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Ruling Allows Grand Jury Witnesses Access to Their Testimony

In a ruling that is winning praise from the white-collar bar, the United States Court of Appeals for the District of Columbia held, in a case of first impression, that grand jury witnesses have a right to review their own testimony under Federal Rule of Criminal Procedure 6(e)(3)(E)(i). *In re Grand Jury*, 490 F.3d 978 (D.C. Cir. 2007) (per curiam).

In conjunction with a criminal investigation of a company and its employees, the Government issued multiple grand jury subpoenas to two corporate employees. Both employees cooperated and testified before the grand jury—one even appeared and testified three different times. Apparently not satisfied, the Government subpoenaed them to appear and testify again. Because two months had passed since their last appearance, and rightly fearing the possibility of perjury, the employees asked to review the transcripts of their prior testimony to 1) "avoid the possibility of inconsistent statements"; 2) "to aid counsel in advising them"; and 3) to possibly recant under 18 U.S.C. § 1623. Moreover, one of the employees suspected that he was a "subject" of the investigation based on comments made by the prosecutor. But the Government refused. Likewise, the district court also denied their motions for access to their testimony.

The employees appealed and the Court of Appeals held that "federal courts have the authority under Rule 6(e)(3)(E)(i) to order disclosure to grand jury witnesses of their own transcripts." In reaching this conclusion, the court relied on Rule 6(e)(3)(E)(i) which allows disclosure either "preliminary to" or "in connection with" a judicial proceeding. "The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter preliminarily to or in connection with a judicial proceeding . . . ." But courts are divided on whether grand jury witnesses are entitled to review their own testimony. The court noted that although the Ninth Circuit has allowed access, the First, Second, Fourth, and Fifth Circuits have not. Considering these decisions and the Rule, the court decided that it "must weigh the competing interests of the Government and grand jury witnesses."

On the one hand, grand jury witnesses are interested in ensuring "that the transcripts of their testimony accurately convey their recollections." This interest is strongly reinforced in federal law under 18 U.S.C. § 1623, which allows a witness to recant. But, the court pointed out, "[a] witness would have difficulty taking full

advantage of the statutory recantation provision . . . without obtaining prompt access to transcripts of their own testimony."

On the other hand, the Government is interested in: 1) maintaining grand jury secrecy and 2) preventing witness intimidation. The rationale for secrecy is to prevent the public or third parties from learning what the witness said to the grand jury. "But the secrecy rationale does not apply when a witness seeks access to a transcript of *his or her own* grand jury testimony." Indeed, under the Federal Rules of Criminal Procedure a "witness can stand on the courthouse steps and tell the public everything the witness was asked and answered." FED. R. CRIM. P. 6(e)(2)(A)-(B) ("No obligation of secrecy may be imposed on any person . . . .").

As for preventing witness intimidation, the court agreed that witness intimidation is a serious concern because a third-party could try to force the witness to disclose the transcript. But this was less of a concern here because the "appellants' counsel expressly conceded during oral argument that if the employees were granted access to the transcripts, then they would not need to obtain copies of the transcripts . . . ."

After weighing the competing interests of the Government and grand jury witnesses, the court held that the grand jury witnesses had a strong interest in reviewing their own testimony. "[G]rand jury witnesses are entitled under Rule 6(e)(3)(E)(i) to review transcripts of their own grand jury testimony in private at the U.S. Attorney's Office or a place agreed to by the parties or designated by the district court." But it did not resolve the questions of whether the witness was allowed to have her attorney present, or whether the witness was allowed to take notes—leaving these questions to the discretion of the district court. And, based on the facts of the case, the court refused to address the separate question of whether the witness could obtain a copy of the transcript. "Because our holding on the right of access affords the employees complete relief, we need not and do not resolve the issue of whether witnesses also have a right to obtain a copy of the transcripts of their testimony, leaving that issue for another day."

In conclusion, this decision opens the door significantly for grand jury witnesses to review transcripts of their testimony. It tips the scales toward a policy of disclosure unless the Government has significant evidence to prevent such a review. And helps corporate employees avoid inadvertent charges of perjury.

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