

violation has occurred. The court also has pending the motion of Philadelphia Media Network ("PMN"), the publisher of The Philadelphia Inquirer ("Inquirer"), to quash Fattah's subpoenas of PMN and four of its reporters.

I.

FBI Special Agent Richard Haag ("Agent Haag"), the case agent assigned to this matter, began his testimony in the government's case on the afternoon of Tuesday, October 27. Around 8:30 A.M. the following day, the prosecutors first learned from Agent Haag that he had disclosed information between the latter half of 2011 and early 2012 to Inquirer education reporter Martha Woodall ("Woodall") regarding the government's investigation of Fattah related to his dealings with the School District. Around 9:30 A.M., before the start of trial on October 28, the government advised the court ex parte of this development. The court immediately directed the government to provide the information to the defendant and his stand-by counsel. The government did so on the record and outside the presence of the jury. It also supplied the defendant with notes from the government's interview of Agent Haag that took place that morning.

Thereafter, as the government continued its direct examination, the Assistant United States Attorney asked Agent Haag in detail about his conversations with Woodall and his

recent disclosure to the government. Agent Haag testified that he first approached Woodall because of her knowledge of the School District. Woodall provided background information to Agent Haag regarding the School District and its alternative education programs in which Fattah was involved. Agent Haag, in turn, provided Woodall with information concerning the focus of the government's investigation, the content of FBI recordings between Fattah and Matthew Amato, the address of Fattah's home, and the exact date and time when a sealed search warrant would be executed. These conversations led to the presence of the press, including photographers, during the execution of the search warrant on the morning of February 29, 2012. Detailed Inquirer newspaper articles co-authored by Woodall followed as well as press interviews of key individuals tied to the investigation.

The government finished its direct examination of Agent Haag right before lunch on October 28. The court recessed for the remainder of the day to allow Fattah the opportunity to prepare his cross-examination.

That evening Fattah served Subpoenas to Testify at a Hearing or Trial in a Criminal Case for PMN, Mark Fazlollah,

Martha Woodall, Joseph Tanfani,¹ and Kristin Graham. The subpoenas directed those individuals to appear in court at 9:00 A.M. the following day, that is on October 29, with “[c]opies of any and all notes, documents, work product, memoranda, emails, recordings, of communication, audio and video recording regarding Chaka Fattah, Jr., Chaka Fattah, Sr. and/or Agent Richard Haag.” Early on the morning of October 29, Fattah also filed “Motion of Defendant Chaka Fattah, Jr. for a Hearing Pursuant to Rule 6(e)(2)(B) & (e)(7) and Brady v. Maryland.”

During the luncheon recess that day, stand-by counsel presented argument in support of the motion on behalf of Fattah. At that time, counsel for PMN also made an oral motion to quash the subpoenas served on PMN. The court, ruling from the bench, denied Fattah’s motion and quashed the subpoenas. We stated that an opinion would follow.

II.

Fattah’s motion under Rule 6 of the Federal Rules of Criminal Procedure seeks a hearing on whether Agent Haag disclosed secret grand jury material to Woodall so that the court “may fashion an appropriate remedy.” Grand juries, in secret, conduct investigations and decide whether to issue indictments. Pursuant to Rule 6, a government agent such as Agent Haag “must not disclose a

1. The subpoenas were served on PMN. Because Joseph Tanfani is no longer employed by PMN, service of his subpoena on PMN was ineffective.

matter occurring before the grand jury" without the court's authorization pursuant to the circumstances listed in the Rule. See Fed. R. Crim. P. 6(e). The rule provides that if Agent Haag committed a "knowing violation" of the secrecy rules, the violation "may be punished as a contempt of court." See Fed. R. Crim. P. 6(e) (7).

As articulated by stand-by counsel on behalf of Fattah, Fattah seeks a hearing so as to secure either a contempt ruling or a dismissal of the superseding indictment. First, Fattah urges the court to stay the trial and hold an immediate hearing to determine if Agent Haag should be held in contempt. Fattah wants a prompt decision so that, should the court find against Agent Haag, Fattah can then have this finding disclosed to the jury.

