

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-20104 BV
)	
OMAR ABDI JAMAL,)	
)	
Defendant.)	

ORDER ON DEFENDANT'S MOTION FOR DISCLOSURE OF GRAND JURY EVIDENCE

Before the court is a motion filed June 13, 2003 by the defendant, Omar Abdi Jamal, seeking pretrial discovery pursuant to Rules 6(e), 12(b)(1)(2), and 16 of the Federal Rules of Criminal Procedure. The government timely responded on June 23, 2003. The motion was referred to the United States Magistrate Judge for determination. For the following reasons, the motion is denied.

BACKGROUND

In 1998, the defendant, Omar Jamal, sought asylum in the United States as a refugee from Somalia. On March 25, 2003, a grand jury returned a six count indictment against him based on false statements he allegedly made in connection with his application for asylum. Counts 1 through 5 of the indictment allege that on approximately April 1, 1998 or April 3, 1998 and June 11, 1998, Jamal violated 18 U.S.C. § 1546(a) and 18 U.S.C. § 1001 by "knowingly subscrib[ing] as true" a false statement with respect to a material fact when he answered "No" in his application for asylum in the United States to questions related to whether he,

his spouse, or his child(ren) had ever been granted asylum or held permanent residence in another country, other than the one from which he was then claiming asylum. Count 6 of the indictment alleges that on June 11, 1998, Jamal "knowingly and willfully" made a false statement in violation of 18 U.S.C. § 1001 when he claimed in his application for asylum in the United States that neither he nor his spouse or child(ren) had traveled through another country after leaving the country for which he was then claiming asylum.

The defendant has petitioned the court for permission "to examine, and/or copy, transcripts and other evidence submitted to the grand jury" pursuant to Rule 6(e), 12(b)(1)(2), and 16 of the Federal Rules of Criminal Procedure. (Req. for Disc. of Grand Jury Evidence in Support of Def.'s Proposed Mot. to Dismiss All or Part of the Indictment at 1.) Jamal asserts that he is entitled to discovery of the grand jury transcript because he has a "reasonable belief" that grounds exist to dismiss all or part of the indictment. (*Id.*) Essentially, he claims that such grounds must exist because it would not be possible that a grand jury could have returned an indictment based on the information he currently has available to him. (*See id.* at 10.) Jamal asserts that if no additional information was presented to the grand jury to support the charges against him, a motion to dismiss would properly lie with respect to the indictment or any count of the indictment for which no additional proof could be ascertained. (*Id.* at 2, 3, 5, 6, 10.)

In addition to insufficient evidence to support the indictment, Jamal asserts that grounds exist to support a motion to dismiss because he was subject to "selective and vindictive

prosecution." (*Id.* at 9.) In support of his argument, he claims that he has been subjected to selective prosecution because he was the only one out of three people to be prosecuted after the Minnesota Immigration and Naturalization Service ("INS") began an investigation and requested information from Canada about Jamal and two other aliens on October 31, 2001. (*Id.* at 6.) He asserts that the request for information came less than one week after he made public statements as the Executive Director of the Somali Justice Advocacy Center regarding the treatment of Somalis in Minnesota following September 11, 2001. (*Id.*) In fact, Jamal claims that his indictment was the result of "improper, politically motivated treatment" due to the public stance he took criticizing INS policies and his role in "initiating, supporting and publicizing cases" that have resulted in injunctions preventing the deportation of aliens to Somalia. (*Id.* at 7.) He also indicates that the delay that occurred between the date of the INS request for information and his indictment, coupled with the INS's alleged failure to notify Jamal about the questions raised by the INS's investigation into his previous asylum in Canada, kept him from responding to the investigation into his asylum application in a civil immigration proceedings, as opposed to an indictment. (*Id.*) Finally, Jamal asserts that the Department of Homeland Security ("DHS") intentionally tried to mislead the public as to the true origins of its investigation into his prior asylum in Canada.¹ (*Id.* at 9.)

¹ Apparently, DHS publicly stated that its investigation of Jamal was initiated because of complaints and informants within the Somali community in Minnesota. (Req. for Disc. of Grand Jury Evidence in Support of Def.'s Proposed Mot. to Dismiss All or Part of the Indictment at 8.)

ANALYSIS

The general rule of secrecy of grand jury proceedings has been held to be essential to the purpose of the grand jury process. *United States v. Proctor and Gamble Co.*, 356 U.S. 677, 681 (1958). The exceptions to the general rule are few, as evidenced by Rule 6(e)(3) of the Federal Rules of Criminal Procedure. See FED. R. CRIM. P. 6(e)(3). Nevertheless, the defendant asserts that he is entitled to discovery of grand jury evidence pursuant to Rules 6(e), 12(b)(1)(2), and 16.

Rule 16 of the Federal Rules of Criminal Procedure, which governs pretrial discovery in criminal matters, specifically excludes the disclosure of grand jury transcripts except as provided in Rules 6, 12(h), 16(a)(1), and 26.2. FED. R. CRIM. P. 16(a)(3). Rule 16(a)(1)(B)(iii) provides that a defendant may obtain, upon request, his own "recorded testimony before a grand jury relating to the charged offense." FED. R. CRIM. P. 16(a)(1)(B)(iii). Therefore, Jamal would be entitled to his own grand jury testimony if in fact he had testified at the grand jury proceeding. The record, however, does not indicate that Jamal was present, much less gave testimony. Rule 16 has no application to grand jury witnesses other than the defendant. Accordingly, Rule 16(a)(1)(B)(iii) is not applicable to the case at hand.

The Jencks Act, 18 U.S.C. § 3500, the substance of which is contained in Rule 26.2, requires the government to produce a witness statement after the witness has testified on direct examination. *United States v. Short*, 671 F.2d 178, 185-86 (6th Cir. 1982). Rule 26.2 and the Jencks Act, however, do not apply to

a motion for pretrial disclosure of a grand jury transcript because the production of such statement is only required after a witness has testified at trial. *Id.*; *United States v. Farley*, 2 F.3d 645, 653-55 (6th Cir. 1993); see FED. R. CRIM. P. 26.2(a); 26.2(f)(3). The defendant here seeks production of witness statements taken before the grand jury in advance of trial. A court cannot compel earlier production of the witness statements, unless the defendant can establish grounds for pretrial disclosure of a grand jury transcript pursuant to Rule 6(e). See *Short*, 671 F.2d at 186 ("Such a [pretrial] motion is covered by Rule 6(e).").

The defendant argues that he has demonstrated grounds for disclosure under Rule 6(e) in the present case. Rule 6(e)(3)(E)(ii)² provides in pertinent part:

The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

. . .

(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; . . .

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The text of Rule 6(e)(3)(E) was formerly Rule 6(e)(3)(C) before it was amended. In the present case, the defendant cited former rule 6(e)(3)(C)(i) in support of his motion. (Req. for Disc. of Grand Jury Evidence in Support of Def.'s Proposed Mot. to Dismiss All or Part of the Indictment at 1.) The court will assume due to the caption and substance of the motion that Jamal seeks disclosure of the grand jury evidence pursuant to exception (ii) of Rule 6(e)(3)(E). Additionally, the current Rule 6(e)(3)(C) does not have a subpart (i) and is not pertinent to the issue at hand. The current Rule 6(e)(3)(C) reads as follows: "[a]n attorney for the government may disclose any grand-jury matter to another federal grand jury." FED. R. CRIM. P. 6(e)(3)(C).

FED. R. CRIM. P. 6(e) (3) (E) (ii). It has long been the "settled rule" of the Sixth Circuit to require the defendant to demonstrate a "particularized need" for grand jury testimony before the defendant may have pretrial access thereto. *United States v. Tennyson*, 88 F.R.D. 119, 121 (E.D. Tenn. 1980) (citations omitted); see also *Short*, 671 F.2d at 186. The defendant's particularized need for disclosure must outweigh the interest in continued grand jury secrecy. A "generalized desire" to inspect the grand jury transcripts in the hopes that evidence beneficial to the defendant will be discovered does not satisfy the particularized need requirement. *Tennyson*, 88 F.R.D. at 121. Furthermore, the disclosure of grand jury proceedings is "not proper merely for discovery purposes." *Id.* It is within the trial judge's discretion whether to grant or deny requests for the disclosure of grand jury proceedings. *United States v. Levinson*, 405 F.2d 971, 981 (6th Cir. 1968).

