WHEN COOPERATION EQUALS CONTROL: WHAT CRIMINAL DEFENDANTS AND THEIR COUNSEL NEED TO KNOW TO SEEK DISCOVERY FROM COOPERATORS THROUGH THE GOVERNMENT

Michael T. Packard & George T. Phillips[*]

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[*] Michael T. Packard is a partner in the Boston office of Quinn Emanuel Urquhart & Sullivan, LLP who specializes in white-collar defense and government investigations. He is a former Assistant United States Attorney for the District of Maryland. George T. Phillips is an associate in the New York office of the same firm.

INTRODUCTION

Among the strongest weapons criminal defendants can arm themselves with for trial is evidence that undermines the credibility of the government's cooperators, particularly when that evidence comes from the cooperators themselves. But federal defendants often face significant obstacles in obtaining cooperator evidence. Sometimes they do not receive that discovery at all; other times they do not receive it until very close to trial. Defendants seeking such evidence before trial through Rule 17(c) subpoenas of the government's cooperators must meet demanding standards and follow byzantine procedures. Those hurdles often prove insurmountable, especially when judges take an overly rigid view of Rule 17's requirements.

One way defendants may sidestep those obstacles is to seek discovery from cooperators through the government under Rule 16(a)(1)(E). That provision empowers defendants to demand production of material discovery in the government's "possession, custody, or control." Courts have held that cooperators may fall within the government's "control" when the terms of their cooperation require them to produce documents and information to the government upon request. In those circumstances, defendants may seek discovery from cooperators through the government—often getting discovery faster and with fewer burdens than using Rule 17 subpoenas.

This article discusses when, how, and why defendants should seek discovery from cooperators through the government itself under Rule 16(a)(1)(E). Part I outlines defendants' general discovery rights under the criminal rules, other statutes, and the Constitution. Part II discusses defendants' ability to use Rule 16(a)(1)(E) to compel the government to obtain key discovery from its own cooperators under existing precedent, explains why that discovery can be critical before and at trial, and considers potential limitations on this use of Rule 16(a)(1)(E). Finally, Part III explains why obtaining cooperator discovery before trial through the government can be more expedient for defendants than using Rule 17 subpoenas.

DISCUSSION

I. OVERVIEW OF FEDERAL CRIMINAL DEFENDANTS' DISCOVERY RIGHTS

Federal criminal defendants generally obtain discovery in three ways: through Rule 16 party discovery, through Rule 17 third-party subpoenas,

and through statutes and constitutional precedent requiring certain disclosures.[1] Part I summarizes each in turn.[2]

A. Party Discovery Under Rule 16

In most cases, defendants get the lion's share of discovery from the government in standard party discovery under Rule 16.[3] Specifically, Rule 16(a) delineates what discovery the government must give to a defendant and when.[4]

A key provision in Rule 16 is subpart (a)(1)(E), which governs discovery of "documents and objects." Under the discovery rules, the term "document" includes all manner of materials, including electronically stored information.[5] Rule 16(a)(1)(E) provides that, "upon a defendant's request, the government must permit the defendant" access to discovery if it is both (1) "within the government's possession, custody, or control";

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[1] Of course, defendants may use a wide array of alternative techniques to locate helpful discovery, including open-source research, private investigatory work, voluntary productions from friendly third parties, and requests under the Freedom of Information Act (as well as state and local analogues and similar laws in foreign countries).

[2] This article focuses on fact discovery and does not discuss a defendant's right to receive and prepare expert discovery. *See* Fed. R. Crim. P. 16(a)(1)(G), (b)(1)(C).

[3] Party discovery typically begins soon after arraignment. *See* Fed. R. Crim. P. 16(a) ("No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16."). Discovery disputes that lead to an impasse are resolved by motion. *See id.* at 16(b) ("After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial."). Many jurisdictions and judges require counsel to certify that the parties conferred to an impasse on a discovery dispute before they can move for relief. *See, e.g.*, S.D.N.Y. & E.D.N.Y. Lcl. Crim. R. 16.1 (rev. 2024); E.D. Pa. Lcl. Crim. R. 16.1(c) (rev. 2018).

[4] Rule 16(b) determines what a defendant must give to the government and when.

[5] *See* Fed. R. Civ. P. 34(a)(1)(A). Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure requires the government to disclose "books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items," without mentioning electronically stored information. Even so, courts have construed criminal Rule 16 to require the production of electronically stored information consistent with its civil counterpart. *See, e.g.*, United States v. Stirling, No. 11 Cr. 20792, 2012 WL 12926045, at *2 (S.D. Fla. June 5, 2012) (requiring government "to produce ESI in a reasonably usable form," consistent with Fed. R. Civ. P. 34); United States v. O'Keefe, 537 F. Supp. 2d 14, 18–19 (D.D.C. 2008) (Facciola, M.J.) (looking to Fed. R. Civ. P. 34 for guidance on how ESI should be produced in criminal cases); *see also* United States v. Spivak, 639 F. Supp. 3d 773, 779 (N.D. Ohio 2022) ("[D]iscovery of electronically stored information presents an area where criminal practice might—and probably should—follow the lead of civil discovery.").

and (2) "material to preparing the defense."[6] Once a defendant meets these requirements, the government must produce the requested discovery.[7]

The materiality requirement "is not a heavy burden,"[8] and a defendant need make only a "prima facie showing of materiality" to obtain discovery.[9] "[E]vidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, . . . assisting impeachment or rebuttal," "counter[ing] the government's case," or "bolster[ing] a defense."[10] The discovery sought thus "need not directly relate to the defendant's guilt or innocence" to be material under Rule 16.[11] Further, a defendant's proof of materiality need not be absolute—even "some indication that pretrial disclosure of the disputed evidence would enable the defendant significantly to alter the quantum of proof in his favor" is enough to trigger the government's obligation to produce.[12]

When a defendant wants discovery from a cooperator that the government has not already obtained—an little-used tactic that this article aims to promote—the defendant typically must rely on Rule 16(a)(1)(E)'s "control" trigger, rather than "possession" or "custody," both of which require the government to already have the discovery in question.[13] Rule 16's "control" trigger is nuanced and distinct from "possession" or "custody."[14] To show "control," neither "legal ownership" nor "actual possession" of the discovery sought is required.[15] Instead, "control" typically carries the same meaning in both civil and criminal cases,[16] and

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[6] Fed. R. Crim. P. 16(a)(1)(E)(i).

[7] *See* 2 Peter J. Henning & Cortney E. Lollar, *Federal Practice and Procedure – Criminal (Wright & Miller)* § 254 (4th ed. Sept. 2025 update) ("Discovery of material of this kind, which was discretionary prior to 1975, is now a matter of right if the conditions specified in subdivision (E) [of Rule 16(a)(1)] are satisfied."); *see also id.* ("[u]nlike a prior version of the rule, subdivision (E) does not require that the request be reasonable").

[8] United States v. Stein, 488 F. Supp. 2d 350, 356 (S.D.N.Y. 2007); *accord, e.g.*, United States v. Lloyd, 992 F.2d 348, 350–51 (D.C. Cir. 1993) (stressing that materiality under Rule 16 is a low bar).

[9] United States v. Weigand, 482 F. Supp. 3d 224, 244 (S.D.N.Y. 2020) (quoting United States v. Urena, 989 F. Supp. 2d 253, 261 (S.D.N.Y. 2013)).

[10] *Stein*, 488 F. Supp. 2d at 356–57.

[11] United States v. George, 786 F. Supp. 11, 13 (D.D.C. 1991).

[12] *Stein*, 488 F. Supp. 2d at 357 (quoting United States v. Maniktala, 934 F.2d 25, 28 (2d Cir. 1991)).

[13] If the government already obtained from its cooperator the discovery sought, then the government would already have "possession" or "custody," and it would have to produce those materials upon request (and on a showing of materiality), whether or not it had "control" over them.

[14] *Stein*, 488 F. Supp. 2d at 361, 363.

[15] *Id.* at 361.

[16] *See, e.g.*, *id.* at 360–61 ("There is no hint in the history of [the civil and criminal discovery rules] that the meaning of the phrase ['possession, custody, or control'] differs

so includes circumstances in which a party, like the government, has a "legal right to obtain the documents requested upon demand."[17]

B. Third-Party Discovery Under Rule 17

Criminal defendants often obtain third-party discovery through Rule 17 subpoenas because that evidence is often not in the government's "possession" or "custody."[18] There are generally two kinds of subpoenas.[19] The first are subpoenas *ad testificandum*, seeking to compel a witness to appear and testify, typically at trial.[20] The second are subpoenas *duces tecum*, seeking to compel the "produc[tion of] documents and objects."[21] The disadvantages of Rule 17 subpoenas compared to Rule 16 discovery requests are discussed further in Part III.

For document subpoenas under Rule 17(c), "[t]he court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence."[22] The "chief innovation [of Rule 17(c)] was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials."[23] Rule 17(c) therefore affords the requesting party the opportunity to inspect subpoenaed documents before trial, "for the purpose . . . of enabling the party to see whether he can use it or whether he wants to use it" at trial.[24]

Thus, when a defendant seeks authorization under Rule 17 to issue a pretrial document subpoena to a third party, judges have "wide discretion" to authorize that subpoena or to deny it, in whole or in part.[25] As explained below in Part III, the test that courts require defendants to pass before authorizing pretrial subpoenas to third parties can be stringent; the

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depending upon which rule is in question. . . . Common sense, not to mention settled principles of construction, suggests a uniform construction."); United States v. Skeddle, 176 F.R.D. 258, 261 n.5 (N.D. Ohio 1997) ("There is no reason to believe that the drafters of the procedural rules did not intend th[e] phrase ['possession, custody, or control'] to have the same meaning in both civil and criminal cases.").

17 *Stein*, 488 F. Supp. 2d at 361, 363; *see also, e.g.*, Coventry Cap. US LLC v. EEA Life Settlements Inc., 333 F.R.D. 60, 64 (S.D.N.Y. 2019) ("documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action").

18 Fed. R. Crim. P. 17.

19 *See* Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951).

20 Fed. R. Crim. P. 17(a). Subpart (f) of Rule 17 also permits deposition subpoenas.

21 Fed. R. Crim. P. 17(c).

22 *Id.*

23 *Bowman Dairy*, 341 U.S. at 220.

24 *Id.* at 220 n.5.

25 United States v. Merchia, No. 22 Cr. 10355 (NMG) (JCB), 2024 WL 1676842, at *1 (D. Mass. Apr. 18, 2024) (citation omitted); *see* Fed. R. Crim. P. 17(c)(1) ("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." (emphases added)).

processes for obtaining and executing such subpoenas are notoriously arcane; and unless the right steps are taken, defendants seeking such subpoenas risk premature disclosure of their confidential trial strategies to the government or denial of the discovery sought.[26]

C. Other Discovery Rights

Other statutes and constitutional precedent require the government to disclose certain cooperator discovery to defendants. Three of these discovery vehicles are particularly important. First, under the Sixth Amendment, the government must produce *Brady* material—exculpatory information in the government's possession.[27] Second, the government must, under the Sixth Amendment, produce *Giglio* material—information that could be used to impeach government witnesses at trial.[28] Third, and relatedly, the government is required, under the Jencks Act (18 U.S.C. § 3500) and Rule 26.2, to produce materials in the government's possession that reflect a trial witness's past statements.

Of these three, the government takes the position that only *Brady* material must be disclosed "reasonably promptly after it is discovered."[29] The government asserts that *Giglio* and Jencks Act material can be disclosed much later because its duty to disclose such impeachment material is triggered only if the witness's credibility is put to the test by testifying at trial; thus, the government "will typically [ ] disclose" such material "at a reasonable time before trial to allow the trial to proceed efficiently."[30] The government's ability to delay disclosure of *Giglio* and

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[26] *See, e.g.*, United States v. Tucker, 249 F.R.D. 58, 64 & n.35 (S.D.N.Y. 2008) (collecting authorities sharing these criticisms and agreeing that Rule 17(c) standards "make it unnecessarily difficult" for defendants to obtain pretrial discovery from third parties). *See also Bowman Dairy*, 341 U.S. at 220 ("Rule 17(c) [is] not intended to provide an additional means of discovery" beyond that authorized under Rule 16); 2 Peter J. Henning & Cortney E. Lollar, *Federal Practice and Procedure—Criminal (Wright & Miller)* § 275 (4th ed. Sept. 2025 update) (similar).

