

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE PETITION OF NATIONAL SECURITY )  
ARCHIVE, AMERICAN HISTORICAL )  
ASSOCIATION, AMERICAN SOCIETY OF LEGAL ) 08 Civ. 6599 (AKH)  
HISTORY, ORGANIZATION OF AMERICAN )  
HISTORIANS, SOCIETY OF AMERICAN )  
ARCHIVISTS, AND SAM ROBERTS )  
FOR ORDER DIRECTING RELEASE OF )  
GRAND JURY MINUTES )  
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**RENEWED PETITION FOR AN ORDER DIRECTING  
RELEASE OF REMAINING GRAND JURY MINUTES AND  
TESTIMONY BEFORE THE SPECIAL GRAND JURY  
CONVENED IN 1950-1951 PERTAINING TO THE INDICTMENT  
OF AND CONVICTION OF ETHEL AND JULIUS ROSENBERG**

Petitioners, a coalition of historical organizations and a journalist, hereby renew their Petition to seek release of the remaining grand jury records relating to the Cold War prosecutions of Ethel and Julius Rosenberg. In response to Petitioners’ 2008 initial request, this Court issued two related Orders directing the release of most, but not all, of the minutes and testimony sought by petitioners. The Court’s first Order directed the release of the testimony of 36 Rosenberg grand jury witnesses who were deceased or had consented to the release of their testimony. But the order denied the Petition with respect to the testimony of David Greenglass, Ethel Rosenberg’s brother and the prosecution’s key witness against Ethel, because he had “expressed his objection to the release of his testimony.” *See* Order Regulating Proceedings, *In re National Security Archive*, (S.D.N.Y. July 23, 2008 (entered under Misc. No. 11-188 (Part I)) (hereinafter “First Order”). The Court’s second Order granted the Petition with respect to the Rosenberg grand jury witnesses who could not be located and the testimony of witnesses who appeared in the grand jury proceedings that led to the indictments of Abraham Brothman and Miriam

Moskowitz. *See* Summary Order, *In re National Security Archive*, 2008 WL 8985358 (S.D.N.Y. Aug. 26, 2008).

In the six years since the Court's August 2008 ruling, two of the three witnesses whose testimony was withheld, David Greenglass and Max Elitcher, have passed away. David Greenglass died in July 2014. *See* Robert D. McFadden, *David Greenglass, the Brother Who Doomed Ethel Rosenberg, Dies at 92*, N.Y. Times A1 (Oct. 15, 2014). And Max Elitcher died in April 2010.<sup>1</sup> *See* Property Indenture, dated December 3, 2010, disposing of the property of Max and Helene Elitcher, both deceased (attached as Exhibit D).<sup>2</sup>

This Renewed Petition seeks access to the grand jury testimony of David Greenglass and Max Elitcher.<sup>3</sup> The Court's prior Orders recognized that the primary basis for withholding their testimony was that they were alive and objected to release. But this Court's rulings, and the Justice Department's partial opposition to the Petition, made clear that the Court's 2008 determination to withhold their testimony would be subject to reconsideration once the witnesses passed away. This Court's First Order directed release of the testimony of the 36 Rosenberg grand jury witnesses "who are deceased *OR* have consented to the release of their testimony," driving home that any privacy interest a witness might have is diminished by death. *See* First Order, at 1 (emphasis added). The Department of Justice also took the position that a witness's

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<sup>1</sup> Max Elitcher was the prosecution's first witness at the Rosenberg trial. When his veracity was questioned by the defense, Judge Irving Kaufman ordered the prosecution to provide defense counsel with the minutes of his grand jury testimony. *See* Memorandum In Support of Petition, at 7-9.

<sup>2</sup> William Danziger is the only other witness before the Rosenberg grand jury whose testimony was withheld under the Court's First Order. Petitioners have been unable to determine whether Mr. Danziger is still living. For that reason, this request does not seek access to his grand jury testimony.

<sup>3</sup> Petitioners advised the United States Attorney's Office for the Southern District of New York that they would be filing this Petition to seek the release of these additional grand jury materials; the Government has not informed Petitioners how it intends to respond to the Petition.

death greatly diminished any privacy expectation. The Department's 2008 submission to the Court said that a decision withholding any witness's testimony "need not be the final word on disclosure, as petitioners can renew their application with respect to the remainder of the Rosenberg Grand Jury Materials when these witnesses have passed away, or when a substantial period of time has pass such that they can be presumed dead." Government's Memorandum of Law in Partial Opposition to the Petition for the Release of Grand Jury Records, at 2-3.

The death of David Greenglass and Max Elitcher diminishes, if not completely undermines, any legitimate privacy interest that otherwise might be asserted by them or on their behalf. *See, e.g., Schrecker v. Dep't of Justice*, 349 F.3d 657, 660, 664-65 (D.C. Cir. 2003). More to the point here is that the death of known grand jury witnesses cuts decidedly against any lingering privacy interest that might justify keeping their testimony sealed. As Judge Leisure held in the *Hiss* grand jury litigation, "the need to maintain secrecy in order to protect privacy interests [of grand jury witnesses] is insignificant" where, as here, the witnesses are deceased and "the witnesses' involvement with the investigation is public knowledge, as is the substance of portions of some of their grand jury testimony." *See In re American Historical Ass'n*, 49 F. Supp. 2d 274, 293 (S.D.N.Y. 1999); *accord In re Petition of Kutler*, 800 F. Supp. 2d 42, 49 (D.D.C. 2011) (ordering release of Richard Nixon's grand jury testimony in the Watergate investigation because Nixon had "passed away," and because to "the extent to which Watergate figures – both indicted and unindicted – have written, spoken, or testified about Watergate, privacy concerns are of limited significance here."). The deaths of David Greenglass and Max Elitcher are reason enough to grant the Renewed Petition.

For David Greenglass, however, there are additional reasons why the case for the disclosure of his testimony is overwhelming. These arguments were set out in detail in

Petitioners' Reply Memorandum, submitted to the Court on July 14, 2008 (a copy is attached as Exhibit A), but it is worth summarizing those arguments here.

*First*, courts have recognized that one reason to disclose a witness's grand jury testimony is where there has already been widespread disclosure of that witness's testimony. *In re Craig*, 131 F.3d at 107 (citing *In re May*, 13 Media L. Rep. (BNA) 2198 (S.D.N.Y. 1987); *In re North*, 16 F.3d 1234, 1244-45 (D.C. Cir. 1994)); *In re Petition of Kutler*, 800 F. Supp. 2d at 48-49. In this case, Greenglass himself ensured that there was widespread disclosure of the substance of his grand jury testimony. Greenglass repeatedly told his side of the story to historians, including Ronald Radosh, and journalists, including Sam Roberts, and 60 Minutes. Greenglass did not put his grand jury testimony off-limits in any of these interviews. *See, e.g.*, Supplemental Declaration of Ronald Radosh at ¶ 2; Supplemental Declaration of Sam Roberts at ¶¶ 4 & 5 (submitted in support of Plaintiffs' Reply Memorandum). As Ronald Radosh put it in his supplemental declaration (at ¶ 5), Greenglass's request for "privacy makes no sense. Greenglass has already spoken completely about every aspect of his testimony and about the case."

*Second*, courts have recognized that disclosure of grand jury testimony may be proper where the testimony may shed light on prosecutorial misconduct or the witness's own perjury. *See In re American Historical Ass'n*, 49 F. Supp. 2d at 296-97; *In re May, supra*. Both of these concerns are present here. Greenglass acknowledged his own perjury publicly and repeatedly. He claims he cooperated with the FBI, and lied under oath before the grand jury and at trial, to ensure that his wife Ruth Greenglass, who passed atomic secrets from Greenglass to Harry Gold (a Soviet courier) and may have typed Greenglass's notes about the atomic bomb, was not indicted for her role in the conspiracy. *See* Supplemental Declaration of Sam Roberts at ¶7. At trial, Greenglass testified that his sister, Ethel Rosenberg, typed his notes on the design of the

atomic bomb, even though, until the eve of trial, he had always denied that Ethel played any role in the espionage. *Id.*

Greenglass has also alleged, and there is considerable evidence to support his claim, that prosecutors induced his perjury. After all, Greenglass's turnabout came during a pre-trial prep session with prosecutors. *Id.* Greenglass has since claimed, repeatedly, that "he had lied in his testimony, that he had no recollection – then or now – as to whether Ethel typed his notes or not" but he did acknowledge that "I frankly think that my wife did the typing, but I don't remember." *Id.* at ¶ 8. When asked why he changed his testimony, Greenglass pointed a finger at prosecutor Roy Cohn, who Greenglass said pressured him into testifying against Ethel. *Id.* The historical record is crystal clear that Greenglass denied Ethel played a role in the conspiracy until the eve of trial. Greenglass's claim of prosecutorial misconduct is also backed up by extensive FBI interviews with both David and Ruth Greenglass, which demonstrate an about-face on Ethel's role so abrupt, troubling, and beneficial to prosecutors that scholars worry that Ethel was convicted on the basis of testimony prosecutors knew to be at best unreliable and at worse rank perjury.

*Third*, courts have disclosed grand jury records where the witness was in fact prosecuted and convicted of the crime charged. As Judge Leisure explained in *In re American Historical Ass'n*, 62 F. Supp. 2d 1100, 1102 (S.D.N.Y. 1999), the "cornerstone of the grand jury secrecy rule is the protection of the reputations and well-being of individuals who are subjects of grand jury proceedings, but who are never indicted." That concern is wholly lacking here. The testimony at issue is that of a self-admitted traitor who betrayed his country's most urgent secrets, pleaded guilty to the crime of espionage, and then, years later, announced to the world that he lied about his wife's role in the conspiracy to save her from prosecution, and, in so doing,

condemned his sister to execution for a crime he now admits she did not commit. Having publicly cast himself as a traitor, perjurer, and opportunist, there is nothing in the grand jury transcripts that could possibly do additional damage to Greenglass's irreparably sullied reputation. *See generally In re Biaggi*, 478 F.3d 489, 490-91, 494 (2d Cir. 1974) (government supported successful unsealing motion to ensure that political figure could not manipulate grand jury process for his own ends).

The time has now come for the public to learn what David Greenglass said to the grand jury. Many basic questions remain unanswered. Among them are:

- \* What, if anything, did Greenglass tell the grand jury about Ethel's participation in the conspiracy?

- \* Does Greenglass's grand jury testimony support or undermine his allegations of prosecutorial misconduct?

- \* Does Greenglass's grand jury testimony support his claim that he perjured himself in his testimony before the grand jury and at trial?

- \* Did Greenglass admit to other actions on behalf of the Soviets that he was not prosecuted for, such as recruiting others to engage in espionage?

- \* What did Greenglass tell the grand jury about his meetings Harry Gold, the Soviet go-between, who was a key witness for the prosecution?

There are too many more questions to catalogue here. Petitioners instead refer the Court to the Second Supplemental Declaration of Historian Bruce Craig (Exhibit B), which identifies many of the important questions about the Rosenberg prosecution that remain unanswered, but may well be answered by the Greenglass grand jury testimony. Petitioners also submit the Declaration of historian Brad Snyder (Exhibit C), who explains that Greenglass's grand jury

testimony is likely to shed light on several additional questions about the conduct of the Rosenberg prosecution.

### CONCLUSION

For the reasons set forth above, Petitioners' respectfully request that the Court enter an Order granting Petitioners' Renewed Petition to Unseal Grand Jury Records Relating to the Indictment and Prosecution of Julius and Ethel Rosenberg and directing the release of the grand jury testimony of David Greenglass and Max Elitcher.

Respectfully submitted,

Vladeck, Waldman, Elias & Engelhard, PC

By: \_\_\_\_\_  
Debra L. Raskin (DR 5431)  
1501 Broadway  
New York, New York 10036  
(202) 403-7300

\_\_\_\_\_  
David C. Vladeck (DV 4863)  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Washington, DC 20001  
(202) 662-9540

Attorneys for Petitioners

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