

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK U.S. DISTRICT COURT
TAMPA, FLORIDA

UNITED STATES OF AMERICA

vs.

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

GHASSAN ZAYED BALLUT
_____ /

**DEFENDANT GHASSAN BALLUT'S MEMORANDUM TO
REQUEST RECONSIDERATION OF MOTION FOR GRAND JURY
TRANSCRIPTS AND MOTION TO ADOPT DEFENDANT HATIM FARIZ'S
MEMORANDUM IN SUPPORT OF REQUEST FOR RECONSIDERATION**

The Defendant, GHASSAN ZAYED BALLUT, by and through his undersigned counsel, pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Criminal Procedure 6(e)(3)(E), and the Court's Order of November 13, 2003 (Dkt. 371), submits this memorandum in support of his request to reconsider the Magistrate Judge's Order of October 24, 2003 (Dkt. 338), denying the Defendant's motion for grand jury transcripts, being Defendant HATIM FARIZ's Motion for Grand Jury Transcripts (Dkt. 254) as adopted by the Defendant in his Motion to Adopt Defendant Hatim Fariz's Motion for Grand Jury Transcripts (Dkt. 297).

Factual Basis for the Defendant's Request for Grand Jury Transcripts

The Defendant seeks to obtain the transcripts of all grand jury testimony concerning the conversations described in Overt Acts 236, 240, 247, and 253 of Count One of the Indictment. The Government's responses to the Motion for Grand Jury Transcripts demonstrate that the Government understands these specific Overt Acts to be the matters at issue. (Dkt. 307, 325.)

In Overt Acts 236 and 253, it is alleged collectively that Co-Defendant HATIM FARIZ

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had telephone conversations with Co-Defendant ABD AL AZIZ AWDA on or about May 26, 2002, and November 10, 2002, in which fund-raising and the transfer of money to ABD AL AZIZ AWDA were discussed. In Overt Acts 240 and 247, it is alleged collectively that on or about June 7, 2002, and September 13, 2002, HATIM FARIZ had telephone conversations with the Defendant which if true would indicate that the Defendant had knowledge of money transfers and payments to ABD AL AZIZ AWDA. These Overt Acts are clearly the most significant allegations against the Defendant in Count One, as these allegations would be the central basis of the Government's contention that the Defendant had knowledge of the alleged conspiracy and was a party to it. These Overt Acts also serve to support Counts Two, Three, and Four of the Indictment and are the sole basis for Counts Thirty-Seven and Forty-One of the Indictment against the Defendant. An examination of the remaining Overt Acts of Count One containing references to the Defendant demonstrates that other allegations against the Defendant in Count One are relatively insignificant and, standing alone, would likely fail to support the charge.

The issue is that Overt Acts 236, 240, 247, and 253 of Count One are, by the Government's own admission, no longer supported by the evidence. The Government learned on April 7, 2003, that the speaker in Overt Act 253 referred to as ABD AL AZIZ AWDA was in fact "another PIJ member." In light of this, references to ABD AL AZIZ AWDA in Overt Acts 236, 240, and 247 became suspect. Response by the United States to Motion for Grand Jury Transcripts, 2. Because the Indictment is incorrect in naming ABD AL AZIZ AWDA in these Overt Acts, and because these are clearly the most significant allegations against the Defendant in Count One, the validity of Count One against the Defendant is in question and may be subject to dismissal.

The Government seeks to repair this breach of the allegations against the Defendant by instead contending that the person referred to was “another PIJ member.” Given the impeachability of the Government’s evidence supporting Overt Acts 240 and 247, this contention of “another [unidentified] PIJ member,” not yet alleged in the Indictment, is as crucial as it is unsupported. As a matter of due process and the Defendant’s right to know the nature and cause of the accusation against him, the Defendant should be given access to that grand jury testimony that caused such an error of identification to occur, as it is likely to provide the Defendant with a basis to impeach the source of this allegation and to challenge the Government’s new contention.

The Legal Argument for Requesting Grand Jury Transcripts

A defendant seeking grand jury transcripts is required to show (1) that he had a particular need for the material to avoid “a possible injustice,” (2) that the need for disclosure is greater than the need for continued secrecy, and (3) that the request is structured to cover only the material so needed. Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 222, 99 S.Ct. 1667, 1674, 60 L.Ed.2d 156 (1979).

The typical showing of particularized need arises when a litigant seeks to use “the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like,” where such use is necessary to avoid misleading the trier of fact; in these circumstances, disclosure can be limited strictly to those portions of a particular witness’ testimony that bear upon some aspect of his direct testimony at trial. United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). Here, the Defendant wishes to obtain the grand jury testimony concerning the conversations described in Overt Acts 236, 240,

247, and 253, to impeach the credibility and question the competence of the source that mistakenly identified the person speaking in Overt Acts 236 and 253 as the Co-Defendant ABD AL AZIZ AWDA. The Defendant is further requesting a limited disclosure bearing upon a particular aspect of the Indictment, limiting the request to evidence of four specified telephone conversations.

The need for this disclosure on this specific issue is greater than the need for continued grand jury secrecy. The Defendant is clearly prejudiced by allegations that are, by the Government's own admission, false or misleading. The requested disclosure is necessary to protect the Defendant from this prejudice. In making this assessment, the relative need for continued grand jury secrecy should be examined. The reasons for maintaining secrecy are:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Proctor & Gamble, *supra*, 356 U.S. at 681, 78 S.Ct. at 986. For these reasons, courts have been reluctant to breach the secrecy of the grand jury. Still, it is recognized that in some situations justice demands that discrete portions of transcripts be made available for use in subsequent proceedings. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-234, 60 S.Ct. 811, 849, 84 L.Ed. 1129 (1940). Recognition of the need for defendants to have access

to grand jury transcripts is found in Federal Rule of Criminal Procedure 6(e)(3)(E), where it states that disclosure of grand jury transcripts may be made “preliminarily to or in connection with a judicial proceeding” or “at the request of a defendant who shows that a ground may exist to dismiss the Indictment because of a matter that occurred before the grand jury.” At this point in the present proceedings, enumerated reasons (1), (2), (3), and (5) are no longer of concern to the Court or the Government. As for reason (4), although disclosure of grand jury testimony may have the effect of inhibiting the source of these specific allegations, the Court has little interest in encouraging the free and untrammelled disclosure of erroneous or false information.

Finally, the Defendant’s request is structured to cover only the material needed to examine the cause of this error in the Indictment. Given the quantity of evidence adduced to support the 256 Overt Acts in Count One, the Defendant’s request for grand jury testimony relating to four telephone conversations is sufficiently tailored to meet the Defendant’s particularized need.

Conclusion

Because the Defendant has a particular need for the requested material to impeach the source of acknowledged erroneous information that is clearly prejudicial to the Defendant, and because the Defendant’s need for this disclosure is greater than the need for continued grand jury secrecy, and because the Defendant’s request is structured to cover only the material needed for this purpose, the Defendant has provided the Court with a substantial legal basis for disclosing the requested grand jury testimony. The Defendant requests the Court to order the disclosure to the Defendant of all grand jury transcripts relating to Overt Acts 236, 240, 247, and 253 of Count One of the Indictment.

Respectfully submitted,



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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S.

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