

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL NO. 07-103

VERSUS

SECTION "L" MAG. (5)

JAMES G. PERDIGAO

VIOLATION: 18 USC 1341,
1344, 2314, 1957 & 2, 26
USC 7201 & 7206 (1)

**MOTION FOR DISCLOSURE OF
NON-PRIVILEGED JURY INFORMATION**

NOW INTO COURT, through undersigned counsel, comes defendant James Perdigao who hereby moves for disclosure of the following non-privileged jury information:

- A. All records and papers used by the Clerk of this Court in connection with the selection and service of grand and petit juries in the Eastern District of Louisiana, for such period of time as these records and papers have been maintained.
- B. All records and papers used by the Court in the selection of the forepersons and deputy forepersons for each grand jury impanelled in the Eastern District of Louisiana, for such period of time as these papers and records have been maintained.
- C. All records and papers pertaining to or used in connection with the selection and service of grand and petit jurors, forepersons and deputy forepersons in the Eastern District of Louisiana and which records contain information relating to the race, color, national origin, ethnicity, sex, religion, economic status, occupation, education, citizenship, age and/or

legal qualification of said jurors, for such, period of time as these papers and records have been maintained.

D. All records and papers pertaining to or used in connection with the emptying and/or refilling of jury wheels pursuant to 28 U.S.C. § 1863(b)(4) and/or the Local Plan, during the past five years.

E. Any and all reports and/or statistical data compiled or prepared by or for this Court, the Clerk of the Court, any federal judicial council, conference or committee thereof, the Administrative Office of the United States Courts, the Department of Justice, the United States Attorney's Office for the Eastern District of Louisiana, or any other department or official of this Court pertaining, but not limited to, the following:

(1) The master and qualified jury wheels from which persons have been summoned for jury duty since the implementation of the Jury Selection and Service Act of 1968 on December 22, 1968;

(2) The composition of juries (petit or grand) actually impanelled within the Eastern District of Louisiana; and/or

(3) The persons excluded from service by the Court pursuant to 28 U.S.C. § 1866(c), whether or not this data was forwarded to the judicial council of the Circuit as required by said statute.

F. Any and all reports or other documents prepared in connection with 28 U.S.C. § 1863 pertaining to the review of the jury selection plans in force in this District.

G. Any and all impanelment orders, extension orders, or other authorizations, and all records and documents in support thereof, which purport to show the authority and authorization of, purpose for and/or need for the grand jury which returned the Indictment and Superseding Indictment herein and any other grand jury used in the investigation of this case.

H. All instructions, advice and/or comments, written or oral, delivered to the indicting grand jury by any United States Judge, United States Magistrate Judge, Government attorney, or other person relating to the duties of the grand jurors and/or to the facts of or law applicable to the instant case, identified by the person delivering such instructions, advice or comments.

I. Whether the indicting grand jury was presented with any hearsay testimony; and, if so, a copy of the transcript containing any instructions, advice, comments, and/or warnings concerning the hearsay nature of the testimony and/or the dangers in relying upon such testimony.

J. The date, time, place and duration of each hearing or session held by the grand jury in connection with the investigation and return of the Indictment and Superseding Indictment in this case, and, as to each such hearing or session, the name, address and official capacity, if any, of all persons present in the grand jury room (other than any witness then actually testifying out of the presence and hearing of any other witness) at any time during the hearing or session, specifically including, but not limited to all attorneys for the United States or any agency thereof, together with the source of their authority to so appear and all documents in support thereof.

K. The date and time at which each indictment and superseding indictment in this case, whether in preliminary or in final form, was first presented to any grand jury in this case; all further drafts which were presented to any grand jury, together with the date and time of such presentation; the time spent by the grand jurors in deliberation before and/or after the close of the evidence in this matter; the date and time of each vote taken by the grand jury as to each separate count of any proposed indictment in this matter; and the record kept pursuant to Rule 6(c) of the Federal Rules of Criminal Procedure reflecting the number of jurors concurring in the finding of the Indictment or action by the grand jury.

