

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA )

vs. )

THOMAS A. SHAY and )  
ALFRED W. TRENKLER )

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Criminal No.:  
92-10369-Z

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MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT, ALFRED W. TRENKLER'S MOTION FOR  
ISSUANCE OF SUBPOENAS PURSUANT TO F.R.C.R.P. 17(c)

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A. STANDARDS.

Rule 17(c) of the Federal Rules of Criminal Procedure provides:

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 may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial ... and may upon their production permit [them] to be inspected by the parties and their attorneys.

Defendant has moved for the issuance of two subpoenas for specific security log records of the Christian Science Church and for specific business records of Defendant's former company, Advanced Research Communications ("ARCOMM"), to be produced prior to trial and, further for permission to inspect and copy the documents produced prior to trial.

As this Court is well aware, Rule 17 effectuates defendant's Sixth Amendment right to compulsory process which is also an integral component of defendant's due process right to present a

meaningful defense. See e.g., United States v. Barker, 553 F.2d 1013 (6th Cir. 1977); Washington v. Texas, 388 U.S. 14 (1967).

As set forth in United States v. Nixon, 418 U.S. 683, 699-700 (1974) (wherein the Court held that the trial court properly authorized the issuance of a subpoena pursuant to Rule 17(c) for the production of tape recordings and other documents prior to trial), to obtain production prior to trial a 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) that the application is made in good faith and is not intended as a general 'fishing expedition'.

Defendant submits, as set forth below, that his motion, affidavit in support thereof, and this memorandum, satisfy the requisite showings and therefore the subpoenas should be issued.

#### B. ARGUMENT.

##### 1. Relevancy.

Material sought is relevant within the meaning of Rule 17(c) if it is "relat[ed] to the offenses charged in the indictment", Nixon supra at 700. See also United States v. Gross, 24 F.R.D. 138, 140 (S.D.N.Y. 1959) (material is relevant if it is "related to the charges" in the indictment); United States v. IoZIA, 13 F.R.D. 335, 339 (S.D.N.Y. 1952) (material is relevant if it is "closely related to the subject matter of the indictment" even though it might not "serve to exonerate ... defendant of the crime charged.") (Both cases cited approvingly in Nixon supra).

The records sought in this motion from Christian Science Church are relevant under these standards. Specifically, they will establish Defendant's whereabouts on certain critical days in which the government alleges defendant entered into a conspiracy with co-defendant Thomas Shay. Moreover, they may contain exculpatory evidence if they are inconsistent with the government's allegations that certain meetings took place on certain days. Finally, they may contain impeachment evidence to the extent they are inconsistent with testimony presented by government witnesses.

Similarly, the records sought from ARCOMMM are relevant under these standards. These records will also establish Defendant's whereabouts on certain days, may contain exculpatory evidence, and may be inconsistent with certain witness testimony.

2. Evidentiary Nature.

The records sought in both cases are records kept in the ordinary course of business. Thus, they would clearly be admissible.

In addition, under the evidentiary standard set forth in Bowman Dairy Co. v. United States<sup>1</sup>, 341 U.S. 214 (1951), Rule 17(c) permits a party to subpoena materials that may be used for impeaching a witness called by the opposing party. See United

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<sup>1</sup>In Bowman, the Supreme Court addressed the question of a subpoena directed to the government under Rule 17(c). The Court stated: "no good reason appears to us why they [documents in the possession of the government whose disclosure is not required under Rule 16] may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain the evidence." 341 U.S. at 219-220.

States v. Cuthbertson, 630 F.2d 139, 144 (3rd Cir. 1980) cert. den. 449 U.S. 1126 (1981); see also United States v. The LaRouche Campaign, 841 F.2d 1176, 1180 (1st Cir. 1988) (material sought only for purpose of impeaching government witness at trial). As noted above, the materials sought could be used to impeach the testimony of any witness who testified to the whereabouts of Defendant Trenkler on certain dates and times which were inconsistent with said records.

3. Not Otherwise Procurable.

It is also clear that Defendant is seeking documents of third parties whom he does not control. Moreover, given Defendant's incarceration pending trial, he no longer has access to the records of his former business, ARCOMM. In addition, they are not records to which the general public has access and without a subpoena issued by this Court, defendant has no means of obtaining said records. Finally, an agent of counsel for defendant has made informal requests for production, which requests have been denied. See Affidavit of James Karolides. Thus, any additional requests would be futile.

4. Preparation for trial.

Given that the records sought will establish defendant's whereabouts on certain dates critical to the allegations in the indictment, defendant cannot properly prepare for trial without said production and inspection in advance of trial. Moreover, in the event defendant's motion is denied, defendant will have to wait until trial to compel said inspection. This last minute inspection

may cause a delay in defendant's trial so defense counsel can adequately review and analyze these records.

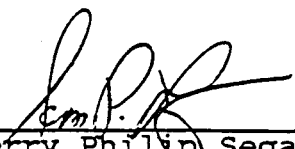
5. Good Faith.

Finally, Defendant has requested specific documents which are limited in time and are not burdensome to produce. The purposes for the documents requested form a significant aspect of Defendant's defense. Consequently, it is clear that these requests are not a general fishing expedition.

C. CONCLUSION.

For these reasons, Defendant submits that he has made the requisite showings for issuance of the subpoenas requested, and therefore, respectfully requests this Court to grant his motion and direct the Clerk's Office to issue the above-mentioned subpoenas for production, inspection and copying on June 16, 1993 at 10:00 a.m.

Respectfully submitted,  
For the Defendant,  
ALFRED W. TRENKLER,  
By his attorneys,



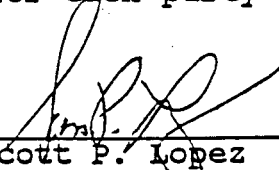
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Dated: May 28, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail on May 28, 1993.

  
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Scott P. Lopez