UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

v.

CASE NO: 6:08-CR-118-ACC-KRS

JUDE LACOUR,

Defendant
____/

DEFENDANT, JUDE LACOUR'S MOTION TO REVIEW THE GRAND JURY TRANASCRIPTS, GOVERNMENT NOTES AND SUBPOENAED DOCUMENTS PUT BEFORE THE GRAND JURY, ETC., AND NOTICE OF ADOPTION

The Defendant, JUDE LACOUR, by and through his undersigned attorney, gives notice that he hereby joins and adopts the position taken by the co-defendant, Akhil,Baranwal (doc# 382), as put forth for examination of Grand Jury transcripts from the year 2005-2009 and would further argue and request that he also be allowed to review the Government notes (Jive Network employee interviews with the government, specifically on the day of April 19, 2005) and discovery received from the Government's subpoenas from the law office of Akerman and Senterfitt (specifically any documents or notes from Jonathan Goodman).

Fed.R.Crim.P 6(e) (3)(c)(ii) permits disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Also this Motion is made pursuant to *Brady v. Maryland*, 37 U.S. 83 (19063); *Giglio v. United States,* 405 U.S. 150, (1972);*United Sates v. Aguars*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 524 U. S. 419 (19915);

***United States v. Lyons*, 352 F. Supp. 2d, 1231, M.D. Fla. 2004**; the *Jenks Act,* 18 U.S.C. s. 3500 and Fed R. Crim P. 26.2.

Federal Courts may use their supervisory powers to dismiss indictments for prosecutorial misconduct in the grand jury. The Supreme Court has held that dismissal of an indictment is appropriate "if it is established that the violations substantially influenced the grand jury's decision to indict" or there is "great doubt" that the decision to indict was free from this substantial influence. *Bank of Nova Scotia v. United States*, 108 S.CT.693 (1988). See also ***United States v. Lyons*, 352 F. Supp. 2d, 1231, M.D. Fla. 2004.**

Government notes:

The co-defendant, Jeffery Lacour, pled guilty (doc.439). Jeffery Lacour withdrew his own Motion to Review the Grand Jury transcripts (doc. 342) and the reason for this is unknown to the Defendant but highly suspect given that Jeffery Lacour stated to the probation officer interviewing him, for his son's (Jude Lacour) PSR, that his son did not know he was breaking the law. This would mean that Jeffery Lacour did not really think he broke the law either, yet he still entered into a plea of guilty, implying he intentionally broke the law.

In the *United States v. Thomas*, 12 F..3d 1350 (5th Cir. 1994), the Fifth Circuit remanded a case to the trial court for a determination of whether the notes made by agents during debriefing sessions at plea –bargaining sessions with the co-defendants contained any exculpatory matters. This is precisely what the defendant in this case is seeking and there appears to ample reason at this point to provide the defendant with the opportunity he seeks.

Akerman Senterfitt Grand Jury Subpoena:

Subsequent to the AUSA Karen Gable receiving SA Groeschner's 302 on September 18, 2005, a Grand Jury subpoena was issued to Akerman Senterfitt requesting the entire Jive Network legal file. The request was based on a suspicious waiver of rights used by the government to obtain Akerman's files. The result of this potential fraudulent Grand Jury subpoena was that Ms. Gable received the entire attorney client privileged file consisting of 1,700+ pages. Even though the government alleges that a taint team was in place, Ms. Gable is the person who returned a copy of the Akerman Senterfitt file to Jonathan Goodman, almost two months after receiving the file.

Ms. Gable's Request for a Waiver

Only a few days after Ms. Gable allegedly returned the questionably obtained attorney- client privileged Jive Network legal file to Akerman Senterfitt, she sent a letter and waiver to Sara Caplan, this defendant's attorney. This waiver acknowledges that Jude LaCour, not Jeff LaCour, was the Akerman Senterfitt client as the sole shareholder of Jive Network. At no time prior to, or after receiving this waiver, did the this defendant speak to any member of the prosecution team concerning any legal representation or agree to any waivers of the attorney-client privilege.

Facts Learned At Trial Concerning Issues That Happened Before or In Relation To Multiple Grand Juries:

Partial Disclosure of Agent Groeschner and Agent Metzger's Grand Jury Testimony:

During trial, the prosecutor Karen Gable turned over to the Defendant the transcripts of Agent Groeschner's testimony before the Grand Jury.
The transcript turned over consisted of only two lines. As the lead case agent who testified that he looked at a majority of the 200,000+ documents seized during the execution of the search warrant, there is no doubt that his Grand Jury testimony would be extensive over the last four years.

The partial disclosure of Agent Groeschner's Grand Jury testimony at trial is a violation of Fed.R.Crim.P. 26.2, 16 (a)(i)(e), and 18 U.S.C s. 3500 and is prosecutorial misconduct on its own. An evidentiary hearing and a review of the Grand Jury transcripts is needed to ascertain the reason behind the prosecutor's blatant and intentional misconduct and obstruction of justice by not disclosing Agent Groeschner's entire Grand Jury testimony.

Disclosing Agent Groeschner's entire Grand Jury testimony will, more than likely, reveal that Agent Groeschner committed more serious misconduct before the Grand Jury than the misconduct committed by not disclosing his entire Grand Jury testimony.

Considering that there is already evidence that Agent Groeschner attempted to convince Dolores Leza to not be forth coming to the Grand Jury concerning the weapons used during the raid on Jive Newtork, it is not much of a stretch of the imagination that he himself may have not been forth coming at one or multiple Grand Juries about the weapons and/or tried to convince or did convince other witnesses to not be forth coming. Or, worse yet, he was honest about the weapons at the Grand Jury that did not indict. But,

at the Grand Jury that did indict, he purposely and intentionally left out that fact in order to insure the Grand Jury came back with an indictment.

According to this defendant's recollection, Agent Groeschner is on record, at trial, under oath, testifying that he is not interested in the truth. Based on that admission alone, combined with Agent Groeschner being the lead case agent, this defendant should be granted an evidentiary hearing and a review of the grand jury transcripts.

Agent Groeschner's own admission that he is not interested in the truth compounded by the misconduct already outlined in this motion, such as attempting to manipulate Ms. Leza's testimony to the Grand Jury, falsifying 302's, using an attorney-client privileged document in the interrogation of Jeff LaCour, etc., calls into question the entire investigation and the indictment. And, just like Ms. Gable, once Agent Groeschner became aware of exculpatory evidence in the Akerman file, he had a duty to present it to the Grand Jury.

But, again, just like Ms. Gable, presenting any information from the Akerman file would be a serious Constitutional error, whether it was exculpatory or not.

It is plausible that Ms. Gable is aware of misconduct committed by Agent Groeschner before the Grand Jury, which is why Agent Groeschner's entire testimony was not disclosed to the defense in violation of Fed.R.Crim.P. 26.2, 16(a)(I)(E) and 18 U.S.C. s. 3500.

In the investigation that yielded the indictment in the instant case, Agent Groeschner testified before the Grand Jury and at trial. Federal Rules of Criminal Procedure 26.2 and 16(a)(1)(E) and 18 U.S.C. s. 3500 requires the Government to

disclose to the defendant, acting as his own counsel, transcripts of Grand Jury testimony of witnesses who would testify at trial. The rules do not allow for a partial disclosure, as was done with Agent Groeschner & Agent Metzger's testimony, and apparently not done with other Grand Jury transcripts of witnesses that also testified at trial.

Discussion

In the last few days of trial, this defendant learned from Dolores Leza, that the 2005 Grand Jury subpoenaed witnesses to testify. When this defendant learned in 2007 from Jeff LaCour (not Akerman) that Akerman Senterfitt complied with the fraudulent Grand Jury subpoena issued by the 2005 Grand Jury, this defendant was not aware of whether witnesses had actually testified before the Grand Jury. This defendant assumes that Ms. Gable improperly instructed the Grand Jury witnesses by telling them not to talk to defendant.

