

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE**

UNITED STATES OF AMERICA

PLAINTIFF

v.

FILED ELECTRONICALLY
CRIMINAL ACTION NO. 3:06MJ-230

STEVEN D. GREEN

DEFENDANT

**UNITED STATES' RESPONSE TO GREEN'S MOTION TO QUASH GRAND
JURY SUBPOENAS TO HIS FATHER, STEPMOTHER, AND BROTHER**

Green moves to quash the grand jury subpoenas to his father, stepmother, and brother.¹ Further, although he does not seek to quash any such subpoenas, Green also suggests that any grand jury subpoenas duces tecum issued to his detention facility for recordings of Green's telephone calls made after receiving clear notice that the facility recorded all nonprivileged conversations would be improper. Because the grand jury has the authority to issue those subpoenas, this Court should deny the motion to quash.

1. The Subpoenas

The defense seeks to quash three grand jury subpoenas. These three sought the testimony of family members (his father, stepmother, and brother). The subpoena to Doug Green, his brother, also required the witness to bring to the grand jury "any correspondence, including but not limited to, cards, letters, or e-mail messages received from Steven D. Green between May 2005 and continuing to the present."

¹ Green has not filed a motion to intervene in this matter pertaining to grand jury subpoenas issued to third parties. The government would not oppose such a motion.

2. The Grand Jury May Subpoena Family Members

To begin with, the Sixth Circuit, like the other courts of appeals, does not recognize a parent-child privilege. United States v. Ismail, 756 F.2d 1253, 1257-1258 (6th Cir. 1985); United States v. Dunford, 148 F.3d 385, 391 (4th Cir. 1998); In re Grand Jury, 103 F.3d 1140, 1150-52 (3d Cir. 1997) (summarizing cases and distinguishing case that Green cites); In re Erato, 2 F.3d 11, 16 (2d Cir. 1993); In re Grand Jury Proceeding, 842 F.2d 244, 245-248 (10th Cir. 1988); United States v. Davies, 768 F.2d 893, 896-900 (7th Cir. 1985); Port v. Heard, 764 F.2d 423, 429 (5th Cir. 1985); In re Grand Jury Subpoena of Santarelli, 740 F.2d 816 (11th Cir. 1984); In re Grand Jury Proceedings of Starr, 647 F.2d 511 (5th Cir. 1981); United States v. Penn, 647 F.2d 876, 884 (9th Cir. 1980) (en banc). In light of the courts' rejection of a common-law privilege, Green's claim of a constitutional violation also fails. See Port, 764 F.2d at 428-430.²

Green additionally contends that the grand jury subpoenas to his family members are improper because they seek testimony relevant only to the penalty phase. That claim is without support. "The law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of authority." United States v. Rugiero, 20 F.3d 1387, 1395 (6th Cir. 1994) (quoting United States v. R. Enterprises, 498 U.S. 292, 300 (1991)). In R. Enterprises, the Supreme Court described the district court's inquiry when a subpoena duces tecum issued during a grand jury investigation is challenged for reasonableness. "[W]here, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government

² Even the marital privilege, which Fed. R. Evid. 501 recognizes, is not constitutionally based. See Trammel v. United States, 445 U.S. 40, 43-45 (1980); United States v. Morris, 988 F.2d 1335, 1338 (4th Cir. 1993); Port, 764 F.2d at 430.

seeks will produce information relevant to the general subject of the grand jury's investigation." 498 U.S. at 301. Moreover, the challenging party bears the burden of demonstrating the claimed impropriety.³ *Id.* See also Ruggiero, 20 F.3d at 1395; United States v. Breitzkreutz, 977 F.2d 214, 217 (6th Cir. 1992).

Green cannot meet that burden here. First, he has not demonstrated that the grand jury testimony of the family members is not relevant to whether he committed the crime. Although he contends that the United States is seeking testimony solely for strategic advantage at a penalty phase, there is no logical basis for that assumption. See Breitzkreutz, 977 F.2d at 217 ("defendant has offered nothing beyond [his] own unproved suspicions to prove that [the witnesses] were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictment[] for trial." (internal quotation marks and citation omitted)). To the contrary, the grand jury is entitled to investigate whether family members have direct knowledge of Green's participation in the crime, and questioning on that topic is directly "relevant to the general subject of the grand jury's investigation." R. Enterprises, 498 U.S. at 301.

Moreover, in light of Ring v. Arizona, 536 U.S. 584 (2002), the scope of the grand jury's investigation in capital cases has expanded. In Ring, the Court held that, for purposes of Apprendi v. New Jersey, 530 U.S. 466 (2000), eligibility factors operate as the "functional equivalent of an element of a greater offense," and therefore must be found by a jury under the Sixth Amendment. *Id.* at 609 (citation omitted). Because, in federal prosecutions, an offense

³ The Supreme Court stated that, in limited circumstances not applicable here, the district court may ask the government to reveal the "general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion." 498 U.S. at 302. Green is well aware, as was R. Enterprises, of the general nature of the grand jury investigation.

element (or its functional equivalent) must be charged in the indictment under the Grand Jury Clause of the Fifth Amendment, see, e.g., United States v. Cotton, 536 U.S. 625, 627 (2002), those factors must be alleged in the indictment. Accordingly, relevant evidence on those factors must be presented to the grand jury. Such evidence may include, at a minimum, testimony that pertains to a defendant's intent and mental state, and relatives may be in the best position to provide such evidence.

United States v. Furrow, 125 F.Supp.2d 1170 (C.D. CA 2000), is also instructive here. In that case, the grand jury was investigating several murders and firearms offenses and had returned a three-count indictment charging Furrow with one of the murders, but not the others. The grand jury continued its investigation, and Furrow claimed that the subpoenas to his family and friends, who had not witnessed the shootings, were improper on several grounds. The court rejected his challenges. First, it held that “[t]he grand jury is not limited * * * to seeking information from individuals present at the crime scene. Rather, it is entitled to question ‘persons suspected of no misconduct but who may be able to provide links in a chain of evidence relating to criminal conduct of others.’” 125 F.Supp.2d at 1174 (quoting United States v. Mandujano, 425 U.S. 564, 573 (1976)). The court also rejected Furrow's claim that questions about his mental health, use of drugs, and ability to form the required specific intent were improper because they could be used at the penalty phase. Because the testimony was relevant to the grand jury's determination of Furrow's intent and whether it should indict at all, the court stated that such inquiries were properly within the grand jury's purview. Id. at 1175-1176. The court thus concluded that “the government was entitled to inquire into the subject of Defendant's mental capacity, even though its questions may have been likely to elicit evidence relevant to

sentencing considerations.” Id. The grand jury’s investigation of Green presents an even more compelling case because the grand jury has not yet returned an indictment, and the timing of the subpoena, unlike that in Furrow, does not call into question the subpoena’s purpose. Cf. United States v. George, 444 F.2d 310, 314 (6th Cir. 1971) (“So long as it is not the sole or dominant purpose of the grand jury to discover facts relating to (a defendant’s) pending indictment, the Court may not interfere with the grand jury’s investigation.”); Breitkreutz, 977 F.2d at 217 (same).

Finally, there is no support for Green’s contention that the United States was not entitled to bring non-Iraqi evidence before the grand jury. Although the foreign situs of the crime and the parallel military prosecution justified a continuance under the Speedy Trial Act, 18 U.S.C. 3161 et seq., there was no corresponding requirement that all American witnesses testify within the first 30 days. Nor is the justification for the continuance invalid because the government presented witnesses and other evidence to the grand jury that did not originate in Iraq. Cf. United States v. Marin, 7 F.3d 679, 685 (7th Cir. 1993) (“[t]here is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid ab initio if . . . [c]ontingencies not foreseen when the continuance was asked for and granted . . . arise that prevent the government from using the continuance for the purposes for which it was granted.”) (quoting United States v. Carlone, 666 F.2d 1112, 1115 (7th Cir. 1981)).

3. The Grand Jury May Subpoena Tape Recordings of Green’s Telephone Calls from the Detention Facility

Green also suggests that the grand jury may not properly subpoena the Grayson County Jail for his recorded calls. As Green acknowledges, inmates are warned that their telephone calls

are monitored and recorded. That notice does not limit the monitoring to specific purposes.

Monitoring of inmates' calls does not violate the Fourth Amendment. See United States v. Paul, 614 F.2d 115, 116 (6th Cir. 1980) ("It still appears to be good law that so far as the Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor."). Cf. Hudson v. Palmer, 468 U.S. 517, 530 (1984) ("the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells.")⁴ Because inmates' use of telephones raises security concerns for prison officials, the prison has a compelling interest in monitoring those calls. See, e.g., United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996); United States v. Amen, 811 F.2d 373, 379-380 (2d Cir. 1987). Moreover, the inmates' knowledge of the facility's recording practices removes any reasonable expectation of privacy in their calls. See Amen, 831 F.2d at 379-380.

Because inmates have no legitimate expectation of privacy in the recorded calls, prison officials may disseminate the recordings to others without implicating the Fourth Amendment. Cf. Hudson, 468 U.S. at 538-539 (O'Connor, J., concurring) ("[I]f the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth Amendment concerns."). The fact that the facility records calls for security purposes does not change that result. Inmates, who have no reasonable expectation of privacy in those calls, cannot, at the same time, claim Fourth

⁴ In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court recognized the limited privacy rights of pretrial detainees and the importance of institutional security in imposing restrictions on those detainees. Relying on Bell, the Second Circuit held that jail officials may record pretrial detainees' phone calls. United States v. Willoughby, 860 F.2d 15, 20-21 (2d Cir. 1988).

Amendment protection against the ultimate use of the recordings.⁵

The facility's recording of inmates' calls also does not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510-2522. Under that statute, wire communications may be intercepted by "an investigative or law enforcement officer in the ordinary course of his duties," without a court order. 18 U.S.C. 2510(5)(a). See Paul, 614 F.2d at 117 ("[W]e conclude, as did the district court, that the monitoring took place within the ordinary course of the Correctional Officers' duties and was thus permissible under 18 U.S.C. § 2510(5)(a)."). See also Adams v. Battle, 250 F.3d 980, 984 (6th Cir. 2001) ("Congress most likely carved out an exception for law enforcement officials to make clear that the routine and almost universal recording of phone lines by police departments and prisons, as well as other law enforcement institutions, is exempt from the [wiretapping] statute."). Because the recording falls outside the provisions of Title III, there is no further restriction on the tapes' dissemination. United States v. Hammond, 286 F.3d 189, 193 (4th Cir. 2002) ("the FBI was free to use the intercepted conversations [from a prison] once they were excepted under * * * § 2510(5)(a)(1) "). Thus, it is entirely proper for the jail officials to comply with the grand jury subpoena and disclose the recordings to agents with the Federal Bureau of Investigation.

⁵ Although many courts have also justified jailhouse monitoring of calls on a consent theory, see, e.g., Van Poyck, 77 F.3d at 291; Amen, 831 F.2d at 379, we have not asserted that position here. Thus, Green's contention that he has not "waived" carte blanche his privacy rights is irrelevant. Even if the government had pressed a consent justification for the monitoring, Green was told that all calls (except those to attorneys) were recorded, and he has no basis for claiming that he consented to the recordings only for purposes related to the facility's security. See United States v. Correa, 220 F.Supp.2d 61, 64 (D. Mass. 2002).

4. Conclusion

For the reasons stated above, Green's motion to quash should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of October, 2006, the foregoing United States' Response was electronically filed with the clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Scott T. Wendelsdorf, Federal Defender, and Patrick J. Bouldin, Assistant Federal Defender, 200 Theatre Building, 629 Fourth Avenue, Louisville, Kentucky 40202, counsel for Defendant, Steven D. Green.

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