

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
CHAKA FATTAH, SR.	:	NO. 15-346-1
ROBERT BRAND	:	NO. 15-346-3
KAREN NICHOLAS	:	NO. 15-346-4
BONNIE BOWSER	:	NO. 15-342-5

MEMORANDUM

Bartle, J. December 16, 2015

Defendants Chaka Fattah, Sr. ("Fattah"), Robert Brand ("Brand"), Karen Nicholas ("Nicholas"), and Bonnie Bowser ("Bowser") have filed sealed motions compel the production of Grand Jury materials. The movants seek portions of Grand Jury transcripts which the Government has redacted as well as transcripts of "any legal instructions or guidance" given to the Grand Jury.

I.

The Government, on July 29, 2015, indicted Fattah, Herbert Vederman ("Vederman"), Brand, Nicholas, and Bowser. The indictment charges one or more defendants with: conspiracy to commit racketeering (18 U.S.C. § 1962(d)); conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349); conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1343, 1346, and 1349); conspiracy to commit mail fraud (18 U.S.C. § 1341); mail fraud

(18 U.S.C. § 1341); falsification of records (18 U.S.C. §§ 1519 and 2); conspiracy to commit bribery (18 U.S.C. § 371); bribery (18 U.S.C. § 201(b)(1)); bank fraud (18 U.S.C. §§ 1344 and 2); false statements to financial institutions (18 U.S.C. §§ 1014 and 2); money laundering (18 U.S.C. §§ 1957 and 2); money laundering conspiracy (18 U.S.C. § 1956(b)); and wire fraud (18 U.S.C. § 1343).

On August 20, 2015, the Government produced to defense counsel extensive discovery, including the transcripts of testimony presented to the Grand Jury that returned the indictment. Fifteen of these transcripts contained partial redactions. In the process of running word searches in the ".pdf" versions of these transcripts and copying parts of their text into "Word" documents, counsel for defendant Bowser inadvertently discovered that some, but not all, parts of the redacted portions of the transcripts had become readable. Counsel's review of these newly-visible portions of the transcripts apparently led him to suspect that the prosecutors had made misstatements of law and fact to the Grand Jury, that the prosecutors had improperly engaged in "legal communications" with the Grand Jury in the presence of witnesses, and that some witness testimony had been withheld from production.

Bowser's counsel notified the Government of his discovery and requested that the redacted material be produced.

The Government initially responded that the redacted material related to potential Speech and Debate issues, but it later asserted that the redactions "pertain[ed] to legal communications between the Grand Jurors and the prosecutors." The Government refused to disclose to defense counsel the redacted material without a court order.

Bowser then filed the lead motion now before us. She asks the court to compel the production of complete, unredacted versions of the fifteen transcripts, as well as transcripts of "any legal instructions or guidance given to the grand jury by the prosecutors." Defendants Fattah, Brand, and Nicholas subsequently joined in her motion.

On December 7, 2015, during a telephone conference with the court and counsel for all parties, counsel for defendant Vederman represented that in addition to the fifteen redacted transcripts, he had concerns about the contents of a sixteenth transcript of Grand Jury testimony.¹ The court thereafter ordered the production for in camera review of all sixteen transcripts discussed during the call, as well as unredacted transcripts of any legal instructions given to the Grand Jury. The Government promptly complied with this order.

1. Vederman has not joined in Bowser's motion.

II.

The Fifth Amendment guarantees criminal defendants the right to indictment by an unbiased Grand Jury. U.S. Const. Amend. V; United States v. Serubo, 604 F.2d 807, 816 (3d Cir. 1979). It is well-established that proceedings before such a Grand Jury are to be conducted in secret. United States v. Smith, 123 F.3d 140, 148 (3d Cir. 1997) see also Fed. R. Crim. P. 6(e)(2)(B). Further, proceedings conducted before a Grand Jury "are entitled to 'a presumption of regularity.'" In re Grand Jury Matter, 770 F.2d 36, 40 (3d Cir. 1985) (quoting In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 92 (3d Cir. 1973)). The task of the Grand Jury is simply to "determine whether or not there is probable cause to prosecute a particular defendant." United States v. R. Enterprises, Inc., 498 U.S. 292, 298 (1991). In doing so, the Grand Jury is permitted to consider certain evidence that would not be admissible at trial, such as hearsay. Id.; see also Costello v. United States, 350 U.S. 359, 361-64 (1956).

