UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 12-154S
	:	
JUSTIN LEE WORLEY	:	

MEMORANDUM AND ORDER

Before the Court for determination is the government's Motion for Issuance of Subpoenas Duces Tecum (ECF No. 12) to procure records pertaining to the college education and military service of Defendant Justin Lee Worley, records that the government contends are relevant to sentencing in this matter. The Motion is grounded on Rule 17(c) of the Federal Rules of Criminal Procedure and, for the educational records, the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Defendant objects, asserting that both categories of records sought by the request are personal and confidential and that the government has no legal right to obtain them.

I. Background

On November 7, 2012, Defendant was charged with an eight-count indictment for robbing various banks in Rhode Island (ECF No. 1); a ninth bank robbery in Massachusetts was added by information filed on February 15, 2013 (CR No. 13-033S, ECF No. 1). He pled guilty to all of the robberies on March 7, 2013. Sentencing is scheduled for July 26, 2013. The government contends that the two categories of documents that it seeks leave to subpoena are relevant to matters that Defendant has presented, or may present to the Court for it to consider in determining an appropriate sentence.

The government's belief that Defendant's education and military service may be raised at sentencing is not without foundation.

At the time of his arrest on September 19, 2012, Defendant told investigators that he had been a member of the United States Army, deployed overseas in combat areas – the government contends that it appeared that these statements were made in an attempt to attribute his antisocial behavior to anxiety and depression stemming from his deployment. The government searched public records for evidence to confirm (or impeach) Defendant's claim, but was only able to discover that he was in the Army National Guard of Texas from July 28, 1999, until his honorable discharge on September 28, 2001. There was no mention of an overseas deployment. The government believes that Defendant's claim can be confirmed or rebutted by either DA Form 2-1 or DD Form 214,[1] which the United States Army will provide only with Defendant's consent or pursuant to a subpoena. Defendant has declined a request from the Probation Department for his consent to procure these records,[2] but also represents that he might mention or rely on his military record as a factor bearing on mitigation of sentence. All parties concur that it could take up to three months to obtain this information. Accordingly, the government requests leave to subpoena Defendant's military records (including not only DA Form 2-1 and DD Form 214, but also "other records reflecting assignments overseas").

The incident giving rise to the need for educational records occurred during Defendant's plea colloquy. The Court began that colloquy with a request that Defendant confirm that he understood that false answers to the Court's questions could result in a charge of perjury, which

[1] DA Form 2-1 is the "Personnel Qualification Record." It is a multi-page form, which covers "classification and assignment data," including "overseas service." DD Form 214 is the "Report of Transfer or Discharge." It covers time in "foreign and/or sea service," with details of overseas service.

[2] Defendant represents that he is conducting his own investigation regarding both his military service and his educational achievements. As a result of what is learned in his investigation, he may well consent to the Probation Department obtaining these records at a later time.

he did. ECF No. 15 at 3. The Court then asked for Defendant's name and age. Id. This exchange followed:

> Q. How far did you go in school?
>
> A. Two degrees in college.
>
> Q. And where are those from?
>
> A. Virginia Tech.

Id.

As with his military records, Defendant has declined the request[3] from the Probation Department to consent to release of records from "Virginia Tech,"[4] but leaves open the possibility that he might refer to his educational accomplishments as evidence of positive character traits to be considered at sentencing. The government seeks the educational records as necessary for it to address such a presentation. In addition, if the subpoenaed records establish that Defendant does not have two degrees from Virginia Tech, the government believes that an exaggeration of his level of education to the Court during the plea colloquy may be taken into consideration at sentencing. With its subpoena to Virginia Tech, the government hopes to be permitted to ask not only for transcripts documenting academic performance, but also for "reports of academic deficiencies, academic progress notes [and] scholarship awards . . . ."

II. Standard of Review

Rule 17(c) of the Federal Rules of Criminal Procedure permits a party to obtain a subpoena for "books, papers, documents, data, or other objects the subpoena designates" upon a showing of the following:

(1) that the documents are evidentiary and relevant;

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[3] See n.2.

[4] "Virginia Tech" refers to Virginia Polytechnic Institute and State University, in Blacksburg, Virginia.

(2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence;

(3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and

(4) that the application is made in good faith and is not intended as a general "fishing expedition."

