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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Jeffrey A. Apperson, Clerk
OCT 24 2006

**CRIMINAL ACTION NO.
UNITED STATES OF AMERICA,**

PLAINTIFF,

U.S. DISTRICT COURT
WESTN. DIST. KENTUCKY

vs.

**UNDER SEAL
[GRAND JURY MATTER]**

STEVEN D. GREEN,

DEFENDANT.

**MOTION TO QUASH GRAND JURY SUBPOENAS COMPELLING TESTIMONY BY
STEVEN GREEN'S FATHER, STEPMOTHER AND BROTHER**

Comes the defendant, Steven Green, by counsel and moves the Court to quash grand jury subpoenas which compel the testimony of John Green (defendant's father), Vicki Green (stepmother) and Doug Green (brother) before the grand jury.¹

INTRODUCTION

The government sought and obtained, unopposed, an additional 90 days to investigate the allegations against Steven Green. In obtaining the acquiescence of defense counsel to this extension, the government represented that the additional time was necessary because the evidence and witnesses were in Iraq. This same essential representation was made to the Court, that the case involved coordination with military prosecutors in Iraq, a crime scene and evidence and witnesses in Iraq. [Doc. 16]. The additional time was granted, the Court finding "...given the parallel military prosecution in Iraq with witnesses and evidence located in Iraq, it is unreasonable to expect return and filing of an indictment within the thirty-day period provided for by the Speedy Trial Act." [Doc.

¹ Subpoenas were served on Wednesday, October 17, 2006, compelling testimony on Tuesday, October 24, 2006.

filing of an indictment within the thirty-day period provided for by the Speedy Trial Act.” [Doc. 17].² However, it appears that the government is now using that additional time to conduct domestic investigation, including obtaining recordings of phone calls made by the defendant to his family and friends and to subpoena a number of friends, and - the subject of this motion, family members – and compel testimony before the grand jury.

This motion raises several objections - first, the testimony sought from family members appears to be beyond the power of the grand jury to obtain, relating to the potential penalty phase and case in mitigation rather than the question of whether or not Mr. Green committed the alleged crimes; second, that compelling the testimony of otherwise unwilling close family members, indeed, Mr. Green’s father, stepmother and brother, in this federal capital prosecution violates due process and the Eighth Amendment, third, that these domestic subpoenas violate the understanding between the parties that gave rise to the unopposed extension of time, and fourth, that the phone calls between Mr. Green and his family are being inappropriately subpoenaed from Mr. Green’s detention facility in conjunction with forcing Mr. Green’s family to testify at his Grand Jury.

(1) The power of the district court to regulate the grand jury has been recognized time and again. Branzburg v. Hayes, 408 U.S. 665, 708 (1972) (“Grand Juries are subject to judicial control...”). Gravel v. United States, 408 U.S. 606 (1972) (affirming the district court’s granting of protective relief precluding the asking of certain questions at the grand jury). The power to supervise the conduct of the grand jury is not limited only to protected statutory or constitutional privileges, but extends to curbing the grand jury from subject matter irrelevant to the crimes investigated. See

² On September 15, 2006, the government filed its supplemental justification detailing that a request had been made to a foreign government to obtain evidence. [Doc. 31]. The Court granted the additional reason for extending time from August 8, 2006. [Doc. 34].

United States v. R. Enterprises, 498 U.S. 292 (1991) (district court may quash grand jury subpoena on relevance grounds); see also Beale and Bryson, 1 Grand Jury Law and Practice (1983) at 72 (endorsed by the United States Attorneys' Manual (1990), at 9-11.001) ("The district court may properly deny a grand jury [the] use of subpoena's to engage in 'the indiscriminate summary of witnesses with no objective in mind and in the spirit of meddlesome inquiry' and it may curb a grand jury when it clearly exceeds its historic authority.")

The grand jury's function is restricted to the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. United States v. Calandra, 414 U.S. 338, 343 (1974); see Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972). [T]he grand jury's mission is . . . to determine whether to make a presentment or return an indictment. United States v. Mandujano, 425 U.S. 564, 573 (1976).

Thus, while the powers of the grand jury to investigate a crime may be expansive, those powers are not unlimited. A grand jury cannot investigate to obtain discovery, see, e.g. United States v. Proctor & Gamble Co, 356 U.S. 677, 683 (1958) (civil discovery); United States v. Doss, 563 F.2d 265, 276 (6th Cir. 1977)(en banc)(criminal discovery); see also United States Attorneys' Manual, 9-11.120 ("Nor can the grand jury be used solely for pre-trial discovery or trial preparation."). A grand jury subpoena cannot be used to compel witnesses to submit to interviews with the prosecution. See, e.g., United States v. Fisher, 455 F.2d 1101, 1105 (2d Cir. 1972); Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954). And, it is an abuse of the grand jury process to obtain evidence that is relevant only as mitigation evidence in the penalty phase of a capital proceeding. See United States v. Friend, No. 3:99cr201 (E.D. Va. Apr.5, 2000) (unpublished order) (attached) (precluding the government from affirmatively using the grand jury testimony of the defendant's mother during its case in chief or the penalty phase, should the defendant be convicted); see also State v. Francis, 897

Atl. Rptr. 2d 388, 385 N.J. Super 350 (2006) (noting “it is not proper to use the grand jury for the sole or dominant purpose of preparing a case for the penalty phase of a defendant’s capital trial” and precluding use of mitigation testimony obtained from defendant’s mother, step-father and sister); but see United States v. Furrow, 125 F.Supp. 2d 1170 (C.D.C.A. 2000) (investigation for primary purpose of determining intent required to indict was proper even though some evidence relevant to sentencing obtained).

