

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

THE UNITED STATES OF AMERICA

INDICTMENT: 04-CR-156A

-vs-

BHAVESH KAMDAR

Violation: 18 U.S.C. §§ 1341, 1957, 2

Defendant.

**DEFENDANT'S NOTICE OF MOTION
FOR PRODUCTION AND INSPECTION
OF GRAND JURY MINUTES**

Nature of Action: Mail Fraud and Money Laundering.

Moving Party: Defendant, Bhavesh Kamdar.

Directed To: The United States of America.

Date and Time: To be determined by the Court.

Place: U.S. District Court, Western District of New York
68 Court Street, Buffalo, New York 14202
(Chief District Judge Arcara)

Supporting Papers: Defendant's Memorandum of Law in Support of Motion for Production and Inspection of Grand Jury Minutes and accompanying Declaration of Michelle L. Merola.

Answering Papers: Defendant intends to file and serve reply papers. Under Local Rule 49.1, the government is required to file and serve opposing papers at least eight (8) business days prior to the return date as determined by the Court. Reply papers will then be filed and served at least three (3) business days before the return date.

Relief Requested: Production and inspection of Grand Jury Minutes by the Defendant or alternatively, *in camera* review by the Court.

Grounds for Relief: Federal Rules of Criminal Procedure 6.

Oral Argument: Requested.

Dated: Buffalo, New York
November 10, 2009

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Defendant.

**DEFENDANT'S MEMORANDUM OF LAW IN
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PRELIMINARY STATEMENT

Mr. Kamdar moves the Court for an order directing production and inspection of the grand jury testimony of the summarizing agent and the legal instructions provided to the May, 2003 grand jury that chose to indict. Alternatively, Mr. Kamdar requests that the Court conduct an *in camera* inspection of the above described grand jury material. As set forth below, grounds exist in this case to support the proposition that irregularities on the face of the Indictment and in the conduct of the grand jury proceedings may justify dismissal of the Indictment. Specifically, there is evidence to suggest possible prosecutorial misconduct as well as a violation of Mr. Kamdar's Fifth Amendment right to an independent and unbiased grand jury.

POINT I. THE COURT SHOULD ORDER PRODUCTION OF THE GRAND JURY MINUTES

While grand jury proceedings must generally remain secret,¹ the rule of secrecy is not absolute. Specifically, there are exceptions, such as those codified under Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)"), which have developed alongside the secrecy tradition.² To access grand jury materials under this rule, a defendant must show a "particularized need" that outweighs any justification for secrecy.³ In addition, under Rule 6(e), the defendant must

¹ *In re Petition of Craig*, 131 F.3d 99, 101 (2d Cir. 1997) (citation omitted); *see also In re Biaggi*, 478 F.2d 489, 491 (2d Cir. 1973) (quoting *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959)).

² *In re Petition of Craig*, 131 F.3d at 102; *see also In United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940) ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.") (citation omitted).

³ *See Dennis v. United States*, 384 U.S. 855, 868-72 (1966); *Pittsburgh Plate Glass*, 360 U.S. at 400.

also demonstrate that grounds “may exist to dismiss the indictment because of a matter that occurred before the grand jury.”

A. The Defendant has Shown “Particularized Need” for Disclosure of the Grand Jury Minutes

As a general matter, the Second Circuit follows the Supreme Court’s “highly flexible ‘particularized need’” test for parties seeking disclosure:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.⁴

Although there is no rigid set of prerequisites, the Second Circuit has identified the following non-exhaustive list of factors for a trial court’s consideration when confronted with these highly discretionary and fact-sensitive motions for disclosure: (1) the identity of the party seeking disclosure;⁵ (2) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (3) why disclosure is being sought in the particular case; (4) what specific information is being sought for disclosure; (5) how long ago the grand jury proceedings took place; (6) the current status of the principals of the grand jury proceedings and that of their families; (7) the extent to which the desired material — either permissibly or impermissibly — has been previously made public; (8) whether witnesses to the grand jury proceedings who might be

⁴ *In re Petition of Craig*, 131 F.3d at 104 n.5 (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)).

