

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT D. SUTTON,

Defendant.

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ORDER

01-CR-0032-C-03

Defendant Robert D. Sutton has moved for disclosure of matters occurring before the grand jury, including, among other things, the date on which “each grand jury” was requested, the names of all witnesses presented to the grand juries, all evidence presented to them and the lengths of time spent hearing the evidence, a list or copy and description of all tangible evidence presented to the grand juries, the name of the judge that gave the government the authority to convene the grand jury and any statements made to the grand juries by the government. Defendant says that he has a compelling need for this information in connection with the filing of his motion for post conviction relief. He wants to be able to show that the grand jury that returned the indictment against him might have been without authority to do so and he wants to be able to investigate to see whether the grand

juries relied on excessive hearsay, whether the government informed the grand juries of the witnesses' previous perjured testimony, whether the government knowingly used perjured testimony and what other misconduct the government might have committed.

The motion will be denied. Defendant has not made a showing of his particularized need for the information he is seeking. The broad sweep of his request reveals a desire to fish for evidence of some sort of irregularity that he could use to challenge his conviction rather than a carefully tailored request for grand jury materials for which he can show a clear need. Matter of EyeCare Physicians of America, 100 F.3d 514, 518 (7th Cir. 1996) (“one seeking disclosure of grand jury proceedings must demonstrate more than relevance. . . . [S]ecrecy is not broken ‘except when there is a compelling necessity’ for the material”) (quoting Hernly v. United States, 832 F.2d 980, 983-84 (7th Cir. 1987)).

It would be difficult for defendant to make the requisite showing of need since his conviction by a petit jury renders “harmless any conceivable error in the charging decision that might have flowed from the violation.” United States v. Mechanik, 475 U.S. 66, 73 (1986) (holding that government’s violation of Fed. R. Crim. P. 6(d) by allowing two agents to testify before grand jury at same time did not require automatic reversal of subsequent conviction); United States v. Fountain, 840 F.3d 509, 513-15 (7th Cir. 1988) (function of grand jury is to screen out cases in which no probable cause exists for trying defendant; once defendant has been found guilty by petit jury, courts may be confident that full presentation

to grand jury would have resulted in indictment).

Although the Court of Appeals for the Seventh Circuit has held open the question whether perjury before the grand jury can ever be a ground for dismissal of an indictment, Fountain, 840 F.2d at 513-14, it has indicated that there might be circumstances in which it would suffice. This case does not come close to demonstrating those circumstances. The government does not deny that at least one of the trial witnesses gave perjured testimony (favorable to defendant) before the first grand jury at which she appeared. However, she changed her testimony and admitted her previous lies when she appeared before a second grand jury. Defendant had transcripts of both appearances and was able to cross-examine the witness thoroughly about her contradictory testimony. Defendant has not alleged any facts to suggest that the government knowingly used perjured testimony to secure an indictment against defendant.

Finally, defendant seems to suggest that the grand jury lacked authority to return an indictment against him because its term lasted more than 18 months. Defendant is well aware that the matter was transferred to a second grand jury. He has no reason to believe that the grand jury that returned the indictment had been in session more than the 18 months authorized in Fed. R. Crim. P. 6(g).

ORDER

IT IS ORDERED that defendant Robert D. Sutton's request for disclosure of grand jury materials is DENIED for his failure to show a compelling need for the materials.

Entered this 20th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge