

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

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

HATEM NAJI FARIZ
_____ /

**RENEWED MOTION TO DISMISS THE
SUPERSEDING INDICTMENT
AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the First, Fifth, and Sixth Amendments to the U.S. Constitution, moves this Honorable Court to (1) dismiss Superseding Indictment, and (2) preclude argument or evidence of allegations not specifically charged in the indictment. As grounds in support, Mr. Fariz states:

I. Introduction

This renewed motion to dismiss is filed as a response to the government's proposed jury instructions (Doc. 1161) filed on June 5, 2005.¹ Counsel's initial review of the government's proposed jury instructions demonstrated that certain issues apparently still need to be addressed concerning Mr. Fariz's (1) First Amendment rights of freedom of speech and association, (2) Fifth Amendment due process right to an indictment that provides sufficient notice to allow the defendant to prepare an adequate defense, (3) his Fifth

¹ Mr. Fariz renews all previous pretrial motions that he and his co-defendants have filed. This motion addresses the issues raised in the government's proposed jury instructions.

Amendment grand jury presentment right, (4) his Fifth Amendment right to be found guilty based on his own conduct, and (5) his Sixth Amendment right to be informed of the government's accusations against him.

Counsel have attempted to identify the issues that should be addressed in this motion. However, counsel have not been able to review the government's 173-page document thoroughly and research all of the issues raised in it.² Mr. Fariz would therefore respectfully request leave to file a more complete memorandum, if necessary, addressing issues that should be considered at this stage of the proceedings upon a more thorough review of the instructions, on or by Monday, June 13, 2005.³

II. Motion to Dismiss Count One

A. Count One as Charged in the Indictment

On February 19, 2003, Mr. Fariz and seven co-defendants were charged in a fifty-count indictment with multiple conspiracies and offenses, including the conspiracy to commit racketeering (Count One), in violation of 18 U.S.C. § 1962(d). (Doc. 1). On September 21, 2004, the grand jury returned a superseding indictment against Mr. Fariz and eight co-defendants. (Doc. 636). The superseding indictment also alleges a RICO conspiracy violation. The alleged racketeering activity is the same, except that the superseding

² The RICO conspiracy instruction alone is approximately 125 pages.

³ Mr. Fariz would further note that he has submitted proposed preliminary instructions that contain the essential elements of each of the Counts against him in the indictment. Mr. Fariz anticipates that he will also submit counter-proposed jury instructions for the Court's charge at the end of the case based on the evidence and issues during trial.

indictment adds as an alleged racketeering activity the obstruction of justice (Doc. 1 at 10; Doc. 636 at 11), and amends the overt acts alleged in support of the conspiracy, mostly to add additional overt acts. Thus, essentially the same RICO conspiracy allegation has been in place since the initial indictment in 2003.

The RICO conspiracy alleged in the superseding indictment charges that the Defendants knowingly, willfully, and unlawfully conspired to violate Title 18, United States Code, Section 1962(c); that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the PIJ enterprise, through a pattern of racketeering activity, as defined in Title 18, United States Code, Sections 1961(1) and (5), consisting of:

(a) multiple acts involving murder, in violation of Florida Statutes 782.04; 777.04(3);

(b) multiple acts involving extortion in violation of Florida Statutes 836.05, 777.011 and 777.04;

(c) acts indictable under Title 18, United States Code, Section 1956(a)(2) and (h) [money laundering];

(d) acts indictable under Title 18, United States Code, Section 1952 [interstate or foreign travel or transportation and use of any facilities in interstate or foreign commerce with the intent to promote and carry on an unlawful activity];

(e) acts indictable under Title 18, United States Code, Section 956 [conspiracy to kill, kidnap, maim or injure persons in a foreign country];

(f) acts indictable under Title 18, United States Code, Section 2339B [providing material support or resources to designated Foreign Terrorist Organizations];

(g) acts indictable under Title 18, United States Code, Section 1546 [fraud and misuse of visas, permits, and other documents]; and

(h) acts indictable under Title 18, United States Code, Section 1503 [obstruction of justice].

B. Mr. Fariz's Previous Motion to Dismiss

On September 5, 2003, Mr. Fariz filed a motion to dismiss Count One, contending that Count One is unconstitutionally vague in violation of Mr. Fariz's right to due process under the Fifth Amendment to the Constitution, and in violation of his right to be informed of the accusations against him under the Sixth Amendment to the Constitution. (Doc. 255).⁴ Mr. Fariz argued, in pertinent part, that Count One does not allege any specific "predicate offenses." Rather, subsection "C." of the indictment alleges a "pattern of racketeering activity" which describes, in general terms, different general categories of Florida and federal crimes. Subsection "E." enumerates "overt acts," and incorporates the acts alleged in the subsequent Counts as additional "overt acts," without specifying which overt acts Mr. Fariz should be on notice as constituting specific "predicate offenses" which the government will attempt to prove he agreed would be committed by another conspirator in this alleged RICO conspiracy. Mr. Fariz therefore contended that the indictment failed to provide notice to Mr.

