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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Criminal No. 2:10CR186-MHT**
	)	
MILTON E. MCGREGOR,	)	
THOMAS E. COKER,	)	
ROBERT B. GEDDIE, JR.,	)	
LARRY P. MEANS,	)	
JAMES E. PREUITT,	)	
QUINTON T. ROSS, JR.,	)	
HARRI ANNE H. SMITH,	)	
JARRELL W. WALKER, JR.,	)	
and	)	
JOSEPH R. CROSBY,	)	
	)	
Defendants.	)	

UNITED STATES' MOTION TO QUASH TRIAL SUBPOENAS FOR RECORDS ISSUED TO SCOTT BEASON, PARKER AND TOWNES, P.C., BENJAMIN HARRISON LEWIS, AND CHARLES B. MASK

COMES NOW, the United States of America, by and through its undersigned attorney, and respectfully moves this Court to quash the trial subpoenas for records requested by counsel for defendant Milton McGregor issued to Scott Beason, Parker and Townes, P.C., Benjamin Harrison Lewis, and Charles B. Mask.

In support of this motion, the Government states the following:

I. RELEVANT BACKGROUND

A. The Trial Subpoenas

On April 19, 2011, defense counsel for McGregor issued trial subpoenas to four non-parties to this litigation: Scott Beason; Parker and Townes, P.C., Beason's personal accountant; Benjamin

Harrison Lewis; and Charles B. Mask. The subpoenas each sought trial testimony from the non-parties,[1] as well as documents, electronically-stored information, and other objects.[2]

1. Records Sought From Scott Beason

The subpoena issued to Beason made eight demands for records that fall under four categories:

(a) Beason's personal affairs (*i.e.*, "Any and all . . . diaries or calendars" for 2009 and 2010; and "a complete copy of [Beason's] records" related to the "construction" of Beason's house in Gardendale, Alabama);

(b) Beason's legislative affairs (*i.e.*, "Any and all polls and/or surveys" from June 1, 2009, through November 10, 2010, in Beason's legislative district; and "[a]ny and all documents relating to any legislative bills" regarding "bingo, gaming and/or gambling");

(c) Beason's electronic communications (*i.e.*, "Any and all" cell phone records, including text messages, from March 1, 2009, through April 30, 2010; and "[a] copy of all emails sent or received" for 2009 and 2010); and

(d) Beason's financial records (*i.e.*, "state and federal income tax returns" for 2008 to the present; and "[a]ny and all" documents relating to "monies and/or checks received by [Beason] for any purposes whatsoever . . . from Jarrod Massey" from 2008 to the present).

Beason has not, to date, provided any documents sought in the subpoena to defense counsel.

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[1] As to the requests for personal appearance, defendant McGregor has agreed to release Beason, Lewis, and Mask from their obligations under the respective subpoenas to appear in court based on the Government's representation that, with 48-hours notice, the Government will make Beason, Lewis, and Mask available to McGregor in court.

[2] For the Court's convenience, copies of each subpoena are attached to this motion as Exhibits 1 (Beason), 2 (Parker and Townes), 3 (Lewis), and 4 (Mask).

2. Records Sought From Parker and Townes, P.C.

The subpoena issued to Parker and Townes sought everything related to its client, Beason: "Any and all documents regarding, concerning and relating to Jason Scott Beason also known as Scott Beason." On or about May 3, 2011, Parker and Townes – through custodian Chris Townes, Beason's accountant – provided defense counsel with records pursuant to the subpoena, including Beason's tax return information.

The tax return information that Townes provided to the defense, which covered 2001 through 2004, was unredacted and included the Social Security numbers for Beason, his wife, and his two dependent children.

The firm did not consult with or otherwise notify Beason of the subpoena or its disclosure of their tax and personal identity information.

3. Records Sought From Benjamin Harrison Lewis

The subpoena issued to Lewis made five demands for records that fall under four categories:

(a) Lewis' personal affairs (*i.e.*, "Any and all . . . diaries or calendars" for 2009 and 2010);

(b) Lewis' legislative affairs (*i.e.*, "Any and all polls and/or surveys" from 2008 until his swearing-in as a state judge);

(c) Lewis' electronic communications (*i.e.*, "Any and all" cell phone records, including text messages, from March 1, 2009, through April 30, 2010; and "[a] copy of all emails sent or received" for 2009 and 2010); and

(d) Lewis' judicial-appointment records (*i.e.*, "Any and all documents regarding [Lewis'] appointment as District Judge in Houston County, Alabama" in 2010).

Lewis has not, to date, provided any documents sought in the subpoena to defense counsel.

4. Records Sought From Charles B. Mask

The subpoena issued to Mask made six demands for records that fall under five categories:

(a) Mask's personal affairs (*i.e.*, "Any and all . . . diaries or calendars" from January 1, 2010, through April 30, 2010);

(b) Mask's legislative affairs (*i.e.*, "Any and all polls and/or surveys" from June 1, 2009, through November 2010);

(c) Mask's electronic communications (*i.e.*, "Any and all" cell phone records, including text messages, from February 1, 2010, through April 30, 2010; and "[a] copy of all emails sent or received" for 2009 and 2010);

(d) Mask's contact with specified individuals (*i.e.*, "Any and all documents" related to contact with Mike Hubbard, McGregor, Bob Riley, Michael Robinson, Chris Murphy, Robert Lambert, Bob Geddie, and/or Keith Baker from February 1, 2010, through April 30, 2010); and

(e) Mask's records related to Steve Windom, LLC (*i.e*, "Any and all documents" from the time Mask "received any funds and/or money from Steve Windom LLC to present date").

Mask has not, to date, provided any documents sought in the subpoena to defense counsel.

B. Government's Attempt To Narrow The Record Requests

Upon reviewing the record requests, the Government conferred with counsel for McGregor in an attempt to narrow the scope of the requests contained in the Mask, Lewis, and Beason subpoenas in order to permit the witnesses an opportunity to faithfully and fully comply and in order to determine the relevance of the requests. While McGregor's attorneys have made efforts to narrow

the scope of those requests,[3] as explained below, the Government is of the view that those efforts fall short of complying with Federal Rule of Criminal Procedure ("Rule") 17.

II. ARGUMENT

The subpoenas at issue directed to the non-parties in this case lack any reasonable degree of specificity and otherwise seek records the relevance of which is impossible to discern by virtue of the requests' vagueness and overbreadth. By virtue of this absence of particularity, the witness' ability to comply with the subpoenas is questionable, at best, in that several requests essentially seek every hard-copy or electronic record applicable to the witnesses, whether or not in their possession or related to any issue in this litigation. Additionally, these vague and overbroad subpoenas suggest nothing more than McGregor's attempt at gathering alternative-means discovery and impeachment material. As such, quashing these subpoenas is the justified remedy.

It is well-settled law that a trial subpoena issued pursuant to Rule 17(c) "[is] not intended to provide a means of discovery for criminal cases." *United States v. Nixon*, 418 U.S. 683, 698 (1974); *see also United States v. Cuthbertson*, 630 F.2d 139, 146 (3rd Cir. 1980) ("Courts 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 Fed.R.Crim.P. 16."). Thus, before a witness can be compelled to comply with a Rule 17(c) subpoena, the subpoena proponent – in this case, McGregor – bears the burden of proof in establishing: (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

[3] Even with McGregor's efforts to narrow the requests (as detailed in Exhibits 5, 6, and 7), these subpoenas are an impermissible attempt to gather alternative-means discovery and impeachment material. *See* Exhibit 5 ("[W]e are looking for anything that in any way possibly relates to this case or any of the issues in this case.")

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." *See Nixon*, 418 U.S. at 699-700. In other words, the subpoena proponent must meet three core obligations: "(1) relevancy; (2) admissibility; (3) specificity." *See id.*

A court may quash an improper Rule 17(c) subpoena on two bases – if "compliance would be unreasonable or oppressive" under Rule 17(c)(2), or if "the party seeking production has not met its burden of demonstrating that the threshold requirements for issuance have been met." *See id.* at 701. In this case, quashal is justified on both grounds: first, compliance with the subpoenas would be unreasonable and oppressive because the requests are vague and overbroad; and second, the requests have no apparent relevance to the litigation.

A. <u>The Subpoenas Are Vague And Overbroad</u>

As to Beason, Lewis, and Mask, the subpoenas at issue seek a virtually unlimited range of records, including those that may not be in the witnesses' possession. Faithful compliance would likely become a full-time task for these non-parties, causing an unreasonable and oppressive burden.

As a primary example, the subpoenas call for the witnesses to produce records related to their personal affairs, legislative affairs, and electronic communications without any limitations to the subject matter: the subpoenas universally ask for "[a]ny and all . . . diaries or calendars," "[a]ny and all polls and/or surveys," "[a]ny and all" cell phone records, and "all emails sent or received." The absence of any subject-matter search parameters suggests that McGregor is using the subpoenas as an alternative means of discovery, which the law clearly prohibits. *See, e.g.*, *United States v. Richardson*, 607 F.3d 357, 368 (4th Cir. 2010) ("A subpoena is unreasonable or oppressive if it is 'excessively broad' or 'overly vague'" because "a fundamental concern is that the subpoena duces tecum is not intended to provide a means of pretrial discovery") (citations omitted). Although the

law does not require McGregor to know with exactitude the documents he desires for his defense, his subpoenas' open-ended inquisition for *all* diaries, calendars, cell phone records, and emails *include* everything and *exclude* nothing. The requests sought here, in short, are prototypical examples of an improper "fishing expedition."

The overbroad and vague nature of the requests are also problematic because they could potentially include privileged communications or records – whether, for example, with his spouse, an attorney, or a clergyman. Although the fact of a recognized privilege will not, on its own, necessarily bar disclosure in a Rule 17(c) subpoena context, McGregor carries the burden of proving that his requests – the vagueness and overbreadth notwithstanding – outweigh the need to respect any privilege that may exist.

Thus, because the subpoenas issued to Beason, Lewis, and Mask are overbroad and overly vague, compliance would be unreasonable and oppressive and the Court should quash them.

B. The Subpoenas Have No Apparent Relevance To The Litigation

As a consequence of the overbroad and vague nature of the records requests, there is no meaningful way to discern the relevance of many of the records that the subpoenas would capture. The universal requests for diaries, calendars, cell phone records, and emails of the witnesses will inevitably include records that are purely personal in nature without any relevance to the litigation or any basis for admissibility in evidence. McGregor, who carries the burden of establishing the propriety of his subpoena request, cannot show that a blanket request for these witnesses' diaries, calendars, cell phone records, and emails could, as stated, satisfy any test of relevance or admissibility in this trial. *See, e.g.*, *Cuthbertson*, 630 F.2d at 145 ("[O]nly evidentiary material is subject to subpoena under rule 17(c).").

The requests include other record demands on the witnesses that also suffer from a relevance problem. As to Beason's subpoena, McGregor seeks Beason's income tax returns for 2008 through the present day.[4] The subpoena also seeks all records "relating to the construction" of Beason's house in Gardendale, Alabama. In addition to the request's overbreadth, there is no apparent basis emanating from the indictment for McGregor's request other than his fishing for potential impeachment material against Beason. A request for this purpose is plainly improper. *See, e.g.*, *id.* at 146 ("Thus, the defendants' broad request, which was only slightly limited by the district court, was based solely on the mere hope that some exculpatory material might turn up. We do not think that this 'mere hope' justifies enforcement of a subpoena under rule 17(c).").

Like the Beason request, McGregor's document demand to Parker and Townes bears the same indicia of irrelevance and improper discovery.[5] Even assuming that *all* of Beason's tax returns are, in fact, relevant to this case, there is no apparent relevance – other than for purposes of discovery – to seek Beason's accountant's records about its client. Moreover, the request lacks any date range, which could then call for Parker and Townes to produce (if it has not already done so) records that far exceed any notion of subject-matter reasonableness.

Finally, as to the subpoenas directed to Lewis and Mask, these requests also contain non-germane demands that suggest McGregor is using Rule 17 as a discovery tool. Lewis has been

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[4] Interestingly, McGregor seeks no such time limitation in demanding documents from Beason's accountant. In the subpoena to Parker and Townes, McGregor sought *all* tax records related to Beason regardless of time.

[5] The Parker and Townes subpoena also possibly violated Rule 17(c)(3)'s prohibition against the issuance of a subpoena for "personal or confidential information about a victim" absent a court order. In light of the fact that Beason blew the whistle to federal law enforcement when he was solicited with the conspiracy, he became in a very real way a victim of the scheme. In that event, the Parker and Townes subpoena should be quashed due to the Rule 17(c)(3) violation and the documents that the firm has produced to date should be barred from use at trial.

commanded to produce all records regarding his "appointment as District Judge" in 2010. As for Mask, McGregor has demanded that he turn over any document related to Steve Windom LLC. Neither Lewis' appointment as a judge nor Mask's relationship with Steve Windom LLC have any role in the criminal charges alleged against McGregor and his co-defendants and the Court should quash the witnesses' compliance unless McGregor can articulate satisfactory compliance with the requirements in *Nixon*.

III. CONCLUSION

Based on the foregoing, the Court should grant the Government's motion and quash the subpoenas issued to Scott Beason, Parker and Townes, P.C., Benjamin Harrison Lewis, and Charles B. Mask.[6]

Respectfully submitted,

Dated: June 1, 2011

By: s/ Justin V. Shur

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[6] Additionally, given the return date on the subpoenas is approaching, the Government requests that the Court suspend that date until this motion can be resolved.

CERTIFICATE OF PRE-FILING CONFERENCE

I HEREBY CERTIFY that, under Local Rule 16.1(c)(1), the Government has conferred with the defense in a good-faith effort to resolve the issues raised in the Government's motion and has been unable to resolve the issues.

s/ Justin V. Shur
Justin V. Shur
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 1, 2011, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the attorneys of record for the defendants.

s/ Justin V. Shur
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