

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

United States of America

v.

Case No. 18-cr-98-01-PB
Opinion No. 2021 DNH 050

Joseph A. Foistner

MEMORANDUM AND ORDER

Joseph Foistner was charged in an eleven-count superseding indictment with bank fraud, wire fraud, and other crimes arising out of a series of loan applications. Foistner seeks dismissal of the indictment in its entirety on the grounds of prosecutorial misconduct before the grand jury and vindictive prosecution. He also argues that the indictment is defective with respect to the bank fraud charges. The government objects. For the following reasons, I deny Foistner's motion.

I. BACKGROUND

A. Superseding Indictment

Foistner was an attorney licensed in Massachusetts who owned and managed "The Law Office of Joseph A. Foistner, Esquire & Associates, P.C." from 2001 until 2017. He was first indicted in June 2018. A grand jury issued a superseding indictment in October 2018, charging Foistner with eleven counts in connection with a series of loans he obtained, or sought to obtain, from

various lenders between 2015 and 2017, as well as subsequent false statements he made in his Chapter 7 bankruptcy proceedings.¹ Foistner is alleged to have defrauded, or attempted to defraud, four financial institutions into lending him or his law office millions of dollars by providing false and fraudulent information about his law office's income, his personal income, and his personal finances.² He also allegedly defrauded another bank to loan his wife almost \$400,000 by misrepresenting his wife's personal income and finances. In the course of his subsequent bankruptcy proceedings, Foistner allegedly failed to disclose that the proceeds of one of the loans were in a bank account that he controlled. He is also alleged to have made false statements under oath about the use of those proceeds as the down payment on the purchase of real property and about his connection to that property. See Superseding Indictment, Doc. No. 17.

The government's theory is that the false information Foistner provided in connection with the loan applications caused the lenders to believe that his law office was a

¹ Specifically, Foistner is charged with six counts of bank fraud, one count of wire fraud, one count of money laundering, one count of making a false bankruptcy declaration, and two counts of making a false bankruptcy oath.

² Three banks loaned to Foistner or his law office a total of \$3.3 million. One loan he sought on behalf of his law office, in the amount of \$4.5 million, did not close.

lucrative, cash-producing business that would allow him to make monthly payments on the loans. In reality, the government argues, the only clients of his law office were business entities that Foistner himself controlled, which never paid him money for his legal work. Instead, he invoiced his entities for legal work and then treated those notes receivable as "accrued income" when preparing his federal income tax returns. The government takes no position on the propriety of this accounting method for tax reporting purposes, but it argues that Foistner realized virtually no income from his law practice, contrary to what he led his lenders to believe.

B. Foistner's Allegations

Foistner maintains that he is a victim of a multi-decade conspiracy involving, among others, his former business partner Antonia Shelzi, his former attorney James Laboe, Assistant U.S. Trustee ("AUST") Geraldine Karonis, Chapter 7 Trustees Stephen Notinger, Deborah Notinger, and Victor Dahar, and New Hampshire Superior Court Judge David Ruoff. Foistner alleges that some of those conspirators "hired" now-retired Assistant U.S. Attorney ("AUSA") Robert Kinsella to bring charges against Foistner in this case to eliminate their financial exposures resulting from ongoing civil litigation initiated by Foistner. For purposes of this motion, it suffices to give a brief overview of the alleged conspiracy.

Foistner was a real estate developer who started a development project in 1985 in New Boston, New Hampshire, called Waldorf Estates. Since then, Foistner or his business entities have been involved in over twenty lawsuits that directly or indirectly concerned Waldorf Estates. Foistner contends that Attorney Laboe's law firm, Orr & Reno, P.A., represented Foistner and his partner Shelzi in some of those lawsuits between 1995 and 2005. Shelzi was eventually forced out of the business venture, allegedly on account of criminal activity. Laboe subsequently represented Shelzi in lawsuits where Foistner or one of his entities was an adverse party. In those lawsuits, several state judges, including Judge Ruoff, rejected Foistner's argument that Attorney Laboe had a conflict of interest and should be disqualified from representing Shelzi because Orr & Reno had previously represented Foistner. Foistner claimed that Judge Ruoff conspired with Laboe, so he filed judicial misconduct and criminal complaints against him, to no avail.

Meanwhile, in 1999, one of the business entities controlled by Foistner, JFL Enterprises, filed for bankruptcy protection. Foistner alleges that the Notingers, who served as Chapter 7 trustees under the supervision of AUST Karonis, stole \$465,000 from the bankruptcy estate in the course of that proceeding. Foistner's resulting criminal complaints against the Notingers

and Karonis to the U.S. Attorney's Office in New Hampshire and other law enforcement agencies went unheeded.

