

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ALVIN JEROME WALTON	:	NO. 04-508-03

ORDER AND MEMORANDUM

ORDER

AND NOW, this 16th day of November, 2005, upon consideration of defendant's *pro se* Motion for Dismissal of Indictment (Document No. 113, filed October 5, 2005), and Government's Response to Defendant's *Pro Se* Motion for Dismissal of Indictment (Document No. 116, filed October 20, 2005), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that defendant's *pro se* Motion for Dismissal of Indictment is **DENIED**.

IT IS FURTHER ORDERED that copies of this Order shall be served on all counsel and on defendant, Alvin Jerome Walton, at the Federal Detention Center, P.O. Box 562, Philadelphia, Pennsylvania 19105.

MEMORANDUM

I. BACKGROUND

The defendant, Alvin Jerome Walton, is charged in a Superseding Indictment with one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, and two counts of distributing cocaine in violation of 21 U.S.C. § 841(a)(1). The Superseding Indictment alleges that in July of 2004, Walton and two co-defendants, Anthony Winfrey and James Bostick, Jr., conspired to distribute approximately 6 kilograms of cocaine. According to the Superseding Indictment, Walton mailed packages of cocaine to Winfrey, who lived in Philadelphia; Winfrey then removed the cocaine from the packages and gave

the cocaine to Bostick. Winfrey has pled guilty to his role in the conspiracy, and is expected to cooperate with the government against Walton and Bostick at trial, which is scheduled to begin on November 28, 2005.

On October 5, 2005, Walton filed a *pro se* Motion for Dismissal of Superceding Indictment. In the motion, Walton alleges that Winfrey gave false and conflicting statements during interviews with the government and in his testimony before the grand jury. These statements covered subjects including Winfrey's knowledge of whether the packages contained cocaine, how many times he received packages from the defendant, when he began receiving packages from the defendant, and whether Bostick knew that Winfrey was paid to receive the packages.

II. ANALYSIS

Walton challenges his Superceding Indictment on the basis that the government obtained the indictment using false evidence in the form of Winfrey's testimony. In support of this argument, Walton compares notes taken by government agents during several interviews with Winfrey and Winfrey's grand jury testimony. The notes reflect slightly different answers on the same subject. For example, on the subject of whether Winfrey knew that the packages mailed to him contained cocaine, the government's notes during a July 28, 2004 interview state that "he knew cocaine was inside." During an interview on January 5, 2005, the notes state that "Winfrey believed that there was drugs in the package but not sure [sic]." In his grand jury testimony, Winfrey stated that he "believed" the packages contained cocaine. On the subject of how many times Winfrey received packages from Walton, one set of interview notes states four to five times, one set states two times, and one set states that "he thinks that it only happened three times."

Courts generally refuse to dismiss indictments based on insufficiency of the evidence presented

to the grand jury. Holt v. United States, 218 U.S. 245 (1910). “An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.” Costello v. United States, 350 U.S. 359, 363 (1956).

Courts have dismissed an indictment based on evidentiary issues in “flagrant” cases where perjured testimony is knowingly presented to a grand jury. United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978); see also United States v. Deerfield Specialty Papers, 501 F. Supp. 796, 805 (E.D. Pa. 1980) (“An indictment may nevertheless be dismissed in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to a grand jury.”). “Indeed, it is well settled that a court will not uphold a challenge to the defendant’s indictment on the ground[] that . . . the Grand Jury was not fully informed on the credibility of witnesses.” United States v. Sweeney, 688 F.2d 1131, 1139 (7th Cir. 1982).

The evidence presented by Walton fails to demonstrate that Winfrey provided perjured testimony to the grand jury. At most it demonstrates that Winfrey is not always a consistent witness. This is not the kind of “flagrant” case that requires dismissal of the indictment.

The proper time to challenge Winfrey’s allegedly contradictory statements is at trial, when Winfrey will presumably testify. At that time, Walton may use Winfrey’s prior statements in an attempt to impeach his credibility. See Fed. R. Evid. 613.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.