

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

FILED

04 MAY 10 AM 8:44

dc

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

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

FILED UNDER SEAL

Case Number: CR 00-S-422-S

GOVERNMENT'S FILING UNDER SEAL

** unsealed 5/25/04 per order doc #223*

210

denial nor a refusal to produce the documents under the *Touhy* regulations; instead, the government is unable to make a decision on the subpoenas under the *Touhy* regulations, because the federal officials tasked with that responsibility cannot be informed of the request.

The *Touhy* regulations were promulgated by the United States Attorney General, apply to all employees subject to the control of the Attorney General, and "set[] forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department." 28 C.F.R. §16.21(a)&(b). Furthermore, the validity of regulations such as these was explicitly upheld by the Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The Eleventh Circuit subsequently applied the U.S. Supreme Court's ruling in *United States ex rel. Touhy v. Ragen* to a criminal case in which the United States was a party and found that the DOJ's *Touhy* regulations are constitutional. *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982) (considering 1980 version of regulations).

The defendant urges the court to reject the application of the *Touhy* regulations to this case or, alternatively, to limit DOJ review of the subpoenas to a lawyer not involved in the prosecution. *Defendant's Reply to Motion to Quash Subpoenas Issued to the Bureau of Alcohol, Tobacco, Firearms & Explosives*

(*Defendant's Opposition*), pages 4-5. In effect, the defendant is seeking an order invalidating the regulations and requiring subordinate DOJ employees to undermine the Attorney General's explicit directives without justification. In support of his position, the defendant devotes the bulk of his brief in opposition to the motion to quash, and for that matter the bulk of his *ex parte* application for Rule 17(c) subpoenas, to establishing his entitlement to documents. At present, the BATF takes no position as to the merits of the subpoena – the defendant may or may not be entitled to documents or information from the agency's files; in fact, because of the *Touhy* regulations, BATF can not presently take a position as to the merits of the subpoena. As stated previously, BATF filed the motion to quash based on the procedural issue of whether the subpoena should remain sealed rather than based on any substantive issue regarding the subpoena itself. And yet, in response to the motion to quash, the defendant offers little to support his position that he is entitled to *ex parte* proceedings. In the absence of a constitutional or statutory basis entitling the defendant to an *ex parte* process, this court must uphold the *Touhy* regulations in this case. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); see also *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982); see also *State of North Carolina v. Carr*, 264 F. Supp. 75, 80 (W.D.N.C.), appeal dismissed 386 F.2d 129, 131 (4th Cir. 1967) (Department of Justice Order No. 324-64,

predecessor to 28 C.F.R. § 16.21 et seq., should be accorded the force of law because it is "lawful and fully authorized by law.")

II. The Touhy Regulation Must Be Upheld Because The Defendant Has No Constitutional Or Statutory Right To An Ex Parte Process.

The defendant filed, under seal, an *ex parte* application for the issuance of the Rule 17(c) subpoenas presently in dispute.¹ In his application, the defendant points to his indigent status and asserts that the request was made *ex parte* because, in making the application, the defendant "disclose[d] [his] strategy and attorney work-product."² *Defendant's Ex Parte Application For Issuance of Rule 17(c) Subpoena*, p. 6.

Fed. R. Crim. P. 17 governs the process whereby subpoenas for testimony and the production of documents are issued in criminal cases. The rule contains provisions which are directed to the issuance of subpoenas for use at trials and related proceedings; the case law is replete with opinions emphatically stating that the rule and its provisions governing the pretrial inspection of documents are not to be used as a substitute for discovery or as an

¹ After the filing of the BATF's motion to quash, by order entered May 4, 2004, the court unsealed to the undersigned assistant U.S. attorney said application for issuance of Rule 17(c) subpoenas and the corresponding order granting said application.

² Respondent BATF is seeking either to have the subpoenas in dispute quashed, or in the alternative, unsealed to the prosecution team so that the Touhy regulations can be followed. Counsel is unaware of any reason why, at this time, the underlying application would have to be unsealed.

adjunct to Rule 16 procedures, see *United States v. Nixon*, 418 U.S. 683, 698-99 (1974), citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *United States v. Hart*, 826 F. Supp. 380, 382 (D. Colo. 1993); *United States v. Ferguson*, 37 F.R.D. 6, 7 (D.D.C. 1965).

Subsection (c) of Rule 17, upon which the defendant relies, contains the Rule's provision regarding the issuance of subpoenas duces tecum. It provides that a party may require documents be produced at the time of trial. A party may also request that documents be produced for inspection prior to trial, as the defendant seeks here, but this may only be done with the permission of the court. This particular portion of the rule was designed to address the problem of mid-trial delays caused by the need for parties to review documents being produced in response to a subpoena duces tecum at trial. *United States v. Ferguson, supra*, 37 F.R.D. at 7. Of particular importance here is that Subsection (c) also provides that if a court decides to allow pretrial production, it may also permit the opposing party to inspect the documents when they are produced for the requesting party.

In *United States v. Nixon, supra*, the Supreme Court discussed Rule 17's provision for pretrial inspection, and ruled that because it is not to be used as a discovery tool, a party requesting a pre-trial subpoena duces tecum must establish the following facts before pretrial inspection will be ordered: "(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 to unreasonably 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.

Many courts that have considered *ex parte* demands for documents under 17(c) have found that, given the above-described statutory scheme, such requests are not permissible and have refused to allow them. *See generally, United States v. Finn*, 919 F. Supp. 1305, 1330 (D. Minn. 1995), *aff'd* 121 F.3d 1157 (8th Cir. 1997); *United States v. Najarian*, 164 F.R.D. 484, 488 (D. Minn 1995); *United States v. Hart*, 826 F.Supp. 380, 382 (D. Colo. 1993); and *United States v. Urlacher*, 136 F.R.D. 550, 552 (W.D.N.Y. 1991). These authorities have identified a number of reasons why *ex parte* subpoenas *duces tecum* are not permitted under the Rule.

The primary reason cited in refusing to authorize such *ex parte* subpoenas is that Rule 17(c), by its very language, simply does not permit it. *See generally United States v. Urlacher*, *supra*, 136 F.R.D. at 552. Subsection (c)'s silence on this matter is particularly significant in view of subsection (b)'s specific provision for *ex parte* procedures in the case of subpoenas for

testimony³, *id.* In addition, while the Rule is clearly not to be used as a discovery tool, secret, one-sided review of documents pretrial would accomplish just that. Furthermore, the Rule's provision for motions to quash contemplates participation by the opposing party in the process. Perhaps most significant, however, is that to allow pretrial inspection of documents or an *ex parte* basis would be completely inconsistent with the Rule's provision for simultaneous inspection by the opposing party. See *United States v. Urlacher*, 136 F.R.D. at 555-56; *see also United States v. Hart*, *supra*, 826 F.Supp at 381 (scheme of Rule 17 prohibits pretrial, *ex parte* production of documents); *United States v. Najarian*, *supra*, 164 F.R.D. at 488 (where pretrial review of documents is sought pursuant to Rule 17, application should be reviewable by other party).

In fact, in *United States v. Ferguson*, *supra*, the court implicitly recognized the need for the opposing party to be notified of the issuance of this type of subpoena, and of the corresponding right to object to its issuance, 37 F.R.D. at 7-8. *Ferguson* also recognized that the very purpose for which the pretrial inspection provision was created would be defeated by a procedure that would allow only one party pretrial access to

³ Any argument that the U.S. Constitution requires that Rule 17(c) be construed as authorizing an *ex parte* process is suspect in light of the fact that, prior to 1966, Rule 17, F. R. Crim. P., did not allow for *ex parte* applications at all.

documents -- which it presumably intends to offer into evidence -- before they are to be introduced at the trial. Because the government would have a concomitant right to inspect these documents before they are introduced, to allow one-sided inspection before trial would invite the very type of mid-trial delay the rule was designed to avoid, see *id.* at 7.

The defendant cites the need to prevent disclosure of his defense strategy as a reason for *ex parte* proceedings. The government respectfully notes that it is unaware of any provision in the law that shields this information. Defendant's attempt to keep his theories from being revealed is ephemeral at best; very shortly they will be apparent to the government upon the filing of a motion to suppress. Moreover, it is difficult to see how the subpoenas or the subpoenaed documents themselves will reveal any defense work product. In reality, a claim that the disclosure of a pretrial subpoena duces tecum will reveal information pertinent to defense theories could be made by any defendant in any criminal case, and the government respectfully submits that creating a precedent of issuing *ex parte* pretrial document subpoenas for that reason would create a dangerous precedent. As observed by the Court in *United States v. Najarian, supra*, using such concerns to justify an *ex parte* application evinces a misunderstanding of the rule's purpose.

The defendant cites *U.S. v. Beckford*, 964 F. Supp. 1010 (E.D. Va. 1997) for the proposition that Rule 17(c) authorizes *ex parte* procedure with respect to the issuance of pre-trial subpoenas in rare instances. *Defendant's Ex Parte Application For Issuance of Rule 17(c) Subpoena*, p. 6. The government disagrees with much in the *Beckford* decision; however, even if persuasive to this court, a full and fair reading of that decision supports a finding that the defendant is not entitled to an *ex parte* proceeding in this case. The facts in this case and in *Beckford* differ significantly. The defendant in this case is demanding from BATF, an DOJ investigative agency supporting this prosecution, the disclosure of information and documents related, at least in part, to methodologies and techniques used in investigation of the defendant. In contrast, the *Beckford* defendant's sought documents unrelated to the underlying criminal investigation from agencies uninvolved in said investigation. The particular material and entities subpoenaed were of significance to the district court in rendering its decision in *Beckford*:

...Rule 17(c) authorizes *ex parte* procedure with respect to the issuance of pre-trial subpoenas only in exceptional circumstances. Ordinarily, *ex parte* procedure will be unnecessary and thus inappropriate. For example, where one party subpoenas documents from the files of the opposing party, *ex parte* procedure would not be available. The same would obtain for defense subpoenas seeking documents from state law enforcement agencies officially involved in the federal investigation of the crimes on trial. Nor could *ex parte* process be

used to seek documents as to which both parties will have pre-trial access.

Beckford, 964 F. Supp. at 1030 (citing *Urlacher*, 136 F.R.D. at 556). In this case, the defendant is seeking to subpoena material, to which both parties will have pre-trial access, from an opposing party, a Department of Justice investigative agency intimately involved in the underlying criminal investigation (rather than from some government agency unrelated to the prosecution of this case); and therefore, *Beckford* does not support the defendant's position. Because the defendant lacks any constitutional or statutory right to an *ex parte* process, the *Touhy* regulations are due to be upheld.

Conclusion

For the foregoing reasons, this Court should grant the BATF's motion to quash the defendant's subpoenas.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

ARTHUR R. GOLDBERG
Assistant Branch Director

JOSHUA Z. RABINOVITZ
Trial Attorney
United States Department of Justice

Civil Division, Room 7220
20 Massachusetts Ave, N.W.
Washington DC 20530
Telephone: (202) 353-7633
Fax: (202) 616-8470

SHARON D. SIMMONS
Assistant United States Attorney
Attorney No. 2082



EDWARD Q. RAGLAND
Assistant United States Attorney
Attorney No. 7291
1801 4th Avenue North
Birmingham, AL 35203
(205) 244-2109
(205) 244-2181 (FAX)

OF COUNSEL:

Richard Isen
Office of Chief Counsel
Bureau of Alcohol, Tobacco,
Firearms, & Explosives
650 Massachusetts Avenue, NW Room 6100
Washington, DC 20226
(202) 927-8213
(202) 927-8673 (FAX)

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon the following by mailing the same by facsimile transmission and by first class United States mail, properly addressed and postage prepaid, on this the 10th day of May, 2004:

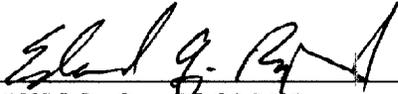
Judy Clarke, Esq.
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Fax No. (619) 687-2666

Richard Jaffe, Esq.
Derek Drennan, Esq.
JAFFE, STRICKLAND & DRENNAN, P.C.
2320 Arlington Avenue
Birmingham, AL 35205
Fax No. (205) 930-9809

William M. Bowen, Jr., Esq.
WHITE ARNOLD ANDREWS & DOWD
2025 3rd Avenue North, Suite 600
Birmingham, AL 35203
Fax No. (205) 323-8907

Emory Anthony, Jr., Esq.
2015 First Avenue, North
Birmingham, AL 35203
Fax No. (205) 328-6957

Michael N. Burt, Esq.
600 Townsend Street, Suite 329-E
San Francisco, CA 94103
Fax No. (415) 522-1506



EDWARD Q. RAGLAND
Assistant United States Attorney