9-11.000 - GRAND JURY

9-11.010 - INTRODUCTION

This chapter contains the Department's policy on grand jury practice.

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

[updated January 2020]

9-11.101 - POWERS AND LIMITATIONS OF GRAND JURIES—THE FUNCTIONS OF A GRAND JURY

While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a "no-bill." *See* Wright, *Federal Practice and Procedure*, Criminal Section 110.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed at JM 9-11.300 and JM 9-11.330. *See Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). Whether a regular grand jury enjoys a comparable authority to issue a report is a difficult and complex question. *Cf. United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). The Criminal Division of the Department of Justice should be consulted before any grand jury report is initiated, whether by a regular or special grand jury. See also JM 9-11.330.

[updated January 2020] [cited in JM 9-69.400]

9-11.120 - POWER OF A GRAND JURY LIMITED BY ITS FUNCTION

The grand jury's power, although expansive, is limited by its function toward possible return of an

indictment. *Costello v. United States*, 350 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied sub nom.*, *Hurt v. United States*, 429 U.S. 1062 (1977). Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972). After indictment, the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978).

A. **Approval Required Prior to Resubmission of Same Matter to Grand Jury:** Once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., the same transaction or event and the same putative defendant) should not be presented to another grand jury or resubmitted to the same grand jury without first securing the approval of the responsible United States Attorney.

B. **Use of Grand Jury to Locate Fugitives:** It is improper to utilize the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest. *In re Pedro Archuleta*, 432 F. Supp. 583 (S.D.N.Y. 1977); *In re Wood*, 430 F. Supp. 41 (S.D.N.Y. 1977),*aff'd sub nom In re Cueto*, 554 F.2d 14 (2d Cir. 1977). However, if the grand jury has a legitimate interest in the testimony of a fugitive, it may subpoena other witnesses and records in an effort to locate the fugitive. *Wood*, *supra*, citing *Hoffman v. United States*, 341 U.S. 479 (1951). If the present whereabouts of a fugitive is related to a legitimate grand jury investigation of offenses such as harboring, 18 U.S.C. §§ 1071, 1072, 1381, misprision of felony, 18 U.S.C. § 4, accessory after the fact, 18 U.S.C. § 3, escape from custody, 18 U.S.C. §§ 751, 752, or failure to appear, 18 U.S.C. § 3146, the gran d jury properly may inquire as to the fugitive's whereabouts. *See In re Grusse*, 402 F. Supp. 1232 (D.Conn. 1975). Unless such collateral interests are present, the grand jury should not be employed in locating fugitives in bail-jumping and escape cases since, as a rule, those offenses relate to the circumstances of defendant's disappearance rather than his or her current whereabouts.

   Generally, grand jury subpoenas should not be used to locate fugitives in investigations of unlawful flight to avoid prosecution. 18 U.S.C. § 1073. Normally an unlawful flight complaint will be dismissed when a fugitive is apprehended and turned over to State authorities to await extradition. Prosecutions for unlawful flight are rare and the statute requires prior written approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. See JM 9-69.460 (containing prior approval requirement for § 1073 indictments). Since indictments for unlawful flight are rarely sought, it would be improper to routinely use the grand jury in an effort to locate unlawful flight fugitives.

C. **Obtaining Records to Aid in Location of Federal Fugitives: Alternatives to Grand Jury Subpoenas:**Since the enactment of the Electronic Communications Privacy Act of 1986, law enforcement access to telephone records is covered by Federal statute. *See* 18 U.S.C. § 2703. Pursuant to 18 U.S.C. §§ 2703(c)(1)(B) and 2703(c)(2) the government may obtain a "record or other information pertaining to a subscriber" (telephone toll records) without notice to the subscriber by obtaining: (1) an administrative or grand jury subpoena; (2) a search warrant pursuant to State or Federal law; or (3) a court order pursuant to 18 U.S.C. § 2703(d) based on a finding that the information is relevant to a legitimate law enforcement inquiry. See JM 9-7.000 et seq. for information regarding the Electronic Communications Privacy Act of 1986.

   Occasionally, there may be records other than telephone toll records which might be useful in a fugitive investigation but which cannot be obtained by grand jury subpoena, administrative subpoena, or search warrant. In such instances, it is appropriate to seek a court order for production of the records under the All Writs Act, 28 U.S.C. § 1651. The All

Writs Act provides:

> The Supreme Court and all courts established by the Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The United States Supreme Court has recognized the power of a Federal court to issue orders under the All Writs Act "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of its jurisdiction."*See United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

Because the purpose of the All Writs Act is to aid the court in the exercise of its jurisdiction, an application for an order under the act must be sought only from the United States District Court in which the complaint or indictment is pending.

The use of the All Writs Act to obtain records in a fugitive investigation is not a procedure to be used in every fugitive case. The willingness of courts to issue such orders may depend on the selectivity with which such applications are made, and the courts will not condone a wholesale use of the act for this purpose. Thus, the procedure should be used only in extraordinary cases where a strong showing can be made that the records are likely to lead to ascertaining the whereabouts of the fugitive.

[cited in JM 9-69.400]

9-11.121 - VENUE LIMITATIONS

A case should not be presented to a grand jury in a district unless venue for the offense lies in that district.

9-11.130 - LIMITATION ON NAMING PERSONS AS UNINDICTED CO-CONSPIRATORS

In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments. The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975).

Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." In any indictment where an allegation that the defendant conspired with "another person or persons known" is insufficient, some other generic reference should be used, such as "Employee 1" or "Company 2". The use of non-generic descriptors, like a person's actual initials, is usually an unnecessarily-specific description and should not be used.

If identification of the person is required, it can be supplied, upon request, in a bill of particulars. *See* JM 9-27.760. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

The prohibition against naming unindicted co-conspirators should not extend to persons who have otherwise been charged with the same conspiracy, by way of unsealed criminal complaint or information. In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments. See JM 9-16.500; 9-27.760.

[updated April 2018] [cited in JM 9-16.500]

9-11.140 - LIMITATION ON GRAND JURY SUBPOENAS

Subpoenas in Federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Federal Rules of Criminal Procedure. Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court.

There are special considerations involved when evidence sought by United States investigators and prosecutors is located in a foreign country. Before initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required pursuant to JM 9-13.500. Inquiries should be directed to the Office of International Affairs. See JM 9-13.500.

"Forthwith" subpoenas should be used only when an immediate response is justified and then only with the prior approval of the United States Attorney.

Policies regarding the issuance of subpoenas to members of the news media and the issuance of subpoenas for telephone toll records of members of the news media are discussed elsewhere in the JM. See JM 9-13.400 (prior approval required).

9-11.141 - FAIR CREDIT REPORTING ACT AND GRAND JURY SUBPOENAS

Disclosure of consumer credit information is controlled by the Fair Credit Reporting Act, 15 U.S.C. § 1681. The Fair Credit Reporting Act, 15 U.S.C. § 1681(b), has been amended to permit prosecutors to obtain consumer credit report records by using a federal grand jury subpoena without applying to the district court for an order.

Regarding access, disclosure and transfer of financial records, see JM 9-13.800.

9-11.142 - GRAND JURY SUBPOENAS FOR FINANCIAL RECORDS

A bank depositor lacks the necessary Fourth Amendment interest to challenge a subpoena duces tecum issued to a bank for its records of the depositor's transactions. *United States v. Miller*, 425 U.S. 435 (1976). Because of procedures imposed by the Right to Financial Privacy Act of 1978, it is important, nevertheless, that United States Attorneys exercise close control over the process of obtaining for law enforcement purposes business records of banks and other financial institutions.

Sound grand jury practice requires that:

- The prosecutor personally authorize the issuance of a subpoena duces tecum to obtain financial institution account records to avoid any appearance that the matter was left to the discretion of an investigative agent serving the subpoena;
- The subpoena be returnable on a date when the grand jury is in session and the subpoenaed records be produced before the grand jury unless the grand jury itself has previously agreed upon some different course, *see United States v. Hilton*, 534 F.2d 556, 564, 565 (3d Cir.1976), *cert. denied*, 429 U.S. 828; and
- If, for the sake of convenience and economy, the subpoenaed party is permitted voluntarily to relinquish the records to the government agent serving the subpoena, a formal return of the records be made in due course to the grand jury.

Every recipient of a grand jury subpoena for financial institution records who might be subject to the disclosure penalties should be made aware that civil and criminal penalties exist for making certain disclosures involving (FIF) offenses regarding the subpoena. The notice may be provided by way of an attachment to the subpoena setting forth the disclosure prohibitions and the penalties

for disclosure. The prohibited notifications and applicable penalties are set out in 12 U.S.C. § 3402(b) and 18 U.S.C. § 1510(b), respectively. The criminal penalties include fines and a maximum prison term of five years if an officer of a financial institution (as defined in 18 U.S.C. § 1510(b)) notifies, directly or indirectly, any person regarding the existence or contents of this subpoena with the intent to obstruct a judicial proceeding. In addition, fines and a maximum prison term of one year may be imposed if the notification is made, directly or indirectly, to a customer of the financial institution whose records are sought by the subpoena or to any other person named in the subpoena. Section 3420(b) of the Right to Financial Privacy Act contains a provision to be read *in pari materia* with 18 U.S.C. § 1510(b) under which civil penalties may also be imposed. *See* also JM 9-13.800 *et seq*.

[updated April 2018]

9-11.150 - SUBPOENAING TARGETS OF THE INVESTIGATION

A grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation. *See United States v. Wong*, 431 U.S. 174, 179 n. 8 (1977); *United States v. Washington*, 431 U.S. 181, 190 n. 6 (1977); *United States v. Mandujano*, 425 U.S. 564, 573-75 and 584 n. 9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n. 8 (1973). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in JM 9-11.151) is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target's voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations:

- The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;
- Whether the substance of the testimony or other information sought could be provided by other witnesses; and
- Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

[cited in JM 9-11.153] [updated April 2018]

9-11.151 - ADVICE OF "RIGHTS" OF GRAND JURY WITNESSES

It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation.

A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness's grand jury

testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 186 and 190-191 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n. 7. (1976). In*Mandujano* the Court took cognizance of the fact that Federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington*, the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *See Washington*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an "Advice of Rights" form be appended to all grand jury subpoenas to be served on any "target" or "subject" of an investigation. *See* advice of rights below.

In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

Although the Court in *Washington*, *supra*, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s)," the Department of Justice continues its longstanding policy to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

Advice of Rights

- The grand jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955).
- You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
- Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.
- If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Additional Advice to be Given to Targets: If the witness is a target, the above advice should also contain a supplemental warning that the witness's conduct is being investigated for possible violation of federal criminal law.

[updated January 2020] [cited in JM 9-11.150]

9-11.152 - REQUESTS BY SUBJECTS AND TARGETS TO TESTIFY BEFORE THE GRAND JURY

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify, *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1976)), a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation, as defined above, to testify personally before the

grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Such witnesses may wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests or to reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses, is a matter left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 343 (1974).

[cited in JM 9-11.153]

9-11.153 - NOTIFICATION OF TARGETS

When a target is not called to testify pursuant to JM 9-11.150, and does not request to testify on his or her own motion (see JM 9-11.152), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in JM 9-11.152. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154 - ADVANCE ASSERTIONS OF AN INTENTION TO CLAIM THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

A question frequently faced by Federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify the witness will refuse to testify on Fifth Amendment grounds. If a "target" of the investigation and his or her attorney state in a writing, signed by both, that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the United States Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry.

Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself or herself.

9-11.155 - NOTIFICATION TO TARGETS WHEN TARGET STATUS ENDS

The United States Attorney has the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

Discontinuation of target status may be appropriate when:

- The target previously has been notified by the government that he or she was a target of the investigation; and,

- The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the notification is appropriate, the language of the notification may be tailored to the particular case. In a particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a "clean bill of health" or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution.

9-11.160 - LIMITATION ON RESUBPOENAING CONTUMACIOUS WITNESSES BEFORE SUCCESSIVE GRAND JURIES

Witnesses who refuse to answer questions properly put to them by the grand jury may be held in contempt and either fined or imprisoned until they comply with the directions of the grand jury. The contempt may extend for the life of the grand jury.

While the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, 371 n. 8 (1963), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the policy of the Department of Justice generally not to resubpoena a contumacious witness before successive grand juries for the purpose of instituting further contempt proceedings. Resubpoenaing a contumacious witness may be justified in certain circumstances, however, such as when the questions to be asked the witness relate to matters not covered in the previous proceedings or when there is an indication from the witness or the witness's counsel that the witness will testify if called before the new grand jury. If the prosecutor believes that the witness possesses information essential to the investigation, resubpoenaing the witness may also be justified when the witness himself or herself is involved to a significant degree in the criminality about which the witness can testify. Prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to resubpoena a witness before the successive grand jury as well as to seek civil contempt sanctions should the witness persist in his or her refusal to testify. To obtain approval, the prosecutor must show either: (a) that the witness is prepared to testify; or (b) that the appearance of the witness is justified since the witness possesses information essential to the investigation.

If the grand jury's term is about to expire, the Department recommends that a subpoena ordinarily should not be issued to a witness who has advised the prosecutor that he or she will refuse to testify before such grand jury. The coercive effect of a civil contempt adjudication is substantially diluted if a grand jury is approaching its expiration date. This is a matter within the discretion of the United States Attorney and there may well be situations when it is necessary to subpoena a witness and institute contempt proceedings for recalcitrance in such circumstances. In most situations, however, it would seem preferable to subpoena the witness before a new grand jury.

9-11.231 - MOTIONS TO DISMISS DUE TO ILLEGALLY OBTAINED EVIDENCE BEFORE A GRAND JURY

A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a

direct result of the constitutional violation.

9-11.232 - USE OF HEARSAY IN A GRAND JURY PROCEEDING

As a general rule, it is proper to present hearsay to the grand jury, *United States v. Calandra* 414 U.S. 338 (1974). Each United States Attorney should be assured that hearsay evidence presented to the grand jury will be presented on its merits so that the jurors are not misled into believing that the witness is giving his or her personal account. *See United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969); *but see United States v. Trass*, 644 F.2d 791 (9th Cir. 1981).

9-11.233 - PRESENTATION OF EXCULPATORY EVIDENCE

In *United States v. Williams*, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

[cited in JM 9-5.001]

9-11.241 - DEPARTMENT OF JUSTICE ATTORNEYS AUTHORIZED TO CONDUCT GRAND JURY PROCEEDINGS

Federal Rule of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of that rule, an "attorney for the government" is defined in Fed. R. Crim. P. 1(b) as the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and certain other persons in cases arising under the laws of Guam.

The authority for a United States Attorney to conduct grand jury proceedings is set forth in the statute establishing United States Attorney duties, 28 U.S.C. § 547. United States Attorneys are directed in that statute to "prosecute for all offenses against the United States." Assistant United States Attorneys similarly derive their authority to conduct grand jury proceedings in the district of their appointment from their appointment statute, 28 U.S.C. § 542.

When a United States Attorney or Assistant United States Attorney needs to appear before a grand jury in a district other than the district in which he or she has been appointed, the United States Attorney for either the district of appointment or the district of the grand jury should complete an appointment letter, appointing the attorney as a Special Assistant United States Attorney (SAUSA). The United States Attorney's Office (USAO) completing the appointment letter should send a copy of the letter to the Executive Office for United States Attorneys, Personnel Office. USAOs should also send a copy of any letter extending the appointment of the SAUSA.

Departmental attorneys, other than United States Attorneys and AUSAs, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegate pursuant to 28 U.S.C. § 515(a). The Attorney General has delegated the authority to direct Department of Justice Attorneys to conduct grand jury proceedings to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters supervised by them. (Order No. 725-77.) Requests in Criminal Division cases should be submitted to the supervising Deputy Assistant Attorney General.

[updated June 2008]

9-11.242 - NON-DEPARTMENT OF JUSTICE GOVERNMENT ATTORNEYS

Federal Rule of Criminal Procedure 6(d) provides that the only prosecution personnel who may be present while the grand jury is in session are "attorneys for the government." Rule 1(b) defines attorney for the government for Federal Rules of Criminal Procedure purposes as the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and certain other persons in cases arising under the laws of Guam.

An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. § 515, or a Special Assistant to a United States Attorney, pursuant to 28 U.S.C. § 543, in order to appear before a grand jury in the district of appointment. When the less common Special Assistant or Special Assistant to the Attorney General appointment is to be used in cases or matters within the jurisdiction of the Criminal Division, the Office of Enforcement Operations should be contacted for information.

A letter of appointment is executed and the oath of office as a Special Assistant to a United States Attorney must be taken (see 28 U.S.C. §§ 515, 543 and 544). Requests for such appointments must be made in writing through the Director of the Executive Office for United States Attorneys and must include the following information:

A. The facts and circumstances of the case;
B. The reasons supporting the appointment;
C. The duration and any special conditions of the appointment;
D. Whether the appointee may be called as a witness before the grand jury. If such a possibility exists, it ordinarily would be unwise to make the appointment;
E. How the attorney has been informed of the grand jury secrecy requirements in Federal Rule of Criminal Procedure 6(e).
F. If the appointee is an agency attorney, whether the agency from which the attorney comes is conducting or may conduct contemporaneous administrative or other civil proceedings. If so, a full description of the substance and status of such proceedings should be included; and
G. If the appointee is an agency attorney, a full description of the arrangements that have been made to prevent the attorney's agency from obtaining access through the attorney to grand jury materials in the case.

Finally, the request must contain the following statement, signed by the agency attorney:

> I understand the restrictions on the grand jury secrecy obligations of this appointment as a Special Assistant to the United States Attorney and do hereby certify that I will adhere to the requirements contained in this letter.

The use of agency attorneys as Special Assistants before the grand jury has been upheld by the courts. *See United States v. Wencke*, 604 F.2d 607 (9th Cir. 1979); *United States v. Birdman*, 602 F.2d 547 (3d Cir. 1979); *In re Perlin*, 589 F.2d 260 (7th Cir. 1978). The United States Attorney or Departmental attorney with responsibility for the case retains full responsibility, notwithstanding the participation of government attorneys from other agencies.

[updated January 2020]

9-11.244 - PRESENCE OF AN INTERPRETER

Attorneys for the government should ensure that any interpreter used in a grand jury proceeding is aware of his or her secrecy obligation, and that the interpreter has received the necessary security clearance and has been properly sworn.

9-11.250 - DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY TO DEPARTMENT OF JUSTICE ATTORNEYS AND ASSISTANT UNITED STATES ATTORNEYS

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made without a court order "to an attorney for the government for use in the performance of such attorney's duty." See Fed. R. Crim. P. 6(e)(3)(A)(i). "Attorney for the government" is defined in Fed. R. Crim. P. 1(b)(1). Further guidance on the definition of “attorney for the government,” derived from the decision in United States v. Forman, 71 F.3d 1214 (6th Cir. 1996), is available to Department attorneys.

[updated January 2020]

9-11.254 - GUIDELINES FOR HANDLING DOCUMENTS OBTAINED BY THE GRAND JURY

In 1996, the Deputy Attorney General approved the following Guidelines for "Handling Documents Obtained by the Grand Jury." The Guidelines, written by a working group composed of representatives of each of the litigating Divisions, the Executive Office for United States Attorneys, and the Office of Information and Privacy, address the need to establish and follow proper recordkeeping procedures regarding evidence obtained by the grand jury.

The Department of Justice routinely receives requests for access to documents from Congress, from individuals or entities filing requests pursuant to the Freedom of Information Act (FOIA), and from private and government lawyers engaged in civil litigation. Records retention practices can make it difficult to identify what evidence may properly be provided in response to a request and may hamper the proper use of non-grand jury information by civil attorneys of the Department. For example, if a file marked "Grand Jury" includes documents obtained by grand jury subpoena and documents otherwise obtained, it is difficult in some instances to determine whether the Rule 6 limitations on disclosure apply to certain documents in the file. The task is more difficult in those situations where the prosecutor who handled the grand jury matter is no longer in government service. The Guidelines, which apply to the United States Attorneys and to the litigating Divisions of the Department, will make it easier to determine those documents that reveal matters occurring before the grand jury and those that do not.

Although local practice, local rules, and case law varies to some extent among the Circuits, every effort should be made to apply a consistent procedure that will maintain the integrity of evidence obtained by the grand jury and, at the same time, assist in identifying what are "matters occurring before a grand jury." This will enable a clear and proper determination of what material can and should be released to a FOIA requestor and what documents may be shared with attorneys for the government engaged in civil litigation. Generally, government attorneys who are handling only civil cases do not have automatic access to grand jury materials but may obtain access to such materials only upon court order issued pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i). *See United States v. Sells Engineering, Inc.*, 463 U.S. 418, 427 (1983). A specific exception has been created for certain banking financial matters. *See* 18 U.S.C. § 3322.

Accordingly, whenever it is practicable to do so, prosecutors obtaining evidence in a criminal investigation should use the following procedures. These procedures supplement those described in the Department's Federal Grand Jury Practice Manual, January 1993, pages 106 through 120. The procedures do not create any rights in third parties:

Guidelines for Handling Documents Obtained by the Grand Jury

1. **Consider Alternatives.** Before issuing a grand jury subpoena, prosecutors should consider what evidence has already been collected through other means and whether a

voluntary request, contractual obligation, inspector general subpoena, civil investigative demand or other compulsory process is available to obtain the information sought. Those methods may be just as effective as a grand jury subpoena in obtaining information but their use may avoid grand jury secrecy issues.

2. **Identify a Custodian.** As early as practicable, a prosecutor should determine who will have custody of original documents and real evidence, and where such documents and evidence will be maintained. If the case agent is to have custody, the grand jury should authorize him to maintain the evidence; but, unless required by local rule, the grand jury should not make him an "agent" of the grand jury. (As explained at footnote 234 on page 107 of the Federal Grand Jury Practice Manual, prosecutors are discouraged from swearing in an investigator as an agent of the grand jury). Prosecutors should not commingle original documents and real evidence obtained by grand jury subpoena with evidence obtained by other means.
3. **a. Create an Identification System.** Upon receipt, prosecutors should number, then copy, documents and real evidence -- however they are obtained. The originals should then be secured. If the volume of documents is great, prosecutors should consider microfilming them. Numbering and securing the originals in the order in which they are obtained will facilitate access to the evidence and make it easier for prosecutors to create a record of how, and from whom, the evidence was obtained. For example, use of an identification system, such as a list of the documents by their identifying numbers under topic headings, permits the government to respond more efficiently to FOIA requests and better enables prosecutors to support a decision to withhold documents should a court demand an explanation of the basis for claiming that the documents are covered by Rule 6(e). *See Church of Scientology International v. United States Dep't of Justice*, 30 F.3d 224 (1st Cir. 1994). As the Federal Grand Jury Practice Manual explains (at pp. 157-59), documents not covered by Rule 6(e) include materials obtained or created independently of the grand jury, so long as their disclosure does not otherwise reveal what transpired before or at the direction of the grand jury, *see In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982). Similarly, Rule 6(e) does not cover documents, even subpoenaed documents, that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury. *See, e.g.*, *DiLeo v. Commissioner of Internal Revenue*, 959 F.2d 16, 19 (2d Cir. 1992). *Accord Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 582-84 (D.C. Cir. 1987).

   b. Make the System Simple. The identification system should be simple but it should permit the prosecutor to determine the source of the evidence and how it was obtained (*i.e.*, whether the evidence was in response to a grand jury subpoena and, if so, which subpoena). The identification system also should permit the prosecutor to determine what use the grand jury made of the evidence: what evidence generally was made available to the grand jury, what evidence was physically offered and made available to the grand jury, and what evidence was entered as an exhibit or otherwise formally presented to the grand jury.

4. **At All Times, Maintain an Unmarked Set of Documents.**Where appropriate, prosecutors should clearly mark the file cabinet, box or file in which subpoenaed evidence is maintained as containing grand jury subpoenaed records. But as the Department's Guide on Rule 6(e) advises, no grand jury marking or stamp should be affixed to the original documents themselves. See United States Department of Justice Guide on Rule 6(e) After *Sells* and *Baggot*, Jan. 1984, at 53. If a document is to be marked as an exhibit and presented to the grand jury, prosecutors should use a copy of the original or, if for some reason the original of a document must be entered as an exhibit before the grand jury, prosecutors should endeavor to place the exhibit sticker on a folder or an envelope containing the document and not on the document itself. (If a document is placed in an envelope, it should be adequately identified for the record.)
5. **The Security of Evidence Must be Maintained.** Prosecutors should take whatever

precautions are necessary to protect grand jury materials, including, generally, keeping them in a locked file cabinet in a locked room. If information from the documents is entered into a computer, the prosecutor should make sure that the data *are* secure or kept on a disc that can be secured.

6. **Informing the Grand Jury of Available Evidence.** The practice of bringing all subpoenaed documents before the grand jury varies among jurisdictions. Providing notice to the grand jury that the custodian or case agent has reviewed the documents may be legally sufficient, regardless of local custom. At a minimum, however, prosecutors should keep the grand jury apprised of the location and organization of the documents.

The foregoing procedures should help ensure that documents obtained during an investigation are maintained in a system that allows easy access to original documents, that clearly separates documents that were obtained by subpoena from those obtained by other means, and that enables identification of evidence the grand jury actually considered.

9-11.255 - PRIOR DEPARTMENT OF JUSTICE APPROVAL REQUIREMENTS—GRAND JURY SUBPOENAS TO LAWYERS AND MEMBERS OF THE NEWS MEDIA

Prior approval of the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division generally is required before a grand jury subpoena may be issued to an attorney for information relating to the representation of a client. See JM 9-13.410.

Prior approval of the Attorney General generally is required before a grand jury subpoena may be issued to obtain information from, or records of, a member of the news media. *See* 28 C.F.R. § 50.10; JM 9-13.400.

[updated April 2016]

9-11.260 - RULE 6(E)(3)(E)(IV) DISCLOSURE OF GRAND JURY MATERIAL TO STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

In 1985, the Supreme Court adopted an amendment to the Federal Rules of Criminal Procedure that added a new subdivision, 6(e)(3)(E)(iv). This change was for the stated purpose of eliminating "an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws (by allowing) a court to permit disclosure to a State or local official for the purpose of enforcing State law when an attorney for the government so requests and makes the requisite showing." (*See* the notes of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.) The subdivision now reads as follows:

> (E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter...
>
> > (iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law.

It is both the intent of the amended rule, and the policy of the Department of Justice, to share grand jury information whenever it is appropriate to do so. Thus, the phrase "appropriate official of a State or subdivision of a State" shall be interpreted to mean any official whose official duties include enforcement of the State criminal law whose violation is indicated in the matters for which disclosure authorization is sought. This policy is, however, subject to the caution in the Advisory Committee notes that "(t)here is no intention to have Federal grand juries act as an arm of the State."

It is clear that the decision to release or withhold grand jury information may have a significant impact upon relations between Federal prosecutors and their state and local counterparts, and disclosure may raise issues that go to the heart of the Federal grand jury process. Accordingly, Federal prosecutors must request authorization to apply for an order permitting the disclosure of grand jury material to State or State subdivision authorities under Rule 6(e)(3)(E)(iv). In a matter being handled by a United States Attorney's Office, Assistant United States Attorneys must seek prior authorization from the United States Attorney (or a delegated Supervisory Assistant United States Attorney). In a matter being handled by a litigating Division within the Department, Federal prosecutors must seek prior authorization from the Assistant Attorney General of that Division (or a delegate). A form is available to Department attorneys for submitting requests to the Criminal Division for approval to disclose grand jury information under Rule 6(e)(3)(E)(iv).

Prosecutors are cautioned that in certain types of cases, particularly tax and tax-related cases, some grand jury information may also be subject to additional statutory and regulatory restrictions governing disclosure and sharing. *See, e.g.*, 26 U.S.C. § 6103.

[updated January 2020]

9-11.300 - THE SPECIAL GRAND JURY—18 U.S.C. § 3331

Empanelment of Special Grand Juries for organized crime (18 U.S.C. § 3331) requires certification obtained through the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations, (202) 305-4023 or PSEU@usdoj.gov (link sends e-mail).

[updated January 2020] [cited in JM 9-11.101]

9-11.330 - CONSULTATION WITH THE CRIMINAL DIVISION ABOUT REPORTS **UNDER 18 U.S.C. § 3333**

If a special grand jury will be considering the issuance of a report under 18 USC § 3333 rather than an indictment; United States Attorneys are requested to notify the Chief of the Organized Crime and Gang Section. When providing such notice, United States Attorneys should indicate why an indictment cannot be found to obviate the issuance of a grand jury report. It should also be explained how the facts developed during a criminal investigation support one of the authorized types of reports. Before any draft report is furnished to the grand jury, it must be submitted to the Chief of the Organized Crime and Gang Section for approval. When a United States Attorney learns that a grand jury is preparing a report which he/she has not requested, he/she should advise the Criminal Division.

It is not clear what remedy the government would have if a court acted wrongly in sealing a special grand jury report and refusing to make it public. The Chief of the Organized Crime and Gang Section should be notified promptly if a court finally determines for any reason that a grand jury report is deficient or not proper to be released, so that consideration may be given to the possibility of taking the matter to the court of appeals.

[updated January 2020] [cited in JM 9-11.101]

9-11.500 - USE OF ASSET FORFEITURE IN CONNECTION WITH STRUCTURING OFFENSES

Title 31, United States Code, section 5324(a) prohibits evasion of certain currency transaction reporting and record-keeping requirements, including structuring schemes. Generally speaking, structuring occurs when, instead of conducting a single transaction in currency in an amount that would require a report to be filed or record made by a domestic financial institution, the violator conducts a series of currency transactions, keeping each individual transaction at an amount below applicable thresholds to evade reporting or recording. The policies in this section apply to all federal seizures for civil or criminal forfeiture based on a violation of the structuring statute, except

those occurring after an indictment or other criminal charging instrument has been filed. These policies apply to all structuring activity whether it constitutes "imperfect structuring" chargeable under 31 U.S.C. § 5324(a)(1) or "perfect structuring" chargeable under 31 U.S.C. § 5324(a)(3).

A. **Link to prior or anticipated criminal activity**

If no criminal charge has been filed and a prosecutor has not obtained the approval identified below, a prosecutor shall not move to seize structured funds unless there is probable cause that the structured funds were generated by unlawful activity or that the structured funds were intended for use in, or to conceal or promote, ongoing or anticipated unlawful activity. For these purposes, "unlawful activity" includes instances in which the investigation revealed no known legitimate source for the funds being structured. Also for these purposes, the term "anticipated unlawful activity" does not include future Title 26 offenses. The basis for linking the structured funds to additional unlawful activity must receive appropriate supervisory approval and be memorialized in the prosecutor's records. In order to avoid prematurely revealing the existence of the investigation of the additional unlawful activity to the investigation's targets, there is no requirement that the evidence linking the structured funds to the additional unlawful activity be memorialized in the seizure warrant application.

Where the requirements of the above paragraph are not satisfied, unless criminal charges are filed, a warrant to seize structured funds may be sought from the court only upon approval from an appropriate official, as follows:

- For Assistant U.S. Attorneys ("AUSAs"), approval must be obtained from their respective U.S. Attorney. The U.S. Attorney may not delegate this approval authority. Although this authority is ordinarily non-delegable, if the U.S. Attorney is recused from a matter or absent from the office, the U.S. Attorney may designate an Acting U.S. Attorney to exercise this authority, in the manner prescribed by regulation. *See* 28 C.F.R. § 0.136.
- For Criminal Division trial attorneys or other Department components not partnering with a United States Attorney's Office ("USAO"), approval must be obtained from the Chief of the Money Laundering and Asset Recovery Section ("MLARS"). The Chief of MLARS may not delegate this approval authority.

The U.S. Attorney or Chief of MLARS may grant approval if there is a compelling law enforcement reason to seek a warrant, including, but not limited to, reasons such as: serial evasion of the reporting or record keeping requirements; the causing of domestic financial institutions to file false or incomplete reports; and violations committed, or aided and abetted, by persons who are owners, officers, directors, or employees of domestic financial institutions.
If the U.S. Attorney or Chief of MLARS approves the warrant, the prosecutor must send a completed "Structuring Warrant Notification Form" to MLARS.

B. **No Intent to Structure**

There may be instances in which a prosecutor properly obtains a seizure warrant but subsequently determines that there is insufficient admissible evidence to prevail at either a civil or criminal trial for violations of the structuring statute or another federal crime for which forfeiture of the seized assets is authorized. In such cases, within seven (7) days of reaching this conclusion, the prosecutor must direct the seizing agency to return the full amount of the seized money. Once directed, the seizing agency will promptly initiate the process to return the seized funds.

C. **150-Day Deadline**

Within 150 days of seizure based on structuring, if a prosecutor has not obtained the approval discussed below, a prosecutor must either file a criminal indictment or a civil complaint against the

asset. This deadline does not apply to administrative cases governed by the independent time limits specified by the Civil Asset Forfeiture Reform Act. The criminal charge or civil complaint can be based on an offense other than structuring. If no criminal charge or civil complaint is filed within 150 days of seizure, then the prosecutor must direct the seizing agency to return the full amount of the seized money to the person from whom it was seized by no later than the close of the 150-day period. Once directed, the seizing agency will promptly initiate the process to return the seized funds.

With the written consent of the claimant, the prosecutor can extend the 150-day deadline by 60 days. Further extensions, even with consent of the claimant, are not allowed, unless the prosecutor has obtained the approval discussed below.

An exception to this requirement is permissible only upon approval from an appropriate official as follows:

- For AUSAs, approval must be obtained from their respective U.S. Attorney. The U.S. Attorney may not delegate this approval authority, except as discussed above.
- For Criminal Division trial attorneys or other Department components not partnering with a USAO, approval must be obtained from the Chief of MLARS. The Chief of MLARS may not delegate this approval authority.

If additional evidence becomes available after the seized money has been returned, an indictment or complaint can still be filed.

D. Settlement

Settlements to forfeit and/or return a portion of any funds involved in a structuring investigation, civil action, or prosecution must comply with the requirements set forth in the *Asset Forfeiture Policy Manual* and the JM Chapter 9-113.000. In addition, settlements must be in writing, include all material terms, and be signed by a federal prosecutor. Informal settlements, including those negotiated between law enforcement and private parties, are expressly prohibited.

[added December 2017]

‹ 9-10.000 - Capital Crimes up 9-13.000 - Obtaining Evidence ›