

1 [COUNSEL LISTED ON SIGNATURE PAGE]

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
HARRISON ULRICH JACK; GENERAL  
VANG PAO, aka Pao Vang, aka Vang Pao;  
LO CHA THAO; LO THAO, aka President Lo  
Thao, aka Xia Lo Thao; YOUA TRUE  
VANG, aka Joseph Youa Vang, aka Colonel  
Youa True Vang; HUE VANG; CHONG  
YANG THAO; SENG VUE; CHUE LO;  
NHIA KAO VANG; and DANG VANG, aka  
David Vang,  
  
Defendants.

Case No. 2:07-CR-0266 FCD

**DEFENDANTS' MOTION FOR  
DISCOVERY OF GRAND JURY  
TRANSCRIPTS**

Date: October 5, 2009  
Time: 11:00 a.m.  
Dept: 2  
Judge: Hon. Frank C. Damrell, Jr.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## I. INTRODUCTION

The government charged the defendants in this case through a criminal complaint supported by a 55-page affidavit from the undercover agent. That affidavit—and 18 others, which repeated many of its allegations—was riddled with false and misleading statements. Eleven days after the undercover agent signed the affidavit, a grand jury returned an indictment against the defendants.

Under Rule 6(e), defendants are entitled to the transcripts of the grand jury proceedings that led to that indictment. Since the indictment came just weeks after agents signed the false affidavits, the government likely presented similar false and misleading information to the grand jury. Further, because the transcripts reflect evidence that the government possessed at the time, they may bring to light other falsehoods or material omissions in the affidavits. In either case, access to the transcripts is necessary to prevent an injustice in this case—both in connection with defendants’ forthcoming suppression motion and renewed motion to dismiss for outrageous government conduct, which this Court has said it wants decide on a “complete record,” and because false statements to the grand jury may themselves be a basis for dismissal. *See United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979).

In contrast, any countervailing interest in keeping the transcripts secret is minimal, and easily outweighed. The Supreme Court has held that, once a grand jury has finished its activities, as this one has, the interest in grand jury secrecy is “reduced,” and “a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-3 (1979). And any surviving interest in secrecy in this case can be fully addressed by a protective order restricting disclosure of the transcripts.

For these reasons, and as more fully set forth below, the Court should order the government to produce the grand jury transcripts.<sup>1</sup>

---

<sup>1</sup> Because this motion relates to defendants’ motion to dismiss, the Court approved filing it with this Court rather than the Magistrate Judge. *See* Declaration of Galia A. Phillips (“Phillips Decl.”) Exh. 1 at 59:8.

**II. FACTS**

Between March and June 2007, ATF agents signed at least 19 affidavits in this matter. *See* Phillips Decl. Exs 2-6. The undercover agent signed four affidavits—three in support of wiretaps, and one, on June 3, in support of the Complaint. *Id.* at Exs. 2-5. Another ATF agent, Eric Crowder, signed fifteen affidavits in support of search warrants. *Id.* at Exh. 6.

As defendants laid out in detail in their Motion to Dismiss for Outrageous Government Conduct (Document Nos. 379 and 418), these affidavits misstated numerous facts. For example, as the government has now admitted, all 19 of them attested to supposedly incriminating exchanges at the February 7, 2007 Amarin Restaurant meeting that appear nowhere on the audio recording of that meeting. *See* Opp. to Mot. to Dismiss (Document No. 412) at 80:14-18. In some cases, the government insists that the conversations occurred, but the recording device failed to capture them—although it admits that the agent *first* memorialized the allegedly missing conversations “approximately five to seven weeks” after the meeting, and that in a report that he wrote just days after the meeting, he did not describe them, nor did he state that the recording omitted any significant conversations. *Id.* at 80 n.55. In other cases, the government candidly admits that the undercover agent “cannot presently remember” that the facts that he swore to in his affidavit are true. *Id.* at 87:19-22.

Similarly, all 19 of the affidavits falsely stated that this case started when defendant Harrison Jack reached out to a “defense contractor”—an allegation intended to convey that the defendants had ready sources of weapons.<sup>2</sup> But in fact, the person that Jack allegedly contacted, Namon Hawthorne, was not a defense contractor at all, but a purveyor of specially processed

---

<sup>2</sup> *See* Phillips Dec., Exh. 2, Agent’s Affidavit in Support of Criminal Complaint at 4:4-6; Phillips Dec., Exh. 3, Affidavit of Undercover Agent in Support of Application to Wiretap Harrison Jack’s Phone (“HJ Wiretap Affidavit”) at ¶ 49 [TarnEgl 035396]; Phillips Dec., Exh 4, Affidavit of Undercover Agent in Support of Continued Application to Wiretap Harrison Jack’s Phone (“HJ Cont. Wiretap Affidavit”) at 19:3-14 [TarnEgl 034804]; Phillips Dec., Exh. 5, Affidavit of Undercover Agent in Support of Application to Wiretap Lo Cha Thao’s Phone (“LCT Wiretap Affidavit”) at 17:17-27 [TarnEgl 034954]; *See also* Phillips Dec., Exh. 6, (Pages from 15 other Affidavits) at ¶ 13 [TarnEgl 000305], *id.* at ¶ 14 [TarnEgl 002021], *id.* at ¶ 13 [TarnEgl 000008], *id.* at ¶ 13 [TarnEgl 000912], *id.* at ¶ 13 [TarnEgl 000107], *id.* at ¶ 13 [TarnEgl 000202], *id.* at ¶ 13 [TarnEgl 001279], *id.* at ¶ 13 [TarnEgl 001664], *id.* at ¶ 13 [TarnEgl 001786], *id.* at ¶ 13 [TarnEgl 000789], *id.* at ¶ 13 [TarnEgl 000406], *id.* at ¶ 13 [TarnEgl 001002], *id.* at ¶ 13 [TarnEgl 001156], *id.* at ¶ 13 [TarnEgl 000525], *id.* at ¶ 13 [TarnEgl 001400].

1 water, which he claims can cure diabetes, leukemia, shingles, and numerous other ailments.  
2 Phillips Dec., Exh. 7, Excerpts from [www.kinesiswater.com](http://www.kinesiswater.com). The undercover agent knew all  
3 about Hawthorne and his purported miraculous abilities, having listened to Jack expound about  
4 them at length. *See id.*, Exh. 8, 3/5/07 meeting at 99:24-102:25..

5 In other cases, the affidavits omitted critical facts, while in near contemporaneous  
6 statements, the government directly contradicted the true facts. For example, when asking the  
7 Court to hold all of the defendants in custody, the government stated that, at a June 2, 2007  
8 meeting, defendant General Vang Pao endorsed the alleged coup plot, enabling it to go forward.  
9 *See Gov.’s Opp. to Def.’s Motion for Bail* (Document No. 76) at 13:22-25 (“If Vang Pao . . . had  
10 said, ‘No. Stop,’ then the co-conspirators would have stopped. He didn’t say ‘No.’ He said  
11 ‘yes;’ that is why we are here now. That is why the defendants are a danger now.”) Today,  
12 however, the government concedes that its wiretap recordings show just the opposite—that  
13 General Vang Pao forbade anyone to participate in the alleged plan. *See id.* at 4:9-12 (admitting  
14 that the wiretap recordings “arguably suggest that Vang Pao ultimately opposed the plan.”).  
15 Further, while the government insists that it never listened to the wiretap recordings before  
16 seeking indictments, it concedes that an interpreter warned the prosecutors and agents *before* the  
17 arrests that telephone intercepts “appeared to indicate that there was a conflict in the group, that  
18 Vang Pao was apparently unhappy, that certain people were threatening to resign, and that there  
19 appeared to be some sort of power struggle.” *Opp. to Mot. to Dismiss* (Document No. 412) at 64  
20 n.42.

