ORIGINAL

In the

Supreme Court of the United States

DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY,

PETITIONERS,

V.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO, UNITED STATES OF AMERICA

RESPONDENTS.

No. 77-1547

Washington, D. C.
December 5, 1978

Pages 1 thru 54

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DOUGLAS OIL COMPANY OF CALIFORNIA AND PHILLIPS PETROLEUM COMPANY, Petitioners,	
v.	No. 77-1547
PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA, Respondents.	

Washington, D. C.

Tuesday, December 5, 1978

The above-entitled matter came on for argument at 2:12 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MAX L. GILLAM, ESQ., 555 South Flower Street, Los Angeles, California 90071; on behalf of the petitioners.

DANIEL L. BERMAN, ESQ., Berman & Giauque, 500 Kearns Building, Salt Lake City, Utah 84101; on behalf of the private respondents.

MRS. SARA S. BEALE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the respondent United States.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-1547, Douglas Oil against Petrol Stops Northwest.

Mr. Gillam, you may proceed whenever you're ready.

ORAL ARGUMENT OF MAX L. GILLAM, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GILLAM: Mr. Chief Justice, may it please the Court:

I represent here today the petitioner, Douglas Oil Company of California, but I will also be speaking on behalf of the other petitioner, Phillips Petroleum.

I would propose to break this argument down into five parts, and we inform the Court of this now so that if there are particular questions, the Court may elect if it wish to defer them until later on.

First of all I'm going to talk about what I think there's confusion about, which is what exactly petitioners are requesting here, and what the petitioners are not requesting.

Secondly, I'll talk about the facts for a few minutes.

Third, the position of the government in these proceedings, and our believe that the government is sitting today at the wrong table in connection with this grand jury transcript argument.

Fourth, I would like to talk about the procedures for the determination of a particularized need.

And fifth, our believe in the significance of this Court's reaffirmation of the principles contained in Procter & Gamble.

We seek to have this Court do two things: we want the rather rigid principles of particularized need of Procter & Gamble reaffirmed; secondly, we would like a ruling by this Court that would indicate to the district courts in the United States this Court's feeling on the proper forum in which a determination of particularized need should be made.

QUESTION: Mr. Gillam?

MR. GILLAM: Yes, sir.

QUESTION: Was this a civil or criminal action as you conceive it?

MR. GILLAM: This arises out of a civil action.

QUESTION: I don't mean the Arizona action; I mean these rather odd proceedings that took place over in California.

MR. GILLAM: They come under the heading of the miscellaneous criminal calendar, as a matter of nomenclature, and are regarded, I believe, as being ancillary to the court's jurisdiction sitting criminally in connection with the grand jury investigation.

QUESTION: Then you get to the court of appeals pursuant to what, 28 U.S.C. 1292?

MR. GILLAM: Yes, sir, I believe so.

QUESTION: This is a final decision?

MR. GILLAM: Yes, sir; it is a final decision which gave us the right to appeal.

QUESTION: And you -- won the basis of federal jurisdiction, the district court was what?

MR. GILLAM: Basically, the basis of jurisdiction is the federal district courts' control of what is in fact an arm of the judiciary, the grand jury, and the control which it exercises over that.

QUESTION: Well, but ordinarily you don't have third parties such as your opponent intervening in a criminal case.

MR. GILLAM: They were not intervening in a criminal case.

QUESTION: I thought that's what you said --

MR. GILLAM: No, sir. This is ancillary to the criminal proceeding, which had already been completed.

They had to file under the miscellaneous criminal duty judge responsibilities, because it is regarded in the central district of California that the criminal side of the court has jurisdiction over all matters relating to grand juries.

QUESTION: Well, we're not bound, I take it, by the views of the criminal division of the central division of the district court of California.

MR. GILLAM: Yes, sir, that is correct; you arenot bound by it.

But that --

QUESTION: Doesn't it bother you at all, the basis for federal jurisdiction in the district court here, or how the case got to the court of appeals? It's a very unorthodox thing.

MR. GILLAM: It is not, Your Honor, as unorthodox as I wish it were. The court that has jurisdiction over the documents normally has that jurisdiction pursuant to an impounding order which is issued at the beginning of the grand jury which impounds the document in that district, and they may not be removed from the district without further order of the court.

So the application is to the court, and I don't think it makes much difference whether it's regarded as the civil or the criminal side of the court.

But the application is to that court which received those documents under an impounding order.

QUESTION: And anyone then can come in and ask for the documents?

MR. GILLAM: Yes, sir.

QUESTION: And if they are turned down, or if they're granted, in either case, it's a final decision.

MR. GILLAM: Yes, sir.

QUESTION: Appealable to the court of appeals?

MR. GILLAM: Yes, sir, and historically regarded as such.

I would like to emphasize that the petitioners in this case are not seeking to affect any kind of coverup although there were implications of thatin the proceedings surrounding these documents and in the opinion of the court of appeals.

We do not contend that the respondents would not be entitled in some measure to some portion of the applicable transcripts and documents when and if they could show a legitimate need or requirement for them.

They have the whole panoply of the remedies available under the federal rules of civil procedure, and the concomitant actions they can take in connection with their regular federal civil procedure document requests and depositions.

They have the concomitant right to appeal for the -- to a court -- for the release to them, if they can show the proper case, of portions of the grand jury transcripts and documents.

QUESTION: You said -- you used the term, proper showing.

Would you define that a little more?

MR. GILLAM: Yes, sir.

QUESTION: Are you talking about particularized need, or just what do you have in mind?

MR. GILLAM: I have the three requirements that

Procter & Gamble set forth: the requirement that they show that that which they seek is useful, that which they seek is relevant to the proceeding; that they show that they will suffer prejudice or an injustice will be done if they do not get the materials; and third, as this Court articulated in Procter, a particularized need for them.

That's what I mean by proper showing, Your Honor.

May I say that few decisions of this Court have engendered as much dispute as Procter & Gamble. The federal district courts and the circuit courts are in complete disagreement about almost every aspect of particularized need.

On the one hand we have the Ninth Circuit, four judges of the Seventh Circuit, as in the Klavey decision; and many district court judges in the Ninth, Seventh and Fifth circuit.

This group adheres to what I refer to as the slight need test for the release of grand jury documents.

On the other hand you have dicta in the second Circuit to the contrary -- Baker v. United tates Steel. The Third Circuit, to the contrary in City of Philadelphia v. Westinghouse.

QUESTION: What do you mean, contrary? No need or much more need?

MR. GILLAM: Much more need, Your Honor; much more need.

