

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	No. 1: 08cr0079 (JCC)
)	
KYLE DUSTIN FOGGO,)	
aka "DUSTY" FOGGO,)	
)	
Defendant.)	
)	

MOTION FOR ORDER ALLOWING USE OF GRAND JURY TRANSCRIPTS FOR SENTENCING

The United States moves this Court for an order pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i) to allowing the disclosure of grand jury information in the United States' Sentencing Memorandum and at the sentencing hearing. The information is necessary to assist the Court in determining the appropriate sentence for the defendant and fulfill the goals of 18 U.S.C. § 3553(a).

ARGUMENT

Under Rule 6(e)(2) of the Federal Rules of Criminal Procedure, attorneys for the government are among those listed persons who "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules" Disclosure of grand jury matters is permitted, however, when authorized by a court "preliminary to or in connection with a judicial proceeding" Fed. R. Crim. P. 6(e)(3)(E)(i).

The power of the Court to order disclosure of grand jury matters is discretionary, *In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d 1293, 1298 (4th Cir. 1986), and may be exercised upon a showing of need and a finding that disclosure is required by the ends of justice. *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958); *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 470 (E.D. Pa. 1971).

The Supreme Court has articulated five general reasons for grand jury secrecy:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes; and (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Proctor & Gamble Co., 356 U.S. at 681 n.6 (citation omitted). The inquiry is a flexible one, and “as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 227 (1979). *See also In re Grand Jury Proceedings GJ-76-4 & GJ-75-3*, 800 F.2d at 1301 (that the grand jury has completed its investigation, the prosecution has concluded without others being indicted, and time has passed all lessen the need for grand jury secrecy).

Now that the grand jury has returned the indictment and the defendant has pled guilty, a variety of factors all outweigh the interests of complete secrecy for all grand jury materials, including the right of the parties to make and respond to sentencing arguments, the Court’s need to gain a full understanding of the facts and circumstances of this case, and the public’s right of access

to this case. In the present case, the government wishes to disclose grand jury documents and transcripts in order to: (1) enable the defendant and the government to prepare sentencing arguments; (2) enable the defendant to respond to the government's sentencing arguments; and (3) apprise this Court of the relevant facts and circumstances necessary for it to exercise its sentencing discretion.

A full and fair sentencing proceeding is important in all cases, but especially important in a case involving a high government official who has pleaded guilty to defrauding the United States, which has generated the level of public interest that Foggo's case has. "A trial judge has great latitude in the sentencing process; the judge may consider any reliable evidence, regardless of whether such evidence was introduced at trial." *United States v. Johnson v. U.S.*, 508 A.2d 910, 911 (D.C. Cir. 1985) (rejecting a petitioner's argument that the court erred in permitting the government to address the charge and quote secret grand jury testimony during its sentencing colloquy with the court).

Here, the government will make recommendations regarding the appropriate sentence based on conduct that was not expressly admitted by Foggo at the time of his plea. The sworn testimony of witnesses who appeared before the grand jury both in this district and in the Southern District of California^{1/} is important to allow the Court to properly assess Foggo's criminality and impose the appropriate sentence. *See also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.")

^{1/} A separate motion will be filed to seek disclosure of grand jury information from the Southern District of California. *See* Fed. R. Crim. P. 6(e)(3)(F) ("A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened.")

By the same token, it is the public that is the victim of this fraud, and the public should have an opportunity to consider all of Foggo's conduct. Public disclosure of evidence against Foggo will also serve the sentencing factors at 18 U.S.C. § 3553(a), including the need to impose a sentence that reflects the seriousness of the offense, promote respect for the law, and afford adequate deterrence to criminal conduct.

Given these justifications, the general reasons for secrecy, with the possible exception of the fourth reason, are considerably less compelling at this stage in the proceedings against the defendant. Even the fourth reason, encouraging free and untrammelled disclosure by witnesses, weighs only slightly in favor of maintaining secrecy here, because the grand jury witnesses with relevant information would have likely been called at the trial of this case, where they would have been subject to impeachment and cross-examination with their prior grand jury transcripts. *See United States v. Lee*, 540 F.2d 1205, 1209-10 (4th Cir. 1976) (recognizing that prior grand jury testimony could be admitted at trial to prove matters contained therein). Although there will now be no trial, the government would still have to reveal the identities of witnesses who provide evidence that substantiate the government's sentencing recommendation, either by calling them to testify at a contested sentencing hearing or submitting their sworn declarations.

The Fourth Circuit has recognized that the government's disclosure of grand jury information may constitute part of the government's duty to inform the court of relevant information. *See United States v. Manglitz*, 773 F.2d 1463, 1467 (4th Cir. 1985) ("We believe that a prosecutor, in performing his duty to enforce the criminal laws of the United States, is not required to obtain a court order prior to disclosing grand jury material at a Rule 11 hearing as long as the material introduced is relevant to the question of guilt or if it will assist the Court in sentencing the

CERTIFICATE OF SERVICE

I certify that on November 20, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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