IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 03-20400 BV**
	)	
LOGAN YOUNG,	)	
	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTIONS FOR LEAVE TO ISSUE SUBPOENAS DUCES TECUM TO PHILLIP FULMER AND TO THE NCAA

Before the court are two motions filed by the defendant, Logan Young, on January 15, 2004, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking an order from the court granting leave to issue a *subpoena duces tecum* to Philip Fulmer, the head football coach for the University of Tennessee, and another *subpoena duces tecum* to the National Collegiate Athletic Association ("NCAA"), both non-parties to this criminal proceeding. The motions were referred to the United States Magistrate Judge for determination. A copy of the proposed subpoenas accompanied the motions. The government has responded in opposition. For the reasons that follow, the motions are granted.

Logan Young, a local business man and a supporter of the University of Alabama, is charged in a three-count indictment returned by the grand jury on October 30, 2003, with the following

offenses: one count of structuring a $150,000 financial transaction with a domestic financial institution by making multiple cash withdrawals from his bank account in amounts less than $10,000 to avoid filing cash transactions reports, all in violation of 31 U.S.C. § 5324(a)(3); one count of violating the Travel Act, 18 U.S.C. § 1952, by traveling across state lines from Memphis, Tennessee, to Tuscaloosa, Alabama, to promote or carry on an illegal activity, that is, bribery of a public servant; and one count of conspiring with Lynn Lang, a Trezvant High School football coach in Memphis, Tennessee, to commit these two offenses in violation of the conspiracy statute, 18 U.S.C. § 371. The indictment alleges that Young paid the $150,000 in cash to Coach Lynn Lang to ensure that a Trezvant High School football player, Albert Means, would sign a letter of intent, attend college, and play football at the University of Alabama.

Young's proposed subpoena directed to Philip Fulmer, the head football coach at the University of Tennessee, seeks pretrial production of all notes, recordings (audio or video), and any other memorialization or documentation made by Fulmer or his attorney of any interviews or discussions with the NCAA and with Tom Culpepper, a University of Alabama "booster", regarding the NCAA's investigation of the University of Alabama Football program in 2000 to 2002. In particular, it seeks Fulmer and his attorney's notes and memorialization of interviews with the NCAA on March 9, 2000,

May 23, 2000, and August 7, 2000; their notes of Fulmer and his attorney's eight-hour meeting with Tom Culpepper sometime before August 7, 2000; and Fulmer's one and one-half hour secret tape recording of the meeting with Culpepper.

With regard to the NCAA, Young seeks all memoranda, summaries, notes, recordings, or any other memorialization or documentation relating to information provided to the NCAA by Tom Culpepper, Phillip Fulmer, and any other confidential sources in connection with the NCAA's investigation of the University of Alabama Football program in 2000 to 2002; the case summary produced by the NCAA Enforcement Staff in connection with the investigation,; any recording or transcription of the November 17, 2001 hearing before the NCAA Committee on Infractions; and transcript, recordings, interview notes, summaries, or other memorialization of witness interviews conducted by the NCAA in connection with the investigation, including interviews that took place subsequent to the issuance of the infractions report, specifically interviews with Lynn Lang pursuant to the terms of Lang's plea agreement with the federal prosecutors.

Rule 17(c) of the Federal Rules of Criminal Procedure governs the issuance of *subpoenas duces tecum* in federal criminal proceedings. It authorizes issuance of a *subpoena duces tecum* commanding the production of documents or other objects before

trial for inspection by the parties and their attorneys. FED. R. CIV. P. 17(c)[1]. The purpose of the rule is to expedite trial by providing a time and place before trial for the inspection of documentary evidence. *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951). In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court set forth the showing required for production prior to trial:

> **(1) That the documents are evidentiary and relevant; (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by exercise of due diligence; (3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend to unreasonably to delay the trial; (4) That the application is made in good faith and is not intended as a general fishing expedition.**

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[1] **Federal Rule of Criminal Procedure 17(c) provides**

> **(c) Producing Documents and Objects.**
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> **(1) In General. 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 in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.**
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> **(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.**

United States V. Nixon, 418 U.S. 683, 699 (1974)(citing *United States v. Iozia*, 13 F.R.D. 335, 338 (S.D.N.Y. 1952)); *see also Bowman Dairy Company v. United States*, 341 U.S. 214 (1951); *United States v. Hughes*, 895 F.2d 1135 (6th Cir. 1990). Decisions regarding the issuance and enforcement of Rule 17(c) subpoenas are within the sound discretion of the trial judge and will not be reversed on appeal "unless it is clearly arbitrary or without support in the record." *Hughes*, 895 F.2d at 1145.

The government maintains, however, that the requested items are not discoverable before trial because of Rule 17(h). That rule provides:

> (h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Rule 17(h) qualifies 17(c)'s broad grant of access to documents and objects. Rule 17(h) provides that the production of "statements" of witnesses or prospective witnesses is governed by Federal Rule of Criminal Procedure 26.2. Rule 26.2(a) provides:

> (a) Motion to Produce. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any *statement* of the witness that is *in their possession* and that relates to the subject matter of the witness's testimony.

FED. R. CRIM. P. 26.2(a)(emphasis added).[2] Thus, Rule 26.2(a) provides that after a witness testifies on direct, the government must disclose the witness's "statements" that relate to the witness's testimony and are in the *possession* of the government.

The government's reliance on Rule 17(c) and Rule 26.2 is misplaced for several reasons. First of all, in its response to Young's present motions, the government has represented to the court that Culpepper is a prospective government witness, but that it does not intend to call Fulmer or the NCAA as witnesses at trial as part of its case in chief against Young. Thus, only statements by Culpepper as a prospective witness would come within the purview of Rules 17(c) and 26.2. *See U.S. v. Blais*, 98 F.3d 647, 650 (1st Cir. 1996)(holding that a police officer's report of an interview with a complainant whose complaint led to the defendant's arrest for being a felon in possession of a firearm was not Jencks Act material because the complainant did not testify.) In addition, Young is not seeking documents in the possession of the government. Young is seeking documents in the possession of the NCAA and Philip Fulmer

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[2] Rule 26.2 incorporates the Jencks Act, 18 U.S.C. § 3500, into the Federal Rules of Criminal Procedure. The Jencks Act entitles defendants to discover statements of the government's witnesses. Rule 26.2 expands the Jencks Act by allowing the government to discover statements of the defendant's witnesses. The Jencks Act states that "no statement or report *in the possession of the United States* which was made by a government witness or prospective Government witness . . . shall be subject to subpoena . . . until said witness has testified on direct examination." 18 U.S.C.A. § 3500 (emphasis added).

who are not parties to this litigation. Rules 17(h), Rule 26.2, and the Jencks Act only apply to statements in the government's possession. See, e.g., *United States v. Calderon,* 127 F.3d 1314, 1334-34 (11th cir. 1997) (finding that transcript of prior testimony of government witness was not Jencks Act material which the government was required to produce because the prosecutors were not in possession of the transcript); *United States v. Durham*, 941 F.2d 858, 861 (9th Cir. 1991) (finding that notes taken by a state investigator during interview of witness were not Jencks Act material which the government was obligated to produce because the interview notes were not in the prosecutor's possession).

Furthermore, most of the items sought by Young in the proposed subpoenas do not meet the definition of a "statement" as that term is defined in Rule 26.2. As used in Rule 26.2, a witness "statement" means:

> **(1) a written statement that the witness makes and signs, or otherwise adopts or approves;**
> **(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statements that is contained in any recording or any transcript of a recording; or**
> **(3) the witness's statements to a grand jury.**

FED. R. CRIM. P. 26.2(f). Rule 26.2 excludes from pre-trial discovery only written statements that the witness signs or otherwise adopts, contemporaneous recordings of the witness's statement or a transcript of the recording, or a witness's statement

to a grand jury. In *U.S. v. Medina*, 992 F.2d 573, 580 (6th Cir. 1993), the Sixth Circuit held that notes of an interview were not Jencks Act "statements" because the notes were not read back to the witness nor did she read the notes, know of their existence, or adopt them as her own. Other than Fulmer's surreptiously recorded one and one-half hour tape of the meeting between Culpepper, Fulmer, and Fulmer's attorney, there is no indication that the items sought by Fulmer include written statements signed or otherwise adopted by Culpepper, contemporaneous recordings of statements by Culpepper, or grand jury statements. As for the one-and-one-half hour tape of the Culpepper-Fulmer meeting, there is no indication on the record before the court that the tape itself is in the possession of the government so as to constitute Jencks Act material. For these reasons, Rules 17(h), 26.2, and the Jencks Act do not control Young's request for an order directing the issuance of subpoenas to Fulmer and the NCAA for pretrial production of items in the possession of Fulmer and the NCAA.

The government also raises the question of whether the information sought is protected as attorney work product or attorney-client communications. The government, however, has no standing to raise objections on the bases of these two privileges. The attorney-client privilege and work product protection belong to Fulmer and his attorney, not the government.

Based on the present record, the court finds that Young has

made the necessary showing mandated by *United States v. Nixon* for pretrial production of the requested information. The requested records and documents that Young seeks are relevant and evidentiary. The NCAA investigation of the University of Alabama's football program and recruiting practices focused on the same allegations and activities that gave rise to the indictment against Young. According to the affidavit of Keith Belt, an attorney who represented a former assistant University of Alabama football coach in the investigation and who was allowed to review the NCAA's files, the NCAA investigation conducted by its Enforcement Staff consisted of numerous interviews of various high school and college football coaches and other individuals, including Milton Kirk, Lynn Lang, Dabbo Swinney, Brad Lawing, Johhny Luckett, Wayne Randall, Rip Scherer, David Cutcliffe, Kurt Roper, Jeff Rouzie, Charlie Stubbs, Pat Washington Ron Brown, Daryl Drake, Fitz Hill, and Leon Perry. Milton Kirk, a former assistant football coach at Trezvant High School, was interviewed on at least six separate occasions by the NCAA. The investigation culminated in an Infractions Report issued in February 2002. Fulmer and Culpepper have been identified as the confidential sources referenced in the NCAA report. The University of Alabama officials and coaches were allowed access to most of the materials but others implicated in the NCAA report who were not directly affiliated with the University were not allowed access. Clearly, the subject matter of the items sought by Logan in the

subpoenas are directly related to the allegations in the pending indictment against him, and the witnesses interviewed provided information to the NCAA about the subject matter at issue in this case.

All the documents sought appear to be admissible as business records. To be considered evidentiary, the documents must have greater value than simply impeachment. *Nixon*, 418 U.S. at 701. As in *Nixon*, the items sought here appear to have valid potential evidentiary uses other than simply for impeachment. For example, the information contained in these memorializations may be used to refresh the memory of Culpepper about matters of which he previously had knowledge should he take the stand. They may also contain substantive matters that could be used by Young as part of his defense. Young indicates that Coach Fulmer may be called as a witness by the defense. His records could be used to refresh his recollection. Also, Belt, in his affidavit, offers his legal opinion that after reviewing the pending indictment against Young and having seen the NCAA's files, the materials he reviewed "will provide admissible evidence in this case, as well as impeachment matters." (Mem. in Supp. of Def. Logan Young's Mot. for an Order Granting Leave to Issue *Subpeona Duces Tecum* to the National Collegiate Athletic Assc., Ex. B, Aff. of Keith Belt at ¶ 7.) As in *Nixon*, the sought items should be disclosed.

The items that Young seeks are also not otherwise procurable and will likely impede his trial preparation and unreasonably delay trial if not provided in advance of trial. The NCAA and Fulmer have already denied Young's requests for these items, and the NCAA and Fulmer are presumably the only persons in possession of these items other than possibly the government. Consequently, only the NCAA and Fulmer are in a position to disclose the items. Young needs these items in order to properly prepare his arguments and defenses for trial. They are important to his defense and, as alleged, Young's trial preparation will be hampered if they are not obtained. Should Young be forced to wait until trial for disclosure, the review of the items would likely be lengthy and would likely unreasonably delay trial. Belt describes the material in the NCAA files as voluminous. (*Id.* at ¶ 6.) He indicated that the recorded statements of Milton Kirk alone are approximately twenty-four hours in length. The NCAA memorandum of meetings with Fulmer provided to Young by the government as part of its discovery is not necessarily an adequate substitute for all the memoranda and notes of interviews in the possession of the NCAA and of Fulmer.

Finally, the documents are sought in good faith and are specifically identified. Young has not engaged in a "fishing expedition." He seeks only those items that concern the NCAA investigation of the University of Alabama football program between the years 2000 and 2002. Also, there is no evidence before the

court that compliance with the subpoena would be unreasonable or oppressive or would unduly delay the trial. Trial is currently set for May 3, 2004.

For these reasons, Young's motions to issue a *subpoena duces tecum* to Fulmer and a *subpoena duces tecum* to the NCAA is granted. The subpoena shall direct Fulmer and the NCAA to produce the documents and items requested in court before Magistrate Judge Diane K. Vescovo, Courtroom #5, 167 N. Main St. Memphis, Tennessee, on Friday, April 2, 2004, at 9:30 a.m. The parties are reminded that in accordance with the order issued by U.S. District Judge J. Daniel Breen on February 2, 2004, "no pretrial public filing, disclosure or dissemination shall be made of anything originating or obtained from the National Collegiate Athletic Association and provided to the defendant by the United States in the discovery process absent further orders of this Court." The same applies to anything originating from, obtained from, or provided by the National Collegiate Athletic Association during the discovery process.

IT IS SO ORDERED this 4th day of March, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE