

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 JOSEPH MERLINO, et al. : NO. 99-0363

MEMORANDUM AND ORDER

HUTTON, J.

March 19, 2001

Presently before this Court are Government's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 381) Defendants' Joint Response to Government's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 386), Government's Reply Memorandum of Law in Support of It's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 390), Defendants' Joint Motion to Authorize Issuance of Rule 17(c) Subpoena and accompanying Memorandum of Law (Docket No. 409), Government's Response to Defendant's Reply Memorandum of March 15, 2001 Regarding Bureau of Prisons Tapes and arguments of counsel presented at a hearing on March 13, 2001.

I. BACKGROUND

On December 15, 1999, Defendant Joseph Merlino's attorney asked the prosecutors in this case to preserve, as possible Jencks and Brady material, all Bureau of Prisons ("BOP") tape recordings of telephone conversations of Ralph Natale. In response, the

government filed a motion for an order directing the BOP to preserve all BOP tape recorded conversations of Ralph Natale. On February 15, 2001, this Court Ordered the BOP to preserve and maintain all tape recorded telephone conversations of Ralph Natale, to the extent that such recordings exist or come into existence, until the completion of the Defendant's trial. Entry of that Order neither required nor authorized the BOP to record any telephone conversations of Ralph Natale that would otherwise not be recorded in accord with BOP policy or federal law that governs electronic surveillance and consensual recordings. See Court's Order of February 15, 2000. Thereafter, the government served the BOP with two subpoenas dated August 2, 2000 and January 9, 2001, directing the BOP to preserve and make copies of all existing BOP tape recorded conversations of Ralph Natale. The BOP provided the prosecutors in this case with 26 cassette tapes which included 231 telephone calls of Ralph Natale taped recorded by the BOP from October 11, 1999 to December 16, 1999. The government has located an additional 72 telephone calls of Ralph Natale (resulting in a total of 303 conversations) in its possession that were tape recorded from November 6, 1999 to November 25, 1999 by the BOP in the ordinary course of its operation and pursuant to routine practices. In addition, prosecutors have turned over to Defendants tape recordings and transcripts of three conversations of Ralph

Natale and forty-six excerpts of the other 300 Ralph Natale conversations.

On March 30, 2000, Defendant Frank Gambino's attorney requested the prosecutors in this case to preserve, as possible Jencks or Brady material, all BOP tape recorded conversations of Gaetano Scafidi, Peter Carpio, Robert Luisi and Fred Angelucci. In response to this request, the government served the BOP with four subpoenas, dated June 19, 2000, July 19, 2000, August 22, 2000 and September 22, 2000, which requested the BOP to preserve copies of existing BOP tape recorded conversations of Gaetano Scafidi and the government likewise served the BOP with two subpoena, dated October 23, 2000 and November 22, 2000, which requested that the BOP preserve copies of existing BOP tape recorded conversations of Peter Caprio.

The government in this case did not request that the BOP copy or preserve any telephone conversations of Ralph Natale, Gaetano Scafidi and Peter Caprio for any criminal investigation or prosecution purpose. Rather, the government did so solely in response to defense attorneys' request that these tape recordings be preserved for possible discovery.

On February 12, 2001, the government filed a motion to vacate this Court's Order to preserve the BOP tape recordings. On March 15, 2001, Defendants' jointly motioned this Court to authorize the issuance of a Rule 17(c) subpoena requiring pretrial production the

BOP tapes.

II. ANALYSIS

As noted above, Defendants here seek pretrial discovery of certain tape recordings made by the BOP. Some of these tape recordings have been examined by the prosecution. The government has provided Defendants with three conversations and forty-six excerpts. Defendants seek production of the remaining tapes.

A. Defendants' Evidentiary Request

The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with the United States Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). See *Kyles v. Whitley*, 514 U.S. 419, 431 (1995). In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See *Brady*, 373 U.S. at 87. To state a valid *Brady* claim, a plaintiff must show that the evidence was (1) suppressed, (2) favorable, and (3) material to the defense. See *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991). Evidence is material if there is a reasonable probability that the outcome would have been different had the evidence been disclosed to the defense. See

United States v. Bagley, 473 U.S. 667, 682 (1985). Evidence that may be used to impeach may qualify as Brady material. See Kyles, 514 U.S. at 445; Bagley, 473 U.S. at 676.

The Supreme Court subsequently held that the prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused. See United States v. Agurs, 427 U.S. 97, 107 (1976). Evidence is favorable to the accused under Brady "if it would tend to exculpate him or reduce the penalty" See Brady, 373 U.S. at 87-88. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. See Kyles, 514 U.S. at 437.

Although courts have used different terminologies to define "materiality," a majority of the United States Supreme Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. See Pennsylvania v. Richie, 480 U.S. 39, 57 (1987). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." See *id.*; see also United States v. Bagley, 473 U.S. 667, 682 (1985).

Even though this duty of disclosure is tightly tethered to constitutional guarantees of due process, "the Constitution is not violated every time the government fails or chooses not to disclose

evidence that might prove helpful to the defense." See *Kyles*, 514 U.S. at 436-37. Rather, the prosecution's failure to disclose evidence rises to the level of a due process violation "only if the government's evidentiary suppression undermines confidence in the outcome of the trial." *Id.* at 434. Thus, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the [concealed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

Applying this standard at this juncture raises the concern that the prosecutor may withhold a piece of given evidence because it is difficult to know exactly what might become important later. While the definition of materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. See *id.*; 514 U.S. at 437. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. See *id.* But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is

in good faith or bad faith, see Brady, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Here, Defendants have been provided three full taped and recorded conversations of Ralph Natale from the government. See Transcript of Hearing, March 13, 2001, at 16, lines 10-13. In addition, Defendants have been provided with forty-six excerpts from another 300 conversations. See *id.*, lines 13-15. Although the government has provided Defendants three full conversations and forty-six excerpts, the government has never conceded that this evidence is Brady material. See *id.* at 25-27; 53, lines 13-14. Defendants, however, argue that these tapes demonstrate bias. See Transcript of Hearing, March 13, 2001, at 13, 35-37, 46. Because the government has provided these tapes to Defendants, they are free to vigorously cross-examine any witness about the issues they suggest these tapes reveal.

As to the remaining tapes that Defendants seek to have produced, the government maintains that these tape recorded conversations do not contain Brady material. Defendants argue that they are entitled to discovery of the 300 undisclosed telephone calls that the government has reviewed as well as those unreviewed tapes in possession of the BOP. See Defs.['] Jt. Memo. Of Law in Support of Defs.['] Mot. for Rule 17(c) Subpoena, and Defs.['] Jt.

Reply Memo. To Government's Mot. to Vacate Order Directing Preservation of Evidence, 10. Their argument for further production of the taped conversations rests on their interpretation of the three telephone conversations of Ralph Natale with Daniel D'Ambrosia and forty-six excerpted conversations of Ralph Natale. These conversations, the Defendants argue, demonstrate the bias of Natale against the Defendants, his expectations of leniency and also Natale's urging to Peter Caprio, through D'Ambrosia, to cooperate with the government. See Transcript of Hearing, March 13, 2001, at 13, 35-37, 46.

Defendants may not require this Court to search through the BOP tape recorded conversations without first establishing a basis for their claim that the tapes contain material evidence. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (party must at least make some plausible showing of how their testimony would have been both material and favorable to his defense). The Third Circuit in *United States v Riley*, rejected a defendant's argument that the district court should not have accepted the government's representation that certain wiretap recordings did not contain any Brady material and that the district court was required to inspect the wiretap recordings to determine whether they contained Brady material. See 237 F.3d 300, 322-24 (3d Cir. 2001). A defendant seeking an in camera inspection to determine whether files contain Brady material must at least make a plausible showing

that the inspection will reveal material evidence. See *Riley*, 237 F.3d at 323; see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15 (1987) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). Mere speculation is not enough. See *Riley*, 237 F.3d at 323; *United States v. Navarro*, 737 F.2d 625, 631 (7th Cir. 1984).

Here, Defendants fail to make a plausible showing that an inspection of the tapes will reveal material evidence. At the Hearing held on this issue, Defendants admitted no knowledge of Brady material on the tapes being sought. See Transcript of Hearing, at 37, lines 19-20; at 40, lines 19-24. Defendants, rather, base their argument on supposition and guess work. It was asserted at the hearing that because a review of 300 conversations produced forty-six excerpts that arguably contain Brady material, a review of the remaining BOP tapes would yield a similar percentage of helpful evidence. See Transcript of Hearing, at 13, lines 8-15; at 43, lines 20-25; at 44, lines 1-3; at 47, lines 6-11. Defendants argue:

[o]f the three hundred tapes in the prosecution's possession, 40 of them, in its estimation, contain material evidence. This is approximately 15% of the tapes reviewed. If this number proves to be consistent, then that means that of the remaining 1379 Natale tapes, approximately 200 will contain relevant, evidential material. There is no reason to believe that the other Natale tapes involving call to his spouse will be any different. Of course, they are going to be discussing his expected sentence, his book and movie deal, others who can support his version of events by cooperating, and his feelings about the Co-Defendants."

See Defs.['] Jt. Memo. Of Law in Support of Defs.['] Mot. for Rule 17(c) Subpoena, and Defs.['] Jt. Reply Memo. To Government's Mot. to Vacate Order Directing Preservation of Evidence, 6-7.

Defendants' "plausible showing" essentially argues that where there is smoke, there must be fire. The Court, however, needs more than speculation that an in camera review will yield material evidence. The government has represented that the tapes it has examined do not contain Brady material and the Court accepts that representation. The government is aware of its obligations under Brady. Defendants have only speculated as to the contents of the tapes based on percentages. The Court finds that this is not enough to satisfy the legal standard established by the United States Supreme Court and the Third Circuit.

B. Defendants' Motion to Authorize Issuance of Rule 17(c) Subpoena Requiring Pretrial Production of Documents

As a threshold matter, Defendants assert that the government does not have standing to ask for the vacation of this Court's Order. See Defs.['] Jt. Memo. Of Law in Support of Defs.['] Mot. for Rule 17(c) Subpoena, and Defs.['] Jt. Reply Memo. To Government's Mot. to Vacate Order Directing Preservation of Evidence, 2. The United States Supreme Court has explained that it is the responsibility of the court, not the opposing party, to ensure that a subpoena secured under Rule 17(c) is for a proper purpose. See *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221

(1951). For this reason, the Court will analyze Defendants' request for a Rule 17(c) subpoena on its merits.

Rule 17(c) is not a method of discovery in criminal cases. See *United States v. Cherry*, 876 F. Supp. 547, 552 (S.D.N.Y. Feb. 17, 1995). Indeed, "[c]ourts must be careful that Rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in Federal Rule of Criminal Procedure 16." See *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980).

Rule 17(c) of the Federal rules of Criminal Procedure states that:

[a] subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

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

To ensure that Rule 17(c) subpoenas are not abused, a party seeking production of documents must demonstrate that the materials sought are relevant, admissible and specifically identified. See *United States v. Nixon*, 418 U.S. 683, 700 (1974). Stated another way, in order to require production prior to trial, the moving party 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) the application is made in good faith and is not intended as a general "fishing expedition". See *Nixon*, 418 U.S. 683, 699-700 (1974).

Defendants fail to meet their burden in several respects. In *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951), the United States Supreme Court identified the scope of material that is subject to subpoena under the rule. The Court held that "any document or other materials, admissible as evidence" is subject to subpoena under the rule. *Id.* at 221. Thus, Rule 17(c) is designed as an aid for obtaining relevant evidentiary material that the moving party may use at trial. See *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980). Under the "evidentiary" standard of *Bowman*, Rule 17(c) permits a party to subpoena materials that may be used for impeaching a witness called by the opposing party, including prior statements of the witness. See *Cuthbertson*, 630 F.2d at 144. Because such statements ripen into evidentiary material for purposes of impeachment only if and when the witness testifies at trial, impeachment statements, although subject to subpoena under rule 17(c), generally are not subject to production and inspection by the moving party prior to trial. See *Nixon*, 418

U.S. 683, 701; *United States of America v. Coriaty*, Crim.A. 99-1251, 2000 WL 1099920, at *7-8 (S.D.N.Y Aug. 7, 2000) (stating courts have consistently interpreted admissibility standard of Rule 17(c) to preclude production of materials whose evidentiary use is limited to impeachment); *United States v. Nachamie*, 91 F. Supp. 2d 565, 564 (S.D.N.Y Jan. 6, 2000)(stating Rule 17(c) request was improper because it may contain impeachment material rather than evidence); *United States v. Cherry*, 876 F. Supp. 547, 553 (S.D.N.Y. Feb. 17, 1995).

Here, Defendants assert that "[t]he materials in the tapes which are sought directly relates to the reliability of three key witnesses: Natale, Caprio and Scafidi, each of whom are receiving plea bargains in exchange for their testimony. Their bias, motives, expectation of leniency and participation in other crimes, especially those against Defendants, are highly probative . . . There is no other or better way to prepare effective cross examination . . . these tapes allow impeachment on bias and motive as well as the witnesses' expectation of leniency. See Defs.['] Jt. Memo. Of Law in Support of Defs.['] Mot. for Rule 17(c) Subpoena, and Defs.['] Jt. Reply Memo. To Government's Mot. to Vacate Order Directing Preservation of Evidence, 8-9. Because Defendants' requested Rule 17(c) subpoena clearly seeks impeachment evidence, it is improper.

Additionally, the Court concludes that Defendants' are engaged in a fishing expedition. Rather than specifically targeting evidentiary and relevant material, the proposed subpoena appears to be an attempt by Defendants to unearth a mass of personal communications by potential government witnesses in an attempt to find anything that might impeach their credibility. Defendants posit that because the disclosed tapes contain helpful evidence, then the undisclosed tapes must also contain helpful evidence. See Defs.['] Jt. Memo. Of Law in Support of Defs.['] Mot. for Rule 17(c) Subpoena, and Defs.['] Jt. Reply Memo. To Government's Mot. to Vacate Order Directing Preservation of Evidence, 8-9 (see quote from Defendants' Memorandum, supra page 7). Defendants have no basis in fact to conclude that the undisclosed tapes have helpful information. Such a factually baseless request is nothing more than a fishing expedition and thus cannot serve as a basis for a Rule 17(c) subpoena.

Finally, Defendants are seeking all 2200 tape recorded conversations made by the BOP of Ralph Natale, Peter Caprio and Gaetano Scafidi. As noted above, Defendants request is based on its mathematical evaluation of the discovery produced by the government thus far. The Court concludes that such a vague and inexact request does not pass muster under the 17(c) standard.

Because Defendants have failed to meet their burden under Rule 17(c) of demonstrating that the information sought is evidentiary,

that the request was not a fishing expedition and that the request was specific, the Court will not authorize the requested Rule 17(c) subpoena.

An appropriate Order follows.

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O R D E R

AND NOW, this 19th day of March, 2001, upon consideration of Government's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 381) Defendants' Joint Response to Government's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 386), Government's Reply Memorandum of Law in Support of It's Motion to Vacate Court's Order to Preserve Certain Tape Recordings (Docket No. 390), Defendants Joint Memorandum of Law in Support of Defendants Motion for Rule 17(c) Subpoena, and Defendants Joint Reply Memorandum to Government's Motion to Vacate Order Directing Preservation of Evidence (Docket No. 409), Government's Response to Defendant's Reply Memorandum of March 15, 2001 Regarding Bureau of Prisons Tapes and arguments of counsel presented at a hearing on March 13, 2001, IT IS HEREBY ORDERED that the government's Motion to Vacate Court's Order to Preserve Certain Tape Recordings is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Motion for Rule 17(c)
Subpoena is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.