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United States District Court, D. Massachusetts.

UNITED STATES of America

v.

Thomas A. SHAY and Alfred W. Trenkler.

Crim. A. No. 92-10369-Z.

April 2, 1993.

Nancy Gertner, Dwyer, Collora & Gertner, Boston, MA, Jefferson W. Boone, Allston, MA, and Terry Philip Segal, Segal & Feinberg, Boston, MA, for defendants.

Paul V. Kelly, U.S. Attorney's Office, Boston, MA, for the U.S.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

*1 This matter is before the Court on the motion of the United States pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure to compel production of a videotape containing an interview conducted by WLVI-TV ("Channel 56") with defendant Thomas A. Shay ("Shay"). Channel 56 opposes the motion on two grounds: (1) that the motion does not satisfy the requirements of Rule 17(c); and (2) that its First Amendment interests outweigh the government's need for disclosure. For reasons stated more fully below, the motion of the United States is denied.

Rule 17(c)

As the Supreme Court declared in *United States v. Nixon*, a subpoena will be enforced under Rule 17(c) only after the movant establishes three elements: (1) relevancy; (2) specificity; and (3) admissibility. 418 U.S. 683, 700 (1974). There is no dispute that the content of the videotape, a forty-five minute interview with Shay relating at least in part to his role in the crime for which he was indicted, is relevant to this criminal prosecution. Channel 56 argues, however, that the government cannot establish the last two elements.

First, Channel 56 argues that the United States has

not demonstrated a specific need for the videotape, given that a corrections officer was present during the interview and there has been no showing that the officer is unavailable for deposition. The videotape is, however, unique in that (1) it is not vulnerable, as human recollection, to the passage of time; and (2) its content includes not only spoken assertions but facial expressions and other communicative gestures. See *United States v. The LaRouche Campaign*, 841 F.2d 1176, 1180 (1st Cir.1988); *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir.1980) ("interview statements are 'unique bits of evidence that are frozen at a particular place and time' "). Because there is no dispute that Channel 56 possesses the only copy of the videotape, the government's request is sufficiently specific.

Second, Channel 56 states that the government cannot establish that the videotape is sufficiently evidentiary until it is more certain that the defendant will testify at trial. Although, as the First Circuit has recognized, the admissibility of impeachment evidence cannot fully be evaluated until the witness actually testifies, *LaRouche*, 841 F.2d at 1180, that is not the case where the statements are those of a criminal defendant. In this case all that is required is that the government establish a "likelihood" that the videotape would reveal statements that could be admitted against Shay at trial as admissions under Rule 801(d)(2) of the Federal Rules of Evidence. See *LaRouche*, 841 F.2d at 1180; see also *Nixon*, 418 U.S. at 701 n. 13 (statements by party defendant admissible for " 'whatever inferences' might reasonably be drawn"). Under the test thus framed, the serious barrier to satisfaction of Rule 17(c) in this case is not the possibility that Shay may not testify, but the possibility that there may be no trial at all; Shay may plead guilty or be declared incompetent to stand trial. The occurrence of either event would obviate the government's need for the tape. [FN1]

*2 In *LaRouche* the First Circuit warned that compelled disclosure of investigative materials held by the media should not become routine or casual. 841 F.2d at 1182. Against the backdrop of the First Amendment, and bearing in mind the interests reflected in Rule 17(c), I conclude that *in camera* review of the videotape is premature. Nothing in this opinion shall be construed to express a judgment

as to whether the First Amendment interests of Channel 56 are outweighed by the needs of the prosecution. Nor shall it be construed to prohibit reconsideration of this motion if it becomes apparent that Shay will stand trial.

The motion (# 48) is, accordingly, denied without prejudice.

FN1. There has been no indication that the government seeks to use the videotape in connection with the prosecution of the codefendant, Trenkler; it is unlikely, in any event, that such a request would be proper under *Bruton v. United States*, 391 U.S. 123 (1968).

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