UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF GRAND JURY INVESTIGATION	No. 18-gj-00008 (BAH) Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION

A witness who testified under a grant of immunity before the grand jury in this District on four separate days, in February and March, 2018, in connection with the investigation conducted by Special Counsel Robert S. Mueller, III ("the Special Counsel"), has petitioned, pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(i), to obtain "copies of transcripts and any audio recordings of his grand jury testimony," Pet'r's Mem. Supp. Sealed Mot. for Disclosure of [Petitioner]'s Grand Jury Testimony ("Pet'r's Mem.") at 1, ECF No. 6-1. According to the petitioner, these materials "are critically necessary to assist him and his counsel in evaluating his current legal rights and defenses," *id.*, in a pending criminal case against him in another federal district court.[1] The government opposes this request on the ground that the limited accommodations already made to permit petitioner's counsel to review the petitioner's grand jury transcripts in the U.S. Attorney's Office are sufficient. For the reasons explained below, the petition is granted and the government is ordered to disclose promptly to the petitioner a copy of the transcript of his grand-jury testimony.

[1] The petitioner is [redacted]

I. BACKGROUND

The petitioner last testified before the grand jury in this District in late March 2018. Pet'r's Mem. at 1. His testimony before the grand jury was under a formal grant of immunity, pursuant to 18 U.S.C. §§ 6002, 6003, which expressly provided that "no testimony or other information compelled under this Order, or any information directly derived from such testimony or other information, may be used against the Witness in any criminal case, except in a prosecution for perjury, giving a false statement, obstruction of justice, or otherwise failing to comply with this Order." Pet'r's Mem., Ex. 1, Immunity Order (Feb. 8, 2018) ("Immunity Order"), ECF No. 6-3.

[redacted].[2] The petitioner faces trial in early 2020 in another federal district court, Joint Status Report (Sept. 30, 2019) ("Sept. 30 JSR") at 3, ECF No. 11, with two of the three counts against him "predicated directly upon evidence that agents working at the direction of the [Special Counsel's Office] purportedly found in searches of electronic devices that the [Special Counsel's Office] seized from [petitioner] in January 2018," *id.* If convicted, the petitioner faces a mandatory-minimum sentence of fifteen years' incarceration. *Id.* (citing Indictment). [redacted]

[2] The petitioner provided the following citation to the affidavit supporting the criminal complaint: Aff. In Supp. Of Criminal Compl., [redacted]

[redacted] Since shortly after his arrest, the petitioner has been detained, with limited visitation permitted due to his prisoner designation. Pet'r's Mem. at 4–5; Sept. 30 JSR at 7; Pet'r's Reply at 5–6. Consequently, all petitioner's communications with visitors are recorded, except for conversations with petitioner's counsel of record in the pending criminal case. Pet'r's Reply at 5–6.

The petitioner filed the instant petition on June 25, 2019. Pet'r's Sealed Mot. for Disclosure of [] Grand Jury Testimony ("Pet'r's Mot."), ECF No. 6. At the direction of the Court, *see* Min. Order (June 25, 2019), the parties conferred and agreed to hold the petition in abeyance, while the government agreed to provide to petitioner's counsel "read-only access to the grand jury transcripts," Status Report (June 28, 2019) ("June 28 JSR") at 1, ECF No. 7. The government filed an unopposed motion for a protective order governing this access that was entered on July 3, 2019. *See* Gov't's Unopposed Mot. for Protective Order, ECF No. 9; Protective Order Governing Discovery (July 3, 2019) ("Protective Order") at ¶¶ 1–3, ECF No. 10 (providing terms of access to transcripts of petitioner's grand jury testimony, including limiting access to petitioner's counsel of record and counsel admitted *pro hac vice* in both this matter and his criminal case, and prohibiting such counsel from copying the transcripts or making further disclosures to unauthorized persons). Under the auspices of the Protective Order, the government provided, in the confines of the U.S. Attorney's Office, a single, paper copy of the

transcript, approximately 900-pages long, to petitioner's counsel, who were permitted to take notes by hand but not electronically; counsel were not permitted to take any laptops or phones into the U.S. Attorney's Office. Sept. 30 JSR at 5–6. [3]

After failing to submit a timely status report on July 31, 2019, the parties were ordered to advise whether issues raised in the petition were resolved and the matter could be closed. Min. Order (Sept. 6, 2019). The petitioner responded by renewing his request for disclosure of a copy of his grand-jury testimony, rather than read-only access for his counsel in the U.S. Attorney's Office. Sept. 30 JSR at 6–10. In a single paragraph, the government offered an additional accommodation to permit counsel to use, within the U.S Attorney's Office, "a computer and as many copies of the transcript as requested," *id.* at 10, but otherwise argued that the petitioner's request should be sought in the district where the criminal case is pending, *id.* at 11.

Given the brevity of its submission, the government was ordered to submit "a full explanation of its reasoning," Min. Order (Oct. 4, 2019), which supplemental submission was filed on October 8, 2019, Gov't's Resp. to Minute Order ("Gov't's Resp."), ECF No. 12. The petitioner has submitted a reply, Pet'r's Reply, and the pending petition is now ripe for resolution.

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 6(e), courts may authorize disclosure of grand jury matters when such disclosure is made "preliminarily to or in connection with a judicial proceeding." FED. R. CRIM. P. 6(e)(3)(E)(i). Generally, to obtain disclosure under this provision,

---

[3] Notably, the Protective Order does not prescribe the terms of access that the government has provided, but instead bars the petitioner and his counsel from copying, reproducing or disclosing the grand jury materials or disclosing their notes or records made in relation to the contents of those materials to any unauthorized persons. Protective Order ¶¶ 2, 3. In addition, the grand jury materials and all copies thereof must be destroyed or returned to the United States on "conclusion of all stages of this case … unless otherwise ordered by the Court." *Id.* ¶ 4.

the petitioner must make "a strong showing of particularized need," *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983), that "the materials sought be 'needed to avoid a possible injustice in another judicial proceeding' and that the moving party's request be 'structured to cover only material so needed," *United States v. Baggot*, 463 U.S. 476, 480 n. 4 (1983) (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)).

While the Supreme Court has not addressed the precise question of how the particularized need test applies to grand-jury witnesses seeking disclosure of their own grand jury testimony, the D.C. Circuit views that test as being "crafted to deal with '*third-party* requests for secret transcripts of other witnesses' testimony' and not applicable "in this *first-party* context." *In re Grand Jury*, 490 F.3d 978, 989 (D.C. Cir. 2007) (per curiam) (emphasis in original) (citing *In re Sealed Motion*, 880 F.2d 1367, 1370–73 & n.6 (D.C. Cir. 1989) (per curiam) (noting, in footnote 6, that "[b]oth *Sells Engineering* and *Douglas Oil* [] involved cases where the movants sought disclosure of grand jury testimony of *third parties*" and concluding "that where movant is a witness and seeks a transcript of his own grand jury testimony, the standards outlined in *Sells Engineering* and *Douglas Oil* do not apply.") (emphasis in original)). Instead, the Circuit has instructed that, in the first-party context, "we must weigh the competing interests of the Government and the grand jury witnesses." *In re Grand Jury*, 490 F.3d at 987; *see also In re Sealed Motion*, 880 F.2d at 1373 (stating that grand jury witness "has a general right to a transcript of [his own] testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript.").[4] In applying this balancing test, the Circuit discounts the government's interest in preserving grand jury secrecy because grand

[4] The D.C. Circuit also found, in *In re Sealed Motion*, that "if a particularized need test were applied to the instant case, the record amply support such finding," 880 F.2d at 1376, but principally relied on the more lenient test, "hold[ing] that a grand jury witness has a general right to a transcript of his own grand jury testimony when sought in connection with a judicial proceeding," *id.*

jury witnesses are under no obligation of secrecy as to their own testimony. *In re Grand Jury*, 490 F.3d at 989; *In re Sealed Motion*, 880 F.2d at 1371.

Rule 6(e) provides additional guidance on the logistics of disclosures under Rule 6(e)(3)(E)(i), including when the judicial proceeding for which the disclosure is sought is pending in another federal district court. Specifically, as relevant here, petitions "to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened." FED. R. CRIM. P. 6(e)(3)(F). The next subparagraph provides, however, that "[i]f the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper." *Id.* 6(e)(3)(G). Upon transfer of the petition, the petitioned court "must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand-jury secrecy." *Id.* This written evaluation requirement is firm. *See In re Sealed Case*, 250 F.3d 764, 771 (D.C. Cir. 2001) (finding that a grand jury court erred by transferring grand-jury materials without a providing a written evaluation).

III. DISCUSSION

The petitioner contends that he has a need for and is entitled to a copy of his own grand-jury testimony under Federal Rule of Criminal Procedure 6(e)(3)(E)(i). The government counters with two arguments: first, that the petition should be transferred to the district where the petitioner's criminal case is pending, in accordance with Rule 6(e)(3)(G); and second, that the petitioner is not entitled to a copy of his grand-jury testimony under Rule 6(e)(3)(E)(i). These arguments are examined in turn.

A. Transfer is Unnecessary Under Rule 6(e)(3)(G)

The government urges that the petition be transferred, pursuant to Rule (6)(e)(3)(G), because the requested grand jury disclosure "is more appropriately considered by that [transferee] Court, which has before it all the relevant information concerning [petitioner]'s criminal case for which he claims the transcript is required," Gov't's Resp. at 2, and, further, such transfer would serve the interests of "judicial economy," since the petitioner intends to file a motion to compel in his criminal case, *id.* The government is misreading Rule (6)(e)(3)(G).

