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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL ACTION NO.
	)	2:10-cr-186-MHT
	)	
MILTON E. McGREGOR	)	

ORDER

Pending before the Court are the *State of Alabama's Motion to Quash Subpoenas to Testify at Trial or in the Alternative to Limit Scope of Discovery* (Doc. 1182, filed May 25, 2011) and *Former Governor Bob Riley's Motion to Quash or Modify Subpoena to Testify at Trial* (Doc. 1186, filed May 26, 2011). The motions have been referred by the District Judge to the undersigned for disposition. After the June 11, 2011 hearing and due consideration of briefs, arguments, and applicable law, the Court finds the motions are due to be GRANTED in part and DENIED as moot in part.

I. BACKGROUND

On October 1, 2010, Defendant Milton E. McGregor ("Defendant McGregor") was indicted as part of a multi-count indictment against eleven defendants. *See* Doc. 1. The indictment generally alleges that the defendants conspired to bribe and corruptly influence Alabama legislators to secure the passage of Senate Bill 471 ("SB471") and House Bill 676 ("HB676"). *Id*. On or about April 19, 2011, counsel for Defendant McGregor issued trial subpoenas to four non-parties to this litigation: former Alabama Governor Bob Riley, former

Alabama Department of Public Safety Director Chris Murphy, current Alabama Department of Public Safety Director Hugh McCall, and current Alabama Department of Public Safety Executive Counsel Michael Robinson. *See* Doc. 1227, Exhibits. On May 25, 2011, the State of Alabama ("the State") filed its motion to quash asserting that the four witnesses sought have no direct knowledge about issues relevant to this criminal proceeding and thus cannot provide any admissible testimony. *See* Doc. 1182 at p. 1. Further, the State asserts that even if they did have relevant knowledge, any information and testimony related to ongoing state criminal investigations are subject to privilege. *Id*. On May 26, 2011, Governor Riley filed his own separate motion to quash. *See* Doc. 1186. In his motion, Governor Riley asserts the same rationale as the State in that he does not have any relevant personal, nonprivileged knowledge concerning the alleged acts made the basis of the Indictment. *Id*. at p. 2. Further, he also asserts undue burden as it would interfere with a preexisting trip to Alaska. *Id*. at p. 3-4. The District Judge ordered Defendant McGregor to show cause by June 3, 2011 why the motions to quash should not be granted. *See* Doc. 1192. Defendant McGregor filed his response wherein he states the subpoenas were proper and the objections are without basis. *See* Doc. 1227. The sole legal argument presented in the response is the Sixth Amendment guaranty of compulsory process and that the right to compel attendance is "vital to the presentation of a meaningful defense." *Id*. Defendant McGregor does not address the legal arguments and authorities asserted by the State and former Governor Riley. On June 8, 2011, the District Judge referred these motions to the undersigned for resolution. As such, the Court

convened a hearing on June 11, 2011.

The Court first notes that prior to the hearing, Defendant McGregor and the State resolved all issues pertaining to the documents at issue. Consequently, the resolved portions of the motions are moot. All that remains for the Court's resolution is the testimony of Riley, Murphy, McCall, and Robinson.

II. DISCUSSION AND ANALYSIS

"There is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977). However, over time, several statutory and judicial rules have evolved to govern criminal discovery including the Federal Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and The Jencks Act codified at 18 U.S.C. § 3500. Rule 16 of the Federal Rules of Criminal Procedure specifically governs criminal discovery and imposes discovery obligations on both the government and the defense. *See* FED. R. CRIM. P. 16. Under Rule 16, a criminal defendant is entitled to rather limited discovery. In contrast, a party in a civil case is entitled as a general matter to any information sought if it appears "reasonably calculated to lead to the discovery of admissible evidence." *Compare* FED. R. CRIM. P. 16 *with* FED. R. CIV. P. 26(b)(1); *see also Degen v. United States*, 517 U.S. 820, 825-26, 116 S.Ct. 1777, 1781-82, 135 L.Ed.2d 102 (1996) (comparing limited discovery in criminal cases and the broad discovery in civil cases).

Rule 17(c) of the Federal Rule of Criminal Procedure governs the use of subpoenas in

federal criminal proceedings. *See United States v. Silverman*, 745 F.2d 1386, 1397 (11th Cir. 1984). "A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates" and states that the court "may direct the witness to produce the designated items in court before trial." FED. R. CRIM. P. 17(c)(1). Further, "[o]n motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." FED. R. CRIM. P. 17(c)(2). Rule 17(c) is "not intended to provide an additional means of discovery," but "to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220, 71 S.Ct. 675, 679, 95 L.Ed. 879 (1951); *accord United States v. Nixon*, 418 U.S. 683, 698, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Moreover, "[i]t was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms." *Bowman Dairy*, 341 U.S. at 220, 71 S.Ct. at 679. Thus, under *Nixon*, a party seeking a subpoena duces tecum under Rule 17(c) 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.'" *Nixon*, 418 U.S. at 699-700, 94 S.Ct. at 3103. In other words, the proponent of the subpoena "must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id*. at 700, 94 S.Ct. at 3103.

Almost universally, courts apply the *Nixon* factors to determine whether to quash a subpoena issued under Rule 17. In dicta, the Supreme Court indicates that a lower standard might be appropriate for cases involving subpoenas issued to non-parties, but did actually not decide whether such a lower standard exists. *See id.* at 701 n. 12, 94 S.Ct. at 3103 n. 12. At least one judge in the Southern District of New York has held that the resolution of challenges to subpoenas issued by defendants to non-parties should be limited to whether the subpoena at issue is "reasonable" and not "unduly repressive." *United States. v. Nachamie*, 91 F.Supp.2d 552, 562 (S.D.N.Y. 2000). More recently that same judge expressly held that the lower evidentiary standard governs. *See United States v. Tucker*, 249 F.R.D. 58, 66 (S.D.N.Y. 2008) (holding that subpoenas issued by defendants to non-parties should be enforced if "reasonable, construed as 'material to the defense'" and "not unduly oppressive for the producing party"). Defendant McGregor suggests that the Court apply this lower standard, though he never specifically cites to either *Nachamie* or *Tucker*. Rather, Defendant McGregor simply glosses over the *Nixon* factors and focuses instead on the potential for impeachment, witness credibility, and that it may be material to his defense. Notwithstanding the Supreme Court's dicta and the two opinions from a single federal district judge in New York, this Court is in no position to break from the long-standing precedent without specific guidance from the Supreme Court. *See, e.g., United States v. Khan*, Civ. Act. No. 06-cr-255, 2009 WL 152582, *2 (E.D.N.Y. 2009).[1]

[1] The Court acknowledges that it remains ironic that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any

At this stage in the proceedings, Defendant McGregor is unable to clear all three *Nixon* hurdles. In first looking to relevancy and admissibility, the Court turns to the rules of evidence. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of an action more ... or less probable than it would be without the evidence." FED. R. EVID. 401. Next, counsel asserts he should be able to admit the testimony of Riley, Murphy, McCall, and Robinson under FED. R. EVID. 613. For the purposes of this opinion, the court will assume, *without deciding*, that the evidence McGregor seeks is relevant and that Rule 613 applies, so the relevancy and admissibility requirements are met for the purposes of this analysis.[2] Where Defendant McGregor undeniably fails is specificity. The entirety of the argument in support of his request for these witnesses is that they are "necessary for the defense" for use in impeachment and credibility. Counsel even admits that he may or may not need these witnesses depending on the testimony of certain government witnesses. Further, McGregor's counsel acknowledges that he does not know exactly that the witnesses would say or what information they may actually possess because he has not talked to or tried to question these witnesses.[3] As such, he is unable to

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documents "reasonably calculated to lead to the discovery of admissible evidence," FED. R. CIV. P. 26(b)(1), while a defendant on trial for his life or liberty does not even have the right to obtain documents "material to his defense" from those same third-parties.

[2] The parties are not to interpret this as a dispositive ruling on the admissibility of any testimony as that would be a decision left for the District Judge. The undersigned merely assumes that it *could* be met for the purposes of this analysis.

[3] It's possible that these witnesses may not converse without the presence of counsel, but as Defendant McGregor's counsel has not attempted to learn what information they may possess, he cannot proffer to the court with any specificity what their testimony may offer to

overcome the third hurdle of specificity. Consequently, the motions to quash should be granted.

Regardless of the above, the Court acknowledges that this is a complex criminal proceeding and that the information sought may very well be not only relevant and admissible at a later date, but also counsel may be able to satisfy the specificity requirement once the government concludes its case. As such, the undersigned is loathe to completely disregard the positions of not only Defendant McGregor but also the United States. At the hearing, the United States acknowledged that it is possible that after the presentation of its witnesses, McGregor may be able to satisfy the *Nixon* factors. The State of Alabama and former Governor Riley (both through the State's motion and his own independent motion to quash) assert that even if this were the case, any information sought by McGregor would be privileged. However, the question as to privilege is not one before the undersigned, but is more properly put before the District Judge at the appropriate time should McGregor be able to establish the *Nixon* factors. In short, the undersigned makes no finding pertaining to the admissibility of the testimony sought.

Moreover, though the Court finds that the subpoenas are due to be quashed, the Court directs that the four individuals remain physically available to testify in person should it later be determined that their testimony is necessary. Counsel for Riley and McGregor already advised the Court that an agreement had been reached so that Riley's travel plans could

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the proceedings. This, by its very nature, is the definition of a fishing expedition.

continue. As such, to avoid a potential future problem regarding availability - as aptly noted by the United States - the witnesses should remain reasonably available should a future subpoena be appropriate.

III. CONCLUSION

For the reasons stated above, the Court orders:

(1) The *State of Alabama's Motion to Quash Subpoenas to Testify at Trial or in the Alternative to Limit Scope of Discovery* (Doc. 1182) and *Former Governor Bob Riley's Motion to Quash or Modify Subpoena to Testify at Trial* (Doc. 1186) are granted.

(2) The referenced subpoenas are quashed without prejudice as to the testimony of former Alabama Governor Bob Riley, former Alabama Department of Public Safety Director Chris Murphy, current Alabama Department of Public Safety Director Hugh McCall, and current Alabama Department of Public Safety Executive Counsel Michael Robinson.

(3) Regardless of the above, Riley, Murphy, McCall, and Robinson are to remain available - with appropriate notice - in the event Defendant McGregor can later meet the *Nixon* factors. Defendant McGregor shall notify the Court and the four individuals at the earliest date he believes he can establish the requirements under *Nixon*.

DONE this 13th day of June, 2011.

/s/Terry F. Moorer
TERRY F. MOORER
UNITED STATES MAGISTRATE JUDGE