L. The number of transcripts of the proceedings before any grand jury in any district in connection with this case that were prepared by the official court reporter, or other persons responsible therefor; and the name, address, and official capacity, if any, of each person to whom any exhibit in or transcript of any of the proceedings before any grand jury in connection with this case, or any copy, portion, summary or content thereof, was disseminated, together with any Order or other documents purporting to authorize such dissemination, and the date, time and place of such dissemination.

M. Any and all information whether reduced to writing or not, arguably relating to or connected with any violation of the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure pertaining to the grand jury investigation in this case.

The reasons for this motion are more fully set forth in the attached memorandum in support of this motion. Defendant further reserves the right to file additional motions regarding these matters based on the information disclosed and government's response.

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CERTIFICATE OF SERVICE

I hereby certify that on **September 26, 2008** I electronically filed the above and foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

/s/ William F. Wessel
WILLIAM F. WESSEL (8551)

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**MEMORANDUM IN SUPPORT OF
MOTION FOR DISCLOSURE OF
NON-PRIVILEGED JURY INFORMATION**

This memorandum is respectfully submitted by defendant James Perdigao, through undersigned counsel, in support of his motion for disclosure of non-privileged jury information.

Introduction

The Defendant is hereby moving for disclosure of non-privileged information relating to grand jury proceedings and petit jury composition. Pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq., the Defendant is entitled to the discovery of such information as a matter of right. Indeed, section 1867(f) of the Act provides that:

The contents of the records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion [challenging compliance with selection procedures] under . . . section. . . . The parties in a

case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. . . .

(emphasis added).

The Supreme Court has interpreted section 1867(f) to provide a litigant with an unqualified right of access:

This provision makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the "preparation" of motions challenging jury-selection procedures. Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's overall purpose insuring "grand and petit juries selected at random from a fair cross section of the community." 28 U.S.C. § 1861.

Test v. United States, 420 U.S. 28, 30 (1975) (per curiam) (emphasis in original; footnotes omitted).

Accordingly, this motion seeks to determine, among other things, whether the promise of fair and impartial grand jury proceedings has been kept and whether the Indictment and Superseding Indictment have been brought in conformity with the governing law. See United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998); United States v. Kennedy, 548 F.2d 608 (5th Cir. 1977). This motion also seeks to insure that such promises will be kept at the time that petit jury is sworn.

The motion is drafted to avoid compromise of grand jury secrecy--it calls for disclosure of no matter of evidence occurring before any grand jury, no deliberations of any grand jury, and no vote of any individual grand juror. See Fed. R. Crim, P. 6(e); Fed. R. Evid. 606(b). The defense's thesis is precisely what the Court of Appeals held in United States v. Alter, 482 F.2d 1016, 1028-29 n.21 (9th Cir. 1973):

The proceedings before the grand jury are secret, but the ground rules by which the grand jury conducts those proceedings are not. E.g., U.S. Judicial Conference Committee on the Jury System, Handbook for Federal Grand Jurors 10 (1971).

Accord In Re Special Grand Jury, 674 F.2d 778, 781 (9th Cir. 1982). Thus, in the present case, the Government should have no objection to disclosure of the "ground rules" and procedures governing the grand jury, nor to the Court then deciding whether the grand jury has operated according to the law. See United States v. Louie, 625 F. Supp. 1327, 1343 (S.D.N.Y. 1985), appeal dismissed, 787 F.2d 65 (2d Cir. 1986).

Indeed, the jury system is an integral and fundamental part of our nation's law. See generally Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998); United States v. Mechanik, 475 U.S. 66 (1986); United States v. Calandra, 414 U.S. 338, 342-43 (1974); Duncan v. Louisiana, 391 U.S. 145 (1968); Kalven & Zeisel, The American Jury (1966). Our commitment as a nation to the jury system "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." Duncan, 391 U.S. at 155. Congress has reaffirmed and reinforced that commitment by passing the Jury Selection and Service Act of 1968. 28 U.S.C. §§ 1861 et seq.