Fed.R.Criminal P. 6(e) established a general rule of secrecy to prevent disclosure of matters occurring before the Grand Jury. To these ends, Rule 6(e)(2) states in part that…. "A grand juror, an interpreter, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person who disclosure is made under paragraph 3(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule." According to its plain terms, the Rule excludes the imposition of an "obligation of secrecy" on anyone who is not among the specifically named individuals. *In re Grand Jury Proceedings,* 814 F.2d 61, 68 (1st Cir. 1987); *United States v. Kilpatrick,* 821 F.2d

1456, 1472 (10th Cir. 1987). *aff'd Bank Of Nova Scotia v. United States,* ______ U.S. __ ______, 108 S.Ct.693 (1988).

Witnesses, since they are not mentioned in the Rule, are not bound by any obligation of secrecy.

The Supreme Court, too, has observed that witnesses are not bound by the secrecy obligation of the rule. *United States v. Sells Engineering, Inc.,* 463 U.S. 418, 425, 103 S.Ct. 3133, 3138 (1983). The Rule, in view of its interpretation by the Advisory Committee note and the Supreme Court in *Sells Engineering*, *Id.* positively exempts witnesses from any such obligation. *In Re Grand Jury Proceedings,* 814 F.2d at 69 several courts have taken this approach. See, e.g., *United States v. Radetsky,* 535 F.2d 556, 569 (10th Cir. 1976); *In Re Langswanger,* 392 F.Supp 783, 788 (N.D. Ill, 1975); *In Re Russo,* 53 F.R.D. 564, 570 (C.D. Cal. 1971); *In Re Grand Jury Subpoena Duces Tecum,* 575 F.Supp. 1219, 1221 (E.D.Pa. 1983) ("explicit directive" of Rule 6(e) cannot be overridden by court's general supervisor authority over grand juries); *In Re Grand Jury Subpoena, (East National Bank),* 517 F. Supp. 1061, 1066 (D.Colo. 1981); *In Re Grand Jury Proceedings,* 558 F.Supp. 532 (W.D.Va. 1983) ("systematic debriefing" of grand jury witnesses permitted); *In Re Grand Jury Summoned October 12, 1970,* 321 F.Supp. 238 (N.D. Ohio 1970) (same).

At least one court sharply condemned the prosecutors for violating the rule in this manner. *United States v. Kilpatrick,* 575 F. Supp. 325, 331-32 (D.Colo. 1983) (secrecy obligation "foolishness" and "misconduct" on the part of prosecutor for whom "ignorance of the law is no defense"). A while back, it was the practice to make Grand Jury witnesses take an oath of secrecy, and this is still the rule in some state court

systems. Because of public outcry, the rule was changed, and, as has been seen, this is not verboten because of the language of the rule saying, "No obligation of secrecy may be imposed on any person except in accordance with this rule." This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In Re Langswanger,* (1975) D.C. Ill. 392 F.Supp. 783; *In Re Grand Jury Witness Subpoenas,* (1974) D.C.Fla. 370 F.Supp. 1282; *In Re Alvarez* (1972) D.C.Cal 351 F.Supp. 1089; *In Re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In Re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the Grand Jury description discloses. No "oath" of secrecy was administered, but an obligation of secrecy was imposed by instuctions from the government's counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. *Id.* at 331-332.

Further it would be of importance to determine if the law was presented correctly to the Grand Jury in discerning profits, proceeds etc. as annunciated by the Supreme Court in *United States v. Santos*, 128 Sc. Ct. 2020 (2008). To say the least trying to separate what is and what is not money laundering is not clear after *Santos* and any unintentional misrepresentation of the law could have prejudiced the Grand Jury's decision.

Why so many Grand Juries?

