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2 NOT FOR PUBLICATION

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Rachel Jernigan,

No. CV-08-2332-PHX-GMS

10 Plaintiff,

ORDER

11 vs.

12 Kyle Richard, et al.,

13 Defendants.

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16 Pending before the Court is Plaintiff’s Motion for Release of the Minutes of the Grand
17 Jury In CR-00-01010-PHX-FJM (Dkt. # 32). For the reasons stated below the Court grants
18 the Motion as it pertains to the transcripts of the grand jury proceedings that resulted in the
19 return of the superceding indictment on January 2, 2001.

20 In the year 2000, five robberies of east valley banks were committed by an
21 Hispanic/Asian female. The robberies were committed on September 20, October 11,
22 October 25, November 28 and November 30. On October 11 of that year, Plaintiff Rachael
23 Jernigan was indicted for the first of the robberies by a grand jury. She was subsequently
24 arrested for this robbery on November 10, 2000 and was held in custody pending trial.

25 After Plaintiff had been taken into custody the two November robberies occurred.
26 The physical and clothing descriptions of the robber in the latter two November robberies
27 matched at least some of the descriptions given of the suspect in the first three robberies as
28 did the description of the vehicle in which the robber left the scene. On January 2, 2001,

1 Plaintiff was ultimately charged by a superceding indictment with the three robberies that
2 preceded her arrest. The complaint alleges that when it obtained the superceding indictment,
3 the government did not disclose to the grand jury that shortly after Jernigan had been taken
4 into custody two similar robberies had occurred in which the descriptions of the suspect and
5 details surrounding the incidents were similar to the bank robberies for which Jernigan was
6 charged. Nor was Plaintiff provided with this information.

7 Thus at trial, Plaintiff was unable to present this exculpatory evidence. In the absence
8 of such evidence, Ms. Jernigan was convicted and sentenced to 168 months of incarceration.
9 On December 11, 2001, the same bank that was robbed on September 20, 2000 was again
10 robbed by an Hispanic/Asian female. Juanita Rodriguez-Gallegos was arrested and also
11 charged with the two November 2000 robberies that were similar to the robberies for which
12 Plaintiff had been convicted. In a plea agreement with the government Rodriguez-Gallegos
13 pleaded guilty to the December 11, 2001 robbery and the other two charges were dismissed.
14 Plaintiff contends and Defendant does not contest that Juanita Rodriguez-Gallegos also
15 confessed to committing the bank robberies for which Plaintiff was convicted.

16 When Plaintiff heard of Rodriguez-Gallegos's eventual arrest for similar robberies,
17 she sought relief from her conviction. Ultimately the Ninth Circuit reversed Ms. Jernigan's
18 conviction because the prosecution failed to provide Ms. Jernigan with the exculpatory
19 evidence concerning the two very similar robberies that occurred shortly after her arrest.
20 *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007). The United States ultimately
21 dismissed the indictment against her. She was released after she had been incarcerated for
22 approximately seven years and three months.

23 Defendant Kyle Richard was the agent in charge of the investigation of all six of the
24 bank robberies for the FBI. He was present at the arrest of Jernigan. Among other claims,
25 Plaintiff brings § 1983 claims against Richard for the violation of her fourth, fifth and
26 fourteenth amendment rights for his failure to disclose to Jernigan and others the facts of the
27 similar bank robberies that occurred after her arrest and detention. *Tennison v. City and*
28 *County of San Francisco*, 570 F.3d 1078, 1080 (9th Cir. 2009) (holding that police officers

1 who withhold material exculpatory evidence from the prosecution, thereby preventing the
2 evidence from being turned over to the defense, can be held personally liable under § 1983
3 for a *Brady* violation).

4 As a prerequisite to a successful suit against Richard under at least some of her §1983
5 claims Jernigan must establish that Richard acted with malice or reckless disregard for her
6 rights. Towards that end, Jernigan requests the minutes and transcripts of the proceedings
7 before the grand jury that indicted her. Richard opposes the request.

