[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14006

D.C. Docket No. 0:18-gj-00001-UNA

IN RE: Grand Jury Proceedings for the Southern District of Florida, No. FGJ-07-1005 FTL.

Appeal from the United States District Court
for the Southern District of Florida

(August 27, 2020)

Before WILSON, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

Alan M. Berkun appeals a district court order granting the government's petition to disclose grand jury materials related to his criminal case. He claims the district court violated his due process rights and abused its discretion in granting the order. After careful review, we affirm.

I.

On February 8, 2011, Berkun was charged by criminal information in the Southern District of Florida with a single count of filing false income tax returns in

violation of 26 U.S.C. § 7206(1). Information, United States v. Berkun, No. 11-CR-60024-JEM (S.D. Fla. Feb. 8, 2011), ECF 1. The criminal case was transferred to the Eastern District of New York, where it was consolidated with another criminal case pending against Berkun. Notice of Case Transfer, United States v. Berkun, No. 11-CR-214-ILG (E.D.N.Y. Mar. 23, 2011), ECF 1. Pursuant to a plea agreement, Berkun waived indictment and pled guilty to the single § 7206(1) count in the information. He also pled guilty to one count of attempted securities fraud, in violation of 18 U.S.C. §§ 1348 and 1349. He was sentenced to a total of 12-months imprisonment for both offenses. Judgment, Berkun, No. 11-CR-214-ILG (E.D.N.Y. Feb 15, 2012), ECF 22.

In 2017, the Internal Revenue Service ("IRS") sent Berkun a notice of deficiency, claiming he had understated his income from 2001 through 2005. The notice asserted that Berkun owed over $3 million in taxes and penalties. Berkun filed a dispute in the U.S. Tax Court challenging the notice of deficiency and arguing that the statute of limitations had expired for his 2001 through 2005 tax liabilities.

On August 26, 2019, the government filed a petition in the Southern District of Florida seeking disclosure of material from Berkun's grand jury proceedings, pursuant to Federal Rule of Criminal Procedure 6(e). The government sought documents obtained by grand jury subpoena in Berkun's prosecution for criminal

tax violations; documents prepared by the IRS's Criminal Investigation Division; and the IRS Special Agent Report and accompanying documents. The government's memorandum of law accompanying the petition cited the passage of time between the grand jury proceedings and pending Tax Court litigation as grounds for disclosure. The government also claimed that the records obtained and interviews conducted during the grand jury investigation would be very difficult, if not impossible, to recreate.

The district court granted the government's petition before Berkun filed a response. It found the government had demonstrated a particularized need for the disclosure based on the facts and circumstances set forth in the petition. The court ordered that IRS attorneys and agents assigned to Berkun's Tax Court proceeding be allowed to inspect, copy, and use documents and records containing matters which occurred before the grand jury. Those records include documents obtained by grand jury subpoena; documents prepared by agents of the IRS's Criminal Investigation Division; and the IRS Special Agent Report and its exhibits. The court also permitted IRS attorneys and agents to "[u]tilize the services and knowledge of all Government personnel who had access to these matters occurring before the grand jury, for trial preparation and as witnesses" in the Tax Court proceeding.

Berkun filed a motion for reconsideration. He said the district court violated his due process rights by issuing the disclosure order before he could respond. He further argued that the district court erred in issuing the order because the government did not demonstrate a particularized need for the requested material; the government's inability to access materials was due to its own delay; and disclosure of the material would cause him prejudice. In its response, the government argued the IRS's central witness in the Tax Court proceeding, Karl G. Voelker, would not be able to effectively testify in that case without the disclosure of the records he created. The government submitted a declaration from Mr. Voelker, in which he asserted that only one witness testified before the grand jury and no records were ever presented to the grand jury. The government also clarified that it did not seek disclosure of grand jury transcripts and that there were no grand jury deliberations in Berkun's case because the government had proceeded against him by information, not indictment.

The district court denied Berkun's motion for reconsideration. The court stated that it "agrees with the Government's response" and noted that the requested documents were never seen by the grand jury. Berkun timely appealed.

II.

We review for abuse of discretion the district court's decision to allow disclosure of grand jury materials. See United States v. Aisenberg, 358 F.3d 1327,

1338 (11th Cir. 2004). We review de novo whether a due process violation occurred. Stansell v. Revolutionary Armed Forces of Colom., 771 F.3d 713, 725 (11th Cir. 2014).

III.

Berkun claims the district court violated his due process rights by granting the government's petition without first giving him an opportunity to respond and by issuing a short, summary order. This argument is without merit.

The Federal Rules of Criminal Procedure authorize ex parte disclosure of grand jury matters without notice to parties in cases where the government is the petitioner. Fed. R. Crim. P. 6(e)(3)(F). Here, however, the government did not proceed ex parte. The Federal Rules of Criminal Procedure therefore required the district court to afford Berkun a "reasonable opportunity to appear and be heard." Id. Even if the district court failed to comply with this requirement, any error was harmless. See Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). In applying the harmless error rule to constitutional claims, we review whether the error was "harmless beyond a reasonable doubt." United States v. Roy, 855 F.3d 1133, 1178 (11th Cir. 2017) (en banc) (quotation marks omitted). Here, Berkun had the opportunity to present evidence and argument in his motion for reconsideration. The government then stated it would not object to the district court treating the

motion as Berkun's opposition to the request for disclosure. And in its order denying Berkun's motion for reconsideration, the district court showed that it had considered Berkun's arguments and rejected them. Given this, Berkun was given a reasonable opportunity to be appear and be heard in opposition to the government's motion, so any initial error on the district court's part was "harmless beyond a reasonable doubt." Roy, 855 F.3d at 1178.

Berkun also argues the district court violated his due process rights by adopting the government's arguments and failing to articulate specific findings regarding the disclosure of grand jury materials. While we discourage district courts from simply adopting parties' arguments, the practice does not amount to a due process violation. See United States v. El Paso Nat. Gas Co., 376 U.S. 651, 656, 84 S. Ct. 1044, 1047 (1964) (holding that a district court order adopting a party's arguments is "not to be rejected out-of-hand" and will "stand if supported by evidence"). And while we have vacated and remanded for further explanation when a district court's summary order "wholly fail[s] to provide this Court with an opportunity to conduct meaningful appellate review," Danley v. Allen, 480 F.3d 1090, 1092 (11th Cir. 2007) (per curiam), here the district court's adoption of the government's reasoning provided sufficient explanation of its ruling to allow for appellate review.

We therefore reject Berkun's argument that the district court violated his due process rights.

IV.

Berkun next argues the district court abused its discretion in granting the government's request for disclosure of documents subpoenaed by the grand jury. After careful review, we conclude the record shows sufficient particularized need to support disclosure. The district court thus did not abuse its discretion in granting the government's petition.

Grand jury proceedings are secret except for in a limited set of circumstances justifying their disclosure. Aisenberg, 358 F.3d at 1346–47. Federal Rule of Criminal Procedure 6(e) codifies the general rule of grand jury secrecy and provides a comprehensive framework for determining when materials from grand jury proceedings may be released. Pitch v. United States, 953 F.3d 1226, 1229 (11th Cir. 2020) (en banc). Here, the government sought disclosure under Rule 6(e)(3)(E)(i), which provides that a court "may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter . . . preliminary to or in connection with a judicial proceeding." To obtain disclosure of this material, the government must show a particularized need sufficient to warrant disclosure. In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Mia. ("Hastings"), 833 F.2d 1438, 1441 (11th Cir.

1987). This requires showing that (1) the requested material is needed to avoid possible injustice in another judicial proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only the needed material. Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222, 99 S. Ct. 1667, 1674 (1979). District judges are afforded "wide discretion" in evaluating whether to grant disclosure under Rule 6(e). United States v. John Doe, Inc. I, 481 U.S. 102, 116, 107 S. Ct. 1656, 1664 (1987).

The district court did not abuse its discretion in granting the government's motion for disclosure and denying Berkun's motion to reconsider. The government showed that the requested grand jury materials are needed to avoid possible injustice. This requirement can be satisfied by a showing that the public purpose of "efficient, effective, and evenhanded enforcement of federal statutes" will be served by disclosure. See id. at 113, 107 S. Ct. at 1663 (holding that enabling Department of Justice Antitrust Division attorneys to obtain material from other attorneys in the civil division justified the disclosure of grand jury materials).

Here, over five years passed between the conclusion of Berkun's criminal prosecution and Berkun's challenge to his IRS assessment. The passage of significant time between grand jury proceedings and a request for materials can show sufficient need to warrant disclosure, since such materials may "contain the freshest recollections of some of the key witnesses to the events being investigated

by the grand jury." Hastings, 833 F.2d at 1442. Given the passage of time between the grand jury proceedings and the current request, the government plausibly asserts that documents obtained through the grand jury are needed to recreate the body of evidence on which the government relied in Berkun's criminal case.

The need for disclosure also outweighs the general public interest in the secrecy of grand jury proceedings. The interests that underlie the policy of grand jury secrecy are at a particularly low ebb here. The Supreme Court identified these interests in United States v. Procter & Gamble Co., 356 U.S. 677, 78 S. Ct. 983 (1958). They are:

> (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 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.

Id. at 681 n.6, 78 S. Ct. at 986 n.6 (quotation marks omitted). While secrecy continues to be the default rule, it does not appear that any of those interests are implicated here.

Several considerations further diminish the interest in the secrecy of these grand jury proceedings. First, the grand jury concluded its investigation of Berkun in February 2011. See Douglas Oil, 441 U.S. at 222, 99 S. Ct. at 1674 (holding that the interest in grand jury secrecy is reduced, but not eliminated, by the conclusion of grand jury proceedings); In re Grand Jury, 583 F.2d 128, 130 (5th Cir. 1978) (per curiam) ("After a grand jury's investigation has terminated, most of the reasons for grand jury secrecy are no longer applicable and the others are less compelling.").[1] The passage of nearly a decade significantly reduces the interest in grand jury secrecy. Second, the government is the party requesting disclosure. While the Douglas Oil standard applies to both the government and private litigants, "the interests that underlie the policy of grand jury secrecy are affected to a lesser extent when disclosure to a governmental body is requested." Hastings, 833 F.2d at 1441. Third, the government does not seek disclosure of transcripts of grand jury proceedings and none of the requested records were presented to the grand jury.[2] The disclosure of these documents is therefore unlikely to chill or

[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. Id. at 1209.

[2] The government argues that, because the requested documents were never disclosed to the grand jury, they fall outside the protections of Rule 6(e). It is true that documents obtained from sources independent of the grand jury proceedings and never presented to the grand jury are not covered by Rule 6(e). See In re Grand Jury Investigation, 610 F.2d 202, 216 (5th Cir. 1980). Here, at least some of the requested documents were obtained by grand jury subpoena, and so

otherwise affect future grand jury testimony. See United States v. Sells Eng'g, Inc., 463 U.S. 418, 432, 103 S. Ct. 3133, 3142 (1983) (holding that unwarranted disclosure of grand jury materials may threaten the willingness of witnesses to testify fully and candidly in grand jury proceedings). Accordingly, we conclude that the government's need for disclosure outweighs the general public interest in the secrecy of the grand jury. See Douglas Oil, 441 U.S. at 223, 99 S. Ct. at 1675 (holding that "as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury [material] will have a lesser burden in showing justification").

Finally, we note that the district court's order was structured to disclose only needed material. The order authorizes disclosure only of documents and records obtained by the grand jury; documents prepared by agents of the IRS's Criminal Investigation Division; and the Special Agent Report and evidence exhibited within it. And the order only permits the disclosure of these documents to IRS attorneys, agents, and clerical personnel assigned to or assisting in Berkun's Tax Court litigation. We see nothing in this order which sweeps beyond the government's expressed needs.

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were not obtained from sources independent of grand jury proceedings. But because we hold that disclosure was permitted, we need not decide whether these materials are protected by Rule 6(e).

On this record, we conclude that the district court did not abuse its discretion by granting the government's request for disclosure of grand jury materials.

AFFIRMED