21 Of course, the foregoing list is illustrative only. Many more similar government  
22 misstatements are set forth in defendants’ motion to dismiss, which defendants incorporate  
23 herein by reference.

24 At the same time that the government was making these misstatements, it was presenting  
25 evidence to the grand jury. The 2007 grand jury began selection on February 7, 2007, and  
26 returned an indictment on June 14, 2007. Phillips Decl. Exs. 9 & 10.

### 27 **III. ARGUMENT**

28 Federal Rule of Criminal Procedure 6(e)(3)(E) permits disclosure of grand jury

1 transcripts (1) “when so directed by a court preliminarily to or in connection with a judicial  
2 proceeding,” or (2) “when permitted by a court at the request of the defendant, upon a showing  
3 that grounds **may exist** for a motion to dismiss the indictment because of matters occurring  
4 before the grand jury.” *See* Fed.R.Crim.P. 6(e)(3)(E) (emphasis added). When deciding whether  
5 to release grand jury transcripts, district courts are “infused with substantial discretion[.]”  
6 *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979).

7 Defendants must show a “particularized need” that warrants disclosure of the materials.  
8 *Id.* at 221. To do so, they must show that (1) “the material they seek is needed to avoid a  
9 possible injustice in another judicial proceeding,” (2) “the need for disclosure is greater than the  
10 need for continued secrecy,” and (3) “their request is structured to cover only materials so  
11 needed.” *Id.* at 222. The particularized-need standard is “a highly flexible one, adaptable to  
12 different circumstances and sensitive to the fact that the requirements of secrecy are greater in  
13 some situations than in others.” *United States v. John Doe, Inc. I*, 481 U.S. 102, 116-17 (1987).  
14 Here, all three factors weigh in favor of releasing the transcripts.

15 **A. Discovery of the grand jury transcripts is necessary to avoid an injustice.**

16 A “typical showing of particularized need . . . arises when a litigant seeks to use a grand  
17 jury transcript at trial to impeach, refresh the recollection of, or test the credibility of a witness.”  
18 *In re Grand Jury Proc.*, 62 F.3d 1175, 1180 (9th Cir. 1995) (internal quotation marks omitted).  
19 The same compelling need exists when the transcripts are relevant to pre-trial proceedings. *See*  
20 *United States v. Fischbach & Moore, Inc.*, 776 F.2d 839, 845 (9th Cir. 1985) (“We agree that the  
21 need to impeach testimony or refresh recollections during depositions can establish a compelling  
22 need for disclosure.”)

23 Defendants will soon be filing both a motion to suppress under *Franks v. Delaware*, 438  
24 U.S. 154 (1978), and a renewed motion to dismiss for outrageous government conduct.<sup>3</sup> This  
25 Court has stated that it wishes to consider defendants’ dismissal motion “on a full and complete

26 \_\_\_\_\_  
27 <sup>3</sup> On May 11, 2009, the Court ordered the government to produce all remaining discovery to the  
28 defendants in 60 days. Phillips Decl. Exh. 1 at 57:11-25. The government then produced over  
2,000 pages of documents and over 100 CD-ROMs and DVDs containing more than 5,000  
electronic files.

1 [record],” and has further recognized that the motion may turn on “credibility issues[.]” Phillips  
2 Decl. Exh. 1 at 56:9-12 and 55:4-6. The grand jury transcripts are an essential part of that full  
3 and complete record, and will be vital for the examination of the agents and interpreters at a  
4 hearing. Because the government was presenting evidence to the grand jury at the same time  
5 that it was misstating facts in the agents’ affidavits and elsewhere, the grand jury transcripts  
6 likely reflect similar misstatements, or will bring to light other false and misleading statements.  
7 In either case, the transcripts will bear on both the substance of defendants’ suppression and  
8 dismissal motions, and on the witnesses’ credibility.

9 In addition, presenting false information to the grand jury may itself be a basis for  
10 dismissing the indictment. See *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979).  
11 Rule 6(e)(3) thus authorizes disclosure of grand jury transcripts when a defendant shows that  
12 “grounds **may exist** for a motion to dismiss the indictment because of matters occurring before  
13 the grand jury.” Fed.R.Crim.P. 6(e)(3)(E) (emphasis added). Defendants have clearly done so  
14 here. As just one example, if the government told the grand jurors that defendant General Vang  
15 Pao *endorsed* the alleged plan at the June 2 meeting, when its own wiretap evidence shows that  
16 he actually opposed it, and told them that at the February 7 Amarin Restaurant meeting he  
17 “advised [the agent] that the plan was to provide arms to insurgents who were in place in Laos,  
18 and to initiate hostile military action in the very near future against military forces of the  
19 government of Laos,” when in its own audio recording shows that he said nothing of the kind—  
20 or made other misstatements to the grand jury like the ones in its affidavits and representations to  
21 the Court—it may have so compromised the grand jury proceedings as to render them  
22 fundamentally unfair. See *United States v. Isgro*, 974 F.2d 1091, 1094 and n.3 (9th Cir. 1992)  
23 (“Although deliberate introduction of perjured testimony is perhaps the most flagrant example  
24 of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper  
25 influence and usurpation of the grand jury’s role.”) (quoting *Samango*, 607 F.2d at 882).  
26 Because the government was making these and other misstatements at or near the time it was  
27 presenting information to the grand jury, there is ample reason to believe that it did make similar  
28 misstatements to the grand jury.

1 **B. The interest in continued secrecy is minimal and easily outweighed.**

2 In *Douglas Oil*, the Supreme Court recognized that the interest in grand jury secrecy is  
3 “reduced” once the grand jury finishes its activities—as this one has—and that “as the  
4 considerations justifying secrecy become less relevant, a party asserting a need for grand jury  
5 transcripts will have a lesser burden in showing justification.” *Douglas Oil*, 441 U.S. at 222-3.  
6 Following *Douglas Oil*, the Ninth Circuit has held that, of the five factors that determine the  
7 need for continued secrecy, three are “insignificant” once the grand jury investigation has  
8 concluded.<sup>4</sup> *In re Grand Jury Proc.*, 62 F.3d at 1180 n.2. And as this Court is aware, in other  
9 cases in this district, the government has voluntarily released grand jury transcripts after the  
10 grand jury investigation concludes. See *United States v. Greer, et al.*, No. CR-S 03-042-FCD;  
11 *United States v. Brewster*, No. CR-08-035-N-BLW.

12 Here, the compelling need for disclosure outweighs the small remaining interest in  
13 secrecy. The transcripts are essential to enable the Court to decide defendants’ *Franks* motion  
14 and motion to dismiss for outrageous government conduct on a full record, and may also provide  
15 an independent basis for a motion to dismiss. Moreover, any remaining interest in secrecy can  
16 be fully addressed by a protective order restricting further disclosure of the transcripts. See  
17 *Douglas Oil*, 441 U.S. at 223 (“[I]f disclosure is ordered, the court may include protective  
18 limitations on the use of the disclosed material[.]”) Defendants will consent to any reasonable  
19 restrictions that the government believes are necessary, including that the transcripts be used  
20 only for this case, and that they be kept confidential and disclosed only to the parties and their  
21 attorneys.

22 **C. Defendants’ request is structured to cover only the materials needed.**

23 “When the defense shows a particularized need for grand jury transcripts that outweighs  
24

---

25 <sup>4</sup> The five factors that the Supreme Court has identified are “(1) the need to prevent the escape of  
26 prospective indictees; (2) the need to insure freedom to the grand jury in its deliberations; (3) the  
27 need to prevent subornation of perjury and tampering with witnesses by targets of the  
28 investigation; (4) the need to encourage free disclosure by witnesses before the grand jury; and  
29 (5) the need to protect those exonerated by the grand jury from disclosure of the fact that they  
30 were under investigation.” *In re Grand Jury Proc.*, 62 F.3d at 1180 n.2. In *In re Grand Jury*, the  
31 Ninth Circuit held that the first three factors were “insignificant” because the grand jury  
32 investigation had already terminated. *Id.*

1 the need for secrecy, the trial judge's function is reduced to eliminating only extraneous material  
2 or issuing protective orders in unusual situations." *United States v. Plummer*, 941 F.2d 799, 806  
3 (9th Cir. 1991). Thus, in *Plummer*, the defendant received "all parts of the transcripts that  
4 mentioned [him] or that seemed relevant to his indictment," but did not receive portions that  
5 related exclusively to other defendants. *Id.*

6 Here, no portion of the transcripts is extraneous, because this request is made by all of the  
7 defendants jointly. Further, the full transcripts have broad relevance to the issues in this case,  
8 including the government's conduct during the investigation, the agents' credibility, and possible  
9 misconduct before the grand jury itself. Thus, defendants are entitled to the complete transcripts,  
10 including witness testimony, questions by the prosecutors and grand jurors, and any legal  
11 instructions provided by the prosecutors.<sup>5</sup>

#### 12 IV. CONCLUSION

13 For the foregoing reasons, Defendants respectfully request that the Court order discovery  
14 of the grand jury transcripts.

15 Respectfully submitted,

16 Dated: August 4, 2009

17 KEKER & VAN NEST, LLP

18  
19 By: /s/ John W. Kecker

20 JOHN W. KEKER  
21 DAVID J. SILBERT  
22 GALIA A. PHILLIPS  
23 Attorneys for Defendant  
24 GENERAL VANG PAO

25  
26  
27  
28 <sup>5</sup> Defendants do not seek the identities of the grand jurors. To the extent the transcripts disclose that information, defendants agree that the identities may be redacted.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: August 4, 2009

LAW OFFICE OF JOHN BALAZS

By: /s/ John Balazs  
JOHN BALAZS  
Attorneys for Defendant  
GENERAL VANG PAO

Dated: August 4, 2009

OFFICE OF THE FEDERAL DEFENDER

By: /s/ Daniel J. Broderick  
DANIEL J. BRODERICK  
Attorneys for Defendant  
HARRISON JACK

Dated: August 4, 2009

By: /s/ Mark J. Reichel  
MARK J. REICHEL  
Attorneys for Defendant  
LO CHA THAO

Dated: August 4, 2009

By: /s/ William J. Portanova  
WILLIAM J. PORTANOVA  
Attorneys for Defendant  
LO THAO

Dated: August 4, 2009

MORRISON & FOERSTER LLP

By: /s/ James J. Brosnahan  
JAMES J. BROSNAHAN  
GEORGE C. HARRIS  
SOMNATH RAJ CHATTERJEE  
MELISSA ANN JONES  
Attorneys for Defendant  
YOUA TRUE VANG

1 Dated: August 4, 2009

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

By: /s/ Krista Hart  
KRISTA HART  
Attorneys for Defendant  
HUE VANG

Dated: August 4, 2009 LAW OFFICES OF DINA LEE SANTOS

By: /s/ Dina Lee Santos  
DINA LEE SANTOS  
Attorneys for Defendant  
CHONG YANG THAO

Dated: August 4, 2009 LAW OFFICE OF MICHAEL B.  
BIGELOW

By: /s/ Michael B. Bigelow  
MICHAEL B. BIGELOW  
Attorneys for Defendant  
SENG VUE

Dated: August 4, 2009 LAW OFFICE OF SHARI RUSK

By: /s/ Shari Rusk  
SHARI RUSK  
Attorneys for Defendant  
CHUE LO

Dated: August 4, 2009 LAW OFFICE OF DANNY D. BRACE,  
JR.

By: /s/ Danny D. Brace, Jr.  
DANNY D. BRACE, JR.  
Attorneys for Defendant  
NHIA KAO VANG

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: August 4, 2009

LAW OFFICE OF HAYES H. GABLE, III

By: /s/ Hayes H. Gable, III  
HAYES H. GABLE, III  
Attorneys for Defendant  
DANG VANG