

ORIGINAL
C. J. W. (m/c)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

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FILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION
2014 JUN -5 AM 8:32
CLERK OF COURT

UNITED STATES OF AMERICA §
v. §
RICHARD MICHAEL SIMKANIN §

CRIMINAL NO. 4:03-188-A

**DEFENDANT'S MOTION TO DISMISS THE INDICTMENT
FOR FAILURE TO COMPLY WITH RULE 6(f)**

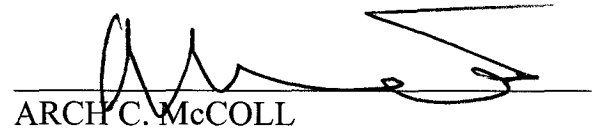
COMES NOW, the Defendant RICHARD MICHAEL SIMKANIN, ("Simkanin") by and through his attorney of record, Arch C. McColl, III, and files this Motion to Dismiss the Indictment for Failure to Comply with Rule 6(f) and for cause would show as follows:

1. **Rule 6(f)** - The federal rules of criminal procedure require that the Indictment be returned in open court and that was not done. Even though the indictment recites words to that effect, that presumption of regularity must fall in face of actual factual evidence (attached, Exhibit 1), which is the affidavit of an assistant to Counsel who checked with the Clerk of Judge Bliell and confirmed that the Indictment was not returned in open court.

2. **Mandatory** - Rule 6(f) is mandatory and is a violation of Due Process when it is not done because it is the way of ensuring that the Grand Jury heard all the necessary factual elements to find probable cause on each of the counts in the Indictment that is returned against a defendant.

WHEREFORE PREMISES CONSIDERED, the Defendant respectfully prays that this Motion be, in all things, granted and that the Indictment in this case be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Arch C. McColl', is written over a horizontal line. The signature is stylized with a large initial 'A' and a long, sweeping tail.

ARCH C. McCOLL

State Bar Number: 13431800

McCull & McCulloch

2000 Thanksgiving Tower

1601 Elm Street

Dallas, Texas 75201

(214) 979-0999

(214) 979-9090 Facsimile

AFFIDAVIT

STATE OF TEXAS §

§

COUNTY OF Tarrant §

My name is Willie Voncille Malatesta. I am over 21 years of age. I have not been convicted of a felony or misdemeanor involving dishonesty. I have personal knowledge of the facts herein and they are true and correct.

I, Willie Voncille Malatesta, do hereby affirm the information below happened on December 29, 2003 at approximately 9:30a.m.

I arrived at Magistrate Judge Bliell's office to request a copy of the transcripts for December 17, 2003 court proceedings. I was greeted by Rebecca Fitzhugh, who said she worked for Judge Bliell for 20 years. She told me there were only 2 cases that went before Judge Bliell on December the 17th, a "USA v. Solomon CR-318-y" and "USA v. Brunson CR-254-A", and asked "which one did I want?" I told her I needed the entire day's proceedings, regardless of what case was before the judge. She asked me why I wanted this so that she could better help me locate what I was looking for. I told her I needed the entire day's proceedings and that I was particularly looking for the indictments that were read by Judge Bliell. She said that Judge Bliell does not read indictments in open court. So I told her to just give me whatever she had for Judge Bliell's court recording for that particular day. She said it would cost me, and I told her I had a hundred dollar bill. She said she doesn't have change and pointed me in the direction of a bank, and said that she would have the tape ready for when I got back.

I got back to Judge Bliell's office at 10:10am, and Ms. Fitzhugh had the tape ready for me. She said she just doesn't understand why I wanted that tape, I told her again that it was about Grand Jury Indictments for that day, and Ms Fitzhugh said that Judge Bliell probably signed the indictment, but that if I wanted to further investigate the information, to call the U.S. Attorney's office at 817-252-5200 and ask who was the court reporter who was present for the GJ returns on December 17th.

I then called the number that I was given 817-252-5200 and asked for the court reporter who was present for the GJ returns for December 17th and Mindy Miller

Exhibit 1

said that all Grand Jury indictments are confidential information according to 6E rules, 18 or 21, and are not read in open court until the person is arraigned.

After inquiring at the judge's office and reviewing the tape that was provided, I was unable to determine if any indictment was returned in open court against Richard Simkanin that on December 17, 2003.

Signed under penalties of perjury according to applicable federal statutory law.

Willie Voncille Malatesta

Willie Voncille Malatesta

State of Texas

County of Tarrant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this day personally appeared Willie Voncille Malatesta known to me or proved to me to be the person(s) whose name are subscribed to the foregoing instrument, and acknowledged to me that he (they) executed the same under penalties of perjury according to applicable federal statutory law.

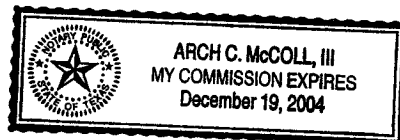
Affiant(s) are: personally known to me; or have produced identification:

ID#: PP. 208614525

Given under my hand and seal this 4th day of January, 2004



Arch C. McColl
Notary Public for the State of Texas



CERTIFICATE OF SERVICE

I, ARCH C. McCOLL, III do hereby certify that on the 5th day of January, 2004, a true and correct copy of Defendant's Motion to Dismiss the for Failure to Comply with Rule 6(f) has been hand delivered to David Jarvis, Assistant U.S. Attorney for the Northern District of Texas, Fort Worth Division, Burnett Plaza, Ste. 1700, 801 Cherry Street, Fort Worth, Texas 76102-6882.



ARCH C. McCOLL, III

CERTIFICATE OF CONFERENCE

I, ARCH C. McCOLL, III, do hereby certify that on the 5th day of January, 2004, I was (able) (unable) to communicate with David Jarvis, the Assistant U.S. Attorney for the Northern District of Texas, Fort Worth Division, regarding the Defendant's Motion to Dismiss the for Failure to Comply with Rule 6(f).



ARCH C. McCOLL, III