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FIFTH AMENDMENT—USE OF GRAND JURY TESTIMONY AT TRIAL

New Jersey v. Portash, 440 U.S. 450 (1979).
Douglas Oil Co. v. Petrol Stops Northwest, 99 S. Ct. 1667 (1979).

Last Term the Supreme Court in two decisions clarified the availability of grand jury testimony for use in subsequent criminal and civil proceedings. In *New Jersey v. Portash*[1] the Court held that a prosecutor could not use a person's immunized grand jury testimony to impeach his credibility as a testifying defendant at a later criminal trial. In *Douglas Oil Co. v. Petrol Stops Northwest*[2] the Court held that in order to obtain transcripts from a previous federal grand jury proceeding, a plaintiff in a civil antitrust action had to make a showing that the necessity for disclosure was greater than the need for grand jury secrecy, although the burden to justify disclosure would vary as the need for grand jury secrecy varied. The cases represented a divergence in the protection of grand jury testimony for use in later judicial actions. In *Portash*, the Court refused to carve out an exception to the rule that immunized testimony could not later be utilized in a prosecution of the testifying person. In contrast, the Court in *Douglas Oil* approved an existing trend among lower federal courts to be more amenable to requests to disclose transcripts from completed grand jury proceedings for use in civil antitrust actions. While *Portash* foreclosed a potential weapon by the government in criminal prosecutions, *Douglas Oil* added a weapon to the arsenal of civil antitrust plaintiffs, one that may prove to be an inducement to such litigation.

NEW JERSEY V. PORTASH

The criminal defendant in *Portash* posed a constitutional challenge to the use of his prior immunized testimony for impeachment at trial. The fifth amendment[3] to the Constitution, as applied to the states through the fourteenth amendment,[4] prohibits a person from being "compelled . . . to be a witness against himself."[5] However, this privilege is not absolute. The Supreme Court has upheld the validity of "immunity" statutes,[6] which authorize agreements wherein the government agrees not to prosecute a witness, or use his testimony, in exchange for the witness relinquishing his privilege not to testify against himself. Immunity statutes fall into two categories. "Transactional" immunity statutes bar the government from prosecuting an individual for any transaction as to which he testified.[7] "Use and derivative use" statutes,[8] in contrast, permit the government to prosecute a witness, but preclude using either the compelled testimony or any information derived from it against the witness at trial.[9]

The Court first considered the necessary scope of immunity statutes in *Counselman v. Hitchcock*,[10] and concluded that the immunity provided was insufficient because the statute permitted the use at trial of evidence derived from the immunized testimony. This abridged the constitutional privi-

[1] 440 U.S. 450 (1979).
[2] 99 S. Ct. 1667 (1979).
[3] "No person . . . shall be compelled in any criminal case to be a witness against himself. . . . " U.S. CONST. amend. V.
[4] In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court held that the fifth amendment privilege against self-incrimination was applicable to the states through the fourteenth amendment.
[5] U.S. CONST. amend. V.
[6] Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).
[7] *See, e.g.*, ILL. ANN. STAT. ch. 38, § 106-1 (Smith-Hurd 1978); MINN. STAT. § 609.09 (1969); OHIO REV. CODE ANN. § 2945.44 (Baldwin 1973).
[8] Use and derivative use immunity is also referred to as "testimonial" or "use-plus-fruits" immunity.
[9] *See, e.g.*, 18 U.S.C. §§ 6001–6005 (1976); KAN. STAT. § 22-3102 (1974).
[10] 142 U.S. 547 (1892).

lege, the Court reasoning that "legislation . . . cannot replace or supply . . . [the privilege], at least unless it is so broad as to have the same extent in scope and effect."[11]

The rather broad language of *Counselman* and later cases[12] was generally assumed to have required a transactional immunity rule. This belief was perpetuated until the Court ruled squarely on the issue again in 1972, when it considered federal legislation[13] which adopted use and derivative use immunity. The federal statute at issue prevented the use of compelled testimony or information, or any information directly or indirectly derived therefrom, against a witness in any criminal trial.[14] In *Kastigar v. United States*[15] the Court held that the statute was valid, adopting the standard that the immunity granted must be coextensive with the protection provided by the self-incrimination privilege.[16] This outcome necessitated a narrower reading of the self-incrimination privilege than that suggested by *Counselman*:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[17]

It is against this background that *New Jersey v. Portash*[18] came before the Court last Term. In 1974 Joseph Portash, mayor of Manchester Township in New Jersey, was subpoenaed by a state grand jury. After expressing his intention to claim his privilege against self-incrimination, the prosecutors and Portash's lawyers agreed that Portash's testimony before the grand jury and any evidence derived from it could not be used in subsequent criminal proceedings under New Jersey's use immunity statute.[19] Portash testified, but no agreement to avoid a criminal prosecution could be reached. In 1975 Portash was indicted for misconduct in office and extortion by a public official.[20]

Before trial, defense counsel requested a ruling from the trial judge that no use of the immunized grand jury testimony would be permitted for impeachment purposes.[21] The judge refused, and defense counsel renewed the request after completion of the state's case.[22] Ultimately, the judge ruled that if Portash testified and gave an answer on direct or cross-examination which was materially inconsistent with his grand jury testimony, the prosecutor could use the testimony in his cross-examination of Portash.[23] Defense counsel advised Portash not to testify, he did not, and a jury convicted him on one of two counts.[24]

The conviction was reversed by the New Jersey Appellate Division.[25] The court, employing the reasoning found in *Kastigar*, noted that the grant of immunity "must leave the witness whose testimony has been compelled and the prosecutorial authorities 'in substantially the same position as if the witness had claimed the Fifth Amendment privilege.'"[26] Allowing the use of compelled testimony to impeach a witness at a subsequent trial did not meet this test, since the testimony would not have existed had the defendant not been compelled to speak.[27]

[11] *Id.* at 585.

[12] *See* Smith v. United States, 337 U.S. 137 (1949); Shapiro v. United States, 335 U.S. 1 (1948).

[13] 18 U.S.C. §§ 6001-6005 (1976).

[14] *Id.* at § 6002.

[15] 406 U.S. 441 (1972).

[16] *Id.* at 449, 453.

[17] *Id.* at 453 (emphasis in original, footnote omitted). In addition, the Court stated that the "broad language in *Counselman* relied upon by the petitioner was unnecessary to the Court's decision, and cannot be considered binding authority." *Id.* at 454-55 (footnote omitted).

[18] 440 U.S. 450 (1979).

[19] At that time the statute read as follows:

> If any public employee testifies before any court, grand jury or the State Commission of Investigation, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury committed while so testifying.

N.J. STAT. ANN. § 2A:81-17.2a2 (West 1976). In 1975 several additions were made to the phrasing of the statute, requiring the employee to claim the privilege against self-incrimination, requiring that the employee must be told that failure to appear and testify will subject him to removal from office, and adding false swearing to the unexempted prosecution or punishment. N.J. STAT. ANN. § 2A:81-17.2a2 (West Supp. 1979).

[20] 440 U.S. at 451-52.

[21] *Id.* at 452.

[22] *Id.*

[23] *Id.* Justice Blackmun, dissenting in *Portash*, contested this version of the facts. *See* text accompanying notes 44-47 *infra*.

[24] 440 U.S. at 452.

[25] 151 N.J. Super. 200, 376 A.2d 950 (1977).

[26] *Id.* at 205, 376 A.2d at 953 (quoting Kastigar v. United States, 406 U.S. at 462).

[27] 151 N.J. Super. at 205, 376 A.2d at 953.

In addition, the court refused to accept the state's argument that the impeachment should be allowed by the reasoning of *Harris v. New York*[28] and its progeny, which involved admissability of *Miranda*-violative confessions.[29] The court noted that in *Harris* the statement sought to be used for impeachment purposes was voluntarily given, while Portash's testimony was compelled under the immunity statute.[30] The New Jersey Supreme Court denied the state's petition for certification of an appeal.[31]

The Supreme Court affirmed in an opinion by Justice Stewart.[32] First, the Court disposed of the state's argument that since Portash never became a witness and his grand jury testimony was never used against him, the constitutional issue presented was "abstract and hypothetical."[33] While Portash had not testified, the Court noted that this did not prevent the New Jersey appellate court from deciding the merits of the federal constitutional issue.[34] Justice Stewart analogized the case to *Brooks v. Tennessee*,[35] where the Court (and the Tennessee court) had considered the validity of a state statute requiring a defendant who desired to testify to be his own first witness. In *Brooks*, the defendant had not testified, but the Court found his constitutional rights impinged since the statute penalized his fifth amendment privilege to remain silent. Similarly, Portash was not required to testify in order to raise his constitutional claim.[36]

On the merits, Justice Stewart quickly rejected the state's arguments, in language and reasoning that paralleled the opinion of the New Jersey appellate court. Briefly tracing the Court's consideration of immunity statutes from *Counselman* to *Kastigar*, Justice Stewart reiterated the language from *Kastigar* which, while somewhat narrowing the previously understood scope of the fifth amendment privilege, stated that compelled testimony could not be used "in *any* respect" in a subsequent prosecution.[37]

Apparently of the view that the *Kastigar* language was dispositive, the Court without pause then considered if the exceptions found valid in *Harris* and *Oregon v. Hass*[38] applied in this case. Noting, as had the New Jersey court, that the voluntary aspect of the *Miranda*-violative statements in *Harris* and *Hass* were "central to the decisions in those cases,"[39] the Court refused to balance the need to prevent perjury with the need to deter unlawful police conduct, the test under which the police had prevailed in *Harris* and *Hass*. Since testimony given under a grant of immunity "is the essence of coerced testimony . . . [b]alancing . . . is not simply unnecessary. It is impermissable."[40]

In a concurring opinion, Justice Brennan, joined by Justice Marshall, felt that there may have been "adequate and independent state grounds" for the result that the New Jersey courts reached, precluding Supreme Court review. He did, however, agree with the Court's disposal of the federal constitutional question.[41]

[28] 401 U.S. 222 (1971).

[29] *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975). In both *Harris* and *Hass* the Court allowed the prosecution to utilize confessions from the defendants, voluntarily given, that were violative of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), as long as the evidence was not used in the prosecution's "case in chief." Harris v. New York, 401 U.S. at 224; Oregon v. Hass, 420 U.S. at 721. In both cases the prosecution used the incriminating statements for impeachment.

[30] 151 N.J. Super. at 206, 376 A.2d at 954.

[31] 75 N.J. 597, 384 A.2d 827 (1978).

[32] Justices Brennan and Powell submitted separate concurring opinions, while Justice Blackmun, joined by Chief Justice Burger, dissented.

[33] 440 U.S. at 454.

[34] *Id.* at 455.

[35] 406 U.S. 605 (1972).

[36] 440 U.S. at 456.

[37] *Id.* at 458 (quoting Kastigar v. United States, 406 U.S. at 453)(emphasis in original). The same language appears in the text accompanying note 17 *supra*. In addition, the Court reiterated the prohibition against the use at trial of involuntary statements from the accused by citing a case from 1978: "But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law." 440 U.S. at 459 (quoting Mincey v. Arizona, 437 U.S. 385, 398 (1978))(emphasis in original).

[38] 420 U.S. 714 (1975).

[39] 440 U.S. at 459.

[40] *Id.* In footnote nine, the Court stated that "[w]e express no view as to whether possibly truthful immunized testimony may be used in a subsequent false declarations prosecution premised on an inconsistency between that testimony and later, nonimmunized, testimony. That question will be presented in *Dunn v. United States*, . . . cert. granted, 439 U.S. 1045." 440 U.S. at 459 n.9.

Later in the Term the Court decided *Dunn*, finding it unnecessary to reach the question presented in the *Portash* footnote. Dunn v. United States, 99 S. Ct. 2190, 2193 (1979). Dunn was convicted of lying before a grand jury while giving immunized testimony, and the court of appeals upheld the use of the grand jury testimony to convict him, noting that the perjury was "another crime not existing when the immunity was offered." 577 F.2d 119, 125 (10th Cir. 1978). However, it also noted that Dunn had admitted that his immunized testimony was false, and the court was doubtful that the testimony could be used "without a prior showing of falsity." *Id.*

[41] 440 U.S. at 460 (Brennan and Marshall, JJ., con-

In a separate concurring opinion, Justice Powell, joined by Justice Rehnquist, expressed his agreement with the Court's holding, emphasizing first, on the procedural issue, that he preferred defendants in such cases to take the stand, but that the state court treated the issue as properly presented;[42] and second, on the merits, that the fifth amendment privilege prevents a state from using compulsion to extract information from a defendant, regardless of whether that information is truthful or false.[43]

In a lengthy dissent addressing only the procedural issue, Justice Blackmun reviewed the facts and concluded that the Court was improperly resolving an "abstract dispute" that was not at issue before the trial judge.[44] He characterized the state's argument as not that the federal constitutional issue was improperly presented, but that there was no federal issue at all,[45] asserting that the infringement of Portash's right to testify was merely "speculative."[46] Upon examining the record Blackmun argued that Portash's counsel was not concerned that the state would use the immunized testimony to impeach his client; rather, he was concerned with the state relying on the immunized testimony in formulating cross-examination questions for his client. Blackmun concluded that this issue was the proper one for decision, not the issue of impeachment that was addressed by the state court and the Supreme Court.[47]

One commentator, while agreeing with the result of the state court in *Portash*, scored that court for its "mechanical application of the *Kastigar* doctrine"[48] in resolving the case. Given the brevity of the Supreme Court's opinion, the same charge could be leveled at it. The broad language in *Kastigar*, which the reviewing courts relied on, must be read in light of the *Harris* line of cases. On an initial reading, the state's reliance on *Harris* was not a futile gesture, since the *Harris* Court distinguished between affirmative use of evidence obtained in violation of *Miranda* and impeachment use of such evidence. The latter was permissible, the *Harris* Court stated, because the privilege to remain silent or testify "cannot be construed to include the right to commit perjury."[49] The Court in *Harris* also pointed out that the statements were trustworthy and were only barred from use in the prosecution's case in chief.[50] In addition, numerous commentators[51] had predicted that the *Harris* reasoning would allow prosecutors to use immunized testimony for impeachment purposes—the precise situation addressed in *Portash*.

However, the Court's distinguishing of *Harris* is the better view, since the logical interpretation is that *Harris* turned on the reasoning that violating *Miranda* did not necessarily violate the defendant's fifth amendment privilege. A balancing test was not applicable in *Portash*, since the fifth amendment self-incrimination privilege is absolute and not qualified. As long as the statements are voluntary, as in *Harris*, the fifth amendment privilege does not come into play, since it only prohibits use of *compelled* statements. However, if the statements are compelled in any manner, as in *Portash*, then the privilege becomes an absolute.

Some possible exceptions to *Portash* are indirectly raised by Justice Blackmun's dissent. Blackmun felt that the use of the immunized testimony for cross-examination, not impeachment, purposes was the proper issue for review. However, given the reasoning of the majority, it is likely that either reading of the facts would have required reversal of the trial judge's decision. Use of the testimony to prepare questions for cross-examination is but another derivative use of the testimony forbidden by *Kastigar*.[52] Indeed, following *Portash*, it is likely that the Court would prohibit the prosecution from using the compelled testimony in any way to replace the investigative and analytical processes involved in the preparation and presentation of a criminal trial.

In addition, at least two more possible exceptions

curring). Justice Brennan cited several New Jersey Supreme Court opinions which impose stricter standards on self-incrimination issues than that required by the federal constitution. However, the New Jersey appellate court cited none of these cases and relied, with one exception, entirely on federal case law. *See also* the Court's opinion, 440 U.S. at 453 n.3.

[42] *Id.* at 462 (Powell and Rehnquist, JJ., concurring).

[43] *Id.* at 463.

[44] *Id.* (Blackmun, J., dissenting).

[45] *Id.* at 465.

[46] *Id.* at 467.

[47] *Id.* at 469-71.

[48] Comment, *State v. Portash—Threatening Impeachment and Influencing Defendants' Decision to Testify: Prohibited Uses of Compelled Testimony*, 31 RUTGERS L. REV. 815, 827 (1978) (footnote omitted).

[49] 401 U.S. at 225.

[50] *Id.* at 224.

[51] *See, e.g.*, Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1223 (1971); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 415 (1977); Comment, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 485 (1972).

[52] 406 U.S. at 453.

are suggested by the Court's opinion: whether the immunized grand jury testimony could be used in a trial following an indictment for perjury committed at a trial following the grand jury testimony or whether the testimony could be used in a trial for perjury committed while giving the testimony before the grand jury. In both examples affirmative answers are doubtful since, following the *Kastigar* rule, the testimony would not have existed but for the grant of immunity. However, the counterargument would run that the grant of immunity covers only the subject matter of incriminating statements in the testimony, and does not immunize crimes (*e.g.*, perjury) committed after or during the delivery of the immunized testimony.[53]

In light of *Kastigar*, *Portash* should not be considered a great doctrinal leap forward by the Court, but rather a logical extension of precedent. The Court seemed to be willing, as Justice Blackmun charged, to stretch the article III "case or controversy" requirement to close off an extension of *Harris* suggested by a number of commentators.[54] The opposite decision would have allowed prosecutors to obtain testimony under a grant of use immunity and then bring a prosecution, safe in the knowledge that the defendant could not contradict previous testimony without opening himself to its use in evidence. The result would have been a formidable end-run around the traditional confines of the use and derivative use rule.

Douglas Oil Co. v. Petrol Stops Northwest

In contrast to the result in *Portash*, the Court in *Douglas Oil*[55] proved to be much more willing, in the civil context, to approve the use of grand jury materials in later judicial proceedings. While the tradition of grand jury secrecy has remained an integral part of the criminal justice system,[56] the Court has been willing to sanction the disclosure of grand jury testimony (in transcript form) for later use when "the ends of justice require it."[57] This tendency is especially apparent when the grand jury has been dismissed, and the various policy reasons in favor of secrecy[58] are not present in full force.

Prior to *Douglas Oil*, the Supreme Court on three occasions considered the issue of releasing transcripts of completed grand jury proceedings. The first two cases involved antitrust suits brought by the government; in both cases, the defendant companies sought the transcripts to aid in preparing for their defense. In *United States v. Procter & Gamble*[59] the company sought the transcripts under Rule 34 of the Federal Rules of Civil Procedure.[60] The majority held that there must be "a compelling need" to break the secrecy of the grand jury, since the relevancy or usefulness of the transcripts were not sufficient to establish "good cause"[61] under Rule 34. As examples of "particularized need" to lift grand jury secrecy, the Court listed the use of a transcript at trial to impeach a witness, refresh his memory, or test his credibility.[62] In *Pittsburgh Plate Glass Co. v. United States*,[63] the Court adopted the "particularized need" test of *Procter & Gamble*

[53] The issue of the use of immunized grand jury testimony in a prosecution for grand jury perjury is addressed in note 40 *supra*.

[54] Indeed, Justice Blackmun characterized the issue the Court decided as an "abstract and *academic* legal question." 440 U.S. at 468 (Blackmun, J., dissenting) (emphasis added)

[55] 99 S. Ct. 1667 (1979).

[56] *Id.* at 1672 n.9.

[57] *Id.* at 1673 (quoting United States v. Socony-Vacuum, 310 U.S. 150, 234 (1940)). While the courts generally speak of transcripts, on occasion other grand jury material is involved and may be sought in discovery by civil plaintiffs. *See, e.g.*, United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978), where Department of Justice interview memoranda used before a grand jury were sought in civil discovery.

[58] The Court has stated and summarized different rationale for grand jury secrecy. One summary that the Court and lower courts have frequently quoted is found in United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954):

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

(Quoted with approval in Douglas Oil Co. v. Petrol Stops Northwest, 99 S. Ct. at 1673 n.10).

[59] 356 U.S. 677 (1958).

[60] Fed. R. Civ. P. 34.

[61] 356 U.S. at 682. An amendment in 1970 eliminated the requirement of "good cause" from Rule 34. This change, however, does not diminish the force of reasoning from *Procter & Gamble*, since that decision properly relied more on policy reasons for safeguarding the secrecy of grand jury proceedings, rather than on an elaboration of the meaning of "good cause."

[62] *Id.* at 683.

[63] 360 U.S. 395 (1959).

to evaluate a transcript request under Rule 6(e) of the Federal Rules of Criminal Procedure.[64]

In the third case, *Dennis v. United States*,[65] the Court in a somewhat different context retained the "particularized need" principle but arguably modified the meaning of that term. There, it was held that a district court should have granted a Rule 6(e) request by a criminal defendant to have the grand jury testimony of four government witnesses released. The Court, after approving the trend toward greater criminal discovery,[66] stated that the "particularized need" test had been met since the testimony had been given years earlier and for several reasons was suspect and since the government conceded that the necessity for continued grand jury secrecy was minimal.[67] The Court concluded that this showing went "substantially beyond the minimum required by Rule 6(e) and the prior decisions of this Court."[68] This language suggested a flexible standard with only a "minimum" showing of need required beyond a request for general discovery.

Numerous lower federal courts attempted to apply the standards of these three cases in considering requests for the release of grand jury material for use in private antitrust litigation.[69] One trend, notably present in *City of Philadelphia v. Westinghouse Electric Corp.*,[70] emphasized that a breakdown in the need for secrecy did not lower the standard of necessity that a civil party must show in order to secure release of transcripts.

The more recent and prevalent trend, often relying on the more lenient language of *Dennis*,[71] was to downplay the need for secrecy and decrease the required showing that parties seeking disclosure must demonstrate. In one leading decision, *U.S. Industries v. United States District Court*,[72] the court stated that if the reasons for maintaining secrecy applied to a lesser degree, than a "large compelling need" was not required to be shown.[73] Disclosure was granted, since only the policy of protecting future grand jury witnesses was relevant, and that interest could be protected by the deletion of references to the witnesses' names.[74]

Two more recent lower court decisions exemplified the divergence in standards of review. In *Texas v. United States Steel Corp.*,[75] the corporation, in a completed criminal action, had obtained transcripts of grand jury testimony of its own employees pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure.[76] In a civil antitrust action, the state of Texas, under Rule 34, attempted to discover the material from the corporation. However, the court of appeals upheld a denial of that request, reasoning that grand jury secrecy had not been breached by the prior release to the corporation since a corporation acquiring testimony of its own spokesmen was similar to an individual defendant acquiring his own transcript; the mere fact that the opposing party had transcripts did not establish a particularized need for Texas.[77]

In contrast, the court of appeals in *Illinois v. Sarbaugh*,[78] on a similar fact pattern to that in *United States Steel*, noted that the particularized need standard had "'been eroded to some extent' ... by language in *Dennis* ... if not by decisions of lower federal courts led by *U.S. Industries v. United States District Court*...."[79] Since the corporate parties had already obtained their employee's testimony, only a residual reason for grand jury secrecy remained, which could be covered by a protective order.[80] The court found the standard met if the corporate employer of the grand jury witness whose transcript was sought already had a copy of that transcript, and the witness was scheduled to be deposed or to give testimony at trial.[81]

[64] Rule 6(e) provides for the disclosure of grand jury transcripts "when so directed by a court preliminarily to or in connection with a judicial proceeding." FED. R. CRIM. P. 6(e)(2)(C)(i).