Yet, even if this federal prosecution could be divorced from such legislation, the Constitution would still require fair and impartial procedures for charging and trying a defendant on infamous crimes. Therefore, in further support of this motion, the Defendant also invokes the fair-cross-section-of-the-community jury guarantee of the Sixth Amendment, and the Equal Protection and Due Process safeguards of the Fifth Amendment.

Information Which Should Be Disclosed

The items of information which should be disclosed are discussed separately below.

1) Grand and petit jury selection documents.

Defendant fears that substantial grounds exist to challenge the regularity of the jury selection system. He needs to investigate the process by which jurors are selected and disqualified for service and to analyze the resulting composition of juries. See Vasquez v. Hillery, 474 U.S. 254 (1986). He should also be allowed to investigate the process by which grand jury forepersons are selected within this District to ensure that it complies with the federal model. See Campbell, 523 U.S. 392, 118 S. Ct. 1419, 140 L. Ed. 2d 551. Further, he must review the records and papers of the particular grand jury which indicted him, in order to learn whether all the constitutional and statutory strictures for the proceedings have been followed and what irregularities may exist in this District. See Timmel v. Phillips, 799 F.2d 1083 (5th Cir. 1986); United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993).

A denial of this motion would so impair Defendant's ability to substantiate his claims it would be tantamount to a denial of his right to make such a challenge at all, in violation of the letter and spirit of the Jury Selection and Service Act of 1968. Government of Canal Zone v. Davis, 592 F.2d 887, 889 (5th Cir. 1979); see also Test, 420 U.S. at 29 n.2. The Jury Selection and Service Act invites scrutiny and review of the jury system. Indeed, section 1867(d) of the provides for a mandatory hearing to resolve challenges:

Upon motion filed under subsection (a), (b) or (c) of this section . . . the moving party shall be entitled to present in support of such motion the testimony of the

jury commissioner or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence.

(Emphasis supplied).

2) *Grand Jury Authority.*

The Defendant also seeks impanelment orders, extension orders, or other documents relating to the authority of the grand jury. Such documents are ministerial records and, as such, any member of the public, whether or not indicted, has a right to these records absent specific and substantial reasons for a refusal. In re Special Grand Jury, 674 F.2d 778, 781 (9th Cir. 1982). The Defendant needs the information and documents relating to the authority under which the grand jury was impanelled, and the date of the impanelment, in order to determine whether the grand jury had legal authority to return the Indictment and Superseding Indictment in this matter. Where a grand jury was illegally convened, or was sitting beyond its legal term at the time it returned an indictment, the indictment must be dismissed. United States v. Fein, 504 F.2d 1170 (2d Cir. 1974).

In addition, the Defendant seeks similar official convening and extending papers of any other grand jury used in the investigation of this case. This request is designed to discover any grand jury abuse related to these proceedings. Based on the foregoing law and the public information nature of the documents that the Defendant is seeking, the requested items of disclosure should be granted without hesitation.

3) *Grand Jury Instructions.*

Instructions, advice, and comments given to the grand jury are not subject to the

rules of secrecy normally applied to testimony before the grand jury. United States v. Alter, 482 F.2d 1016, 1028-29 n.21 (9th Cir. 1973); see Fed. R. Crim. P. 6(e); see generally Johnston, The Grand Jury--Prosecutorial Abuse of the Indictment Process, 65 J. Crim. L. & C. 157, 166-68 (1974). Disclosure may well reveal erroneous instructions, failure to instruct on crucial points of law, or even undue influence exerted upon the grand jury by the prosecution. See United States v. Breslin, 916 F. Supp. 438, 443 (E.D. Pa. 1996) ("The prosecutor has an obligation not to engage in techniques, either knowingly or inadvertently, to curry favor with the grand jurors and lead them to abrogate their role as unbiased factfinders."). See generally Note, Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence, 29 U. Chi. L. Rev. 661 (1972). Such errors, omissions, or undue influence may require dismissal of the indictment. See, e.g., United States v. Braniff Airways, Inc., 428 F. Supp. 579, 586 (W.D. Tex. 1977) (failure to instruct jury on statutory exemption to criminal charge). See also United States v. Williams, 378 F. Supp. 61, 64 (W.D. Mo. 1974) (inspection of grand jury minutes justified to determine what prosecutor told grand jury with regard to applicable law).

If the prosecution prejudiced the grand jury in any way, or if the grand jury was misinstructed on basic principles of law, defense counsel and the Court are entitled to know about it so that the Defendant can make an appropriate motion, and the Court can make a fully informed ruling on it. This disclosure motion is as simple as that.

The defense expects the prosecution to concede that the Defendant is entitled to inspect and copy any and all instructions, advice, and comments delivered to the grand

jury by the Court itself. But defense expects that the prosecution, out of instinct for self-preservation, will oppose similar scrutiny of its own conduct. In anticipation of such a stance, it may be worthwhile considering the reasons why grand juries exist in the first place.

In Wood v. Georgia, 370 U.S. 375, 390 (1962), the United States Supreme Court described the protective function of the grand jury:

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

(Footnote omitted). In United States v. Dionisio, 410 U.S. 1, 17 (1973), the Supreme Court noted that the grand jury's "historic role [is] as a protective bulwark between the ordinary citizen and the overzealous prosecutor" In Stirone v. United States, 361 U.S. 212, 218 (1960), the Court stated:

The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.

(Footnote omitted.)

These sentiments are not outmoded notions. In United States v. Calandra, 414 U.S. 338, 342-43 (1974), the Supreme Court reiterated the importance of the grand jury's protective function to our constitutional security:

The institution of the grand jury is deeply rooted in Anglo-American history. In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that

they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. Costello v. United States, 350 U.S. 359, 361, 362 (1957) . The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686-687.

(Footnote omitted). See also United States v. Mechanik, 475 U.S. 66 (1986) (O'Connor, J., joined by Brennan and Blackmun, J.J., concurring in the judgment).

The courts of appeals have also spoken out on improper prosecutorial conduct before a grand jury. In reviewing one less than "commendable" grand jury presentation, the court stated: "Inflammatory remarks made by a prosecutor justify the dismissal of an indictment if the improper remarks so biased the grand jurors that their votes were based on their bias." United States v. Cathey, 591 F.2d 268, 273-74 (5th Cir. 1979). See also United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); United States v. Birdman, 602 F.2d 547, 561 n.61 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Ciamone, 601 F.2d 616, 623 (2d Cir. 1979); United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971); United States v. Bruzgo, 373 F.2d 383, 387 (3d Cir. 1967).

Further, where a prosecutor departs from normal practices instituted by his office to protect an accused before a grand jury, dismissal may lie for prosecutorial misconduct based upon the supervisory power of the Court. United States v. Breslin 916 F. Supp. 438, 441 (E.D. Pa. 1996) ("A district court does have the power to dismiss an indictment based on prosecutorial misconduct."). See also United States v. Jacobs, 547 F.2d 772, 778 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). And, where prosecutorial misconduct has become "entrenched and

flagrant," dismissal of an indictment in the exercise of the court's supervisory power is an appropriate prophylactic remedy even if defendant can show no prejudice. Serubo, 604 F.2d at 817; Birdman, *supra*; *cf.* United States v. Leslie, 783 F.2d 541 (5th Cir. 1986) (en banc). Indeed, relatively insignificant incidences of prosecutorial misconduct taken together may so bias a grand jury by their cumulative effect that dismissal is required. United States v. Samango, 607 F.2d 877 (9th Cir. 1979).

In conclusion, it is fundamental that for an indictment to be valid the grand jury must be legally constituted and "unbiased." Costello v. United States, 350 U.S. 359, 363 (1956); Samango, *supra*. Instances in which prosecutorial zeal has misled or prejudiced grand juries are plentiful. *E.g.*, Samango, *supra*; Serubo, *supra*; United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); Breslin, 916 F. Supp. at 446; United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Goldman, 451 F. Supp. 518 (S.D.N.Y. 1978); United States v. Provenzano, 440 F. Supp. 561 (S.D.N.Y. 1977); United States v. Braniff Airways, Inc., 428 F. Supp. 579, 583-85, 589 (W.D. Tex. 1977); United States v. DeMarco, 401 F. Supp. 505 (C.D. Cal 1975). aff'd on other grounds, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975); United States v. Abbott Laboratories, 369 F. Supp. 1395 (E.D.N.C. 1973), rev'd. on grounds of factual distinction, 505 F.2d 565 (4th Cir. 1974), cert. denied, 420 U.S. 990 (1975); United States v. DiGrazia, 213 F. Supp. 232 (E.D. Ill. 1963); United States v. Wells, 163 F. 313 (D. Idaho 1908).

Since there is no wall of secrecy which protects the prosecutor's instructions,

advice, and comments to the grand jury, and since "justice must satisfy the appearance of justice," Offut v. United States, 348 U.S. 11, 14 (1954), all proceedings before the grand jury other than actual testimony, exhibits, deliberations and votes of the individual grand jurors should be disclosed to defense counsel. Further, all prosecutorial statements intertwined with privileged proceedings should either be disclosed to defense counsel or be reviewed by the Court in camera. See United States v. Pastor, 419 F. Supp. 1318, 1326-28 (S.D.N.Y. 1975) (Government consents to in camera inspection and court simultaneously grants evidentiary hearing to defense). There is too much potential for abuse to let the prosecutor's behavior go unreviewed by anyone. The Court should instead let the sun shine in.

4) Concealing Hearsay Nature of Evidence.

The defense also seeks to know whether the grand jury was presented with hearsay testimony and, if so, whether it was properly advised of the nature of that testimony. While an indictment may be based on hearsay alone, a prosecutor may not conceal the hearsay nature of the evidence, especially when non-hearsay evidence is readily available and the grand jury would not have indicted the defendant if they had heard eyewitness testimony. E.g., United States v. Wander, 601 F.2d 1251, 1260 (3d Cir. 1979).

As the Second Circuit explained in United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972), the "grand jury must not be misled into thinking it is getting eye-witness testimony . . . whereas it is actually being given an account whose hearsay nature is concealed." Since such use of hearsay testimony can result in the dismissal of an indictment, the defense is entitled to discovery of the circumstances in this case.

5) *Unauthorized Persons.*

Disclosure of all persons in the grand jury room at any hearing or session relating to this case is required, since the presence of an unauthorized person is grounds for dismissing the indictment against the Defendant. Fed. R. Crim. P. 6(d); see United States v. Mechanik, 475 U.S. 66 (1986). It has long been the rule that where unauthorized persons are present during grand jury proceedings, an indictment thereafter returned is *per se* invalid. United States v. Echols, 542 F.2d 948, 951 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977); Latham v. United States, 226 F. 420 (5th Cir. 1915). No showing of nonprejudicial effect will save such an indictment from dismissal. Echols, 542 F.2d at 951. See also Martin v. United States, 266 F.2d 97, 99 (5th Cir. 1959); United States v. Phillips Petroleum Co., 435 F. Supp. 610, 618 (N.D. Okla. 1977); United States v. Braniff Airways, Inc., 428 F. Supp. 579, 582-83 (W.D. Tex. 1977); United States v. Daneals, 370 F. Supp. 1289, 1296-97 (W.D.N.Y. 1974); United States v. Bowdach, 324 F. Supp. 123, 124 (S.D. Fla. 1971); United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953); United States v. Borys, 169 F. Supp. 366 (D. Alaska 1959). The same need exists for all information, uniquely within the Government's control, pertaining to the source of "authorization" of persons in the grand jury room. The presence of an improperly authorized person can also invalidate an indictment. United States v. Pignatiello, 582 F. Supp. 251 (D. Colo. 1984); see United States v. Morris, 532 F.2d 436, 439-41 (5th Cir. 1976). Therefore, disclosure is in order.

