

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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

UNITED STATES OF AMERICA

v.

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

HATIM NAJI FARIZ
_____ /

**MEMORANDUM IN SUPPORT OF REQUEST FOR RECONSIDERATION
OF THE MAGISTRATE JUDGE'S ORDER DENYING
MR. FARIZ'S MOTION FOR GRAND JURY TRANSCRIPTS**

Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, and pursuant to 28 U.S.C. § 636(b)(1)(A) and this Court's Order of November 10, 2003 (Doc. 369), hereby submits his memorandum in support of his request for reconsideration of the Magistrate Judge's Order (Doc. 338) denying his motion for grand jury transcripts. As grounds in support, Mr. Fariz states:

PRELIMINARY STATEMENT

On September 5, 2003, Mr. Fariz filed his Motion for Grand Jury Transcripts. (Doc. 254). Defendants Ghassan Ballut and Sameeh Hammoudeh similarly filed motions for grand jury transcripts. (Docs. 297, 311, 331). On October 24, 2003, the U.S. Magistrate Judge denied the Defendants' motions for grand jury transcripts. (Doc. 338). The Magistrate Judge's Order makes essentially two findings: (1) that the Defendants had failed to demonstrate that the disclosure of the grand jury transcripts was necessary or appropriate, and (2) the Defendants' request for the disclosure of the grand jury transcripts was not

sufficiently limited. Mr. Fariz respectfully seeks reconsideration of the decision of the Magistrate Judge before this Court.

STANDARD OF REVIEW

This Court “may reconsider any pretrial matter under [28 U.S.C. § 636(b)(1)(A)] where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A).

ARGUMENT

Mr. Fariz Demonstrated a Particularized Need for the Disclosure of the Grand Jury Transcripts In Light of the Admittedly False Allegations Against Him.

As the Magistrate Judge set forth in his Order, the appropriate standard for determining whether the traditional secrecy of the grand jury proceedings should be overcome is that “[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). The *Douglas Oil* standard is a “highly flexible one, adaptable to different circumstances.” *United States v. Doe*, 481 U.S. 102, 112 (1987) (citation and internal quotation marks omitted).

Mr. Fariz contends that the disclosure of the grand jury transcripts is appropriate and necessary in this case, in light of the government’s admission that the identification of Abd

Al Aziz Awda was incorrect in Overt Act 253, and suspect in Overt Acts 236, 240, and 247. (Doc. 71). These alleged overt acts purport to describe conversations involving Mr. Fariz either with or about Mr. Awda, who is alleged to be the founder and spiritual leader of the Palestinian Islamic Jihad (“PIJ”) and a Specially Designated Terrorist. These overt acts are alleged as a basis for the conspiracy charges against Mr. Fariz in Counts 1, 2, 3, and 4, and are the sole acts incorporated into the charges in Counts 35, 37, 41, and 43 against Mr. Fariz.

The Magistrate Judge found that Mr. 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,” referring to the alleged 255 Overt Acts in the indictment. (Doc. 338 at 5 & n.8) (emphasis added). The Magistrate Judge then concluded that “[g]iven 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.” (Doc. 338 at 6).

The Magistrate Judge’s findings inexplicably modify and diminish the government’s admissions that the most significant Overt Acts alleged against Mr. Fariz are inaccurate or suspect. Specifically, the allegations against Mr. Fariz were not merely “possibly” misrepresented before the grand jury – the government’s admission shows that Mr. Fariz’s

involvement was misrepresented before the grand jury. Moreover, the significance as to Mr. Fariz cannot be summarily dismissed. Significantly, the Magistrate Judge's findings are inconsistent with those that Magistrate Judge Pizzo made after having the benefit of the detention hearing. *See United States v. Al-Arian*, 2003 WL 21078080, at *6-*7 (M.D. Fla. Apr. 10, 2003).

Furthermore, while the Magistrate Judge's Order characterizes the government admissions as a "few inaccuracies," the Magistrate Judge ignores that Mr. Fariz is named in only 17 alleged overt acts. Instead, the Magistrate Judge's Order relies in part on the substantial number of other overt acts attributed to all of the Defendants to find that the disclosure of the grand jury transcripts is not appropriate. (Doc. 338 at 5-6 & n.8). This conclusion, however, ignores the concern, addressed in case law involving requests for grand jury transcripts and severance, that conspiracy cases involve the "inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants." *Dennis v. United States*, 384 U.S. 855, 873 (1966) (citation omitted); *Kotteakos v. United States*, 328 U.S. 750, 773-74 (1946). Indeed, as the Supreme Court observed:

Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

Dennis, 384 U.S. at 873 (holding that the grand jury testimony of four government witnesses should have been provided under the circumstances of that case) (footnote omitted).