You have the Fourth Circuit in the Bass decision

adhering more to the rigid standard of Procter & Gamble.

In the Fifth Circuit you have Texas v. United States Steel. And you have four judges on the Seventh Circuit court of appeals. The Klavey decision, recently handed down by the Seventh Circuit, is instructive.

The issue was whether the court had improperly -- the court below had improperly refused to permit an accused to obtain the transcripts of his proceedings.

The district court judge said that it had not acted improperly in refusing him the transcript. A panel of the Seventh Circuit then upheld that on a two-to-one vote. Petition for re-hearing en banc was granted, thereby vacating the judgment of the panel. And the judges split four to four on whether there had been the kind of particularized need under Procter & Gamble that would have given that criminal defendant a copy of his transcript.

QUESTION: Most human beings are products of their experience, and that even includes federal judges. Isn't it true that in California in the state courts in California, grand jury proceedings are not secret, and they're pretty readily available to everybody?

MR. GILLAM: Yes, sir. At the conclusion -- at the issuance of an indictment, a transcript of the proceedings is automatically given to counsel for the defendant.

QUESTION: That is what I thought.

MR. GILLAM: That's nice in some ways and it is not nice in other ways.

QUESTION: In any event, that's the California practice.

MR. GILLAM: Yes, sir.

QUESTION: That a California lawyer is used to?

MR. GILLAM: Yes, sir.

QUESTION: Right.

QUESTION: Mr. Gillam, in this case as I remember you do have the transcripts, the defendant has the transcripts of the grand jury procedings?

MR. GILLAM: That's correct.

QUESTION: Does the record tell us how they got them?

MR. GILLAM: No, sir, the record does not tell you, I believe, how they got them, because that did not become an issue in the district court or in the court of appeals.

The transcripts were sought from the government -- let me go back a second to answer your question.

The respondents here -- the plaintiffs in the Arizona court -- in October of 1976 filed a request for the production of transcripts, and grand jury documents, which were in the hands of Douglas and Phillips.

Objections were made to that production on the grounds of relevancy and related issues.

No objection was made at that stage, and hasn't been

made, on the grounds that the transcripts were released subject to restrictions.

Standard operating procedures --

QUESTION: Was there an objection made on the ground that the proper remedy was in the other court?

MR. GILLAM: No, sir. Objection was not made on that ground. We did not have the kind of finger-pointing in each direction that I think plaintiffs would believe we were guilty of.

QUESTION: What' we're reviewing here, Mr. Gillam, of course, is the court of appeals' decision which said the district court's ruling was not an abuse of discretion, as I read the last paragraph of it.

MR. GILLAM: Yes, sir.

QUESTION: Was the district judge who passed on this motion the one who had tried the criminal case?

MR. GILLAM: No, sir. There wasno trial of the criminal case. There was no -- he had had -- Judge Gray is the judge below who issued the opinion which we are -- which the Ninth Circuit reviewed, and which we are requesting you to review.

That has nothing to do with any aspect of any case.

QUESTION: He just happened to be a calendar mjudge or motion judge before whom this came up?

MR. GILLAM: He was a miscellaneous duty judge during

that month, and it was assigned to him.

Judge Ferguson first had the case. Judge Malcolm Lucas then had the criminal case. Judge Pragerson in the central district had the companion civil case.

Judge Gray had had nothing to do with any one of those actions.

QUESTION: So then the court of appeals is not entitled, I suppose, to rely very heavily on the district court's knowledge of the case.

MR. GILLAM: Yes, sir, that's correct. And Judge Gray, whom we respect greatly and think is one of the finest judges in our district and if not the country --

QUESTION: Former president of your bar association.

MR. GILLAM: Yes, sir, and a pleasure to try a case before him always. Judge Gray made no bones of the fact that he didn't know anything at all about this.

But where he went wrong, we believe, and we have told him this and have not succeeded in convincing him, is in believing that after the grand jury proceedings are concluded, there is a very slight need for secrecy.

As a practicing lawyer who stomps the grapes in this vineyard regularly, I disagree violently with him with respect to that. And I think that the entire criminal bar --

QUESTION: You're disagreeing with the prosecutor too, I guess.

MR. GILLAM: No, sir, the prosecutor --

QUESTION: Well, you're disagreeing with the federal anti-trust prosecutors.

MR. GILLAM: In this case, Your Honor, the government has taken the position that transcripts should be released. And I would like, if it's appropriate at this time, to direct my remarks at that, about why in the world is the government --

QUESTION: Before you leave the question of which -- I think you were tal-ing about which judge is the right one to decide these issues, you made the point that Judge Gray had little familiarity with the case.

But as I understand your legal argument, you make precisely the same legal argument if there had been a full criminal trial at which Judge Gray had presided. You'd still say the case should be edecided by the judge inthe place where the treble damage action was filed.

MR. GILLAM: Yes, sir, I would still say that and --

QUESTION: So the particular -- the question of whether Judge Gray knew very much about the case really has nothing to do with the issue.

MR. GILLAM: It has very little to do with it, Your Honor, if the Court considers the nature of the anti-trust complex litigation, and the enormous significance that the trial judge take hold of that litigation.

The initial report of the Presidential Commission on

the abused of discovery, and remedies under the anti-trust laws, comes out very strongly with what everybody else who has studied this matter has come out with. It is extremely important that the trial judge take hold of the litigation.

Only in that fashion can you stop the enormous waste of time and expense involved. You are now faced with a proposed amendment to rule 26, which would require, at the request of either party, that the trial judge hold an initial hearing and determine what issues the discovery shal 1 proceed upon, and the order in which discovery shall proceed.

That is for a very good reason. There are almost always in these litigations, standing questions, questions on whether the plaintiff has been injured under Illinois Brick, which is decidedly an issue in this case as admitted on page 7 of respondent's brief.

It would be folly to permit the parties to engage in broadscale discovery, we would contend, prior to a resolution of 12(b)(6) motions, prior to the resolution of motions on standing and injury under Illinois Brick.

That is why the trial judge should be in charge. You may never reach these discovery issues if the trial judge will set the proper kind of schedule.

QUESTION: But in this case, didn't Judge Gray call up the trial judge and ask him whether --

MR. GILLAM: No, sir. Judge Gray offered to call up

the trial judge and see if they had any objection to his releasing the transcripts and he documents.

This is not the kind of informed -- not the kind of hearing which we would have wanted to have had with the trial judge to discuss all of the reasons why the transcripts and documents should not be released at this time.

QUESTION: Why didn't you, why wouldn't you at that point make the very argument you're making now?

MR. GILLAM: We did make the argument I'm making now.

QUESTION: You said he asked you whether he should call the trial judge, and you said, don't bother.

MR. GILLAM: No, he said, would you like me to call the trial judge and see if he has any objections to my releasing the documents. We did not ask him --

QUESTION: I understand what you've been saying very persuasively up to now is, you very violently wanted the other trial judge to decide it, and why didn't you tell Judge Gray that?

MR. GILLAM: Well, we did tell Judge Gray --

QUESTION: Judge Gray wouldn't know all the issues about your case the way the trial judge in Arizona.

MR. GILLAM: We did tell Judge Gray that we wanted the trial judge to decide it.

QUESTION: Oh, I see.

MR. GILLAM: We did not agree with him that he should call the trial judge to ask a narrow question of whether the trial judge had any objections to him releasing the transcripts and the documents.

QUESTION: Oh, I see.

QUESTION: Do you have the individual calendar or the master calendar?

MR. GILLAM: We have an individual calendar in the central district of California.

QUESTION: How about Arizona?

MR. GILLAM: They also have individual assignment to individual judges.

It would be a very different situation, Your Honor, if we had a master calendar situation. But most of the federal districts in which --

QUESTION: An individual calendar is aimed at having one judge deal with everything related to the case, and no other judge put his hands on it, isn't it?

MR. GILLAM: Yes, sir, the individual calendar, and that's both that way in Arizona and in the central district of California and I believe in most districts around the country. I've practiced in most jurisdictions.

And these anti-trust cases, even if there is a master calendar situation, are assigned to one judge for all purposes. You can't have a different judge ruling on it every

month.

I would like to return to the question of Mr. Justice White, if I may, who asked me about government; I believe it was Mr. Justice White, I may be confused.

QUESTION: No, I did.

MR. GILLAM: And you asked me if we were not in fact opposed to the government here.

I would prefer to state that we are fighting the government's fight because they are not willing to. And that I think is for a variety of reasons.

QUESTION: Well, they didn't need to file.

MR. GILLAM: Sir?

QUESTION: They didn't need to take this position that they have. I take it -- I take it they've taken it honestly that they think it's a proper rule of law to release these minutes.

MR. GILLAM : This is -- this is the position they've taken, and I do not quarrel withthe fact that they've taken it honestly.

I think they've taken it mistakenly, and I think they've taken it for three reasons, they have taken it mistakenly.

First of all, I don't think the government really understands the significance to the individual witness going into a grand jury of his knowledge that it's only under the most egregious circumstances that his transcript will be released.

QUESTION: Well, the Department's been in the criminal prosecution business a long time.

MR. GILLAM : But not representing many defendants, Your Honor, in this case.

QUESTION: Well, I know, but they've been calling a lot of witnesses.

MR. GILLAM: Yes, sir, they certainly have.

QUESTION: And I suppose they would feel the first chill -- the first chilling wind on witnesses they would feel.

MR. GILLAM: They are feeling that chill. The change in the government's position is not -- has not been initiated in this case, but it's been a gradual change in the government's position with respect to the secrecy of grand jury proceedings.

It almost coincided with the semi-national scandal involving Dita Beard and ITT. It was augmented by the Watergate situation and the fear of government prosecutors that the world would think that they have been guilty of a coverup.

In fact, in this case, the accusation basically of a coverup was made by the former anti-trust division attorney who had left the office six months before the indictment came down.

These are the Jonathon P. Nave affidavits which were attached as exhibits to the motion to supplement the appeal in the Ninth Circuit -- supplement the record -- by respondent; and which for the Ninth Circuit opinion, it considered in making

its ruling, there at pages 26 through 42 of the appendix.

The former person in the government, Mr. Nave, stated that his attention had been drawn to the portion of the competitive impact statement filed in the civil case which said, quote, that since the government did not develop evidence of price fixing with respect to gasoline other than re-brand gasoline, basically, end of quote -- this is the only reason the re-brand gasoline alone was involved in the indictment.

Mr. Nave filed that affidavit in camera together with his statement about that portion of the competitive impact statement, at the direction of Judge Pregerson.

He then filed the second affidavit, which is contained in the appendix at approximately the page number I mentioned, approximately page 30, in which he, while not referring to specific companies, gave five lines of inquiry that he knew from having conducted a portion of the grand jury until September of 1974, he gave the leads which the government had, but as to which no indictment had come down.

Retail price fixing: no indictment came down; no one was accused. This retail price fixing under his affidavit included an alleged pipeline right into the executive office of the White House.

Second: use of exchange agreements to deny supply to independents. No indictment was ever handed down for that.

Third, collusive action to deny import quotas. No

indictment as to that.

Fourth: collusion to eliminate cross-hauling.

And fifth: collusion to include the price of credit cards in the sale of crude oil, so that independents who did not have their own crude oil supplies could not compete.

This charge of -- was basically a charge of coverup by a former man in the division -- I think has made the government understandably very sensible about taking any kind of position against disclosure of any transcript involved in this grand jury.

But may I say to this Court, the very act of a former attorney for the anti-trust division in filing this kind of affidavit is, I believe, a violation of Rule 6(e). It certainly discloses crime as to which there was no indictment.

QUESTION: At whose behest did he file it?

MR. GILLAM: I can only refer you, sir, to the language of his first affidavit, in which he said he had been contacted by counsel for Petrol Stops and Gas-A-Tron, the respondents herein, and had been asked to comment on the competitive impact statement of the government.

This is necessary under the Tunney Act, as the Court held.

QUESTION: Are you prepared to say it was not filed on your behalf?

MR. GILLAM: Oh, yes, sir. It was certainly not filed

at my behest, or at our behest.

I would like to reserve the few minutes I have remaining, if I may.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Gillam.

Mr. Berman.

ORAL ARGUMENT OF DANIEL L. BERMAN, ESQ.,

ON BEHALF OF THE PRIVATE RESPONDENTS

MR. BERMAN: Mr. Chief Justice, and may it please the Court:

The parties I represent are the only parties before the Court that have not had access to the grand jury material in question.

And frankly, I would be more impressed by Douglas' and Phillips' fervent concern for grand jury secrecy if they were in the same position. But they are not in the same position.

And we are not arguing about secret grand jury materials. Because the only grand jury materials that the district court ordered disclosed to the parties that I represent were grand jury transcripts that had already been disclosed to the petitioners Douglas and Phillips and documents produced by the petitioners Douglas and Phillips in connection with the grand jury proceeding.

QUESTION: Why didn't you make a motion for production in the civil action?

MR. BERMAN: We filed, Your Honor, a Rule 34 request in the Civil action for these materials. We proceeded in the California court, where the criminal action had been filed, because we believed under Rule 6(e) that that was the court in which the petition had to be filed.

Rule 6(e) says that a court may grant disclosure of grand jury materials in connection with a judicial proceeding. And there was a line of authority, and it made sense to us to believe, that the court with the primary responsibility to protect grand jury secrecy was the court charged with supervision of the grand jury.

QUESTION: You say you did file a Rule 34 motion. You regard your 6(e) proceeding in the central district as independent of that, I take it.

MR. BERMAN: We do. And I think, Your Honor, in light of your other questions, as I rule -- as I read Rule 6(e), Rule 6(e) expressly gives a court in which a criminal action has been filed the authority to entertain a petition for grand jury transcripts.

QUESTION: Which sentence of Rule (e) is it?

MR. BERMAN: Your Honor, it --

QUESTION: I -- 6(e) is a negative. It's a prohibition that says, it shall not be released unless --

MR. BERMAN: I don't think that's true, Your Honor. Let me, if I may, read precisely what the rule says.

The -- may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding.

And, Your Honor, that rule, as it now stands, as it has been amended, expressly provides, in subparagraph (c), disclosure otherwise prohibited by this rule of matters occurring before the grand jury, may also be made when so directed by a court preliminary to or in connection with a judicial proceeding.

It is an authorizing provision to grant disclosure.

QUESTION: What happened to your rule 34 motion in the Arizona court?

MR. BERMAN: The rule 34 motion? They filed an objection, Your Honor, and we did not proceed under Rule 37 because we believed -- and there was again good authority for our belief -- that the court in Arizona could not grant that motion, since it involved the secrecy of grand jury transcript.

QUESTION: You mean transcripts already in possession of the defendant?

MR. BERMAN: Yes. And let me say why I believe that, Mr. Justice --

QUESTION: Well, it certainly wouldn't reach documents that they had, that they had given to the grand jury; those wouldn't be subject to the grand jury secrecy, would they?

MR. BERMAN: Well, there's certainly a question

whether the documents produced at grand juryare grand jury materials, Your Honor.

QUESTION: You mean all a defendant has to do to make secret documents is to give them to a grand jury?

MR. BERMAN: No, Your Honor, that's not our position. But our position was, in our 6(e) petition, we didn't seek these documents or these materials from the defendant; we sought them from the government.

QUESTION: I know you did. But your Rule 34 sought it from the defendants.

MR. BERMAN: It did, Your Honor.

QUESTION: Well, why weren't those producible? Why shouldn't you have prevailed there?

MR. BERMAN: Your Honor, I think -- the answer is we never called on a Rule 37 motion to enforce our Rule 34 demand under civil action.

QUESTION: In other words, you didn't press it.

MR. BERMAN: We did not press it in the Arizona courts. We pressed it where we thought it was proper to press it, in the California court.

QUESTION: Suppose you had, and the court had said -- had ruled against you on the grounds that these documents are completely irrelevant to anything he can imagine would arise in this case.

Would you -- I suppose your position would be that

you could still get them from the -- from the California court?

MR. BERMAN: It's hard for me to imagine that a California court, faced with that kind of ruling, would have granted the motion. But I don't think, in fact, there was even a close question with regard to the relevancy of these documents, Your Honor.

If you just simply compare the offense charged in the indictment with the claims of price fixing made in the civil complaint, they're virtually identical.

And in fact there was no suggestion -- absolutely no concrete suggestion -- when this petition was called for hearing in the California court, as to why the California court shouldn't proceed.

I'd like to say why --

QUESTION: What if you'd have won in the -- who pays for the copies of the documents? In the California court, the judge rules in your favor, which he did; is that right?

MR. BERMAN: He did, Your Honor.

QUESTION: And what relief would you have gotten? Would the documents just have been turned over to you? Or would you have had to copy them?

MR. BERMAN: We would have had-- we were granted the right to make one copy, Your Honor; and we got those documents under a protective order that only permitted their use for

purposes of impeachment and refreshing recollection.

I think, Your Honor, that the reason we believe that the California court was the proper court is it's because that court is going to be in the best position to consider whether there are any special reasons for continued secrecy.

If there are no reasons for continued secrecy, then we're not talking about any of the realities of the policies behind grand jury secrecy.

But the court in which the criminal action is pending is the court that has access to the government employees who know whether there's any particular risk of retaliation.

QUESTION: Was there any realistic chance that Judge Gray was going to interview the government employees who testified in a grand jury proceeding that he had nothing to do with?

MR. BERMAN: There certainly was, Your Honor. And they were in the room at the time the petition was argued.

QUESTION: And he could have then questioned them?

MR. BERMAN: Certainly. I mean, the petition was addressed to the government. The filed a response saying that they felt there had been a sufficient showing of particularized need, and that they had no objection to the petition being granted.

But they were in the courtroom on the day the petition was argued, and made their appearance, so he had access to them.

QUESTION: The employees? The witnesses were, or --

MR. BERMAN: Excuse me, I may have --

QUESTION: I thought you said the employees were. I take it now you meant the attorneys.

MR. BERMAN: The prosecutors were.

QUESTION: Yes, the prosecutors.

QUESTION: Incidentally, have any of our cases ever held that anybody other than a defendant in the government's case is entitled to production of grand jury testimony?

MR. BERMAN: The only two cases -- well, let me put it this way. The only cases that were before this Court, Pittsburgh Plate, Dennis and Procter & Gamble, all involved defendants.

The Dennis case and Pittsburgh Plate were criminal prosecutions. That matter is now covered by the Jencks Act.

In Procter & Gamble, we weren't talking about this situation. The documents -- the grand jury materials were sought in mass as a substitute for discovery. And there had been no prior disclosure.

Our principal argument is, Your HOnor, with regard to the merit, was that there was no further reason for secrecy. These documents had been disclosed. There was no risk of retaliation because they were produced under a protective order that only permitted their use for purposes of impeachment or refreshing recollection.

There was absolutely no risk in terms of the interests protected by grand jury secrecy in terms of the disclosure made. And the necessity -- the use of these documents was for the very purpose of the particularized needs recognized by the Court in Procter & Gamble.

That is, the Court said that examples of particularized need was the need for impeachment and refreshing recollection. It's the need for effective cross-examination.

And that's the only purpose to which the use of these documents could be put. Independently, we had asked in the civil action, in an interrogatory, asked these people whether they had engaged in any price-related conversations, with -- between Phillips and Douglas, and between their other defendant; including Gulf, who was an indicted co-conspirator, and they said, we are not aware of any such conversations.

They made those answers to interrogatories at the time they had the grand jury transcripts in their possession. And I think we are clearly entitled to the opportunity to impeach those answers; that is, to show that in fact they had such conversations.

The bill of particulars indicated that there were 11 director conversations.

And secondly, to show that they knowingly concealed the information at the time when they had it in their possession when they were called upon to provide an answer.

QUESTION: Could you answer -- could you explain to me why the restrictions were put on?

I assume that some of these -- some of these grand jury witnesses were employees of the defendants, or were all of them?

MR. BERMAN: The only disclosure -- the only transcripts involved were transcripts which were disclosed to the defendants pursuants to rule 16, which would only relate to their employees or former employees.

QUESTION: And wouldn't any of these employees' out of court statements, wouldn't they ever qualify as admissions of a defendant?

MR. BERMAN: Well, these were only -- they're statements in terms of the transcripts made to the grand jury.

QUESTION: Well, they were made to the grand jury. But nevertheless, they were statements of fact with respect to the conduct of a defendant.

MR. BERMAN: Under Rule 801, Your Honor, they'd be admissions under the federal rules of evidence.

QUESTION: Well, why were they -- why wouldn't they be admissible in your case in chief as an admission of an defendant?

MR. BERMAN: Well, I think the answer simply is that the court adds an extra step to make sure that there was no --

QUESTION: Didn't you object to that or not?

MR. BERMAN: No, Your Honor, we didn't. I think that our real -- our position simply is that if we had this information, we'll be able to effectively conduct cross-examination.

And since we're going to have to, as in any conspiracy case, prove this case out of adversary witnesses, that was critical to us.

QUESTION: Well, I would have thought it would have been of much more use to you, you know, on an unrestricted basis, and admissible in your case in chief.

MR. BERMAN: I think I'd say this, Your Honor, it certainly would be better if we could have them for all purposes. But sine qua non, we really have to have them for cross-examination.

QUESTION: If you had prevailed on your Rule 34 motion, your would have had them on an unrestricted basis, I would suggest.

MR. BERMAN: Your Honor, it'd be a surmise on my part, but I strongly doubt it.

There was a healthy body of authority in the lower courts that where there was no further reason for secrecy, the district courts used these protective orders as a proper means to reconcile the interests between secrecy and the search for the truth.

And this was a proper balancing. You don't get the documents, or get the chance to show them to your client, and

have them run around the industry and tell them what was said about people, or anything like that.

But you can only use them for the critical business of the litigation.

QUESTION: Well, that may be -- as to whom you can disclose them to, that may be so. But the use you can put them to in the trial is another matter.

You didn't object to that restriction?

MR. BERMAN: We did not objection, Your Honor, to the trestriction that they be used only for the purpose of impeachment or refreshing recollection.

And as I said, it may be to our greater advantage to have them for other purposes, but I view this as the critical purpose. This is --

I'd like to make one observation. In government litigation that ends in a nolo plea and a consent decree, this is likely to be the only benefit the private plaintiffs get out of government-related anti-trust enforcement.

And the critical thing is to be able to use this information, where you're having to prove your case out of your adversaries' mouths, to obtain truthful and accurate testimony.

That's the real guts of the problem; and that's what we think demonstrated particularized need in this case.

QUESTION: Well, what makes you think private plaintiffs

should get any sort of benefit out of a plea that ends in a nolo? Out of a government case that ends in a nolo plea?

MR. BERMAN: Well, I think what we should get, Your Honor, is I think we should get the benefit of truthful and accurate testimony.

That is, if there is no reason why these documents should remain secret, that they've been disclosed to defendant, if they still have them in their possession, why shouldn't we have the opportunity to use relevant evidence to make sure that they're furnishing truthful and accurate testimony in the course of a private anti-trust litigation?

QUESTION: Well, isn't it true, Mr. Berman, that the Clayton Act provides that if the plea of nolo is entered by the defendants, that protects them from the risk of judgment, being prima facie evidence against them? And doesn't that indicate some expression of congressional policy to encourage defendants to plead nolo so that the government litigation won't be useful against them?

MR. BERMAN: I think, Your Honor -- of course, where you accurately summarized the Clayton Act, I don't dispute that.

I think the answer to that is, you can't use the government case, then, as a means of proving your case on a prima facie basis. I don't think that justifies -- or prevents the parties from using what was developed in the government

case to determine the truth in the civil action.

That is, we ought to have the opportunity to use highly critical and relevant evidence for the purposes of cross-examination.

That's not the same thing as getting a leg up because somebody filed an action and plead nolo. It depends on what in fact they said and what their testimony is. That's the normal business of civil litigation.

QUESTION: But would you concede that the disclosure may have the tendency to discourage nolo pleas?

MR. BERMAN: No, I would not, Your Honor. I do not.

I think -- I think that if you start looking at the assumption that would have to be made to say this would change anything, they're purely fanciful.

What difference would they make? The whole idea in grand jury secrecy is not to give the defendants some strategic mitigating advantage.

The idea of grand jury secrecy is to serve the institution of the grand jury, and to protect that and a number of interests. Most of those are done when the criminal proceeding is over.

But there is nothing -- and this Court has never indicated there's anything -- in having grand jury secrecy grant a party an adversarial advantage.

I think, Your Honor, I've used my 15 minutes of the

argument.

MR. CHIEF JUSTICE BURGER: Mrs. Beale.

ORAL ARGUMENT OF MRS. SARA S. BEALE,

ON BEHALF ON THE RESPONDENTS

MRS. BEALE: Mr. Chief Justice, and may it please the Court:

Although the United States does not opposed disclosure in this case, it has a vital interest as prosecutor in preserving the traditional secrecy of grand jury proceedings.

And we do not believe our position in this case is in any way inconsistent with that interest.

As the briefs of the parties make clear, the federal rules of criminal procedure do not resolve the questions presented here. They do not designate which court should rule whether disclosure should be permitted, nor do they specify what showing is required in order to warrant disclosure in particular proceedings.

The government submits that the ultimate authority to disclose grand jury materials must rest in each case in the district court in which the grand jury was convened; and further, that the grand jury court in this case properly permitted disclosure based on a finding that there was a particularized need that outweighed the consideration in favor of continued secrecy.

It is petitioner's contention that the Arizona civil

court rather than the grand jury court was in the best position to make a searching examination of particularized need. And they urge that because the Arizona court -- and they urge that the Arizona court had jurisdiction to order disclosure because petitioners who were parties over whom that court had jurisdiction, had in their possession copies of the grand jury transcripts of the testimony given by their employee.

In our brief we discuss what we believe to be the general reasons why the grand jury court and not the civil court should ultimately rule on the propriety of disclosure in each case.

But we think that in this case the Court need not reach these more general considerations, because the facts here make it clear that it would be inappropriate for the Arizona civil court to authorize disclosure by directing the petitioner here to reveal to respondents the copies of the grand jury transcripts that petitioners had in their possession.

QUESTION: Well, we certainly have to reach the question of whether a separate civil action can be commenced in California by treble damage plaintiffs.

MRS. BEALE: Well, I think perhaps these facts here do not present that more general issue, for a reason that unfortunately is not discussed in the briefs of the parties.

In reviewing the record of the grand jury court, we discovered that the order -- the original order -- authorizing

disclosure to the plaintiffs here --

QUESTION: Mrs. Beale, you're amicus.

MRS. BEALE: We are a party.

QUESTION: Oh, are you a party? I'm sorry.

MRS. BEALE: Yes, we are.

QUESTION: Go ahead.

MRS. BEALE: -- to petitioners did not permit them to obtain the grand jury transcripts once they had tendered their plea of nolo contendere. And that that order would be violated by any use of the transcripts in the Arizona civil proceeding.

The California court's order, which was filed in July of 1975, authorized disclosure under Rule 16 of the federal rules of criminal procedure for the sole purpose of the preparation of petitioner's defense to the criminal anti-trust charges.

That order also required petitioners to keep the transcript otherwise confidential, and to return them to the Department of Justice when the criminal anti-trust case was concluded.

That order has been neither amended or modified in pertinent part.

Had the petitioners returned the grand jury transcript as they were required to do by the terms of the California court's order, they would not have had those documents in their

possession at the time that the respondents first requested discovery of those documents.

QUESTION: What about the documents that they gave to the grand --

MRS. BEALE: The documents as we understand it really are not the focus of the petition at this point. They were discussed in the court below.

In fact --

QUESTION: Well, I'll ask you again: What about the documents?

Let's suppose they were --

MRS. BEALE: The documents were -- the documents were within the jurisdiction of the Arizona court, and they were not, I think, subject tothe same concerns of grand jury secrecy, because they were sought to see what those documents said, and not to learn what the grand jury was saying.

QUESTION: How does the incident to which you refer create federal jurisdiction in a California court?

MRS. BEALE: Well, the California -- Rule 6 provides that -- as counsel read it -- that disclosure may be made preliminary to or in connection with judicial proceedings.

We think quite properly that respondents who wish to have disclosure made of the documents which the court certainly retained jurisdiction over in the criminal case, permitted the California court to authorize -- if it determined it was proper --

that disclosure should be made by the government to respondents.

QUESTION: You don't have to get in, then, under 28 U.S.C. 1331 or 13 --

MRS. BEALE: Well, we would view this as a continuation of the criminal proceedings, and we have so suggested. And that is one reason that we believe petitioners, who were the defendants in that case, are properly party, although there was no official order permitting them to intervene here.

We think that the criminal court jurisdiction over this case permitted it to take its own records, at the request of a party that came before the court, and order their disclosure under Rule 6.

Now if a --

QUESTION: If the request of a party who was in no way a party to the criminal act.

MRS. BEALE: Well, it was not until it came before the court and filed a petition requesting disclosure, which we would think is authorized by Rule 6, and Rule 16, to clearly permit that in our view.

QUESTION: But it's clear that the federal rules of criminal procedure don't add to nor detract from federal jurisdiction, do they?

MRS. BEALE: Well, I don't know that I would want to make such a broad statement. I would think that it's a statutory matter, and they may help in defining what classes of

action or what authority the court might exercise.

But it does seem clear that the criminal case was properly in the California court; there's no question of that.

QUESTION: The people who requested these grand jury -- this grand jury jmaterial were not parties to the criminal case, were they?

MRS. BEALE: They were not parties to the original criminal case, that's correct.

There were a number of defendants, including petitioners and not including respondents, who sought disclosure. But they came in and requested from the custodian of the documents that they be turned over and showed what -- the required standard of particularized need, and that considerations of secrecy were not outweighed.

In addition, in view of the fact that California court's order specifically limited the use of the transcript to the preparation of the defense in a criminal trial, we think it's clear that had the Arizona court purported to permit the use of those copies of the documents, where in the civil case it could not have done so without first modifying the restrictions of the California court's order.

It seems crystal clear to us that that kind of interference with the order of the California court -- or it could not possibly be proper, and that this case is certainly not one

where the civil court could properly have exercised jurisdiction. Once the California court --

QUESTION: Well, isn't there an intermediate position though? Even if you're quite correct that the Arizona court couldn't really effect the release of the grand jury minutes without the cooperation of the California court, the intermediate position is, why shouldn't the California court be asked to release them to the extent that the Arizona court finds them relevant and otherwise admissible -- disclosable under Rule 34, or in a deposition?

MRS. BEALE: Well, I think in a proper case it would be possible either for the criminal court to conclude that the reasons of secrecy might permit disclosure, but that it cannot evaluate particularized need, and refer the matter over to the civil court.

Or alternatively, the civil court --

QUESTION: Because the criminal court might order the release of documents that were submitted to the grand jury that the court in Arizona would have never ordered turned over.

MRS. BEALE: I think that's right. In a close case the criminal court may well conclude -- the grand jury court, that it is not able to ascertain whether there will be a particularized need. But --

QUESTION: I'm suggesting, why shouldn't it be the general rule that the California court -- that the criminal

court defer -- dismiss the secrecy order to the extent that --

MRS. BEALE: Well, we do think that it is very important that the court that has familiarity with the records in a criminal case, with a particular concerns, the court in which the local prosecutors have appeared, and the only single court which could resolve all these matters, should in the first instance, and must ultimately in every instance, be consulted and give its approval for disclosure.

Now it may well be the case.--

QUESTION: Mrs. Beale, you're talking about a court which has probably 20 judges. And a motion which comes up simply on the motion docket.

And so you can't mean that the judge who passes on this motion is going to have intimate familiarity with the past history of the criminal case.

MRS. BEALE: Well, I think that's quite right. In particular cases it will vary how much familiarity the individual judge has.

But one of the concerns that we have is how easy will it be for the court to determine what the most important considerations in favor of secrecy or continued secrecy are.

