

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
V.	§	CR. A. H-02-0121
	§	
ARTHUR ANDERSEN, L.L.P.,	§	
Defendant.	§	

**ANDERSEN’S REPLY IN SUPPORT OF ITS MOTION
TO QUASH SUBPOENAS AND LIMIT GRAND JURY PROCEEDINGS**

Although the government’s response to Andersen’s motion contains lots of surprisingly overheated rhetoric, the brief is most notable for what it does *not* say: the government entirely fails to engage Andersen’s arguments. The Justice Department offers no plausible explanation – indeed, it offers literally *no explanation at all* – for the extraordinary timing of its grand jury subpoenas. At the same time, the government does not deny that, by putting Andersen personnel before the grand jury, it effectively is seeking to *compel admissions from the indicted defendant*. In these circumstances, Andersen plainly is entitled to relief.

A. The Sequence Of Events Demonstrates That The Government Is Seeking To Use The Grand Jury For Trial Preparation

1. It is clear from the government’s response that the parties are in fundamental agreement on the legal principles that are dispositive here. Although the Justice Department devotes much of its brief to a recital of citations for the boilerplate proposition that grand jury proceedings are entitled to a presumption of regularity, the Department also *acknowledges* that subpoenas must be quashed when the government is seeking to use the grand jury to “strengthen[] its case on a pending indictment or as a substitute for discovery.” Gov’t Mem. 4 (citation omitted). In particular, the government recognizes that the Court need not accept the government’s word about the propriety

of its purposes – and therefore should grant the defendant relief – when ““there is an indicative sequence of events demonstrating an irregularity”” in the grand jury process. *Id.* at 7 (citation omitted). *See also, e.g., In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1885 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985).

Yet the government offers no response at all to the demonstration in Andersen’s motion that there was just such a bizarre, “indicative sequence” of events in this case. We explained in the motion that:

- The government put *no* witnesses other than federal agents before the grand jury prior to March 7, 2002, when Andersen was indicted.^{1/}
- The government put *no* witnesses before the grand jury in the week following March 7, when Andersen and the Justice Department were engaged in discussions about possible resolution of the case – a period when the government evidently expected that the firm would enter a plea of guilty.
- These discussions terminated late in the day on March 13, the government unsealed the indictment and held a nationally televised press conference about the case on March 14, and the national media reported on March 15 that Andersen was determined to move as expeditiously as possible to trial.

^{1/} Indeed, we have now learned that the government made *no grand jury presentation at all* until March 6, 2002, the day before the grand jury returned the indictment against Andersen. *See* Gov’t Mem. 15 (“[o]nly on the night of March 5, 2002, when the government was to begin its presentation to the grand jury the very next day ...”).

- *That same day*, the government – for the first time – told four Andersen personnel that it wanted them to appear before the grand jury. *See Andersen Mot. 5.*^{2/}

The only plausible explanation for this sequence of events is that the government, suddenly realizing that it faced an early trial, determined to use the grand jury to bolster its already indicted case against Andersen. In this regard, it is revealing that the Justice Department has *absolutely nothing to say* in its brief about the remarkable coincidence in the timing of its requests for grand jury appearances. The sum total of its explanation for its sudden change in tactics is the surprising assertion that it moved to indict quickly as an accommodation *to Andersen* and its further blithe report that, in happening to call grand jury witnesses the day after the indictment was unsealed, the government was simply continuing its investigation “actively and apace.” Gov’t Mem. 13.^{3/} Obviously, however, this is no explanation at all: it does not even attempt to explain why, having seen no need to call live witnesses before the indictment, the government suddenly found it necessary to call four witnesses – all of whose testimony is relevant to the pending obstruction case – immediately after. The government’s argument thus is considerably *weaker* than the one in *Simels*, which the court dismissed as “insubstantial and plainly inadequate to rebut the defendant’s

^{2/} The government states that it has called two Andersen partners before the grand jury. Gov’t Mem. 13. In fact, so far as we are aware, the government has called three partners and one employee. *See Andersen Mem. 5 & n.1.*

^{3/} Although the government says that the investigation was continuing “apace” on March 15, we are now told that it did not in fact empanel a “special grand jury” to investigate Enron-related matters until March 27, 2002 – two days *after* Andersen’s pending motion was filed. *See Gov’t Mot. 3.*

strong showing that the government's dominant purpose * * * was trial preparation." 767 F.2d at 30.^{4/}

The government does assert that it is not aware of any Fifth Circuit case sustaining a claim of grand jury abuse. Gov't Mem. 5. If true, that presumably is because prosecutors in the Fifth Circuit generally adhere to Justice Department guidelines and refrain from calling witnesses before the grand jury for the purpose of bolstering their cases at trial. The more fundamental point, however, is this: the government has not pointed to *any* case in *any* circuit, and we are not aware of one, that permitted the government to proceed in the face of timing as suspicious as that presented here. If anything, the facts of this case, and the government's evident disregard for the rules and good practice, are considerably more compelling than those in other proceedings where courts have quashed grand jury subpoenas. *See* Andersen Mot. 4 (citing case).

2. Given the skimpy nature of the government's response on this point, we imagine that the Justice Department may have placed its relevant argument in the sealed, *ex parte* declaration of Andrew Weissman. If so, the government's tactic is plainly improper. It is well settled that "in camera proceedings are extraordinary events" and "that sealed affidavits are a disfavored means of

^{4/} The government argues at some length both that it need not stop grand jury proceedings once it has determined the existence of probable cause and that the grand jury may indict on the basis of summary witness testimony. Gov't Mem. 8-9, 14-15. While true, these observations simply miss the relevant point. Andersen argued in its motion that the government's *willingness* to indict Andersen based on summary testimony, as well as the government's conclusion that probable cause already had been made out as to the firm, raised serious doubts about the government's motive in now professing a need for live witness testimony in its purported investigation of individuals. The government's only apparent response to this point is its assertion that "proof of criminal intent may differ in important respects between a partnership and its individual partners and employees." Gov't Mem. 8-9. This contention could have merit only if the government means to say that its indictment of Andersen is premised *exclusively* on a theory of "collective knowledge" and not on the basis of vicarious liability. *See id.* at 9 (citing *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987)). The government, however, does *not* affirm that the pending indictment of Andersen is so limited.

offering testimony.” *United States v. Lilly*, 185 F.R.D. 113, 114 (D. Mass. 1999) (citing *In Re Grand Jury Proceedings*, 814 F.2d 61, 72 (1st Cir. 1987)). This is so even where the *ex parte* submission purports to disclose or touch upon information related to an ongoing grand jury proceeding. *See id.* at 61. Courts have expressed particular skepticism toward *ex parte* submissions in this setting (*i.e.*, a challenge to the government’s post-indictment use of the grand jury) where the information furnished under seal is the statement of a government agent rather than grand jury testimony itself. *See id.* at 72. Moreover, proceeding by way of sealed, *ex parte* affidavit also has been rejected where it is clear that the submission is a fruit of the government’s own investigatory activity and “does not bear the imprint of the Grand Jury’s independent initiative.” *In re Grand Jury Subpoena*, 615 F. Supp. 958, 966 (D. Mass. 1985) (sealed affidavit ordered disclosed in grand jury-related litigation). And in the circumstances here, the government’s failure to seek leave from the Court (or to provide notice to Andersen) before premising its argument on an *ex parte* filing places the Court in an extraordinarily awkward position; the government would have the Court deny Andersen’s motion without an essential airing of the relevant facts.

Applying these principles, if Mr. Weissman’s declaration does contain assertions that bear on the proper disposition of Andersen’s motion, the Court should unseal the government’s submission and afford Andersen a reasonable opportunity to respond to the claimed rationale for continuing to call Andersen personnel before the grand jury. Here, there is every reason to believe that the government’s *ex parte* submission is based entirely upon the “government’s own investigatory activity” and is not the product of the grand jury’s “independent initiative.” At a

minimum, principles of fundamental fairness would entitle Andersen to participate in an *in camera* hearing at which the government's allegations could be addressed.^{5/}

B. The Government Is Effectively Seeking To Question The Defendant Before The Grand Jury Post-Indictment

In addition, the Justice Department simply fails to address Andersen's argument that, by placing Andersen personnel before the grand jury, the government is improperly seeking to compel testimony from the indicted defendant. The government's only response is that Andersen as an entity has no Fifth Amendment privilege against self-incrimination and that individuals may not refuse to testify on the ground that doing so would implicate someone else. Gov't Mem. 11-12. But these truisms, while doubtless correct, entirely miss the point. The rule stated in *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977) and recognized by the Fifth Circuit (*see* Andersen Mot. 7-8) – that it is inappropriate to question the defendant before the grand jury post-indictment – is premised, *not* on the individual's privilege against self-incrimination, but on “the right to counsel ... and the due process clause of the Fifth Amendment.” *Doss*, 563 F.2d at 276. And here, the government pointedly does not deny either (1) that statements by Andersen personnel before the grand jury may constitute admissions attributable to Andersen or (2) that the government accordingly is seeking to gain direct testimony from the defendant that will be used to construct the case against it at trial. The government's tactics in this case therefore present precisely the danger identified in *Doss*:

^{5/} In addition, general principles governing the disclosure of “matters occurring before the grand jury” warrant unsealing of the government's affidavit. Under Fed. R. Crim. P. 6(e)(3)(C)(i), grand jury material may be disclosed “preliminarily to or in connection with a judicial proceeding.” And here, Andersen plainly has a “particularized need” for the information. *Denis v. United States*, 384 U.S. 855, 870 (1966). *See generally John Doe, Inc. I*, 481 U.S. 102, 116-17 (1987). Anything less than full disclosure under these circumstances would result in a manifest injustice. *See United States v. Barker*, 741 F.2d 250, 255 (9th Cir. 1984) (likelihood of injustice in the absence of disclosure of grand jury material is a significant factor militating toward disclosure).

questioning of the sort proposed by the government “can destroy a defendant’s right to [a] subsequent fair trial.” *Id.* at 278. Again, we are not aware of any case permitting grand jury proceedings in such circumstances, and the government has not purported to cite one.^{6/}

C. The Government Is Attempting To “Freeze” The Testimony Of Witnesses

One other point made by the government warrants brief discussion: pointing to statements in Andersen’s newspaper advertisements and on its website, the government alleges that the firm “is taking action that may influence the potential testimony of its own employees” and “border on efforts at witness coaching.” Gov’t Mem. 10.^{7/} Even making allowances for the hyperbole that can be expected when the government is feeling stressed, this assertion is a bit over-the-top. The government surely does not mean to contend that there is anything improper when Andersen – for the benefit both of its thousands of clients and of the tens of thousands of Andersen personnel who had nothing to do with Enron – proclaims its innocence and suggests that there are non-criminal explanations for the events underlying the indictment. The implication that these public messages are aimed at affecting witness testimony is false and is, of course, utterly without foundation in the record. Indeed, the most noteworthy aspect of the government’s argument is that it provides clear *support* for Andersen’s motion: the government essentially *acknowledges* that it is calling witnesses

^{6/} The government’s position calls to mind the approach to evidence taken by the King of Hearts, who directed witnesses: “Give your evidence ... and don’t be nervous, or I’ll have you executed on the spot.” Lewis Carroll, ALICE’S ADVENTURES IN WONDERLAND, in THE ANNOTATED ALICE 113 (Martin Gardner ed. 2000). That philosophy may have been suitable in Wonderland; it does not govern in the Southern District of Texas.

^{7/} In this regard, it is a little perplexing that the government chides Andersen for its “tepid” cooperation and “adversarial posture” with the Justice Department. Gov’t Mem. 9-10. The government, after all, has *indicted* Andersen, despite the firm’s full and complete self-disclosure of information relating to document destruction; surely the Justice Department does not expect Andersen to now also assist the government in obtaining a conviction.

before the grand jury to lock in their testimony at trial. *See id.* (“the government would be foolhardy to take Andersen’s suggestion that it cease grand jury work and rely instead upon interviews of Andersen personnel”). That in itself offers a sufficient basis for granting Andersen’s motion.^{8/}

* * * *

Given the compelling objective indicia of the government’s impermissible purpose, it is wholly insufficient for the Justice Department to offer conclusory, boilerplate assertions that it seeks to call witnesses for proper investigative reasons. *See Gov’t Mem. 7.* Andersen’s motion must be resolved through “application of a legal standard designed to ensure that the grand jury ... is not misused by the prosecutor for trial preparation.” *Simels*, 767 F.2d at 29. And although “Anything Goes” was a very good song, it is not a suitable standard for the conduct of grand jury proceedings. Under any other standard, Andersen is entitled to relief.^{9/}

^{8/} The government devotes substantial space to justifying its refusal of Andersen’s request to appear before the grand jury prior to indictment. Gov’t Mem. 13-14 & nn. 3, 4. Although we take sharp issue with the government’s factual account of this episode, we will not burden the court with a tit-for-tat because the details are not material to the Court’s resolution of the pending motion. We do note, however, that the government – although correctly observing that defendants have no judicially enforceable right to appear before a grand jury – makes no attempt to explain how its rejection of Andersen’s request can be squared with the Justice Department’s own internal guidelines.

^{9/} The government’s half-hearted suggestion that Andersen lacks standing to challenge the third-party subpoenas and other activity of the grand jury (Gov’t Mem. 6-7 n.2) is meritless. Courts repeatedly have held that a defendant has standing to challenge the grand jury’s issuance of subpoenas to others where the defendant is asserting claims of grand jury abuse. *See e.g., In re Grand Jury Proceedings*, 814 F.2d at 66-67 (defendant had standing to challenge third party subpoena where defendant alleged that subpoena was the product of improper use of grand jury); *In re Grand Jury (Schmidt)*, 619 F.2d 1022 (3d Cir. 1980) (employer had standing to challenge subpoenas issued to employees in connection with employer’s claim that the government was abusing grand jury process). *Cf. In re Special 1977 Grand Jury*, 581 F.2d 589 (7th Cir. 1978) (court reached merits of challenge by state attorney general to grand jury subpoenas served on staff members); *United States v. Finazzo*, 407 F. Supp. 1127, 1132 (E.D. Mich. 1975) (defendant successfully enjoined third party subpoenas for records “pertaining to [his] transactions”).

For the foregoing reasons and those stated in the motion, Andersen's Motion to Quash Subpoenas and Limit Grand Jury Proceedings should be granted.

Respectfully submitted,

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