A defendant seeking to pierce the veil of Grand Jury secrecy "bears [a] heavy burden." United States v. Bunty, 617 F. Supp. 2d 359, 372 (E.D. Pa. 2008). The defendant must establish that "particularized and factually based grounds exist to support the proposition that irregularities in the grand jury proceedings may create a basis for dismissal of the indictment."

Id.; see also Fed. R. Crim. P. 6(e)(3)(E)(ii). Dismissal of an indictment on the basis of errors in Grand Jury proceedings is warranted only where such errors were prejudicial to the defendant. Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988).

Here, Bowser points to several general bases for her claim that the proceedings before the Grand Jury involved irregularities sufficient to warrant dismissal of the indictment. First, she contends that the portions of the transcript inadvertently uncovered by her counsel suggest that the prosecutors made misstatements of fact about whether she exercised her right not to appear before the Grand Jury. She further contends that the prosecutors failed adequately to respond to a Grand Juror's questions on this issue. Having reviewed this portion of the transcript in its unredacted form, we are satisfied that no irregularities occurred. See, e.g., Buntz, 617 F. Supp. 2d at 372. Even assuming without deciding that the prosecutor did make a misstatement of fact, we find nothing to suggest that such a misstatement prejudiced any defendant. See Bank of Nova Scotia v. United States, 487 U.S. at 254.

Second, Bowser asserts that her review of the inadvertently-revealed portions of the transcripts indicates that the prosecutors misstated the law of conspiracy when

instructing the Grand Jury. Having inspected the entire section of the transcript on this subject, we disagree.

Third, Bowser argues that the prosecutors presented unsworn testimony to the Grand Jury under the guise of legal instruction. It is her position that this improper testimony is contained in the redacted portions of the transcripts. She urges that this material, as Grand Jury testimony, must be produced pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Again, we have reviewed the redacted material and conclude that it does not in fact include unsworn testimony. Further, the disputed sections of the transcripts contain no irregularities, nor do they contain anything that would give rise to prejudice against any defendant. See Bank of Nova Scotia v. United States, 487 U.S. at 254; Bunty, 617 F. Supp. 2d at 372.

In addition, Bowser contends that some of the redactions in the produced transcripts appear to conceal witness testimony. Our review of the redacted material at issue reveals that she is mistaken. No witness testimony is concealed.

Finally, Bowser maintains that by engaging in "legal communications" in the presence of Grand Jury witnesses, the prosecutors somehow tainted the testimony of those witnesses. According to her, the Government, "having produced the indicting grand jury witness transcripts pursuant to its discovery

obligations . . . cannot selectively filter the information that was made available to these witnesses during their testimony.” However, as the Government points out, the witnesses were all law enforcement personnel who were part of the team investigating defendants. They would have been familiar with the legal principles that served as the basis for the indictment. Bowser offers no support for her claim that a prosecutor may not provide legal instructions to a Grand Jury in the presence of a law enforcement witness who is a member of the investigating team. We will not permit her to pierce the veil of Grand Jury secrecy on this basis.

Bowser also asks the court to order the production of the transcripts of “any legal instructions or guidance given to the grand jury by the prosecutors.” She argues that the purported irregularities in the transcripts that were produced “provide a compelling justification for permitting the defense to review . . . the government’s other legal guidance to the grand jury” so that the defense can “assess in the context of Rule 12 the full extent of these errors and whether similar mistakes were made.” As we have identified no irregularities in the redacted portions of the transcripts that were produced to the defense, we see no reason why the defense should be provided with transcripts of the prosecutors’ legal instructions.

In sum, having reviewed in their entirety the redacted portions of the Grand Jury transcripts as well as the Grand Jury transcripts containing legal instructions and guidance, we find nothing that demonstrates prosecutorial misconduct or abuse or any prejudice to any of the defendants. Accordingly, the motion of Bowser to compel the production of Grand Jury materials will be denied, as will the motions of Fattah, Brand, and Nicholas which join in Bowser's motion.

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ORDER

AND NOW, this 16th day of December, 2015, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) The motion of defendant Bonnie Bowser to compel production of Grand Jury material (Doc. # 82) is DENIED;

(2) the motion of defendant Robert Brand to compel the production of Grand Jury material (Doc. # 88) is DENIED;

(3) The motion of defendant Chaka Fattah, Sr. to compel the production of Grand Jury material (Doc. # 95) is DENIED; and

(4) The motion of defendant Karen Nicholas to compel the production of Grand Jury material (Doc. # 99) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.