

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION**

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| <b>UNITED STATES OF AMERICA,</b> | ) |                                     |
|                                  | ) |                                     |
|                                  | ) | <b>Civil Action No.: 5:15cr0007</b> |
| <b>v.</b>                        | ) |                                     |
|                                  | ) |                                     |
| <b>DMYTRO PATIUTKA,</b>          | ) |                                     |
|                                  | ) | <b>By: Hon. Michael F. Urbanski</b> |
| <b>Defendant.</b>                | ) | <b>United States District Judge</b> |
|                                  | ) |                                     |
|                                  | ) |                                     |

**MEMORANDUM OPINION**

Before the court is defendant Dmytro Patiutka’s (“Patiutka”) request for disclosure of grand jury testimony, Dkt. No. 45. In this motion, Patiutka seeks the grand jury testimony and exhibits presented in order to obtain the indictment in this case. Because Patiutka has shown a particularized need for this material, the court will order the disclosure to defendant the testimony of law enforcement officers, and associated exhibits, presented to the grand jury.

**I.**

The grand jury returned an indictment on March 12, 2015 charging Patiutka with conspiracy to commit access device fraud and aggravated identity theft. This case is directly related to another case involving Patiutka, United States v. Patiutka, No. 5:14cr00014 (W.D. Va.) (“Patiutka I”), which is currently on interlocutory appeal to the Fourth Circuit Court of Appeals. In Patiutka I, Patiutka is charged with possession of counterfeit or unauthorized access devices, illegal possession of device making equipment, and aggravated identity theft.

The charges in both cases are the result of a traffic stop on Interstate 81 during which Patiutka provided false identification to law enforcement and law enforcement subsequently discovered a credit card reader, multiple iPads, a credit card embosser, and multiple blank credit

cards in Patiutka's vehicle. Patiutka initially consented to the search of his vehicle but revoked it, and in Patiutka I, the court suppressed evidence seized and inculpatory statements made after Patiutka expressly revoked his consent. See United States v. Patiutka, No. 5:14cr00014, Dkt. No. 57 at \*10, \*24 (W.D. Va. Dec. 4, 2014). The court explicitly rejected the government's arguments that the search incident to arrest, automobile, and inevitable discovery exceptions applied to the exclusionary rule. Id. at \*16, \*19, \*22. That order is presently pending before the Fourth Circuit, and, to date, the Fourth Circuit has not issued its decision.

A motion to suppress was filed in this case by Patiutka's former counsel. That motion alleges that "evidence intended to be used [in this case] is tainted by the unlawful search and seizure of evidence that has previously been suppressed by this court . . . ." Dkt. No. 30 at \*1. Days before filing that motion, Patiutka's former counsel moved for substitution of counsel which the court granted. Due to the change of counsel, the court gave Patiutka's new counsel time to familiarize himself with the case and decide whether he intended to pursue the motion to suppress. In his request for grand jury material, Patiutka's counsel incorporates the motions to suppress filed both in Patiutka I and in this case but submits he needs grand jury materials in order to determine whether the evidence submitted to the grand jury was subject to the court's suppression order issued in Patiutka I. The government objects to the disclosure of the grand jury materials prior to its obligation under the discovery order and argues the defendant has failed to meet the standards for disclosure of such materials under Federal Rule of Criminal Procedure 6(e). The government further argues that the evidence supporting the indictment in this case is unrelated to the evidence suppressed in Patiutka I.

## II.

The "proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

The veil of secrecy that protects grand jury proceedings is codified in Rule 6(e) of the Federal Rules of Criminal Procedure. The rule, nevertheless, identifies certain circumstances under which the veil of secrecy may be pierced and grand jury materials disclosed. Fed. R. Crim. P. 6(e)(3)(E). Here, defendant seeks disclosure of grand jury matters “preliminarily to or in connection with a judicial proceeding.” Fed. R. Crim. P. 6(e)(3)(E)(i).

A party seeking grand jury transcripts must show that (1) the materials are needed to avoid a possible injustice, (2) the need for disclosure outweighs the traditional public interest needs for continued secrecy, and (3) the request covers only the necessary material. Douglas Oil, 441 U.S. at 222. More specifically, the moving party must demonstrate a particularized need for the disclosure of grand jury materials. United States v. Sells Eng'g, Inc., 463 U.S. 418, 443 (1983). To make a showing of a particularized need, the moving party must demonstrate that the requested grand jury materials are “rationally related” to the judicial proceeding and that disclosure serves the interests of fairness and justice. In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1303 (4th Cir. 1986). Whether to disclose grand jury materials is left to the sound discretion of the trial court. Id. at 1299 (citing Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959)).

Disclosure of grand jury materials is only appropriate when the particularized need propounded by the moving party outweighs the public interest in continued secrecy. Illinois v. Abbott & Associates, Inc., 460 U.S. 557, 568 n.15 (1983); Douglas Oil, 441 U.S. at 222. The traditional public interest in continued secrecy of grand jury proceedings serves to:

- (1) prevent the escape of those whose indictment may be contemplated;
- (2) insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning grand jurors;
- (3) prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at trial of those indicted by it;
- (4) encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) 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.

Douglas Oil, 441 U.S. at 219 n.10 (internal quotation marks omitted). The rationale for grand jury secrecy even applies when the grand jury has concluded its operations, because courts should “not only [consider] the immediate effects upon a particular jury, but also the possible effect upon the functioning of future grand juries.” Id. at 222. At the same time, the public interest in grand jury secrecy diminishes after a grand jury’s investigation has terminated. Id. at 222-23; In re Grand Jury Proceedings, 800 F.2d at 1301.

The court finds Patiutka has met his burden of showing a particularized need for the grand jury materials and that need outweighs the public interest in grand jury secrecy in this case. First, the grand jury proceeding terminated months ago. Therefore, “most of the reasons for grand jury secrecy are no longer applicable and others are less compelling.” In re Grand Jury Proceedings, 800 F.2d at 1300 (quoting SEC v. Everest Management Corp., 87 F.R.D. 100, 104 (S.D.N.Y. 1980)). Second, the court’s discovery order provides for the disclosure of witness statements two weeks before trial, which deadline is only a little over a week away. Third, the testimony Patiutka seeks is likely to primarily consist of testimony from law enforcement and other government agents, not victims or civilian witnesses. Thus, there is little concern that the disclosure here will have a chilling effect on witness participation in other grand jury proceedings. Id. Fourth, and most importantly, Patiutka’s request encompasses only those materials related to the grand jury’s finding of probable cause to obtain an indictment in this case. See Dkt. No. 45 at \*2.

Based on the video of the traffic stop that led to Patiutka’s indictment in Patiutka I, there is a question as to whether the investigation regarding the charges in this case stemmed from Patiutka’s providing of false identifying information to law enforcement, or law enforcement’s decision to “call Secret Service” after discovering the credit card embosser and blank credit cards. United States v. Patiutka, No. 5:14cr00014, Dkt. No. 57 at \*6. The defendant’s concern here is that the

investigation regarding identity theft resulted not from the fake driver's license he had in his possession, but rather the illegal search, and, thus, the investigation related to the charges in this case was "fruit of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471 (1963). Whether the grand jury found probable cause to indict Patiutka in this case based on evidence of an investigation that flowed from an illegal search could impact this case. The government asserts that the Patiutka II prosecution is based only upon defendant's statement at the outset of the traffic stop that his name was Roman Pak and is not founded at all upon evidence obtained from the search that the court found to be unconstitutional. Defendant is entitled to discovery to assess the factual basis for the government's assertion.<sup>1</sup>

The government relies on United States v. Loc Tien Nguyen, 314 F. Supp. 2d 612 (E.D. Va. 2004), in support of its opposition to disclosing the grand jury materials. Nguyen, however, is distinguishable from this case. Nguyen involved multiple superseding indictments charging that defendant with RICO violations. Before trial, the defendant made "breathtakingly broad" requests for grand jury material. Nguyen, 314 F. Supp. 2d at 614-15. After a hearing on the motion for disclosure, the defendant limited his request to three categories of information but failed to demonstrate any particularized need for the grand jury information. Id. at 615, 616-17. The request at issue here is not nearly so broad as that in Nguyen, and, as explained above, Patiutka has shown a particularized need for the grand jury testimony, i.e., whether the grand jury considered information suppressed in Patiutka I. Furthermore, the Nguyen court addressed that defendant's request under Rule 6(e)(3)(ii), not subsection (i), as the court has done here.<sup>2</sup> Finally, the Nguyen court noted that

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<sup>1</sup> Moreover, to the extent that the government's trial witnesses testified before the grand jury, their grand jury testimony is subject to the court's standard discovery order requiring production two weeks before the scheduled trial. Dkt. No. 19. Given the issue in this case of the application of the court's prior suppression ruling to this prosecution, earlier production of witness statements is warranted.

<sup>2</sup> The Nguyen court, relying on United States v. Proctor & Gamble Co., 356 U.S. 677 (1958), determined that the language of Rule 6(e)(3)(E)(i) did not permit disclosure of grand jury material for "the criminal trial authorized by the grand jury's indictment." Id. at 615. The Nguyen court believed that allowing disclosure of grand jury materials in such a manner "would render [Rule 6(e)(3)(E)(ii)] superfluous, as [Rule 6(e)(3)(E)(i)] would always encompass [Rule

even if Nguyen's request fell under subsection (i), he failed to establish a particularized need for the grand jury materials. Id. at 616 n.6.

### III.

For the foregoing reasons, the court finds that Patiutka has shown a particularized need for certain grand jury testimony which outweighs the public interest in grand jury secrecy. As such, because of the impending disclosure deadline, defense counsel's recent appearance in this case, and Patiutka's showing of a particularized need for these materials, the court will order the disclosure to defendant the testimony of law enforcement officers, and associated exhibits, presented to the grand jury. An appropriate order will be entered this day.

Entered: June 30, 2015

*/s/ Michael F. Urbanski*

Michael F. Urbanski  
United States District Judge

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6(e)(3)(E)(ii)].” Id. The court does not agree with the Nguyen court's reading of Rule 6(e)(3)(E)(i) for two reasons. First, such a reading would eviscerate the plain language of the rule. Rule 6(e)(3)(E)(i) states a court may permit the disclosure of grand jury material “preliminarily to or in connection with a judicial proceeding.” The rule does not use the phrase “another judicial proceeding” or “a separate judicial proceeding,” it uses the phrase “a judicial proceeding.” “Courts must construe statutes as written, and not add words of their own choosing.” Ignacio v. United States, 674 F.3d 252, 255 (4th Cir. 2012) (quoting Barbour v. Int'l Union, 640 F.3d 599, 623 (4th Cir. 2011) (en banc) (Agee, J. concurring in judgment)). Second, such a reading ignores the common practice of allowing grand jury testimony to be used for impeachment, establishing credibility, and refreshing recollection during the criminal trial authorized by the grand jury's indictment. See Douglas Oil, 441 U.S. at 222 n.12.