledged that Florida law grants to the State broader jurisdiction than many other states to charge defendants with crimes under Florida law. In Lane v. State of Florida, 388 So.2d 1022, 1028 (Fla. 1980), the Florida Supreme Court held with respect to Sections 910.005(1)(a) and (2), Florida had territorial jurisdiction over criminal activity committed “partly within the state” if the conduct that is an essential element of the offense occurred in Florida, or the “result” that is an essential element occurred in Florida. In Lane, the crime was first-

degree murder and the conduct in Florida could have related to the essential element of premeditated design or a robbery under a felony murder theory. In Ross v. State of Florida, 664 So.2d 1004, 1009 (Fla. 4th DCA 1995), the Fourth DCA held that Section 910.005(2) applied to a charge of conspiracy where acts showing the formation of the conspiracy occurred in Florida because the agreement is an essential element of a conspiracy.

With respect to Section 910.005(1)(d), Florida law interpreting this section also supports the government's position. Although it seems virtually self-evident that Florida would have jurisdiction over a conspiracy in Florida to commit murder and extortion in Israel, nevertheless there is Florida case authority confirming the obvious. In Carone v. State of Florida, 361 So.2d 437, 437-38 (Fla. 2d. DCA 1978), the defendant was charged with a conspiracy to possess marijuana. The defendant conspired with others to purchase the marijuana in Colombia and ship it directly to Michigan. The marijuana never entered Florida. Defendant contended that since he could not be convicted in Florida of possession of marijuana, he could not be convicted of conspiracy to possess marijuana. Relying on Section 910.005(1)(d) of the Florida Statutes, the Second DCA rejected defendant's argument. The court pointed out that possession of marijuana is a crime in both Florida and Michigan, which fulfilled the requirements of the statute. Id. at 438. See also Ross, 664 So.2d at 1009 (same holding). The Second DCA also noted that the same result had been reached in other states without the benefit of a statute "because the gravamen of the offense of conspiracy is deemed to be the combination and agreement." Carone, 361 So.2d at 438. Here it is anticipated that the government will prove that the defendants conspired in Florida to commit murders and extortions in

Israel, and murder and extortion are crimes in both jurisdictions. See, e.g. One 1997 E35 Ford Van, 50 F. Supp.2d. at 802 (noting that extortion is a crime under Israeli law). Thus, Florida would have jurisdiction over a conspiracy in Florida to commit murder or extortion in Israel.

Lest there be any lingering doubt of Florida's territorial jurisdiction, in Black v. State of Florida, 819 So.2d 208, 212 (Fla. 1st DCA 2002), in a Florida RICO prosecution, the First DCA held that a conspiracy carried out by sending telephone calls and facsimiles into Florida from another jurisdiction would be sufficient to support a prosecution in Florida under Florida law. And, the allegations set forth in this indictment involve activity in Florida far more varied and substantial than the mere receipt of telephone calls and facsimiles.

Florida's broad assertion of territorial jurisdiction is entirely consistent with federal principles. For example, in Melia v. United States, 667 F.2d 300, 303-04 (2d Cir. 1981), the Second Circuit affirmed an extradition order for a resident of the United States who was charged in Canada with conspiracy to commit a murder in the United States. The court noted that if the situation were reversed, the United States would have jurisdiction to prosecute on several bases: (1) acts done outside a jurisdiction, but intended to produce a detrimental effect within it justify that jurisdiction's prosecution; and (2) the jurisdiction may prosecute if at least one overt act occurred within the jurisdiction even if the main conspiracy took place elsewhere. These same principles are at work with respect to the several defendants in this case.

Second, Defendant Fariz again argues that the Indictment fails to allege the facts which would show that the defendants obtained, or attempted to obtain, property through the threat or use of force. As stated previously, the Indictment alleges all the necessary legal elements of the RICO conspiracy. Whether property was obtained through extortionate means is a matter for proof at trial.

Third, defendant Fariz argues that the government of Israel cannot be a victim of a Florida extortion because it is not a "person" within the meaning of the Florida definition of "person." This is a general statute not specifically a part of the extortion statute. It provides:

The word "person" includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations and all other groups or combinations.

Section 1.01(3), Florida Statutes. This definition of "person" is quite broad and includes numerous collective entities. There is no reason not to include a government as another "group or combination." Cf. Van Den Borre v. State of Florida, 596 So.2d 687, 691 (FL 4th DCA 1992) (foreign government qualified as a "person" with respect to a rule of evidence which required a document to be executed by a "person"). This is especially true if the government owns property, as is the case in Israel. Some inhabitants of Israel also own property. The object of the extortionate activities of the PIJ enterprise was to obtain property from the Israeli government and the individual land owners. Logic and common sense dictate that any holder or owner of property (here land) can and should qualify as a potential victim of an extortion scheme.

Therefore, for the foregoing reasons, defendant Fariz's Motion to Quash Paragraph 26(b) of Count One of the Indictment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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