Jamal's motion to dismiss all or part of the indictment is not presently before the court; however, a determination of whether disclosure is proper requires the consideration of whether the defendant has demonstrated 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) (ii). Jamal asserts that he has two grounds upon which to support a motion to dismiss the indictment that would qualify as a particularized need for the disclosure of evidence and testimony presented to the grand jury.

First, he claims that he needs transcripts of the grand jury proceedings to establish that there was no competent evidence

before the grand jury upon which a valid indictment could be returned. Pretrial motions to dismiss are governed by Rule 12 of the Federal Rules of Criminal Procedure. Rule 12(b)(2) provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without trial of the general issue." FED. R. CRIM. P. 12(b)(2). Furthermore, Rule 12(b)(3)(B) states that a motion "alleging a defect in the indictment" must be made before trial. FED. R. CRIM. P. 12(b)(3)(B). Upon close reading of Rule 12(b), courts have held that "a pretrial motion to dismiss the indictment cannot be based on a sufficiency of the evidence argument because such an argument raises factual questions embraced in the general issue." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987) (superceded by statute on other grounds); accord *United States v. Nukida*, 8 F.3d 665, 669-70 (9th Cir. 1993); *United States v. Levin* 973 F.2d 463, 468 n.2 (6th Cir. 1992) (recognizing that "during pretrial proceedings, a defendant may not properly challenge an indictment on the ground that it is not supported by adequate evidence"); *United States v. Powell*, 823 F.2d 996, 1000 (6th Cir. 1987) (quoting *U.S. v. Markey*, 693 F.2d 594, 596 (6th Cir. 1982)); see *Short*, 671 F.2d at 182-83.

In this case, Jamal has not asserted that the indictment was defective in any way. For instance, he does not assert that he has knowledge to indicate that a witness testified falsely or that the grand jury proceedings themselves were defective. He does not contend that the grand jury was biased or illegally constituted. Putting aside his allegations of selective and vindictive prosecution, Jamal has not pointed to any particular fact that

would support a pretrial motion to dismiss the grand jury indictment other than there was insufficient evidence upon which a valid indictment could be returned. In a similar case involving fraudulent income tax returns, the Sixth Circuit refused to reverse a district court's denial of a defendant's pretrial motion to dismiss the indictment and for disclosure of the grand jury transcripts where the record disclosed "nothing more than [defendant's] conclusion that there was no competent evidence before the Grand Jury." *United States v. Barnes*, 313 F.2d 325, 326 (6th Cir. 1963). The court finds that Jamal has shown no particular need for the grand jury transcripts that puts him in any position different than other defendant with respect to the secrecy of grand jury proceedings. The prosecution's evidence is best tested at trial, not in a preliminary proceeding. See *Short*, 671 F.2d at 183. Jamal's motion to dismiss the indictment would more properly be raised at trial as a Rule 29 motion for judgment of acquittal. That issue, however, is not presently before the court. The defendant has failed to demonstrate that a "ground may exist" to dismiss the indictment based on an insufficiency of evidence argument. Accordingly, his motion for the disclosure of the grand jury transcript is denied as to that ground.

Likewise, the court finds Jamal's second possible ground for a motion to dismiss the indictment to be without merit. Jamal asserts in his second argument that grounds exist to dismiss all or part of the indictment because he was subject to selective and vindictive prosecution. Jamal, however, has failed to demonstrate how any grand jury testimony would relate to a motion to dismiss

the indictment based on a defense of vindictive prosecution. Conclusory statements made in support of a motion to dismiss the indictment and a motion to inspect the grand jury minutes are not enough to establish a particularized need. *Levinson*, 405 F.2d at 981. Accordingly, the defendant's motion to inspect the grand jury transcript is denied as to the second ground.

CONCLUSION

In the absence of a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, the proceedings of the grand jury in this case shall be kept secret as required by Rule 6(e). Accordingly, the motion of the defendant is denied.

IT IS SO ORDERED this 14th day of January, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE