

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 07-CR-00462-JLK-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

CORY VOORHIS,

Defendant.

**MOTION TO QUASH SUBPOENAES/SUBPOENAES DUCES TECUM SERVED
ON WITNESSES BRENDA WELLINGTON, LYNN KIMBROUGH,
AND CHARLES LEPLEY**

Brenda Wellington, Lynn Kimbrough, and Charles Lepley (collectively, the “witnesses”), employees of the Denver District Attorney’s Office, by their undersigned attorney, pursuant to Fed.R.Crim.17(c), move to quash the subpoenas/subpoenas *duces tecum* (the “subpoenas”) issued in the above matter and served on each of them. In support of this motion, the witnesses state the following:

INTRODUCTON AND BACKGROUND

Defendant Cory Voorhis was charged, in essence, with exceeding authorized access to the National Crime Information Center database by requesting information on certain individuals without having a lawful purpose. Pursuant to application of the defendant, and under Fed.R.Crim.P. 17(c), this Court issued a subpoena/subpoena *duces tecum* for three employees of the Denver District Attorney’s Office:

Brenda Wellington, Executive Secretary to the elected Denver District Attorney; Lynn Kimbrough, Public Information Officer; and Charles Lepley, The Assistant District Attorney in Denver.

On January 8, 2008, Defendant served counsel for the witnesses with a subpoena/subpoena *duces tecum* for each witness, directing them to appear before this Court on January 14, 2008 at 10:00 am, to testify and bring with them the following:

1. For Executive Secretary Brenda Wellington: email communications from any government email account used by or assigned to Brenda Wellington related to 1) Walter Noel Ramo, 2) Carlos Medina Estrada, or 3) television advertising referencing said persons for the dates of October 10-13, 2006 between Brenda Wellington and any other person, including but not limited to the following persons: 1) Chuck Lepley, 2) Lynn Kimbrough, 3) Mitchell Morrissey, or 4) any person working for or associated with the Bill Ritter for Governor campaign;

2. For Public Information Officer Lynn Kimbrough: handwritten call log entries for the dates October 10-13, 2006 as described in an FBI Form FD-302 that was referenced as being attached to the subpoena but which was not in fact attached; cellular telephone records for the dates October 10-13, 2006 for any government cellular phone used by or assigned to Lynn Kimbrough; and, email communications from any government email account used by or assigned to Lynn Kimbrough related to 1) Walter Noel Ramo, 2) Carlos Medina Estrada, or 3) television advertising referencing said persons for the dates of October 10-13, 2006 between Lynn Kimbrough and any other person, including but not limited to the following persons: 1) Brenda Wellington, 2) Chuck Lepley, 3) Mitchell Morrissey, or 4) any person working for or associated with the Bill Ritter for Governor campaign;

3. For The Assistant District Attorney Charles Lepley: cellular telephone records for the dates October 10-13, 2006 for any government cellular phone used by or assigned to Charles Lepley; and, email communications from any government email account used by or assigned to Charles Lepley related to 1) Walter Noel Ramo, 2) Carlos Medina Estrada, or 3) television advertising referencing said persons for the dates of October 10-13, 2006 between Charles Lepley and any other person, including but not limited to the following persons: 1) Brenda Wellington, 2) Lynn Kimbrough, 3) Mitchell Morrissey, or 4) any person working for or associated with the Bill Ritter for Governor campaign.

PRELIMINARY MATTERS

While reserving and without waiving other grounds for objection and argument by the witnesses to the subpoenas and also specifically with regards to the portions of the subpoenas relating to cellular telephone records, the undersigned and counsel for the defendant have reached several stipulations:

- That the breadth of the language used in the subpoenas served on Ms. Kimbrough and Mr. Lepley relating to cellular telephone records is modified and narrowed down, in a fashion similar to the email request, to cover the following:

Government cellular telephone records for Ms. Kimbrough and Mr. Lepley for the dates October 10, 11, 12, and 13, 2006 related to communications concerning: 1) Walter Noel Ramo, 2) Carlos Medina Estrada, or 3) television advertising referencing said persons for the dates of October 10-13, 2006 with any other person, including but not limited to the following persons: 1) Brenda Wellington, 2) Lynn Kimbrough, 3) Charles Lepley, 4) Mitchell Morrissey, or 5) any person working for or associated with the Bill Ritter for Governor campaign.

