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Expert Analysis

# Grand Jury Witness Access To Testimony Transcripts

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Under the Federal Rules of Criminal Procedure, a court may authorize disclosure of a grand jury transcript in connection with a judicial proceeding "at a time, in a manner, and subject to any other conditions that it directs."[1] The Supreme Court has held that a party seeking grand jury transcripts under these rules must show a "particularized need" that outweighs the strong policy of protecting grand jury secrecy. "Parties seeking grand jury transcripts under Rule 6(e)(3) 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."[2]

In *In re: Grand Jury*,[3] the U.S. Court of Appeals for the First Circuit considered these rules in deciding whether a grand jury witness was entitled to see the transcript of his prior testimony. In May 2008, the government issued a subpoena seeking the appellant's testimony before a federal grand jury sitting in the District of Massachusetts. The appellant indicated through his attorney his intention of refusing to testify and asserting his Fifth Amendment privilege. In response, the government obtained an order granting the witness use immunity and compelling him to testify.

The following month, the appellant, a non-target, testified before the grand jury for approximately three hours on a series of complex events and documents. The examination was conducted by three assistant U.S. attorneys simultaneously. Repeatedly, the government attorneys warned the witness that the use immunity order did not protect him from a perjury prosecution. In addition, the assistants asked repetitive questions, suggested inconsistency in the testimony, and "verbally abused" the appellant.[4]

> Prior case law focused on instances in which the witnesses sought copies of the transcripts as opposed to an opportunity to review the transcripts.

The appellant's testimony was continued to a later date and in the interim he sought access to the transcript of his earlier testimony. Specifically, he sought to review the transcript with his attorney at the U.S. Attorney's office or a similar location in advance of his second day of testimony. The government declined his request, and the appellant filed an emergency motion for access under Federal Rule of Criminal Procedure 6(e)(3)(E)(i).

In support of his motion, the appellant cited *In re Grand Jury*,[5] a 2007 decision from the U.S. Court of Appeals for the District of Columbia. He argued that the district court should follow that federal appeals court's decision which held that grand jury witnesses are entitled to review transcripts of their own grand jury testimony under Rule 6 (e). In the alternative, the appellant argued that he had shown "a particularized need for access to the transcript given the prosecutors' warnings of possible perjury prosecution and the complexity of the subject matter of his testimony."[6] The government opposed this motion, arguing that under First Circuit law, as set forth in *In re Special Proceedings* and *In re Bianchi*,[7] the appellant was required to provide "a strong showing of particularized need."

Although the district court agreed with the reasoning set forth in the D.C. Circuit case, noting that the benefit to the witness outweighed the "very mild burden on grand jury secrecy," the court ultimately concluded it was bound by First Circuit precedent requiring the appellant to provide a "strong showing" of particularized need. Although the facts of the case were "unusual," the district court did not find them "highly unusual" or enough to show particularized need. Accordingly, the district court denied the appellant's request.

When he reappeared before the grand

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jury, the appellant refused to testify further and, on the government's motion, the district court found the appellant in contempt. The witness appealed the district court's decision denying him access to his prior testimony.

### Standard to Be Applied

The appellant argued that the district court should have applied the less demanding standard of particularized need in considering his request for access to the transcript. According to the appellant, the stricter standard requiring a "strong showing" of particularized need only applies to those instances where a grand jury witness seeks an actual copy of a transcript of his testimony. In making this argument the appellant relied heavily on the D.C. Circuit's opinion in *In re Grand Jury*.

In the D.C. Circuit case, two company employees were subpoenaed to testify a second time during a grand jury investigation. Both moved for access to the transcript of their prior testimony "in order to avoid the possibility of inconsistent statements occasioned by the passage of years since the events in question and many months [since they last testified]."

