

*****TO BE FILED UNDER SEAL*****

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IN THE UNITED STATES DISTRICT COURT U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA N.D. OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 V.) CR00-S-422-S
)
 ERIC ROBERT RUDOLPH,)
)
 Defendant.)

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

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

UNITED STATES OF AMERICA,)	
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Plaintiff,)	<u>FILED UNDER SEAL</u>
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V.)	Case No. CR-00-S-422-S
)	
ERIC ROBERT RUDOLPH,)	
)	
Defendant.)	

**DEFENDANT’S RESPONSE TO GOVERNMENT’S REPLY
RE MOTION TO QUASH SUPBOENAS ISSUED TO THE BATF**

The Government now argues that the *Touhy* regulations must be upheld unless there is a Constitutional or statutory basis for a defendant seeking the issuance of subpoenas *ex parte*. [Govt Reply, p. 3, 10]. For support the Government relies upon its conclusion that Rule 17(c) does not permit *ex parte* proceedings, and stakes out the position that it is unaware of any provision in the law that shields defense strategy. [Govt. Reply, p. 6, 8]. It is unclear whether the Government takes this position for all defense Rule 17(c) subpoenas, or only the one at issue. Regardless, the Government’s position is wrong and should be rejected by this Court.¹

The simple fact there is a split in the district courts regarding whether Rule 17(c) provides for an *ex parte* application itself indicates that there is authority to permit *ex parte* applications under Rule 17(c). Indeed, the Government recognizes *Beckford*, the case upon

¹ This position is also contrary to one taken by the Government when it sought to obtain *ex parte* pretrial subpoenas duces tecum. See *United States v. Reyes*, 162 F.R.D. 468 (S.D.N.Y.) (Government attorney’s letter brief noting that U.S. Attorney’s Office in Southern District of New York has generally sought Rule 17(c) subpoenas on an *ex parte* basis; Court finding strong policy reasons in favor of an *ex parte* procedure, including that a party may have to detail its trial strategy in order to convince a court that the subpoena satisfies *Nixon* standards of specificity, relevance and admissibility.)

which the defendant's *ex parte* application for the subpoenas duces tecum relied, but also cites to a handful of district court cases that stand for the proposition that Rule 17(c) does not provide for *ex parte* procedures.² *Beckford* does not stand alone, as there are a number of district courts that have concluded that Rule 17(c) subpoenas may be obtained *ex parte*.³ In addition, the apparently lone Circuit Court of Appeal to address the question concluded that Rule 17(c) provides for an *ex parte* application. *United States v. Hang*, 75 F.3d 1275, 1282 (8th Cir. 1996) (“we conclude that an indigent defendant may, pursuant to Rule 17(c) make an *ex parte* request to the district court for issuance of a subpoena duces tecum”). The reasoning and conclusion of the Court in *Hang* is sound, supports the earlier ruling of this Court in granting Mr. Rudolph's *ex parte* application and reaches the same result as that reached in at least two reported federal capital cases. See Footnote 2, *supra*.

The government asserts that “it is unaware of any provision in the law that shields” disclosure of defense strategy. [Govt. Reply, p. 8] Clearly, a criminal defendant's constitutional rights to counsel, to the effective assistance of counsel, and to attorney-client confidentiality

² The cases relied on by the Government are not capital cases, while *United States v. Beckford*, 964 F.Supp. 1010 (E.D. Va. 1997), relied on by the defendant, was a federal capital case. Another federal capital case in which the Court upheld *ex parte* procedures is *United States v. Johnson*, 2004 U.S. Dist. LEXIS 7018 (April 23, 2004) (agreeing with *Beckford*).

