

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-80205-cr-Marra-Hopkins

UNITED STATES OF AMERICA,

Plaintiff

v.

MITCHELL J. STEIN,

Defendants.

**DEFENDANT MITCHELL J. STEIN'S MOTION TO COMPEL PRODUCTION OF
MINUTES AND TRANSCRIPTS OF GRAND JURY PROCEEDINGS AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW, the Defendant, Mitchell J. Stein, by and through the undersigned counsel, and hereby moves the Court for an order compelling the government, the Clerk of the District Court, and/or the court reporter attending the grand jury(ies) that received evidence in connection with the investigation that resulted in the Indictment against the Defendant, to disclose to the undersigned the minutes and transcripts of the grand jury proceedings (other than deliberations), including transcripts of all testimony presented to said grand jury(ies), as well as all statements by prosecutors to said body(ies), and in support thereof states as follows:

1. The disclosure to defense counsel of grand jury minutes may reveal that grounds exist for a motion to dismiss. Fed. R. Crim. P. 6(e)(3)(E).
2. The disclosure to defense counsel of matters occurring before the grand jury and the nature of testimony presented and evidence exhibited may reveal that grounds exist for a motion to dismiss based upon matters occurring before the grand jury. *Id.*

3. The disclosure to defense counsel of matters occurring before the grand jury and the nature of testimony presented and evidence exhibited will reveal evidence which is favorable or helpful or tends to exculpate the defendant, either by indicating his innocence of the charges or by impeaching the credibility of government witnesses, and thus disclosure is compelled under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Dennis v. United States*, 384 U.S. 855 (1966).

4. Delay in supplying any or all of this information will deny the defendant his constitutional rights -- including his right to the effective assistance of counsel and to due process of law -- because some of the information requested, if not all of it, is favorable or helpful or exculpatory and will establish or help establish the defendant's innocence or otherwise establish mitigating evidence.

5. Other grounds to support this motion may be established by oral argument on this motion and other motions made by the defendant.

MEMORANDUM OF LAW

A district court has express authority, pursuant to *Rule 6(e)*, to authorize the disclosure of grand jury matters: (i) if such disclosure is "preliminarily to or in connection with a judicial proceeding;" or (ii) "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." *Fed.R.Crim.P. 6(e)(3)(E)(i) and (ii)*.

The Supreme Court has held that the "preliminarily to ...a judicial proceeding" exception "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated." *United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 3167, 77 L. Ed. 2d 785 (1983). For a request to be "in connection with" a judicial proceeding, the proceeding must already be pending. *Id.* at 479, 103 S.Ct. at 3166.

A party seeking grand jury matters under *Rule 6(e)* must show that: (1) the material sought is needed to avoid possible injustice in another judicial proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to embrace only necessary material. *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 222, 99 S.Ct. 1667, 1674, 60 L.E. 2d 156 (1979); *United States v. Aisenberg*, 358 F.3d 1327, 1348 (11th Cir. 2004). General allegations are insufficient and a party seeking grand jury matters must instead show a “particular need” for the material. *United States v. Burke*, 856 F.2d 1492, 1496 (11th Cir. 1988).

To establish a particularized need for disclosure, a party must show that certain difficulties peculiar to his case could be alleviated by access to specific grand jury materials and that the disclosure will not do disproportionate harm to the salutary purpose of secrecy embodied in the grand jury process. *Aisenberg*, 358 F.3d at 1348-49.

In the instant case, the Defendant has raised colorable claims in its post-trial papers that the government either knowingly presented perjured trial testimony, or knowingly allowed such testimony to go uncorrected before the jury. If indeed such claims are justified, the Defendant may very well be entitled to a new trial or even dismissal of the charges. Indeed, a claim that a prosecutor repeatedly misrepresented facts and deliberately failed to correct false testimony, if meritorious, can result in severe sanctions. As exhaustively argued by the Defendant in his previously filed papers, the consequences of such prosecutorial misconduct can be radically more severe than other types of trial errors. In order to fully inform the Court and the parties regarding the government’s knowledge and intent with respect to the prosecutorial misconduct claim, it is necessary to examine the testimony of witnesses presented to the grand jury (ies) but not called to the stand at trial, as well as the statements the prosecutors made to said grand jury

(ies). In this regard, the undersigned is informed that no witness who testified during the two-week trial of this case gave testimony before a grand jury. Put another way, and more significantly, not one witness who testified in the grand jury (ies) was called as a witness at trial. Despite this, we do have a window into the possible testimony given before the grand jury (ies) by those non-trial witnesses, as many of those witnesses had given sworn statements to the SEC, which statements were supplied to DOJ attorneys based on their (limited) request to that agency. Significant portions of those SEC statements were, apparently, inconsistent with the factual theories argued by the prosecution throughout the trial of this case. If these “non-trial” SEC witnesses testified similarly before a grand jury, the fact that they were not presented at trial – and that their grand jury testimony was not turned over to the defense -- would serve as evidence that the government was endeavoring to mislead the Court and jury. Further, if indeed, the government did mislead the Court and jury as alleged, the intent of its prosecutors would be exposed by their statements to the grand jury (ies) -- statements made out of the presence of a judicial officer and under circumstances where such statements are rarely disclosed to a court.

The undersigned has only recently been engaged to handle the post-trial motions in this case and is loath to recklessly impugn the integrity of a colleague without thoroughly examining the merits of the claim. Nevertheless, the Defendant’s colorable claims merit deeper scrutiny, particularly where the government has not denied that false statements of prosecutors and witnesses went uncorrected but, instead, has essentially argued that any such error was harmless because the defense was aware of contrary evidence. If Defendant’s claims are accurate, the knowledge and intent of the prosecutors should clearly be revealed through their statements to the grand jury (ies) and through the testimony of the witnesses that were held back by the government in its trial presentation. Because the material sought is necessary to avoid possible

injustice in this case, and because it has been demonstrated that the need for disclosure in this particular case is greater than the need for continued secrecy; and in view of the fact that the defendant has structured his request narrowly to embrace only those materials necessary to elucidate the issue of prosecutorial misconduct (*i.e.* the prosecutors' statements to the grand jury (ies) and the testimonies of those witnesses who were not called to testify at trial), the defendant has shown a particularized need for specifically described grand jury materials under the legal standards cited above.

WHEREFORE, for the reasons set forth herein, the defendant respectfully requests that the Court enter an order compelling the government, the Clerk of the District Court, and/or the court reporter attending the grand jury(ies) that received evidence in connection with the investigation that resulted in the Indictment against the Defendant, to disclose to the undersigned the minutes and transcripts of the grand jury proceedings (other than deliberations), including transcripts of all testimony presented to said grand jury(ies) (excepting those transcripts that have already been provided), as well as all statements by prosecutors to said body(ies), and for all other and further relief that this Court deems just and proper under the circumstances.

Dated: May 2, 2014

Respectfully submitted,

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By: /s/ Bruce Udolf
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically using the Court's CM/ECF system, on this 2nd day of May, 2014.

By: /s/ Bruce Udolf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-80205-cr-Marra-Hopkins

UNITED STATES OF AMERICA,

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Defendants.

_____/

**ORDER GRANTING DEFENDANT MITCHELL J. STEIN'S MOTION TO COMPEL
PRODUCTION OF MINUTES AND TRANSCRIPTS OF GRAND JURY
PROCEEDINGS**

THIS CAUSE came before the Court without hearing upon the Defendant's Motion to Compel Production Of Minutes And Transcripts Of Grand Jury Proceedings (The "Motion") [De ____], and the Court, being duly advised in the premises, does hereby:

ORDER AND ADJUDGE that the Motion is **GRANTED**. _____

DONE AND ORDERED in Chambers in Fort Lauderdale, Florida this ____ day of May, 2014.

HONORABLE KENNETH A. MARRA
UNITED STATES DISTRICT COURT JUDGE

C: All Counsel of Record