In addition, the employees noted that they needed access to their testimony to determine whether they would need to recant any portion as permitted by federal statute. The district court denied both motions, finding that neither employee showed a particularized need that outweighed the interest of maintaining grand jury secrecy.[8]

The D.C. Circuit Court of Appeals considered the issue as one of first impression. The Court of Appeals stated that the district court erroneously relied on Supreme Court precedent requiring a showing of particularized need when copies of transcripts were sought by third parties. In contrast, the Court noted that a grand jury witness is under no obligation to maintain the secrecy of grand jury proceedings.

Balancing the witnesses' interests in ensuring that their recollections are accurately reflected in the transcript and preparing for future testimony against the government's interest in maintaining grand jury secrecy and preventing witness intimidation, the D.C. Circuit Court concluded that the witnesses' interests outweighed the government's interests. Finding that "the Supreme Court's 'particularized need' standard, which the court crafted to deal with third party requests for secret transcripts of other witnesses' testimony, does not apply in this first party context,"[9] the court concluded that the employee first-party witnesses were entitled to access of their transcripts under Rule 6(e).

The First Circuit concurred with the appellant's argument that the D.C. Circuit's decision supported his claim that a less demanding standard applied to his request for access to his testimony transcript. "To be clear, we do not adopt the D.C. Circuit's holding that a grand jury witness is entitled to access to a transcript of his grand jury testimony. Instead, we hold that, in light of the considerations supporting the D.C. Circuit decision and our own review of our precedent, a less demanding requirement of particularized need applies when a grand jury witness demands access to a transcript, rather than a copy of the transcript."[10]

Although First Circuit precedent clearly stated that a grand jury witness had no general right to transcripts of his testimony and had to provide "a strong showing of particularized need" to obtain a copy of such transcripts, the court noted that the prior case law focused on those instances in which the witnesses sought copies of the transcripts as opposed to access to or an opportunity to review the transcripts. "In none of [the earlier] cases did we have the occasion to address whether a demand for access, which imposes a lesser burden on the governmental interests of grand jury secrecy and witness intimidation, still requires a strong showing of particularized need."[11]

**Weighing the Competing Interests.** The First Circuit addressed a witness' significant interest in reviewing a transcript of their grand jury testimony. Even those witnesses intending to testify truthfully have an interest in avoiding inconsistencies or inaccuracies in their testimony that might expose them to a perjury prosecution. The court noted that federal law "strongly reinforces" this interest. Specifically, 18 U.S.C. §1623(d) allows a witness to recant portions of his testimony. A witness would have difficulty taking advantage of this statute if not allowed access to a transcript of such testimony. The court further opined that the criminal justice system as a whole had a substantial interest in maintaining the accuracy of grand jury testimony.

The court then turned to consider the government's interests and how those were impacted by a witness seeking access to, as compared to a copy of, grand jury transcripts. It noted that there were legitimate government concerns surrounding witness intimidation. First, if a witness routinely could obtain a copy of his grand jury transcript, he could provide it to a potentially threatening third party. In addition, a witness' fear of being compelled to disclose the transcript to a third party might deter the witness from testifying freely and candidly. The court found that both of these concerns were alleviated significantly when access to the transcript, versus a copy of the transcript, was provided.

With respect to the government's interest in grand jury secrecy, the court reinforced the point made by the D.C. Circuit and the district court in this case—that a grand jury witness is under no obligation to maintain the secrecy of his or her testimony. "Thus, any concern with maintaining grand jury secrecy is already diminished in the grand jury witness context. However, permitting access does not *exacerbate* the situation in the way making a copy available does."[12]

Finally, the court recognized the interest in promoting efficiency within the criminal justice system. It opined that although requiring a grand jury witness to show a lesser standard of particularized need to obtain his transcript may increase the burdens on the government in the grand jury proceedings, "we agree with the district court that 'the benefit to the wit-

ness greatly outweighs the burden to the government.'"

The cost of providing a transcript, which likely must be created anyway, and a slight delay caused by the witness' review would not impede an investigation significantly. The court noted that there was no evidence that the D.C. Circuit's more lenient rule has had any detrimental effect on grand jury investigations in that circuit.