³ Some district courts have found that *ex parte* applications under Rule 17(c) may be granted routinely, provided they meet the *Nixon* test. See *United States v. Florack*, 838 F.Supp. 77 (W.D. N.Y. 1993) (documents requested in connection with pretrial suppression hearing, distinguishing *Urlacher* and finding that “defendants are entitled to apply in an *ex parte* proceeding to determine whether a subpoena duces tecum should issue); *United States v. Reyes*, 162 F.R.D. 468 (S.D.N.Y. 1995) (“strong policy reasons in favor of an *ex parte* procedure, i.e., the source or the integrity of the evidence might be imperiled by early disclosure, or a party might have to detail its trial strategy or witness list in order to convince a court that the subpoena satisfies the *Nixon* standards; furthermore, the non-moving party may lack standing to challenge a subpoena issue to a third party absent a claim of privilege or a proprietary interest in the subpoenaed material.”). Others, like *Beckford*, have held that *ex parte* applications may be appropriate in limited circumstances. See *United States v. Daniels*, 95 F. Supp. 2d 1160, 1162-63 (D. Kan. 2000); *United States v. Tomison*, 969 F.Supp. 587, 589-95 (E.D. Ca. 1997).

include the right not to be compelled to prematurely divulge trial strategy. In determining whether a criminal defendant whose attorney-client deliberations have been ruptured by a covert government agent has shown the prejudice necessary to make out a sixth amendment violation, one of the factors a court must consider is whether the prosecution received otherwise confidential information about trial preparations or defense strategy as a result of the intrusion. *Weatherford v. Bursey*, 429 U.S. 545 (1977)⁴; *United States v. Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986). See also, *United States v. Durant*, 545 F.2d 823, 828 (2d Cir. 1976) (“Defense

⁴ *Weatherford v. Bursey*, 429 U.S. 545, 562-563 (U.S., 1977):

“There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it), the defendant, or the defense counsel. In *Wardius v. Oregon*, 412 U.S. 470 (1973), this Court made clear that while ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded... it does speak to the balance of forces between the accused and his accuser.’ *Id.*, at 474. Due process requires that discovery “be a two-way street.”

‘The State may not insist that trials be run as a “search for truth” so far as defense witnesses are concerned, while maintaining “poker game” secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.’ *Id.*, at 475-476.

“At issue in *Wardius* was a statute compelling defendants to provide certain information about their case to the prosecution. But the same concerns are implicated when the State seeks such information, not by force of law, but by surreptitious invasions and deceit.

“Of equal concern, governmental incursions into confidential lawyer-client communications threaten criminal defendants’ right to the effective assistance of counsel.”

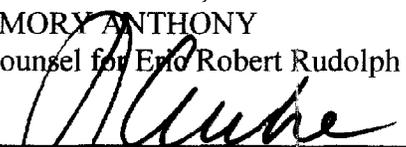
counsel cannot be held accountable for not having outlined the identity defense more clearly when he requested appointment of an expert, because the judge failed to conduct the proceeding ex parte. The [Criminal Justice] Act, see text accompanying note 5 supra, calls for an ex parte application to protect the defense from premature disclosure to the prosecution of defense strategy.”); *United States v. Stepney*, 246 F. Supp. 2d 1069, 1078 (N.D. Cal. 2003) (“The court has nonetheless conducted its inquiry into joint defense agreements in camera in order to avoid offering the prosecution any hint of defense strategies.”); *United States v. Lindh*, 198 F. Supp. 2d 739, 742 (E.D. Va. 2002) (“Specifically, he first argues that his ability to prepare for trial is burdened because the proposed protective order requires pre-screening of investigators and expert witnesses before information contained in the redacted interview reports may be disclosed to them. This requirement, defendant argues, might result in revealing defense strategy to the prosecution. This argument, although not without some force, does not compel the conclusion that no protective order is appropriate.”); *United States v. Poindexter*, 725 F. Supp. 13, 29 (D.D.C. 1989) (“Defendant’s more specific proffer concerning the materiality of the Presidential and Vice Presidential documents was submitted in camera (to avoid the disclosure of possibly privileged documents) and ex parte (to avoid revelation of defense strategy to the prosecution in advance of trial).”). Furthermore, even the Federal Rules of Civil Procedure provide that “[i]n ordering discovery ... the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” FRCP 26(b)(3).

CONCLUSION

This Court had and has the authority to permit Mr. Rudolph to proceed *ex parte* in applying for these Rule 17(c) subpoenas.

Dated: May 12, 2004

Respectfully Submitted,
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