If it's the court in which the criminal proceedings have been conducted, where the grand jury sat, the entire arecord will be available there; not just bits and pieces; not just the transcript which these petitioners happen to have disclosed to them, which may not give the whole picture.

The local prosecutors who have conducted the grand jury who will know whether further proceedings are contemplated; who will know if particular witnesses were extremely reluctant and feared that their statements might unnecessarily be made available to certain parties.

All of that information is most readily available in the court where the grand jury proceedings were conduct. And we believe that in many cases, and this case is a very good example of the ability of the grand jury court to determine has the person requesting disclosure come forward with a sufficient showing of particularized need.

It is not a case, we think, where it's the court's duty to go through all of the records and determine whether there might be some conceivable way in which the documents can be used.

The person seeking disclosure -- the respondents here -- came forward, we believe, with quite a plain showing of particularized need. And the government which, despite petitioners' disagreement, is indeed concerned with the question of whether there is a continued need for secrecy, took into account not only the question whether there had been a showing of particularized need, but whether there was a reason for continued secrecy.

QUESTION: But under your theory of the case, treble damages plaintiffs could come in 20 years after the nolo plea

was entered and the criminal case was entered. And ask for these things. And then whatever judge happens to be on the bench at the time, whatever Assistant U.S. Attorney happens to be sent over, that isn't going to be a very accurate reflection, is it?

MRS. BEALE: Well, I think that we have to determine what proceeding should be the norm.

And we don't disagree that in cases where the criminal court determined that it cannot make by itself a determination of whether a sufficient showing of need has been made, that it might refer the matter over the civil court.

We think this is not such a case, and we think that a rule of bifurcation go first to the criminal court, then to the civil court, setting that up as a necessity in cases where the criminal court is perfectly well able to determine whether disclosure can be made, would simply stretch these proceedings out and waste judicial resources.

QUESTION: I know, but the government's position, I take it, is that there's not much of a burden on the fellow who asks for it. He merely has to show some kind of relevance to his treble damage case.

MRS. BEALE: Well, I think that -- we do feel that --

QUESTION: Is that right? Or I don't understand your position. That's all particularized need amounts to.

MRS. BEALE: Well, I don't think that that is quite our

position, although I will say that --

QUESTION: What else does he need to show, tell me, in a few words.

MRS. BEALE: I would say that what was shown here is far more than relevance. If one can show that --

QUESTION: That isn't what I asked you. I just asked you what your position is, what do you think particularized need is.

MRS. BEALE: I think it's more than simply relevance.

QUESTION: What else is there?

QUESTION: Can't get it anywhere else?

MRS. BEALE: Pardon me?

QUESTION: That you can't get it anywhere else?

MRS. BEALE: Well, I think if it's relevant, and -you can't get it anywhere else, that is certainly a particularized need.

QUESTION: Now we want to pursue the answer to the question.

What else besides relevance does the government agree must be shown to the criminal court judge?

MRS. BEALE: Well, I think it's difficult to formulate. The courts use a lot of different terms: compelling need, inability to get the materials elsewhere. I don't know --

QUESTION: So you haven't really formulated your own standards for this, is that right?

MRS. BEALE: I don't know that we can formulate it any more clearly than -- we have found the standards in the prior court cases to be satisfactory. And parties do disagree in given cases, the applications of their standards, particularized need, compelling need, to a particular case.

We think that --

QUESTION: As I read your brief, that particularized need in the context of a treble damage suit by a plaintiff who wants the grand jury minutes, it's enough to show relevance.

MRS. BEALE: The plaintiffs here, and the showing we found sufficient, was a showing that the answers that the defendants had made in different contexts -- petitioners here-- were conflicting, and that the best way of testing their statements, and to either refresh the recollections of the witnesses or to possibly impeach statements which might be untruthful would be by showing the inconsistency of those statements under oath before the grand jury.

I think that that goes beyond relevance --

QUESTION: Right between the two courts.

MRS. BEALE: I'm sorry?

QUESTION: Between the two courts. Isn't it true that where the nolo contedere court, all they are is custodians, once ithe case is over. As a matter of fact, they might not even be there. They might be in some depository.

So why do they have any greater interest in this than

the court that is in the trial of the suit, the civil suit?

MRS. BEALE: Well, we do think that the best place for all of the considerations of secrecy to be taken into account is the court where the grand jury sat, where the criminal proceedings, if any, took place, where the local prosecutors are available, where all of the criminal records are available.

All of the criminal records are not available in a civil district. And there may be many such civil districts --

QUESTION: Well, I don't know, but I'm sure that all of the records of the trials in the Southern District of New York, are not in that building, because the building is just not that big.

So they're in a depository someplace.

MRS. BEALE: Well, I think that --

QUESTION: Well, assuming they're in the depositroy in St. Louis, where do they get any more expertise than the judge who is going to try it again?

MRS. BEALE: Well, I think that our only answer would have to be -- or our best answer -- would be that there is a possibility for those judges to be familiar with the local circumstances, with the parties that have before them the prosecutor, and indeed, I suppose that one could well first send from the repository to the Arizona court; then to the Montana court; then --

QUESTION: Well, it isn't --

MRS. BEALE:--to another court. But we think it more efficient --

QUESTION: Usually, isn't the quote, prosecutor, end quote of the anti-trust case after the nolo, isn't he now back in Washington?

MRS. BEALE: Well, in fact there is a local office --

QUESTION: -- here in Washington.

MRS. BEALE: No, sir. There's a local office of the anti-trust division in Los Angeles, and that was the office that handled the case. So in fact the personnel of that office were -- and the person in charge of that case was the one who came to the hearing on the disclosure here.

But certainly it's --

QUESTION: But isn't it true that all anti-trust cases are under the immediately supervision of the Attorney General of the United States?

MRS. BEALE: Oh, I wouldn't disagree with that for a moment.

QUESTION: All right. And he's in Washington.

MRS. BEALE: Usually; often.

I see my time is up, so if there are no further questions.

MR. CHIEF JUSTICE BURGER: Mr. Gillam.

REBUTTAL ARGUMENT OF MAX L. GILLAM, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GILLAM: May it please the Court:

I hope I will not be required to utilize the time I have remaining.

Mr. Justice White and Mr. Justice Marshall hit on, I believe, the weakness of the government's position in this regard.

Historically, the better practice has been for the trial judge to believe that he would need the grand jury materials, and to ask the grand jury district judge to forward them to him.