Rule 6(e) makes clear at the outset that "[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," which is here the District of Columbia. Fed. R. Crim. P. 6(e)(3)(F). Transfer of such a petition seeking disclosure of grand jury materials for use in "a judicial proceeding in another district" is not appropriate when "the petitioned court can reasonably determine whether disclosure is proper." *Id.* (6)(e)(3)(G) (stating that transfer is required "unless the petitioned court can reasonably determine whether disclosure is proper."). As the Advisory Committee notes make clear, this phrasing reflects "a preference for having the disclosure issue decided by the grand jury court." Fed. R. Crim. P. 6, Advisory Committee Notes, 1983 Amendment, Note to Subdivision (e)(3)(D). Thus, the threshold question in determining whether transfer is required is whether this grand jury court "can reasonably determine whether disclosure is proper"; otherwise, transfer is unnecessary and disfavored.

To "reasonably determine whether disclosure is proper" when grand-jury witnesses seek the disclosure of their own grand-jury testimony, the grand jury court must: (1) find that the disclosure is being sought "preliminarily to or in connection with a judicial proceeding," in accordance with Rule 6(e)(3)(E)(i); and (2) weigh the relative interests of the government and petitioner in disclosure or continued grand-jury secrecy from the grand-jury witness. The

government offers little argument about why this Court lacks the ability to make this determination and thus to rule on the petition, despite having the opportunity to specify the interests the government seeks to protect in denying the petitioner a copy of his grand-jury testimony. *See generally* Sept. 30 JSR at 10–11; Gov't's Resp. The petitioner, on the other hand, has made specific and concrete representations regarding both the nature of the pending and potential judicial proceeding in connection with which disclosure is sought and the petitioner's interest in obtaining disclosure. *See generally* Pet'r's Mem.; Sept. 30 JSR at 1–10; Pet'r's Reply. As detailed *infra*, in Part III.B., based on the current record, including the timing of the petitioner's immunized grand-jury testimony, the undisputed seizure of the petitioner's phone in connection with the Special Counsel's investigation that provided evidence underlying at least in part the pending criminal charges against the petitioner, the potential "additional, contemplated charges" he may face stemming from his grand jury testimony, Pet'r's Resp. to Gov't's Status Report at 2, and the challenges outlined by petitioner's counsel in reviewing petitioner's grand-jury testimony effectively through the read-only access provided by the government in the U.S. Attorney's Office, this Court can "reasonably determine whether disclosure is proper," making transfer under Rule 6(e)(3)(G) unnecessary.

Notably, though urging transfer, the government fails to address the additional requirements of Rule 6(e)(3)(G). Specifically, in the event of a transfer, the grand jury court must provide the transferee court with "a written evaluation of the need for continued grand-jury secrecy." Absent "a written evaluation of the need for continued grand-jury secrecy" required under the rule, transfer of the petition would amount to legal error. *See In re Sealed Case*, 250 F.3d at 771. Yet, the government has submitted no information or basis for preparing such an evaluative report. Judicial supervision of the grand jury typically does not provide the court

doing the supervising with information necessary to assess "the need for continued grand jury secrecy," let alone prepare the requisite evaluative report. *See McKeever v. Barr*, 920 F.3d 842, 848 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-307 (Sept. 5, 2019) (noting that "a district court is not ordinarily privy to grand jury matters unless called upon to respond to a request to disclose [a] grand jury matter."). Such an assessment triggers, *inter alia*, consideration of whether persons are referenced or discussed before the grand jury with privacy or reputational interests, because they have not and will not be charged, that may militate for continued secrecy; whether any criminal investigations or operations stemming from the grand jury's work may be ongoing and not public, necessitating continued secrecy; and whether classified or other confidential information is revealed in the requested grand jury information that may warrant continued secrecy. Judicial review of grand-jury transcripts alone, even if performed diligently and thoroughly to prepare an evaluative report, would be insufficient to address these considerations since the prosecutor, not the court, holds the necessary information.

Where, as here, the grand jury investigation is over and the prosecutor has remained virtually silent on any continuing need for secrecy particular to this grand jury investigation, the grand-jury court is at a distinct disadvantage in being able to prepare the requisite evaluative report for transfer to another district. This awkward position results from the procedure dictated by Rule 6(e)(3)(F) and (G), which are predicated on the Supreme Court's guidance in *Douglas Oil*. *See* Fed. R. Crim. P., Adv. Notes to 1983 Amendments (relying heavily on Douglas Oil for explanation of amendments).

