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,
HATEM NAJI FARIZ

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT HATEM NAJI FARIZ'S MOTION TO DISMISS BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL AND MEMORANDUM OF LAW IN SUPPORT

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, respectfully submits its response in opposition to defendant Hatem Naji Fariz's Motion to Dismiss Based on the Doctrine of Collateral Estoppel and Memorandum of Law in Support (Doc. 1488).

INTRODUCTION

Having repeatedly failed to show that a rational jury cannot find him guilty beyond a reasonable doubt on the remaining counts of the indictment, defendant Fariz now moves this Court to dismiss the remaining counts on "collateral estoppel" grounds.[1] This gambit also fails.[2]

---

[1]Nowhere in his motion does Fariz ask his Court to exclude evidence at retrial. He tries only to bar reprosecution altogether.

[2]Defendant Al-Arian also asks this Court to dismiss his indictment on "collateral estoppel" grounds, purporting simply to "adopt" Fariz's motion. Doc. 1497. A defendant, however, cannot rely on another defendant's acquittal to estop his own prosecution. Standefer v. United States, 447 U.S. 10 (1980). Moreover, a defendant bears the burden of persuasion on all points when attempting to bar prosecution on estoppel grounds, United States v. Hewitt, 663 F.2d 1381, 1387 & n.7 (11th Cir. 1981); United States v. Mock, 640 F.2d 629, 631 n.1 (5th Cir. March 23, 1981). Thus, he has

Fariz fundamentally misunderstands estoppel, as is evidenced by his reliance on "collateral" instead of "direct" estoppel. The former applies to defendants who attempt to estop prosecution of a sequential indictment. The latter applies to defendants, like Fariz, who attempt to estop counts of the same indictment. As explained herein, Fariz cannot rely on direct estoppel to prevent relitigation of the mistried counts because his argument defeats itself. Fariz asserts that the jury necessarily decided an essential factual element of each mistried count in his favor when it acquitted him on accompanying counts. If that were true, however, the jury also would have acquitted him on the mistried counts. Because it did not, Fariz cannot prove his case and his argument fails.

Even if this Court were to ignore this fundamental defect in Fariz's argument, Fariz still cannot fulfill the requirements necessary to estop his retrial. Fariz has not narrowed the possible reasons for the jury's verdict to identifiable facts that are "essential elements" of the mistried counts such that the United States may not relitigate those elements and, by extension, may not relitigate the counts themselves.

---

an "obligation" to support his collateral estoppel argument with record evidence, and when he has produced no such evidence, he cannot gain relief. Hewitt, 663 F.2d at 1387 (emphasis added). Al-Arian has presented no evidence whatsoever in his motion to adopt, and he cannot rely on Fariz's arguments alone, as they are based on the evidence and issues specific to Fariz. Thus, Al-Arian's motion is patently without merit. See Id., (flatly rejecting defendant's estoppel argument when he had produced "no competent evidence" to support it); United States v. Bennett, 836 F.2d 1314, 1317 n.1 (11th Cir. 1988) (defendant could not meet his burden of proof when he had not "precisely define[d] those factual issues that were necessarily decided in [his] prior trial). The United States, of course, reserves the right to respond to a proper estoppel motion if Al-Arian presents one to the Court.

This Court, therefore, should reject Fariz's motion to dismiss and should allow the trial to proceed.

ARGUMENT

I. Fariz cannot directly estop his retrial as a matter of law.

Fariz, having received a general jury verdict of partial acquittal and partial mistrial due to a hung jury, seeks to estop retrial of the mistried counts based on the acquitted counts. Notably, he cites to no case binding on this Court upholding estoppel of a prosecution in this situation. There is good reason because there is no legal support for such a position.

Estoppel applies in both civil and criminal cases to prevent relitigation of facts in an attempt to promote efficiency and ensure finality. See Southern Pac R. Co. v. United States, 168 U.S. 1, 48-51 (1897); Adams v. United States, 287 F.2d 701, 702-03 (5th Cir. 1961). Estoppel in both contexts prevents retrial of a particular factual issue, United States v. Shenberg, 89 F.3d 1461, 1479 (11th Cir. 1996); thus, it is a species of "*res judicata*" and is treated as such, see Hoag v. New Jersey, 356 U.S. 464, 470 (1958); United States v. Powell, 469 U.S. 57, 63-64 (1984). In the criminal context, estoppel also is "embodied in the Double Jeopardy Clause" because it effectively prevents multiple prosecutions for the same offense. Ashe v. Swenson, 397 U.S. 436, 445 (1970); Adams, 287 F.2d at 703.[3]

[3]Although Fariz vaguely invokes the Double Jeopardy Clause, Fariz's Motion at 2, 12, it is clear that he cannot rely on this component of collateral estoppel to prevent retrial of the mistried counts. There is no double jeopardy bar to retrial on mistried counts when the mistrial is due to the inability of the jury to reach a unanimous verdict. Richardson v. United States, 468 U.S. 317 (1984). Thus, there is no double jeopardy bar to retrial on mistrial counts despite that the defendant characterizes his argument as

There is, however, an important difference between the application of civil estoppel and the application of criminal estoppel--one that dooms Fariz's motion here. Estoppel prevents relitigation only of a factual issue "necessarily" previously decided, United States v. Bennett, 836 F.2d 1314, 1316 (11h Cir. 1988) (emphasis in original), and only when the party estopped had a "full and fair opportunity to litigate" that issue. Kremer v. Chemical Construction Co., 456 U.S. 461, 480-81 (1982). When a defendant seeks to estop based on a jury's general verdict of acquittal in a criminal trial, however (like Fariz does here), it is difficult to show that the jury determined any factual issue. It is well established that a jury may acquit not only on insufficiency of the evidence of particular facts but "out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." Standefer, 447 U.S. at 22 (citing Dunn v. United States, 284 U.S. 390 (1932)) (internal quotations omitted); accord, United States v. Espinosa-Cerpa, 630 F.2d 328, 331-32 (5th Cir. 1980) (adding "mistake" to list and refusing to estop charges based on acquittal of co-defendant).[4] Moreover, the United States has no "full and fair

---

one for estoppel. See United States v. Shenberg, 89 F.3d 1461, 1478-79 (11th Cir. 1996).

[4]This does not mean that collateral estoppel can never be employed in a criminal case. Occasionally, it is possible to determine whether the jury acquitted for insufficiency of the evidence (and therefore on a particular factual issue) or for other reasons. In Ashe v. Swenson, 397 U.S. 436 (1970), for instance (the seminal Supreme Court case regarding estoppel on which Fariz entirely relies), the state jury returned a verdict specifying that petitioner was "not guilty due to insufficient evidence." Id. at 439. The Supreme Court therefore applied the previous acquittal to estop a second indictment because "[t]he single rationally conceivable issue in dispute before the jury" was a particular factual matter necessary to prosecute the subsequent offense. Id. at 445. In addition, when estoppel is based on acquittal by the Court pursuant to Fed. R. Crim. P. 29, the only possible basis is insufficient evidence (and the United States

opportunity" to litigate any particular factual issue that might contribute to a jury acquittal because, among other reasons, it could not appeal the jury's verdict. Standefer, 447 U.S. at 22. Thus, as the Supreme Court has stated, "[u]nder contemporary principles of collateral estoppel, [the government's inability to correct error] strongly militates against giving an acquittal preclusive effect." Id. at 23 (refusing to extend doctrine of nonmutual collateral estoppel to criminal cases).

Nonetheless, in the Eleventh Circuit, a defendant who relies on "collateral" estoppel--that is, estoppel based on a jury's acquittal on a previous indictment--may reap the benefit of all doubts regarding a jury acquittal. Despite that the jury may have acquitted him based on prejudice, etc., the Eleventh Circuit will assume that the jury behaved in accordance with its jury instructions by acquitting solely based on insufficiency of the evidence. United States v. Brown, 983 F.2d 201, 202-03 (11th Cir. 1993). The Court purposefully will ignore "the possibility of jury nullification," etc., id. at 203, despite that the United States did not fully litigate any factual issue regarding the acquittal. The defendant therefore may establish that the jury "necessarily" found particular facts via its acquittal.

Regardless of the wisdom of this rule, compare Brown with Standefer, 447 U.S. at 22-23,[5] it cannot affect Fariz's estoppel claim. Fariz is not asserting collateral estoppel

---

normally can appeal the Court's order); thus, the defendant may utilize a Rule 29 order to estop factual issues without the concerns regarding use of a jury's verdict. See, e.g., United States v. Garcia, 78 F.3d 1517, 1521 (11th Cir. 1996) (applying estoppel analysis based on Rule 29 acquittal).

[5]Although the United States questions the wisdom of Brown, it recognizes that that case is binding precedent on this Court. Thus, unlike Fariz does regarding United States v. Shenberg, 89 F.3d 1461 (11th Cir. 1996), see Fariz's Motion at 19

based on a previous indictment, but "direct estoppel"--estoppel of mistried counts due to a hung jury based on the jury's simultaneous acquittal on accompanying counts. See Shenberg, 89 F.3d at 1478. The fact that the same jury has spoken on both the acquitted count and the mistried counts poses a major obstacle for the defendant attempting to invoke estoppel: the defendant asks the Court to find that the jury, when it acquitted, necessarily resolved a factual issue in his favor that is an essential element of the mistried count. If that is true, however, the jury would have acquitted him also on the mistried count in the first place. A direct estoppel argument, therefore, essentially devolves into an attack on the inconsistency of the verdict; the defendant asks the Court to find that the jury should have acquitted on the mistried counts and that the Court therefore should bar reprosecution of those counts. This runs counter to the well-established principle that a defendant cannot attack a verdict based on inconsistency with a simultaneous verdict. Indeed, this Court has just rejected Fariz's motion for acquittal of the mistried counts on this ground.

Moreover, even if the defendant, pursuant to Brown, is given the benefit of the doubt for estoppel purposes when a jury's acquittal on one count is unaccompanied by an inconsistent conviction or mistrial on another, he should not be given that benefit when it is clear from the presence of a split verdict that the jury did not behave according to their instructions. See Standefer, 447 U.S. at 23 n.17 (stating that inconsistency due to "seemingly irreconcilable determinations" of jury regarding acquitted and convicted

---

(recognizing that Shenberg applies to his case but arguing that the Court should not apply it because Shenberg's reasoning is faulty), the United States does not urge this Court to ignore Brown.

counts "is reason, in itself, for not giving preclusive effect to the acquittals"). The defendant should not reap a "windfall" by asserting that the jury correctly acquitted him on some counts but incorrectly hung on others. See Powell, 469 U.S. at 65 ("Inconsistent verdicts . . . present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored."). The efficiency goal of *res judicata* collateral estoppel cannot outweigh the interest of justice in achieving the correct result on the mistried counts. Cf. Standefer, 447 U.S. at 25 (refusing to extend nonmutual estoppel to criminal cases because "the public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases . . . [we reject a] rule that would spread the effect of an erroneous acquittal . . .").

Other courts of appeals still have applied direct estoppel to bar reprosecution of mistried counts. See United States v. Bailin, 977 F.2d 270, 277 (7th Cir. 1992) (reasoning that an acquittal, "however mistaken it may have been" should bar retrial on accompanying mistried counts); United States v. Romeo, 114 F.3d 141, 144 (9th Cir. 1997) (holding, over dissent, that a mixed verdict of acquittal and hung jury is not the "logically inconsistent mixed verdict of acquittals and convictions" to which Supreme Court precedent applies). In this Circuit, however (as well as in others), the court of appeals consistently has required the defendant seeking direct estoppel to "reconcile" the acquitted counts with the mistried counts in a way that avoids inconsistency on the factual issue he wishes to estop. See United States v. Quintero, 165 F.3d 831, 836-37 (11th Cir. 1999) (holding that district court clearly erred during estoppel analysis in finding that jury must have acquitted based on intent because jury then also would have

acquitted him of mistried count with same intent); United States v. Mulherin, 710 F.2d 731, 742 (11th Cir. 1983) (refusing to apply estoppel based on defendant's assertion that jury necessarily found entrapment because: "If, as appellants contend, the jury necessarily found them entrapped as to [the acquitted counts], it would be difficult to understand why the jury did not also find all appellants entrapped on [the hung counts]."); see also United States v. Bennett, 836 F.2d 1314, 1315-16 (11th Cir. 1988) (refusing to directly estop on basis of defendant's argument that the jury acquitted on overall witness credibility because "[i]nherent in the split verdict is the possibility and even likelihood that the jury accepted some and rejected some of the government witness testimony"); cf. Standefer, 447 U.S. at 23 n.17 (defendant cannot use acquittal to estop without explanation for inconsistency of split verdict); accord, United States v. Jenkins, 902 F.2d 459, 469 (6th Cir. 1990); United States v. Medina, 709 F.2d 155, 156 (2d Cir. 1983); United States v. DeVincent, 632 F.2d 155, 161 (1st Cir. 1980). But cf. United States v. Gil, 142 F.3d 1398, 1401 n.4 (11th Cir. 1998) (refusing to estop even introduction of evidence in a split verdict estoppel case but citing in a footnote Brown's decision to give the defendant the benefit of the doubt); Shenberg, 89 F.3d at 1479 (upholding direct estoppel without discussion of inconsistent verdict). It is difficult to see how a defendant ever can resolve such a verdict to the Court's satisfaction. Certainly Fariz has not and cannot do so here.

Fariz's entire estoppel argument is that the jury determined by its acquittal on particular counts factual issues in his favor, and that those factual issues constitute

necessary elements of the mistried counts.[6] If that is true, however, the jury could not rationally have acquitted on the mistried counts in the first place. Thus, it could not have determined Fariz's factual issues in his favor, and Fariz's motion defeats itself. Fariz provides no explanation that might "cohere" the split verdict. Thus, he cannot estop retrial.

---

[6]For instance, Fariz asserts that the jury determined in his favor by acquitting him of particular material support counts that the United States failed to prove "that [he] provided or attempted to provide [particular] money to the PIJ, and/or that he did not do so knowingly or with the specific intent to further the unlawful activities of the PIJ." Fariz's Motion at 9. He then argues that, to find guilt on the "parallel" money laundering counts based on the same transactions, the United States will have to prove "both (1) that [he] transferred the money with the intent to contribute to or for the benefit of the PIJ and (2) with the specific intent to further the unlawful activities of the PIJ." Id. at 10. If this is true, however, the jury had to find both those factual elements the first time around, and its inability to reach a verdict means that it necessarily did not find a failure of proof on either factual element; otherwise, it would have had to acquit on the money laundering counts as well.

Fariz's remaining arguments are much less clear, but it is apparent that he argues from the same premise regarding each: the jury necessarily decided in his favor a particular factual issue on one of the acquitted counts that should prevent retrial on a mistried count. See Fariz's Motion at 11-12 (arguing that the jury's acquittal on substantive material support counts necessarily precludes reprosecution for the hung material support conspiracy count), 15 (relying on the exact same argument concerning money laundering counts and material support conspiracy count to bar reprosecution of IEEPA conspiracy count), 20 (arguing that he cannot be retried on the RICO conspiracy count because "[i]f what he did was not unlawful, as demonstrated by the jury's verdicts of not guilty in the material support counts, then any agreement in which he entered was not illegal"); 21 (arguing that he cannot be retried on Count Twenty merely by incorporating his previous arguments regarding "the findings of fact that the jury must have made to have acquitted Mr. Fariz of conspiracy to murder and of the substantive material support counts"). Each of these arguments necessarily fails for the same reason as the argument regarding the money laundering counts; it is impossible to decide that the jury necessarily decided those issues in his favor, as it then would have acquitted him on the mistried count as well.

II. Fariz has failed to carry his burden of establishing estoppel.

In any event, even if Fariz does not have to explain the continued presence of each mistried count in order to estop it, his motion still fails.

As Fariz states, the Court considering estoppel must engage in a two-step analysis: "First, [it] must examine the verdict and record to see what facts, if any, were necessarily determined in the acquittal at the first trial. Second, [it] must determine whether the previously determined facts constituted an essential element of the mistried count." Shenberg, 89 F.3d at 1479 (internal quotations and citations omitted).[7] The party seeking estoppel bears the burden of persuading the Court at both steps of the analysis. United States v. Hewitt, 663 F.2d 1381, 1387 & n.7 (11th Cir. 1981); United States v. Mock, 640 F.2d 629, 631 n.1 (5th Cir. March 23, 1981). This burden is a "heavy" one. United States v. Brown, 983 F.2d 201, 205 (11th Cir. 1993).

Even setting the inquiry "in a practical frame," see Ashe v. Swenson, 397 U.S. 436, 444 (1970), and putting aside Fariz's inability to rely on a rationally inconsistent acquittal, Fariz has not carried his burden regarding any of the mistried counts.

---

[7]As Fariz notes, the Supreme Court originally phrased this second step as a determination of whether "a rational jury could have reached its not guilty verdict without having decided an ultimate issue of fact which the defendant seeks to foreclose from consideration. Ashe v.Swenson, 397 U.S. 436, 444 (1970). Put this way, it is easy to see why a defendant seeking "directly" to estop prosecution literally cannot succeed if relying on a simultaneous jury verdict of acquittal: a rational jury must have reached its not guilty verdict without having decided the ultimate issue of fact; otherwise, it would have acquitted on the hung counts too. A conclusion to the contrary threatens to divide the jury into "rational" and "irrational" jurors based on the degree of their favor for the defendant: the rational ones wanted to acquit on both the acquitted counts and the hung counts, while the irrational ones wanted to acquit on the acquitted counts but not on the hung counts.

A. Money Laundering Counts (Counts Thirty-Three, Thirty-Eight, and Forty)

Fariz first argues that his acquittals on the substantive material support counts should estop prosecution on the mistried money laundering counts that are based on the same transactions. He asserts that the jury necessarily found via those acquittals that (1) he had not made the charged money transfer "to the PIJ" "and/or" (2) he had not done so "knowingly." Fariz's Motion at 8-9 (emphasis added). Even assuming that Fariz has proven that these two facts were the only facts on which the jury could have acquitted (a point the United States does not concede),[8] Fariz still cannot establish that the jury found for him on both his selected facts--only that the jury "must" have acquitted

---

[8]As Fariz himself points out, numerous other facts were necessary to convict, for instance: that Fariz "(1) provided (2) money, and (3) that money is a material support or resource," and that the PIJ was an FTO. Fariz asserts that the jury could not have found in his favor on any of these facts because he "never disputed" them. Fariz's Motion at 6. He does not, however, cite to anything in the record affirmatively removing them from the jury's consideration, relying solely on his counsel's statements during opening arguments.

Fariz put every element at issue by pleading not guilty, see, e.g., United States v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005), and he should not be allowed now selectively to "concede" those elements for purposes of estoppel. In any event, Fariz's counsel's opening remarks "conceded" precious little, and certainly not the issue, for instance, of designation. See Doc. 1201 at 67 (stating, regarding a different portion of the charges, " I'll tell you from the outset that what the government alleges occurred in great part is what we will tell you occurred"), 71-73 (attached). Thus, Fariz has not carried his heavy burden of establishing that the jury "necessarily" found particular facts merely by asserting that the remainder were not in dispute.

Moreover, to the extent that proof of a money laundering count requires proof of providing material support, as suggested by Fariz's Motion at page 8, a mere acquittal on the corresponding material support charge does not bar reprosecution on the mistried money laundering count. At most, such a decision results in an inconsistent verdict. See Powell, 469 U.S. at 68 (the argument necessarily assumes that the acquittal on the predicate offense was proper . . . this is not necessarily correct).

on one or the other.[9] Thus, Fariz must establish that both are essential elements for money laundering to estop the money laundering counts as necessarily based on facts already litigated regarding material support. Johnson v. Estelle, 506 F.2d 347, 350 (5th Cir. 1975).[10]

Unfortunately for Fariz, the transfer of money to the PIJ is not an "essential element" of a violation of 18 U.S.C. § 1956(a)(2)(A) regarding that money. Section 1956 does not require the proof that the laundered money went to the PIJ or any other particular entity, only that it went overseas. See 18 U.S.C. § 1956(a)(2)(A). Fariz, therefore, cannot show that the jury's prior acquittals on the substantive material support counts necessarily determined facts essential to conviction on the money laundering counts, and his estoppel argument fails.

---

[9]In an important sleight of hand, Fariz asserts later that the jury necessarily found that he did not transfer money to anyone with "specific intent" to further the PIJ's unlawful activities, reasoning that if the jury found that he did not transfer money "to the PIJ," such money cannot have been transferred with the requisite intent. Fariz's Motion at 6. If the jury found that Fariz had not transferred money "to the PIJ," however, it would have had no reason to determine whether the money transferred "to the PIJ" was transferred with any particular intent.

[10]In another sleight of hand, Fariz later asserts that the government "cannot relitigate either one of these two dispositive issues." Fariz's Motion at 11. Not true. The most Fariz can do is estop any prosecution that requires the proof of both issues, as such a prosecution necessarily depends on something the jury found in Fariz's favor, despite that Fariz cannot establish which of the two issues that something is. Unless Fariz can establish that the jury actually found on both issues, he cannot exclude evidence on either issue or otherwise estop relitigation of either, as it is necessarily unclear whether either was decided via previous acquittal. See United States v. Irvin, 787 F.2d 1506, 1515 (11th Cir. 1986) ("[T]he fact sought to be foreclosed by the defendant must necessarily have been determined in his favor in the prior trial; it is not that the fact may have been determined in the former trial." (Emphasis in original.)).

Fariz still argues for estoppel, asserting that because money laundering requires a finding that he intended by the money transfers to promote either material support to the PIJ as an FTO (as described in the material support statute) or support to or for the benefit of the PIJ as an SDT (as described in the IEEPA statute), the fact that he did not transfer the money actually to the PIJ precludes a finding of intent to promote. Even if the jury was unable to conclude that Fariz's transfer actually went "to the PIJ," however, it still could find that the money was intended ultimately to promote support to or for the benefit of the PIJ as necessary to convict for money laundering. For instance, the jury could have been unable to determine where the money went at all (because of the complicated system of transfers to individuals), but still find, based on the context of the transfer, that it ultimately was intended to promote support for the PIJ. Or the jury could have determined that the money went to a particular organization that the United States failed to prove was an arm of the PIJ (the Elehssan Society[11]) but with the intent to further activities of that organization that would benefit others who intended to provide material support to the PIJ. Fariz provides no evidence that the jury cannot have acquitted based on this scenario. Thus, Fariz has failed to prove that the jury

[11]In the same opening statement on which Fariz relies entirely to establish that the jury "necessarily" found particular facts, Fariz's counsel vehemently defended any transfers to the Elehssan Society as transfers to a "legitimate" charity unconnected to the PIJ. Doc. 1201 at 69, 71-72. The United States then spent a great amount of time at trial presenting evidence that the Elehssan Society was in fact part of the PIJ. See, e.g., testimony of Ziad Abu Amr and Russell Hayes; Gov't Exs. 214, 611, 658, 694-A, 694-C, 699-A, 699-C, 789-A, 789-C, 790-A, 790-B, 793-A, and 793-C. Fariz vehemently challenged this evidence. Fariz, therefore, cannot establish that the jury did not acquit him for this reason alone.

necessarily determined facts via its acquittal on the substantive material support counts necessary for conviction on the "parallel" money laundering counts.

B. Conspiracy to Provide Material Support (Count Three)

Fariz next asserts that his acquittals on the substantive material support counts estop his prosecution for conspiracy to prove material support. He again relies on the jury's findings either that he did not transfer money "to the PIJ" or that he did not do so with the requisite intent to promote material support to the PIJ or to violate IEEPA. To convict Fariz of conspiracy to provide material support, of course, the jury need not find that Fariz personally conducted the money transfers charged in the substantive material support counts or that those transfers occurred at all. Thus, he cannot estop a conspiracy prosecution based on acquittal of personal commission of one of its goals. United States v. Corley, 824 F.2d 931, 936 (11th Cir. 1987); cf. Shenberg, 89 F.3d at 1479 (refusing to estop prosecution for RICO conspiracy based on acquittal of substantive counts charging conduct constituting predicate acts, because "the actual commission of the underlying crime does not constitute 'an essential element' of RICO conspiracy").[12]