In Baker v. United States Steel, pending in the district of Connecticut, Judge Newman came to the conclusion that portions of the grand jury materials might be relevant, and he requestedJudge Wyatt, who was the titular custodian of those documents, to transmit the grand jury materials to the district of Connecticut so that Judge Newman could review them and see if there was a particularized need for disclosure.

QUESTION: Well, what is your standard on -- your standard on particularized need?

MR. GILLAM: My standard on particularized need, sir, is that it must be relevant and useful to the litigation.

QUESTION: Is that it?

MR. GILLAM: No, sir; that's the first point.

The second one is that the failure to obtain it would render an injustice of some kind, such as the materials not being available anywhere else.

And the third matter is that there is a particularized need in this litigation to refresh the recollection of a witness who has said he doesn't remember now, but when his transcript -- but when he appeared before the grand jury four years ago, his memory was a lot better.

And we were sure that if he could look at that transcript, it would refresh his recollection.

QUESTION: So you would say that -- you would say that in no case was just the plaintiff's desire to save himself the expense, time and trouble of deposing those same witnesses would benenough?

MR. GILLAM: Yes, sir. And may I say --

QUESTION: Well, you mean, it would never be enough?

MR. GILLAM: It would never be enough. It would never be enough.

But please, don't you see how these two issues are hand in glove? You can't decide one without deciding the other.

If there is nothing to particularized need, who cares what court makes the determination.

QUESTION: I understand then that you would make the plaintiff -- you would say the plaintiff must be taking a deposition and find out that he really does need the materials.

MR. GILLAM: That's highly likely, Your Honor.

As a matter of fact, I cannot envision a situation where as here, in advance of the taking of any depositions or any testimony, there would be a particularized need for a wholesale disclosure of a grand jury transcript to enable the plaintiff to refresh the recollection of a witness who has not yet indicated he needed his recollection refreshed, or to impeach him when there's no evidence that at this stage there is any impeaching material in the grand jury transcript.

These are one thing: this particularized need question; and which court should do the ruling. They are not different.

QUESTION: Mr. Gillam, let me ask you one question that makes this a little different hthat some cases, and Mrs. Beale adverted to it.

There was a -- is it correct that there was an order outstanding that required you to return the transcripts?

MR. GILLAM: Yes, sir.

QUESTION: And did you comply with that order?

MR. GILLAM: They had not been returned at the time the Rule 34 request was made for production in Arizona.

So we discovered at that time -- and I think the government did -- that we had not returned them at the close of the criminal case.

QUESTION: One of those things nobody thought was

very important once the case was --

MR. GILLAM: No, sir, we were embroiled so in the Tunney Act hearings, in the attempt to get a consent judgment in the civil, companion case, with the charges of coverup and what have you, that I think it just slipped the government's mind, and it slipped ours.

QUESTION: It seems to me it might make a difference at the time -- you're suggesting that we ought to take that position, thatthe witness has a lapse of memory repeatedly, then that's particularized need, something like that.

It might make a difference, though. Ifyou're able to prepare the witness with the grand jury transcript, perhaps in that case it was somewhat -- at little bit one-sided to say that they shouldn't have access to it.

MR. GILLAM: Yes, sir --

QUESTION: Of course, that's not true here now, as I understand you've returned --

MR. GILLAM: Well, it's not true here now, because we don't know what witnesses are going to be -- excuse me. At the time the district court ruled, we didn't know -- he didn't know what witnesses would be deposed; whether they would ever be deposed; whether they would ever testify.

QUESTION: Of course, I suppose part of it is, one witness leads to another, and the government finds out which people are involved, and they know which witnesses to interrogate,

and the plaintiff may not know those names when he starts out.

MR. GILLAM: Yes, sir, but please. You -- I have not succeeded in at least one aspect of what I am attempting to do today.

This -- the record shows that this anti-trust investigation was like almost all antitrust investigations. It considered exchange agreements. It considered alleged collusive restrictions in crude oil purchases. It considered alleged collusions in cross-hauling. It considered retail price-fixing: None of which was involved in the indictment.

The disclosure of an entire transcript of a witness does indeed, as Mr. Justice Brennan stated in Pittsburgh Glass, disclose derogatory information presented to a grand jury against an accused who has not been indicted for this.

QUESTION: What you're saying is that part of the transcript would fairly clearly be irrelevant; and parts might be relevant.

MR. GILLAM: Yes,sir.

QUESTION: How do you find out that?

?

MR. GILLAM: The exact way that Judge Newman went about it in Baker v. United States Steel?

QUESTION: Have the trial judge read the transcript?

MR. GILLAM: No, no. He had the criminal judge send him -- I'm sorry, Judge Newman was the trial judge -- send him the transcript, and he went through it and excised those

portions which were highly irrelevant.

Judge Cleary, in City of Philadelphia v. Westinghouse, directed that copies of the transcripts go out to the deposition judges in the various districts, so that they could determine what portions to disclose.

But he himself, with a key witness, came to the conclusion that that particular witness' transcript should not go out. He was the trial judge.

QUESTION: Mr. Gillam, in this case you objected to any disclosure.

Did you also alternatively suggest to the trial judge that he should edit the transcript and edit out the material that you say was prejudicial and irrelevant?

MR. GILLAM: We've never had the opportunity to discuss this particular thing with the trial judge. Our only argument --

QUESTION: I mean the trial judge in San Francisco, or wherever it was.

QUESTION: Judge Gray.

QUESTION: Judge Gray.

MR. GILLAM: The criminal duty judge.

QUESTION: Yes.

MR. GILLAM: No, sir. We did not suggest to himthat he go through and exise out irrelevant portions. That would have been an exercise in futility.

QUESTION: Well, it's your submission that that function is for the judge in Arizona, isn't it?

MR. GILLAM: Yes, sir, because he is the one -- he's assigned to that case, and he knows what's relevant to it. The criminal duty judge in Los Angeles would not be in a position to read the transcript.

QUESTION: Now that I've interrupted you, Mr. Gillam: This question was asked and you answered it, I think. But I didn't get the answer.

What happened to the Rule 34 request in this case?

MR. GILLAM: The Rule 34 request was not self-executing. You request documents. Objection was made to the production of the grand jury transcripts and documents on the grounds of relevancy and related grounds.

The plaintiffs -- Petrol Stops, Gas-A-Tron -- did not elect to press with a Rule 37 motion, which is required under those circumstances.

QUESTION: In order to enforce that.

MR. GILLAM : Certainly. Yes, that's correct.

QUESTION: And so that just --

MR. GILLAM: It's sitting there.

QUESTION: Never was resolved.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:14 o'clock, p.m., the case in the above-entitled matter was submitted.]