UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES	:	
v.	:	B-90-090(TFGD) B-86-59 (TGFD)
ARIF DURRANI	:	June 4, 1990

GOVERNMENT RESPONSE TO ORDER TO SHOW CAUSE ISSUED PURSUANT TO 28 U.S.C. SECTION 2255

The defendant has filed a Motion for a New Trial under 28 U.S.C. Section 2255, claiming that newly-discovered or revealed evidence proves both that his testimony at trial was truthful and that the government withheld exculpatory evidence from him. The defendant also claims that the government knowingly offered perjured testimony at the trial, that prosecution of Durrani is barred by the doctrine of "due process estoppel" and that he was selectively prosecuted.

While the defendant's claims are absurd and totally unsupported by the documents he provided to the Court in support of this Motion, he raises a number of issues of fact which cannot properly under controlling Second Circuit law be disposed of summarily. See Hill v. United States, 368 U.S. 424, 426-27 (1962);

Johnson v. Fogg, 653 F.2d 750, 753 (2d Cir. 1981); William v. United States, 503 F.2d 995, 998 (2d Cir. 1974); O'Neil v. United States, 486 F.2d 1034, 1036 (2d Cir. 1973). Therefore, the government requests that this matter be set down for a hearing at which time the defendant will be required to produce competent evidence (including testimony subject to cross-examination) in support of his claims or abandon them.

Suppression of Exculpatory Evidence

Mr. Durrani claims that the government suppressed eight different items of exculpatory evidence. The government denies that any exculpatory evidence was suppressed. However, because the suppression of material exculpatory evidence would entitle the defendant to a new trial if it created a question about the guilt of the defendant, Brady v. Maryland, 373 U.S. 83 (1963), the Court must hold a hearing to resolve any issues of fact concerning (1)existence of the proffered evidence; (2)materiality of the proffered evidence; (3)whether the proffered evidence was exculpatory; (3) whether the proffered evidence was deliberately withheld or suppressed.

(1) Oliver North's Trip to London

Durrani claims that the government deliberately withheld at his trial evidence that Oliver North was in fact in London between September 28 and October 2, 1986. As in his Rule 35 Motion, Durrani reiterates his testimony at trial that Durrani met and talked to North in London about the attempted export of Hawk missile system parts which was the subject of his Count Two conviction. According to Durrani's passport and hotel records, Durrani was in London between September 28 and October 2, 1986.

At trial, Michael Sneddon, an accounting and budget analyst for the National Security Council, testified that he was asked to search the NSC travel records

(1) "to determine whether Lieutenant Colonel Oliver North was traveling in Lisbon, Portugal on September 12, 1986"; and

(2) "to determine whether Lieutenant Colonel Oliver North was traveling in London, England between September 28 and October 2, 1986."

The results of his search were that Colonel North "was not traveling on September 12th, 1986" and that "Colonel North was not traveling in London between September 28th and October 2nd," either under his own name or under the alias William P. Goode. (4/1/87 Tr. 109-110) Sneddon did say there were other travel arrangements for North in September and October, 1986. (4/1/87

Tr. 116-118)

Sneddon also testified that "

"if [North] did not go through our Executive Secretary, if he did not go through Admiral Poindexter, then the travel would not have been reflected as official NSC travel. Any official NSC travel would go through my office, whether -- whatever type of activity it is." (4/1/87 Tr. 121-122)[1]

Durrani bases his latest claim that the government suppressed information about North's travels on a stipulation he claims was filed at the trial of Oliver North (Exhibit C) which referred to a London trip in September, 1986. Paragraph 106 of the stipulation proffered by Durrani states, "In late September 1986, LtCol North reported to Admiral Poindexter on his London meeting with Noriega." Paragraph 101 of that same document states, "In mid-September 1986, LtCol North notified Admiral Poindexter that Noriega wanted to meet with him in London within a few days." By inference at least, this meeting in London with Noriega took place between mid-September and late September. Certainly, this

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1 Sneddon testified that he was not asked to search records from May 1986 to determine whether North traveled to Teheran and did not do so. "Off the top of my head I honestly don't know if I cut orders for him for Iran," he said. (4/1/87 Tr. 112, 123)

document fails to provide any support for a claim that Sneddon's testimony was inaccurate, let alone perjurious. Nor does it establish that North was in London on the operative dates of September 28 through October 2, 1986, still less support Durrani's claim that North met there with Durrani.

However, since Mr. Durrani filed his 2255 Motion, substantial portions of Oliver North's diaries have been released under the Freedom of Information Act. These documents do not appear to support Mr. Durrani's claims either, but Mr. Durrani should be given an opportunity to raise any claims that they do (or to withdraw this claim in light of the information in the diaries). If Oliver North were in London between September 28 and October 2, 1986, whether or not Michael Sneddon knew about it, that information would have arguably supported Durrani's defense claims. Durrani should therefore be given every opportunity to produce any witness or document he can to establish this underlying fact. If the fact is established (the government still knows of no support for this claim), then the Court would have to determine whether the

fact was knowingly withheld from Mr. Durrani, or whether the prosecution knowingly put forward perjured testimony from Michael Sneddon on this subject. Alternatively, even if the Court found the information was not knowingly suppressed, conceivably it could support a new trial motion as newly-discovered evidence.

(2) CIA Procurement of Hawk Parts

At Durrani's trial, Charles Moyer, senior records management officer for the Directorate of Administration, Central Intelligence Agency, testified (4/1/87 Tr. 124-144) that it was the responsibility of the CIA's Office of Logistics "to obtain the parts" sold by the U.S. government to Iran in May and August of 1986, and that the Office of Logistics did obtain all the Hawk missile system parts shipped to Iran by the U.S. government from the Department of Defense. He said that no attempts were made by the CIA to obtain the parts from non-Department of Defense sources, and that no parts were obtained and no efforts to obtain parts were made from Arif Durrani, CAD Transportation, Merex,

Manuel Pires, Willy deGreef, Risenvest, Rutland, Kram, LTD, Advanced Tehcnology, Inc., George Hassan, Richard Secord, Albert Hakim, Jack Korser, Varian Associates. He also said that none of the parts were shipped through Belgium.

Moyer also testified that the Directorate of Administration was responsible for the records of persons employed by or associated with the Central Intelligence Agency, including staff and contract employees. He testified that the CIA had no records of any association with Durrani, Pires, deGreef, George Hassan, Jack Korser, Risenvest, Rutland, Kram, Merex, CAD Transportation, Advanced Technology, or Radio Research. He did find records of a contract association with both Richard Secord and Albert Hakim, but the records reflected no involvement by Secord and Hakim in obtaining Hawk missile system parts for shipment by our government to Iran.[2]

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2 Further, Moyer was asked if in his search he attempted to find any memoranda between the NSC and CIA concerning strategy about continued shipments of Hawk parts to Iran. He said his search did not involve such memoranda because he did not consider it responsive to the search request. Asked whether he came across a memorandum from CIA Director Casey in late July, 1986, concerning further attempts after May to obtain Hawk parts in return for

Durrani claims in the 2255 Motion that the government deliberately withheld from him evidence that the CIA was using Forways Industries to procure Hawk missile parts on the secondary market. He believes disclosure of the material would have buttressed his claim that he was asked by CIA operatives to procure Hawk missile parts on the secondary market.

Again, the document Durrani proffers in support of this allegation, Exhibit E, does not support the allegation. Durrani says the prosecution of Forways was dismissed because Forways continued to export covertly on behalf of the government. The document he provides is an indictment (returned on May 26,1988, a year after Durrani's conviction) which does not on its face suggest any involvement of Forways in obtaining the Hawk missile

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hostages, he responded, "I can't testify that it exists. I don't know." (4/1/87 Tr. 187-188) While there was no affirmative evidence introduced at trial to prove the existence or contents of such a memorandum, a document Durrani may be referring to was apparently shown to the Court for its in camera review in response to the defendant's trial subpoenae served on the CIA and NSC. The Court did not find that document disclosable to the defense. See "Suppression of the Casey Memorandum," infra.

system parts shipped to Iran as part of the Iran-Contra affair, let alone establish that the case was dismissed or the reasons for any such dismissal. The earliest alleged overt act in the conspiracy is December 22, 1986, well after the arms-for-hostages exports. In fact, the Forways case and other related matters were previously called to the attention of the Court in connection with the Rule 35 Motion.[3]

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3 In Exhibit 1 to the Government's Memorandum re Disposition of Other Iran Export Cases, these cases were described as follows:

U.S. v. Juergen Zimmermann, et al., indicted 11/14/86, S.D.Cal.
Export of military avionics (aircraft navigational systems) to Iran in 1986. Both defendants pled guilty 12/9/86 to 2778 and bribery of public official and agreed to cooperate. Defendant Bernd Pleuger has cooperated extensively, resulting in indictment of two companies and seven individuals; he was sentenced 1/17/89 to five years' probation. Defendant Zimmerman failed to cooperate and failed to appear for sentencing; he has been located in West Germany.