After Foistner filed for bankruptcy protection in 2017, Dahar, who was appointed as Chapter 7 trustee, allegedly squandered the estate's assets. In the meantime, AUST Karonis permitted the Notingers and Attorney Laboe to participate in the bankruptcy proceedings, apparently as representatives of Foistner's creditors. Laboe purportedly used that opportunity to spread "lies" about Foistner's tax filings and loan applications, using documents that Foistner maintains are either protected by the attorney-client privilege or forgeries made by Shelzi. Laboe then allegedly passed those same documents onto AUSA Kinsella, who began investigating Foistner.

Shortly before his indictment, Foistner filed another criminal complaint against AUST Karonis, which he claims the U.S. Attorney's Office declined to investigate. He also delivered over 500 documents to AUSA Kinsella that Foistner believes contain exculpatory information, including IRS audit letters and other tax records showing that Foistner correctly reported his income on federal tax filings over a period of sixteen years. Foistner claims that AUSA Kinsella did not provide those documents to the grand jury and instead used documents that he had illegally obtained from Attorney Laboe. According to Foistner, Kinsella became the "Manager" of the

criminal conspiracy against him, "employed by Laboe" and others to "destroy" Foistner. Doc. No. 63 at 2, 21.

II. STANDARD OF REVIEW

Foistner's motion does not cite the rule under which he is moving, but I assume it is [Federal Rule of Criminal Procedure 12\(b\)](#), which provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." With respect to Foistner's claims of prosecutorial misconduct and vindictive prosecution, the applicable rule is Rule 12(b)(3)(A), which allows a defendant to make a motion alleging "a defect in instituting the prosecution," including "selective or vindictive prosecution." [Fed. R. Crim. P. 12\(b\)\(3\)\(A\)](#). His claim that certain counts of the indictment are defective invokes Rule 12(b)(3)(B), which provides for pretrial motions alleging "a defect in the indictment," including "lack of specificity" and "failure to state an offense." [Fed. R. Crim. P. 12\(b\)\(3\)\(B\)](#).

When considering a motion to dismiss an indictment, the court must accept the allegations in the indictment as true and construe all facts in the light most favorable to the government. [United States v. Young](#), 694 F. Supp. 2d 25, 27 (D. Me. 2010); see [Boyce Motor Lines, Inc. v. United States](#), 342 U.S. 337, 343 n.16 (1952). "A court should exercise its

authority to dismiss cautiously, since to dismiss an indictment 'directly encroaches upon the fundamental role of the grand jury.'" [United States v. Thomas](#), 519 F. Supp. 2d 141, 143-44 (D. Me. 2007) (quoting [Whitehouse v. U.S. Dist. Court](#), 53 F.3d 1349, 1360 (1st Cir. 1995)).

A [Rule 12\(b\)](#) motion alleging a defect in an indictment does not "provide[] an occasion to force the government to defend the sufficiency of its evidence to be marshalled in support of proving the charged offense." [United States v. Rodríguez-Rivera](#), 918 F.3d 32, 35 (1st Cir. 2019). "[T]he question is not whether the government has presented enough evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense." [United States v. Stepanets](#), 879 F.3d 367, 372 (1st Cir. 2018) (internal quotation marks omitted).

III. ANALYSIS

Foistner seeks dismissal of the indictment in its entirety on two grounds: prosecutorial misconduct before the grand jury and vindictive prosecution. He also argues that the indictment is defective with respect to the bank fraud counts. I examine these arguments in turn and conclude that they have no merit.

A. Prosecutorial Misconduct

Foistner argues that prosecutorial misconduct resulted in material misrepresentations and omissions in the evidence

presented to the grand jury. Specifically, Foistner faults AUSA Kinsella for allegedly relying upon illegally obtained evidence from Attorney Laboe and failing to disclose to the grand jury evidence that Foistner considers exculpatory. The omitted evidence included IRS audit letters showing that Foistner's tax filings for the relevant time period were accepted by the IRS without changes, as well as Foistner's criminal complaints against AUST Karonis and others concerning the theft of assets from the bankruptcy estate of his entity JFL Enterprises.

Dismissal of an indictment for prosecutorial misconduct is an extraordinary remedy. [United States v. Laboy](#), 909 F.2d 581, 585 (1st Cir. 1990). It is "appropriate only in cases of 'serious and blatant prosecutorial misconduct that distorts the integrity of the judicial process.'" [United States v. Font-Ramírez](#), 944 F.2d 42, 46 (1st Cir. 1991) (quoting [United States v. Giorgi](#), 840 F.2d 1022, 1030 (1st Cir. 1988)). To succeed on a motion to dismiss an indictment on this basis, the defendant must first show that prosecutorial misconduct occurred. [Bank of Nova Scotia v. United States](#), 487 U.S. 250, 260-61 (1988). If that showing is made, the defendant must then establish "that the violation substantially influenced the grand jury's decision to indict, or [that] there is grave doubt that the decision to indict was free from the substantial influence of such violations." [Id.](#) at 256 (internal quotation marks omitted).

This “standard of prejudice is a high one.” [In re United States](#), 441 F.3d 44, 60 (1st Cir. 2006).

Foistner argues that AUSA Kinsella’s failure to present exculpatory evidence to the grand jury amounts to prosecutorial misconduct warranting dismissal of the indictment. This argument runs headlong into Supreme Court precedent. In [United States v. Williams](#), the Supreme Court held that a court has no authority to dismiss an indictment on the ground that the government failed to disclose to the grand jury “substantial exculpatory evidence” in its possession. [See](#) 504 U.S. 36, 37-38, 45-47 (1992). In that case, the Tenth Circuit had affirmed the district court’s dismissal of an indictment because the prosecutor failed to present to the grand jury substantial exculpatory evidence of which he was personally aware, in violation of a Tenth Circuit rule requiring such disclosure. [See id. at 39](#). The Supreme Court reversed, holding that the district court had improperly used its supervisory judicial powers. The Court reasoned that a court may use its judicial authority to dismiss an indictment for prosecutorial misconduct before the grand jury only “where that misconduct amounts to a violation of one of those few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury’s functions.” [Id. at 46](#) (internal quotation marks omitted). A requirement to disclose exculpatory

evidence to the grand jury was not one of those rules. See id. at 46-47.

Central to the Court's analysis in Williams was the grand jury's unique role in our constitutional system. The Court described the grand jury as "a constitutional fixture in its own right" that "belongs to no branch of the institutional Government." Id. at 47 (internal quotation marks omitted). Because it functions independently of the judiciary, courts may not invoke their supervisory power to reshape "the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself." Id. at 50. The Supreme Court explained that a grand jury is not convened to assess guilt or innocence but only to determine whether criminal proceedings should be instituted. Id. at 51. Because "neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented," the Court reasoned that "[i]mposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system." Id. at 52.

Foistner relies on an excerpt from an internal manual for Department of Justice ("DOJ") prosecutors known as the "Justice Manual" to argue that the Williams case was "overruled" by a DOJ

policy requiring a prosecutor to disclose to the grand jury when he is "personally aware of substantial evidence that directly negates the guilt of a subject of the investigation." Justice Manual, § 9-11.233. This argument suffers from at least two fatal defects.

First, the Supreme Court in Williams paid no heed to a virtually identical DOJ policy. See [504 U.S. at 69-70](#) (Stevens, J., dissenting) (quoting U.S. Attorneys' Manual, ¶ 9-11.233 at 88 (1988)). As the Seventh Circuit observed, "[t]he government in Williams had failed to present the exculpatory evidence despite an internal Department of Justice policy, similar to that at issue here, requiring it to do so." [United States v. Gillespie](#), [974 F.2d 796, 800 \(7th Cir. 1992\)](#). Regardless of that policy, the Supreme Court held that a prosecutor's failure to present exculpatory evidence to the grand jury will not cause an indictment to be dismissed. See [Williams](#), [504 U.S. at 51-52](#).

Second, the Justice Manual provides internal DOJ guidance to prosecutors that can neither overrule Supreme Court precedent nor confer substantive rights on criminal defendants. See [United States v. Lopez-Matias](#), [522 F.3d 150, 155-56 \(1st Cir. 2008\)](#) (holding that the U.S. Attorneys' Manual, predecessor to the Justice Manual, did not give rise to substantive rights and that its violation was insufficient to give rise to sanctions). Numerous courts have rejected attempts to circumvent Williams

based on alleged violations of the Justice Manual. See [United States v. Gross](#), 40 F. App'x 397, 398 (9th Cir. 2002) (holding that failure to disclose exculpatory evidence to the grand jury was not a basis to dismiss the indictment because defendant "had no constitutional right to have exculpatory evidence presented to the grand jury, and the U.S. Attorney's Manual did not create enforceable rights") (citations omitted); [United States v. Myers](#), 123 F.3d 350, 355-56 (6th Cir. 1997) (holding that prosecutor's failure to follow the U.S. Attorneys' Manual did not create a basis for suppressing grand jury testimony); [Gillespie](#), 974 F.2d at 800-01 (same). Indeed, the Justice Manual itself notes that a failure to follow the DOJ's policy in this regard "should not result in dismissal of an indictment." § 9-11.233. Thus, assuming, without deciding, that the evidence Foistner delivered to AUSA Kinsella was in fact exculpatory, the government's failure to follow its own internal policy on presenting such evidence to the grand jury does not justify dismissing the indictment.³