The Supreme Court in *Douglas Oil* concluded that the district court's decision to grant a petition for disclosure of grand jury testimony, under Rule 6(e), "directly to" defendants in an unrelated civil antitrust proceeding pending in another district was an abuse of discretion. 441

U.S. at 228. The grand jury transcripts at issue contained the testimony of employees of certain plaintiffs in the civil suit that had already been disclosed to the plaintiff employers, who declined to produce them in discovery to the defendants, *id.* at 216, and thus the petition to the grand jury court effectively bypassed the normal discovery process in the civil litigation. Nevertheless, the Antitrust Division prosecutors, who had presented the testimony to the grand jury, had no objection to the defendants "receiving the transcripts already made available to" the plaintiffs, *id.*; the plaintiffs, who were objecting to disclosure, "made no concrete showing of irrelevance [and] also passed up two procedural opportunities to make such a showing," *id.* at 235–6 (Stevens, J., dissenting); and the grand-jury court concluded, based on review of certain documents from the civil suit, "that the transcripts would facilitate the prosecution of respondents' civil suits," *id.* at 217. In reversing the grand-jury court's disclosure, the Court counseled that "the better practice" would be to bifurcate the inquiry into "the relative needs for secrecy and disclosure," *id.*, so that the grand-jury court would evaluate the need for secrecy and the court where the civil case was pending could evaluate the need for disclosure. "In this way, both the need for continued secrecy and the need for disclosure could have been evaluated by the courts in the best position to make the respective evaluations." *Id.* at 231.

In allocating these responsibilities, the Supreme Court found that "the grand jury's supervisory court … is in the best position to determine the need for grand jury secrecy," *id.* at 225, because "[t]he records are in the custody of the district court, and therefore readily available for reference," *id.* at 226; *id.* at 213 (describing grand jury court "as custodian of the grand jury documents"), and "the personnel of that court—and particularly those of the U.S. Attorney's office who worked with the grand jury—are more likely to be informed about the grand jury proceedings than those in a district that had no prior experience with the subject of the request,"

id. at 226.[5] On the other hand, the court where the judicial proceeding is pending, "with [its] special knowledge of the status of the civil actions, then could have considered the requests for disclosure in light of the [grand jury] court's evaluation of the need for continued grand jury secrecy." *Id.* at 230–31.

The specific circumstances at issue in *Douglas Oil*—requested disclosure by a third-party of grand jury transcripts of an adverse civil party's employees, when the transcripts were generated in an unrelated criminal case and no showing is made that those same employees may be witnesses in the civil case—dictated the contours of the Court's recommended "better practice." This guidance was synthesized in subparagraphs (F) and (G) to apply generally rather than closely tied to the type of circumstances that arose in *Douglas Oil*. As a result, the combination of subparagraphs (G) and (F) in Rule 6(e)(3), creates a cumbersome, inefficient process whereby petitions to disclose grand-jury materials for use in a judicial proceeding pending in another district, under Rule 6(e)(3)(E)(i), first "must be filed" in the grand-jury court, Fed. R. Crim. P. 6(e)(3)(F), only to be transferred under Rule 6(e)(3)(G), along with a written evaluation based inevitably on information held by the prosecutors, to another district, where the transferee court would have the opportunity to conduct a second judicial review of both the grand jury transcripts and prosecutors' information in the written evaluation, to determine the propriety of disclosure for use in the judicial proceeding. The transferee court would also have to repeat the grand-jury court's review of the petitioner and government's submissions

[5] In 1979, the same year *Douglas Oil* was decided, Rule 6(e) was amended to "mandate that grand jury proceedings be transcribed or taped," with government attorneys tasked to "keep the transcripts and tapes of grand jury proceedings." *In Re Grand Jury*, 490 F.3d at 986. Thus, in contrast to the Supreme Court's observation, records of grand jury proceedings are not in the custody of the district court nor "readily available for reference," *see McKeever*, 920 F.3d at 848 ("Rule 6 assumes the records are in the custody of the Government, not that of the court"). Nor, as already noted, are court personnel "ordinarily privy to grand jury matters," *id.*

addressing the countervailing interests at stake in order to evaluate the relevance and intended use of the grand jury material in the judicial proceeding.

An expansive reading of subparagraph (G) would make this twice-over judicial review process almost automatic in every case where disclosure of grand jury material is sought for use in another district's judicial proceeding. Instead, Rule 6(e)(3)(G) must be read in light of the Advisory Committee notes, as allowing but not requiring transfer.[6] Here, this Court can "reasonably determine whether disclosure is proper," and therefore declines to transfer the petition, under Rule 6(e)(3)(G), to the other district where the petitioner faces criminal indictment.

B. The Petitioner Is Entitled to a Copy of his Grand Jury Testimony Under Rule 6(e)(3)(E)(i)

Under Rule 6(e)(3)(E)(i), courts may only authorize the disclosure of grand-jury material "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). In this context, "[t]he term judicial proceeding has been given a broad interpretation by the courts," *In re Sealed Motion*, 880 F.2d at 1379, one which clearly includes criminal prosecutions, *see In re Grand Jury*, 490 F.3d at 986. The phrase "in connection with" refers to an already pending proceeding, while "preliminarily to" refers to a proceeding that has not yet begun. *Baggot*, 463 U.S. at 479. Here, the government does not contest that these threshold requirements are met, and the petition clearly falls within the scope of Rule 6(e)(3)(E)(i), since the petitioner seeks his own grand jury transcript for use in his pending criminal case in another district and potential other federal criminal charges not yet brought. *See generally*, Gov't's Resp. In addition, the

---

[6] "In the absence of a clear legislative mandate, the Advisory Committee Notes [to the Federal Rules of Criminal Procedure] provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002).

government does not appear to dispute that the petitioner is entitled to some form of access to his grand-jury testimony. *See* Sept. 30 JSR. The parties disagree, however, as to whether the petitioner is entitled to a copy of his grand-jury transcript for the use that he seeks in connection with his own criminal trial.

As an initial matter, a grand jury witness has no automatic right to a transcript of his or her testimony. *See* 1 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 106 (4th ed.) ("Although witnesses have a right to disclose their testimony freely, they generally have no right to a transcript of their grand jury testimony."); *see also United States v. John Doe, Inc. I*, 481 U.S. 102, 125–26 (1987) (Brennan, J., dissenting) (stating "the well settled rule that a witness is not entitled to a copy of his grand jury testimony on demand, even though he obviously was present in the grand jury room during the receipt of evidence, *since a rule of automatic access would expose grand jury witnesses to potential intimidation* by making it possible for those with power over the witness to monitor his or her testimony.") (internal quotations and citations omitted) (emphasis in original)); *Executive Securities Corp. v. Doe*, 702 F.2d 406, 408–09 (2d Cir. 1983) ("witnesses do not have the prerogative to effect the release of transcripts of their own grand jury testimony"); *Valenti v. United States Dep't of Justice*, 503 F. Supp. 230, 233 (E.D. La. 1980) ("A witness before a grand jury has no inherent right to a transcript of his testimony.").

Nevertheless, the D.C. Circuit has made clear that grand-jury witnesses seeking a copy of their own grand jury testimony to use in a judicial proceeding, under Rule 6(e)(3)(E)(i), need only show that their interest in disclosure outweighs the "competing interests of the Government." *In re Grand Jury*, 490 F.3d at 987. In that case, two corporate employees, who testified multiple times before the grand jury, sought an opportunity to review transcripts, not

obtain copies, of their own grand jury testimony "to avoid the possibility of inconsistent statements occasioned by the passage of years since the events in question and many months since their prior grand jury appearances, to aid counsel in advising them, and potentially to allow them to take advantage of recantation pursuant to 18 U.S.C. § 1623." *Id.* at 984. The Circuit held that "grand jury witnesses are entitled under Rule 6(e)(3)(E)(i) to review the transcripts of their own testimony in private at the U.S. Attorney's Office or a place agreed to by the parties or designated by the district court," *id.* at 990, finding that "grand jury witnesses have a strong interest in reviewing the transcripts of their own grand jury testimony," and the government, by contrast, "has little good reason to prevent witnesses from reviewing their transcripts," *id.*

The Circuit further explained that applying the more lenient balancing test to grand-jury witnesses—in contrast to third parties, who must meet the more exacting "particularized need" standard, *id.* at 987—is warranted because federal grand-jury witnesses are under no obligation of secrecy as to their own grand-jury testimony, *id.* at 989. "A grand jury witness is legally free to tell, for example, his or her attorney, family, friends, associates, reporters, or bloggers what happened in the grand jury." *Id.*; *see also* Fed. R. Crim. P. 6(e)(2)(A)-(B); Fed. R. Crim. P. 6, Advisory Committee Notes, 1944 Adoption, Note to Subdivision (e) ("rule does not impose any obligation of secrecy on witnesses"). Since grand-jury witnesses are under no obligation of secrecy, the government's normal interest in preserving grand-jury secrecy does not apply when dealing with a petition for disclosure concerning a grand-jury witness's own testimony. *See In re Grand Jury*, 490 F. 3d at 989 ("The secrecy rules therefore are no justification for denying witnesses access *to their own transcripts*.") (italics in original); *In re Sealed Motion*, 880 F.2d at 1371 (recognizing that "the government's interest in nondisclosure … was a *non sequitur* when a grand jury witness moves for a copy of his own testimony because the right to secrecy in a grand

jury proceeding belongs to the grand jury witness and the witness is already cognizant of his testimony.").

In accord with *In re Grand Jury*, the government concedes that the petitioner is entitled to review the transcript of his grand-jury testimony in private, at the U.S. Attorney's Office, but maintains that the petitioner is not entitled to receive a copy of his transcript. Sept. 30 JSR at 10; Gov't's Resp. at 3. In support, the government asserts in conclusory fashion three interests to counter the petitioner's interest in obtaining a copy, arguing that releasing a copy of a witness's testimony will allow for witness intimidation by third parties, Gov't's Resp. at 3; relatedly, that such possible intimidation "could chill other witnesses from giving full and candid responses" to grand juries in the future, *id.* at 4; and, finally, that the petitioner's grand-jury testimony, which includes "questions regarding ongoing investigations," might potentially "be used by third parties to assess what the government is investigating or why," *id.*

None of these asserted interests is developed in detail or with specific citation to any part of the grand jury transcripts at issue.[7] As the government correctly points out, the D.C. Circuit has recognized that concerns about witness intimidation could arise "if a witness could routinely obtain a copy of the grand jury transcript" since "an interested party could in turn pressure the witness to obtain the transcript and to give it to that third party," and a "witness's fear of being forced to disclose the transcript to a threatening third party could deter witnesses from testifying freely and candidly in the first place." *In re Grand Jury*, 490 F.3d at 989. At the same time, the Circuit had no occasion in that case—because the petitioners did not request a transcript copy, *id.* at 985 & n.5—and therefore expressly declined to address "whether [grand jury] witnesses also

[7] The government offered no explanation of its position in the Joint Status Report filed on September 30, *see generally* Sept. 30 JSR, and provided roughly two pages of explanation in its subsequent submission, *see* Gov.'s Resp. at 3–5, filed in response to the Court's order requesting additional explanation, *see* Minute Order (October 4, 2019).

have a right to obtain a copy of the transcripts of their prior testimony, leaving that issue for another day," *id.* at 990; *id.* at 989–90 (noting that "the possibility [that] witness intimidation would justify denying copies of transcripts" was "an issue we need not decide").

Meanwhile, though not acknowledged by the D.C. Circuit in *In re Grand Jury*, the D.C. Circuit has sanctioned the provision to grand jury witnesses of transcripts of their prior testimony. *See In re Sealed Motion*, 880 F.2d at 1380–81 (ordering that "Independent Counsel forthwith deliver the witness a copy of his testimony as a witness before the grand jury"); *id.* at 1373 n.9 (noting that Mr. and Mrs. Meese were given "access to their own grand jury testimony," but denied access to "*third party grand jury testimony*" "of individuals who testified before the grand jury during the investigation of Mr. Meese and Mr. Wallach," who was the Meeses' attorney) (emphasis in original)).[8]

Thus, while the government's stated interest in preventing witness intimidation is a factor to be considered in weighing the relative interests, this consideration does not pose an absolute bar to providing a copy to petitioner of his prior grand jury testimony for use in his defense of criminal charges in another district. In this respect, the government's mere citing to *In re Grand Jury*, without any specific assertions about how, in this case, disclosing a copy of the petitioner's

---

[8] Although some courts have discounted the holding in *In re Sealed Motion* as "turn[ing] on the *sui generis* nature of the now defunct Independent Counsel Act and its requirement that the Independent Counsel file a report that could be made public even though no indictment was returned," *In re Grand Jury Proceeding*, 237 F.R.D. 1, 3 (D.D.C. 2006) (Hogan, C.J.), *rev'd sub nom. In re Grand Jury*, 490 F.3d at 990, this is incorrect. *See also, e.g., Doe v. United States (In re Grand Jury Subpoena)*, 72 F.3d 271, 274–76 (2d Cir. 1995) (rejecting standard in *In re Sealed Motion*, citing that case's "unusual facts" and attributing D.C. Circuit's holding to "statutory right" of grand jury witness named in Independent Counsel's report to comment on the report); *Davis v. United States*, 641 A.2d 484, 491 (D.C. 1994) ("view[ing] the holding of *Sealed Motion* in the particular context of that case—namely, a request by a witness for a transcript of the testimony she gave before a grand jury convened by an Independent Counsel."). The D.C. Circuit squarely concluded that "a grand jury witness has a general right to a transcript of [his own] testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript," *In re Sealed Motion*, 880 F.2d at 1373, a conclusion separate from consideration of any provisions of the Independent Counsel statute, which figured prominently only in the Court's jurisdictional analysis of whether the question was moot or properly before it.

testimony would allow for third-party intimidation, is insufficient. *See In re Sealed Motion*, 880 F.2d at 1373 (finding "that a grand jury witness has a general right to a transcript of such testimony absent the government demonstrating countervailing interests which outweigh the right to release of a transcript. The Independent Counsel has made no such showing here and the record in this cause demonstrates that such grounds do not exist."). Indeed, the government entirely fails to show, in the circumstances of this case, that witness intimidation is a realistic threat. The petitioner is currently incarcerated at a federal detention center in another district. Pet'r's Mem. at 5; Pet'r's Reply at 5. As such, the witness's contact with outsiders is strictly limited, and his conversations with visitors in jail are recorded, except those conversations with a pre-approved list of attorneys, which at this point only includes the petitioner's counsel of record in the pending criminal case. Pet'r's Reply at 5–6. Moreover, the parties have a Protective Order in effect that strictly limits any copying, reproducing or disclosure to unauthorized persons of the grand jury materials or notes about those materials, as well as requiring destruction or return of the materials after their use in "all stages of this case" is complete. Protective Order ¶¶ 2–5.[9] Under these circumstances, the potential risk of the petitioner being subject to third-party intimidation appears negligible.

Likewise, the government's concern that disclosing a copy of the petitioner's testimony would potentially deter future grand jury witnesses from testifying fully and truthfully, for fear of subsequent third-party intimidation, is similarly unpersuasive given the particular facts of this case. Granting the petitioner access to a copy of his grand jury testimony transcript does not mean similar access will, would, should or must be granted to any and all petitioning grand-jury

[9] The Protective Order also limits use of the grand jury material "solely" to the petitioner's pending criminal case and does not permit use "in connection with [any] other proceeding, without further order of this Court," Protective Order ¶ 1, but the government has raised no argument that petitioner's expressed need to use the grand jury transcripts for addressing potential charges by the Department of Justice is inappropriate.

witnesses in the future. Each such witness would face a fact-specific balancing inquiry, and rarely will similar circumstances arise where the witness is, as the petitioner in this case, incarcerated awaiting trial based on evidence that may have been collected in connection with immunized testimony provided before a grand jury. Rather than explaining specifically how providing *this* petitioner a copy of his testimony would deter future grand-jury witnesses from testifying fully and truthfully, the government simply suggests the abstract possibility that such deterrence could occur. In this sense, the government's argument reads as an attempt to reassert a more general grand-jury secrecy interest, which, as indicated by the D.C. Circuit, has less, if any, weight when a grand-jury witness seeks only his or her own testimony.

Finally, the government claims that the petitioner's testimony is particularly sensitive because it includes "questions regarding ongoing investigations" and therefore "could be used by third parties to assess what the government is investigating or why." Gov't's Resp. at 4. This argument appears to pertain more directly to the petitioner's testimony, but again the government fails to address the specific circumstances of the case. The government does not explain, for example, how a third party eager to "assess what the government is investigating or why" could gain such knowledge from the petitioner while the petitioner is in jail. Instead, the government again resorts to hypothetical speculation regarding "a witness" not *this* witness. *See id.* ("if a witness were asked 'Do you know John Doe?' and truthfully answered in the negative, a third party with knowledge regarding John Doe could examine the testimony and deduce information regarding the government's investigation that may not be apparent to the witness himself."). In a single paragraph of briefing, *see id.*, the government fails to make a convincing showing regarding its concerns.

While the government's interests in denying the petitioner a copy of his testimony appear to be minimal, the petitioner's interests in obtaining a copy are clearly pressing. The petitioner is being prosecuted for multiple felony offenses; if convicted, he faces a lengthy prison sentence, with [redacted]. *See* Sept. 30 JSR. at 3 (explaining that the petitioner faces [redacted] Pet'r's Reply at 6. The petitioner received an order of immunity in February 2018, before he gave his grand-jury testimony in connection with the Special Counsel's investigation. Pet'r's Mem. at 3; Immunity Order. The petitioner thus needs to review his grand-jury testimony to determine the extent to which his immunity will "inform[]" his legal defenses at trial. Sept. 30 JSR at 5.

The petitioner explains that the read-only access thus far provided to his counsel at the U.S. Attorney's Office has been "wholly inadequate" to this purpose, *i.e.*, "to prepare his legal defense in the [other district] Prosecution," particularly since he testified before the grand jury for four days, and the transcript of his testimony is roughly 900-pages long. *Id.* at 5–6. Petitioner's lawyers were provided with one hard copy of the transcript to review at the U.S. Attorney's Office, limiting review to a single attorney at a time. *Id.* at 5. Only counsel of record and counsel admitted *pro hac vice* were permitted to view the transcript, and counsel were only allowed to take hand-written notes. *Id.* Given the transcript's length, these restrictions have hindered counsel's ability to review its contents effectively. *See In re Sealed Motion*, 880 F.2d at 1377 (stating that the court "attaches significance to the volume of testimony the grand jury witness provided, as well as its subject matter, when considering a request for a transcript.").

More important, these conditions have made it impossible for the petitioner to review the transcript himself, and difficult for counsel to discuss the transcript with the petitioner. Sept. 30 JSR at 7.

The government has now belatedly offered additional concessions to alleviate some of these concerns by agreeing to provide multiple copies of, and computer access to, the transcript in the U.S. Attorney's Office, *id.* at 10, and to "arrange" for the petitioner himself to review the transcript either "in the United States Attorney's Office for the District of Columbia or another suitable location," Gov't's Resp. at 3. These additional concessions still appear inadequate, however, in light of the particular circumstances of the case and the petitioner's demonstrated need. The length of the transcripts makes thorough review time-consuming, and thorough review is particularly necessary in this case because the significant federal criminal charges the petitioner now faces and may potentially face allegedly are connected to the immunized grand jury testimony he gave shortly after seizure of his phone "in January 2018 in connection with the Special Counsel's Investigation." Pet'r's Mem. at 2. To evaluate possible defenses or claims regarding the extent to which any current or potential charges rely on information for which the petitioner has received immunity, effective review by petitioner and his counsel of the transcript of his grand jury testimony is critical. In other words, the petitioner's argument linking his immunized testimony to his ability to prepare a legal defense for any is upcoming trial is concrete rather than speculative or hypothetical.

Finally, the government relies on *In re Grand Jury Proceeding*, 520 F. Supp. 2d 61 (D.D.C. 2007), to argue that the petitioner should not be granted a copy of his grand jury transcript. After the D.C. Circuit held in *In re Grand Jury* that grand-jury witnesses were entitled to access transcripts of their own grand-jury testimony, the case was remanded to the

District Court, where one of the witnesses petitioned to obtain a copy of his transcript, but this request was denied. *In re Grand Jury Proceeding*, 520 F. Supp. 2d at 65. The government's argument is unpersuasive, however, because the circumstances prompting denial of the grand jury transcript copy in *In re Grand Jury Proceeding* are clearly distinguishable. In *In re Grand Jury Proceeding*, the witnesses involved were "employees of an indicted corporation, many of whom [were] represented by the same counsel," *id.* at 63, and in this context, the court found a "likelihood of unauthorized disclosures of grand jury materials, whether accidental or otherwise," *id.* Moroever, the witness had "concede[ed] to the D.C. Circuit that mere access would suffice to protect the interests he advanced," and subsequently "failed … to credibly explain why he now need[ed] a copy of the transcript." *Id.* By contrast, here, the petitioner has not conceded that "mere access" is sufficient for the intended uses in the other judicial proceeding. Nor is the petitioner joined through counsel to other, related witnesses; instead, he stands alone as a charged defendant. Additionally, since the petitioner is in pre-trial detention under restrictive conditions, the risks of unauthorized further disclosure are mitigated. The petitioner's need for a transcript copy, meanwhile, is demonstrably more significant than that of the petitioner in *In re Grand Jury Proceeding*, who was neither imprisoned nor facing criminal charges. *Id.* (noting that "[t]he petitioner is not a target of the investigation").

In sum, neither *In re Grand Jury Proceeding* or *In re Grand Jury*, where the petitioners expressly conceded that read-only access was adequate to protect their interests, direct the government's desired outcome in this case. Weighing the interests here, the petitioner's need for a copy of his transcript clearly exceeds the government's interests in refusing to grant him one. [10]

[10] Although the petitioner's original motion in June 2019 requested "any audio recordings of [the Petitioner's] grand jury testimony" in addition to "copies of the transcripts," *see* Pet'r's Mot. at 1, in subsequent briefing in September and October 2019, the petitioner limited his requested disclosure to the transcripts, making no arguments regarding any additional need for audio recordings, *see generally* Sept. 30 JSR; Pet'r's Reply. Accordingly, in

The petitioner, who is imprisoned, whose communication is being closely monitored and who is subject to a Protective Order, along with his counsel, needs to review his lengthy grand-jury testimony in order to determine the extent to which the immunity order pursuant to which he gave that testimony may be relevant in defending against the serious criminal charges he now faces and may face. The government, by contrast, has offered only conclusory and minimal briefing expressing a general interest in preventing petitioner intimidation and further unauthorized disclosure that falls far short of demonstrating any realistic risk in the particular circumstances of this case.

IV. CONCLUSION

For the foregoing reasons, the petitioner's Sealed Motion for Disclosure is granted. Accordingly, the government is directed to provide promptly to the petitioner a copy of the transcript of the petitioner's grand jury testimony.

The parties are directed to submit jointly within 5 days of the issuance of this Memorandum Opinion a report advising whether any portions of the Memorandum Opinion may be unsealed and made available on a public docket and, if so, proposing any appropriate redactions.

An appropriate Sealed Order accompanies this Memorandum Opinion.

Date: October 30, 2019

BERYL A. HOWELL
Chief Judge

exercising the authority to order disclosure "at a time, in a manner, and subject to any other conditions that it directs," *see* Fed. R. Crim. P. 6(e)(3)(E), only the disclosure of a copy of the petitioner's grand-jury testimony transcript is ordered, and not any audio recordings of such testimony.