The Supreme Court's decision in Mechanik makes it all the more essential that this information be made available to Defendant well in advance of trial. In that case, the

defendant learned of a Rule 6(d), Fed. R. Crim. P., violation during trial and brought it to the trial court's attention. The trial court reserved ruling and later denied the defendant's motion to dismiss, finding that the violation had not harmed the defendant. The Supreme Court, assuming that Rule 6(d) had been violated and that the trial court would have been justified in dismissing the indictment had there been actual prejudice and had the matter been called to its attention prior to trial, nevertheless allowed the conviction to stand, finding that "the supervening jury verdict made reversal of the conviction and dismissal of the mandate inappropriate." 475 U.S. at 70. It is imperative, then, that Defendant be afforded an opportunity to mount a challenge to the propriety of these grand jury proceedings, if grounds for such a challenge indeed exist, prior to trial, lest "the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively render[] those rules a dead letter." 475 U.S. at 73 (O'Connor, J., joined by Brennan and Blackmun, J.J., concurring in the judgment).

6) Indictment Process.

The circumstances under which the Indictment was presented to the grand jury should be disclosed. In Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), the Court ruled that the indictment must actually be presented to the full grand jury, or a quorum thereof, in order to be valid. In United States v. Daneals, 370 F. Supp. 1289 (W.D.N.Y. 1974), the Court invalidated a large number of selective service indictments for violation of defendants' right to be indicted by the grand jury, since hasty and inadequate presentation and consideration by the grand jury was shown. See also Breslin, 916 F. Supp. at 443. This Court should permit the circumstances of the grand

jury's consideration of the indictments herein to be disclosed so that the Court can determine whether the procedures used amount to adequate protection of the constitutional right not to be tried except upon indictment by a grand jury.

7) Government Disclosure of Testimony.

Rule 6(e) of the Federal Rules of Criminal Procedure ordinarily protects the secrecy of actual testimony given before the grand jury and carefully limits disclosure to exceptional circumstances. Even then, a disclosure order should first be requested and obtained from the Court. See United States v. Malatesta, 583 F.2d 748, 753-54 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379 (5th Cir.) (en banc), cert. denied, 440 U.S. 962 (1979). Disclosure in violation of Rule 6(e) may invalidate an indictment and discovery of this information is clearly authorized. See Hawthorne v. Director of Internal Revenue, 406 F. Supp. 1098, 1128 n.61 (E.D. Pa. 1976). Thus, Defendant requests discovery of the names of persons who have learned grand jury secrets and of the orders, if any, allowing them to have this information.

The Government's disclosure of grand jury secrets to outsiders may so undermine the integrity and independence of the proceedings as to require dismissal of the indictment. United States v. Tager, 638 F.2d 167 (10th Cir. 1980). In Tager, the Court reversed a conviction and ordered the indictment dismissed because grand jury materials were released, under a trial court disclosure order, to a private non-governmental investigator working for the Insurance Crime Prevention Institute. The purpose of the disclosure was to enable the investigator to assist the Government in an ongoing investigation. The Court of Appeals held that there was no authority for this breach of

the rule of secrecy. Defendant herein should likewise be informed of disclosures which may invalidate his indictment.