⁵ The Second Circuit noted in *Craig* that the identity of the party seeking disclosure should “carry great weight.” *Id.* at 106.

affected by disclosure are still alive; and (9) the additional need for maintaining secrecy in the particular case in question.⁶

In this case, these factors unequivocally support disclosing the requested grand jury material. For example, the request for disclosure is made by Mr. Kamdar, not a third-party who seeks information to support an unrelated litigation, proceeding or campaign. The defendant is already in possession of numerous grand jury transcripts which were produced as *Jencks* material prior to trial. Thus, at this juncture, the only information sought by the defendant is the testimony of the summarizing agent and the instructions that were provided to the jurors at the time of the vote. Although the Government may oppose this motion, it cannot credibly do so on the grounds that there is a particular need to maintain secrecy in this case since a full trial has been conducted at which more than twenty witnesses testified. Moreover, this is not the type of case that raises concern for the safety of witnesses and/or grand jurors. The grand jury proceedings took place over six years ago and the grand jurors involved no longer remain seated.

Most importantly, in this case, the disclosure is sought because of the irregularities that exist on the face of the Indictment and a course of conduct by the prosecution that calls into question the legitimacy of the Indictment. In particular, as discussed more fully in the next section, there is concrete (and undisputed) evidence that a key factual allegation in the Indictment is erroneous – the allegation that the Kamdars were not required to provide a personal guarantee.

⁶ *In re Petition of Craig*, 131 F.3d at 106.

B. There is Evidence of Irregularities and Improprieties in the Grand Jury Proceedings such that Dismissal May be Warranted

1. An Error in the Indictment as well as the Testimony of a Key Witness During Trial Suggests the Possibility of Prosecutorial Misconduct

Courts have limited supervisory authority over grand juries.⁷ Nonetheless, an Indictment is subject to dismissal on constitutional grounds “if prosecutorial misconduct has undermined the grand jury’s ability to make an informed and objective evaluation of the evidence presented to it.”⁸ In many cases, such as this one, an assessment of the validity of the Indictment requires inspection of the grand jury minutes.

In a similar case, the District Court for the District of Columbia granted the defendant’s motion for inspection of the grand jury minutes and instructions. In *United States v. Naegele*,⁹ the defendant who was charged with false declarations, sought production and inspection of grand jury minutes on the ground that the grand jury lacked proof of an essential element of the crime. Prior to trial, the government conceded that the grand jury was not presented with a signed declaration containing the allegedly false statement.¹⁰ Moreover, the case agent who testified before the grand jury did not disclose that there was no signature page.¹¹

⁷ *United States v. Williams*, 504 U.S. 36, 37-38, 56 (1992) (holding that the Court did not have authority to dismiss an indictment for failure to present exculpatory evidence).

⁸ *See United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 (9th Cir. 1983); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988) (internal quotation omitted) (holding that dismissal of an indictment for non-constitutional error is appropriate “if it is established that the violation substantially influenced the grand jury’s decision to indict” or if there is “grave doubt” that the decision is free from the substantial influence of such violations).

⁹ 474 F. Supp.2d 9, 10 (D.D.C. 2007).

¹⁰ *Id.* at 11.

¹¹ *Id.*

Therefore, the Court found that the defendant was entitled to the grand jury material to discover which counts may have been affected by the possible misconduct or misleading nature of the grand jury presentation.¹²

In Mr. Kamdar's case, as discussed more fully in the accompanying Declaration, the Indictment contains an unexplainable factual error. Specifically, the Indictment alleged that Mr. Kamdar falsely represented that he had to provide collateral *and a personal guarantee*. But, as the evidence at trial demonstrated, Mr. Kamdar did, in fact, have to provide a personal guarantee. That fact was clearly and unambiguously documented in the General Indemnity Agreement and has never been a disputed issue in this case. Nonetheless, the government's *de facto* decision maker, Mr. Kainz, was not asked any questions about collateral and personal guarantees in the grand jury. Nor was he shown a copy of the General Indemnity Agreement. Because this entire prosecution surrounds Mr. Kamdar's statements regarding his legal obligations to the surety, the Indictment's error regarding a fundamental allegation underlying the alleged criminality is suspicious and warrants further investigation.

2. Grand Jury Transcripts Already Disclosed Suggest Irregularities which may have Deprived the Defendant of the Right to be Indicted by an Independent and Unbiased Grand Jury

In this case, the prosecution has engaged in a course of conduct that calls into question the legitimacy of the Indictment. The Fifth Amendment requires that an Indictment issue only from "*an independent and unbiased grand jury*," and in *United States v. Leeper*,¹³ this Court found that this right had been violated. In that case, the government sought to remedy an error in the Indictment by obtaining a superseding indictment, but since the original grand jury

¹² *Id.* at 13.

¹³ 06-CR-58A, 2006 U.S. Dist. LEXIS 32147 (W.D.N.Y. May 22, 2006) (Arcara, Chief Judge).

had expired, the government had to present evidence to a new grand jury.¹⁴ Given the expediency with which a new Indictment was procured, this Court asked to see transcripts from the grand jury proceedings.¹⁵

A review of the transcripts in *Leeper* demonstrated significant problems in the proceedings. First, immediately after the new grand jury was assembled, it was informed that an earlier grand jury had already indicted the defendant and that its purpose was to fix a defect in the Indictment.¹⁶ The grand jury was also told that trial had begun, a petit jury had been impaneled, and that the original jury could not fix the defect because it had expired.¹⁷ Further, the prosecutor hurriedly ran through select portions of some of the testimony considered by the original grand jury, often providing summaries instead of quotations, and as such, becoming an unsworn witness, while the jury was misled into believing that it had been provided all of the testimony considered by the original grand jury.¹⁸ In conclusion, this Court found that the Fifth Amendment was violated in light of:

The haste of the proceeding, the jury's knowledge that another grand jury had already indicted the defendant, the prosecutors' assurances that the error was merely an "oversight" . . . the implication that the original grand jury would have fixed the error itself had it not expired, the immediacy with which the [new] grand jury was being asked to return the superseding indictment, and their knowledge that a petit judge had already been picked and the trial had started, all placed undue influence on the [new] grand jury to return the [] Indictment without fully considering the matter.¹⁹

¹⁴ *Id.* at *2-*3.

¹⁵ *Id.* at *3-*4.

¹⁶ *Id.* at *7.

¹⁷ *Id.*

¹⁸ *Id.* at *10.

¹⁹ *Id.* at *11.

This Court then turned to the remedy for such a violation and noted that an Indictment cannot be dismissed in the absence of a showing of prejudice to the defendant — specifically, that the violation had an effect on the grand jury’s decision to indict.²⁰ But, under these circumstances, this Court found that there was no doubt that the irregularity of the proceedings affected the grand jury’s decision to issue the superseding Indictment, and thus, the Court dismissed the Indictment.²¹

While the defense does not yet have available the instructions rendered to the grand jury, there is a pattern of irregularities which support this request. These irregularities are laid out in detail in the accompanying Declaration. To summarize, the witnesses were presented to the grand jury beginning in 2001, although the Indictment was not returned until 2004. Further, despite having had ample time to develop its case, the government’s theory of prosecution at trial was different than the theory set forth in the Indictment. Specifically, the theory that the government ended up relying upon — that Mr. Kamdar made misrepresentations regarding the “loss of use” of his assets — is nowhere to be found in the Indictment. Moreover, four different grand juries heard evidence in the case, despite the fact that several were sitting at the same time. And the grand jury that indicted the case, which was impaneled in May, 2003, heard only the testimony of a summarizing agent. The government sought an indictment from this grand jury despite the fact that another, active grand jury had heard evidence from at least four witnesses in the case.

These irregularities, taken together, lend support to defense’s belief that grounds may exist to dismiss the Indictment based on matters that occurred before the grand jury. Thus,

²⁰ *Id.* at *13-14 (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988)).

²¹ *Id.*

disclosure of the grand jury minutes may, as it did in *Leeper*, demonstrate a significant violation of Mr. Kamdar's right to be tried by an independent and unbiased grand jury, necessitating a dismissal of the Indictment.

CONCLUSION

Based on the foregoing, Defendant respectfully requests that this Court grant the instant motion.

Dated: November 10, 2009

HODGSON RUSS LLP

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Violation: 18 U.S.C. §§ 1341, 1957, 2

Defendant.

**DECLARATION IN SUPPORT OF MOTION TO
DISCLOSE THE GRAND JURY MINUTES**

MICHELLE L. MEROLA, under penalty of perjury and pursuant to 28 U.S.C. § 1746, declares the following to be true and correct.

1. I am an attorney with the firm of Hodgson Russ LLP, counsel for the defendant in this matter, Bhavesh Kamdar. I submit this Declaration in support of Mr. Kamdar's Motion to Disclose the Grand Jury Minutes.

2. Based on the significant irregularities which are revealed on the face of the Indictment as well as in the grand jury transcripts which have been provided, the defense believes that disclosure of the grand jury minutes in above-referenced matter are necessary to determine whether any significant rights have been violated, such that the Indictment should be dismissed.