[12]Contrary to Fariz's implication, Fariz's Motion at 13 n.6, the United States' evidence that Fariz conspired to provide material support was not confined to the evidence of his personal commission of the money transfers that were the subject of the substantive material support counts such that exclusion of evidence concerning the substantive material support counts (were Fariz requesting such) would render it impossible to try the conspiracy count. For instance, the United States introduced evidence that Fariz and his co-conspirators planned to convert videotapes for the PIJ and committed overt acts to further that conversion. Gov't Exs. 954, 963, 964. The United States also presented evidence that Fariz and others agreed to and actually disseminated PIJ propoganda. Gov't Exs. 949 and 965. The United States further presented evidence that in August 2000, Fariz agreed to assist in the preparation of a false biography for Abd Al Aziz Awda for the benefit of Mazen Al-Najjar. Gov't Exs. 1081 and 1082.

Fariz also argues that if the jury acquitted him of providing material support, an agreement to provide that support cannot be unlawful, citing the maxim that "if the defendant['s] act . . . was not an illegal act, it follows a fortiori that defendants' alleged 'agreement' to [commit that act] was not a criminal conspiracy." United States v. Whiteside, 285 F.3d 1345, 1351 n.1 (11th Cir.2002) (cited in Fariz's Motion at 12); see also Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."). There is nothing to suggest, however, that the jury determined as a matter of fact that Fariz engaged in the charged conduct and then acquitted him based on a legal determination that that conduct was not unlawful; indeed, it could not have, as that was the Court's province. Thus, the jury's verdict does not render the conduct "unlawful" for purposes of applying Fariz's maxim.[13] Fariz must still show that the jury necessarily found that the United States had failed to prove a particular fact, and that that fact is necessary to complete the proof for the mistried count. He has not and cannot do so.

---

[13] In Whiteside, the court of appeals held, as a matter of law, that the United States could not prove a particular allegedly false statement actually was false because such an argument was contrary to particular regulations governing the statement. 285 F.3d at 1352. The court reversed defendants' conviction for conspiracy to make that statement, as such a conspiracy was legally impossible. Id. at 1351 n.1. Even if the court's decision in Whiteside could be considered a version of factual estoppel--i.e., the court reversed because the United States failed to prove the defendants actually engaged in the charged conduct--it would not support Fariz's argument here. As set forth in note 12 above, the United States's evidence of conspiracy to provide material support was not confined to an agreement to make the particular transfers of money charged against Fariz in his substantive material support counts. Thus, Fariz's acquittal on those transfers dose not eliminate all proof necessary to establish that he conspired to provide material support.

C. IEEPA conspiracy (Count Four)

For the same reasons as articulated in parts A and B above, Fariz's argument that his acquittal on the substantive material support counts somehow estops prosecution for IEEPA conspiracy fails. See Corley, 824 F.2d 931. Nothing the jury decided regarding the substantive material support counts is an "essential element" of IEEPA conspiracy.

D. RICO conspiracy (Count One)

Fariz next argues for estoppel of the RICO conspiracy count. To the extent he relies on his acquittal for material support (Fariz's Motion at 17), his argument fails for the same reasons already articulated. See Corley, 824 F.2d 931 and note 12 above. In addition, as Fariz himself notes, to the extent that he argues he has been acquitted of personally committing one of the "predicate acts" for the RICO conspiracy (conspiracy to murder and maim, Count Two), and therefore that his RICO prosecution has been estopped, the Eleventh Circuit specifically has foreclosed that argument. See Shenberg, 89 F.3d at 1479.[14] Thus, Fariz's argument regarding the RICO conspiracy is twice-

---

[14]To the extent that Fariz implies that conspiracy to murder and maim and RICO conspiracy have an identity of factual elements that makes acquittal of one a bar to the reprosecution of the other (Fariz's Motion at 17), that argument fails.

The elements of the two conspiracies are considerably different from one another. Compare Jury Instruction Nos. 18 and 21 with 30. Legally, that is what matters in the analysis.