It is clear that the Grand Jury that commenced in 2005 did not issue an indictment against this defendant as the indictment did not come down until 2008. This defendant is now aware of at least two (2) Grand Juries that were convened in relation to this matter. The question becomes whether there were any additional Grand Juries between the 2005 and the 2007/2008 Grand Jury. And, if so, why did it take multiple Grand Juries to issue an indictment? Was this further misconduct on the part of the prosecutor? Was she shopping for a favorable Grand Jury? Assuming that there were only two (2) Grand Juries, one in 2005, which did not return an indictment and one that commenced in 2007 that did return an indictment in 2008, why did the Grand Jury in 2005 not indict when the 2007 Grand Jury did indict? This, and many other questions, will be answered in the requested evidentiary hearing. However, it is necessary to outline potential arguments here to demonstrate to the Court that an evidentiary hearing is needed. It is clear from the documentation in defendant's possession that there is enough misconduct to warrant a review of the Grand Jury transcripts and/or a dismissal with prejudice. But, an evidentiary hearing is needed to ascertain just how pervasive the misconduct is to prevent further travesties of justice.

As the Court is aware, SA John Groeschner attempted to persuade Dolores Leza to not tell the Grand Jury the truth, by asking her to leave out the fact that the 50+ agents that executed the corporate search warrant on Jive Network pointed their guns at the employees when they stormed in the offices. Instead, Ms. Leza did the right thing and informed the Grand Jury of the truth…when asked by the Grand Jurors. She was scared and in a state of shock because of the 50+ agents that stormed the offices with guns

pointed at the employees while shouting, "Put your hands up!" Is this why the Grand Jury chose not to indict? Did other Grand Jury witnesses inform the Grand Jury of the same information? Is this why the Grand Jury did not indict in 2005 or 2006?

Based on this motion and previously filed motions and specifically the Motion for a New Trial by this defendant, the Court is now fully aware of the fact that Ms. Gable used a Grand Jury to obtain the entire attorney-client privileged file from Akerman Senterfitt.

The question is, what did Ms. Gable do with the file once she received it? Considering the circumstances with which Ms. Gable received the file, she is caught in a "Catch 22". If she presented a single piece of information from this file or any attorney-client privileged Akerman Senterfitt document to the Grand Jury, she committed a major misconduct and Constitutional error.

If Ms. Gable did not present any of the information from the file to the Grand Jury, she has committed misconduct by not making the Grand Jury aware of exculpatory evidence. When a prosecutor is aware of any substantial evidence negating guilt, she should, in the interest of justice, make it known to the Grand Jury, at least where it might reasonably be expected to lead the jury not to indict. *Id.* at 623. *American Bar Association Standards for Criminal Justice, Standard* 3-3.6(b) (2d ed 1980) (requiring prosecutor to disclose "evidence which will tend substantially to negate guilt"); *United States Attorneys' Manual – Title 9 – Criminal Division, 9-11.334,* "Presentation of Exculpatory Evidence" (When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the

investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.)

While mere failure to present evidence favorable to a defendant to a Grand Jury is not necessarily automatic grounds for dismissal; *United States v. Ruyle,* 524 F.2d 1133, 1135 (6th Cir. 1975), *cert. denied,* 425 U.S. 934, 36 S.Ct. 1664 (1976); *United States v. Mandel,* 415 F. Supp. 1033, 1040 (D.Md. 1976), failure to present evidence that clearly negates guilt would tend to undermine the authority of the grand jury; *Id; United States v. Trass,* 644 F.2d 791, 796-797 (9th Cir. 1981).

This defendant understands that it is not conceivable that the prosecutor could present all exculpatory evidence to the Grand Jury; the prosecutor must present evidence that clearly negates guilty that the prosecutor is aware. *United States v. Page,* 808 F.2d 723, 727 (10th Cir.), *cert. denied,* 107 S.Ct. 3195 (1987); *United States v. Flomenhoft,* 714 F.2d 708, 711-712 (7th Cir. 1983), *cert. denied,* 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed. 2d 745 (1984); *United States v. Ciambrone,* 601 F.2d 616, 622-23 (2nd Cir. 1979).

By receiving the entire corporate file from Akerman Senterfitt while purporting to be in possession of the file legally as shown by her representation to Mr. Goodman that she did, in fact, have a valid waiver of the attorney-client privilege. Ms. Gable was certainly able to and, under her flawed reasoning, required to review the entire Akerman Senterfitt file. Notwithstanding the reality of the situation, she did not have a valid waiver.

Setting that aside and going back to her flawed reasoning, she had an obligation to present exculpatory evidence from the file to the Grand Jury. *United States v. Page,* 808

F.2d 723, 727 (10th Cir.), *cert. denied,* 107 S.Ct. 3195 (1987); *United States v. Flomenhoft,* 714 F.2d 708, 711-712 (7th Cir. 1983), *cert. denied,* 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed. 2d 745 (1984); *United States v. Ciambrone,* 601 F.2d 616, 622-23 (2nd Cir. 1979); *Id.* at 623. American Bar Association Standards for Criminal Justice, Standard 3-3.6(b) (2d ed 1980) (requiring prosecutor to disclose "evidence which will tend substantially to negate guilt"); *United States Attorneys' Manual – Title 9 – Criminal Division, 9-11.334,* "Presentation of Exculpatory Evidence" (When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the Grand Jury before seeking an indictment against such a person.) as discussed above. However, if any of the information in the file was presented to the Grand Jury, a blatant and intentional violation of Defendant's attorney-client privilege creates a serious Constitutional error. The Department of Justice United States Attorney's Manual recognizes that evidence obtained in violation of the Constitution should not be presented to a Grand Jury.

A line by line review of the Grand Jury transcripts is needed to determine whether any of this material was presented to any of the Grand Juries in this case.

If Ms. Gable did present exculpatory information from the Akerman Senterfitt file to the Grand Jury in 2005 and that caused the Grand Jury not to indict, was this information withheld from 2008 Grand Jury to insure an indictment? If yes, actual prejudice was caused by Ms. Gable's misconduct and a dismissal with prejudice is warranted.

If Ms. Gable, instead, did not present exculpatory information from the file to the Grand Jury in 2005 but used information from the file and admissions from Jeff LaCour's interrogation on August 16, 2005 in the 2008 Grand Jury to secure an indictment, then actual prejudice was caused by Ms. Gable's misconduct and the indictment must be dismissed with prejudice.

There are many other potential scenarios concerning what happened before the Grand Jury in relation to the fraudulently obtained corporate file from Akerman Senterfitt. At this point exactly what happened is speculation.

To ascertain the whole truth and nothing but the truth, an evidentiary hearing is required along with a review of the Grand Jury transcripts. If it becomes clear that the misconduct committed by the prosecution team, including SA John Groeschner, the indictment should be dismissed with prejudice.

2008/2009 Grand Jury

This defendant, only a few weeks ago, became aware of the fact that witnesses testified before the Grand Jury starting in 2005, shortly after the execution of the search warrant. In addition, this defendant also learned that Ms. Leza did not testify at the 2007/2008 Grand Jury that returned the indictment.

This blatant and intentional exclusion of Ms. Leza, an original Grand Jury witness from the Grand Jury that returned the indictment, was apparently done to conceal from the Grand Jurors the fact that guns were used in the corporate search warrant and other

exculpatory information Ms. Leza more than likely testified to in accordance with the declaration she provided in 2005

WHEREFORE, the defendant, Jude Lacour, hereby requests that an Order be entered allowing him and/or the Court to hold a review of the Grand Jury Transcripts and Government investigative notes and reports previously described within this motion along with other subpoenaed documents previously described, in order to aid Mr. Lacour in his post-trial pleadings and his sentencing to ensure that justice was done within the purviews of this trial and prosecution.

Respectfully submitted,

_/s/ H. Kyle Fletcher
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2009, I filed the original of the foregoing document by electronic delivery with the Clerk of the Court, and the Clerk will send a notice electronically of this filing to the following: Assistant US Attorney, Karen Gable, U.S. Attorney's Office, Middle District of Florida, and all other counsel of record for all defendants.

_/s/ H. Kyle Fletcher
H. KYLE FLETCHER, ESQ.