### Whether Standard Was Met

Because the district court did not make any factual findings, the court addressed whether the appellant in this case made a showing of particularized need in light of the less demanding standard adopted by the court. The appellant argued that his need for access was sufficiently particularized because of the government's repeated threats of perjury during his initial examination and the complexity of the subject matter of his testimony. The court concurred.

First, upon reviewing the grand jury transcript, it found the government's repeated perjury warnings not only strongly worded, but also "buttressed by repetitious questions and insulting language." "In some instances the prosecutors made pointed comments to the appellant, asking in places if he 'ha[d] a hearing problem' or whether he 'speak[s] the English language.'" Declining to find that the threats alone were sufficient to demonstrate a particularized need under the more lenient standard for access, the court held that when combined with the complexity of appellant's testimony on events and dates occurring nearly a decade prior, the standard for particularized need had been satisfied.[13]

Finally, the court opined that its application of a lesser standard of particularized need in cases where a grand jury witness seeks access to his testimony would not impose undue hardship on grand jury investigations. Rather, a district court was free to use its discretion to employ procedures such as expedited hearings to minimize any undue effect or delay. For all these reasons, the court reversed the district court's finding of contempt and remanded the matter for the district court to permit the appellant access to a transcript of his testimony.

### Dissenting Opinion

Judge Jeffrey R. Howard filed a dissenting opinion, noting that the Circuit Court was not writing on a blank slate, but was obligated to follow 30-year-old precedent. "[B]ecause the majority's conclusion is contrary to our precedent, unwise as a matter of policy, and insupportable on this record, I respectfully dissent."[14]

Noting that the prior First Circuit decisions may have addressed issues broader than that in this case, the dissent argued that absent contravening authority from the First Circuit Court of Appeals or the Supreme Court, the court was obligated to honor the precedent set forth in *In re Special Proceedings*. The distinction created by the majority in analyzing a grand jury witness' request for access as opposed to a copy of testimony transcripts was insufficient to justify ignoring precedent.

In noting the First Circuit's adherence to a majority rule among the circuits that "a 'non-defendant witness seeking access to his own [grand jury] transcript must make a 'strong showing of particularized need' for such disclosure," the dissent cited Second Circuit law as set forth in a 1995 decision, *In re Grand Jury Subpoena*.[15]

In that case, the Second Circuit declined to decide whether: i) a grand jury witness had a presumptive right of access which could be overcome only by a clear showing that other interests outweigh his right to his testimony or ii) the witness was required to demonstrate a particularized need for the transcript. Rather, the Court found that under either test the witness in that case had failed to establish his right to access his prior testimony. The Second Circuit has not addressed the issue since.

The First Circuit dissent further found that even if precedent allowed the creation of a new rule such as the majority proposed, "the majority's chosen rule permitting access based on a 'less demanding requirement of particularized need' is unwise." First, the dissent believed that the majority opinion failed to give due weight to the government's interests in maintaining grand jury secrecy and avoiding witness intimidation, while overemphasizing a witnesses' interest in access to his testimony.

Further, the dissent found that the majority's approach would "improvidently hamstring the operation of grand juries."[16] Future movants should bear these considerations in mind in formulating their applications for relief.

1. Fed. R. Crim. Proc. 6(e)(3)(E)(i).
2. *Douglas Oil Co. v. Petrol Stops Northwest,* 441 U.S. 221, 222 (1979); see also *United States v. Torres,* 901 F.2d 205, 232-33 (2d Cir.1990).
3. 566 F.3d 12 (1st Cir. 2009).
4. Id. at 14.
5. 490 F.3d 978 (D.C. Cir. 2007).
6. 566 F.3d at 15.
7. 373 F.3d 37, 47 (1st Cir. 2004); 542 F.2d 98 (1st Cir. 1976).
8. 490 F.3d at 980, 984.
9. Id. at 989.
10. 566 F.3d at 17-18.
11. Id. at 18-19.
12. Id. at 20 (emphasis in original).
13. Id. at 22.
14. Id. at 24.
15. 72 F.3d 271, 274 (2d Cir.1995).
16. 566 F.3d at 25.