Parenthetically, the Defendant should be allowed to inspect all disclosure orders which released grand jury secrets to or from the grand jury which indicted him. For example, in United States v. Spina, Case No. 81-6124-Cr-JCP (S.D. Fla. April 12, 1982), and United States v. Spina, Case No. 82-6032-Cr-JAG (S.D. Fla. May 27, 1983), the release of information gathered by an improperly extended grand jury to the actual indicting grand jury contributed to the dismissal of the indictment.

In addition, revelation of the extent to which attorneys for the Government have disclosed testimony or disseminated grand jury transcripts in this case to unauthorized persons may provide a basis for the Defendant to contend that the Government has waived the privilege of secrecy. See United States v. Johnson, 337 F.2d 180, 197 (4th Cir. 1964), aff'd on other grounds, 383 U.S. 169 (1966). If the Government has itself violated the usual rule of secrecy, then it cannot use that rule as a shield against the Defendant.

To be clear, no demand is being made at this stage by the defense to be informed what secrets may have been leaked. But, if the Government has disclosed grand jury testimony, transcripts, exhibits or related secrets, it is only fair that the Defendant at least be told of this fact so that he can pursue whatever full relief he may then be entitled to under the law.

Conclusion

In placing questions of the validity of the jury selection process and grand jury

proceedings before the Court, Defendant believes he pursues the interest of all parties to this action--and no less the interests of this Court--that justice conform to the rule of law and satisfy the appearance of justice as well. With due regard for such justice and in compliance with the letter and spirit of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq., and the case law cited above, Defendant's motion should be granted.

It is respectfully requested that this Court enter an Order directing the Clerk and Judges of this Court, the Judicial Council for the Fifth Circuit, the Judicial Conference of the United States, the Administrative Office of the United States Courts, the Department of Justice, the United States Attorney's Office for the Eastern District of Louisiana, the various official court reporters of the United States District Court for the Eastern District of Louisiana and the United States Bureau of the Census to disclose to counsel for Defendant and/or his authorized representatives and to permit the inspection, reproduction and copying of the documents, information and materials requested in this motion and for such other relief as may be proper in the premises. Defendant further reserves the right to file additional motions regarding these matters based on the information disclosed and government's response.

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JAMES PERDIGAO**

CERTIFICATE OF SERVICE

I hereby certify that on **September 26, 2008** I electronically filed the above and foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

/s/ William F. Wessel
WILLIAM F. WESSEL (8551)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL NO. 07-103

VERSUS

SECTION "L" MAG. (5)

JAMES G. PERDIGAO

VIOLATION: 18 USC 1341,
1344, 2314, 1957 & 2, 26
USC 7201 & 7206 (1)

NOTICE OF HEARING

To: James R. Mann, AUSA
U.S. Attorney's Office
Hale Boggs Building
500 Poydras Street, Suite B-210
New Orleans, LA 70130

PLEASE TAKE NOTICE that the Motion for Disclosure of Non-Privileged Jury Information filed by defendant James Perdigo, through undersigned counsel, will be brought for hearing before the Honorable Eldon Fallon, United States District Judge, 500 Poydras Street, New Orleans, Louisiana 70130 at 2:00 p.m. on November 5, 2008, or at such other date and time as may be set by the court.

**WESSEL & ASSOCIATES
A LAW CORPORATION**

/s/ William F. Wessel
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127 Camp St.

New Orleans, LA 70130
Telephone (504) 568-1112
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and

/s/ Charles F. Griffin
CHARLES GRIFFIN, ESQ.
(#06318)
802 S. Carrollton Avenue
New Orleans, Louisiana 70118
Telephone (504) 866-4046
Facsimile (504) 866-5633

**ATTORNEYS FOR
DEFENDANT
JAMES PERDIGAO**

CERTIFICATE OF SERVICE

I hereby certify that on **September 26, 2008** I electronically filed the Notice of Hearing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

/s/ William F. Wessel
WILLIAM F. WESSEL (8551)