

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

**THE UNITED STATES OF AMERICA**

**v.**

**Criminal No. CCB-98-0408**

**JERRY W. MILLER, et al.**

\* \* \* \* \*

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
EX PARTE PETITION FOR THE ISSUANCE  
OF SUBPOENA(S) PURSUANT TO RULE 17(c) OF  
THE FEDERAL RULES OF CRIMINAL PROCEDURE (UNDER SEAL)**

The defendant, Jerry Wayne Miller, through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Barry Pollack, Assistant Federal Public Defender, files this Supplemental Memorandum pursuant to the Court’s Order dated October 14, 1999 (filed under seal).

**FACTUAL BACKGROUND**

Defendant Jerry Miller and his wife and co-defendant Weddina Miller at all times relevant to the Superseding Indictment were mortgage lending officers (“loan originators”) employed by what is now Susquehanna Bank. As lending officers, the Millers were responsible for overseeing the execution of the paperwork required for a potential borrower to make a mortgage loan application. A loan processor employed by the bank would be responsible for verifying the information set forth in the loan application (e.g., the applicant’s employment status). After the loan application information had been verified, a loan underwriter employed by the bank would either

approve or reject the loan. If the loan was approved, the Millers would receive a commission from the bank representing a percentage of the dollar amount of the loan.

Among the various types of loans originated by the Millers were rehabilitation loans guaranteed by the United States Department of Housing and Urban Development (HUD) under its “203(k)” program. These loans were designed to encourage the rehabilitation of dilapidated housing. The applicant can borrow money based on an estimate of the value the house will have upon the completion of the proposed rehabilitation work, rather than, as with a traditional home mortgage, merely based on the “as is” value of the house. The applicant would then receive draws against the loan through various stages of the completion of rehabilitation work. Some applicants would take out these loans to rehabilitate a house in which they wished to live. Others would take out these loans as investments, planning to sell the house at a profit once the rehabilitation work was complete. HUD would guarantee the loans, to protect the lender against defaults. Accordingly, for the lender, these loans were essentially a risk-free proposition.

For each 203(k) loan application, a HUD-approved housing inspector would need to inspect the house and establish a checklist of approved rehabilitation work. An appraiser would then perform an “as-is” appraisal and an appraisal of what he or she believed the property would be worth following the completion of the approved rehabilitation work. The loan amount could not exceed a specified percentage of the latter figure.

Neither the HUD-approved inspector nor the appraiser were bank employees. Each would be paid a specified amount for each property inspected or appraised. As with other loans, the loan officer would oversee the initial loan application, a loan processor would verify the loan

application information and a loan underwriter would either approve or reject the loan. And, as with other loans, the lending officer would receive a commission on loans made.

Once the loans are made, in order to receive a draw on the loan for rehabilitation work, the borrower must request the draw and have that request approved by a HUD-approved inspector. The funds are kept in escrow and cannot be released without the approval of the HUD-approved inspector.

The Millers served as lending officers on approximately thirty 203(k) loans. In addition, the Millers themselves applied to their employer for a total of six 203(k) loans as investments. A bank lending officer other than the Millers served as the loan originator on each of these loans. The Millers fully disclosed their affiliation with the bank. The loan application information was verified by a loan processor and each of the loans was approved by a loan underwriter.

The Government's theory of this case is that, for each of the loans originated by the Millers and for each of the loans made to the Millers, the Millers and the HUD-approved inspector (and possibly unidentified others) conspired to defraud HUD by causing 203(k) loans to be made on which the proper rehabilitation work would not be performed and, instead, the draws would be diverted for the borrower to use as he or she saw fit. The Government alleges that the Millers conspired to make false statements in the loan applications, in the estimates of the costs of rehabilitation work and in the certifications of the completion of this work.<sup>1</sup> At trial, the government intends to demonstrate that on large numbers of the properties for which the Millers were either the

---

<sup>1</sup> The government has never identified the alleged falsities or misrepresentations. This failure is the subject of a pending motion for a bill of particulars.

lending officers or the borrowers, rehabilitation work that was supposed to have been completed, and for which draws were received, was not in fact performed.

The Millers' theory of defense at trial will be two-fold. First, they fully believed that the 203(k) program was working as intended for all loans originated by them, i.e.: 1) the Millers in good faith oversaw the potential borrower's completion of the loan application; 2) after the Millers forwarded the completed loan application to the loan processor, the loan application information was verified; 3) the loan was approved by the loan underwriter only if it met the bank's and HUD's qualifications; 4) when a loan was made, the rehabilitation work was performed; and 5) the HUD-approved inspector would approve a draw request only if the rehabilitation work was proceeding properly. Once these loans were originated by the Millers, the Millers had minimal further involvement with them and had no reason to believe that there were any problems with these loans. Second, the loans on which the Millers themselves were the investors/borrowers were not fraudulent. The Millers filled out the loan applications truthfully in all material respects and they were processed and approved by other bank employees. The Millers oversaw extensive rehabilitation to each of their properties and used the draws solely to complete this rehabilitation work.

Ultimately, the Millers defaulted on each of their six loans. The Millers attribute the defaults to the fact that some of the rehabilitation work proved more expensive than they had expected and to Mr. Miller's illness.<sup>2</sup> The Government presumably attributes the defaults to an alleged lack of intent on the part of the Millers to rehabilitate the properties and repay the loans.

---

<sup>2</sup> As the Court is aware from Defendant Jerry Miller's recent motion to continue trial, Mr. Miller suffers from colon cancer.

**The Millers' Good Faith Rehabilitation of their  
Properties Will Be a Crucial Component of their Defense**

As the lending officers, the Millers had minimal involvement with the 203(k) loans after they were made. They would not have been in a position to know that the HUD-approved inspector was not in fact performing good faith inspections of the properties and was approving draw requests whether or not rehabilitation work had been performed. Accordingly, the conduct of the loans on which the Millers themselves were the investor/borrowers will be crucial to ascertaining their state of mind. If they acted in good faith when they were the borrowers, and the HUD-approved inspector appeared to be properly performing his function on these loans, this bolsters the Millers' defense that they had no reason to believe, and did not believe, that other borrowers were failing to act in good faith. Conversely, if the Millers did not act in good faith in the conduct of their own loans, they are guilty of defrauding HUD -- independent of their knowledge relating to the other loans.

The discovery provided by the Government to the Millers indicates that an agent of the HUD Office of the Inspector General (OIG) has inspected five of the six properties owned by the Millers and discovered numerous instances where he believes that certain work called for in the HUD-approved inspector's specifications, for which the Millers received draws, was not in fact performed.<sup>3</sup> As set forth above, whether the Millers rehabilitated their properties in good faith is going to be a crucial issue at trial. Accordingly, the Millers must attempt to rebut the conclusions

---

<sup>3</sup> The HUD OIG agent apparently did not attempt to document whether there were instances where work that had been identified by the HUD-approved inspector as needing to be done had proven to be more costly than estimated by the HUD-approved inspector or whether there was work that was performed in addition to that which had been identified by the HUD-approved inspector.

of the HUD OIG inspector, and the inferences the Government will ask the jury to draw as a result of those conclusions.

Mr. Miller intends to do so in two ways. First, Mr. Miller intends to demonstrate that persons other than the HUD OIG agent who viewed the Millers' properties reached conclusions contrary to those of the HUD OIG agent. Second, Mr. Miller has retained an expert housing inspector for the specific purpose of examining the properties and rendering his own conclusions.<sup>4</sup>

### **Eyewitnesses to Condition of Properties Rehabilitated by the Millers**

The Millers recall that numerous individuals saw the properties that they rehabilitated. First, the Millers recall that an employee of the bank inspected the properties. They do not recall this individual's name, but recall that in the course of inspecting the properties, he commented favorably on the condition of the properties and the rehabilitation work that had been performed. Second, the Millers recall that two City of Baltimore housing inspectors inspected the properties. These individuals likewise stated their favorable impression of the properties. An investigator from the Office of the Federal Public Defender has interviewed one of these city housing inspectors, Kenneth Addicks. Mr. Addicks confirmed that he inspected the properties, and reiterated to the investigator his favorable impression of the properties. However, Mr. Addicks stated that he would not produce his notes of these inspections to counsel for Mr. Miller unless served with a subpoena requiring such

---

<sup>4</sup> Three of the properties are presently owned by HUD. The other three are owned by mortgage companies. If Mr. Miller is unable to obtain their consent without the assistance of the Court, Mr. Miller intends to file an ex parte petition to the Court seeking the issuance of a subpoena to the present owners of the properties allowing Mr. Miller's expert physically to inspect the properties.

production. Mr. Addicks' supervisor, Rose Walker, who also inspected the properties, would likewise decline to produce any documents, unless served with a subpoena.

