

# New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 233—NO. 44

TUESDAY, MARCH 8, 2005

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## WHITE-COLLAR CRIME

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### *The Limits of Rule 17(c) Subpoenas*

For years, defendants have been frustrated by courts denying requests for authorization to issue subpoenas duces tecum pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure prior to trial or hearings.

The courts have often reminded defendants that Rule 17(c) is not intended as a means of discovery nor as a basis for a “general fishing expedition.” Courts have also reminded the government on occasion that it too is subject to the rule’s limitations.

The recent opinion of Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York in *United States v. Leaver*<sup>1</sup> addresses a significant issue for criminal practitioners, and one on which the U.S. Court of Appeals for the Second Circuit has yet to rule: whether the government, in seeking to issue a subpoena in anticipation of making a motion to reconsider the dismissal of a criminal case, should be required to justify its failure to seek new



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evidence prior to the court’s ruling on the motion to dismiss.

Without announcing a blanket rule, Judge Scheindlin ruled that the government in *Leaver* should have provided at least some justification for its failure to seek new evidence at the proper time.

#### The ‘Leaver’ Facts

In July 2004, the defendant Jonathan Leaver was arrested on an indictment returned in 1998 — charging mail fraud, wire fraud and bank fraud in violation of 18 USC §§1341, 1342 and 1344 — based on events that allegedly occurred in 1993. On Dec. 13, 2004, Judge Scheindlin dismissed the indictment based on the violation of defendant’s Sixth Amendment right to a speedy trial.

In her Dec. 13 order, Judge Scheindlin made two important factual findings: (1) that although the defendant had left the United States before the government began its investigation and had lived abroad since, he had been living openly without any attempt to conceal his whereabouts; and (2) that the government was negligent in its pursuit of the

defendant. In making these findings, the court relied in part on the defendant’s testimony — which the court found credible — that he had continuously used the same American Express card, issued in 1978 and listed under his own name and Social Security number; that he had filed a change of address with American Express; and that he had placed his name, address and phone number on the checks he used to pay his American Express card bills.

The court stayed the effect of the order dismissing the indictment pending an anticipated government motion to reconsider. The government then sought to show that, contrary to the defendant’s testimony, he did not inform the credit card company of his addresses abroad or pay his bills with checks bearing those addresses. To support its anticipated motion for reconsideration, the government sought to issue a third-party subpoena to American Express for the defendant’s credit card records pursuant to Rule 17(c).<sup>2</sup> The government attempted to justify its failure to seek the evidence sooner by claiming that it was surprised by the weight the court’s Dec. 13 order placed on the defendant’s claims regarding his American Express card, even though, according to the court, the defendant had made clear all along that he intended to make a motion to dismiss and had made prominent statements in his affidavits and briefs concerning his American Express card. The government also stated that it had not expected that the court would make findings of fact without holding

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an evidentiary hearing, although the government itself had stated that there was no “necessity for a hearing” and, according to the court, could not reasonably have expected that the court would rule on the motion to dismiss without making any findings of fact.

Judge Scheindlin observed that the government also had been given “ample opportunity” to respond to the defendant’s statements. After the government’s initial response failed to address the defendant’s Sixth Amendment claim and after the government failed to offer any affidavits of its own, the court instructed the government to file a supplemental brief. Two weeks prior to the court’s issuance of its dismissal order, the government waived the right to a hearing and represented that the motion was ripe for decision on the record as it stood. The government still could have sought a subpoena after its waiver; instead, it “chose to await the outcome of the motion before contesting Leaver’s version of the facts.”

### The ‘Leaver’ Court’s Reasoning

After reviewing Rule 17(c), which provides for the production of documents prior to trial,<sup>3</sup> Judge Scheindlin set forth the Supreme Court’s test, from *United States v. Nixon*,<sup>4</sup> for an enforceable Rule 17(c) subpoena: “(1) relevancy; (2) admissibility; (3) specificity.” Further quoting *Nixon*, the court noted that Rule 17(c) is not intended to provide “a means of discovery for criminal cases ... but to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials.” Nor is a subpoena to be used for a “general fishing expedition.”

