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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06 CR-00019-R

UNITED STATES OF AMERICA

PLAINTIFF

v.

STEVEN D. GREEN

DEFENDANT

**UNITED STATES' RESPONSE AND OBJECTION TO
DEFENDANT'S MOTION FOR DISMISSAL OF THE INDICTMENT,
GRAND JURY RELATED DISCOVERY, AND APPROPRIATE SANCTIONS**

Comes the United States, by counsel, and responds and objects to defendant's Motion for Dismissal of the Indictment, Grand Jury Related Discovery, and Appropriate Sanctions.

Defendant argues that prosecutors abused grand jury subpoena power by compelling pre-indictment testimony of Green's family and friends regarding matters outside the scope of the grand jury.¹ Defendant accuses the government of misconduct in securing the appearance of an unnamed witness before the grand jury, and for improperly seeking compliance with grand jury subpoenas to Green's detention facility. Finally, defendant opines that prosecutors may have incorrectly instructed the grand jury regarding its "special findings."

To remedy the alleged abuses, defendant asks this Court for (i) compelled production of grand jury related materials, including subpoenas issued, transcripts of grand jury witnesses, and instructions given to the grand jury regarding special findings; (ii) withdrawal of grand jury subpoenas not returned prior to indictment; (iii) dismissal of the indictment; and (iv) "appropriate

¹ Defendant makes this argument despite the fact the Court previously considered, and denied, Green's motion to quash the grand jury subpoenas issued to Green's family members.

sanctions.”²

The defendant cites no authority that substantiates his claims of misconduct or warrants his requested relief. For the reasons provided below, the motion should be denied.

I. Defendant has not Established that the Grand Jury Testimony of Friends and Family was Improper

A. The Alleged Impropriety of the Witnesses’ Grand Jury Testimony Has Already Been Litigated and Ruled Upon by the Court

As an initial matter, the United States notes that this motion with respect to grand jury testimony given by Green’s friends and family mirrors Green’s earlier motion to quash grand jury subpoenas compelling testimony by his father, stepmother, brother, and sister. *See* Def’s Motion of Oct. 24, 2006 (filed under seal).³ The defendant argued in that motion, as he did here, that testimony of his family was “beyond the power of the grand jury to obtain” because it “relat[ed] to the potential penalty phase and case in mitigation.” *Id.* at 2. This Court denied the motion, holding that Green “failed to demonstrate that there is no reasonable possibility that the subpoenas to Green’s [family] will produce information relevant to the general subject of the

² Defendant’s request for “appropriate sanctions” in the title and first paragraph of the Motion (page 1) is made in the conjunctive and is separate from other requested relief. As the Court is aware, a defense counsel’s use of the word “sanctions” in criminal practice generally refers to court-mandated penalties on prosecutors for prosecutorial misconduct. But defendant’s motion is devoid of any argument or legal support that would give the Court cause even to consider sanctions for prosecutorial misconduct. Unsupported and unfounded requests for penalties of this sort are misleading to the Court and public. *See* Brett Barrouquere, Associated Press, *Lawyers: Iraq Case Mishandled*, Courier-Journal, January 20, 2007 (“Wendelsdorf and Bouldin want . . . sanctions brought against the prosecutors.”) To create the inference of prosecutorial misconduct that warrants sanctions without a word of factual justification or legal authority may be itself improper. *See* Kentucky Rules of Professional Conduct, Rule 3.130(8.2)(a) & Commentary [1]. Defendant’s unfounded inference of misconduct does little to further the interests of the parties and much to inflame the media’s interest in the case.

³ Defendant’s motion of October 24, 2006, and the subsequent Response, Reply, and Order of the Court were sealed by the Court. Nonetheless, defendant has now disclosed the contents of those documents without leave of Court. To respond to the defendant’s instant motion, the United States must cite contents of those documents. Accordingly, the United States is filing a contemporaneous motion to unseal the documents, a motion that surely will not now be

grand jury's investigation." Memo. Op. of Oct. 30, 2006, at 3 (filed under seal) (citing *United States v. Breitkreutz*, 977 F.2d 214, 217 (6th Cir. 1992)).

The instant motion, as it pertains to grand jury testimony of friends and family, reasserts the same unsupported arguments as Green's prior motion to quash, and should be denied for the same reasons as provided in the Court's order of October 30, 2006.

B. The Law Presumes Grand Jury Legitimacy

Courts have repeatedly described the expansive investigatory powers of the grand jury. The Supreme Court described the breadth of the grand jury's powers in *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991):

The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'"

Id. at 297 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) and *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)); see also *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 423-24 (1983); *United States v. Calandra*, 414 U.S. 338, 343 (1974).

The federal grand jury is an independent body and "[b]ecause the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists"

United States v. Williams, 504 U.S. 36, 47 (1992). As an independent body, the grand jury remains "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v.*

opposed.

Dionisio, 410 U.S. 1, 17-18 (1973). “Over the years, we [the Supreme Court] have received many requests to exercise supervision over the grand jury’s evidence-taking process, but we have refused them all” *Williams*, 504 U.S. at 50. Further, “[t]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.” *United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01 (1991), cited in Memo. Op. of Oct. 30, 2006, at 2.

Against this backdrop, defendant asserts, inaccurately, that prosecutors abused the power of the grand jury by questioning Green’s friends and family about information “that a mitigation investigator would be interested in to develop a social history for a capital case penalty phase.” Def’s Mot. at 6.

C. Defendant Fails to Establish Grand Jury Testimony was Received for the Sole and Dominant Purpose of Trial Preparation or Discovery

Essentially, defendant asks the Court to employ its supervisory powers to limit the grand jury’s inquiry into evidence that might be relevant to Green’s case in mitigation in the event this is a capital prosecution.⁴ But as noted, a court’s exercise of its supervisory powers over the grand jury is generally contrary to recent Supreme Court precedent, especially after *R Enterprises* and *Williams*. Nonetheless, if the Court decides to exercise its supervisory powers over this grand jury, it should only find grand jury abuse if the government’s sole and dominant purpose for presenting the challenged testimony was for trial preparation or discovery. *United States v. Breitzkreutz*, 977 F.2d 214, 217 (6th Cir. 1992) (“[a] court may not interfere with the grand jury’s investigation ‘[s]o long as it is not the sole or dominant purpose of the grand jury to discover

⁴ Although defendant’s motion does not specifically call upon the Court’s supervisory powers, defendant fails to delineate how the Fifth, Sixth, and Eighth Amendments support his claims or provide for his requested relief. See

facts relating to [a defendant's] pending indictment").⁵

1. Defendant Cannot Meet his Burden of Establishing Improper Purpose by Mere Speculation

To support his claim of grand jury misconduct, defendant first cites an independent law review article that advises prosecutors how to undermine mitigation cases.⁶ With suggestions of the article firmly in mind, defendant then theorizes that the purpose of the purported grand jury questioning was akin to development of a "social history for a capital case penalty phase." Def's Mot. at 6. But speculation and suspicion cannot establish a grand jury's sole and dominant purpose in receiving testimony. *Breitkreutz*, 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").

2. Defendant Fails to Show that Purported Topics of Grand Jury Questioning were Improper

The presumptive topics of questioning cited in defendant's brief would not solely involve mitigation phase evidence. Although questioning witnesses about the defendant's possible use of alcohol or illegal drugs (Def's Mot. at 3), hearing or vision problems (*id.*), use of medication

Def's Mot. at 1-2.

⁵ It is worthy of note that, in this case, there was no pending indictment. Unlike all other Sixth Circuit cases, and most if not all published federal cases, defendant has alleged the grand jury was misused pre-indictment (as opposed to post-indictment grand jury abuse) for purposes of trial preparation. The Sixth Circuit cases defendant cites, and indeed, all Sixth Circuit cases dealing with alleged improper use of the grand jury to obtain discovery or trial preparation have analyzed conduct occurring after return of the grand jury's indictment. See e.g. *United States v. Rugiero*, 20 F.3d 1387 (6th Cir. 1994); *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993), *United States v. Breitkreutz*, 977 F.2d 214 (6th Cir. 1992); *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977); *United States v. Woods*, 544 F.2d 242 (6th Cir. 1976); *United States v. George*, 444 F.2d 310 (6th Cir. 1971).

⁶ Although defendant characterizes David Novak's law review article as the "first publicly available primer for federal prosecutors on the federal death penalty," Def's Mot. at 6, n.4, the privately authored article is neither incorporated within the U.S. Attorney's Manual nor endorsed by the Department of Justice. Further, the article was written in 1999 and therefore, its suggestions regarding mitigation evidence may have been outpaced by *Apprendi*

(*id.*), inclination to play with fire (*id.*), instances of animal cruelty (*id.* at 4), and intelligence level (*id.* at 3-4) might relate to mitigation, these topics are relevant and probative of Green's ability to form the specific intent and premeditation to commit the crimes for which he was under investigation (e.g. premeditated murder and rape) as well as factors regarding the defendant's intent set forth in Title 18, United States Code, Sections 3591 and 3592. Attempts to hamstring the grand jury by limiting its ability to obtain evidence relevant to both intent and mitigation would prevent the grand jury from its time-honored right of obtaining "every man's evidence." *United States v. Burr*, 25 F. Cas. 38 (No. 14,692e) (CC Va. 1807); *see also United States v. Mandujano*, 425 U.S. 564, 573 (1976) ("Probing questions to all types of witnesses is the stuff that grand jury investigations are made of; the grand jury's mission is, after all, to determine whether to make a presentment or return an indictment").

Furthermore, even if a question to a grand jury witness ultimately applies to a prosecution's penalty phase, it still relates to the offense and, therefore, is properly the subject of investigation. Indeed, the fallacy of defendant's argument lies in his quest to pigeonhole evidence as falling into certain categories such as mitigation, aggravation, and "direct evidence of guilt." Def's Mot. at 7. The fact that a witness testified to matters that may fall into the "mitigation box" does not necessarily mean that the testimony is not relevant or probative on intent elements for the offenses and capital eligibility factors in Title 18, United States Code, Section 3591 and 3592, which are all proper areas of investigation. *See United States v. Hart*, 640 F.2d 856, 857 (6th Cir. 1981) (grand jury must find probable cause as to each element of the crime); *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002),

and *Ring*.

United States v. Cotton, 536 U.S. 625 (2002).

The grand jury may properly probe evidence of a defendant's ability to form the requisite intent for the crimes under investigation. For example, in *United States v. Furrow*, 125 F. Supp. 2d 1170 (C.D.Ca. 2000), 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.'" *Id.* 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 1175-76. 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.*

In addition to considering whether defendant possessed the requisite *mens rea* to commit the charged offenses, this Court has recognized that the grand jury's investigative role in capital cases has expanded. Memo. Op. of Oct. 30, 2006, at 3 (citing *Ring v. Arizona*, 536 U.S. 584

(2002)). In *Ring*, the Court held that, for purposes of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), eligibility factors for capital punishment operate as the “functional equivalent of an element of a greater offense,” and therefore must be found by a petit jury under the Sixth Amendment. *Id.* at 609 (citation omitted). Because, in federal prosecutions, an offense element (or its functional equivalent) must be charged in the indictment under the Indictment 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. Relevant evidence on those factors must be presented to the grand jury, and the defendant has no legitimate claim that the grand jury improperly received testimony relevant to those factors. Consequently, defendant has not demonstrated that the sole and dominant purpose of the witnesses’ testimony was improper.

Finally, in some circumstances, like *Furrow*, post-indictment subpoenas, by themselves, can raise questions as to whether the subpoena’s purpose was for trial preparation or discovery because the defendant has already been indicted and the case has begun. But the grand jury’s investigation of Green presents an even more compelling case of grand jury propriety because at the time the witnesses testified, the grand jury had not yet returned its indictment. Therefore, defendant’s burden of demonstrating abuse is that much more demanding because the challenged acts of the grand jury occurred pre-indictment and do not by themselves call into question any improper purpose.

D. Defendant’s Requests for Dismissal and for Grand Jury Transcripts Are Unfounded as He Does not Establish Prosecutorial Misconduct, Prejudice, or Particularized Need

Defendant requests grand jury transcripts and dismissal of the indictment to remedy his claims of grand jury abuse. “Dismissal of a grand jury indictment is appropriate only where a

defendant can establish a long standing pattern of prosecutorial misconduct before a grand jury and actual prejudice.” *United States v. Castro*, 908 F.2d 85, 89 (6th Cir. 1990) (citing *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir. 1985)); see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 251 (1988) (non-constitutional grand jury challenge should result in dismissal of an indictment only if the violation "substantially influenced the grand jury's decision to indict"). As stated, defendant fails to demonstrate grand jury abuse because he cannot show that the sole and dominant purpose of the testimony of witnesses was improper. Further, defendant makes no attempt to demonstrate prejudice in the challenged grand jury testimony – indeed, there is none. Defendant cannot argue that presenting mitigation evidence substantially influenced the grand jury’s decision to indict Green. Absent prejudice, no relief is warranted. *United States v. Streebing*, 987 F.2d 368, 372 (6th Cir. 1993). Therefore, his request for dismissal must be denied.

Defendant’s request for transcripts of witness testimony before the grand jury must also be denied. Defendant moves under Fed. R. Crim P. 6(e)(3)(E) for disclosure of grand jury materials “at a request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.” Def’s Mot. at 5 (citing Fed. R. Crim. P. 6(e)(3)(E)). But again, defendant provides no grounds for dismissal or prejudice to warrant such relief. Nor do his speculative claims begin to establish “particularized need” under *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). Defendant fails in his burden to show that his “need” (as opposed to his claimed and unfounded instances of grand jury misconduct) outweighs the policy of grand jury secrecy. *Id.* at 401 (noting that release of grand jury material runs counter to a long-established policy of secrecy older than our Nation itself)

(citations and quotations omitted). Accordingly, defendant's requests for dismissal of the indictment and disclosure of grand jury transcripts must be denied.⁷

II. Defendant Lacks Standing to Contest Grand Jury Subpoenas to Third Parties

Defendant claims the United States improperly subpoenaed an individual for testimony after Special Agent Frank Charles of the Federal Bureau of Investigation ("FBI") allegedly told her that if she spoke to him, she would not have to testify before the grand jury. The defendant lacks standing, however, to challenge the grand jury subpoena issued to the unnamed grand jury witness.

The Supreme Court has stated, "this Court has serious doubts that [defendant] has standing to challenge the use of a Grand Jury to elicit the testimony of a third party witness." *United States v. Payner*, 447 U.S. 727, 736 (1980). In *Payner*, the Supreme Court made clear that "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the Court." *Id.* at 735. Courts throughout the country have consistently agreed that defendants lack standing to seek to quash a subpoena upon a third party except when it infringes on their legitimate interests. *See, e.g., United States v. Segal*, 276 F. Supp. 2d 896, 900 (N.D. Ill. 2003); *United States v. Daniels*, 95 F. Supp. 2d 1160, 1164 (D. Kan. 2000); *United States v. Nachamie*, 91 F. Supp. 2d 552, 558 (S.D.N.Y. 2000). The defendant does not and cannot show that the challenged subpoena to an unnamed witness infringes on his legitimate interests, especially given this

⁷ Defendant also claims grand jury abuse when "[o]ne member reportedly asked for a copy of the transcript of his [grand jury] testimony and was told that he could not have it." Def's. Mot. at 6. However, the government does not have the authority to provide grand jury transcripts to witnesses under Fed. R. Crim. P. 6(e). If a witness so desires, he/she may petition the court for release of the transcript pursuant to Rule 6(e)(3)(D) after showing that a "particularized need" for the transcript exists that outweighs the need for maintaining grand jury secrecy. *See Fed.*

Court's order of October 30, 2006, denying his motion to quash. Because defendant lacks standing to litigate the subpoenas, his requests for relief must be denied.⁸ However, if the Court reaches the merits of Green's motion, it should nonetheless deny defendant's requested relief.

A. Defendant's Claim of Misconduct in Compelling an Unnamed Witness to Testify Before the Grand Jury is Baseless

Defendant not only lacks standing to contest the manner in which unnamed individuals are subpoenaed by the grand jury, but his objection is factually and legally frivolous. Defendant fails to provide any evidence of wrongdoing, including but not limited to, his failure to attach an affidavit, declaration, or exhibit, or at the very least, to file a sworn motion. Defense counsel's unspecific and non-evidentiary proffer to facts of FBI misconduct should not be accepted.

Furthermore, Green's claim that the FBI misled witnesses is untrue. At this time, the government does not feel it appropriate to contest defendant's unfounded claims with an affidavit given that the burden of demonstrating grand jury abuse falls squarely on the defendant.

Breitkreutz, 977 F.2d at 217. If the Court desires a hearing on this matter, however, FBI Special Agent Frank Charles will be available to testify after the United States is provided the opportunity to cross-examine the unnamed witness mentioned in defendant's motion.⁹

R. Crim. P. 6(e)(3)(c)(i); *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218-20 (1979).

⁸ Defendant's motion objects to an outstanding grand jury subpoena seeking Green's military medical and psychiatric records. But defendant's objection to the subpoena and request that it be withdrawn is disingenuous. One week before defendant filed the instant motion, the United States communicated with defense counsel and indicated that it had not received information from the grand jury's subpoena for medical information. The United States then agreed not to object to defendant's motion to compel the U.S. Army to produce Green's medical and psychiatric records. As part of the agreement, defense counsel pledged to provide the records to a government taint team to review for privileged communication. In light of this agreement, the subpoena for Green's military medical and psychiatric records has been withdrawn.

⁹ The defendant carries a heavy burden even to obtain a hearing on these claims. *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983); *In Re Special April 1977 Grand Jury*, 587 F.2d 889, 892 (7th Cir. 1978).

III. Defendant's Accusation that the United States Misused Grand Jury Power to Seek Subpoena Compliance at Green's Detention Facility is False

Defendant argues that the government abused the power of the grand jury in seeking compliance with subpoenas for recorded telephone calls after return of the indictment. Def's Mot. at 6-7. For support, defendant attaches a letter from FBI Special Agent ("SA") Frank Charles to Green's detention facility dated November 16, 2006. Def's Mot., Ex. A. The letter first identifies the grand jury subpoenas issued to the facility and notes in parenthesis that a subpoena is outstanding. Second, SA Charles indicates that a "[r]eview of recordings from the first two subpoenas reveals GREEN talking about calls to his brother . . . and his sister. . . [however] . . . we don't have any of these calls on the two CD's that we have received from the jail." *Id.* Third, SA Charles requests that the jail "search for phone calls to these specific numbers during the period of the above subpoenas." *Id.* Fourth, SA Charles asks if "GREEN is able to use more than one phone to make each of his calls, especially from a phone line that is not recorded/not located in his cell." *Id.*

SA Charles' letter does not seek compliance with prior grand jury subpoenas. By mentioning the grand jury subpoenas issued, Charles provides context to his requests that the jail (i) search for telephone recordings to Green's brother and sister and (ii) provide information about Green's access to unrecorded telephones. The letter is not disguised as a grand jury subpoena or cloaked with its power. Nor does it mention the jail's failure to comply with grand jury subpoenas or indicate an intention to seek contempt of court proceedings.

SA Charles did not wield the power of the grand jury to obtain his requested information. Notably, the detention facility's response to SA Charles supports this contention. After

receiving the letter, the jail sent SA Charles a CD with Green's outgoing calls to his brother, and called to explain whether Green had access to unrecorded telephones. Had the detention facility construed SA Charles' letter as a grand jury subpoena compliance or enforcement measure, they would have likely responded immediately with a return on the third subpoena. But they did not respond to the outstanding subpoena, and in fact, they have yet to respond to that subpoena.¹⁰

Green's accusation that the government misused grand jury power to seek compliance with subpoenas after the return of the indictment is false. If the Court finds otherwise, Green's requests for relief should nonetheless be denied for the reasons set forth in Section II of this response – Green lacks standing to contest third-party subpoenas as he cannot demonstrate a legitimate interest in the subpoenaed information, especially given this Court's order of October 30, 2006. *See* Memo. Op. of Oct. 30, 2006 (holding Green has no reasonable expectation of privacy in recorded prison calls).

IV. Defendant's Claims of Inappropriate Instructions to the Grand Jury Regarding "Special Findings" are Speculative and Unsupported

Defendant speculates that prosecutors might have improperly instructed the grand jury if the grand jury was not informed that its decision to return the "special findings" would make the defendant eligible for capital punishment. Def's Mot. at 7-8. Defendant's speculation and suspicion cannot demonstrate impropriety before the grand jury. Indeed, defendant's motion states that he merely seeks to "raise[] the question of how the grand jury was instructed...." *Id.* at 7. But Rule 6(e) is not "an invitation to engage in a fishing expedition to search for grand jury

¹⁰ The United States does not intend to pursue contempt of court proceedings against the jail for its failure to return the requested information. Given the jail's failure to timely respond to the third subpoena and the government's ability to obtain the recorded calls by request or trial subpoena pursuant to Fed. R. Crim. P. 17, the United States has withdrawn the outstanding grand jury subpoena for Green's telephone calls.

wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse occurred.” *United States v. Loc Tien Nguyen*, 314 F. Supp. 2d 612, 616 (E.D.Va. 2004) (citing *Breitkreutz*, 977 F.2d at 217).

Green’s claim does not begin to satisfy a claim of prosecutorial misconduct or form the basis of the “particularized need” requirement of Rule 6(e) for production of transcripts. Should the Court reach the merits of defendant’s speculative assertion of impropriety, however, Supreme Court precedent provides that the government is not required to inform grand jurors of the potential penalties that attach to their special findings.

A. The Grand Jury Need Not Be Informed of Defendant’s Death Penalty Eligibility

An indictment must charge the elements necessary to constitute the crime, and need not charge the ultimate punishment sought for the offense committed. Specifically, the Supreme Court has stated:

It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as “these words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.”

United States v. Hamling, 418 U.S. 87, 117 (1974) (quoting *United States v. Carll*, 105 U.S. 611, 612 (1881)).

Even after *Apprendi v. New Jersey*, 529 U.S. 1002 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), federal courts have continued to exempt sentencing considerations from the grand jury’s expanded role in determining elements of crimes. In *United States v. Haynes*, 269 F. Supp. 2d 970 (W.D. Tenn. 2003), the trial court faced the same argument as is raised here. The *Haynes* indictment contained allegations of *mens rea* and statutory aggravating factors similar to

the instant case, and the court concluded that the indictment satisfied both purposes of the Indictment Clause -- (i) notice to the defendant of the charges against which he must defend, and (ii) protection of the citizenry against unfounded criminal prosecutions. *Id.* at 980.

The special findings in *Haynes* and in the present case were drawn directly from Title 18, United States Code, Sections 3591 and 3592, so the defendant here, as in *Haynes*, cannot legitimately claim lack of notice. With respect to the grand jury's check on prosecutorial power and unfounded criminal prosecutions, the *Haynes* court squarely accepted the grand jury's fact finding role as sufficiently protecting the defendant's Fifth Amendment rights. Specifically, the court stated:

The Superseding Indictment also served as a check on prosecutorial power by requiring a grand jury to determine that probable cause exists to warrant the special findings supporting the imposition of the death penalty. *Accord Fell*, 217 F. Supp. 2d at 484 ("When it returned a true bill, the grand jury performed its check on prosecutorial power by determining that probable cause exists to find that the specified mental culpability and aggravating factors exist.").

Id. at 981.

The *Haynes* court also responded to that defendant's claim that the grand jurors could not fulfill their function as a check on prosecutorial power because, as is claimed in the instant case, *Haynes* asserted the grand jurors were unaware of the defendant's death penalty eligibility. The court pointed out that the defendant "cites no authority in support of this assertion and the Court has found none." *Id.* Indeed, the court proceeded to cite a string of cases acknowledging that a defendant's requisite Fifth Amendment protection lies in the grand jury's factual determinations, and not in any creation of grand jury support for imposition of a particular sentence. *Id.*

Green also fails to cite authority to support his claims that the grand jury must be

informed of the defendant's death penalty eligibility. Defendant's reliance on *Beck v. Alabama*, 447 U.S. 625 (1980), is misplaced. Defendant cites *Beck* for the proposition that a grand jury must be provided the opportunity to charge a lesser offense, rather than capital murder or nothing at all. Def's Mot. at 8. Accordingly, defendant argues that the grand jury must be informed of the defendant's capital eligibility. But *Beck* is not analogous here because the Court's holding was directed to the role of the petit jury, not the grand jury.

In *Beck*, the Supreme Court reviewed an Alabama death penalty statute that required a petit jury to either convict the defendant of the charged capital case and impose the death sentence or acquit the defendant. *Beck*, 447 U.S. at 628-29. In that context, the Court held that the death sentence may not be imposed after a jury verdict of guilty when the petit jury was not permitted to consider a guilty verdict to a lesser included offense. *Id.* at 638. Given that the roles of the grand and petit juries are so inherently distinct, *Beck* cannot support the defendant's contention in this case.

In sum, the defendant's indictment and the grand jury's finding of probable cause satisfy the strictures of the Indictment Clause of the Fifth Amendment, *Apprendi*, and *Ring*. Defendant's claims of misconduct are speculative and unsupported by the facts and law. Accordingly, his attempt to establish "particularized need" for production of grand jury materials falls utterly short.

IV. Conclusion

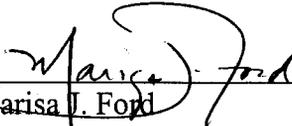
The law presumes that a grand jury acts within the legitimate scope of its authority. Therefore, it is the defendant's burden to demonstrate impropriety or irregularity. Here, the defendant cannot do that. First, Green fails to show that pre-indictment grand jury testimony was

compelled for the sole and dominant purpose of trial preparation or criminal discovery. Second, the defendant lacks standing to object to grand jury subpoenas served on unnamed third parties. Even were that not so, he fails to present evidence of misconduct, he cannot demonstrate prejudice, and the legal support for his contentions is misplaced. Third, his allegations that the government improperly sought grand jury subpoena compliance at Green's detention facility are false, and indeed, he lacks standing to raise such arguments. Finally, Green's claims of inappropriate instruction to the grand jury regarding its "special findings" are speculative and unfounded. Defendant's request for withdrawal of outstanding grand jury subpoenas for Green's medical and psychiatric records and for recorded telephone calls at his detention facility is moot. All remaining requests for relief must be denied.

WHEREFORE, the United States respectfully requests that this Court deny defendant's Motion for Dismissal of the Indictment, Grand Jury Related Discovery, and Appropriate Sanctions.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

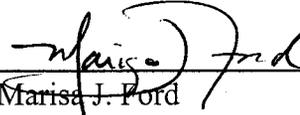


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CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of February, 2007, the foregoing response was filed with the clerk of the Court, and will be mailed to 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.



Marisa J. Ford
Assistant United States Attorney