

1) The Government's request to be permitted to listen to recordings of all of Eric Rudolph's phone conversations since he has been housed at the Jefferson County Jail is nothing more than a "fishing expedition" premised upon zero facts and zero allegations that such recordings contain anything more than the intimate and personal conversations between himself and his mother or other family members. The Government's filing makes no effort to suggest that anything of any value will be contained on these recordings. Instead the Government relies on its mere curiosity that there may possibly be something of value on the tapes. This is insufficient to justify the issuance of a subpoena for the recordings and is an abuse of Rule 17(c). The Federal Rules of Criminal Procedure do not suggest or imply that the Court facilitate either party in the issuing, haphazardly, of subpoenas premised upon mere guesses, speculation and curiosity. The Rules exists so that a party may make legitimate requests for materials based upon demonstrated facts and

be treated the same as calls to lawyers without interfering with the function or primary use of the phone system generally.

Given that set of facts, it is the Defendant's position that the recordings may not fit an exception to the Federal Wiretap statutes in that they are not recorded "by an investigative or law enforcement officer in the ordinary course of his duties" which would include security, but not "phone call control management," nor would the consent to being monitored extend beyond the scope of general security or legitimate law enforcement functions. See 18 U.S.C. 2510(5)(a)(ii) and 18 U.S.C. 2511(2)(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.") In short, the Defendant's consent, if any, is limited to the monitoring phone calls for the purpose of the security of the facility in which he is housed. The Defendant has not consented to having personal calls of a personal nature perused randomly by the Government without any basis in security or other legitimate law enforcement function. Any inmate of any facility should have privacy to the extent that he can talk to his family or friends without fear that their intimate conversations with be passed around U.S. Attorney Offices, FBI Offices and ATF Offices in Birmingham, Atlanta and Washington, D.C. without some showing that the conversations contain more than the persons respective feelings for one another.

Further, it is the Defendant's position that any recording of the Defendant's phone calls under these circumstances is a violation of his privacy right's in that the phone calls are being recorded without any actual justification and not for security or other legitimate law enforcement function. The defendant realizes that his expectation of privacy is diminished while in the Jefferson County Jail. However, his limited privacy rights would override the jail's interest in making such recordings where there is no legitimate use or need for such recordings.

Further, should the court reject the Defendant's objection pursuant to Rule 17, the Defendant objects further to the issuance of the subpoena due to the possibility that attorney-client phone calls may inadvertently be subject to recording and thus be subject to the subpoena.

reasonable beliefs that the materials will have some bearing on the matters before the court. See United States v. Nixon, 418 U.S. 683 (1974).

2) The Government's request does not comport with the letter and spirit of Rule 17(c). In a request for a subpoena to issue pursuant to Rule 17(c) the Government, "in order to carry [its] burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." United States v. Nixon, 418 U.S. 683, 700 (1974). Stated otherwise, the Government 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.'" United States v. Nixon, 418 U.S. 683, 699-700 (1974).²

² The cases cited by the Government, United States v. Hammond, 286 F.3d 189 (4th Cir. 2002), United States v. Correa, 220 F.Supp.2d 61 (D.C. Mass. 2002) and Unites States v. Valencia, 711 F.Supp. 608 (S.D. Fla. 1989) all involve Title III based suppression motions concerning the admissibility of recorded phone calls made by an inmate defendant which had already been obtained by subpoena. None of the cases deal directly or indirectly with Rule 17(c). In two of the cases cited by the Government, Hammond and Valencia, law enforcement had undertaken some investigation demonstrating that the recordings contained evidentiary material prior to the Government effort to obtain them by subpoena. In Hammond, the defendant, after a remand for a hearing, presented a witness, Queen Tynes, who, suspiciously, had not testified in previous proceedings. Hammond, at 191. It was discovered that the defendant had made several calls to this witness from prison to the witness prior to the testimony presented. Hammond, at 191. A subpoena was issued for the tapes *after* these facts were demonstrated. Id. at 191. In Valencia, law enforcement determined from conversations with a confidential informant that the tapes contained evidence of past and present criminal activity. Valencia, at 610. After this information came to light, law enforcement sought a subpoena. In Correa, jail employees permitted investigating officer's access to an inmates phone calls prior to the issuance of a subpoena or court order in violation of jail policy. Correa, at 62. Law enforcement subpoenaed all of the recordings after being permitted to listen to some of these recordings. Correa, at 62. The district court refused to suppress the recordings, but did not address the validity of the issuing subpoena. Correa, at 61. (It is not stated in Correa, but it can be inferred that the jail officials who shared the recordings with investigators had some legitimate law enforcement concern regarding the substance of Correa's calls prior to their disclosure to investigators.)

The Government has not demonstrated through its motion the items sought are "evidentiary" or "relevant" as required by law. ("Evidentiary" in this context is equivalent to admissibility. See United States v. Nixon, 418 U.S. 683, 699-700 (1974)). Given that the Government has stated that asserted that admissibility is not an issue despite its necessity according to United States Supreme Court case law, it can be inferred that the Government has no basis for requesting these recordings, that the Government has no information to suggest that they contain relevant information, and that the Government is seeking them out of mere curiosity. See "United States' Motion For Issuance Of Rule 17(c) Subpoena," page 2. The Government has not shown that its preparation for trial will be impaired without the production of these recordings. Finally, the Government has not demonstrated in its motion that its request is made in "good faith" and not simply a "fishing expedition."³

3) Rule 17(c) is not designed to serve as a substitute for discovery. Bowman Dairy Co. v. United States, 341 U.S. 214, 71 S.Ct. 675, 95 L.Ed. 879 (1951). "This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." United States v. Nixon, 418 U.S. 683, 699 (1974). The fact the Rule is not intended to serve as a discovery tool further underscores the fact that such subpoenas should only issue where the movant can specify the

In each of these cases the jail officials monitoring the calls used the phone recording system for security. See Hammond, at 191 (BOP officials monitor some, but not all calls made by inmates), See Valencia, at 609, 610 ("These multiple lines are monitored by two MCC-Miami officials"), See Correa, at 62 ("The calls are subject to monitoring by prison officials").

³ Should the Government seek to establish some factual basis for the issuance of the subpoena, the Defendant requests that such a showing be made at an *in camera* hearing in the Defendant's presence.

relevance and the need for the materials requested.⁴

RESPECTFULLY SUBMITTED,


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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 10th day of December, 2003, served a copy of the foregoing by United States mail, postage prepaid and properly addressed, and/or by hand-delivery, to AUSA Michael Whisonant, United States Attorney's Office, 1801 4th Avenue North, Birmingham, AL 35203.


RICHARD S. JAFFE

⁴ The Defendant requests a hearing on all factual and legal issues raised in this motion should the Court find that Rule 17(c) and United States v. Nixon, 418 U.S. 683 (1974) do not prohibit the issuance of the subpoena.