United States v. Nixon, 418 U.S. 683, 699-700 (1974) (internal footnotes omitted). While the language of Rule 17(c) does not explicitly require a motion to secure issuance of a subpoena duces tecum returnable before trial or a hearing, a motion seeking leave, as the government has made here, is the procedure recognized by courts as an "orderly and desirable procedure and one frequently followed." United States v. Gonzalez, No. 94 CR. 134(WK), 2002 WL 31641109, at *1 (S.D.N.Y. Nov. 13, 2002); see also 2 Wright, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 274 at 154 (4th ed.). In considering such a motion, the Court must be careful that Rule 17(c) is not turned into a broad discovery tool, rendering meaningless Rule 16's strict discovery limitations on discovery in criminal cases. Nixon, 418 U.S. at 698-99; Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951). Courts should be particularly vigilant when Rule 17(c) is deployed to obtain intrusive discovery into private matters; as Defendant correctly points out, "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635 (1886).

Rule 17(c) references the use of the subpoena in aid of trial; however, cases construing the Rule have fairly uniformly concluded that Rule 17(c) subpoenas can be used to procure documentary evidence for sentencing. See, e. g., United States v. Winner, 641 U.S. 825, 833 (1981); United States v. Krane, 625 F.3d 568, 573, 574 (9th Cir. 2010); United States v. Eisenhart, 43 Fed. App'x 500, 505 (3d Cir. 2002); United States v. Reid, No. 10-20596, 2011

WL 5075661, at *3 (E.D. Mich. Oct. 26, 2011); but see United States v. Shrader, Criminal No. 1:09-0270, 2010 WL 4781625, at *2 (S.D. W.Va. Nov. 16, 2010) (court denies motion for Rule 17(c)(3) subpoena for victim's psychologist's records based on lack of showing of necessity at sentencing, but also because defendant did not cite, and the court was unaware of, any cases authorizing issuance of Rule 17(c)(3) subpoenas in aid of sentencing). In this District, Rule 17(c) has been used to subpoena information relevant at the sentencing phase. United States v. Pleau, No. CR 10-184-1 S, 2012 WL 4369302, at *1 (D.R.I. Sept. 24, 2012) (defendant's educational records may be subpoenaed based on relevancy at penalty phase).

In addition to satisfying the Nixon elements, the government's request for Defendant's educational records must comply with FERPA, which affords privacy protection for educational records, prohibiting access to an individual's educational records absent consent, except when the records are obtained pursuant to a judicial order or subpoena. 20 U.S.C. § 1232g(b)(2)(B). To overcome the protections of FERPA, the government must demonstrate that its need for access to educational records outweighs the defendant's privacy interests. Pleau, 2012 WL 4369302, at *2 (privacy interest outweighed by government's genuine need for access to educational records that are highly relevant to assessment of penalty); Warner Bros. Records, Inc. v. Does 1-6, 527 F. Supp. 2d 1, 2 (D.D.C. 2007) (plaintiffs' showing of good cause for educational discovery is sufficient to justify subpoena because information relevant and crucial to plaintiffs' claims); Rios v. Read, 73 F.R.D. 589, 599 (E.D.N.Y. 1977) (FERPA requires party seeking disclosure of educational records to demonstrate a genuine need that outweighs privacy interest of student).

III. Analysis

a. Military Records

Application of the Nixon factors here demonstrates that the government has generally established the requisite necessity for Defendant's military records.

First, the forms sought regarding Defendant's overseas military service are unquestionably evidentiary. They also are likely to be highly relevant, in that Defendant has represented to this Court that he might present his military history to the Court as a mitigating factor at sentencing. See 18 U.S.C. § 3553(a) ("history and characteristics" of defendant to be considered in determining the sentence to be imposed). While it remains possible that he might opt not to rely on his military service, the time that it will take to procure these records would leave the government unable to get them if the subpoena does not issue now.[5] Under these circumstances, where it is not yet known whether these records will be relevant, instead of quashing the subpoena, the subpoena should issue, but the responsive records must be delivered to the Court. They will be held in camera until July 1, 2013 – if Defendant advises the government by that date that he will not mention or rely in any way on his military history or record, they will be destroyed. Otherwise, the Court will produce copies of them to the government. See United States v. Hunter, 13 F. Supp. 2d 586, 593-94 (D. Vt. 1998) (Rule 17(c) subpoena for any "and all records concerning" defendant at Yale not quashed because records might become relevant depending on what defendant presents at sentencing; records to be deposited with court until relevancy clarified).

Second, these records are unquestionably not otherwise procurable – the government has gotten as much as is publicly available and cannot get the remaining records except with

[5] Because of other issues – requiring the testimony of victims – that will need to be addressed at sentencing, a continuance to procure the military records is not desirable. In any event, Nixon is clear that a subpoena should issue if delay would otherwise result. 418 U.S. at 699.