## **ARGUMENT**

On October 4, 1999, Mr. Miller filed an ex parte petition for the issuance of subpoenas pursuant to Rule 17(c) requiring the production of documents by the Millers' former employer, Susquehanna Bank, and the Housing Authority for Baltimore City, pertaining to their respective inspections of the Millers' former properties. On October 14, 1999, the Court issued an ex parte Order asking Mr. Miller to address three issues pertaining to his subpoena application: 1) the need for an ex parte proceeding; 2) the Nixon requirements of relevancy, admissibility, and specificity; and 3) authority for ordering the documents to be produced to Mr. Miller's counsel rather than to the Court.

### **I. The Need for an Ex Parte Proceeding**

Rule 17(a) governs the issuance of subpoenas for the attendance of trial witnesses. It states that a party may obtain a blank subpoena from the Clerk of the Court and issue that subpoena without any judicial involvement. Rule 17(b) sets forth an ex parte procedure for the issuance of subpoenas for the attendance of trial witnesses for parties that cannot afford the requisite witness and process fees. The purpose of Rule 17(b) is to put indigent defendants on equal footing with defendants who have financial resources. See, e.g., United States v. Hang, 75 F.3d 1275, 1281 (8<sup>th</sup> Cir. 1996)(Rule 17(b)'s ex parte procedure "places all defendants, whether impoverished or with ample financial resources, on equal footing, and it prevents the Government from securing undue

discovery”); United States v. Beckford, 964 F. Supp. 1010, 1016 (E.D. Va. 1997)(“[T]he ex parte procedure provided for in the current iteration of Rule 17(b) secures for the indigent defendant the benefits of the rule which, for affluent defendants, authorizes compulsory attendance of witnesses without requiring notice or disclosure to the Government.”)

Rule 17(c) governs the issuance of subpoenas duces tecum and specifically provides for the possibility of the pre-trial production of documents. However, Rule 17(c) speaks in permissive terms (a subpoena “may” also command the production of documents; the court “may” direct the production be made to the court in advance of trial) and fails to set forth a procedure to be followed for the issuance of such subpoenas.

**A. Rule 17(c) Does Not Require Prior Judicial Approval of Document Subpoenas Returnable Before Trial and Incorporates the Ex Parte Procedure Authorized by Rule 17(b)**

Rule 17(c), by its terms, does not require judicial approval prior to the issuance of a subpoena duces tecum. Accordingly, Rule 17(c) can be read to permit a party to issue subpoenas duces tecum with a return date in advance of trial without seeking prior approval from the court.

As the Eastern District of New York has stated:

---

As a preliminary matter, the Court notes that Rule 17(c) does not expressly require that a party make a pre-trial motion before issuing a subpoena duces tecum. Nevertheless, “the prior invocation of the court’s aid when pretrial production pursuant to a subpoena duces tecum is sought has been described as an orderly and desirable procedure and one often followed.” United States v. Urlacher, 136 F.R.D. 550, 554 (W.D. N.Y. 1991). The Urlacher court noted that one possible disposition of a motion for issuance of a pre-trial subpoena duces tecum is to dismiss it as unnecessary because Rule 17(c) provides for adequate court supervision of such a subpoena on a motion to quash made by the subpoenaed party. *Id.* Nevertheless, the Urlacher court chose, instead, to entertain that motion because the defendant had, by its filing, sought the “court’s aid in the matter, which will ensure the judicial supervision contemplated by subdivision (c) at the earliest stage.” *Id.* at 554-

55. This Court, like the court in Urlacher, finds that “the motion for issuance is appropriate, though not strictly necessary, and should be entertained by the court.” *Id.* at 555.

United States v. Ashley, 162 F.R.D. 265, 266 (E.D. N.Y. 1995)(emphasis added).<sup>5</sup> This view that pre-issuance review by the court of a subpoena duces tecum seeking production prior to trial is available to litigants, but is not required of litigants, allows parties with financial resources to issue such a subpoena pursuant to the procedure set forth in Rule 17(a), without any judicial intervention.

Mr. Miller has found no case law in the District of Maryland stating one way or the other whether or not judicial approval is required prior to the issuance of a subpoena duces tecum returnable before trial. While Mr. Miller has no ability to produce any empirical evidence on this point, it is his belief that private non-indigent parties in criminal matters in this District routinely issue such subpoenas without seeking prior approval from the court. Except where the recipient of the subpoena files a motion to quash, the non-indigent defendant receives the documents pre-trial and the court never has any involvement in this process.

There is absolutely nothing wrong with this state of affairs. Rule 17(c) specifically provides that the court may quash a document subpoena if compliance would be unreasonable or oppressive. These are objections to the subpoena that only the recipient has standing to raise.

---

<sup>5</sup> Contrary to the view of the Eastern District of New York articulated in Ashley that, while a litigant may do so, a litigant is not required to seek approval prior to issuing a subpoena duces tecum returnable before trial, in Beckford, the Eastern District of Virginia set forth just such a requirement. However, the Beckford court noted that “it is obvious that Rule 17(c) does not expressly require a party to make a motion to secure issuance of a subpoena duces tecum returnable before trial,” 964 F. Supp. at 1020, and conceded that there is no controlling authority mandating judicial intervention in the issuance of such subpoenas, *id.* at 1023. Nonetheless, the Beckford court went on to conclude that the potential for abuse of such subpoenas provides “a cogent rationale” for interpreting Rule 17(c) to require judicial pre-approval of the issuance of such subpoenas. *Id.* at 1025.

United States v. Tomison, 969 F. Supp. 587, 591, 595-96 (E.D. Cal. 1997). Accordingly, it makes perfect sense that a party need not provide notice to the other party when it issues a document subpoena. Nor is it necessary for the court to review the propriety of that subpoena upon issuance. Only if the recipient asserts that compliance is unreasonable or oppressive is there a need for judicial involvement.<sup>6</sup>

Assuming that the Ashley court is correct that there is a procedure available to private non-indigent litigants to compel pre-trial document production pursuant to Rule 17(a) without seeking prior judicial review, then Rule 17(b) must likewise be available to indigent defendants to compel pre-trial document production. See United States v. Florack, 838 F. Supp. 77, 79 (W.D. N.Y. 1993) (“[T]o conclude that Rules 17(a) and (c) permit an individual of financial means to subpoena both witnesses and documents without notice to the Government, while Rules 17(b) and 17(c) only allow an indigent defendant to subpoena witnesses, would result in a disability based on financial status in violation of the Fifth Amendment. Therefore, in order to be consistent with the Fifth Amendment, Rule 17(c) must be read as authorizing an ex parte procedure for indigent defendants seeking to subpoena records.”); see also Beckford, 964 F. Supp. at 1017-18 (“the courts have treated trial subpoenas duces tecum as simply a type of subpoena that can be issued under the procedures set forth in Rules 17(a) and (b)”); “because today’s Rule 17 contemplates that all parties in a criminal case, indigent or not, will be on an equal footing as respects the ability to subpoena evidence without disclosure to its documents, an indigent defendant is entitled, under Rule 17(c), to issuance of subpoenas duces tecum returnable at trial by making the same showing as required by

---

<sup>6</sup> Indeed, the cases cited herein arose because a motion to quash was filed, not because a court declined to provide pre-approval to the issuance of a subpoena.

Rule 17(b) to secure issuance of a trial witness subpoena”). Once the court ascertains, upon an ex parte showing, that the defendant is in fact indigent, the court “shall” order the issuance of the subpoena. See Fed.R.Crim.P. 17(b).<sup>7</sup>

If the Court adopts this view of Rule 17(c), that judicial approval need not be obtained prior to the issuance of a document subpoena returnable before trial, the Court has authority to issue the subpoena on an ex parte basis pursuant to Rule 17(b). To put the indigent defendant on equal footing with the non-indigent defendant who can simply issue the subpoena under Rule 17(a) without the court’s involvement, the Court shall issue the subpoena based solely on the defendant’s showing of indigency.<sup>8</sup>

---

<sup>7</sup> Requiring an indigent defendant to obtain approval from the court prior to the issuance of a subpoena duces tecum seeking production before trial would leave indigent defendants as the only category of litigants to whom no compulsory process for obtaining documentary evidence would be available absent specific approval by the court. Non-indigent defendants can obtain documentary evidence by using the Rule 17(a) process. The Government, on the other hand, need not even resort to Rule 17(a) to obtain such evidence, since the Government routinely uses grand juries to obtain all documents that could conceivably have evidentiary value. See Tomison, 969 F. Supp. at 594 n. 18 (“One can only describe as brass the government’s objection to `fishing expeditions [through the defendant’s use of Rule 17(c)],’ given its routine behavior relative to subpoenas duces tecum issued in connection with grand jury investigations.”)

<sup>8</sup> Accordingly, Mr. Miller need not make the Nixon showing at this point. Rather, Mr. Miller, like a non-indigent defendant, would only need to make this showing if a subpoena recipient filed a motion to quash the subpoena. Likewise, there would be no reason to review Mr. Miller’s request that the documents be returned to his counsel’s office. There would be no review of a non-indigent defendant’s request that the documents be returned directly to the party. Nor would such review be warranted. Rule 16 will determine what, if any, portion of the documents produced pursuant to the subpoena must be subsequently disclosed to the other litigants.

**B. Even If Rule 17(c) Requires Prior Judicial Approval of Document Subpoenas Returnable Before Trial, Approval May Be Sought Ex Parte**

If, on the other hand, this Court concludes, contrary to the Ashley court, that prior judicial approval is required for the issuance of document subpoenas returnable before trial, it should conclude that such approval may be sought ex parte. The Beckford court, while noting the lack of Fourth Circuit authority governing the invocation of the ex parte application process for document subpoenas returnable prior to trial, concluded that this procedure may be employed:

Forcing any defendant to confront the choice between issuing a pre-trial subpoena duces tecum and disclosing his defense to the Government places an unconstitutional limitation on the defendant's right to compulsory process. Congress recognized as much when it amended Rule 17(b) to eliminate this choice for indigent defendants as to the issuance of trial subpoenas ad testificandum.

964 F. Supp. at 1027.<sup>9</sup> The Tomison court also concluded that a petition for the issuance of a document subpoena returnable before trial may be made ex parte. See Tomison, 969 F. Supp. at 592-93 (“requiring a defendant to apply for the subpoena duces tecum by noticed motion could

---

<sup>9</sup> In addition, as set forth above, there is a Fifth Amendment right “not to be subjected to disabilities by the criminal justice system because of financial status.” *Id.* at 1027 n. 22. In United States v. Jenkins, 895 F. Supp. 1389 (D. Haw. 1995), the court found that this right would be infringed upon were the ex parte application process not available to indigent defendants seeking subpoenas duces tecum returnable before trial. The Beckford court, while concurring that the ex parte application process is available for Rule 17(c) document subpoenas returnable before trial, rejects this rationale for the ex parte procedure, since the Beckford court concluded that all defendants, indigent and non-indigent, are required to make a pre-issuance motion for this type of subpoena. However, the Beckford court ignores the lack of any enforcement mechanism vis-a-vis non-indigent defendants for its newly-articulated rule requiring prior judicial approval. Since non-indigent defendants, irrespective of Beckford's holding, issue subpoenas duces tecum returnable before trial without judicial intervention -- and therefore without disclosing to the other party their theory as to why the documents sought are relevant -- the Fifth Amendment rights of indigent defendants would be violated if Beckford's rule were to be enforced against them.

defeat the Rule's goal of facilitating the speed and efficiency of the trial," since it would discourage litigants from seeking production in advance of trial; further, "the need to preserve a defendant's constitutional right to obtain and use relevant evidence suggests that Rule 17(c) affords the defendant the right to pre-trial production in secrecy"); see also Hang, 75 F.3d at 1282 ("we conclude that an indigent defendant may, pursuant to Rule 17(c), make an *ex parte* request to the district court for issuance of a subpoena duces tecum").

This Supplemental Memorandum by its very nature illustrates the need for allowing the subpoena application process (assuming a party is in fact required to obtain judicial approval prior to the issuance of a subpoena) to be conducted *ex parte* and for exercising the Court's discretion to permit that process in this case. The Beckford court stated that a court should exercise its discretion to allow an *ex parte* application where, *inter alia*, disclosure of the subpoena application would divulge trial strategy, witness lists or work product. Beckford, 964 F. Supp. at 1030. This Supplemental Memorandum divulges all three.

In order to set forth in detail how the Nixon requirements are met, this Supplemental Memorandum discloses Mr. Miller's theory of defense (that the loans on which he was the borrower worked as designed and that he had no basis for knowing that this was not true regarding loans he had originated, but for which he was not the borrower); defense attorney work product (defense counsel's belief that the condition of the houses rehabilitated by the Millers will be a crucial issue at trial, and specifically how defense counsel intends to prove that the Millers in fact did substantial rehabilitation work to those properties); and a portion of the defendants' witness list (Rose Walker

and Ken Addicks). The defendant should not be required to make these disclosures in order to exercise his constitutional right to compulsory process to obtain documentary evidence.<sup>10</sup>

## II. The Requested Subpoenas Meet the Nixon Standard

Rule 16 governs discovery from the opposing party in a criminal case. In the context of issuing a subpoena to the opposing party, the Supreme Court has noted that Rule 17 was not intended to provide an additional means for discovery. Bowman Dairy, Inc. v. United States, 341 U.S. 214, 220 (1951). It is questionable whether this admonition has any applicability to the ability of a party to use Rule 17 to obtain documents from a third party, an issue not addressed by Rule 16. See Tomison, 969 F. Supp. at 593 n. 14. Accordingly, it is questionable whether the Nixon standard, also articulated in the context of seeking documents from a party to the litigation, applies where documents are sought from a third party. See United States v. Nixon, 418 U.S. 683, 699 n. 12 (1974). Nonetheless, that standard is easily met here.

The Nixon standard sets forth that a party seeking pre-trial production of documents pursuant to Rule 17(c) must demonstrate: 1) relevancy; 2) admissibility; and 3) specificity. Id. at 700. There is an obvious relationship between the first two of these prongs: “while the Supreme

---

<sup>10</sup> As set forth below, the documents should be returned to defense counsel. However, even if the Court were inclined to allow inspection by both parties, this would not obviate the need for the ex parte application process. Disclosing the documents sought by the defendant is not as invasive of defense counsel’s work product and trial strategy as would be requiring defense counsel to disclose to the Government why he sought these documents. Also, requiring a full adversary application would require disclosure of work product and trial strategy to the opposing party even if the court ultimately declined to issue the requested subpoena. See, e.g., United States v. Jenkins, 895 F. Supp. 1389, 1396 (D. Haw. 1995)(“Regardless of what happens once the subpoena issues, the court’s decision in the first instance to issue the subpoena should approximate where possible the blank subpoena provided for in Rule 17(a) and the Rule 17(b) ex parte procedure simulating the blank subpoena. Otherwise, the reigning in of abuses of Rule 17(c) would compel premature disclosure of trial strategy.”)

Court in Nixon established relevancy and admissibility as separate requirements, it seems that admissibility subsumes relevancy since one aspect of admissibility is relevance.” In re Martin Marietta Corporation v. Pollard, 856 F.2d 619, 622 (4<sup>th</sup> Cir. 1988). Further,

[w]hile Rule 17(c) is limited to evidentiary materials, 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 evidence.

Id.

In Martin Marietta, the Fourth Circuit found that the defendant had demonstrated the Nixon requirements were met when he sought to subpoena, inter alia, the results of an internal audit performed by his employer, where the defendant was alleged to have participated in a scheme to defraud the Department of Defense (DOD) by overstating the costs of his employer that were reimbursable by DOD. The Fourth Circuit found this to be a request for a specific category of documents that were clearly of evidentiary value. Indeed, the court also found the standard met for documents pertaining to an administrative settlement Martin Marietta reached with DOD, since the defendant had articulated a vague theory of the defense that Martin Marietta “hung him out to dry while protecting its own interest.” Id.

In this Supplemental Memorandum, Mr. Miller demonstrates that he seeks a specific category of documents (those relating to inspections made of his properties) that plainly have evidentiary value, since they document the condition of those properties, and what rehabilitation work was done to his properties goes straight to the heart of Mr. Miller’s theory of defense.

### **III. The Court Should Order the Documents Returned to Mr. Miller's Counsel**

Finally, Rule 17(c) states that the court “may” order the documents returned to the court to be inspected by “the parties.” Subsumed in this discretionary power is the power to decline to order inspection by both parties and allow the documents to be returned solely to the party who issued the subpoena for them. Tomison, 969 F. Supp. at 591 (“Since the Rule itself contemplates that the court ‘may’ permit inspection by the parties of documents produced before trial, it follows that the Rule empowers the court to deny an adverse party the opportunity to inspect the documents.”); United States v. Reyes, 162 F.R.D. 468, 471 (S.D. N.Y. 1995)(“Under Rule 17(c), the Court exercises discretion on a case-by-case basis to determine whether subpoenaed material should be deposited with the Court and whether this material should be disclosed to the adverse party.”)

There is no need for the court to allow inspection by both parties. Tomison, 969 F. Supp. at 597 (“The two values which appear to most directly inform the exercise of that discretion is the right of the defendant to confidentiality and the need to insure an efficient trial.”) Rule 16 will require the party who issued the subpoena to provide copies to the opposing parties of all of the documents that the party intends to introduce into evidence. The timely compliance by Mr. Miller with his Rule 16 obligations will assure that there is no inefficiency at trial. On the other hand, ordering that all documents that are the subject of the subpoenas be produced to the Government would prematurely disclose to the Government the identity of at least two of Mr. Miller's trial witnesses. It would also apprise the Government of the focus of the defendants' investigation strategy and that the focus of its defense at trial will be in demonstrating that the Millers, in good faith, rehabilitated the properties on which they were the borrowers. Finally, it would disclose the

basis for Mr. Miller's likely cross-examination of a key government witness, the HUD OIG agent. To avoid these unwarranted premature disclosures, the Court should exercise its discretion to issue the subpoenas returnable to Mr. Miller's counsel.<sup>11</sup> Rule 16 will ensure that the Government will not be prejudiced by this procedure and that the trial will proceed without delay.

## CONCLUSION

A litigant in a criminal case is not required to receive authorization of the Court prior to the issuance of a document subpoena to a third party returnable before trial. Accordingly, under Rule 17(b), the Court shall issue the requested subpoenas upon finding that the defendant is indigent. Alternatively, if prior approval of the Court is required, it may be sought on an ex parte basis. In this case, the subpoenas identify specific documents that Mr. Miller in good faith believes to be of evidentiary value. The documents should be produced to Mr. Miller's counsel in advance of trial. Upon counsel's designation of those documents to be introduced in the defendants' case, such documents will be produced to the Government pursuant to Rule 16.

---

<sup>11</sup> As discussed above, non-indigent defendants can and do obtain documentary evidence by issuing subpoenas returnable directly to the defendant. This is an additional reason why, in the absence of any evidence that an indigent defendant is abusing Rule 17(c), the Court should -- even if such a result is not constitutionally compelled, (see preceding footnote) -- exercise its discretion to issue Rule 17(c) subpoenas returnable directly to an indigent defendant's counsel. The Office of the Federal Public Defender is mindful of the Nixon requirements and exercises diligence in the use of Rule 17(c) subpoenas to prevent any abuse of the subpoena process. The Federal Public Defender for this District makes every effort personally to review petitions for document subpoenas before they are filed with the Court.

Respectfully submitted,

JAMES WYDA  
Federal Public Defender  
for the District of Maryland

---

BARRY J. POLLACK  
Assistant Federal Public Defender  
100 S. Charles Street  
Tower II, Suite 1100  
Baltimore, MD 21201