Applying these long-standing guidelines to the *Leaver* case, Judge Scheindlin denied the government’s request on two grounds. First, the court pointed out that no trial or even hearing date was expected in *Leaver*. The government had not sought the materials in connection with

an anticipated hearing, but rather had hoped that, once it had the materials, a hearing might result. “To permit a Rule 17(c) subpoena in these circumstances,” the court wrote, “would be to extend the rule far beyond its limits, transforming it from a carefully circumscribed device to expedite trials and hearings into an effectively unlimited tool for discovery and investigation.”

The second ground consumed a significant portion of the court’s opinion. Judge Scheindlin denied the government’s request to issue a Rule 17(c) subpoena at such a late date in the proceedings because the subpoena could not produce “relevant or admissible evidence.” The

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court noted that “new facts not previously presented to the [c]ourt may not generally be offered for the first time in a motion to reconsider.” The judge acknowledged, however, that the standard to be applied in deciding reconsideration motions in criminal cases has not been clearly established; neither the Federal Rules of Criminal Procedure nor the Local Criminal Rules expressly provide for reconsideration motions.<sup>5</sup> The court then proceeded to link the issue of whether the subpoena could produce admissible evidence to the anticipated motion to reconsider, and specifically to the need for the government to justify its failure to seek the new evidence sooner.

### Hearings, Orders

The *Leaver* court noted that, in the “closely analogous context” of a suppression order, the Second Circuit, in *United States v. Bayless*,<sup>6</sup> had “left open the

question of whether the [g]overnment was required to justify its failure to present the new evidence prior to the district court’s ruling [on the suppression order].” The court in *Bayless* was able to leave the question open because it found that the government had “adequately justified its decision not to introduce the [testimonial evidence]” on the basis that the testimony in question “echoed” that of another witness and therefore the government “had no reason to believe that [the] testimony would be anything but cumulative.” The Second Circuit further commented that “vague notions of unfairness, that the government should not have ‘two bites’ off the same apple, ought not control.”<sup>7</sup>

Other circuits, as Judge Scheindlin pointed out, have split on the issue. Of the five circuits to address it, two — the U.S. Courts of Appeals for the Eleventh and the District of Columbia circuits — have held that the government, when it moves for reconsideration of a suppression order on the ground that it can introduce new evidence, must proffer a justification for its failure to present the relevant evidence at the original suppression hearing.<sup>8</sup> The U.S. Courts of Appeals for the Fifth, Seventh and Ninth circuits have declined to impose a justification requirement in the context of a motion to reconsider a suppression order.<sup>9</sup>

A judge in the U.S. District Court for the Northern District of New York, in *United States v. Gagnon*,<sup>10</sup> recently considered the justification issue in the context of a suppression order. There, the government received notice of new evidence after the suppression hearing but a full two months prior to the issuance of the suppression order. It did not bring the evidence to light until after the court had issued a suppression order, when it moved for reconsideration of the order. The government argued that it had spent the intervening time investigating the evidence.

The court held that, “[a]t the very least, due diligence required a speeding up of the process so that the information could

come to light prior to the [suppression order] being filed.” In strong language, the court admonished the government that it would “not now be permitted to relitigate an issue already decided. An issue on which the government had months to prepare and gather witnesses and testimony. An issue on which the ... newly discovered evidence was, or should have been, in the government’s hands and brought to the attention of the [c]ourt at the hearing, or, at the very least, prior to the issuance of [the suppression order].”

The courts’ treatment of motions to reopen suppression hearings, as Judge Scheindlin noted in *Leaver*, is also instructive. In those cases, the moving party — whether the government or the defendant — must show that the evidence was “newly discovered and was unknown to [the moving party] at the time of the original hearing” and that “the failure to learn of the evidence previously was not the result of lack of due diligence on the part of the [moving party].”<sup>11</sup>

## The ‘Leaver’ Ruling

After finding that “it is not possible to avoid choosing between these two approaches” (a justification requirement or none) and that “[i]t is ... necessary to decide whether justification is required,” the *Leaver* court held that “[n]otwithstanding the *Bayless* court’s directive that ‘the interests of justice’ should outweigh mere ‘vague notions’ of finality and fairness, it would be inappropriate here to permit the [g]overnment to use a Rule 17(c) subpoena to obtain new evidence that it intends to offer at a ‘re-opened’ hearing, without providing some justification for its failure to seek this evidence at the proper time.”

