

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
ANDRE HENRY	:	NO. 06-33-01
	:	

ORDER & MEMORANDUM

ORDER

AND NOW, this 25th day of January, 2007, upon consideration of defendant Andre Henry's *pro se* Motion for Subpoena (Doc. No. 254, filed Nov. 20, 2006), defendant Andre Henry's *pro se* Motion for Subpoena (Doc. No. 292, filed Dec. 12, 2006), the Government's Response in Opposition to Defendant's Pro-se Motions for Subpoena[s] (Doc. No. 312, filed Dec. 29, 2006), and a letter from Andre Henry's counsel dated December 29, 2006 ("Dec. 29, 2006 Letter"),¹ **IT IS ORDERED THAT** defendant Andre Henry's *pro se* Motion for Subpoena (Doc. No. 254) and defendant Andre Henry's *pro se* Motion for Subpoena (Doc. No. 292) are **DENIED**.

IT IS FURTHER ORDERED that the Deputy Clerk shall serve copies of this Order and Memorandum on all counsel and on defendant, Andre Henry.

MEMORANDUM

I. INTRODUCTION

On October 24, 2006, defendant, Andre Henry, was charged in a 28-count Superseding

¹ The Deputy Clerk shall docket a copy of the letter from Andre Henry's counsel dated December 29, 2006.

Indictment in connection with eight robberies of fast food restaurants, the purchase and possession of firearms and assault weapons, two armed bank robberies, a conspiracy to commit a third armed bank robbery, a car jacking and police shooting, and solicitation to commit murder of a federal grand jury witness. Defendant filed two motions for subpoenas pursuant to Federal Rules of Criminal Procedure 17(c). For the reasons set forth below, defendant's motions are denied, and no subpoena shall issue.

II. SUBPOENA REQUESTS

In defendant's first motion for a subpoena, defendant makes the following subpoena requests:

1. Video surveillance tapes from Abington Gun Sports for the months of September and October 2003;
2. Video surveillance tapes from First National Penn Bank for the months of September and October 2003;
3. Video surveillance from State Correctional Institute at Somerset ("SCI Somerset") for the period of June 20, 2005 to July 15, 2005, and specifically, an interview of defendant by law enforcement agents;
4. Video surveillance from the state parole suboffice on Wayne Avenue in Philadelphia for October 21, 2003;
5. The complete parole file and supervision history of Andre Henry from SCI Greene;
6. The complete parole file and supervision history of Craig Williams, also known as Theodore Mills;
7. Craig Williams's phone calls from SCI Somerset from May 2, 2004 to February 29, 2005, and Craig Williams's telephone list;
8. Craig Williams's telephone list from the Federal Detention Center in Philadelphia ("FDC");
9. Craig Williams's telephone list from SCI Mercer;

10. Federal Firearm License and renewal payments to hold an active license for four gun stores;
11. Handwritten papers and mail from SCI Greene for Andre Henry.

In defendant's second motion for a subpoena, defendant makes the following subpoena requests:

1. Surveillance tapes from National Penn Bank from September 1, 2003 to October 21, 2003;
2. Surveillance tapes from Abington Gun Sports from August 7, 2003 and August 13, 2003;
3. SCI Somerset to produce:
 - a. Video surveillance from the Restricted Housing Units conference rooms for June 2, 2005 to July 15, 2005;
 - b. Inmate Theodore Mills's recorded telephone calls and telephone number list from May 2, 2004 until January 27, 2005;
4. SCI Mercer to produce:
 - a. Inmate Theodore Mills's recorded telephone conversations from January 28, 2005 to February 14, 2006;
 - b. Inmate Inmate Theodore Mills's complete parole and security investigation file;
5. SCI Greene to produce inmate Andre Henry's complete parole and security file;
6. The Bureau of Alcohol, Tobacco, and Firearms to produce renewal applications, renewal payments, and proof of a valid or invalid license for four gun stores from August 1, 2003 to October 31, 2003; and
7. Checkers, Wendy's, McDonald's, and Burger King to produce:
 - a. Names and addresses of wholesalers;
 - b. Records, names, and locations of accounts payable for wholesalers for the last quarter of 2003;

- c. Reported loss of assets by way of robbery for each quarter of the year 2003;
- d. Proof of insurance for fire, theft, and mismanaged funds;
- e. Reported value of assets replaced through insurance; and
- f. Net asset value for each quarter of the year 2003.

III. LEGAL STANDARD

Federal Rule of Criminal Procedure 17(c) governs the use of subpoenas to obtain documentary evidence in criminal cases.² “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.” United States v. Dent, 149 F.3d 180, 191 (3d Cir. 1998) (citing United States v. Cuthbertson, 651 F.2d 189, 192 (3d Cir. 1981)); see also Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951) (“Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials.”) “Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in

² The Rule provides as follows:

A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

Fed. R. Crim. P. 17(c).

criminal cases found in Fed. R. Crim. P. 16.”³ Cuthbertson, 630 F.2d at 146.

Under United States v. Nixon, 418 U.S. 683, 699-700 (1974), a moving party must satisfy the following four-part test before a subpoena may issue pursuant to Rule 17(c):

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.’

Moreover, “[c]ourts have consistently interpreted the admissibility standard of Rule 17(c) to preclude production of materials whose evidentiary use is limited to impeachment.” United States v. Cherry, 876 F. Supp. 547, 553 (S.D.N.Y. 1995) (citing, among other cases, United States v. Hughes, 895 F.2d 1135, 1146 (6th Cir. 1990) and United States v. Fields, 663 F.2d 880, 881 (9th Cir. 1981)); see also United States v. Merlino, 349 F.3d 144, 155 (3d Cir. 2003) (“As for the District Court’s rejection of the 17(c) subpoena, defendants acknowledge that

³ As the Third Circuit stated in United States v. Ramos, 27 F.3d 65, 68 (3d. Cir. 1994),

In contrast to the wide-ranging discovery permitted in civil cases, Rule 16 of the Federal Rules of Criminal Procedure delineates the categories of information to which defendants are entitled in pretrial discovery in criminal cases, with some additional material being discoverable in accordance with statutory pronouncements and the due process clause of the Constitution.

impeachment material is generally not subject to pre-trial disclosure under the Rule.”)

IV. ANALYSIS

Each of defendant’s subpoena requests are either irrelevant, inadmissible, overbroad, or unnecessary. Furthermore, defendant’s subpoena requests collectively evince that defendant’s applications were not made in good faith, but were rather intended as a general “fishing expedition.” Nixon, 418 U.S. at 700. Accordingly, the Court denies defendant’s motions for subpoenas, and no subpoena shall issue. The Court addresses each of defendant’s subpoena requests in turn.

A. Defendant’s First Motion for a Subpoena

As to the video surveillance tapes from Abington Gun Sports for the months of September and October 2003, the Court determines that defendant’s request is irrelevant and overbroad, as defendant is charged with purchases made on August 7, 2003 and August 13, 2003. Moreover, according to the government, surveillance tapes from those two dates do not exist. (Gov’t Resp. at 1.)

As to the video surveillance tapes from First National Penn Bank for the months of September and October of 2003, this information has been subpoenaed by the government, but had not been received as of December 29, 2006. (Id. at 1-2.) The government states that these video surveillance tapes will be provided to defendant once they are received, as part of the government’s continuing discovery obligations. (Id.)

As to the video surveillance from Somerset SCI for the month of June 20, 2005 to July 15, 2005, and more specifically, an interview of defendant by law enforcement agents, the Court

determines that this request is overbroad in that it seeks surveillance tapes for nearly a month, during which defendant was interviewed briefly during one day. (Id. at 2.) Moreover, according to the government, the statements made by defendant were not taped. (Id.)

As to the video surveillance from the state parole suboffice on Wayne Avenue in Philadelphia for October 21, 2003, the Court determines that defendant has not met his burden of showing that this video surveillance is relevant and admissible in his case.

As to the complete parole file and supervision history of Andre Henry, the government states that the only relevant documents in this case have already been turned over in discovery to defendant. (Id. at 2.) Of the documents that have not been turned over to defendant by the government, the Court determines that defendant has not met his burden of showing the relevance and admissibility of such evidence.

The complete parole file and supervision history of Craig Williams, also known as Theodore Mills, pertains to a cooperating witness who will be testifying against defendant at trial. The Court determines that defendant has not demonstrated the admissibility of this evidence beyond mere impeachment purposes, as is required before a subpoena may issue under Rule 17(c). Cherry, 876 F. Supp. at 553. For this reason, the Court also denies the following subpoena requests: (1) Craig Williams's phone calls from SCI Somerset from May 2, 2004 to February 29, 2005 and Craig Williams's telephone list; (2) Craig Williams's telephone list from the FDC; (3) and Craig Williams's telephone list from SCI Mercer.

As to the Federal Firearm License and renewal payments to hold an active license for the four gun stores, the government states that the Federal Firearm Licenses have been ordered, and

will be turned over to defendant as part of the government's continuing discovery obligations once they are received. The Court determines that production of renewal payments sought by defendant are irrelevant so long as the gun stores carry a valid Federal Firearm License.

As to the handwritten papers and mail from SCI Greene for Andre Henry, the Court determines that defendant has failed to set out with specificity what handwritten papers or mail he is seeking. Moreover, to the extent that defendant seeks all handwritten papers or mail, the Court determines that the request is overbroad.

B. Defendant's Second Motion for a Subpoena

As to the surveillance tapes from National Penn Bank from September 1, 2003 to October 21, 2003, the Court rejects defendant's request because it essentially duplicates a request made by defendant in his first motion.

As to the surveillance tapes from Abington Gun Sports from August 7, 2003 and August 13, 2003, according to the government, these surveillance tapes do not exist. (Gov't Resp. at 1.)

As to the video surveillance from the Restricted Housing Units conference rooms at SCI Somerset for June 2, 2005 to July 15, 2005, the Court determines that this request is overbroad, as defendant was interviewed briefly during one day. (Id. at 2.) Moreover, the statements made by defendant were not taped. (Id.)

As to each of defendant's subpoena requests that pertain to Theodore Mills, the Court determines that defendant has not demonstrated the admissibility of this evidence beyond mere impeachment purposes, as is required before a subpoena may issue under Rule 17(c). Cherry, 876 F. Supp. at 553.

As to inmate Andre Henry's complete parole and security file from SCI Greene, the Court rejects defendant's request because it essentially duplicates a request made by defendant in his first motion.

As to the renewal applications, renewal payments, and proof of a valid or invalid license for the four gun stores from August 1, 2003 to October 31, 2003, the Court rejects defendant's request because it essentially duplicates a request made by defendant in his first motion.

As to the evidence pertaining to Checkers, Wendy's, McDonald's, and Burger King, the government intends to call witnesses from each of the fast food corporations, who will testify that the products used by their restaurants are purchased outside the Commonwealth of Pennsylvania. (Gov't Resp. at 4.) Hence, the Court determines that requiring production of the information sought by defendant is overbroad and irrelevant.

V. CONCLUSION

For the foregoing reasons, defendant's motions for subpoenas are denied, and no subpoena shall issue. If the defense develops a need during trial for any witness not then subpoenaed, defendant is granted leave to file a motion for subpoena in which defendant sets forth in detail why such a subpoena is appropriate under Nixon, 418 U.S. 683 at its progeny.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.