³ Foistner also argues that the government has failed to disclose material exculpatory evidence in violation of [Brady v. Maryland](#), 373 U.S. 83, 87-88 (1963). [Brady](#) material must be disclosed in a timely manner, [United States v. Sepulveda](#), 15 F.3d 1161, 1178 (1st Cir. 1993), which, under the local rules of this district, is at least twenty-one days before trial. See LCrR 16.1(d). Considering that the trial is not scheduled to begin until May 2021, the government has not yet run afoul of [Brady](#). In any event, except in rare and extraordinary circumstances, the customary remedy for a delay in disclosing [Brady](#) material is a

Foistner's argument that the indictment should be quashed because the prosecutor presented improperly obtained documents to the grand jury fares no better. Foistner has presented no evidence that AUSA Kinsella showed the grand jury any documents he may have obtained from Attorney Laboe. The government has represented that no documents received from Attorney Laboe or Orr & Reno were before the grand jury. Because Foistner has failed to refute this representation, I must accept it as true for purposes of this motion.

Even if such evidence had been presented, however, Foistner has not established that he is entitled to the relief he seeks. To the extent Foistner argues that the Laboe documents included forgeries, there is no evidence that the government was aware they were fake or that those documents prejudiced the grand jury. See [United States v. Reyes-Echevarria](#), 345 F.3d 1, 5 (1st Cir. 2003) (rejecting claim of prosecutorial misconduct before the grand jury for lack of prejudice where the defendant failed to establish that the challenged evidence was false and that the prosecutor knew it was false).⁴

continuance, not dismissal of the indictment. See [United States v. Mathur](#), 624 F.3d 498, 506 (1st Cir. 2010).

⁴ Relying on the Ninth Circuit's decision in [United States v. Basurto](#), 497 F.2d 781 (9th Cir. 1974), Foistner also argues that the indictment violated due process because the government knew it relied on falsified evidence. [Basurto](#) held that the due process clause "is violated when a defendant has to stand trial

To the extent Foistner argues that the Laboe documents were illegally obtained, dismissal of the indictment is not an appropriate remedy. The Supreme Court has held that “[a]n indictment returned by a legally constituted and unbiased grand jury . . ., if valid on its face, is enough to call for trial of the charge on the merits.” [Costello v. United States](#), 350 U.S. 359, 363 (1956). “[T]he mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment,” and . . . ‘a challenge to the reliability or competence of the evidence presented to the grand jury’ will not be heard.” [Williams](#), 504 U.S. at 54 (quoting [Bank of Nova Scotia](#), 487 U.S. at 261). The Supreme Court’s reluctance to examine the quality or sufficiency of the evidence presented to a grand jury extends even to unconstitutionally obtained evidence. See [United States v. Calandra](#), 414 U.S. 338, 344-45 (1974) (stating that “an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on

on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.” [Id.](#) at 785. The First Circuit had declined to endorse the Ninth Circuit’s holding in [Basurto](#) on several occasions. See [United States v. Mangual-Corchado](#), 139 F.3d 34, 41 (1st Cir. 1998) (collecting cases). But even if [Basurto](#) were the law in this circuit, Foistner’s claim would fail because there is no evidence suggesting either that the government knew the Laboe documents were falsified or that those documents were sufficiently material to require dismissing the indictment.

the basis of . . . information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination") (citations omitted); [United States v. Blue](#), 384 U.S. 251, 255 (1966) ("Our numerous precedents ordering the exclusion of . . . illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether."). Accordingly, even if the grand jury examined illegally obtained evidence, dismissing the indictment is not warranted. If the government attempts to introduce such evidence at trial, however, Foistner may move to suppress.

B. Vindictive Prosecution

Foistner alleges that Attorney Laboe and other conspirators hired AUSA Kinsella to bring charges against him, either as an act of revenge or to prevent Foistner from continuing to litigate civil cases against them. There is not a shred of evidence in the record to support this claim.

