

In the
United States Court of Appeals
For the Seventh Circuit

No. 22-1845

UNITED STATES OF AMERICA,

Respondent-Appellant,

v.

DOE CORPORATION,

Petitioner-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:22-mc-00001-JPS-NJ — **J. P. Stadtmueller**, *Judge*.

ARGUED DECEMBER 8, 2022 — DECIDED FEBRUARY 3, 2023

Before RIPPLE, ROVNER, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. Doe Corporation is the target of a federal grand-jury investigation. Pursuant to a search warrant, federal and state agents conducted a day-long search of the company's premises. After the search, Doe Corporation accused the agents of serious misconduct and produced still images from its security-camera footage that appeared to show agents pointing guns at employees. The government wanted to know more, and so it served Doe Corporation with a grand-

jury subpoena for the original video footage. Doe Corporation moved to quash the subpoena, and the district court granted its request. Because the grand jury is entitled to inquire into the circumstances surrounding the collection of evidence relevant to its investigation, we reverse.

I

The federal government is investigating Doe Corporation for suspected criminal violations of the Clean Water Act. See 33 U.S.C. §§ 1317(d), 1319(c)(2)(A). After obtaining a search warrant, federal and state agents conducted a day-long search of Doe Corporation's premises. An hour into the search, agents ordered Doe Corporation to turn off all security cameras.¹ After the search, Doe Corporation contacted the U.S. Attorney's Office and accused the agents of executing the search in a dangerous and threatening manner in violation of the corporation's Fourth Amendment rights. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977). Doe Corporation also filed an emergency motion to unseal the affidavit supporting the search warrant. The motion included still images from security-camera video footage of the search; the images showed agents pointing guns at employees.

The government promptly acknowledged the seriousness of the allegations and asked to view the original video footage from the security cameras. Doe Corporation refused that request. The government then served Doe Corporation with a grand-jury subpoena for the video.

¹ The government represents that this step was taken for safety reasons. That strikes us as odd, but the question whether, by so doing, the agents were engaged in misconduct is not before us.

Doe Corporation moved to quash the subpoena under Federal Rule of Criminal Procedure 17(c)(2) on the ground that the video was irrelevant to the potential Clean Water Act violations that the grand jury was investigating. It further argued that the subpoena was for the improper purpose of conducting pre-trial discovery in advance of Doe Corporation's criminal trial or for potential civil litigation over the alleged constitutional violation.

The government offered two reasons why there was a reasonable possibility that the video would be relevant to the grand jury's investigation. First, "the grand jury is entitled to consider potential evidence of law enforcement misconduct in evaluating whether to indict." Second, the video could be directly relevant to whether Doe Corporation committed Clean Water Act violations, because the video could provide details on such questions as what evidence was collected during the search, which employees had access to evidence, and whether anyone tampered with potential evidence.

The district court granted Doe Corporation's motion to quash the subpoena, holding that the video was not relevant to the grand jury's investigation. The court first rejected the government-misconduct theory of relevance. Any misconduct was beside the point, it thought, because the grand jury is entitled to consider evidence regardless of its admissibility. The district court thus reasoned that "the manner, or fairness, of the search" cannot factor into the grand jury's decision to indict. The court then rejected the substantive relevance theory, reasoning that the agents would not have ordered the security cameras to be shut down if the footage was so important. It added that the agents' testimony could substitute for the security footage. The district court concluded that the

subpoena was issued for the “improper purpose” of “assess[ing] whether the fruits of the search warrant are vulnerable to pre trial suppression motions,” which it considered a form of impermissible pre-trial discovery.

II

We review a district court’s grant of a motion to quash a grand-jury subpoena for abuse of discretion. See *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 726 (7th Cir. 2021); *In re Special Apr. 1977 Grand Jury*, 581 F.2d 589, 595 (7th Cir. 1978). A court abuses its discretion when it bases its decision on a legal error. *United States v. Chaparro*, 956 F.3d 462, 474 (7th Cir. 2020).

The grand jury “serves the ‘dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.’” *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 423 (1983) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972)). To carry out these duties, the grand jury has broad authority to investigate potential wrongdoing and, if wrongdoing is discovered, to decide whether to return a criminal indictment. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

Among the grand jury’s investigatory tools is the power to issue subpoenas. This power is broad but not unlimited. Under Federal Rule of Criminal Procedure 17(c)(2), a district court may quash or modify a subpoena that is “unreasonable or oppressive.” The party opposing the subpoena bears the burden of proving its unreasonableness or oppressiveness. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 293 (1991).

Rule 17(c)(2) does not define what makes a subpoena “unreasonable or oppressive,” and the Supreme Court has emphasized that this depends on context. *R. Enterprises, Inc.*, 498

U.S. at 299. When a trial subpoena is issued after an indictment and in anticipation of trial, it must be a “reasonably specific request for information that would be both relevant and admissible at trial.” *Id.* (citing *United States v. Nixon*, 418 U.S. 683, 700 (1974)). But the Supreme Court rejected this formulation of 17(c)(2)’s reasonableness standard as too demanding in the context of grand-jury subpoenas. The grand jury often does not decide which offenses and offenders to charge until its investigation concludes, and so “[o]ne simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense.” *Id.* at 299–300. The Court therefore rejected the requirement that evidence sought by grand-jury subpoena be admissible and left only the narrowest of paths open to a relevance challenge. A motion to quash a grand-jury subpoena on relevance grounds “must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.” *Id.* at 301.

The question before us is whether there is any “reasonable possibility” that the video footage of the search of Doe Corporation’s premises is “relevant to the general subject of the grand jury’s investigation.” The district court thought not. Because the grand jury may view evidence regardless of its admissibility, the court reasoned, the grand jury had no legitimate interest in examining how the search was conducted. This was too narrow a view of the grand jury’s powers. It is well within the legitimate purview of the grand jury to inquire about the manner in which evidence was collected, including whether any government misconduct occurred in the process.

As we have noted, a grand jury's responsibility does not begin and end with determining whether there is probable cause to believe a crime has been committed. The Supreme Court has expressly recognized that the grand jury "is not bound to indict in every case where a conviction can be obtained." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). And even where the grand jury decides to indict, it may choose whether "to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same facts." *Id.* This discretion permits the grand jury to "serv[e] as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. 36, 47 (1992).

We need not exhaustively list the grounds upon which a grand jury may choose not to indict. But surely one such reason is if there is no admissible evidence to support the government's case at trial. See *Sells Eng'g, Inc.*, 463 U.S. at 430 (stating that a grand jury may decline to indict based on a prosecutor's recommendation "that the law *and admissible evidence* will not support a conviction" (emphasis added)). Or perhaps an investigation uncovers evidence of government misconduct so outrageous that the grand jury is convinced that the government harbors improper animus against the target of the investigation. There is no basis in law that requires us to bar the grand jury from taking these considerations into account as it attempts to "ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424.

Because these considerations are within the legitimate scope of the grand jury's investigation, evidence with any

“reasonable possibility” of bearing upon them is relevant for purposes of Rule 17(c)(2)’s limitation on the subpoena power. *R. Enterprises, Inc.*, 498 U.S. at 301. Given Doe Corporation’s allegations about the government’s misconduct during the search, we conclude that there is a reasonable possibility that the security-camera footage the grand jury wants to see will be relevant to the investigation.

We note that even absent accusations of misconduct or inadmissibility, it is difficult to see how video footage of the execution of a search warrant has no possible relevance to the grand jury’s investigation. Evidence may be collected in a way that calls its reliability into question. That is why, for example, the government maintains careful chain-of-custody records. See 2 McCormick on Evidence § 213 (8th ed. 2022). Conversely, search footage may bolster the reliability of the collected evidence or point the grand jury toward further lines of inquiry by, for instance, showing where incriminating evidence was stored and who had access to the area.

Doe Corporation’s remaining arguments for quashing the subpoena are unavailing. It argues that the testimony of the agents who conducted the search should be sufficient for the grand jury’s purposes, especially given the order the agents themselves gave to shut off all security cameras. In Doe Corporation’s view, the government’s insistence on viewing the video reveals that what it really wants is a sneak peek at the evidence Doe Corporation may use in future litigation.

But there is no “rule requiring the government to show that the grand jury does not already have in its possession the information that it seeks” by subpoena. *United States v. Bell*, 902 F.2d 563, 566 (7th Cir. 1990). The grand jury is entitled to determine the depth of its investigation, and there is reason

enough here for the grand jury to prefer the video in lieu of (or in addition to) the agents' accounts. Doe Corporation bears the burden of offering something more than pure speculation about the government's improper motives. See *R. Enterprises, Inc.*, 498 U.S. at 300–01 (“[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.”) Because Doe Corporation has not provided any such evidence, it has not shown that the subpoena was issued for an improper motive.

III

The grand jury is entitled to inquire into the circumstances surrounding the collection of evidence relevant to its investigation of Doe Corporation, including any government misconduct that may have occurred in the process. We REVERSE the district court's grant of the motion to quash the grand jury subpoena.