

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SEP 02 2004
CLERK'S OFFICE
U. S. DISTRICT COURT
EASTERN MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

No. 01-CR-80778

vs.

Hon. Gerald E. Rosen

(D-1) KARIM KOUBRITI,
(D-2) AHMED HANNAN,
(D-4) ABDEL-ILAH ELMARDOUDI,

Defendants.

MEMORANDUM OPINION AND ORDER REGARDING THE
GOVERNMENT'S AND DEFENDANTS' POST-TRIAL MOTIONS

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on SEP 02 2004

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This Nation's war on terrorism has as its natural and inevitable adjunct the prosecution in the courts of those charged with terrorist activities. It is also inevitable that such cases will bring with them challenges to those who work in the judicial system which at times will place us in uncharted legal and constitutional waters. It should, then, not be surprising that this case -- the first prosecuted and tried in the aftermath of September 11th -- has in its post-trial phase presented the Court and counsel with a confounding maze of complicated and interrelated issues arising out of the original prosecution team's conduct of the case.

Yet, this case, like all others, is governed by the same core constitutional

exculpatory information.

The Court followed this Order with another directing those Government counsel responsible for conducting the investigation to periodically report upon their progress to the Court and to turn over to the Court all relevant documents. As this review developed, and its scope exceeded that which the Court and no doubt Government counsel anticipated, the United States Attorney General, to his credit, appointed a Special Attorney, Craig S. Morford, from outside the Detroit U. S. Attorney's office to lead the Government's review.

As matters progressed further, other developments arising out of the case intervened which made the review more complicated by presenting issues of overlapping concern and potentially conflicting objectives.² This had the unfortunate by-product of delaying the resolution of the principal issues raised in the Defendants' post-trial motions.

It is a fair statement that at the inception of this review no one, least of all the Court, could have anticipated the nature and scope of the issues -- not to mention the sheer number of documents -- that would ultimately be involved in this investigation. (Just one complicating factor, for example, was the necessity for the Court to review many classified documents and for the Court to seek security clearance for its staff and defense counsel, a time consuming process.) Certainly, no one could have imagined last winter that it would be almost autumn before the review was completed and a

² These intervening events included internal Justice Department investigations by the Office of Professional Responsibility and the Office of Professional Integrity into the conduct of the original prosecution team.

considered the Government's filing.

This brings the Court to its second observation. The Court would be remiss if it did not commend both Government and defense counsel, and express its appreciation, for their work and conduct during the post-trial review process. Both the Government team pursuing the review, led by Mr. Morford, and all defense counsel have conducted themselves throughout this difficult process with the highest level of professionalism and commitment to the justice system, and all counsel have at all times thoroughly cooperated with the Court.

With respect to the Government team, in vigorously pursuing and producing to the Court all possible evidence, and helping to develop a complete record upon which a decision could be made, Government counsel has followed the evidence impartially and objectively and allowed the facts to lead where they may. The Court recognizes the initial impulse, under the circumstances presented here, to find fault with a system that allowed the mistakes now acknowledged by the Government -- and, to be sure, the Defendants' due process rights have been compromised as a result of these errors. Nonetheless, any such criticism must be considerably tempered by the Government team's post-trial commitment to uncover all of the evidence and carefully assess whether, in fact, the Defendants were denied their right to a fair trial.³

³Indeed, it bears emphasis that the court-ordered review in this case was directly attributable to the efforts of Government lawyers at the U.S. Attorney's Office in Detroit, who brought evidence to the attention of defense counsel and the Court that resulted in the December 12, 2003 hearing. Further, it was the forthright statements of Government attorneys at this hearing which confirmed the Court's belief that a comprehensive review was necessary. Thus, it would be simply wrong to claim that the prosecution's transgressions came to light purely as a matter of "chance." This view would do a disservice to the system of checks and balances that safeguards the fair

continuing shadow of the threat of future terrorist attacks. It is no exaggeration to say that this monstrous apparition of fanatical terrorism presents to our Nation -- indeed, to the whole civilized world -- the gravest threat of the first decade of the new Millennium. In the first instance, of course, this threat to our security and way of life must be addressed by those in the policy branches of government. But, we are a nation that defines itself by laws, and as we are seeing in courts across the country, many of the actions taken by the Executive and Legislative branches to protect us will invariably end up before the courts for testing against the substantive and procedural protections of our Constitution.

For those of us who work in our Nation's courts and whose responsibility is the administration of justice -- including not only judges, but prosecutors and defense lawyers -- perhaps our greatest challenge will be to insure that this new threat is confronted in a way that preserves our most fundamental and cherished civil liberties. Certainly, the legal front of the war on terrorism is a battle that must be fought and won in the courts, but it must be won in accordance with the rule of law. Those of us in the justice system, including those prosecuting terror suspects, must be ever vigilant to insure that neither the heinousness of the terrorists' mission nor the intense public emotion, fear and revulsion that their grizzly work produces, diminishes in the least the core protections provided criminal defendants by our Constitution. To permit anything less -- to allow our constitutional standards to be tailored to the moment -- would be to give the terrorists an important victory in their campaign to bring us down because they will have caused us to become something less than what we are -- a nation of laws based upon constitutional foundations developed over more than two centuries of

constitutional standards been met.

Given the investment of the Government's time and resources -- not to mention the Court's -- and the significance of this case, one might well ask why and how this happened. This Court probably does not have sufficient training in the field of psychology and motivation to render an educated judgment, and it makes no final assessment here as to the legal or ethical culpability of the prosecution in this case.⁴ However, it is sufficient to say here that two things are obvious to the Court from both its review of the Government's filing, as well as its own independent review of all the documents and evidence presented to it. First, the prosecution early on in the case developed and became invested in a view of the case and the Defendants' culpability and role as to the terrorism charges, and then simply ignored or avoided any evidence or information which contradicted or undermined that view. In doing so, the prosecution abandoned any objectivity or impartiality that any professional prosecutor must bring to his work. It is an axiom that a prosecutor must maintain sufficient distance from his case such that he may pursue and weigh all of the evidence, no matter where it may lead, and then let the facts guide him. That simply did not happen here.

More broadly, when viewed against the backdrop of the September 11 attacks upon our Nation and the public emotion and anxiety that has ensued, the prosecution's understandable sense of mission and its zeal to obtain a conviction overcame not only its professional judgment, but its broader obligations to the justice system and the rule

⁴ As noted above, there are ongoing investigations being conducted as to such matters, and the Court has no desire or intent to interfere with or influence the course or outcome of those investigations.

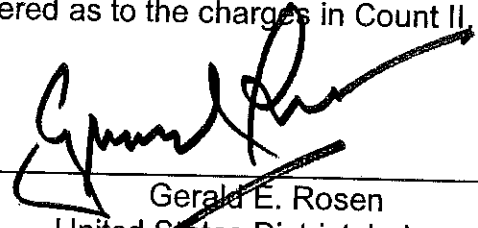
ORDER

For the reasons set forth here and for the reasons set forth in the Government's filing,

IT IS HEREBY ORDERED that the Government's Motion to Dismiss, without prejudice, Count I of the Third Superseding Indictment is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion for New Trial is GRANTED, in part.

Count I of the Third Superseding Indictment, accordingly, is DISMISSED, without prejudice, and a NEW TRIAL is hereby ordered as to the charges in Count II,



Gerald E. Rosen
United States District Judge