Moreover, the Magistrate Judge ignored that the alleged overt acts purporting to involve or relate to Mr. Awda and Mr. Fariz also form the sole basis of four counts against Mr. Fariz, namely Counts 35, 37, 41, and 43. The Magistrate Judge therefore erroneously relied solely on the conspiracies alleging multiple overt acts in considering Mr. Fariz's request for the disclosure of the grand jury transcripts.

Mr. Fariz also asserts that the Magistrate Judge made erroneous conclusions of law based on the circumstances of this case. The court relied on case law to indicate that it "has extremely limited authority to look beyond the facial validity of an indictment," and that "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." (Doc. 338 at 5) (citing *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Costello v. United States*, 350 U.S. 359, 363 (1956); *United States v. Hyder*, 732 F.2d 841, 843-44 (11th Cir. 1984)). These cited cases, however, involve the questions of whether the Fourth Amendment protection against unlawful searches and seizures applies within the grand jury context, *see Calandra*, 414 U.S. at 339, 342-55; whether an indictment may stand where only hearsay evidence was presented to the grand jury, *see Costello*, 350 U.S. at 359; and whether a defendant's Fifth Amendment rights were violated because the grand jury was not informed of his prior state prosecution and sentence and the government's *Petite* policy, *see Hyder*, 732 F.2d at 842.

None of these cases involve the situation presented here where the government has admitted that some of the allegations, and indeed the key allegations, against Mr. Fariz are factually inaccurate and suspect, and where, accordingly, Mr. Fariz's involvement in the alleged criminal activity was misrepresented to the grand jury. *Cf. United States v. Elliott*, 849 F.2d 554, 558 (11th Cir. 1988) (noting that the "only allegation found to approach particularized need was the allegation of fabricated documents," but that the district court had found that "none [of the fabricated documents] came before the grand jury"); *United States v. Burke*, 856 F.2d 1492, 1496 (11th Cir. 1988) (same). The situation in this case goes beyond the mere possibility that false testimony was given to the grand jury or the mere question of credibility. *Cf. United States v. DiBernardo*, 775 F.2d 1470, 1474-75 (11th Cir. 1985) (holding that dismissal of indictment was not proper where the credibility of an agent when he testified before the grand jury had been called into question, absent an abuse of the grand jury process). That key allegations against Mr. Fariz are false, and admittedly so, provides the particularized need for the disclosure of the grand jury transcripts in this case. While the Supreme Court has recognized five reasons for grand jury secrecy, *see Douglas Oil*, 441 U.S. at 219 n.10 (citations omitted), these reasons do not prevent the disclosure of false testimony or evidence presented to the grand jury, as in the instant matter.

The Magistrate Judge further concluded that because the taped conversations have been or will be turned over to the Defendants in discovery, the need for the grand jury transcripts is reduced. This conclusion, however, fails to address the issue of false information being presented to the grand jury. Whether Mr. Fariz possesses the taped

conversations is irrelevant to what occurred before the grand jury. Moreover, this reasoning ignores Mr. Fariz's presumption of innocence. Indeed, as the Supreme Court has indicated, the grand jury serves the dual functions of the "determination [of] whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *Calandra*, 414 U.S. at 343 (citation omitted). As to this latter function, Chief Justice Warren wrote:

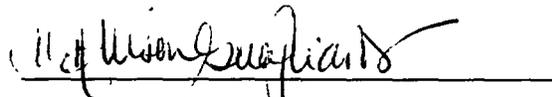
Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. Georgia, 370 U.S. 375, 390 (1962); see also *United States v. Cox*, 342 F.2d 167, 186 (5th Cir. 1965) (Wisdom, J., concurring) ("The Grand Jury earned its place in the Bill of Rights by its shield, not by its sword.").

Based on the foregoing, Mr. Fariz asserts that the Magistrate Judge erred in his conclusions, under the circumstances of this case and the case law, that Mr. Fariz had not demonstrated a particularized need for the disclosure of the grand jury transcripts. The Magistrate Judge further found that even if the factors concerning protecting grand jury secrecy did not weigh against Mr. Fariz's favor, Mr. Fariz's request was not sufficiently limited. (Doc. 338 at 6). In his motion for grand jury transcripts, Mr. Fariz had suggested ways in which the disclosure could be limited, both in how the materials were viewed and in what materials were needed. Should this Court determine that Mr. Fariz has demonstrated

a particularized need for disclosure of the grand jury transcripts, Mr. Fariz asserts that his request was appropriately limited in light of the government's admission of false accusations against Mr. Fariz. Accordingly, Mr. Fariz respectfully requests that this Court reconsider his request for grand jury transcripts.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2003, a true and correct copy of the foregoing has been furnished by hand delivery to Terry Zitek, Assistant United States Attorney, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, and to the following by U.S. Mail:

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