(2) In the context of a capital case, (“death is different”, see Woodson v. North Carolina, 428 U.S. 280, 305 (1976)), the government’s use of the grand jury to discover mitigation or aggravation evidence results in a more glaring perversion of the function of the grand jury. In the first publicly available primer for federal prosecutors on the federal death penalty, government attorneys are urged to speak to anyone who may have known the defendant “to undermine the potential case in mitigation.” See D. Novak, Anatomy of a Federal Death Penalty Prosecution: a Primer for Prosecutors, 50 S.C. L. Rev. 645, 671-672 (1999). By using the grand jury, federal prosecutors can not only seek to speak with potential mitigation witnesses, but can compel them to speak under the threat of contempt, as part of the government’s attempt to “undermine the potential case in mitigation.” This unilateral right to compel testimony regarding mitigation, or aggravation, when the defendant has no equivalent power, creates an imbalance that could well tip the scales in favor of death.

The grand jury subpoena power was never meant to create such an unfair advantage for the government in any case, particularly in a capital case. In this potential capital case, the grand jury subpoena power has become, in effect, a windfall for the prosecution to gather discovery and impeachment evidence for the penalty phase, and to compel family members, who would not

otherwise subject themselves to FBI interview, to testify against their son and brother.³ Such an intrusion into the special relationship between close family members in the context of a capital prosecution can also negatively interfere with the development of the case in mitigation by placing barriers to communication with the defense team.

(3) Thirdly, the subpoenas fly in the face of the understanding of the parties with regard to the lengthy, and unopposed, extension of time for return of the indictment. The government sought, and obtained the defendant's acquiescence in this extraordinary delay on the grounds that it was fairly needed in order to obtain evidence from Iraq. Nothing in the agreement, or understanding between the parties, envisioned a delay to permit the government to reach out, and attempt to compel the testimony of Mr. Green's close family members.

(4) Finally, counsel has grave, grave concerns that Mr. Green's phone calls are being inappropriately subpoenaed from Green's detention facility in conjunction with the subpoenas issued for Mr. Green's family. At said detention facility, the inmates are essentially warned that their phone calls may be monitored and recorded. They are not warned that everything they say on the phone to anyone (even family and potentially defense counsel) is subject to being turned over in total to the United States Attorney's Office at the whim of the prosecution. The defense has always been advised that the reasons the detention facility in question monitors and records inmate phone calls is for security purposes only, not for prosecution purposes. It is defense counsel's understanding that said recordings are only reviewed by the detention facility when there is cause for concern of a security threat at the detention facility- such as an escape, promoting contraband etc. Defense counsel has also

³ The District of Nevada recognized a parent-child privilege in permitting a son to refuse to testify against his father. See In Re Agosto, 553 F.Supp. 1298 (D. Nev. 1986).

been advised that even when reviewing inmate calls for a potential security concerns, the facility does not listen to attorney-client phone calls.

Yet, in this case, the United States is subpoenaing phone calls to the Grand Jury made by Mr. Green for reasons that go far and beyond an alleged security threat at the detention facility. To put it bluntly, these subpoenaed phone calls are not the subject of security concerns by the detention facility, but are being used as a fishing expedition by the prosecution. Counsel does not need to remind the participants that Mr. Green is a pre-trial detainee who is presumed innocent of the charges. Because of the nature of his case, he has almost no privacy at all. Now the prosecution is subpoenaing all phone calls between him and his family just to what they might dig up. Then, the prosecution is subpoenaing Mr. Green's family to testify against Mr. Green at the Grand Jury. This is an improper use of Grand Jury subpoenas.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court quash the subpoenas issued to John Green, Vicky Green and Doug Green, and prohibit further subpoenas of defendant's family members.

Respectfully Submitted,

/s/ Scott T. Wendelsdorf
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CERTIFICATE

I certify that a copy of the foregoing motion was served on the United States by mailing and telefaxing same to its counsel of record, Marisa J. Ford, Esq., and Brian Butler, Esq., Assistant United States Attorneys, Tenth Floor, BB&T Bank Building, 510 West Broadway, Louisville, Kentucky 40202; Brian D. Skaret, Esq., Attorney, Domestic Security Section, Criminal Division, United States Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530; and John A. Drennan, Esq., and Jeffrey P. Singdahlsen, Esq., Attorneys, Appellate Section, Criminal Division, United States Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530, all this 24th day of October, 2006.

/s/ Scott T. Wendelsdorf
Patrick Bouldin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

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UNITED STATES OF AMERICA,

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STEVEN D. GREEN,

DEFENDANT.

ORDER

Defendant Steven D. Green having moved the Court for, the United States having responded,
and the Court being sufficiently advised,

IT IS ORDERED AND ADJUDGED that the defendant's motion to quash the subpoenas
is **GRANTED**.

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