

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA :
 :
v. : CASE NO.: 8:03-CR-77-T-30-TBM
 :
SAMI AMIN AL-ARIAN, :
SAMEEH HAMMOUDEH, :
GHASSAN ZAYED BALLUT, :
HATIM NAJI FARIZ :

RESPONSE OF THE UNITED STATES TO DEFENDANT AL-ARIAN'S MOTION FOR RECONSIDERATION BY THE DISTRICT COURT OF THE MAGISTRATE'S ORDER CONCERNING THE DEFENDANT'S MOTION TO COMPEL

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, hereby responds to Defendant Al-Arian's Motion for Reconsideration by the District Court of the Magistrate's Order Concerning the Defendant's Motion to Compel.

This Court should deny defendant's motion for reconsideration. In his original motion, defendant sought to obtain large categories of information to which Judge McCoun correctly found he is not entitled. Reconsideration of that decision is not warranted because defendant fails to make any showing that suggests that Judge McCoun's order is "clearly erroneous" or "contrary to law" as is required under 28 U.S.C. § 636(b). Even if the Court were to grant reconsideration, defendant presents absolutely no cogent justification for reversing Judge McCoun's well-reasoned decision.

A. BACKGROUND

On March 18, 2004, Defendant Al-Arian filed a motion to compel wide-ranging discovery under Rule 16, Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). (See Doc. 487.) The requests pertinent to defendant's instant motion are the following: (1) Request No. 1 for information on whether defendant was overheard on any electronic surveillance that was conducted on any other targets of any other investigations; (2) Request No. 3 for all translations utilized by the government in preparation of the Indictment that differ in any way from the translations the government used to obtain the Indictment and/or intends to offer at trial; (3) Request No. 4 for the names, credentials and contact information for all translators involved in the creation and production of the translations utilized in preparation of the Indictment; and (4) Request No. 9 for the identity of, any exculpatory information derived from, and Giglio information about any informants used in the investigation, including those who will be called as witnesses at trial. The United States timely responded on April 1, 2004. (See Doc. 499.)

Following a discovery conference held on May 17, 2004, Magistrate Judge McCoun issued an opinion granting in part and denying in part defendant's motion. (See Doc. 544.) First, the magistrate judge denied Request No. 1 as overbroad. The court noted that Rule 16 requires disclosure only of relevant statements, i.e. statements of defendant that are relevant to the charges alleged in this Indictment, while Brady requires production only of statements containing material exculpatory or impeachment information. Judge McCoun rejected defendant's request because defendant failed to show that any of his statements on other wiretaps in other investigations would

necessarily be discoverable under either of these principles. The court also noted that the United States has acknowledged its duties under Rule 16 and Brady to notify the defendant if it comes into knowing possession of a relevant or materially exculpatory statement.

For similar reasons, Judge McCoun denied Request No. 3 as overbroad. He determined that Brady does not require disclosure of translations containing minor discrepancies or inconsistencies "that do not alter the substance of the communication or the parties thereto" because such differences are not material. (Doc. 544 at 9-10.) That is, such differences do not present a reasonable probability of causing a different result. In addition, the court held that further court order was unnecessary since the United States had demonstrated its willingness to comply with its duty under Brady to disclose matters material to the accuracy of its translations.¹

The court denied without prejudice Request No. 4 as unsupported. The magistrate judge determined that defendant had not presented sufficient specific facts to warrant an order requiring a general listing of the identity of and information about the translators used in the preparation of the Indictment. In addition, the court instructed defendant on the necessary showing, namely, that he must identify a particular intercepted communication or translation and show how the identity of the translator is necessary to the defense at trial or at a hearing.

Lastly, Judge McCoun denied Request No. 9 regarding informants as overbroad

¹Judge McCoun specifically referenced the United States' Supplement to the Record which was filed within hours of learning that a participant to conversations alleged in Overt Acts 236 and 253 was misidentified as Abd Al Aziz Awda. (Doc. 544 at 10.)

and unsupported. The court held that defendant failed to address the factors deemed pertinent to the balancing test outlined in Roviaro v. United States, 353 U.S. 53 (1957), or to demonstrate that disclosure is relevant, helpful or necessary to a fair trial. In addition, the court noted that defendant would be apprized of the information he seeks about informants who will be called as witnesses in sufficient time to prepare for trial pursuant to the timetable established in the Second Amended Pretrial Discovery Order.