A. **The timing and presentation of proof to the grand jury in this case raises concerns as to whether the defendant was Indicted by an independent and unbiased grand jury**

3. After a lengthy investigation, the government began to present evidence in this matter to the grand jury in 2001, but an Indictment was not returned against Mr. Kamdar until June, 2004.

4. The presentation of evidence continued for three years, while witnesses were presented to different grand juries. *See* Summary Chart, attached hereto as Exhibit A.

5. Specifically, witnesses testified before the grand jury over a two-year time frame — February, 2002 and April, 2004.

6. Throughout that time frame, witnesses were presented to concurrent grand juries.

7. For example, Anthony Nanula, John Lewyckyj, Joanne Garrison and Robert Larsen testified in July, 2002 before a grand jury that was impaneled in May, 2002.

8. However, there were witnesses that testified both before and after July, 2002, who were presented to a different grand jury which was impaneled in November, 2001.

9. Furthermore, additional witnesses testified in April, 2004 before a grand jury that was impaneled in November, 2003.

10. The Indictment itself was returned by yet another grand jury that was impaneled in May, 2003, which, according to Mr. Bruce, heard only the summary testimony of the case agent.

11. That grand jury was asked to vote on the case despite the fact that there was an active grand jury that had already heard live testimony from at least four witnesses in the case.

B. The Indictment contains an unexplainable factual error

12. The Indictment alleged that Mr. Kamdar falsely represented that he had to provide collateral *and personal guarantees*.

13. At the close of evidence, however, the government sought to excise the words “and personal guarantees” from the Indictment and the jury instructions because the government acknowledged that — despite the language in the Indictment — personal guarantees had been required of the defendant and his wife.

14. While the Court declined to allow this amendment, the clear factual error remains unexplained and calls into question the representations made to the grand jury by the case agent.

C. The testimony of Mr. Kainz during trial as well as the government’s last-minute change in its theory of criminality suggests the possibility of prosecutorial misconduct in the grand jury proceedings

15. During the grand jury testimony of Robert Kainz, the government never posed a single question about the key allegation in the Indictment — Mr. Kamdar’s alleged representation that he had to provide personal guarantees and collateral.

16. Nor did the government provide a copy of the General Indemnity Agreement to Mr. Kainz (or any other witness)¹ to determine whether he reviewed and understood the terms of the agreement before he recommended approval of the contract.

17. The government's failure to elicit such testimony suggests that at the time of his grand jury testimony, the government was well aware that Mr. Kainz could not provide favorable testimony on that point.

18. This inference is bolstered by the testimony that Mr. Kainz provided in the civil trial, where he testified that he reviewed and relied on the General Indemnity Agreement and, based on that, he knew that the only collateral that was provided was the collateral of the company. He further testified at that time that he understood that the surety required personal guarantees from the Careys and the Kamdars.

19. This testimony directly contradicts the key language in the Indictment and, therefore threatened to derail the government's case.

20. However, after meeting with Mr. Bruce for five to six hours in preparation for the criminal trial, Mr. Kainz reversed course and was able to testify at trial (consistent with the Indictment) that it was his understanding that the Kamdars were required to post their personal collateral to the surety.

21. The revisions to Mr. Kainz' testimony call into question the tactics of the prosecutor who was well aware that: (1) Mr. Kainz recommended approving the contract with

¹ During Mr. Carey's grand jury testimony he made reference to the General Indemnity Agreement, but was neither provided a copy nor allowed to explain the significance of the agreement.

ISS immediately after receiving the General Indemnity Agreement; (2) the General Indemnity Agreement specifically set forth the components of the agreement between ISS and AIG, including the requirement of personal guarantees and corporate collateral; and (3) Mr. Kainz had previously testified that he understood these facts.

22. Further, it is worth noting that the government's theory of prosecution at trial was dramatically different than the theory set forth in the Indictment.

23. Specifically, a significant portion of the Indictment is devoted to the allegation that Mr. Kamdar defrauded the State of New York by seeking payments in excess of an alleged contractual "cap."

24. However, in 2008, the Appellate Division of the Third Department of New York State ruled that there was no "cap" in the contract.

25. Regardless of this determination, the prosecutors continued to stand by the "cap" theory until the September 15, 2009 pretrial hearing, where AUSA Anthony Bruce agreed that the government would not argue that it was improper to seek payments in excess of the cap.

26. The prosecution amended its theory yet again when it rendered its closing argument, even though this theory was not presented to the grand jury.

27. This last-minute change was in response to this Court's observation that the General Indemnity Agreement contained a U.C.C. provision which might support the defendant's contention that the agreement was a secured interest in property and, therefore, would satisfy the definition of collateral.

28. To remedy this potential problem, in closing argument, AUSA Bruce claimed that Mr. Kamdar's true misstatement was not the use of the word "collateral," but his representation that he would "lose use of his personal assets."

29. Prior to that point, the government had not made this argument and the "loss of use" allegation was not included in the Indictment. Nor do the grand jury transcripts reveal questions or evidence to support the theory.

Dated: November 10, 2009

s/Michelle L. Merola
Michelle L. Merola

EXHIBIT A

VARIOUS DATES OF GRAND GURRY PROCEEDINGS

Govt Exhibit No.	Name of Witness	Date Grand		GRAND JURY NUMBER	Date of Testimony	Time Commenced	Time Concluded	No. Of Pages	Date of Certification	Date Certification Signed	
		July	Impeneted								
03519A	John Tillman	Nov-01		1	February 13, 2002	10:30 AM		37	February 13, 2001	March 12, 2002	
03507A	Martin Depalo	Nov-01			February 13, 2002	11:30 AM		27	February 13, 2001	March 12, 2002	
13510A	Robert Kainz	Nov-01			February 13, 2002	12:50 PM	2:25 PM	25	February 13, 2002	March 12, 2002	
13500A	Arther Applegate	Nov-01			February 13, 2002	4:13 PM	4:27 PM	14	February 13, 2002	March 11, 2002	
03505A	Thomas Carey	Nov-01			March 20, 2002	2:24 PM	3:00 PM	31	March 20, 2002	May 17, 2002	
13505B	Thomas Carey	Nov-01			May 8, 2002	3:30 PM		8	May 8, 2002	July 23, 2002	
03517A	Joseph Seymour	Nov-01			August 21, 2002	9:40 AM		19	August 21, 2002	August 21, 2002	
03513A	Jerry Lipfield	Nov-01			August 21, 2002	10:10 AM		23	August 21, 2002	August 21, 2002	
03506A	John Dalton	Nov-01			August 21, 2002	10:50 AM		13	August 21, 2002	August 21, 2002	
13518A	Wayne Sickler	Nov-01			August 21, 2002	11:05 AM		11	August 21, 2002	August 21, 2002	
13503A	Donald Bishop	Nov-01		October 9, 2002	9:50 AM		35	October 9, 2001	November 15, 2002		
13515A	William O'Connor	Nov-01		October 9, 2002	11:00 AM		37	October 9, 2001	November 15, 2002		
03514A	Anthony Nanula	May-02		2	July 24, 2002	11:25 AM	12:08 PM	35	July 24, 2002	August 14, 2002	
03512A	John Lewyckyj	May-02			July 24, 2002	12:28 PM	1:11 PM	22	July 24, 2002	August 14, 2002	
13508A	Joann Garrison	May-02			July 24, 2002	2:10 PM	2:41 PM	21	July 24, 2002	August 14, 2002	
13511A	Robert Larson	May-02		3	July 24, 2002	2:43 PM	3:05 PM	18	July 24, 2002	August 14, 2001	
NO WITNESS											
Only testimony from case agent presented and grand jury returned indictment on JUNE 30 2004											
13501A	Caprice Atterbury	Nov-03		4	April 22, 2004	10:00 AM		28	April 22, 2004	April 22, 2004	
13520A	Jon Williams	Nov-03			April 22, 2004	10:40 AM		25	April 22, 2004	April 22, 2004	
13502A	Joann Beaver	Nov-03			April 22, 2004	11:55 AM		16	April 22, 2004	April 22, 2004	
13516A	Greg Photiadis	Nov-03			April 22, 2004	12:15 PM		29	April 22, 2004	April 22, 2004	

Incorrect Dates?

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

THE UNITED STATES OF AMERICA

Plaintiff

INDICTMENT: 04-CR-156A

-vs-

BHAVESH KAMDAR

Violation: 18 U.S.C. §§ 1341, 1957, 2

Defendant.

CERTIFICATE OF SERVICE

I certify that on November 10, 2009, I caused Defendant's Notice of Motion for Production and Inspection of Grand Jury Minutes and accompanying Memorandum of Law and Declaration of Michelle L. Merola, to be served by filing these documents with the CM/ECF system, which electronically served same on:

Anthony M. Bruce, Esq.
Assistant United States Attorney
United States Attorney's Office
Federal Centre
138 Delaware Avenue
Buffalo, NY 14202

s/Michelle L. Merola
Michelle L. Merola