Fattah has not established a prima facie case that Agent Haag disclosed secret grand jury information in violation of Rule 6(e) (2). See In re Newark Morning Ledger Co., 260 F.3d 217, 227 (3d Cir. 2001); United States v. Educ. Dev. Network Corp., 884 F.2d 737, 742 (3d Cir. 1989). Indeed, Agent Haag was examined at length and stated that he did not disclose any matter occurring before the grand jury. The court finds Agent Haag's testimony to be credible, and there is no evidence to the contrary. Further, the government has advised the court that at the time of Agent Haag's interactions with Woodall in late 2011 and early 2012 a grand jury had simply issued subpoenas without taking any testimony. A different grand

jury, empaneled in August 2012, handed down the indictment on July 29, 2014, more than two years after Agent Haag's communications with Woodall. Still, a different grand jury issued the superseding indictment on March 3, 2015. Even assuming that a contempt hearing could have occurred and decision rendered before the end of trial, Fattah's request for such a hearing is without merit.

Fattah also seeks dismissal of the superseding indictment based on what he views as the wrongful conduct of Agent Haag. Our Court of Appeals has stated that "[i]t is well recognized that the remedy of dismissal of an indictment on grounds of prosecutorial misconduct is an extraordinary one." See United States v. Smith, 282 F. App'x 143, 149 (3d Cir. 2008); United States v. Soberon, 929 F.2d 935, 939 (3d Cir. 1991). The court may not dismiss the indictment to achieve deterrence of government misconduct where "means more narrowly tailored to deter objectionable prosecutorial conduct are available." See Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (citation omitted). An indictment may be dismissed only if there is a showing of either fundamental error or that the defendant has been prejudiced by an irregularity in the grand jury proceedings. See id. at 256; Fed. R. Crim. P. 52(a).

Fundamental errors "are ones in which the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." Bank of Nova Scotia, 487 U.S. at 257. What constitutes

a fundamentally unfair proceeding in this context is quite limited. The Supreme Court has found a fundamental error in cases where grand jurors were selected on the basis of race or gender. Id. Here, Fattah has not claimed that gender or racial discrimination influenced the grand jury selection. Our Court of Appeals has explained that even "the presentation of . . . allegedly perjured testimony to the grand jury does not fall into the narrow category of cases in which dismissal of charges without a showing of prejudice is warranted." Soberson, 929 F.2d at 940.

Absent a fundamental error, the indictment is subject to dismissal based only on prejudice to the defendant. Prejudice exists "only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia, 487 U.S. at 257 (quoting United States v. Mechanik, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring)). In Bank of Nova Scotia v. United States, the Supreme Court found no prejudice where the government "violated the secrecy provisions of Rule 6(e) by publicly identifying the targets and the subject matter of the grand jury investigation." Bank of Nova Scotia, 487 U.S. at 259. It held that "it was improper for the District Court to cite such matters in dismissing the indictment" where "it is plain that these alleged

breaches could not have affected the charging decision.” See id. at 259-60.

As noted above, the record does not contain prima facie evidence, much less demonstrate, that Agent Haag’s disclosures to Woodall concerning the investigation of Fattah constituted a violation of the grand jury secrecy rules. In any event, even if evidence existed that a breach of grand jury secrecy had occurred, Fattah is not entitled to a Rule 6 hearing for the purpose of securing a dismissal of the superseding indictment. It is simply not reasonable to infer that the information provided to Woodall in 2011 and 2012 could have substantially and prejudicially influenced the grand jury’s decision to indict in July 2014 or to issue a superseding indictment in March 2015. See Bank of Nova Scotia, 487 U.S. at 259-60. The Supreme Court said no less in Bank of Nova Scotia, where it held that publically disclosing the subject matter and targets of the grand jury investigation plainly could not have affected the charging decision. See id. Agent Haag’s conversations with Woodall are collateral to the charges here. They have no bearing on the merits of this case – which concern whether or not Fattah committed bank fraud, theft, or tax offenses well before the government’s investigation in this case began.

Fattah’s motion for a Rule 6 hearing is a fishing expedition. Fattah’s proposed Rule 6(e) hearing is not warranted at this time.

III.

Fattah also seeks a hearing under Brady v. Maryland, 373 U.S. 83 (1963), to determine the scope of the government's failure to provide information about Agent Haag's conversations with Woodall in advance of trial. Brady requires the government to provide the defendant with all exculpatory evidence in its knowledge or possession, including evidence in the knowledge of government agents. See United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006). The government violates due process by withholding "evidence favorable to an accused . . . where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." See Brady, 373 U.S. at 87.

Brady is directed to the government's failure to "disclose exculpatory evidence with sufficient notice to enable the defendant to use the evidence effectively at trial." Maynard v. Government of Virgin Islands, 392 F. App'x 105, 112 (3d Cir. 2010). Accordingly, "[n]o denial of due process occurs if Brady material is disclosed in time for its effective use at trial." United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984) (citation omitted). A "nondisclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant." Id.

Here, the prosecution disclosed Agent Haag's conversations with Woodall before it finished his direct

examination. The court allowed the government to conclude its direct examination of Agent Haag, during which the government elicited testimony directed to that issue. The court then adjourned, thereby providing Fattah the entire afternoon and evening to prepare for his cross examination with the benefit of the government's complete direct examination. The following day, Fattah conducted a lengthy cross-examination during which he spent substantial time focusing on Agent Haag's purported misconduct.

Fattah argues that had Agent Haag's conduct been timely disclosed, his defense strategy would have been different. He claims that he would have presented a different opening statement and cross-examination had he been aware of this information before trial. Nonetheless, he does not articulate how his strategy would have been materially different. Fattah was able to use those conversations for their only relevant purpose – cross examination of Agent Haag. The defense cannot demonstrate that Agent Haag's conduct had any impact on the sufficiency of evidence underlying any count charged in this action. The late disclosure has not "impede[d] the defendant's ability to prepare for trial." Id.

Accordingly, the government's failure to disclose at an earlier time the conversations between Agent Haag and Woodall does not amount to a suppression of evidence at trial in violation of Brady. See id. Fattah has simply not been prejudiced.

IV.

Finally, as noted above, the court also heard argument on PMN's oral motion to quash subpoenas served by Fattah the previous evening for testimony and the production of certain documentation by PMN, three of its current reporters, and one former reporter.

Journalists have a "federal common law privilege, albeit qualified, to refuse to divulge their sources." See Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979). The privilege recognizes that "important information, tips and leads will dry up and the public will often be deprived . . . unless news[persons] are able to [f]ully and completely protect the sources of their information." Id. (citation omitted). In Riley, our Court of Appeals "str[uck] the delicate balance between the assertion of the privilege on the one hand and the interest of either criminal or civil litigants seeking the information." Id. at 716. It explained that before a journalist may be compelled to testify, the "materiality, relevance and necessity of the information sought must be shown." See id. The burden is on "[t]he party seeking the information [to] show that his only practical access to crucial information necessary for the development of the case is through the news[person's] sources." Id. at 717 (citation omitted).

As a preliminary matter, "the trial court must consider whether the reporter is alleged to possess evidence relevant to the criminal proceeding." See United States v. Criden, 633 F.2d 346,

348 (3d Cir. 1980); Fox v. Township of Jackson, 64 F. App'x 338, 340-41 (3d Cir. 2003). If so, the court then considers "the effect of disclosure on two important constitutionally based concerns: the journalist's privilege not to disclose confidential sources and the constitutional right of a criminal defendant to every reasonable opportunity to develop and uncover exculpatory information." See Criden, 633 F.2d at 348.

Fattah has not demonstrated that PMN or its reporters have relevant, much less crucial information "going to the heart of the (claim)." See Riley, 612 F.2d at 717. Fattah's conduct concerning bank loans, theft, and tax offenses is at the heart of this action. The reporters cannot provide any information which bears on whether or not Fattah committed the acts underlying those offenses. Any conversations between Agent Haag and Woodall have no bearing on the merits of this case.

While Fattah may cross examine Agent Haag about his conduct, as he has done at trial, Fattah may not present collateral, extrinsic evidence for the purpose of impeaching Agent Haag. See Fed. R. Evid. 608(b).

V.

Accordingly, the court has denied the "Motion of Defendant Chaka Fattah, Jr. for a Hearing Pursuant to Rule 6(e) (2) (B) & (e) (7) and Brady v. Maryland." The court has also

quashed the subpoenas issued for Philadelphia Media Network, Mark Fazlollah, Martha Woodall, Joseph Tanfani, and Kristin Graham.

