

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Crim. No. 97-55-P-H
)	
CATHERINE DUFFY PETIT, et al.,)	
)	
Defendants)	

**MEMORANDUM DECISION ON DEFENDANT PETIT’S MOTION
TO REMEDY IMPROPERLY USED GRAND JURY SUBPOENAS**

Defendant Catherine Duffy Petit, contending that the government has used grand jury subpoenas improperly in this case, requests as a remedy immediate disclosure of transcripts of the grand jury proceedings. The other defendants have joined in this motion. Docket Nos. 110, 112, 114, 118. I deny the requested relief.

Petit attaches to her motion letters from several companies and businesses responding to a subpoena, which in some letters is referred to as a grand jury subpoena. Exhs. 1.1-1.17 to Petit’s Motion to Remedy Improperly Used Grand Jury Subpoenas (“Motion”) (Docket No. 91). One of the letters is dated November 4, 1997, the date on which the indictment of these defendants was handed down. Indictment, Exh. A to [Affidavit of] James Osterrieder, submitted with Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions (Docket No. 130), at 33. All of the other letters are dated after November 4, 1997. Petit contends that documents responsive to subpoenas issued in connection with the grand jury proceedings that culminated in her indictment were being received by the government after the indictment issued, and that this is an abuse of the

grand jury subpoena process. The only remedy that she seeks for this alleged abuse is an order requiring the government to provide all defendants with transcripts of all grand jury testimony immediately. Motion at 2.

The government does not deny that it has received documents responsive to the subpoenas since the indictment was issued. It points out that all of the subpoenas were issued prior to the date of the indictment — although it does not disclose the precise dates of issue or the return dates — and notes that the defendants have suffered no harm as a result because copies of all such documents have been provided to them. Petit argues that the government has thereby obtained discovery earlier than it would have otherwise, because the documents could only be subpoenaed for trial, and that in order to restore equality to the parties’ respective positions in this litigation it is necessary to provide the defendants with the transcript of grand jury testimony earlier than they would otherwise receive it.

The Jencks Act, 18 U.S.C. § 3500, provides in pertinent part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.

* * *

(e) The term “statement”, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

* * *

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

The Supreme Court has allowed a defendant access to grand jury transcripts before trial only upon a showing of “particularized need” for specific portions of that testimony. *Dennis v. United States*, 384 U.S. 855, 870 (1966). In addition, Fed. R. Crim. P. 6(e)(3)(C)(ii) allows disclosure to a

defendant “upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

In the First Circuit, “[i]t is well established that a grand jury may not conduct an investigation for the primary purpose of helping the prosecution prepare indictments for trial.” *In re Grand Jury Proceedings*, 814 F.2d 61, 70 (1st Cir. 1987). The government may use at trial, however, evidence “incidentally gained” from a grand jury primarily investigating other crimes. *Id.* Here, Petit claims that the government’s retention of the late-arriving documents constitutes use of the grand jury for precisely that forbidden purpose, and the government does not suggest that the grand jury, after handing down the indictment of these defendants, continued to investigate other possible crimes by these or any other individuals. *See, e.g., United States v. Crosland*, 821 F. Supp. 1123, 1127 (E. D. Va. 1993) (production after indictment of documents subpoenaed before indictment not improper where grand jury investigation ongoing); *In re Grand Jury, April, 1979*, 604 F.2d 69, 72 (10th Cir. 1979) (once indictment rendered, enforcement of subpoenas foreclosed). The First Circuit acknowledged the difficulty in evaluating claims that grand jury investigations are being used improperly to collect evidence for use at trial in *In re Grand Jury Proceedings. Id.* at 71.

Petit provides no authority to support her contention that disclosure of grand jury transcripts before trial is an appropriate remedy for any improper use of the grand jury subpoenas that took place here,¹ or indeed any authority directly supporting her contention that the retention of the documents

¹ Whether any use of the grand jury subpoenas was improper depends on specific facts not before the court, including their issue dates, return dates and whether the government actively pursued compliance with the subpoenas after November 4, 1997. The defendants refer specifically to a letter dated December 1, 1997 from one of the subpoenaed banks to the government that mentions a telephone conversation between bank personnel and an assistant United States attorney that took place during the last week of November 1997 in a context that suggests such active pursuit. (continued...)

submitted after indictment was improper. She relies on *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972), but in that case the allegation was that a grand jury in Massachusetts was being used to support the government's trial prosecution of charges in California, and the First Circuit specifically allowed transcripts of the Massachusetts grand jury testimony to be provided only to the California court, not to the defendant. *Id.* at 1276.

Assuming, without deciding, that the government's acceptance and retention of documents produced after indictment by third parties in response to grand jury subpoenas issued before indictment was improper, the defendants here have shown no effect on the fairness of their upcoming trial as a result, because the government has provided them with the documents. *See United States v. Jenkins*, 904 F.2d 549, 560 (10th Cir. 1990) (denying motion for dismissal where grand jury heard additional testimony concerning defendant after indicting him and no subsequent superseding indictment was filed; defendant did not show that grand jury testimony had any effect on fairness of his trial based on indictment issued before any of the purported abuse occurred). It is apparent here that the government was aware of the existence and location of the documents, if not of their precise contents, before the indictment was issued. The documents could thus be independently subpoenaed for trial and therefore "would not fall under a taint." *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 524 (E.D.N.Y. 1974) (documents provided to United States Attorney in response to grand jury subpoena issued in name of grand jury not then sitting and not sitting on return date not to be excluded solely on that basis). *See also United States v. Phillips*, 577 F. Supp. 879 (N. D. Ill. 1984), in which documents were obtained via grand jury subpoena on the

¹(...continued)
See Exh. 1.13 to Motion.

same day the indictment was handed down; the court found no abuse of the grand jury process, in part because the grand jury first subpoenaed the documents more than six weeks before the indictment, and the grand jury would have been able to consider them if there had been timely compliance with the subpoena. *Id.* at 880.

The remedy sought by Petit is at best overbroad, because there may well be witnesses who testified before the grand jury who do not testify at trial, making the grand jury transcripts of their testimony unavailable under the Jencks Act, and the disclosure of such transcripts before trial would thus be far more than merely an “early” disclosure. In fact, the only remedy sought by Petit is unavailable under the circumstances present here. She has made no showing of “particularized need” for the transcripts of all grand jury testimony in this case, nor does she seek dismissal of the indictment in connection with the alleged abuse, the two established procedural methods available for the relief she seeks. The motion is **DENIED**.

Dated this 3rd day of June, 1998.

David M. Cohen
United States Magistrate Judge