- That the undersigned and counsel for the defendant will engage in further discussions directed towards determining what, if any, issues associated with the subpoenas can be agreed to and resolved without the court having to hear argument on quashing.
- That the filing of this Motion to Quash by the witnesses is done to preserve questions associated with quashing the subpoenas and it is agreed the witnesses reserve the right to file a more complete briefing, if deemed necessary, and that the defendant can also respond to such later filings. Counsel for the Government has also indicated he has no objection to this specific point.

ARGUMENT: OVERVIEW

The witnesses move to quash the subpoenas served on each of them by the defendant because each subpoena is unreasonable and oppressive on several grounds: the information and testimony sought by the subpoenas is not needed for the court to determine the question of selective prosecution as advanced by the defendant. Rather, the witnesses submit the court can decide that question on the basis of legal arguments of counsel without the need for testimony of the witnesses or production of the documents sought in the subpoenas. Should the court decide the selective prosecution motion based on those arguments, the subpoenas and what they seek are rendered moot.

Assuming, *arguendo*, the court determines it cannot rule on the selective prosecution question based on argument, the subpoenas are unreasonable and oppressive also because some of the information or materials sought are protected by the attorney work product and executive or deliberative process privileges (with respect to Ms. Wellington and Mr. Lepley) and some are about or contain sensitive law-enforcement information. Further, with respect to certain of the cellular

telephone records sought, the subpoenas represent an unjustified and overbroad intrusion on privacy. Finally, the subpoenas appear to represent an attempt by the defendant to merely conduct discovery about information that is not relevant, admissible, or appropriately specific to the determination of this matter.

GENERAL STANDARDS FOR MOTION TO QUASH

Fed.R.Crim.P. 17(c) governs the issuance of subpoenas that seek Production of documents and other items in criminal cases. Rule 17(c) states:

(c) Producing Documents and Objects.

(1) *In General.* A subpoena may order the witness to produce any books, papers, documents, data, and 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.

(2) *Quashing or Modifying the Subpoena.* On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.
Fed.R.Crim.P. 17(c).

The purpose of Rule 17(c) is not to facilitate discovery, but to enable a party to obtain and inspect evidentiary material prior to trial. *United States v. Nixon*, 418 U.S. 683, 698-99 (1974). Various courts have held that Rule 17(c) should not be broadly interpreted as a discovery tool in criminal cases. See, e.g. *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d 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).

In *United States v. Nixon*, 418 U.S. 683, (1974), the Supreme Court articulated a four-tiered test of factual issues for the trial court to resolve when deciding whether to quash or modify a subpoena *duces tecum*. Under the rule in *Nixon*, in order for a document request to be valid, it must not be unreasonable or oppressive. To demonstrate that a subpoena is not “unreasonable or oppressive” a party must show:

- (1) that the documents are evidentiary and relevant;
- (2) that they are not otherwise procurable reasonably in advance to trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and
- (3) that the party cannot otherwise properly prepare for 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.”

Nixon, 418 U.S. at 699-700; see also *United States v. Winner*, 641 F.2d 825, 833 (10th Cir. 1981). The *Nixon* requirements have been referred to as “three hurdles” which must be cleared: relevancy, admissibility and specificity. *Nixon*, 418 U.S. at 700. The burden of proving relevance and admissibility is on the proponent of the subpoena. *Id.*

In order to meet its burden, the proponent has to show that the documents sought are both relevant and admissible at the time of the attempted procurement. The fact that they are potentially relevant or may be admissible is not sufficient. See *United States v. Marchislo*, 344 F.2d 653, 669 (2nd Cir. 1965). In this respect, Rule 17(c) can be contrasted with the civil rules which permit the issuance of subpoenas to seek production of documents or other materials which, although not themselves admissible, could lead to admissible evidence, “Unlike the rule in civil actions, a subpoena *duces tecum* in a criminal action is

not intended to the purpose of discovery; the document sought must at that time meet the tests of relevancy and admissibility.” *Marchisio*, 344 F.2d at 669.

CONCLUSION

WHEREFORE, the witnesses respectfully request that the court make a determination on the defendant’s selective prosecution motion without taking testimony from the witnesses or requiring their production of documents and that the subpoenas be quashed. In the alternative, and in the event counsel for the witnesses and counsel for the defendant are unable to reach further agreement on those documents sought in the subpoenas that can be produced without objection, those that might be produced subject to appropriate protective order, and those where the parties do not reach agreement, the witnesses request, per stipulation, that they be able to file a more complete briefing on this motion, if deemed necessary.

BY: /s/_____

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CERTIFICATE OF SERVICE