8 Parties seeking grand jury transcripts must establish that (1) the material they seek is
9 needed to avoid a possible injustice in another judicial proceeding; (2) the need for disclosure
10 is greater than the need for continued secrecy; and (3) their request is structured to cover only
11 material as needed. *Douglas Oil Co. Of Calif. v. Petrol Stops Northwest*, 441 U.S. 211, 222
12 (1979).

13 The Court finds that Jernigan has met this standard at least as it pertains to the grand
14 jury transcripts pertaining to the superceding indictment that was returned after the
15 intervening robberies occurred. Jernigan's complaint alleges that the grand jury that issued
16 the superceding indictment was never told of the similar bank robberies that occurred after
17 Jernigan's arrest because Richard never told the prosecuting Assistant United States Attorney
18 about those bank robberies. The Complaint further alleges that Richard knew of the similar
19 bank robberies and knowingly decided, in concert with other investigators, not to disclose
20 them to the prosecuting AUSA or to Jernigan or her counsel. See Dkt. # 1 at ¶ 83.

21 Richard's failure to disclose to the AUSA similar bank robberies after Jernigan was
22 taken into custody in conjunction with the United States' request for the superceding
23 indictment is one of the factual bases of all of Jernigan's claims against Richard. Richard,
24 of course, could not have known of the exculpatory robberies until after Jernigan was taken
25 into custody on the strength of the first indictment. But, once Jernigan was taken into
26 custody the intervening similar robberies occurred. When the United States sought a
27 superceding indictment, Plaintiff is entitled to argue that the exculpatory information should
28 have been provided to the AUSA both to exculpate her on the charges in the first indictment,

1 and/or for the use of the AUSA and the grand jury in evaluating the charges sought in the
2 supervening indictment.

3 As this Court has previously noted, quoting *Awabdy v. City of Adelanto*, 368 F.3d
4 1062, 1067 (9th Cir. 2004), “the presumption of prosecutorial independence does not bar a
5 subsequent § 1983 claim against . . . officials who . . . knowingly provided misinformation
6 to [the prosecutor], concealed exculpatory evidence, or otherwise engaged in wrongful or bad
7 faith conduct that was actively instrumental in causing the initiation of legal proceedings.”
8 *Lacy v. Maricopa County*, ___ F.Supp.2d ___, 2008 WL 5397585 at 10 (D.Ariz. Dec. 24,
9 2008). In this case the absence of any discussion of the similar robberies in the grand jury
10 transcript is a necessary prerequisite to not only establishing one of the factual allegations
11 of Jernigan’s case, but also to rebutting any presumption of probable cause that arises from
12 the return of the superceding indictment. The question of what happened at the grand jury
13 after the subsequent robberies occurred, therefore, is not merely the subject of a fishing
14 expedition as it was in *United States v. Walczak*, 783 F.2d 853 (9th Cir. 1986), it is
15 information that is necessary to the Plaintiff, and is specific and ascertainable, at least in part,
16 by reference to the transcripts.

17 In this case, the need for secrecy of the transcript is diminished. The United States
18 has dismissed the superceding indictment, the indictment was returned almost nine years ago,
19 and there appears at any rate to be a confession by another suspect to having committed the
20 crimes that for which Jernigan was charged and convicted.

21 Further, to the extent the information disclosed is the evidence presented to the grand
22 jury that returned the superceding indictment, the request is sufficiently narrow to cover only
23 the information that is needed as specified in *Douglas Oil*, 441 U.S. at 222.

24 Accordingly,

25 **IT IS HEREBY ORDERED** granting Plaintiff’s Motion (Dkt. # 32) for release of
26 the minutes of the grand jury that returned the superceding indictment against her.

27 DATED this 17th day of September, 2009.

28


G. Murray Snow
United States District Judge