UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	**CRIMINAL NO. 21-98**
v.	*	**SECTION: "I"(4)**
SHIVA AKULA	*	
	*	
	*	
*	*	*

GOVERNMENT'S OPPOSITION TO MOTIONS BY SHIVA AKULA

The United States of America, through the undersigned Assistant United States Attorneys, hereby opposes various motions filed by pro se defendant Shiva Akula. *See* Rec. Doc. 173 (Motion to Dismiss Indictment); Rec. Doc. 177 (Motion to Vacate Trial Date); Rec. Doc. 183 (Motion for Trial Subpoenas).

LAW AND ARGUMENT

I. Akula's Motion to Dismiss the Indictment should be denied. (Rec. Doc. 173)

Akula requests that the indictment be dismissed because witness statements have not yet been produced. *See* Rec. Doc. 173, p. 4. In support of this request, Akula alleges that he has not been provided with "all" discovery and that the government's refusal to provide agent reports of witness statements before the Jencks Act deadline is a due process violation. *See* Rec. Doc. 173, p. 4. The government addressed Akula's complaints about witness statements and the Jencks Act deadline in a recent filing, pointing out that it is unclear whether Akula understands what he is requesting or the law that applies to his request, despite the government's having previously explained the relevant law in a different motion. *See* Rec. Doc. 192, pp. 6-9.

"[T]he two primary functions of an indictment are that it (1) provides notice of the crime for which the defendant has been charged, allowing him the opportunity to prepare a defense; and (2) interposes the public into the charging decision, such that a defendant is not subject to jeopardy for a crime alleged only by the prosecution." *United States v. Robinson*, 367 F.3d 278, 286-87 (5th Cir. 2004). To be sufficient, an indictment must "1) enumerate[] each prima facie element of the charged offense, 2) notif[y] the defendant of the charges filed against him, and 3) provide[] the defendant with a double jeopardy defense against future prosecutions." *United States v. Nevers*, 7 F.3d 59, 62 (5th Cir. 1993).

Even if an indictment is legally sufficient, it may still be dismissed upon a showing of outrageous government conduct. *See United States v. Sandlin*, 589 F.3d 749, 758-59 (5th Cir. 2009). Establishing outrageous conduct is an "extremely demanding" standard that is satisfied in only "the rarest of circumstances." *See id.* (quotation marks omitted). As the Fifth Circuit has held, "Government misconduct does not mandate dismissal of an indictment unless it is so outrageous that it violates the principle of fundamental fairness under the due process clause of the Fifth Amendment." *United States v. Mauskar*, 557 F.3d 219, 231-32 (5th Cir. 2009) (quotation marks omitted). The Fifth Circuit has "declined to find outrageous conduct where the government failed to disclose that the defendant's signature on a particular document was forged, engaged in entrapment, or abducted the defendant from his home country to circumvent extradition proceedings[.]" *Sandlin*, 589 F.3d at 759 (citations omitted).

In this case, Akula has not demonstrated a fatal deficiency in the indictment or that the government has engaged in outrageous conduct requiring dismissal. As the government explained previously, *see* Rec. Doc. 192, pp. 6-9, the Jencks Act does not require disclosure of a

witness's previous statements until after the witness has testified. *See* 18 U.S.C. § 3500; *see also United States v. Ware*, No. 9:18-CR-43, 2019 WL 2268959, at *1-2 (E.D. Tex. May 24, 2019). "'The trial court cannot compel disclosure . . . at any earlier point'; however, early Jencks Act disclosure 'should be encouraged.'" *Ware*, 2019 WL 2268959, at *2 (quoting *United States v. Yassine*, 574 F. App'x 455, 463-64 (5th Cir. 2014)). Even so, the standard Jencks Act deadline in this district is the Friday before trial, and, here, the government has agreed to a Wednesday deadline that is two days earlier. *See* Rec. Doc. 161, p. 5 (Scheduling Order).

Akula's complaints that the government misled the Court by stating that it had produced "*all* discovery," *see* Rec. Doc. 173, p. 15 (emphasis in original), are similarly meritless because the government made no such representation. Rather, the government informed the Court that it re-produced to Akula the same discovery it had produced to his previous counsel. Because Akula has not demonstrated any government misconduct, let alone misconduct that satisfies the "extremely demanding" standard required by the Fifth Circuit, *see Sandlin*, 589 F.3d at 758, his Motion to Dismiss the Indictment should be denied.

II. Akula's Motion to Vacate the Trial Date should be denied. (Rec. Doc. 177)

Akula's Motion to Vacate the Trial Date makes many of the same arguments Akula makes elsewhere that the Jencks Act exposes him to a "trial by ambush" and that the government has unfairly and improperly withheld witness statements. *See* Rec. Doc. 177, pp. 10-11. This motion fails for the same reasons as the Motion to Dismiss the Indictment discussed above. Even if the Court were to vacate the trial date, the government would still be under no obligation to disclose Jencks Act materials until the Jencks Act deadline, which, under the plain language of the statute, is not until after the witness has testified. *See* 18 U.S.C. § 3500; *see also Ware*, 2019

WL 2268959, at *1-2. Moreover, this Court recently granted the government's Motion to Continue Trial, resetting the trial date to July 10, 2023. Rec. Doc. 193. In the months between now and then, Akula has more than sufficient time to review the evidence (much of which came from his business) and file any non-frivolous pretrial motions. To the extent Akula's Motion to Vacate the Trial Date was not rendered moot by the Court's recent order, it should be denied.

III. Akula's Motion for Trial Subpoenas should be denied. (Rec. Doc. 183)

Akula requests that this Court issue three trial subpoenas commanding production of all cell phone communications and text messages between a former employee, the undersigned, and FBI Special Agent Krista Bradford from 2016 through 2022. *See* Rec. Doc. 183, p. 2. Akula requests these materials so he can establish a defense of entrapment. *See* Rec. Doc. 183, pp. 2-3.

The law is clear that a Rule 17 subpoena is not a discovery device. *United States v. Nixon*, 418 U.S. 683, 698 (1974); *United States v. Poimboeuf*, 331 F.R.D. 478 (W.D. La. 2019). Instead, it is an instrument intended exclusively for trial or a formal hearing. *United States v. Pereira*, 353 F. Supp. 3d 158, 160 (D.P.R. 2019). The subpoena is limited to evidentiary materials, and it cannot be used as a fishing expedition to see what may turn up. 2 Wright & Henning, Federal Practice & Procedure, § 275 at pp. 264-265 & nn.24-25.

Federal Rule of Criminal Procedure 17(c) is directed to trial witnesses, and provides that "[a] subpoena may order the witness to produce any books, papers, documents, data, or 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 into evidence." The purpose of a 17(c) subpoena is "to implement the Sixth Amendment guarantee that the defendant shall have compulsory process to obtain evidence in the defendant's favor." 25 James Wm. Moore et al.,

Moore's Federal Practice § 617.08[1] (3d ed. 2007); *United States v. Ferguson*, No. 3:06CR137 (CFD), 2007 WL 2815068, at *2 (D. Conn. Sept. 26, 2007). Rule 17(c)'s "'chief innovation was to expedite trials by providing a time and place before trial for the inspection of the subpoenaed materials.'" *United States v. Potts*, No. H-16-0147-01, 2017 WL 1314193, at *1 (S.D. Tex. Apr. 6, 2017) (quoting *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

The party requesting the subpoena has the burden to show the court that the materials sought are (a) relevant, (b) admissible, and (c) requested with adequate specificity. *United States v. Gas Pipe*, No. 3:14-cr-298-M, 2018 WL 5262361, at *1 (N.D. Tex. June 18, 2018) (citing *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992)). Materials that have no potential value other than for purposes of impeachment are not subject to subpoena under Rule 17(c). *Id.* The information must be relevant to the government's case or a valid defense. *Id.* Moreover, a Rule 17(c) subpoena is improper where it calls for the production of *Brady*, Jencks Act, or *Giglio* material. *Id.* Courts have considerable discretion under Rule 17 to oversee the subpoena process. *United States v. Parker*, 586 F.2d 422, 428 (5th Cir. 1978). The Court may quash or modify the subpoena if compliance would be "unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2).

Akula's reasons for requesting Rule 17(c) subpoenas are purely speculative. Akula claims that the undersigned and Special Agent Bradford conspired with one of his former employees to "let[] deadlines lapse for administrative challenges to unpaid services in order to entrap" him. *See* Rec. Doc. 183, pp. 2-3. Not only are these accusations untrue, Akula provides no evidence to support them, and he fails to identify specific materials he believes will support an entrapment defense. Courts have denied requests for Rule 17(c) subpoenas in cases where defendants similarly based their requests on conjecture and an alleged need to develop an argument. *See*

United States v. Stevenson, 727 F.3d 826, 832 (8th Cir. 2013) (affirming district court's denial of Rule 17(c) subpoena where the defendant "speculate[d] that the agreements might show that law enforcement officials asked AOL regularly to conduct certain scans, and argue[d] that such information would be relevant to his Fourth Amendment claim"); *United States v. Richardson*, 607 F.3d 357, 368 (4th Cir. 2010) ("[T]he phrasing of Richardson's argument—that 'he should be allowed to discover the facts' supporting his theory that AOL and the Government were in a partnership—betrays his intention to misuse the subpoena duces tecum as a discovery mechanism to develop his agency claim."); *United States v. Turner*, No. 4:19-CR-00026-JHM, 2021 WL 2806219, at *2 (W.D. Ky. July 6, 2021) (denying Rule 17(c) subpoena where defendant "admit[ted] he does not know the contents of the communications between Ingredion and the various authorities, so he can offer mere conjecture about what those communications contain"); *United States v. Tagliaferro*, No. 19-CR-472 (PAC), 2021 WL 980004, at *2 (S.D.N.Y. Mar. 16, 2021) ("Conclusory statements are insufficient to satisfy the *Nixon* requirements.").

Here, Akula clearly intends to use the requested subpoenas as an improper discovery tool, as well as an end-run around the time limits imposed by the Jencks Act for disclosure of witness statements. *See* Rec. Doc. 183, p. 3 ("This discovery is also especially necessary in light of the fact that the government has thus far refused to disclose government witness statements under the disguise that all witnesses in this health care fraud case fall under the Jencks Act."). Akula's request for authorization to conduct a fishing expedition into communications between the undersigned, an FBI agent, and Akula's former employee should be denied.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny the following motions filed by Shiva Akula: Rec. Doc. 173 (Motion to Dismiss Indictment); Rec. Doc. 177 (Motion to Vacate Trial Date); Rec. Doc. 183 (Motion for Trial Subpoenas).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2023, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to ECF-registered counsel of record

/s/ Kathryn M. McHugh
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