[65] 384 U.S. 855 (1966).

[66] *Id.* at 870.

[67] *Id.* at 871–74.

[68] *Id.* at 871–72 (footnote omitted).

[69] *See generally* Comment, *Disclosure of Federal Grand Jury Material*, 68 J. CRIM. L. & C. 399, 406–10 (1977); Comment, *Texas v. United States Steel Corp. and Illinois v. Sarbaugh: The Disclosure and Use of Grand Jury Transcripts in Private Antitrust Litigation*, 9 LOY. CHI. L.J. 984 (1978).

[70] 210 F. Supp. 486 (E.D. Pa. 1962).

[71] *But see* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 109, at 185 (1969), finding *Procter & Gamble* to be controlling in civil suits since *Dennis* "rests on the special need for fair play to criminal defendants."

[72] 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965).

[73] 345 F.2d at 21.

[74] *Id.* at 22.

[75] 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977).

[76] FED. R. CRIM. P. 16(a)(1)(A).

[77] 546 F.2d at 630–31.

[78] 552 F.2d 768 (7th Cir.), *cert. denied*, 434 U.S. 889 (1977).

[79] 552 F.2d at 774 (citations omitted).

[80] *Id.* at 777. The protective order required the attorney of the requesting party to keep a log of to whom and when the transcript was shown, prohibited copying it, and required that it be returned when no longer needed for the prescribed use. *Id.*

[81] *Id.* The court also criticized the analogy made by the *United States Steel* court between a corporation obtaining testimony by its own employees and an individual ob-

Thus, the *Douglas Oil* litigation was conducted in light of a growing body of precedent favoring disclosure of grand jury testimony in civil cases. *Procter & Gamble* and *Pittsburgh Plate Glass* had stressed the requirement of particularized need, regardless of the need for grand jury secrecy. But *Dennis* and its progeny in lower courts stressed a balancing test: the need for grand jury secrecy against the need for transcript disclosure. Moreover, the first prong of the test was given a variable measure. As the need for grand jury secrecy became less weighty (particularly when the grand jury was discharged and the civil defendant had already obtained the transcripts), the corresponding need for the transcripts became less compelling. However, the minimum need had to go beyond a request for general discovery—some showing had to be made that the party would have a need for the testimony at trial.

The fact pattern in *Douglas Oil* is essentially similar to the cases noted above. In 1973, Petrol Stops Northwest, a gasoline retailer with operations in California, Arizona, and other states, filed an antitrust suit in the district court in Arizona, premised on the Sherman Act,[82] against Douglas Oil Company, Phillips Petroleum Company, and ten other oil companies. Two other retailers from Arizona filed a similar antitrust action in the district court in Arizona against nine oil companies, including Phillips Petroleum.[83] Meanwhile, a federal grand jury empaneled in California, which was investigating the pricing behavior of the companies, called several of the oil company employees to testify.[84] This grand jury returned an indictment charging price-fixing against the oil companies; the companies obtained the transcripts of their employees' testimony, pursuant to Rule 16(a)(1)(A), but eventually pleaded *nolo contendere* to the charges.[85] In 1976 the retailers petitioned the district court which had supervised the grand jury to release the transcripts; the district court granted the request, subject to several protective conditions.[86]

On appeal the Ninth Circuit affirmed, noting that "only a minimal showing of particularized need" was required in this situation, citing *U.S. Industries* and *Sarbaugh* in support.[87] The retailers pointed out that the requested material could be used for impeachment at trial, since the oil companies' *nolo contendere* pleas suggested that the materials would support the government's (and the retailer's) position.[88] The court of appeals also approved the district court in California, the location of the grand jury proceedings, as the proper court to consider releasing the material, rather than the district court in Arizona, where the civil suits were taking place.[89]

In an opinion by Justice Powell, the Supreme Court affirmed as to the standard of review, but reversed and remanded on the question of which district court was the proper one to implement the standard of review.[90] On the first issue, the Court discussed the *Procter & Gamble* and *Dennis* decisions and proceeded to outline the standard which "emerge[d]"[91] from those cases: that parties seeking disclosure under Rule 6(e) must show that possible injustice in another proceeding needs to be avoided, that the need for disclosure is greater than the need for continued secrecy, and that the request is narrowly drawn to cover only material so needed.[92]

After noting that the interest to protect the identity of witnesses before future grand juries reduced but did not eliminate the need for secrecy,[93] the Court gave its approval to the lower court trend outlined above. As secrecy considerations "become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification."[94] Thus, the Court

·aining his own transcript. In the former case, the *Sarbaugh* court reasoned, the need for grand jury secrecy actually decreased, since disclosure was made to the most likely source of retaliation to the witness—the corporation that employs him. *Id.* at 778.

[82] 15 U.S.C. §§ 1-2 (1976).

[83] 99 S. Ct. at 1670.

[84] *Id.* at 1671.

[85] *Id.*

[86] *Id.* at 1671-72. The protective order limited disclosure to Petrol Stops' attorneys, prohibited copying, required return when the transcripts were no longer needed, and limited the use of the evidence to impeachment, refreshing recollection, and testing credibility. *Id.* at 1672.

[87] 571 F.2d 1127, 1130 (9th Cir. 1978).

[88] *Id.* at 1131.

[89] *Id.* at 1130 n.4.

[90] 99 S. Ct. at 1667.

[91] *Id.* at 1674.

[92] *Id.* While this language somewhat reformulated the notion of "particularized need," the Court in a footnote reiterated the examples from *Procter & Gamble* as a "typical showing" of particularized need. *Id.* at 1674 n.12. The examples are stated in the text accompanying note 62 *supra*.

[93] 99 S. Ct. at 1674-75. The Court noted that in the instant and similar cases protective conditions on the use of disclosed material may be appropriate. *Id.* at 1675. Such conditions could provide for the deletion of names of witnesses, so witnesses before future grand juries would not be deterred from testifying.

[94] *Id.* at 1675. Significantly, the Court cited the *Sarbaugh* and *U.S. Industries* decisions in support, but not

firmly established a flexible standard (stressing protective conditions covering disclosure, where appropriate) for release of grand jury transcripts to civil plaintiffs. If prior disclosure had been made and the transcripts would be used for impeachment or refreshing memory at deposition or trial, then the need for disclosure overcomes the need to protect the residual reasons for grand jury secrecy.

It is interesting that the Court apparently felt that the jurisdictional issue was as important as the standard of review issue.[95] After an extended discussion of the handling of the distribution of grand jury materials in civil antitrust proceedings, the Court concluded that requests for disclosure should generally be directed at the district court that supervised the grand jury,[96] but that in the instant case the district court in Arizona was in the best position to determine the status of the civil suit where the desired transcripts were to be used.[97] On remand, the Court directed the district court in California to determine the need for secrecy, and then send that information and the requested materials to the Arizona court supervising the civil cases, which was in the best position to evaluate the need for disclosure.[98]

In dissent, Justice Stevens, joined by Chief Justice Burger and Justice Stewart, disagreed solely with the Court's disposal of the jurisdictional issue. He argued that the district court judge in California had not abused his discretion, and found "troubling" the Court's willingness to review the decisions of the trial judge.[99]

Justice Stevens' dissent raises the question of whether the Court established a per se rule for determining which federal district court should supervise the release of grand jury transcripts, or whether it made the determination de novo on the facts in *Douglas Oil*. Stevens apparently adopted the latter view, since he reviewed the record and concluded that the district judge in California had sufficiently consulted with his colleagues in Arizona, indicating that he had not abused his discretion.[100] However, the majority opinion in several places[101] made reference to the rule resolving all cases of this kind in the district courts. In addition, the majority opinion appears to grant courts of appeal greater leeway in evaluating the exercise of discretion by the district courts in these cases.[102]

On the merits, the Court's opinion should not alert lower courts to follow a new standard. While the Court adopted the more lenient approach to the release of grand jury transcripts, caution should be observed in examining Justice Powell's tripartite breakdown of the standard determining release. Each element of the standard, as the Court correctly observed,[103] was present to some extent in both *Procter & Gamble* and *Dennis*. In addition, the significance of the first prong of the standard—that a possible injustice in another judicial proceeding needs to be avoided—was lessened when the Court, later in the opinion,[104] reiterated the standard without explicitly restating the phrase. In effect, the Court was including the first part of the standard under the general term "need for disclosure." Moreover, the adoption of an explicit balancing test[105] significantly clarifies the second prong of the three-part standard—that the need for disclosure is greater than the need for continued secrecy—and follows the results of the majority of the lower court decisions. Finally, the Court in developing the third prong of the standard—that the request must cover only material that is

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United States Steel or *City of Philadelphia*. *Id.* In a footnote, the Court stated that the "minimal showing" language of the court of appeals was not erroneous in the context of the "circumstances of this case." *Id.* at 1675 n.14. The Court came to this conclusion since it read the court of appeals decision as properly applying the standard of proof required by *Procter & Gamble* and *Dennis*. *Id.*

[95] The Court referred to the jurisdictional issue as an "important" question, *id.* at 1676, and felt that on the question lower courts needed "guidance in cases of this kind." *Id.* at 1678 n.18.

[96] *Id.* at 1676.

[97] *Id.* at 1678.

[98] *Id.*

[99] *Id.* at 1682 (Stevens, J., joined by Burger, C.J., and Stewart, J., dissenting). Justice Stevens felt that *Dennis*, which involved criminal defendants, involved policy considerations not relevant here, and did not support the Court's exercise of discretion. *Id.* at 1682 n.9. *Accord*, WRIGHT, note 71 *supra*.

Justice Rehnquist submitted a brief concurring opinion, questioning whether the Court had jurisdiction to review the order of the district court. He concluded that the order was appealable as a "final decision" under 28 U.S.C. § 1291, and the Supreme Court could exercise its certiorari jurisdiction under 28 U.S.C. § 1254. 99 S. Ct. at 1680 (Rehnquist, J., concurring).

[100] *Id.* at 1680–82 (Stevens, J., joined by Burger, C.J., and Stewart, J., dissenting). Justice Stevens also chastised the Court for second guessing the review of the facts made by the district court and the court of appeals. *Id.* at 1680 n.1.

[101] 99 S. Ct. at 1678, 1679.

[102] The Court stated that "[w]e have a duty, however, to guide the exercise of discretion by district courts, and when necessary to overturn discretionary decisions under Rule 6(e)." *Id.* at 1678.

[103] *Id.* at 1674.

[104] *Id.* at 1675.

[105] *Id.*

needed—simply restated the fact that plaintiffs cannot gain wholesale discovery of grand jury material even when they establish a need for disclosure.

It is doubtful that the antitrust bar will unanimously approve of *Douglas Oil*. At least one practitioner, in criticizing the leniency of *Sarbaugh* (and, by extension, *Douglas Oil*) suggested that criminal antitrust defendants will forego obtaining transcripts under Rule 16(a)(1)(A) to avoid having the transcripts released in a subsequent civil suit.[106] Such prior disclosure would lessen the need for secrecy and lessen the required showing of need for the grand jury material. In addition, despite the oil companies' *nolo contendere* pleas in the criminal action, the Court reiterated that the only remaining reason for secrecy was the need to protect witnesses before future grand juries.[107] The Court thus deemphasized one of the classic reasons for secrecy—the protection of the innocent accused. Nor does the Court's jurisdictional ruling seem to modify the substance of the standard of review. The misgivings of the antitrust defense bar seem well founded. However, practitioners representing civil antitrust plaintiffs will likely applaud *Douglas Oil* for its liberalizing of discovery standards and for its potential for speeding traditionally lengthy and complex antitrust litigation.[108]

[106] Unikel, *Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Circuit: Fair Use or Abuse?*, 66 ILL. B.J. 706, 710 (1978).

[107] 99 S. Ct. at 1674–75.

[108] Shortly before the decision in *Douglas Oil*, the trend among lower courts toward greater discovery of grand jury material in civil antitrust litigation was favorably summarized by the Report of the National Commission for the Review of Antitrust Laws and Procedure, reprinted in 80 F.R.D. 509, 552 (1979). Specifically, this report approved the result of the decisions in *U.S. Industries*, *Sarbaugh*, and the court of appeals decision in *Douglas Oil*. *Id.* at 552, nn. 44 & 45.

[109] This prediction is supported by the fact that grand juries are playing an increasing role in federal antitrust investigation. In 1978 it was reported that over 100 such grand jury investigations were pending. Baker, *To Indict or Not To Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 413 (1978). Therefore, more grand jury material will potentially be available to private antitrust plaintiffs.

CONCLUSION

Portash and *Douglas Oil* produced no great doctrinal shifts, but each had important practical consequences. *Portash* refused to extend the *Harris* line of cases to sanction an exemption to the rule prohibiting the use of immunized testimony that threatened to weaken that rule. A witness' immunized testimony, at least for impeachment purposes, falls under the "use and derivative use" prohibition. *Douglas Oil* confirmed an existing trend increasing the use of grand jury material in private antitrust litigation. Given the fact that private antitrust actions are an integral part of the antitrust enforcement scheme and that private actions are often filed on the heels of federal investigations of antitrust violations, *Douglas Oil* will undoubtedly encourage the proliferation, and perhaps the success, of such suits.[109]