⁴ Mr. Fariz reasserts, renews, and incorporates by reference his arguments raised in that motion.

Fariz and to the Court as to which specific “predicate acts” should be submitted to the jury for its consideration as to whether the government will have proven the third element of this Conspiracy to Commit RICO charge, namely, which of at least two “predicate offenses” have been proven beyond a reasonable doubt, in violation of Mr. Fariz’s rights under the Fifth and Sixth Amendments.

Mr. Fariz also argued that the failure of the indictment to specify the “predicate offenses” to provide sufficient notice of the particular “predicate offenses” and their penalties violated the due process requirements established by the Supreme Court in *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Nguyen*, 255 F.3d 1335, 1341 (11th Cir. 2001).

Thus, Mr. Fariz argued that by *generally* describing the *types* of offenses which constitute a “pattern of racketeering activity,” the indictment failed to state a “plain, concise and *definite* written statement of the essential facts constituting the offense charged,” in violation of Federal Rule of Criminal Procedure 7. Mr. Fariz contended that this failure resulted in a lack of notice to Mr. Fariz as to the *specific* predicate offenses which the government may prove, and that without such notice, Mr. Fariz could not prepare an adequate defense and was not on notice of the potential penalty which may be imposed depending upon which two or more predicate acts the jury may find beyond a reasonable doubt were intended to be committed during the RICO conspiracy. Mr. Fariz therefore contended that Count One violated Mr. Fariz’s right to due process under the Fifth Amendment and his right to be informed of the nature of the allegations against him in

violation of the Sixth Amendment. Based upon these violations, Mr. Fariz requested that Count One be dismissed.

On March 12, 2004, this Court denied Mr. Fariz's motion. In pertinent part, this Court found that Count One was sufficiently pled and that Mr. Fariz's *Jones* and *Apprendi* concerns were premature. (Doc. 479). The Court noted that the government could, since it was going to supersede the indictment, clarify the potential penalties. As noted above, however, the RICO conspiracy alleged in the superseding indictment is essentially the same, for the present purposes, as the RICO conspiracy alleged in the original indictment.

C. Renewed Motion to Dismiss

Mr. Fariz renews his motion to dismiss Count One. The government's proposed jury instructions (Doc. 1161) demonstrate: (1) the vagueness of the allegations in the indictment, preventing Mr. Fariz from being sufficiently informed of the charges against him and prepared to present his defense, in violation of the Fifth and Sixth Amendments, and (2) the lack of guarantee that he will be prosecuted only for those crimes charged by a grand jury, in violation of the Fifth Amendment.

1. Racketeering Acts

Mr. Fariz contends that the indictment fails to provide sufficient notice of the racketeering activities that are alleged in this case. For example, for the first time in the over two years that this case has been pending, the government has informed the defense that the money laundering RICO predicate has, as its "*alleged 'specified unlawful activity,'*" eight generally described acts, including "an offense against a foreign nation, namely Israel,

involving murder,” “an offense against Israel involving extortion,” and “an offense against Israel involving the destruction of property by means of explosive or fire.” (Doc. 1161 at 101; *see also id.* at 108 (referencing “destruction of property by means of explosive or fire”). No such “specified” unlawful activity are “alleged” in the superseding indictment, and Mr. Fariz has no notice of such allegations against him.⁵

Mr. Fariz therefore moves to dismiss Count One, renewing his previous motion that the indictment is not sufficiently pled. Mr. Fariz would additionally request that the Court preclude the government from arguing or advancing a theory at trial concerning alleged acts or activities not charged in the indictment.

III. Motion to Dismiss Counts Three, Four, and 22-43

Mr. Fariz renews his motion to dismiss the material support and contributions of funds, goods, or services counts, including but not limited to his arguments on the insufficiency of the indictment and vagueness of the underlying statutes and regulations, as more thoroughly addressed in his motion to dismiss. *See, e.g.*, Doc. 301.

IV. Motion to Dismiss Counts Violating Mr. Fariz’s First and Fifth Amendment Rights

Mr. Fariz additionally moves to dismiss the indictment based on any construction where he could be found guilty based (1) on the actions or intent of a co-conspirator, rather than only on his own actions and intent, in violation of personal guilt, and (2) on activities

⁵ Mr. Fariz has not been able to verify whether these activities are included within the list of activities pertaining to money laundering proscribed by statute.

protected by the First Amendment. In addition, the government claims that, for the first time, that the prong of “unlawful activity that could cause an individual or entity to be designated as a specially designated terrorist includes,” among other things, “activity for, on behalf of, or controlled by a specially designated terrorist.” (Doc. 1161 at 105). While this is one of the “knowing” elements, the government contends that this prong can essentially be any action undertaken by a specially designated terrorist. Mr. Fariz moves to dismiss the indictment based on any construction of the charges that seeks to hold him liable in a way that violates his Fifth Amendment personal guilt protection and First Amendment rights.

IV. Conclusion

Mr. Fariz respectfully moves this Honorable Court to (1) dismiss Superseding Indictment, and (2) preclude argument or evidence of allegations not specifically charged in the indictment.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender