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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

BUFORD O'NEAL FURROW, JR.,
Defendant.

CASE NO. CR 99-838(A) NM

ORDER DENYING DEFENDANT'S
MOTION FOR SANCTIONS FOR
ABUSE OF THE GRAND JURY

I. INTRODUCTION

Criminal defendant Buford O'Neal Furrow, Jr. ("Defendant") is facing criminal prosecution for the August 10, 1999 killing of a U.S. postal worker, Joseph Iletto, the shooting of five individuals at the North Valley Jewish Community Center ("NVJCC"), and various firearms offenses. The initial indictment was issued on August 19, 1999 — nine days after commission of the charged crimes. It contained only three counts: murder of a federal employee (18 U.S.C. § 1114); use of a firearm in the commission of a felony resulting in death (18 U.S.C. § 924(c)(j)); and possession of a firearm by a felon (18 U.S.C. § 922(g)(1)). In the three months that followed, the grand jury heard testimony from 43 witnesses on a variety of topics. On December 2, 1999, the grand jury returned a superseding indictment charging Defendant with thirteen additional counts: six counts alleging interference with federally protected activities on account of the

1 victim's race, color, religion, or national origin (18 U.S.C. § 245); five counts
2 alleging use of a firearm in the commission of a crime of violence (18 U.S.C. §
3 924(c)); unlawful possession of a machinegun (18 U.S.C. § 922(o)(1)); and
4 possession of an unregistered modified firearm (26 U.S.C. § 5861(d)). Now
5 pending before the court is Defendant's motion for sanctions based on the
6 government's alleged abuse of the grand jury.¹

7 II. DISCUSSION

8 A. Legal Standard

9 The Fifth Amendment provides: "No person shall be held to answer for a
10 capital, or otherwise infamous crime, unless on a presentment or indictment of a
11 Grand Jury" U.S. Const., Amend. V. "A grand jury has broad investigative
12 powers to determine whether a crime has been committed and who has committed
13 it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their
14 own personal knowledge." United States v. Dionisio, 410 U.S. 1, 15 (1973)
15 (citing Branzburg v. Hayes, 408 U.S. 665, 701 (1972) ("The investigative powers
16 of the grand jury are necessarily broad if its public responsibility is to be
17 adequately discharged.")); Port v. Heard, 594 F. Supp. 1212, 1217 (S.D. Tex.
18 1985) ("Traditionally, the grand jury has been accorded wide latitude to inquire
19 into violations of criminal law.").

20 "The investigative power of a grand jury does not necessarily end with the
21 return of an indictment." United States v. Jones, 129 F.3d 718, 723 (2d Cir. 1997).
22 Rather, "[a] grand jury investigation is not fully carried out until every available
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24 ¹ As part of his motion, Defendant seeks discovery of grand jury transcripts
25 for sessions prior to August 26, 1999. Mot., at 6, 13 n.9. Because the government
26 provided Defendant with the transcript of the testimony presented to the grand jury
27 before the return of the original indictment contemporaneous with the filing of its
28 opposition to the instant motion, Defendant's request appears to be moot. Opp., at
5 n.3.

1 clue has been run down and all witnesses examined. . . .” Branzburg v. Hayes, 408
2 U.S. at 701. However, use of the grand jury as a means for criminal discovery is
3 prohibited. See, e.g., In re Antitrust Grand Jury Investigation, 714 F.2d 347, 349
4 (4th Cir. 1983); United States v. Kovaleski, 406 F. Supp. 267, 269 (E.D. Mich.
5 1976) (“[T]he calling of witnesses before a grand jury for the dominant purpose of
6 gathering evidence for use in a pending case is improper.”).

7 “Once a defendant has been indicted the government is precluded from
8 using the grand jury for the ‘sole or dominant purpose’ of obtaining additional
9 evidence against him.”² Moss, 756 F.2d at 332; see also United States v. Dardi,
10 330 F.2d 316, 336 (2d Cir.), cert. denied, 379 U.S. 845 (1964) (“It is improper to
11 utilize a Grand Jury for the sole or dominating purpose of preparing an already
12 pending indictment for trial.”).

13 “The ‘dominating purpose’ test presupposes that the government can have
14 more than one purpose in calling a witness before the grand jury.” Kovaleski, 406
15 F. Supp. at 270; In re Antitrust Grand Jury Investigation, 714 F.2d 347, 349 (4th
16 Cir. 1983) (“Even if we assume the government sought the subpoena for an
17 improper purpose, the finding that it was also sought for a legitimate purpose is
18 not clearly erroneous.”). For example, the government may properly use the
19 grand jury “to identify or investigate other individuals involved in criminal
20 schemes, or to prepare superseding indictments against persons already charged.”
21 United States v. Jones, 129 F.3d 718, 723 (2d Cir. 1997) (citing United States v.
22 Sasso, 59 F.3d 341, 352 (2d Cir. 1995); United States v. Leung, 40 F.3d 577, 581
23 (2d Cir. 1994)). The grand jury also “may inquire into possible affirmative
24 defenses and the like in order to determine whether a prosecution should proceed.”
25 Port v. Heard, 594 F. Supp. at 1217 (grand jury properly investigated existence of

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27 ² This test has been adopted by the vast majority of circuits. See Moss, 756
28 F.2d at 332 (collecting cases).

1 affirmative defenses, such as insanity); cf. Dionisio, 410 U.S. at 16-17 (The grand
2 jury’s “mission is to clear the innocent, no less than to bring to trial those who may
3 be guilty.”); United States v. Mandujano, 425 U.S. 564, 573 (1976) (The grand
4 jury “function[s] as a shield against arbitrary accusations.”).

5 Proof that the government derived an incidental benefit at trial from the
6 disputed grand jury testimony is insufficient to establish that prosecutors have
7 abused the grand jury. See United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.
8 1982) (concluding that the government did not misuse the grand jury by calling
9 convicted coconspirator to testify, even though testimony may have incidentally
10 benefitted prosecution of defendant); In re Grand Jury Proceedings (Johanson),
11 632 F.2d 1033, 1040-41 (3d Cir. 1980) (“[A] good faith inquiry into other charges
12 within the scope of the grand jury’s lawful authority is not prohibited even if it
13 uncovers further evidence against an indicted person.”) [hereinafter Johanson].

14 “[T]he law presumes, absent a showing to the contrary, that a grand jury acts
15 within the legitimate scope of its authority.” United States v. R. Enterprises, Inc.,
16 498 U.S. 292, 300 (1991) (citing United States v. Mechanik, 475 U.S. 66, 75
17 (1986) (O’Connor, J., concurring) (“The grand jury proceeding is accorded a
18 presumption of regularity, which generally may be dispelled only upon
19 particularized proof of irregularities in the grand jury process.”)); Ruppel, 666
20 F.2d at 268 (applying “the presumption that the grand jury and the prosecutor have
21 properly performed their duties” to reject defendant’s claim of grand jury abuse);
22 cf. In re Antitrust Grand Jury Investigation, 714 F.2d at 350 (“[A] court should not
23 intervene in the grand jury process absent a compelling reason.”). Accordingly,
24 Defendant bears the burden of demonstrating that an abuse has occurred.³ See,

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27 ³ Defendant maintains that he has presented sufficient evidence, in the form
28 of grand jury transcripts, to shift onto the government the burden of showing
proper use of the grand jury. Mot., at 13. Assuming a sufficient factual showing

1 e.g., United States v. Breitreutz, 977 F.2d 214, 217 (6th Cir. 1992) (“ [A]
2 defendant must show that the challenged witnesses were not called to accomplish
3 a proper objective.”); Johanson, 632 F.2d at 1041-42 (defendant bears burden of
4 showing sole or dominant purpose was to prepare for pending trial).

5 B. Application

6 1. Renewal of Prior Motions

7 The government first argues that the instant motion is merely a renewal of
8 defense motions filed November 17, 1999 and November 24, 1999. Opp., at 4-5.
9 The November 17, 1999 motion sought an order staying the grand jury
10 proceedings on the ground that the government was using the grand jury to gather
11 penalty phase evidence against Defendant. At that time, defense counsel did not
12 know the identity of the witnesses who had testified and had not had the
13 opportunity to review the grand jury transcripts. Reply, at 3. Judge Paez denied
14 emergency relief, citing a lack of factual support, and scheduled a hearing on the
15 motion. Defendant’s November 24, 1999 motion asked the court to quash certain
16 grand jury subpoenas and again sought a stay of the grand jury investigation. On
17 December 6, 1999, Defendant withdrew the pending motions, as the grand jury
18 had returned a superseding indictment and then disbanded. Because Defendant
19 did not receive a full hearing on the merits of his prior motions and because the
20 instant motion is based on new evidence — the grand jury transcripts — the court
21 concludes that the instant motion has not been previously decided and will
22 proceed to address the merits.

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27 of questions apparently unrelated to areas appropriate for grand jury inquiry could
28 result in such burden-shifting, as discussed below, the court finds Defendant has
not made such a showing.

1 2. Improper Use of the Grand Jury

2 Defendant claims that the government used the grand jury for the improper
3 purpose of gathering evidence for use in connection with the penalty phase of
4 Defendant's upcoming trial. Mot., at 13. Defendant specifically objects to the
5 government's interrogation of witnesses on the following topics: Defendant's
6 mental health; his use of prescription medication, illicit drugs, and alcohol; his
7 ability to behave as "functioning member of society"; his sexual relationships and
8 female companions; his tendency to become angry, initiate conflicts, or issue
9 threats. Mot., at 2. The government contends that the primary purpose of the
10 grand jury investigation was threefold: 1) to identify the individuals responsible
11 for the August 10, 1999 shootings; 2) to determine whether Defendant possessed
12 the requisite religious and racial animus to be charged under Section 245; and 3)
13 to determine whether Defendant possessed the requisite specific intent to be
14 charged under Section 245. Opp., at 7-22.

15 Defendant argues that the government acted improperly by summoning
16 Defendant's personal friends and family members, none of whom witnessed the
17 August 10, 1999 shootings, to testify before the grand jury. Mot., at 9. The grand
18 jury is not limited, however, to seeking information from individuals present at the
19 crime scene. Rather, it is entitled to question "persons suspected of no misconduct
20 but who may be able to provide links in a chain of evidence relating to criminal
21 conduct of others." United States v. Mandujano, 425 U.S. 564, 573 (1976); see
22 also United States v. Moss, 756 F.2d at 332 (4th Cir. 1985) ("Lacking
23 clairvoyance, grand juries must be allowed to investigate freely individuals
24 suspected of involvement in crimes for which indictments have already been
25 issued."). The fact that non-percipient witnesses were summoned before the grand
26 jury raises no inference of impropriety.

27 Defendant concedes that the government may explore the existence of any
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1 co-conspirators or accomplices.⁴ Reply, at 5. However, Defendant argues that the
2 prosecution improperly questioned these witnesses on subjects bearing on the
3 penalty phase of the trial, such as defendant’s character and personal practices.
4 Reply, at 6. According to Defendant, examples of such improper interrogation
5 include questions about the nature of Defendant’s relationship with a lesbian
6 friend, his attitude toward women and his female companions, his relationship
7 with his wife, and his patronage of prostitutes. *Id.*⁵ While the reasons for each of
8 these inquiries is not immediately apparent, Defendant raised the issue of these
9 particular questions for the first time in his reply brief. Accordingly, the

11 ⁴ “When applied correctly the sole or dominant purpose test plainly permits
12 grand juries to investigate additional individuals who become suspects only after
13 an indictment has been returned, while precluding improper use of the grand jury
14 for discovery.” *Moss*, 756 F.2d at 332; *see also Breitkreutz*, 977 F.2d at 217
15 (“[W]itnesses may be legitimately summoned to testify before a grand jury for the
16 purpose of investigating persons who may be involved in a previously investigated
17 conspiracy but who were unknown to the grand jury at the time.”). Defendant
18 concedes that the government may explore the existence of any co-conspirators or
19 accomplices. Reply, at 5.

20 ⁵ Defendant was “married” to Debbie Mathews at the Aryan Nation
21 compound in Idaho. *Opp.*, at 20 n.10. Debbie Mathews was previously married to
22 Robert Mathews, a former leader of the Aryan Nation who allegedly took part in
23 the religiously motivated killing of radio talk show host Alan Berg and was
24 subsequently killed in a shootout with FBI agents. *Opp.*, at 23 n.12. The
25 government claims that it was entitled to inquire into Defendant’s relationship
26 with Debbie Mathews to determine whether she could invoke the marital privilege
27 to avoid testifying before the grand jury. While not conceding that such a
28 privilege was available to Ms. Mathews, the government eventually agreed to
release her from her grand jury subpoena. *Opp.*, at 21 n.11. In light of her
connection to the Aryan Nation, her close prior relationship with Defendant, and
Defendant’s attempts to contact her shortly before and immediately after the
shooting, the court must conclude that the government properly sought Debbie
Mathews’ testimony. *Opp.*, at 24 n.13.

1 government has had no opportunity to explain the relevance of each area of
2 questioning.⁶ In any event, they seem equally irrelevant to Defendant’s case in
3 mitigation. As lack of relevance does not establish improper purpose, the court
4 does not view this line of questioning as evidence of grand jury abuse.

5 The government asserts that it subpoenaed Defendant’s personal friends,
6 relatives, employers, colleagues, and acquaintances largely to determine whether
7 he harbored animosity toward racial and religious minorities. Opp., at 13-14.
8 Defendant admits that prosecutors were “entitled to inquire into the racial animus
9 elements of the alleged ‘hate crimes.’” Reply, at 5. The grand jury transcript
10 summaries support the government’s contention that its interrogation of grand jury
11 witnesses focused on this issue. Any witness who had a prior personal
12 relationship with Defendant was questioned about Defendant’s views concerning
13 racial and religious minorities. See Def.’s Exh. 4, passim. For example, Debbie
14 Mathews’ son, Clint Mathews, was questioned about Defendant’s involvement
15 with the Aryan Nation, a white supremacist organization. Opp., at 23. Because a
16 Section 245 violation requires that the offender act on account of the victim’s race,
17 religion, or national origin, this line of questioning falls within the legitimate
18 scope of the grand jury’s investigation.

19 Defendant’s friends, family members, acquaintances, and coworkers also
20 gave testimony to the grand jury regarding whether he was able to form the
21 specific intent required for a Section 245 violation. Specifically, they were asked
22 about Defendant’s mental health; his use of prescription medication, illicit drugs,
23 and alcohol; and his ability to behave as “functioning member of society.”

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25 ⁶ At oral argument, the government adequately explained the reason for
26 inquiring into Defendant’s patronage of prostitutes. The relevant inquiry,
27 however, is not whether the government has shown the propriety of every question
28 asked, but whether Defendant has made a colorable showing that the dominant
purpose of the inquiries was an improper one. On this record, he has not.

1 Defendant objects to these questions as designed to elicit rebuttal evidence for use
2 at the penalty phase of the trial. Mot., at 2; Reply, at 6. The government counters
3 that these questions sought “historical information regarding defendant’s ability to
4 act knowingly, deliberately, and purposefully.” Opp., at 22. For example,
5 questions concerning defendant’s ability to function in social situations were
6 intended to explore “whether defendant acted in a way that suggested that he
7 intended the results of his actions or whether anger, passion, alcohol, or drug
8 abuse made it unclear whether defendant always intended the consequences of his
9 acts, a litmus test in establishing specific intent.” Opp., at 22-23. Clint Mathews
10 testified that Defendant suffered from “panic attacks” that, while physically
11 distressing, did not render him unable to function. Id. at 23. This line of
12 questioning was clearly relevant to the grand jury’s determination of Defendant’s
13 ability to form the criminal intent necessary to warrant the charges ultimately
14 brought. The fact that “witnesses were not [specifically] asked if Mr. Furrow
15 acted knowingly, deliberately or purposefully in prior stressful situations, or while
16 under the influence of alcohol or medications,” Reply, at 6, does not raise an
17 inference that the government’s stated purpose was pretextual.

18 Defendant further argues that questions regarding his need for medication in
19 the past sheds little light on Defendant’s mental state on August 10, 1999, the date
20 the charged offenses were allegedly committed. Reply, at 6-7. Instead, he claims
21 that such questions sought testimony to rebut Defendant’s evidence in mitigation,
22 specifically Defendant’s mental illness and need for medication. Id. at 7. As
23 noted above, the grand jury is not limited to calling witnesses with knowledge of
24 Defendant’s state of mind on August 10, 1999. The Section 245 charges on which
25 Defendant was eventually indicted require that Defendant have acted willfully. In
26 light of the grand jury’s duty to find that each element of the charged crimes was
27 supported by probable cause, the court cannot conclude that an inquiry into
28 Defendant’s known ability to intend the consequences of his actions while taking

1 medication was improper.

2 Furthermore, the grand jury was entitled to hear evidence of Defendant's
3 mental incapacity, as such evidence would clearly would have affected its decision
4 to indict. Because the grand jury's "mission is to clear the innocent, no less than
5 to bring to trial those who may be guilty," Dionisio, 410 U.S. at 16-17, it "may
6 inquire into possible affirmative defenses and the like in order to determine
7 whether a prosecution should proceed."⁷ Port v. Heard, 594 F. Supp. 1212, 1217
8 (S.D. Tex. 1985) (concluding that no abuse occurred where grand jury
9 investigation inquired into existence of affirmative defenses, such as insanity); cf.
10 Mandujano, 425 U.S. at 573 (The grand jury "function[s] as a shield against
11 arbitrary accusations."); Branzburg v. Hayes, 408 U.S. at 688 (grand jury has a
12 duty "to return only well-founded indictments"). In fact, the Department of Justice
13 directs a prosecutor who "is personally aware of substantial evidence that directly
14 negates guilt . . . [to] present or otherwise disclose such evidence to the grand jury
15 before seeking an indictment. . . ." U.S. Dep't of Justice, United States Attorney's
16 Manual ¶9-11.233 (Sept. 1997). To discourage the government from presenting
17 such evidence to the grand jury "would be unsound and contrary to public policy."
18 Port v. Heard, 594 F. Supp. at 1217. Accordingly, the government was entitled to
19 inquire into the subject of Defendant's mental capacity, even though its questions
20 may have been likely to elicit evidence relevant to sentencing considerations.

21 "The timing of the subpoena casts significant light on its purposes." In re
22 Grand Jury Subpoena (Simels), 767 F.2d 26, 29 (2d Cir. 1985) [hereinafter
23 Simels]. "[A]bsent some indicative sequence of events demonstrating an
24 irregularity, a court has to take at face value the Government's word that the

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26 ⁷ In United States v. Williams, 504 U.S. 36, 55 (1992), the Supreme Court
27 held that courts may not sanction the government for failing to present exculpatory
28 evidence to the grand jury. It does not follow, however, that presentation of such
evidence is improper.

1 dominant purpose of the Grand Jury proceedings is proper.” Dardi, 330 F.2d at
2 358. In Simels, the government sought documents relating to the accused’s
3 relationship with his attorney by serving a trial subpoena one week after the
4 superseding indictment was filed. In response to opposition from the criminal
5 defense bar, the government stated that “[t]he trial subpoena was served solely for
6 evidentiary purposes.” Id. at 29. Following deferral of the trial subpoena, the
7 government served on defendant’s attorney “a grand jury subpoena seeking the
8 very same materials described in the trial subpoena.” Id. at 29. The court
9 reasoned:

10 [While] adjournment of the trial subpoena and the substitution of a grand
11 jury subpoena . . . might have represented a laudable attempt to alleviate the
12 concerns raised by Simels and representatives of the organized bar, [there
is] no reason to believe that this concession signified a shift in the uses to
which the government intended to put the information sought.

13 Id. at 29-30.

14 Likewise, in United States v. Kovaleski, 406 F. Supp. 267 (E.D. Mich.
15 1976), the prosecutor called an unindicted coconspirator to testify before the grand
16 jury in connection with an investigation of potential perjury charges against
17 defendant after the court declared a mistrial and the government stated its
18 intention to persist in its prosecution of defendant. The court, describing the
19 timing of the subpoena as “unusual,” found that the government had acted
20 improperly. Id. at 270; cf. United States v. Raphael, 786 F. Supp. 355, 359
21 (S.D.N.Y. 1992) (government’s service of Grand Jury subpoenas on three defense
22 witnesses on Christmas Eve returnable the day after New Year’s Day during
23 preparation for a third trial of defendant “appears questionable.”).

24 By contrast, in United States v. Ruppel, 666 F.2d 261 (5th Cir. 1982), the
25 grand jury questioning at issue occurred after defendant’s conviction but before
26 the judge had ordered a new trial. Thus, unlike Simels and Kovaleski, the
27 sequence of events in Ruppel did not suggest an improper purpose. Id. at 268.

28 Here, there is no unusual sequence of events to justify an inference of

1 prosecutorial misconduct. The original indictment was filed August 19, 1999.
2 After three and a half months of investigation, the grand jury returned a
3 superseding indictment that included thirteen additional counts. Defendant asserts
4 that the six additional counts based on violations of Section 245 were alleged in
5 the Los Angeles District Attorney’s August 11, 1999 complaint, implying that, as
6 of that date, the government had sufficient information to charge Defendant with
7 those offenses.⁸ Mot., at 9; Def.’s Exh. 3. However, the state complaint did not
8 require a finding of probable cause by a grand jury. In addition, interference with
9 a federally protected right is not an element of the state charges. Finally, the
10 availability of sufficient evidence to charge certain crimes at an earlier point in the
11 process does not cast doubt on the propriety of the grand jury’s investigation, for
12 the grand jury has an affirmative duty to conduct a thorough and deliberate
13 investigation. See Branzburg v. Hayes, 408 U.S. at 701 (“A grand jury
14 investigation is not fully carried out until every available clue has been run down
15 and all witnesses examined. . . .”).

16 Even assuming arguendo that some of the questions posed to grand jury
17 witnesses were motivated by improper concerns, on the evidence before the court,
18 Defendant has failed to establish that the sole or dominant reason for the grand
19 jury’s post-indictment labors was to strengthen the prosecution’s case for trial.
20 Here, the government continued to investigate the murder after the initial
21 indictment had been filed, “seeking to identify others potentially involved in the
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24 ⁸ Defendant also claims that a flow chart prepared by a government agent
25 shows that all seven weapons charged in the firearms counts of the First
26 Superseding Indictment were discovered on August 10, 1999. Mot., at 8 n.2.
27 Defendant does not attach that flow chart as an exhibit to its motion or reply
28 papers. Defendant does not contest, however, the government’s contention that
the grand jury was entitled to attempt to determine who might have aided
Defendant, a convicted felon, in obtaining the firearms.

1 conspiracy, and preparing to file additional charges against [Defendant].” United
2 States v. Jones, 129 F.3d 718, 723 (2d Cir. 1997) (concluding that continued
3 detention of defendant to aid the investigation did not constitute a constructive
4 arrest). The government’s use of the grand jury for these purposes is entirely
5 appropriate. See Kovaleski, 406 F. Supp. at 269 (“The pendency of a prosecution
6 does not prevent the government from calling witnesses before a grand jury to
7 investigate the possible commission of other offenses.”).

8 That the post-indictment stage of the grand jury’s investigation may have
9 yielded evidence bearing on Defendant’s future dangerousness or other factors to
10 be considered at the penalty phase of the trial does not compel a finding of abuse.
11 As noted above, such a finding may not be premised on a showing of incidental
12 benefit to the government. While the government may have obtained information
13 relevant to the capital sentencing factors as “an incidental by-product of the grand
14 jury’s investigations, it is clear that pretrial discovery was not their primary or
15 principal reason for continuing their efforts before the grand jury.” Port v. Heard,
16 594 F. Supp. at 1214; see also Ruppel, 666 F.2d at 268 (where grand jury
17 summoned witness to aid its continuing investigation of marijuana smuggling, fact
18 that testimony incidentally benefitted government did not justify sanctions for
19 abuse). Here, Defendant has not shown that the grand jury exceeded its admittedly
20 broad investigatory authority. See Branzburg v. Hayes, 408 U.S. at 688 (“Because
21 its task is to inquire into the Existence of possible criminal conduct and to return
22 only well-founded indictments, its investigative powers are necessarily broad.”).
23 Accordingly, Defendant has failed to overcome the presumption of regularity
24 accorded grand jury proceedings, or to present colorable evidence of grand jury
25 abuse.

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1 IV. CONCLUSION

2 For the reasons set forth above, Defendant's motion for sanctions for abuse
3 of the grand jury is denied.

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5 IT IS SO ORDERED.

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7 DATED: September 19, 2000

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9 Nora M. Manella
10 United States District Judge
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