Subsequent indictments: U.S. v. Forway Industries, et al., indicted 5/26/88; U.S. v. Marsh Aviation Co., Inc. and Floyd D. Stilwell, indicted 4/8/88, and U.S. v. Hans Schneider and Beechcraft West Germany, indicted 10/25/87, all S.D.Cal.
Conspiracy and attempt exported of military avionics (aircraft navigation systems) to Iran in 1986 and 1987. Each corporate defendant and individual defendant received deferred prosecution, all admitted guilt before the court and monetary penalties were paid ranging from $100,000 to $200,000. AUSA explained decision to offer deferred prosecution based in part on Iran-Contra affair but also on other problems with the cases.

However, since the Court will be obliged to hold a hearing on at least some of Durrani's allegations, the defendant ought to be given an opportunity to identify any witness or documentary evidence he can locate to support this claim in advance of the hearing. The defendant should be limited, however, to evidence which contradicts the testimony at trial, i.e., that the Hawk parts shipped to Iran were procured by the CIA from the Department of Defense, and that the CIA made no efforts to procure those parts from Arif Durrani or from the other entities listed by Charles Moyer.

(3) Suppression of Material from Belgium and Other Evidence of Pires Involvement with the U.S. Government

In his Rule 35 motion, Durrani raised a claim, reiterated in the 2255 Motion, that the prosecutor and the case agent received information during a pretrial trip to Belgium from one Tony Van de Meersche that Manuel Pires told Van de Meersche he was working for the U.S. government. Durrani claims this to be evidence that

Manuel Pires was "requested and authorized to act on behalf of the United States, the CIA and Oliver North" in obtaining Hawk parts as part of the Iran-Contra dealings, and that such evidence was suppressed because it was exculpatory.

As the case agent has already sworn in an affidavit to the Court dated Aug. 12, 1988, submitted as Exhibit 2 to the Government's Response to the Rule 35 Motion, he and the prosecutor were told the exact opposite by Van de Meersche. In addition, Manuel Pires has told the case agent he was not working for the U.S. government in procuring Hawk missile parts for Iran, and a witness from the CIA testified under oath at trial that Pires had no relationship with the Agency and was not involved with procurement of the Hawk parts shipped to Iran as part of Iran-Contra.

Durrani apparently bases this claim on his translation of a portion of a document in Flemish and English called a Proces Verbaal which was mailed to Durrani by the Belgian government at some time after his conviction. Assuming that the Proces Verbaal

comports with Durrani's representations (as to which he has so far adduced no evidence)[4], the explanation may be as simple as a mis-translation of a Flemish statement given by Van de Meersche to Belgian customs, or a misreading by the Belgian customs officers of a copy of Special Agent Arruda's notes of the interview (in English), which he provided to them. Durrani also makes claims about the export of Hawk parts from NATO stockpiles in Europe, for which he has provided no support whatsoever. If there is any support for Durrani's representations, then there is a genuine issue of fact as to what the prosecutor and case agent were told in Belgium, which, if resolved in Durrani's favor, could constitute a violation of Brady v. Maryland and entitle Durrani to a new trial. Therefore, the Court will have to resolve this question of fact by hearing the evidence and making credibility judgments.

Durrani proffers other documents which he claims were intro-

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4 Neither Exhibit F or Exhibit G appended by Durrani to his 2255 Motion makes any mention of this claim that Pires told Van De Meersche he was working for the U.S. Government.

duced in evidence at the trial of United States v. Badir, Cr 86-267-A in the Northern District of Georgia; and which he claims prove that Manuel Pires also dealt with Oliver North and the CIA in the shipments which were the subject of the prosecution that case. Durrani says this information was personally known to the prosecutor in his case and deliberately withheld from him.

The Northern District of Georgia case which Durrani refers to as United States v. Badir was in fact titled United States v. Elkins. Badir was a Libyan national charged as a co-defendant but never apprehended. The case involved the illegal export to Libya of a KC-130 tanker aircraft. Elkins was convicted and sentenced to 15 years' imprisonment and a $6.6 million fine. The conviction was affirmed by the Eleventh Circuit in United States v. Elkins, 885 F.2d 775 (11th Cir. 1989).

On their face, the Exhibit H documents support none of these allegations for which they are proffered: that these documents were offered in evidence at a trial, that the documents refer to the Manuel Pires who bought Hawk missile parts from Durrani or to Oliver North, that the documents link anyone to the CIA, that the documents were known to Durrani's prosecutor at the time of his trial. The government disputes all these assertions, which are

contrary to the facts developed by our investigation.

If the prosecutor had knowledge of documents which established that Manuel Pires was affiliated with the CIA at the same time that she elicited testimony from a CIA witness that Pires had no relationship with that agency, conceivably that could, if found to be material, entitle Durrani to a new trial. Therefore, Durrani should be given every opportunity to produce actual proof of these allegations:

(1) that the prosecutor knew of these documents;

(2) that the documents refer to Manuel Pires;

(3) that the documents establish that Pires was working for the CIA.

The documents proffered by Mr.Durrani as Exhibit H to his 2255 have been shown to the case agent in the Elkins investigation, S/A Joseph Webber of the U.S. Customs Service, who says they were never introduced in evidence at the Elkins trial, and that neither Oliver North nor a Manuel Pires was mentioned or involved in the facts of that case. In interviews with the case agent for the Durrani investigation, Manuel Pires has reiterated that he never worked for the CIA, that he did not know Oliver North, and that he had no dealings with or knowledge of the Lock-

heed employee whose notes are reproduced by Mr. Durrani as Exhibit H.

(4) Durrani's Relationship with the CIA

In Exhibit I, Durrani proffers a series of Customs documents as proof that Durrani's company, Merex, was involved with the CIA in importing ammunition. He claims both that these documents were deliberately suppressed by the government because they were exculpatory and that they constitute evidence that the CIA witness at trial committed perjury when he testified that there were no records of any CIA association with Durrani, his company Merex or a number of other entities.

In fact, as Mr. Durrani well knows and the government can easily prove, the Merex referred to in the Customs documents he proffers is a company located in Alexandria, Virginia, which is unrelated to the Merex in California with which Mr. Durrani was associated. The Customs documents also refer to the importation of small arms ammunition, not the export of Hawk missile parts.

If Durrani's Merex had imported small arms into Savannah on October 8, 1986 (for the CIA or for anyone else), he would have known about the transaction long before he read about this matter

in connection with the Iran-Contra affair and long before he was provided with these documents by a Florida journalist. He would have known about this transaction at the time of his trial, and certainly he would have raised it earlier.

This is simply another example of the defendant's penchant for revising his version of events to link himself to publicly-disclosed information about the Iran-Contra affair.

(5) Placement of Bell Helicopter Parts on the Munitions List

Despite the defendant's claims, the representative of the Office of Munitions Control, U.S. Department of State, Brenda Carnahan, did not testify at trial concerning the placement of Bell Helicopter parts on the Munitions List. (3/19/87 Tr. 110-168)

As S/A Steven Arruda did testify,

"If an item such as an aircraft part has a dual use, it's used on a 747 and it's used on a C130 military transport plane, many times if the item has dual use, both military and commerical use, it's not licensed by the State Department, but sometimes, many times it's licensed by the Department of Commerce for export." (3/16/87 Tr. 11)

This question was pursued by defense counsel on cross-examination, eliciting the following responses from S/A Arruda: "If an item has dual use both commerical and military it doesn't

necessarily mean it's not on the munitions list, but many times the Department of Commerce would be the licensing agent, sir." (3/17/87 Tr. 12)

"In my understanding, if it's specifically designed for the military, for the military item and it can be used somewhere else, then it may fall on the munitions list." (3/17/87 Tr. 13)

The only trial testimony about Bell Helicopter parts was elicited in the government's rebuttal case after extensive objection from and argument by defense counsel.(3/26/87 Tr. 65-80) The government had a licensing determination from the State Department placing the sleeve extensions on the Munitions List (EX. 94) and defense counsel was well-aware of the dual use issue and cross-examined Nathan Newbern about various helicopter models. (3/26/87 Tr. 139-143, 152). As Newbern testified both on direct and on redirect, his company was not an exporter of helicopter parts but Arif Durrani told him that he would take care of getting the licenses on these parts.

A subsequent witness, George W. Harvey, manager of the spare parts department (international) of Bell Helicopters, identified the helicopters for which the sleeve extensions exported by Mr. Durrani were designed as military helicopters. (4/1/87 Tr. 34-41).

Reference to the defendant's Exhibit J simply does not sup-

port the allegations of the 2255 Motion. The Department of State responded to a Durrani FOIA request which described the parts as "helicopter sleeve joints and other components...used on the Bell 214 helicopter." The State Department said it was unable to find any State Department licenses responsive to Durrani's request (which was consistent with the government's position at trial, that the sleeve extensions were exported without licenses) and advised "a State Department license would not be required for the export of the Bell Model Helicopter 214 or its spare parts unless the helicopter is modified for military use...Commercial helicopters come under Department of Commerce jurisdiction." This is consistent with S/A Arruda's testimony.

(6) Procurement of Hawk Parts by Priv e Parties

In the course of his 2255 papers, Durrani alleges that private parties were extensively involved in the procurement of the Hawk parts transferred to Iran by the U.S. government. Durrani's "newly discovered" evidence which he claims proves the involvement of private parties in the Hawk procurement process consists of chapters from the Iran-Contra committee report describing the operations of "The Enterprise" conducted by Richard Secord and

Albert Hakim.

On their face, these chapters do not appear to contradict the testimony of Charles Moyer about the source and method of procurement of the Hawk parts shipped to Iran. Moyer told the jury that the CIA had records of association with both Secord and Hakim (4/1/87 Tr. 141) but that no efforts were made to procure the Hawk parts from either of them. (4/1/87 Tr. 136, 141-142)

(7) Suppression of the "Casey Memorandum"

While the prosecutor has never seen such a document, upon information and belief something similar to Durrani's description was apparently disclosed to the Court in March 1987 as part of its in-camera review of the CIA's response to the defendant's trial subpoenas. Except for one document (the parts list entered in evidence as Def. Exhibit 609), the Court found the documents it reviewed to be irrelevant to any claim being made in Durrani's defense. See also note 2, infra. The defendant had an opportunity to litigate the Court's rulings on the trial subpoenas as part of his appeal to the Second Circuit, but did not do so.

Subornation of Perjury

Durrani claims the government knowingly used perjured testimony to convict him at trial. Specifically, Durrani claims that the following government witnesses committed perjury with the knowledge of the prosecutor:

(1) Michael Sneddon of the National Security Council;

(2) Charles Moyer of the Central Intelligence Agency;

(3) Brenda Carnahan of the Office of Munitions Control, U.S. Department of State.

The defendant also claims that the prosecutor in summation argued evidence to the jury that she knew to be false.

As set forth in the "Suppression of Exculpatory Evidence" section of this Response, there is no evidence that any of these witnesses testified inaccurately at trial, let alone any support for the proposition that they committed perjury or that the prosecutor suborned it.

Because of the seriousness of this charge, the defendant should be required to produce competent evidence in support of these claims at a hearing. Such a hearing should be held even though so far the defendant has failed to produce any evidence

entitling him to one on these grounds.

"Due Process Estoppel"

The gravamen of this claim is that Arif Durrani was induced to procure the Hawk missile parts he illegally exported by one Manuel Pires "who in turn was requested and authorized to act on behalf of the United States government, the CIA and Oliver North of the NSC." This is the same claim made by Durrani at trial, and echoes the arguments discussed in Sections (1), (2), amd (3) of the "Suppression of Exculpatory Evidence" section of this memorandum.

If this claim were true, the export would either come within the "official use" exception to the Arms Export Control Act or Durrani would have a defense of apparent government authorization which would negate the specific intent required to commit the crimes for which he was convicted. In fact, the Court charged on these defenses and Durrani testified about and argued both these theories to the jury, which did not believe him. None of the evidence he has produced to date suggests that the jury was wrong.

Selective Prosecution

While Mr. Durrani describes this as a selective prosecution claim, it is in fact a complaint about the length of his sentence in comparison to those received by other defendants convicted of violations of the Arms Export Control Act. This issue was fully aired by the Court in connection with Mr. Durrani's Motion for Reduction of Sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. Mr. Durrani's arguments were rejected. As the government's filings demonstrated, not only was Durrani's sentence proportionate to other sentences, but the release date given to him by the Parole Commission calls for him to serve less time than he would have served if sentenced under the Sentencing Guidelines, had these crimes been committed after November 1, 1987.

The jury's rejection of Mr. Durrani's testimony and the Court's assessment that he lied repeatedly in the course of the Court proceedings were all based on an opportunity to observe the defendant while he testified, and to contrast his demeanor and credibility with that of other witnesses, who were also tested by cross-examination. It was well within the Court's discretion to consider the defendant's perjury in imposing sentence.

The length of the sentence is not an appropriate issue for resolution through a 2255 Motion.

CONCLUSION

Despite the deficiencies in the defendant's moving papers, the government urges the Court to hold a hearing on his claims that the government withheld exculpatory evidence and suborned perjury in the course of his prosecution.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed postage prepaid this 4th day of June, 1990, to Arif Durrani, Inmate # 09027-014, P.O. Box 5000, Sheridan, Oregon 97379.

Holly B. Fitzsimmons

HOLLY B. FITZSIMMONS