Defendant's consent, which has been refused, or by subpoena. Third, the government avers that, unless a subpoena is authorized, it will be unable to prepare for sentencing without these records because it will be unable to respond to whatever evidence or argument Defendant might present about his military service.

Last, the government seeks the records in good faith as a result of Defendant's statements to investigators apparently relying on overseas military service to justify his conduct. Nevertheless, the Court is troubled by the breadth of the government's request in that DA Form 2-1 and DD Form 214 may contain additional personal information beyond the relevant issue (overseas service) for which the government has demonstrated a need. To that extent, the scope of what is proposed for the subpoena strays into the "fishing expedition" territory prohibited by Nixon. 418 U.S. at 700. Since these forms will be produced in the first instance to the Court, this overbreadth problem is readily cured. After DA Form 2-1 and DD Form 214 have been produced to this Magistrate Judge to be held in camera, I will invite Defendant to comment on whether they contain information that is not relevant and will provide the government an opportunity to respond; any information found to be irrelevant will be redacted before the records are provided to the government. Moreover, with the production of the two forms, the catch-all request for "any record reflecting any overseas assignments" is duplicative and unnecessary. United States v. Abuhouran, 972 F. Supp. 326, 327-28 (E.D. Pa. 1997) (Rule 17(c) subpoena quashed because it would require reams of information that is duplicative of information readily available).

b. Educational Records

A Rule 17(c) subpoena for educational records must meet not only the Nixon factors, but also must overcome the privacy rights created by FERPA. The first Nixon factor is readily

satisfied – the educational records are both clearly evidentiary and plainly relevant. Unlike the military records, the government's need for the educational records is not just contingent on whether Defendant plans to rely on his educational achievements in mitigation. Rather, Defendant has already put them in issue by his sworn statements to the Court during the plea colloquy – the government will need them if Defendant mentions his education at sentencing, but also needs them if he does not, to the extent that they reveal that his sworn statements at the plea hearing were false. Second, without Defendant's consent or a subpoena, they are not otherwise procurable because of the prohibition in FERPA. Third, without these records, the government will be unable to prepare regarding Defendant's statements at the plea colloquy or to respond to whatever evidence or argument Defendant might present about his educational background at sentencing. Fourth, the application is made in good faith in that Defendant himself referenced his educational achievements at the time of his plea. In addition to satisfying the Nixon factors, the government has also demonstrated that its need for access to educational records outweighs Defendant's privacy interests[6] because the records are highly relevant to Defendant's "history and characteristics" where he has already put a claim of specific educational attainment on the record before this Court. 18 U.S.C. § 3553(a)(1).

While the government has met its burden under Rule 17(c) and under FERPA for educational records pertaining to his achievements at Virginia Tech, the breadth of the government's request goes further than what it has demonstrated is relevant and necessary; to that extent, the scope of what is proposed for the subpoena exceeds discovery permitted under

[6] The government argues that Defendant's privacy rights are not as robust as those of a citizen who is presumed innocent of the charges, in light of his status as adjudged guilty. See Samson v. California, 547 U.S. 843, 850-52 (2006) (parolees have fewer expectations of privacy than probationers); United States v. Knights, 534 U.S. 112, 118-19 (2001) (inherent in the very nature of probation, like incarceration, is that they do not have the right of absolute liberty to which every citizen is entitled). Because FERPA does not make such distinctions, this Court has not applied a diluted privacy right in the balancing performed in this case.

Nixon and FERPA. See 418 U.S. at 700; 20 U.S.C. § 1232g(b)(1)(J)(ii). Defendant's transcripts are more than adequate to establish his educational achievements. The remainder of the categories of educational records sought by the government are not sufficiently necessary to overcome Defendant's privacy interests. Pleau, 2012 WL 4369302, at *1 (educational records may be subpoenaed for sentencing only if relevancy outweighs privacy interests).

IV. Conclusion

The Court GRANTS IN PART the government's Motion for issuance of a subpoena duces tecum for Defendant's military records, as reflected in DA Form 2-1 and DD Form 214, and for issuance of a subpoena duces tecum for Defendant's transcripts from Virginia Tech. When the return of the subpoena for DA Form 2-1 and DD Form 214 is received, with notice to the Defendant, the responsive records must be delivered directly to this Magistrate Judge's chambers. I will hold them in camera until July 1, 2013 – if Defendant advises the government by that date that he will not mention or rely in any way on his military history or record, they will be destroyed. Otherwise, the Court will confer with the parties regarding redactions to eliminate references on DA Form 2-1 and DD Form 214 that are not relevant and will produce redacted copies of them to the government. To the extent that the government's Motion seeks additional military or educational records, the Motion is DENIED.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
April 23, 2013