Moreover, factually the charges were different. Count Two charged a conspiracy specifically to commit murder of persons outside the United States. In Count One, the indictment charged eight different types of racketeering activities. Jury Instruction 18 provided that the government had to prove that at the time a defendant joined the RICO conspiracy, the defendant did so with the specific intent either to personally participate in the commission of two "racketeering activities," or the defendant specifically intended to otherwise participate in the affairs of the enterprise with the knowledge and intent that other members of the conspiracy would commit two or more racketeering activities as

barred, as he himself recognizes. Fariz's Motion at 21 n.12.[15]

Furthermore, to the extent that Fariz implies that the United States cannot prove the PIJ is an "enterprise" without evidence of a completed conspiracy to murder and maim and Fariz's personal money transfers that were the subject of the acquitted material support counts (Fariz's Motion at 18), that argument is specious. The existence of an enterprise does not depend on a particular proven conspiracy among its members. Fariz's personal actions are not necessary to establish that the PIJ is a group within the definition of "enterprise."

Fariz also apparently argues for "nonmutual" estoppel on Count One, asserting that his co-defendants' acquittals on particular counts estop his reprosecution for RICO conspiracy. Fariz's Motion at 16-17. That argument is foreclosed as a matter of law by Supreme Court precedent. See Standefer.

---

part of a pattern of racketeering activity. No where in this instruction or in any other instruction was the jury advised that it had to make a specific finding as to what the "overall objective" of the enterprise was and whether the defendant agreed to it, as opposed to the racketeering activities alleged in the indictment. The lack of a verdict indicates that the jury did not agree to anything with respect to defendant Fariz's culpability on Count One.

[15]Fariz asks this Court to ignore Corley and Shenberg based on "the specific facts and circumstances of his case," but he neglects to argue based on those facts and circumstances, asserting only that the court of appeals in Shenberg misinterpreted Supreme Court caselaw. Regardless of the wisdom of Shenberg, it is, of course, binding precedent in this Circuit. In any event, Fariz's challenges to Shenberg's reasoning are without merit.

E. Travel Act (Count Twenty)

Finally, Fariz's argument for estoppel of the Travel Act count (Fariz's Motion at 21-22) is, according to his own admission, is largely a reargument of his previous theories. Those theories, as already explained, lack any merit.

Fariz also argues that his acquittal of conspiracy to murder and maim estops reprosecution of this count because "the government never produced any other evidence or made any argument concerning acts of violence" besides those made in connection with the conspiracy to murder and maim count. Fariz's Motion at 22. In other words, Fariz apparently argues that the jury "necessarily" found by acquitting him on Count Two that acts of violence did not occur. This argument defies belief, as Fariz himself specifically stipulated to particular violent acts to preclude the jury from learning the entire extent of the PIJ's violent activities. E.g., Ct. Exs. 2, 11, 12, 18 and 19. Nor does Fariz bother explaining how any element of conspiracy to murder and maim is an "essential element" of the Travel Act count. Thus, Fariz's argument on this point fails doubly.

CONCLUSION

For the foregoing reasons, this Court should deny Fariz's motion to dismiss based on "collateral estoppel" in toto. The motion essentially devolves into one based on inconsistent verdicts: Fariz argues that he cannot be retried on the mistried counts because the jury should have found him not guilty on those counts in the first place based on its simultaneous acquittals. This Court already has rejected Fariz's motion for dismissal based on inconsistent verdicts, Doc. 1501, and it should do so again here.

In any event, Fariz has not shown that the jury necessarily decided particular facts that are "essential elements" of the mistried counts. Even if Fariz could overcome the inconsistency in the split verdict engendered by his view of the acquittals, his arguments lack merit. Any interest in efficiency and finality in preventing relitigation of factual issues decided by the jury's acquittals, therefore, cannot estop Fariz's retrial on the mistried counts.

The Court should reject this final attempt of Fariz to dismiss the remaining counts of the indictment and should allow a retrial to proceed.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: */s Terry A. Zitek*

Terry A. Zitek
Executive Assistant U. S. Attorney
Florida Bar No. 0336531
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6336
Facsimile: (813) 274-6108
E-mail: terry.zitek@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2006, 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
William B. Moffitt
Linda G. Moreno
Wadie E. Said

/s Terry A. Zitek

Terry A. Zitek
Executive Assistant U. S. Attorney
Florida Bar No. 0336531
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6108
E-mail: terry.zitek@usdoj.gov