

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)
)
vs.)
)
ERIC ROBERT RUDOLPH,)
)
Defendant.)

Case No. CR-00-S-422-S

YB

ENTERED

APR - 2 2004

ORDER

The court has before it the defendant's "Ex Parte Motion for Alternative Procedure for the Issuance of Rule 17(a) and (c) Subpoenas," filed under seal on March 15, 2004. At the outset, the court is satisfied that the motion does not reveal any defense strategy or evidence, but seeks only to establish a unique and innovative way of issuing numerous Rule 17(b)¹ subpoenas as efficiently and inexpensively as possible. As such, there is no overriding need for the motion to be under seal and, therefore, the Clerk is DIRECTED to unseal the motion [Doc. 152].

The motion recites, correctly, that this case involves many far-flung witnesses being sought by numerous investigators retained by the defense. Some of these potential witnesses are difficult to find and even more difficult to stay in touch with after they are found. For this reason, the defense seeks to be able to serve subpoenas upon witnesses at the time they are found and initially interviewed by investigators, rather than running the risk of not being able to find them a second time

¹ Although the motion recites that it seeks alternative procedures for the issuance of Rule 17(a) and (c) subpoenas, the court reads this actually to be with respect to Rule 17(b) subpoenas. As Rule 17(a) subpoenas are issued in blank by the terms of the rule, special alternative procedures are unnecessary. Rather, the motion seeks an alternative to the *ex parte* issuance procedures provided under Rule 17(b). Further, for the reasons elaborated in this order, the court declines to establish alternative procedures for Rule 17(c) subpoenas *duces tecum*.

in order to serve them with subpoenas. This means that the defense investigators must have in their possession subpoenas ready to be served at the time each elusive witness is found and interviewed. Although this poses no problem for a defendant with financial resources, for Rule 17(a) authorizes the issuances of subpoenas in blank to be filled in by the party serving them, the same is not true of subpoenas issued on behalf of indigent defendants. Rule 17(b), however, provides a mechanism through which indigent defendants may have subpoenas issued to witnesses with the cost being borne by the Government, if it is determined by the court that the witness is necessary to an adequate defense. Rule 17(b) reads:

(b) Defendant Unable to Pay. Upon a defendant's *ex parte* application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

A plain reading of the rule suggests that the defendant must make an *ex parte* application for the issuance of a subpoena before it is issued. In the circumstances of this case, investigators who locate hard-to-find witnesses once would be required to return to the court, make the *ex parte* showing required by the rule, and then seek the elusive witness a second time in order to serve it. The defense proposes an alternative procedure under which blank subpoenas (similar to Rule 17(a) subpoenas) would be issued to the defense for service at the time the witnesses are first located; then, within a period of time thereafter, the *ex parte* showing of the necessity of the witness would be made to the court. If, after the fact, the court concludes that the subpoena should not have been issued, it will quash it and the defense will be required to notify that served witness that the subpoena has been quashed.

The court finds this alternative procedure to be fair, reasonable, and in essential compliance with the *ex parte* procedures of Rule 17(b). Although subpoenas will be issued before the *ex parte* showing is made, the defendant will remain obligated to make the showing within a short period of time after service of the subpoena. The court then can carry out its duty under Rule 17(b) to assess and determine whether the subpoenaed witness is necessary to an adequate defense.² If not, the subpoena will be quashed and the witness so notified. This procedure has the benefit of being efficient and less expensive, while still maintaining the protection of the witness afforded by the court's determination of the necessity of the subpoena.

Unlike Rule 17(b) subpoenas, which demand appearance at the time of trial or other court proceeding, Rule 17(c) subpoenas *duces tecum* require the served witness to begin the process of gathering and producing documents for inspection before trial. This can be an expensive and cumbersome process. For that reason, the case law much more strictly limits the issuance of Rule 17(c) subpoenas, requiring the requesting party to show that the requested documents are specific, relevant, and admissible at trial. See United States v. Fox, 275 F.Supp.2d 1006 (D. Neb. 2003); United States v. Nixon, 418 U.S. 683, 700, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Because the standard for the issuance of Rule 17(c) subpoenas is much more stringent, imposing a higher duty of review on the court, it is important that that duty be performed before Rule 17(c) subpoenas *duces tecum* are issued. The alternative procedure of reviewing the issuance of the subpoena after it is issued fails to limit the use of such subpoenas adequately to their proper purpose of trial production, rather than discovery, and it fails to protect the witness from the initial expense and inconvenience associated with gathering documents for production.

² There is no dispute that the defendant is indigent.

The defendant's motion, therefore, is due to be and hereby is GRANTED IN PART, only with respect to the issuance of Rule 17(b) subpoenas in blank, subject to the following procedures:

1. The Clerk is DIRECTED to sign, seal, and issue one hundred (100) blank, sequentially numbered Rule 17(b) subpoenas in this action, delivering them to counsel for the defendant.

2. Within the **earlier** of either thirty (30) days following the service of each respective subpoena or not less than fifteen (15) days prior to the court proceeding for which the subpoena is issued, counsel shall prepare and file under seal an *ex parte* showing with respect to each served subpoena, identifying the sequential number of the subpoena, the name and address of the witness served, and why that witness is necessary to an adequate defense.

3. In the event no such showing is filed within the time allowed by this order, or the court otherwise determines that the subpoena should not have been issued and served, the court may quash the subpoena and require defense counsel to notify the witness that the subpoena has been quashed, and to certify to the court, *ex parte* and under seal, that such notification has been made. To be clear, the burden is upon defense counsel to make timely *ex parte* showings with respect to served subpoenas, and failure to do so may result in the quashing of the subpoena.

4. Defendant may move, *ex parte* and under seal, for the issuance of additional blank subpoenas as may be necessary in the future.

5. Nothing in this Order limits or precludes the issuance of subpoenas otherwise consistent with F.R.Crim.P. 17.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 2nd day of April, 2004.

A handwritten signature in black ink, appearing to read "T. Michael Putnam", written in a cursive style with a long horizontal flourish extending to the right.

T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE