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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

In The Matter Of The Search Of ) Case No: 97 - 3471MB (LOA)  
 )  
6783 East Soaring Eagle Way ) **ORDER**  
Scottsdale, Az )  
\_\_\_\_\_ )

This matter arises on Petitioners’ Motion To Release Grand Jury Transcript, filed on April 14, 2000. The Government opposes the disclosure to which the intervenor, Winn-Dixie Stores, Inc., (“Winn-Dixie”) has joined. The issue before the Court is one of first impression: whether a magistrate judge’s lawful authority to order the disclosure of grand jury testimony falls within the “pretrial duties” or “additional duties” delegated to magistrate judges under the Federal Magistrates Act (the “Act”). See, 28 U.S.C. §636(b)(1)(A) and (b)(3), respectively.

**BACKGROUND**

This post-search warrant litigation began when Petitioners’<sup>1</sup> Motion To Unseal Search Warrant Affidavit was filed on February 16, 2000, over two years after a search warrant was issued on December 15, 1997 by the Hon. Barry G. Silverman, then a U.S. Magistrate Judge, and nearly 2 ½ years after a federal grand jury investigated matters related to that search warrant. The grand jury did not return an indictment. The Government

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<sup>1</sup> Initially, Petitioner James Morrison brought this action and was later joined therein by Petitioner Beth Scanlon with Court approval. See, Order, dated April 4, 2000.

1 filed a motion to seal the grand jury transcript herein on March 9, 2000, which the Court  
2 granted subject to further Court Order. The parties herein subsequently resolved by  
3 stipulation the issue regarding the disclosure of the search warrant. See, Order, dated May  
4 16th, 2000. The only remaining, contested issue is the propriety of the disclosure of the  
5 transcript of the testimony heard by the grand jury on September 9, 1997.

6 **MAGISTRATE JUDGE JURISDICTION**

7 Respondents initially argue in their formal Response To Motion To Release  
8 Grand Jury Transcript, filed April 26, 2000, that “the Magistrate Court (judge) does not have  
9 jurisdiction to entertain the motion to unseal” the grand jury transcript under 28 U.S.C. §636.  
10 Petitioners neither filed a reply nor addressed in their motion whether a magistrate judge has  
11 the authority to disclose grand jury testimony.

12 The Act is silent on a magistrate judge’s authority to disclose grand jury  
13 testimony. Additionally, counsel have not provided, nor has this Court’s independent research  
14 discovered, any Supreme Court, circuit or district court decisions that have specifically  
15 addressed the issue before the court. Because the specific issue appears to be one of first  
16 impression, the court will analyze and discuss a magistrate judge’s authority, if any, to order  
17 the disclosure of grand jury testimony by an analyzing the subject statute and related case law.

18 As a non-Article III judge<sup>2</sup>, a federal magistrate judge’s powers and jurisdiction  
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26 <sup>2</sup> Article III, Section I, of the U.S. Constitution provides: “The judicial power of the United States,  
27 shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time  
28 ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good  
Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished  
during their Continuance in Office.”

1 are found in 28 U.S.C. §636<sup>3</sup> and the case law interpreting it and the breadth of their authorized

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5 <sup>3</sup> 636. Jurisdiction, powers, and temporary assignment

6 (a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment--

7 (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

8 (2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

9 (3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

10 (4) the power to enter a sentence for a petty offense that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction; and

11 (5) the power to enter a sentence for a class A misdemeanor, or a class B or C misdemeanor not covered by paragraph (4), in a case in which the parties have consented.

12 (b)(1) Notwithstanding any provision of law to the contrary--

13 (A) **a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except** a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

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17 (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

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19 (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the Court and a copy shall forthwith be mailed to all parties.

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21 Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or s court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

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24 (2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

25  
26 (3) **A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.**

27 (The balance of the statute deals with civil and other matters not relevant to the issue sub judge)(Emphasis added).

