IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	**UNDER SEAL**
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI,	)	
Defendant	)	

GOVERNMENT'S MOTION TO QUASH SUBPOENA *DUCES TECUM* SERVED ON CENTRAL INTELLIGENCE AGENCY (CIA)

The United States respectfully requests the Court to quash the subpoena *duces tecum* served on the CIA because it constitutes an abuse of Fed. R. Crim. P. 17(c). The basis for the motion is as follows:

In an attempt to circumvent the discovery procedures in this case, standby counsel served a subpoena *duces tecum* on CIA Senior Deputy General Counsel John Rizzo requiring production of essentially every document in the possession of the CIA regarding 47 members or associates of *al Qaeda*. Such a blunderbuss approach, particularly at a time of war, constitutes an abuse of Rule 17(c) that mandates the quashing of the subpoena.

Discovery in this Case

The subpoena followed an unprecedented production of discovery by the Government to date, which includes production of Rule 16 material, production of a significant portion of Jencks material, and the production of approximately 170,000 unclassified FBI-302s, which were

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produced in a format conducive to computer searches.[1] In short, the Government has far exceeded the demands of Rule 16 and 18 U.S.C. § 3500. Although a real question exists whether the scope of the Government's discovery responsibilities encompass the intelligence agencies,[2] the Government in this case has searched the files of the intelligence agencies for evidence subject to discovery. Standby counsel have repaid the Government by attempting to circumvent the discovery rules by serving this subpoena *duces tecum* on the CIA. Instead, the subpoena should be quashed and standby counsel should file an appropriate discovery motion setting forth

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[1]In addition, the Government continues to turn over any new discoverable material that comes into its possession.

[2]See, e.g., United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("[K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require us to adopt 'a monolithic view of the government' that would 'condemn the prosecution of criminal cases to a state of paralysis.") (quoting United States v. Gambino, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), aff'd, 59 F.3d 353 (2d Cir. 1995)); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996) (Kyles cannot be "read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) ("prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a *Brady* request for information regarding a government witness."); Horton v. United States, 983 F. Supp. 650, 654 (E.D. Va. 1997) ("But there is no 'duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue'"); United States v. McVeigh, 954 F. Supp. 1441, 1450 (D. Col. 1997) (Brady requires prosecutors to inform themselves about everything that is known, in any government agency, that could assist in the construction of alternative scenarios); United States v. Gonzalez, 938 F. Supp. 1199, 1207 (D. Del. 1996) (no "distinction between different agencies in the same government for the purpose of [the Brady disclosure] inquiry"). But cf. Love v. Johnson, 57 F.3d 1305, 1314 (4th Cir. 1995) ("The 'Brady' right, as recognized and implemented in Ritchie, is not limited to information in the actual possession of the prosecutor and certainly extends to any in the possession of state agencies subject to judicial control").

a detailed basis for their request. In the interim, this Court should reject standby counsel's attempt to procure "additional or advance discovery through the use of Rule 17(c) subpoenas." United States v. Beckford, 964 F. Supp. 1010, 1032 (E.D. Va. 1997); see also United States v. Morris, 287 F.3d 985, 991 (10th Cir. 2002) ("defense counsel attempted to use the Rule 17(c) subpoena for impermissible discovery purposes"), cert. denied, Morris v. United States, 122 S. Ct. 2612 (June 17, 2002).

Indeed, the wide-open discovery standby counsel now seek in the guise of a Rule 17 subpoena would render moot the carefully crafted rules of discovery. As the Supreme Court held in Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951), "[i]t was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms." Accordingly, courts have consistently held that Rule 17(c) "is not a discovery device." United States v. Fowler, 932 F.2d 306, 311 (4th Cir. 1991) (affirming Judge Bryan's denial of application for Rule 17(c) subpoena for classified material from military in prosecution of government contractor for unlawfully acquiring and disseminating classified information); see also United States v. Nixon, 418 U.S. 683, 698 (1974) (It is a "fundamental characteristic[] of the subpoena *duces tecum*" that "it was not intended to provide a means of discovery for criminal cases"); United States v. Hang, 75 F.3d 1275, 1283 (8th Cir. 1996) ("The Supreme Court established long ago that Rule 17(c) 'was not intended to provide an additional means of discovery'") (quoting Bowman Dairy Co., 341 U.S. at 220); United States v. Arditti, 955 F.2d 331, 346 (5th Cir. 1992) (improper for defendant to use Rule 17(c) subpoena "to gain knowledge that he could not obtain under Rule 16(a)(1)"); United States v. George, 883 F.2d 1407, 1418 (9th Cir. 1989) (subpoena *duces tecum* that is used as discovery device is improper, even if

information subpoenaed is otherwise discoverable pursuant to Fed. R. Crim. P. 16(a)(1)(C) and Brady); United States v. Cuthbertson, 651 F.2d 189, 195 (3d Cir. 1981) (Rule 17(c) subpoenas are not available to obtain exculpatory information in the possession of the prosecution); United States v. Beckford, 964 F. Supp. at 1022 ("introduction of the delay-saving technique in Rule 17(c) clearly was not intended to displace the role of Rule 16 in circumscribing discovery to be allowed in criminal cases"); United States v. Colima-Monge, 1997 WL 325318 at *2 (D. Ore. 1997) ("Rule 17(c) does not provide a means of discovery for criminal defendants"); United States v. Stewart, 1997 WL 103700 (E.D. Pa. 1997) (Rule 17(c) is not designed to "provide a means of discovery"). Standby counsel should also fail in their attempted end-run around the discovery rules with their use of the Rule 17(c) subpoena.

Standby Counsel Improperly Seek to Use Rule 17(c) to Conduct a Fishing Expedition

The unreasonable and boundless nature of the subpoena also undercuts the function of Rule 17(c). Put another way, Rule 17(c) subpoenas may not be used to conduct a "general fishing expedition." United States v. Nixon, 418 U.S. at 700; see also United States v. Sawinski, 2000 WL 1702032 at *2 (S.D.N.Y. 2000) ("Under Rule 17(c), the Court is to determine the reasonableness of a subpoena."). Thus, "[i]n describing the documents sought, a subpoena must refer to specific documents or, at least, to specific kinds of documents." United States v. Colima-Monge, 1997 WL 325318 at *3 (internal citation omitted). "Requesting entire files instead of specific documents indicates a fishing expedition." Id.

In Nixon, the Supreme Court set out the standard used to determine the appropriateness of a Rule 17(c) subpoena:

Under this test, in order to require production prior to trial, the moving party must

> show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700. "In short, the requesting party must 'clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.' And, 'the burden is on the party seeking production . . . to show good cause for production prior to trial.'" United States v. Beckford, 964 F. Supp. at 1022.

The subpoena fails to meet any of the prerequisites mandated by Nixon. First, standby counsel have failed to articulate the slightest relevance of the subpoenaed material, which also means that they fail to prove that they are unable to prepare for trial without the material. Standby counsel may not simply guess that the subpoenaed material might contain relevant evidence. In re Sealed Case, 121 F.3d 729, 754-55 (D.C. Cir. 1997) ("Rule 17(c) precludes use of a trial subpoena to obtain evidence that is not relevant to the charges being prosecuted or where the claim that subpoenaed materials will contain such evidence represents mere speculation."). Yet, that is precisely what standby counsel have done in this case by asking for everything but the proverbial kitchen sink regarding substantial numbers of *al Qaeda* members/associates, and doing so without an accompanying explanation or proffer as to how each of the requested documents is material to the defense.

Second, standby counsel neglect to establish the admissibility of any of the materials they seek. Indeed, standby counsel provide not one example of a single document that could be admitted as *evidence* at trial. This is unsurprising given that the vast majority of the requested materials likely are either hearsay or opinion. Thus, standby counsel have failed to demonstrate

their use at trial and their request should therefore be denied.

Relatedly, if standby counsel claim the requested materials are necessary to attack the credibility of a Government prospective witness, this reason cannot supply a basis for a Rule 17(c) subpoena. In Nixon, the Supreme Court observed that "the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." Nixon, 418 U.S. at 701. In United States v. Cuthbertson, 651 F.2d 189 (3d Cir. 1981), a case virtually identical to the present one[3], the Court refused to enforce Rule 17(c) subpoenas geared solely to the gathering of impeachment information. The defendants served a Rule 17(c) subpoena on CBS for production of notes, out takes, audiotapes, and transcripts of interviews with Government witnesses. The Court explained that "Rule 17(c) was not intended to be a broad discovery device, and only materials that are 'admissible as evidence' are subject to subpoena under the rule." Id. at 192. The requested items did not satisfy this requirement and the Court held:

> The appellees in this case have not demonstrated, nor does our research disclose, any potential use of the present materials as evidence in the trial other than for purposes of impeachment. On their face, these materials are simply hearsay. Neither the government nor defendants have asserted a relevant exception to the hearsay rule. . . . Only after a witness has testified will his prior inconsistent statement cease to be hearsay, . . . but we are unable to speculate on the likelihood of that occurrence.

Id. at 195. "Accordingly," ruled the Court, "as a matter of law the materials may not be obtained at this time by a rule 17(c) subpoena." Id.; see also United States v. Hughes, 895 F.2d 1135, 1146 (6th Cir. 1990) (Rule 17(c) subpoena to third party for impeachment material

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[3] Actually, since the defendants in Cuthbertson had subpoenaed files from third parties, their argument was stronger than in the present case, in which standby counsel seek information in the files of the Government that are already subject to discovery.

improper); United States v. Jenkins, 895 F. Supp. 1389, 1394 (D. Hawaii 1995) (Rule 17(c) not to be used to gather impeachment material). Therefore, standby counsel's purported general reason for the subpoena fails to provide an appropriate legal basis for the subpoena, supplying another rationale for quashing the subpoena.

Third, and last, there is the question of specificity. "'If the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up,' the requirement of specificity will not have been met." United States v. Sawinski, 2000 WL 1702032 at *2 (S.D.N.Y. 2000) (quoting United States v. Noriega, 764 F. Supp. 1480, 1493 (S.D. Fla 1991)). In Noriega, the court held that a subpoena for tape-recorded telephone conversations constituted a "broad dragnet aimed at bringing in anything and everything contained in the recordings regardless of their identifiable or foreseeable significance to the charges at issue." Id. at 1493; see also United States v. Hardy, 224 F.3d 752, 756 (8th Cir. 2000) (quashing subpoena as failing to meet Nixon standards); United States v. Hang, 75 F.3d at 1283 (8th Cir. 1996) (specificity element required more than the title of a document and conjecture as to its contents); United States v. Reed, 726 F.2d 570, 577 (9th Cir. 1984) (subpoena properly quashed where defendant failed to establish relevance of subpoenaed materials); United States v. Modi, 2002 WL 188327 at *2-3 (W.D. Va. 2002) (quashing subpoenas for failing to meet Nixon standards); United States v. Merlino, 2001 WL 283165 at *7 (E.D. Pa. 2001) (quashing subpoenas for information about prospective Government witnesses as "fishing expedition"); United States v. Daniels, 95 F. Supp.2d 1160, 1170 (D. Kan. 2000) (quashing subpoena as "extremely broad"); United States v. Crosland, 821 F. Supp. 1123, 1129 (E.D. Va. 1993) (rejecting a subpoena because it lacked specificity that

sought "any and all documents and records concerning the payment of any monies").

That the subpoena in the instant case is a fishing expedition is plainly borne out by the overly broad nature of the subpoena itself. The subpoena seeks *all information* from the last five years on 33 individuals and timelines or chronologies (and all underlying documentation) relating to the whereabouts of 14 individuals during the last five years. Thus, it is self-evident that standby counsel have utterly failed to tailor their subpoena to their needs in any manner.[4] Indeed, this is precisely the kind of fishing expedition that courts have precluded under Rule 17(c) and that was deemed inappropriate in Nixon.

Moreover, production of the material as mandated by the limitless subpoena would essentially require the CIA to empty its files regarding members or associates of *al Qaeda* while we are at war. The drafters of Rule 17 certainly never envisioned such a scenario. Indeed, the opposite is true. Rule 17(c) provides that "the court on motion may promptly quash or modify the subpoena if compliance would be unreasonable or oppressive." To obtain documents before trial, the party issuing the subpoena must "make a reasonably specific request for information that would be both relevant and admissible at trial." U.S. v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991).

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[4] In their Motion to Reissue Subpoenas dated October 24, 2002, standby counsel also state that the information they seek is relevant to the anticipated testimony of a government witness. Yet, counsel provide no basis to believe that "all information" about 33 individuals and all timelines and chronologies of 14 individuals is relevant to such testimony. Standby counsel's unexplained failure to identify specifics is a clear indication that they simply desire to rummage though government information, much of it highly classified, on the off chance that something useful might exist. This is precisely what they cannot use Rule 17 to do.

Rule 17 May Not be Used to Subpoena Witness Statements

Finally, to the extent that any of the subpoenaed material contains statements of prospective witnesses, such statements may not be obtained pursuant to Rule 17(c). Section 3500(a) of Title 18 specifically provides:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

See also United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994) (district court may not order early production of Jencks material). Moreover, Rule 17 itself prohibits procuring Jencks material through the use of a Rule 17(c) subpoena. Fed. R. Crim. P. 17(h) specifically states:

> (h) Information Not Subject to Subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the government or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

Rule 26. 2 follows the restrictions of 18 U.S.C. § 3500. Therefore, Rule 17 itself prohibits the use of a subpoena to acquire the statements of prospective witnesses.

Conclusion

For the many reasons set forth above, the subpoena issued on behalf of standby counsel should be quashed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on November 26, 2002, a copy of the foregoing Government's Response provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following::

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