On June 16, 2004, defendant filed the instant motion. Defense counsel, however, failed to serve it on the government. Instead, the government learned of the filing on June 29, 2004 purely through happenstance when a staff member was reviewing the docket on the Court's website. As a result, on June 29, 2004, the United States filed a Request for Extension of Time to File a Response until July 14, 2004.

B. LEGAL STANDARD

28 U.S.C. § 636(b) permits the district court to designate a magistrate judge to hear and determine any pretrial matter, except for certain enumerated exceptions not pertinent here. The district court may "reconsider any [such] pretrial matter . . . 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).

C. ARGUMENT

Defendant requests reconsideration of Judge McCoun's order denying Requests Nos. 1, 3, 4 and 9. In his motion, however, defendant does not identify any portion of Judge McCoun's order that is clearly erroneous or contrary to law as required under section 636(b). Rather, defendant complains that the order "frustrates due process"

simply because the magistrate judge disagreed with his position and did not order premature and unwarranted discovery.² For the following reasons, the Court should reject defendant's requests and deny his motion.

The United States will address each Request in turn.

1. Request No. 1 - Whether Dr. Al-Arian was overheard on any electronic surveillance that was conducted on any other targets of any other investigations.

Judge McCoun's decision regarding Request No. 1 comports with applicable law and is not clearly erroneous. As the magistrate judge correctly held, there is no legal basis for ordering discovery of statements of defendant that are not relevant to this proceeding. Yet that is precisely what defendant sought in his original motion - *all statements* made during the course of electronic surveillance on *other targets of other investigations* – without making any showing that such statements would be relevant to this case.

Rule 16, Brady and Giglio provide the applicable principles for ordering discovery in criminal cases. As Judge McCoun held, Rule 16(a)(1)(B) requires the government to disclose any *relevant* written or recorded statements by the defendant in the government's knowing possession, custody or control. "Relevant" in this context means relevant to the charges alleged in the Indictment. See, e.g., United States v. Yunis, 867 F.2d 617, 624 n.10 (D.C. Cir. 1989). Similarly, Brady and Giglio would require only disclosure of exculpatory or impeachment statements that are material to

²Given the legal standard for reconsideration of a magistrate judge's order, defendant's request for "guidance and assistance" in the absence of a finding from this Court that Judge McCoun's order was clearly erroneous or contrary to law is improper and should be rejected. (See Doc. 555 at 1-2.)

this case.

As Judge McCoun noted, defendant has received all of his relevant written or recorded statements in the government's knowing possession. In addition to prior statements he made to the FBI, defendant has already received thousands of hours of recorded statements made by him and co-conspirators that are relevant to the alleged charges. The United States recognizes that should any *relevant* statements made by defendant on other wiretaps be located, it is obligated to notify defendant. No court order is required to ensure compliance with that duty.³

Nothing in the magistrate judge's ruling is contrary to pertinent law or clearly erroneous. Accordingly, the Court should decline to reconsider defendant's request for statements from wiretaps in other investigations.

Furthermore, this Court should reject defendant's blatant attempt to improperly circumvent the magistrate judge's designated authority to determine pretrial matters by using the instant motion to revise his original request and raise an argument never presented to the magistrate judge in his original motion. In discussing Request No. 1, defendant says "[t]he magistrate did not recognize, however, that in preparation for a motion to suppress information from the wiretaps, the Accused must know whether any of the wiretaps he seeks to challenge were originally sought because the Accused was overheard on a wiretap from another investigation." (See Doc. 555 at 13.) Defendant then proceeds to rewrite his request to seek information on whether the original FISA

³Requiring the United States to unnecessarily produce statements from wiretaps in other foreign intelligence investigations could also have grave consequences for national security. Since defendant could easily warn the other targets of the existence of the wiretaps, disclosure would likely jeopardize ongoing investigations.

wiretaps were based upon wiretaps of other individuals so he can challenge the legality of the other wiretaps too. This is not the information that defendant requested in his motion to compel. Since he did not file a memorandum of law with his original motion, he never even presented this argument to the magistrate judge. (See Doc. 487 at 1-5.) Since defendant never articulated this particular theory (or any theory for that matter), the government did not discuss it and the magistrate judge never considered it. It is highly improper for defendant to ask this Court to determine a newly-raised issue under the guise of seeking reconsideration of a different request. Rather, defendant should file a motion raising this new request with the magistrate judge.

2. Request No. 3 - All translations utilized by the government in preparation of the Indictment that differ in any way from the translations the government used to obtain the Indictment and/or intends to offer at trial.

Defendant raises several objections to Judge McCoun's decision regarding Request No. 3, none of which are compelling or meet the appropriate standard for reconsideration. Judge McCoun applied the Brady doctrine to this request and determined that it would not require production of translations containing only minor discrepancies or inconsistencies that do not alter the substance of the communication or the parties thereto. Defendant complains that Judge McCoun's order fails to appreciate the "subtle" aspects of his argument, (see Doc. 555 at 8), but fails to present any caselaw supporting his novel interpretation of Brady or showing that Judge McCoun's decision was contrary to law or clearly erroneous.⁴

Judge McCoun properly rejected defendant's request because it did not seek

⁴Defendant presents no argument that Rule 16 could compel discovery of the prior translations, and nor can he since they are clearly exempted under Rule 16(a)(2).

material information under Brady's definition of materiality, that is, translations containing variances that would have a reasonable probability of causing a different result. See Kyles v. Whitley, 514 U.S. 419, 434 (1995). Defendant argues that Judge McCoun's interpretation of the Brady materiality standard is overly restrictive. Instead, he advocates adoption of a loose standard that would require production of summaries or verbatim translations that "differ in any way" from other translations or that contain "editorial comments and factual assumptions" not contained in other versions of translations of the same conversation. (See Doc. 487 at 2; Doc. 555 at 8.) To bolster his argument, defendant claims to have several examples of "benign" translations that contain a description of a telephone call in the Indictment that is purportedly less incriminatory than the translation used to prepare the Indictment. (See Doc. 554 at 5-6; Doc. 555 at 8-10.) An examination of defendant's own example of the type of allegedly exculpatory translation that he seeks to obtain, however, reveals the fallacy in his argument.

Defendant claims that two documents regarding the conversation alleged in Overt Act 239, one of which is an English-language summary of a conversation (commonly referred to as a "tech cut") and one of which appears to be a substantially verbatim transcript of the same conversation, demonstrate his necessity to have all prior translations. However, what defendant is identifying as a material difference in content is really just the difference in function between a transcript and an interpretive summary of a conversation.

The primary purpose of a verbatim transcript is to provide the reader with the particular words that were spoken by the participants to the conversation. Some background or interpretation may be included but, for the most part, it just translates word-for-word what was said. In contrast, the purpose of a “tech cut” summary is to outline the general substance of the conversation and explain what it means in context of the investigation, so that the investigating agent can determine if the call should be logged as relevant to the case. A translator preparing a “tech cut” summary will use his knowledge of prior calls, intonation, and other additional information to explain meaning of the call in context. These types of differences do not make a “tech cut” summary more or less “benign” or “incriminatory” than a verbatim transcript, but merely reflect a difference in purpose.

The defendant’s example illustrates this point clearly. The “tech cut” summary of Overt Act 239 incorporates information from Overt Act 238, a prior call between Hatim Naji Fariz and Ghassan Ballut in which they discuss a suicide bombing in Haifa that occurred on the previous day. The translator who prepared the “tech cut” summary used his knowledge of the conversation alleged in Overt Act 238 to interpret the “world news” identified in the transcript of Overt Act 239 as the news of the Haifa suicide bombing. The transcript shows defendant and Fariz discussing the news, while the “tech cut” further interprets the defendants’ language and tone as sarcasm. Properly viewed with consideration of their distinct purposes, the “tech cut” summary and the transcript do not contain any material differences, but rather are entirely consistent with each other. Thus, defendant cannot rely on these or any other similar instances to support his overly expansive view of the Brady materiality standard.

Defendant further tries to justify his request by casting aspersions on the government's integrity through painting the government as flip-flopping on the accuracy of its translations. (See Doc. 555 at 10-12.) At the discovery conference, the government was merely acknowledging what common sense dictates, namely, that there is no single way to translate between two languages. Any given translation will contain some differences with another. Thus, the government's statements at the conference and the agent's statements in the affidavit that the translations are accurate are not the least bit contradictory.

Not only can he not present any legal justification under the applicable rules of discovery for requiring production of the prior translations, defendant cannot otherwise demonstrate a compelling need for the information. Defendant already has copies of the original tapes containing the recorded conversations. Using these tapes, he can secure his own translations to use to contest the government's version of the recorded conversations either by calling his translator as a witness or using his translation to cross examine the government's translators at trial. (See Doc. 554 at 29-30.) Thus, defendant has ample opportunity to "explore . . . discrepancies without alerting the government to [his] thought processes and with enough time to properly prepare for trial." (See Doc. 555 at 10.)

Similarly, defendant fails to advance any coherent justification for reviewing the prior translations *in camera*. (See Doc. 555 at 12.) Throughout this case, the government has timely complied with its obligations under Brady information. Within hours of discovering the misidentification of Abd Al Aziz Awda in Overt Acts 236 and 253, the United States filed a Supplement to the Record notifying the Court of the error.

There is no basis for defendant's insulting insinuation that the government has failed to comply with its Brady or other discovery duties.

For all of these reasons, the Court should reject defendant's motion to reconsider Request No. 3.⁵

3. Request No. 4 - The names, credentials, and contact information for all translators involved in the creation and production of the translations utilized in preparation of the Indictment.

Defendant relies on largely the same arguments to justify both Request Nos. 3 and 4. In neither case, however, can he demonstrate how Judge McCoun's order is clearly erroneous or contrary to law. Thus, the Court should also deny reconsideration of Request No. 4.⁶

For the same reasons that the prior translations defendant seeks are not discoverable under Brady, neither is information about the translators. As explained above, the two types of translations that defendant tries to cite as containing examples of material discrepancies are entirely consistent with each other when one considers the purpose for which each was created. Since their translations are not exculpatory, the translators would not be able to provide any exculpatory information either.

⁵If the Court decides to grant reconsideration and reverse Judge McCoun's Order, then it should structure production as suggested by defendant, namely, by imposing a reasonable deadline for superseding the Indictment and then requiring defendant to particularize his request for access to translators of specific conversations. (See Doc. 555 at 10 n.5.)

⁶At the discovery conference, defendant grounded his argument on the mistaken proposition that the translators were critical real-time witnesses to the conversation. As Judge McCoun correctly explained, the translators do not listen to the telephone calls as they are intercepted, but rather review tapes of the calls at a later time. (See Doc. 554 at 10-12, 21-22.) Thus, they are not actual witnesses to the conversations alleged in the Indictment.

As the government and the court have acknowledged, defendant may be able to request the appearance of a particular translator at trial or at a specific hearing. At this point, however, defendant is only entitled to discovery warranted under Rule 16, Brady or Giglio, none of which justify defendant's current request. As such, defendant's motion with respect to Request No. 4 should be denied.

4. Request No. 9 - Information regarding any informants the government may have utilized in the investigation of Dr. Al-Arian, consistent with Roviario v. United States, 353 U.S. 53 (1957).

Defendant's initial motion to compel made a vastly overbroad request for the identities of and various types of Giglio information about any informants that may have been used in the investigation of the case. (See Doc. 487 at 3-5.) The United States responded that defendant was not entitled to discover the identities of any informants based on the government's privilege under Roviario v. United States, 353 U.S. 53 (1957) and that any Giglio information would be provided pursuant to the Court's Second Amended Pretrial Discovery Order. (See Doc. 499 at 16-17.)

Judge McCoun properly denied defendant's request. In his Order, Judge McCoun applied the standard established under Roviario by requiring defendant to show that the information would be relevant and helpful or necessary to a fair trial. United States v. Rutherford, 175 F.3d 899, 901 (11th Cir. 1999). Since defendant's original memorandum contained no legal argument, defendant obviously failed to sustain his burden to make this showing. Even at the discovery conference, defense counsel still failed to address the pertinent factors of the test. He merely narrowed his request for information about informants who were "either a participant in an event that is covered by the Indictment or a material witness to that event" and blanketly asserted his

entitlement to such information. (See Doc. 554 at 44.) However, nowhere did defendant address the Roviaro balancing test or present any cogent argument that would justify disclosure under that test.

Defendant's present motion fails for the same reason. In seeking reconsideration, not only has defendant failed to point out any way in which Judge McCoun's decision was contrary to law or clearly erroneous, he also fails to make any effort to satisfy the Roviaro test.

First, defendant argues that he is entitled to the information because the United States changed its position regarding the use of informants in the investigation. This argument has no relevance to any of the Roviaro factors, *i.e.* the extent of the informant's participation in the criminal activity, directness of the relationship between the defendant's asserted defense and the probable testimony of the informant, and the government's interest in non-disclosure. See Rutherford, 175 F.3d at 901.

Next, defendant argues that he cannot provide specific information pertinent to the Roviaro factors because the case covers a long span of time and does not comprise "discrete acts or isolated transactions." (See Doc. 555 at 4.) This statement demonstrates exactly why Judge McCoun appropriately rejected Request No. 9 because it shows that defendant is improperly using Roviaro as a general discovery vehicle, rather than as the targeted and particularized inquiry that it was meant to be. The classic Roviaro case involves an informant to whom the defendant does not otherwise have access but who is the main participant other than the defendant in a discrete criminal transaction – as in the situation where an informant buys drugs from the defendant in an isolated transaction. In these cases, the informant is the only

person other than the defendant who could explain or contradict the testimony of government witnesses. Roviaro, 353 U.S. at 64-65. Under those circumstances, the Supreme Court held that a defendant could overcome the government's privilege and obtain information about the identity of the informant. Id. at 65. By acknowledging that he cannot identify a specific person to whom he does not have access that was involved in a particular transaction and explain what relevant information that person likely has, then defendant is in effect conceding that he cannot meet the Roviaro test. Thus, the Court has no basis for abrogating the government's privilege.

Even if defendant were capable of identifying a particular person whom he believed to be a Roviaro informant, Roviaro still would not apply because he presents no evidence to suggest that he does not already know the identity of any such potential informant. As explained in the government's response to defendant's original motion, Roviaro does not require disclosure of information about a person's status as an informant where the defendant already knows of the person's existence, participation in the case and identity. See United States v. Persico, No. CR-92-0351(CPS), 1997 WL 867788 at *39 (E.D.N.Y. Mar. 13, 1997) (holding that Brady not Roviaro applies to circumstances in which the informant is accessible but the defendant does not know of the person's status as an informant), rev'd in part on other grounds sub nom., United States v. Orena, 145 F.3d 551, 553 (2d Cir. 1998), cert. denied, 525 U.S. 1072 (1999); United States v. LaRouche Campaign, 695 F. Supp. 1290, 1307 (D. Mass. 1988) (stating that Roviaro is relevant only where a defendant is denied the means to obtain further exculpatory evidence from an informant because he does not know the informant's identity).

Even a cursory examination of the Indictment demonstrates that this case is not one to which Roviaro would apply because the majority of the overt acts alleged involve telephone calls or events in which defendant interacted with people he knows, i.e. his family, friends, business associates, and fellow PIJ members. Thus, contrary to defendant's assertion, there is not an endless list of thousands of possible informants, but only a limited and discrete group of people who are clearly identified in the Indictment or, in the case of unidentified coconspirators, have been identified in discovery. Defendant presents no evidence suggesting that he does not have access to any particular person who was a material participant to the alleged overt acts. Thus, he is perfectly capable of locating and subpoenaing any person he suspects of being an informant if he believes his or her testimony is relevant to his defense. In any event, if any informant were listed as a government witness at trial, defendant would obtain relevant impeachment material, including information about the informant's cooperation with the government, in plenty of time to use it effectively at trial. (See Doc. 544 at 13 n.13.)

Judge McCoun properly rejected defendant's attempt at the discovery conference to use United States v. LaRouche Campaign, 695 F. Supp. 1290 (D. Mass. 1988), to establish his entitlement to information about the identity of any informants under Roviaro independently of the government's general discovery obligations pursuant to Giglio or Brady. (See Doc. 554 at 50-51.) Since he was counsel for one of the LaRouche defendants, defense counsel should know that the LaRouche court reached the opposite conclusion and flatly rejected such an affirmative duty in cases where the defendant already has access to the informant. In LaRouche, the

government identified as a trial witness a person who unbeknownst to the defendants was a government informant. Approximately 55 days into the trial, while the informant was still listed as a government witness, the government disclosed written reports of statements the informant had made to the FBI. United States v. LaRouche Campaign, 695 F. Supp. 1265, 1268 (D. Mass. 1988). Although the informant did not testify, the defendants argued that the government had violated its discovery duties by not informing them of the person's status as an informant before trial under Roviaro. LaRouche Campaign, 695 F. Supp. at 1307. The court held that Roviaro did not require the government to disclose the person's status as an informant because the defendants already knew the person's name and address and had both the opportunity to interview him before trial and to call him to testify at trial. Id. at 1307. Since the defendants already had access to the witness, Roviaro did not compel any further disclosures.⁷ Id. Thus, LaRouche provides no support for defendant's position in this case.⁸

Moreover, the government retains a strong interest in maintaining the confidentiality of the identity of its informants because of justifiable concerns over their safety. See United States v. Tenorio-Angel, 756 F.2d 1505, 1510 (11th Cir. 1985). Defendant is a governing member of an international terrorist organization and is facing

⁷The court instead held that, under the particular circumstances of that case, the information constituted Brady material and as such should have been disclosed as soon as the government knew that the informant would be a trial witness. Id. at 1308.

⁸Contrary to defense counsel's misleading insinuation at the discovery conference, (see Doc. 555 at 51), the LaRouche case ultimately mistried not because of any Roviaro violation, but rather because of the machinations of defense counsel who moved to dismiss several jurors during the trial for hardship due to the length of the trial and then refused to agree to proceed with only ten jurors. United States v. LaRouche Campaign, 866 F.2d 512, 513-514 (1st Cir. 1989).

serious criminal charges that could result in a life sentence for him and his codefendants. Given the deadly nature of the PIJ enterprise, the United States is legitimately concerned about the safety and welfare of its informants. Upholding the United States' Roviaro privilege in this case, especially where the defendant is not being deprived of access to any potential witness, does not hinder in any way defendant's ability to defend himself.

As a last ditch attempt to justify his request, defendant accuses the United States of wrongfully asserting its Roviaro privilege to hide the fact that it has somehow intentionally caused the unavailability of or lost track of the informant, or improperly used the informant as an "agent provocateur." (See Doc. 555 at 5.) The government's Roviaro privilege, however, cannot be overcome with such patently rank and baseless speculation. United States v. Trejo-Zambrano, 582 F.2d 460, 466 (9th Cir.), cert denied, 439 U.S. 1005 (1978).

In the alternative, defendant requests the Court review information regarding any informants *in camera* to provide "assurance" to defendant, but again provides no justification for doing so. *In camera* review is only appropriate where the court lacks the information necessary to determine if disclosure of the informant's identity is required. See Tenorio-Angel, 756 F.2d at 1509 n.7. That is not the case here. It is clear from the defendant's submission and the circumstances of this case that defendant has not advanced any legitimate basis for overcoming the United States' Roviaro privilege.

Because defendant presents no showing on any of the factors deemed pertinent under Roviaro, this Court should reject his motion to reconsider Judge McCoun's Order regarding Request No. 9.

D. CONCLUSION

For the foregoing reasons, the Court should deny defendant's motion for reconsideration of the magistrate judge's order in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Kevin T. Beck
M. Allison Guagliardo

I hereby certify that on July 14, 2004, a true and correct copy of the foregoing document and the notice of electronic filing was sent by United States Mail to the following non-CM/ECF participants:

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