1 duties. Additionally, 28 U.S.C. §636(b)(4)<sup>4</sup> provides that each district court “shall” adopt local  
2 rules governing the duties of magistrate judges. The District Court of Arizona has adopted a  
3 Rule of Practice that expressly addresses a magistrate judge’s authority on the issue before the  
4 court. Rule 1.17(d), Rules of Practice for the United States District Court for the District of  
5 Arizona, provides:

6 “(d) Other Duties. Subject to the Constitution and laws of the United States, the  
7 full-time Magistrate Judges in the District of Arizona shall perform the following  
8 duties:

9 \* \* \* \* \*

10 (18) Issue orders upon appropriate application for disclosure of Grand Jury  
11 information pursuant to Rule 6(e)(3)(C)(i), (ii), and (iv)<sup>5</sup> of the Federal Rules of  
12 Criminal Procedure.”

13 Although given the express local authority to disclose grand jury testimony in Arizona, the  
14 analysis of a magistrate judge’s authority does not end here as the specific Rule of Practice  
15 is adopted “[s]ubject to the Constitution and laws of the United States.” See, Hajek v.

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17 <sup>4</sup> “Each district court shall establish rules pursuant to which the magistrates shall discharge their  
18 duties.” 28 U.S.C. §636(b)(4)

19 <sup>5</sup> “Rule 6. **The Grand Jury**  
20 \* \* \* \* \*

21 **(3) Exceptions.**  
22 \* \* \* \* \*

23 **(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may  
24 also be made--**

25 **(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;**  
26 (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for  
27 a motion to dismiss the indictment because of matters occurring before the grand jury;  
28 (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or  
(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such  
matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of  
a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in  
such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand  
jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the  
petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to  
the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons  
as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be  
heard.” (Emphasis added).

1 Burlington Northern R. R. Co., 186 F.3d 1105 (9<sup>th</sup> Cir. 1999)(local district rule that failure  
2 to timely demand reassignment was deemed to be a waiver and consent to magistrate judge  
3 jurisdiction in a civil case held invalid to obtain consent under Article III, Section 1 of the  
4 Constitution and the Federal Rules of Civil Procedure).

5           Essential to this Court’s constitutional analysis of magistrate judge authority is  
6 an understanding of the Act itself and the cases interpreting it. As the Supreme Court has  
7 explained:

8           Since its enactment in 1968, the Federal Magistrates Act has permitted district  
9 courts to assign magistrates certain described powers and duties, as well as ‘such  
10 additional duties’ as are not inconsistent with the Constitution and laws of the  
11 United States.

12 Gomez v. United States, 490 U.S. 858, 859-60 (1989). The Act was amended on several  
13 occasions to significantly broaden the scope of power that magistrate judges may exercise as  
14 “congressional concerns regarding magistrates’ abilities had decreased” in their “integral  
15 important role in the Federal judicial system” in “handl[ing] subsidiary matters to enable  
16 district judges to concentrate on trying cases.” Id. at 865 - 872(outlining the evolution of the  
17 Act). Today, the Act gives magistrate judges “described power and duties” in the following  
18 areas: civil trials with the parties’ consent; misdemeanor trials and sentencing with the  
19 defendant’s consent; certain civil and criminal pretrial matters; and service as a special master.  
20 28 U.S.C. §636(a), (b)(1)-(2), (c). See, United States v. Gomez-Lepe, 207 F.3d 623 (9<sup>th</sup> Cir.  
21 2000). The Act expressly limits, however, their authority in eight pretrial dispositive areas  
22 even if designated to do so by a district judge, including the prohibition that a magistrate judge  
23 may not “dismiss or quash an indictment.” 28 U.S.C. §636(b)(1)(A).<sup>6</sup> Thus, the Act permits  
24 a district judge to refer “any pretrial matter” subject to the eight express prohibitions to a  
25 magistrate judge to properly hear and determine.

26           Although disclosure of grand jury testimony is not a specifically described duty

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27           <sup>6</sup> Arizona’s Rules of Practice permit, however, a magistrate to dismiss an indictment on motion of  
28 the United States Attorney and with the consent of the defendant. See, Rule 1.17(d)(12), Rules of Practice.

1 in 28 U.S.C. §636(a), magistrate judges have historically been actively involved in matters  
2 related to grand juries. The case law has universally affirmed magistrate judge authority in the  
3 grand jury area. Magistrate judges are authorized to accept the return of an indictment from  
4 a grand jury under Rule 6(f), FED.R.CRIM.P.; to seal the indictment under Rule 6(e)(4),  
5 FED.R.CRIM.P.; United States v. Lakin, 875 F.2d 168 (8<sup>th</sup> Cir. 1989); United States v. Laliberte,  
6 131 F.R.D. 20 (D. Mass. 1990); to select and impanel a grand jury, United States v. Diaz, 922  
7 F.2d 998 (2<sup>nd</sup> Cir. 1990), cert. denied, 500 U.S. 925 (1991); to deny a motion to quash a grand  
8 jury subpoena, In re Grand Jury Proceedings Julie Dzikowich, 620 F.Supp. 521 (W.D. Wis.  
9 1985); to direct a witness to testify before a grand jury and to grant a witness immunity from  
10 prosecution on the witness' grand jury testimony, In re the Grand Jury Appearance of  
11 Cummings, 615 F. Supp. 68 (W.D. Wis. 1985).

12 In addition to the enumerated duties, the Act also contains a catch-all provision  
13 that “[a] magistrate may be assigned such additional duties as are not inconsistent with the  
14 Constitution and laws of the United States.” 28 U.S.C. §636(b)(1)(3); Gomez-Lepe, 207 F.3d  
15 at 627. (Emphasis added). Since the 1976 amendments to the Act, the Supreme Court on two  
16 occasions has considered in detail the scope of magistrate judge authority under the “additional  
17 duties” clause. See, Gomez, 490 U.S. 858 (1989); Peretz v. United States, 501 U.S. 923  
18 (1991); Gomez-Lepe, 207 F.3d at 628. Gomez and Peretz involved the authority of a  
19 magistrate judge to preside over jury selection. In Gomez, the Supreme Court held that the  
20 magistrate judge exceeded his authority when he conducted voir dire in a felony trial over the  
21 objection of defense counsel. In Peretz, the Court concluded that Article III and §636(b)(3)  
22 permit a magistrate judge to supervise jury selection in a felony trial where the parties consent.  
23 Id. at 932. Thus, consent of all parties is a key issue in determining whether the duty in  
24 question, especially during a trial, is one that may be properly delegated to a magistrate judge.

25 In the case at bar, it is undisputed that all the parties have not expressly  
26 consented to the undersigned's resolution of the subject motion. The Ninth Circuit has,  
27 however, indicated that consent is not the only factor relevant to a determination of the scope  
28 of the catch-all provision found at 28 U.S.C. §636(b)(3). See, United States v. Colacurcio, 84

1 F.3d 326 (9<sup>th</sup> Cir. 1996). As indicated in Colacurcio and Gomez-Lepe, the test is whether  
2 disclosure of grand jury testimony is merely a subsidiary matter or a critical stage of the  
3 proceeding.

4           Although no bright-line test currently exists to determine if a matter is a  
5 subsidiary matter or a critical stage of the proceedings, the cases of Colacurcio and United  
6 States v. Foster, 57 F.3d 727 (9<sup>th</sup> Cir. 1995), rev'd on other grounds, 133 F.3d 704 (1998)(en  
7 banc), vacated as to that ground, 119 S. Ct. 32 (1998) are helpful to the subject analysis. In  
8 Colacurcio, the Ninth Circuit held that a probation revocation hearing is a “critical stage” of  
9 a criminal proceeding as a defendant’s probation may be revoked and a jail sentence imposed.  
10 84 F.3d at 333. For a resolution of the question whether an additional magistrate duty  
11 constitutes a subsidiary matter or a critical stage of the proceedings, the Ninth Circuit in  
12 Foster indicated that the trial court should consider the degree of responsibility conferred  
13 upon the magistrate judge as well as the extent of interaction between judge and jury. 57 F.3d  
14 at 731. The Court in Foster, however, held that simply accepting and filing a jury verdict,  
15 without more, was a ministerial, subsidiary matter that did not require consent. Subsequently,  
16 the court in Gomez-Lepe concluded that the Colacurcio and Foster cases drew the distinction  
17 between subsidiary matters and critical stages on the court’s balancing of the defendant’s rights  
18 at stake, the discretion exercised and the degree of responsibility conferred, and the nature of  
19 the interactions between the judge and jury. Gomez-Lepe at 629.

20           In light of the factors summarized in Gomez-Lepe, this court points out the  
21 obvious fact that disclosure of grand jury testimony usually arises as a pretrial matter in a  
22 criminal case and is not a dispositive ruling on that criminal case. In this case, however, there  
23 was never an indictment nor a criminal trial as the matter arises as a result of Petitioners’  
24 filing a civil suit in the Maricopa County Superior Court nearly three years after the subject  
25 grand jury convened and conducted its inquiry. Moreover, the numerous responsibilities that  
26 magistrate judges exercise related to grand jury matters, except for the dismissal of an  
27 indictment without consent, are historically matters that have been handled by magistrate  
28 judges in their role to permit district judges to concentrate on trying cases. Although certainly

1 helpful to a defense attorney to know the evidence and testimony that supports a finding of  
2 probable cause against a defendant in a criminal case, disclosure of grand jury testimony alone  
3 does not make conviction beyond a reasonable doubt at trial more or less likely so that one  
4 might fairly label ruling on such a motion a “critical stage” of the criminal proceedings. Of  
5 course, there is no interaction at all between the magistrate judge and the grand jury when a  
6 magistrate judge is requested to rule on whether a grand jury transcript should be disclosed.

7           The Second Circuit’s opinion in United States v. Diaz, 922 F.2d 998 (2<sup>nd</sup> Cir.  
8 1990), cert. denied, 500 U.S. 925 (1991) is helpful to appreciate the significant legal  
9 differences between the judicial responsibilities of selecting a petit jury and a grand jury as  
10 they relate to a magistrate judge’s authority. In Diaz, the court viewed the factors highlighted  
11 by the Supreme Court’s Gomez case as largely inapplicable in the context of grand jury  
12 selection and concluded that grand jury selection is significantly different from the selection  
13 of a petit jury. The Court stated as follows:

14           “In light of the grand jury’s role and the fairly routine nature of the task of  
15 selection, empaneling, and instructing the grand jury, we view the legislative  
16 history of §636(b)(1)(A) as indicating that this is a task whose delegation to  
17 magistrates Congress intended to authorize. (history of the Act given)...

18           \*                   \*                   \*                   \*                   \*                   \*

19           In sum, we are persuaded by the nature of the grand jury selection process, the  
20 role of the grand jury in the judicial process, and the other types of proceedings  
21 whose conduct by magistrates Congress plainly approved, the ‘pretrial matters’ in  
22 §636(b)(1)(A) was intended to include selection and empaneling of grand jurors  
23 among functions that could properly be delegated to a magistrate. And we are  
24 persuaded that, because adequate review is available from an Article III judge, that  
25 delegation does not violate a defendant’s constitutional rights.”

26 Diaz, 922 F.2d at 1004-1005.

27           Drawing the parallel analogy to a preliminary hearing as the Diaz court did, Rule  
28 5.1(c)(1) and (2), FED.R.CRIM.P., specifically authorize a magistrate judge to disclose a  
recording or transcript of a preliminary hearing, conducted after a criminal complaint is filed,  
upon request by defense or government counsel. Clearly, therefore, Congress likely intended  
to empower district judges to authorize magistrate judges to disclose grand jury transcripts as

1 the district judges have done in the District of Arizona with the passage of Rule of Practice  
2 1.17(d).

3 By contrast, where discretion is exercised, the scope of a magistrate judge's  
4 authority is construed more narrowly. See, Gomez-Lepe, 207 F.3d at 628; Harris v. Folk  
5 Constr. Co., 138 F.3d 365 (8<sup>th</sup> Cir. 1998). These cases, however, are clearly distinguishable  
6 to the issue sub judice as the acts performed by the magistrate judges in these cases were  
7 without the consent of all parties and involved the polling of jurors in a criminal trial and  
8 evaluating the competency of a juror in a civil trial, both deemed critical stages in each case.  
9 Here, the determination whether an appropriate showing has been made for disclosure of grand  
10 jury testimony under Rule 6(e), FED.R.CRIM.P., is similar to reviewing documentation  
11 supporting applications for warrants in which magistrate judges engage on a regular basis. See,  
12 Cummings, 615 F. Supp. 68 (W.D. Wis. 1985); Matter of Establishment Inspection of Gilbert  
13 & Bennett Manufacturing Co., 589 F.2d 1335 (7<sup>th</sup> Cir. 1979). As will be discussed hereinafter,  
14 deciding a grand jury disclosure motion does not involve the traditional kind of fact-finding  
15 entrusted exclusively to Article III judges. See, United States v. Raddatz, 447 U.S. 667 (1980).

16 Based upon the foregoing analysis, the court concludes that federal magistrate  
17 judges may lawfully and within the Constitution and laws of the United States pursuant to their  
18 "pretrial matter" authority under §636(b)(1)(A) and their "additional duties" authority under  
19 §636(b)(1)(3) disclose grand jury testimony. Congress specifically authorized district judges  
20 to experiment with the assignment to magistrate judges of functions other than those  
21 enumerated in the Act itself in aid of the business of the courts. In doing so, Congress  
22 recognized that there will be increased time available to district judges for the careful and  
23 unhurried performance of their vital and traditional adjudicatory duties, and a consequent  
24 benefit to both efficiency and the quality of justice in the Federal courts. H.R.Rep. 94-1609,  
25 94th Cong.2d Sess., 5 U.S.Code Cong. & Admin.News, pp. 6162, 6172 (1976). Thus, this  
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1 court rejects the Government's and Winn-Dixie's argument that Rule of Practice 1.17(d)(18)<sup>7</sup>  
2 "is an unlawful delegation of the Rule 6(e) responsibility and such orders may only be entered  
3 by Article III district court judges."  
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5 **DISCLOSURE OF GRAND JURY TESTIMONY**

6 Rule 6(e)(3)(C), FED.R.CRIM.P., permits disclosure of "matters occurring  
7 before the grand jury...when so directed by a court preliminarily to or in connection with a  
8 judicial proceeding." Rule 6(e)(3)(D) establishes the appropriate procedure for disclosure.  
9 No party herein has claimed the Petitioners have followed an inappropriate procedure.

10 Both Petitioners and Respondents cite two of the leading cases in support of  
11 their arguments, i.e. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 99 S.Ct  
12 1667 (1979) and United States v. Fishback and Moore, Inc., 776 F.2d 839 (9<sup>th</sup> Cir. 1985).  
13 In Douglas Oil, the Supreme Court set forth the reasons courts have been reluctant to lift  
14 unnecessarily the veil of secrecy from the grand jury and established the disclosure  
15 standard, known as the Douglas Oil standard, when the need for disclosure outweighs the  
16 public interest in secrecy.

17 We consistently have recognized that the proper functioning of our grand jury  
18 system depends upon the secrecy of grand jury proceedings. (Citations  
19 omitted). In particular, we have noted several distinct interests served by  
20 safeguarding the confidentiality of grand jury proceedings. First, if pre-  
21 indictment proceedings were made public, many prospective witnesses would  
22 be hesitant to come forward voluntarily, knowing that those against whom they  
23 testify would be aware of that testimony. Moreover, witnesses who appeared  
24 before the grand jury would be less likely to testify fully and frankly, as they  
25 would be open to retribution as well as to inducements. There also would be the  
26 risk that those about to be indicted would flee, or would try to influence  
27 individual grand jurors to vote against indictment. Finally, by pre-serving the  
28 secrecy of the proceedings, we assure that persons who are accused but  
exonerated by the grand jury will not be held up to public ridicule.

24 Douglas Oil, 441 U. S. at 218-219.

25 The one exception to the general rule of non-disclosure permitted by the

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27 <sup>7</sup> The government's motion mistakenly cited Rule of Practice 17(d)(20) in its Response To Motion  
28 To Release Grand Jury Transcript. See, page 3 thereof.

1 Federal Rules of Criminal Procedure allows a federal court to direct disclosure of grand  
2 jury testimony if “preliminary to or in connection with a judicial proceeding.” Rule  
3 6(e)(3)(C)(i), FED.R.CRIM.P. Parties seeking disclosure pursuant to this exception

4 ‘must show that the material they seek is needed to avoid a possible injustice in  
5 another judicial proceeding, that the need for disclosure is greater than the need  
6 for continued secrecy, and that their request is structured to cover only material  
7 so needed.’ Douglas Oil, (citations omitted). Moreover, ‘as the considerations  
8 justifying secrecy become less relevant, a party asserting a need for grand jury  
9 transcripts will have a lesser burden’ under this exception. Id. at 223, 99 S.Ct. at  
10 1675.

11 United States v. Fishback and Moore, Inc., 776 F.2d at 843.

12 In applying the Douglas Oil standard to the facts of this case, the need for  
13 secrecy is substantially reduced because the grand jury which investigated the subject  
14 matter was discharged from its duties long ago. Petitioners argue, however, that the  
15 purpose of protecting the grand jury in its deliberative process and to protect the  
16 unidentified accused “has no vitality” because the FBI has concluded its investigation,  
17 returned all seized evidence and no indictments were returned. This Court disagrees.

18 Even though no indictments were returned against either of the Petitioners,  
19 witnesses were nevertheless called to testify before the subject grand jury. Safeguarding  
20 grand jury witnesses’ identities to reduce their hesitation to voluntarily cooperate with a  
21 grand jury investigation should not hinge on an after-the-fact result that no indictment was  
22 ultimately returned. The chilling effect on full and frank testimony, inappropriate  
23 influences and inducements on grand jury witnesses, some of reasons against disclosure,  
24 are likely to occur, if at all, before grand jury deliberations are concluded. Moreover, the  
25 fact that no indictment was returned does not totally remove the stigma that a person was  
26 the subject of a criminal grand jury investigation nor does it eliminate the possibility that  
27 the grand jury could reconvene on a later date at the government’s request when more  
28 evidence may be available. In the Court’s view, the fact that no indictment was returned has  
some weight on the issue of disclosure but not as much as the Petitioners attach to it. More  
importantly as the Fishbach case points out, “a showing of particularized need” still must be

1 made by Petitioners even when the grand jury whose transcripts are sought has concluded  
2 its operations and even, this Court submits, if no indictments are returned. 776 F.2d at 844.

3           Additionally, Petitioners argue that “impeachment and to refresh recollection  
4 at trial and at deposition are in and of themselves appropriate reasons for the disclosure.”  
5 Again, this Court disagrees. While it is true that the Ninth Circuit in Fishbach agrees with  
6 Petitioners that the need to impeach testimony or refresh recollection during depositions  
7 can establish a compelling need for disclosure, see, 776 F.2d at 845, Petitioners have not  
8 demonstrated that a “compelling need” for disclosure exists at this time. Petitioners have  
9 only begun the state court civil proceedings. Petitioners have made no showing herein that  
10 they have diligently, but unsuccessfully, attempted through formal state discovery  
11 procedures to determine if the defendants have knowledge who may have testified before  
12 the federal grand jury, made no showing that discovery attempts by deposition or  
13 interrogatories have been undertaken to obtain the testimony of those witnesses who  
14 testified before the grand jury, made no showing that the witnesses’ memories need to be  
15 refreshed or testimony impeached, and made no showing that the witnesses would not  
16 consent to the disclosure of their grand jury testimony. In short, Petitioners have not  
17 shown at this time that the grand jury testimony is needed now “to avoid a possible  
18 injustice” in the state court proceedings. See, Fishback, 776 F.2d at 843.

19           This Court concludes that Petitioners’ request for disclosure is premature.  
20 Petitioners have failed to meet the Douglas Oil standard by demonstrating that their need  
21 for disclosure outweighs the interest in secrecy of the grand jury process and that their  
22 request for disclosure is tailored to cover only the material needed.

23           Accordingly,

24           **IT IS ORDERED** that Petitioner’s Motion To Release Grand Jury Transcript  
25 is **DENIED** without prejudice.

26           Dated this 10<sup>th</sup> day of August, 2000.  
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*/s/*  
Lawrence O. Anderson  
United States Magistrate Judge