Federal prosecutors enjoy substantial discretion in making decisions on when to prosecute and when not to do so, and their decisions are entitled to a presumption of regularity. [United States v. Lewis](#), 517 F.3d 20, 25 (1st Cir. 2008). To overcome that presumption, a defendant alleging that he is a victim of vindictive prosecution must either (1) produce evidence showing actual vindictiveness, or (2) demonstrate "circumstances that reveal a sufficient likelihood of vindictiveness to warrant a

presumption of vindictiveness.” [United States v. Jenkins](#), 537 F.3d 1, 3 (1st Cir. 2008). “If the defendant creates a presumption of vindictiveness the burden shifts to the government to show that legitimate reasons exist for the prosecution.” [United States v. Lanoue](#), 137 F.3d 656, 664 (1st Cir. 1998). Personal vindictiveness on the part of a prosecutor can sustain a claim of vindictive prosecution. [United States v. Bourque](#), 541 F.2d 290, 293 (1st Cir. 1976).

Foistner has neither produced evidence of actual vindictiveness on the part of AUSA Kinsella nor demonstrated that the circumstances of his prosecution give rise to a likelihood of vindictiveness. Whatever may be said of Foistner’s complaints about the conduct of the bankruptcy trustees or Attorney Laboe, the record before me does not suggest that either AUSA Kinsella or anyone else at the U.S. Attorney’s Office acted out of vindictiveness toward Foistner or participated in a conspiracy against him. Accordingly, his vindictive prosecution claim has no merit.⁵

⁵ Foistner also mentions, but does not develop, a claim of selective prosecution. That claim fails because Foistner has not demonstrated that he was singled out for prosecution “while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him.” [United States v. Penagaricano-Soler](#), 911 F.2d 833, 837 (1st Cir. 1990) (internal quotation marks omitted). Although he alludes to the government’s failure to prosecute AUST Karonis and other alleged conspirators, the

C. Defects in the Indictment

Foistner claims that the indictment is defective with respect to the bank fraud charges. His principal argument is that the government's representation to this court that it does not intend to show at trial that Foistner lied on his federal income tax returns renders the indictment deficient with respect to its allegations of fraud.

There are two constitutional requirements for an indictment: it must set forth the elements of the offense charged in a manner that fairly alerts the defendant to what he is facing, and it must show the defendant to what extent he may plead double jeopardy in any future prosecution for the same offense. [United States v. Resendiz-Ponce](#), 549 U.S. 102, 108 (2007). The Federal Rules of Criminal Procedure effect these guarantees in part through the requirement that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." [Fed. R. Crim. P. 7\(c\)\(1\)](#). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute

crimes they allegedly committed (theft and criminal conspiracy) are not similar to the charges against Foistner.

the offense intended to be punished.” [Hamling v. United States](#), 418 U.S. 87, 117 (1974) (internal quotation marks omitted). If those requirements are met, then “an indictment, valid on its face, returned by a legally constituted grand jury, calls for a trial on the merits.” [United States v. Rodriguez](#), 738 F.2d 13, 16 (1st Cir. 1984).

Foistner concedes that the indictment sets forth the charged elements of bank fraud in a manner that accurately reflects the relevant statutory language. [Compare](#) Doc. No. 17, with 18 U.S.C. § 1344. He does not argue that the statutory language fails to convey the elements of the offense clearly or fully. Instead, he takes issue with the indictment’s allegation that he provided “false and fraudulent information about his law office’s income production, his personal income, and his personal finances.” Doc. No. 17 at 2. Foistner argues that this allegation was nullified by the government’s representation that it does not intend to show that he falsified his federal income tax returns. But the two are not mutually exclusive. Even if it concedes that Foistner accurately reported his income to the IRS, the government could still show that Foistner misrepresented his income and finances to his lenders. For example, the government could show, as it has argued, that Foistner misrepresented that his law office was a cash-producing business by failing to disclose that the notes receivable that

formed the basis of his reported income came from entities that he controlled or that he had no intention of collecting on those notes. Simply put, the government need not establish tax fraud to prove bank fraud, and the indictment does not allege otherwise.

Foistner also argues that he could not have misrepresented his income to the banks because a bank loan officer is the only individual who can calculate income on a loan application. This amounts to an attack on the sufficiency of the government's evidence, rather than the allegations in the indictment. "At the indictment stage, the government need not 'show,' but merely must allege, the required elements" of the offense. [United States v. Stewart](#), 744 F.3d 17, 21 (1st Cir. 2014). It has done so here. Foistner is free to present the role of loan officers as a theory of defense at trial, but it is not a basis for dismissing the charges of bank fraud.⁶

⁶ The same is true with respect to Foistner's argument that the statements which form the basis of the bankruptcy fraud charges are all true and correct. These are disputed facts to be resolved at trial.

IV. CONCLUSION

For the foregoing reasons, I deny Foistner's motion to dismiss the indictment (Doc. No. 63).

SO ORDERED.

/s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

March 10, 2021

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