

Michael K. Jeanes, Clerk of Court

*** Filed ***

November 15, 2007 at 5:00 p.m.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR MISC

11/14/2007

THE HONORABLE ANNA M. BACA

CLERK OF THE COURT
A. Gonzalez
Deputy

IN THE MATTER OF:

CR MISC. 2007 NT

SALLY WELLS

TOM HENZE
BRUCE FEDER
DAVID BODNEY
ROBERT VANWYCK
FILEROOM – CSC MANAGEMENT
EXHIBITSCOURT ORDERS ENTERED / HEARING DATE SET

The court has received and reviewed the State's Report of Document Search in 430 GJ 97 and the Clerk of the Superior Court Maricopa County's Report submitted pursuant to this court's October 24, 2007 order.

On October 24, 2007 this court ordered the Maricopa County Attorney's Office ("MCAO") and the Maricopa County Clerk of the Court ("the Clerk") to search their records for any documents that should be filed in 430 GJ 97 and to report the results to this court.

At the October 24, 2007 hearing, in answer to this court's questions, the Deputy County Attorney representing the MCAO stated that she would expect the grand jury file to contain the original Grand Jury Subpoenas Duces Tecum; the original affidavits of service; and written notations showing any date that presentations related to the subpoenas were made to the grand jury. These documents were not in the Clerk's file on October 24, 2007, nor was there any documentation to reflect any presentations to the grand jury.¹ Furthermore, the Clerk's file did not contain any Notices to the presiding judge of the superior court and to the grand jury foreman that the subpoenas had been issued.

¹ The Subpoenas Duces Tecum were issued on: (1) Phoenix New Times, LLC on October 27, 2007; (2) New Times Media, LLC on August 24, 2007; (3) John E. Dougherty on September 21, 2007; and (4) Paul Rubin on September 21, 2007.

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On November 7, 2007, the Clerk's office reported that it does not have any documents in its possession other than those retrieved at the October 24, 2007 hearing. The MCAO reported that it obtained the prosecution file in 430 GJ 97 from the office of former special prosecutor Dennis Wilenchik and that "no documents were located in that file that should have been part of the Clerk's file." It is not clear what documents are referred to as "documents that should have been part of the Clerk's file." The court now clarifies its prior order and directs the MCAO to supplement its November 7, 2007 report to the court.

The court hereby directs the MCAO to supplement its November 7, 2007 Report by specifically informing this court: (1) whether the MCAO has any documents that reflect when and if the subpoenas were issued at the request of the grand jury, in accordance with A.R.S. § 21-408 and A.R.S. § 13-4071(B); (2) whether the MCAO has the originals or copies of Notices of the issuance of the subpoenas to the grand jury foreman and Notices to the presiding judge, in accordance with A.R.S. 13-4071(C); and (3) whether the MCAO has the original subpoenas and affidavits of service. The court expects that in filing its supplement report the MCAO will not only search all sources of information in its own office and under its control, but will also confer with the former Special Prosecutors to determine whether the documents exist and their whereabouts. If the MCAO locates any of these documents, they are to be delivered to this judge's division along with the Supplemental Report.

Lastly, the court directs that, in its supplemental report, the MCAO set out any legal authority upon which MCAO relies to issue a grand jury subpoena duces tecum that would fail to comply with the requirements of A.R.S. § 13-4071.²

IT IS ORDERED that the MCAO file its supplemental report no later than **November 21, 2007**.

IT IS FURTHER ORDERED setting a hearing regarding the contents of the grand jury file on November 26, 2007 at 11:00 a.m., in this division.

² A.R.S. § 21-408 provides that the county attorney shall "when requested by (the grand jurors) . . . cause process to issue for the attendance of witnesses and other evidence." In addition, A.R.S. § 13-4071(B)(2) provides that a subpoena may be issued and signed by the county attorney for witnesses to appear before the grand jury for witnesses requested by the grand jury. A.R.S. § 13-4071(C) provides that on request of the county attorney the clerk of the court shall issue a subpoena for witnesses to appear before the grand jury without prior authorization of the grand jury if (1) a duly impaneled grand jury is sworn and is in existence at the time of the issuance of the subpoena, (2) the county attorney designates the subpoena with the standard identifying grand jury number, (3) the county attorney reports to the foreman of the grand jury the fact of the issuance of the subpoena within ten days following its issuance, and (4) the county attorney reports to the presiding judge of the superior court the fact of the issuance of the subpoena within ten days following its issuance. The attorney general has no common law power to subpoena witnesses and documents before a state grand jury without prior consent of the grand jury. *Gershon v. Broomfield*, 131 Ariz. 507, 642 P.2d 852 (1982).

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IT IS ORDERED that the Assistant County Attorney representing the MCAO appear.