Judge Scheindlin distinguished *Bayless* on two grounds. First, the government in *Leaver* had not “offered any valid justification” for failing to seek the new evidence prior to the issuance of the order dismissing the case, whereas the Second Circuit in *Bayless* had found that “the government

adequately justified its decision” not to introduce at the suppression hearing the new evidence it offered in its motion for reconsideration. Judge Scheindlin found the government’s attempts at justification in *Leaver* — including the government’s “surprise” at the weight the court placed on the American Express card and its misguided expectation that the court would hold an evidentiary hearing — unconvincing. “The [g]overnment cannot plausibly claim that it did not believe that the evidence sought would have been relevant to the determination of *Leaver*’s claims,” the court wrote.

Second, Judge Scheindlin was troubled that the government “does not (yet) seek merely to introduce some new item of evidence already within its possession (as in *Bayless*) but seeks to use a trial subpoena to open an entirely fresh investigation of the facts.” The court feared that if it “were to permit the [g]overnment to proceed in this way, without requiring a legitimate justification, then there would be no case in which the [g]overnment could not reopen hearings as a matter of course,” which could lead to “disastrous consequences.”

Judge Scheindlin concluded by tying her holding to *Nixon* and specifically to its requirement of admissible evidence. “The [g]overnment has not offered any justification for its failure to seek this evidence at the proper time, other than that it did not expect to lose the motion,” the court wrote. “Because the requested subpoena cannot produce admissible evidence, it does not meet the criteria of *Nixon*.”

## Conclusion

Should the government appeal Judge Scheindlin’s ruling in *Leaver*, the Second Circuit will face this issue for the first time. Judge Scheindlin’s analysis and that of the Eleventh and District of Columbia circuits, provide ample support for holding that the government must be required to justify its failure to timely seek new evidence before it can issue a Rule 17(c)

subpoena in anticipation of making a motion to reconsider a dismissal.



1. No. 98 CR. 731(SAS), 2005 WL35578 (SDNY Jan. 5, 2005). A member of Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. represented the defendant, Jonathan Leaver.

2. Although the defendant arguably lacked standing to move to quash a subpoena issued to a third party (see *United States v. Nachamie*, 91 FSupp2d 552 (SDNY 2000)), the court found it unnecessary to make that determination and proceeded to address the defendant’s objections because “it is the [c]ourt’s responsibility to ensure that the subpoena is for a proper purpose and complies with the requirements of Rule 17(c).”

3. Rule 17(c) provides that “[t]he court may direct that ... documents ... designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the ... documents ... to be inspected by the parties and their attorneys.”

4. 418 US 683 (1974).

5. See *United States v. Delvi*, No. 01 Cr. 74, 2004 WL 235211 (SDNY Feb. 6, 2004). The *Leaver* court also cited to Local Civil Rule 6.3, which refers to reconsideration motions in civil cases being appropriate when a court has overlooked “factual matters that were put before it on the underlying motion,” and to two civil cases, *Davidson v. Scully*, 172 FSupp2d 458 (SDNY 2001), and *Range Road Music, Inc. v. Music Sales Corp.*, 90 FSupp2d 390 (SDNY 2000).

6. 201 F3d 116 (2d Cir.), cert. denied, 529 U.S. 1061 (2000).

7. Quoting *United States v. Tucker*, 380 F2d 206 (2d Cir. 1967).

8. See *United States v. Villabona-Garnica*, 63 F3d 1051 (11th Cir. 1995), cert. denied, 517 U.S. 1114 & 1126 (1996); *McRae v. United States*, 420 F2d 1283 (D.C. Cir. 1969).

9. See *United States v. Rabb*, 752 F2d 1320 (9th Cir. 1984), cert. denied, 471 U.S. 1019 (1985); *United States v. Regilio*, 669 F2d 1169 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States v. Scott*, 524 F2d 465 (5th Cir. 1975).

10. 250 FSupp2d 15 (NDNY 2003), rev’d on other grounds, 373 F2d 230 (2d Cir. 2004).

11. *United States v. Oates*, 445 F. Supp. 351 (EDNY), aff’d, 591 F2d 1332 (2d Cir. 1978); see also *United States v. Perez*, No. 01 CR. 848(SWK), 2002 WL 1835601 (S.D.N.Y. Aug. 8, 2002) (denying defendant’s motion to reopen where new witnesses were known to him and available at time of original hearing); *United States v. Nezaj*, 668 F. Supp. 330 (S.D.N.Y. 1987) (denying government’s motion to reopen).

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