[27] Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also, e.g.*, United States v. Bagley, 475 U.S. 667, 676 (1985). The government must produce *Brady* material even if a defendant does not request discovery of that sort. *See* Kyles v. Whitley, 514 U.S. 419, 432–33 (1995). "In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady* . . . and its progeny, and the possible consequences of violating" those constitutional rules. Fed. R. Crim. P. 5(f)(1).

[28] Giglio v. United States, 405 U.S. 150, 154 (1972).

[29] U.S. Dep't of Just., Just. Manual § 9-5.001(D)(1) (updated Jan. 2020).

[30] *Id.* § 9-5.001(D)(2). Courts sometimes order the government to produce *Giglio* and Jencks Act material further before trial when, for example, the trial will be long and complex. *See, e.g.*, Min. Order, United States v. Aguilar, No. 20-cr-390 (ENV) (E.D.N.Y. June 7, 2023) (ordering those disclosures 45 days before a complex foreign-bribery trial expected to last two months).

Jencks Act material—and its routine practice of doing so for litigation advantage—has been strongly criticized.[31]

These other vehicles thus provide only narrow ways to obtain critical discovery from government cooperators before trial. If the discovery sought is exculpatory, then the government must turn it over promptly; but that process depends on the government recognizing the discovery's exculpatory nature, which is no sure thing.[32] Furthermore, if discovery is merely used to undercut or impeach a cooperator's trial testimony, the government typically resists producing it until uncomfortably close to trial, and it is often produced in volumes that are burdensome to review.[33]

II. CRIMINAL DEFENDANTS MAY OBTAIN DISCOVERY FROM SOME COOPERATORS THROUGH THE GOVERNMENT ITSELF UNDER RULE 16(A)(1)(E)

Given the hurdles defendants face in obtaining pretrial discovery from cooperators—and the importance of such evidence in both preparing for trial and considering a potential plea—defense counsel should understand when and how they can use Rule 16(a)(1)(E) to obtain cooperator discovery through the government itself. As this Part explains, when a third party is subject to a cooperation agreement that requires compliance with the government's discovery requests, that cooperator may fall under

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[31] *See, e.g.*, Marc K. Greenwald & Phillip B. Jobe, *Congress Should Amend The Jencks Act Now*, N.Y.L.J. (Feb. 2, 2022) (explaining that because "[t]he timing of disclosure under the Jencks Act is so ridiculous," judicial decisions, Department of Justice guidelines, and other authorities all counsel prosecutors to disclose Jencks Act material earlier than required by the statute, which in turn warrants amending the statute to comport with modern discovery practices), https://www.law.com/newyorklawjournal/2022/02/02/congress-should-amend-the-jencks-act-now/ [https://perma.cc/A8TE-AS3U].

[32] *See Kyles*, 514 U.S. at 437 (prosecutors bear the "responsibility to gauge the likely net effect of all such" *Brady* material to determine when they individually or collectively require disclosure); *see also, e.g.*, Wearry v. Cain, 577 U.S. 385, 388–90 (2016) (per curiam) (reversing denial of post-conviction relief where prosecutors "belatedly revealed information [that] would have undermined the prosecution and materially aided [the] defense at trial").

[33] *See, e.g.*, United States v. Gil, 297 F.3d 93, 106 (2d Cir. 2002) (criticizing government for producing massive volume of pretrial disclosures "not even one full business day before trial," which "'impaired'" the defense's ability to review and "'assimilate the information into its case'" (quoting Leka v. Portuondo, 257 F.3d 89, 101 (2d Cir. 2001))); United States v. Ng Chong Hwa ("Roger Ng"), No. 18-CR-538 (MKB), 2021 WL 11723583, at *68 (E.D.N.Y. Sept. 3, 2021), *aff'd*, No. 23-6333, 2025 WL 3492484 (2d Cir. Dec. 5, 2025) (expressing concern about "the volume of Section 3500 material in this case" and "urg[ing] the Government to consider disclosing all Section 3500 material . . . at least six weeks or as soon as practicable in advance of trial"); United States v. Mandell, No. (S1) 09 CR. 0662 (PAC), 2011 WL 924891, at *7 (S.D.N.Y. Mar. 16, 2011) (ordering the government to produce *Giglio* and Jencks Act material before statutory deadline because of "the volume of such materials").

the government's "control" for purposes of Rule 16(a)(1)(E), enabling the defendant to obtain potentially case-critical discovery from that cooperator by piggybacking off the government's own discovery powers.

A. Courts Have Held that the Government Must Obtain Discovery for Defendants from Cooperators Subject to Government "Control"

As explained above in Part I.A, the government must produce to defendants all material discovery in the government's "possession, custody, *or control*."[34] Several courts, including the Southern District of New York, have held that this well-known phrase means the same thing in civil and criminal cases.[35]

In Rule 16, the word "control"—just like "possession" and "custody"—is a standalone term that can trigger the government's disclosure obligations.[36] As the Honorable Lewis Kaplan explained in *United States v. Stein*, the leading case on this subject, "[c]ontrol" is distinct from possession or custody, and has been "broadly construed" to include situations in which the government has a "legal right to obtain the documents requested upon demand"—*even when* it lacks "legal ownership" or "actual possession" of the materials at issue.[37] As Judge Kaplan put it: "every circuit to have considered the question has held that 'control' under the federal rules of procedure"—whether civil or criminal—"includes the legal right to obtain the documents in question."[38]

As a result—and as courts have repeatedly held—the government has "control," for purposes of Rule 16(a)(1)(E), over discovery materials in the possession, custody, or control of third parties who have agreed to "cooperat[e] with the government."[39] That includes third parties who have

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[34] Fed. R. Crim. P. 16(a)(1)(E) (emphasis added).

[35] *See supra* note 16 (collecting cases).

[36] Rule 16 thus requires the government to "turn over everything in its possession *or* custody *or* control." United States v. Safavian, 233 F.R.D. 12, 15 (D.D.C. 2005).

[37] 488 F. Supp. 2d 350, 361, 363 (S.D.N.Y. 2007); *see* United States v. Bradley, 105 F.4th 26 (2d Cir. 2024) (finding that the government must produce documents to defendants when government "ha[s] a duty to obtain [the documents] from a third party").

[38] *Stein,* 488 F. Supp. 2d at 363.

[39] *Id.* at 362; *accord, e.g.*, United States v. Tomasetta, No. 10 Cr. 1205(PAC), 2012 WL 896152, at *5 (S.D.N.Y. Mar. 16, 2012) ("If the Government has a written agreement with the third party giving it the legal right to obtain documents upon demand . . . , the Government may be in 'control' of such materials, even if in the possession of third parties."); United States v. Kilroy, 523 F. Supp. 206, 215 (E.D. Wis. 1981) (because a third-party corporation was "cooperating with the Government," the court treated its records "as being within the Government's control" and required the government either to "request" or "subpoena" the records "on the defendant's behalf"); United States v. Elife, 43 F.R.D. 23, 25 (S.D.N.Y. 1967) (holding that, on sufficient showing of "control" over private entity, the government's Rule 16 obligations will extend to materials in a private entity's possession). *See also, e.g.*, United States v. Ellison, 527 F. Supp. 3d 161, 166 (D.P.R. 2021) ("Sometimes, the government may have possession, custody, or

entered into cooperation agreements, non-prosecution agreements, deferred-prosecution agreements, or other formal resolutions with the government that require them to comply with the government's discovery requests.[40] As one former federal prosecutor put it, "prosecutors who demand an unqualified right to documents and information as a condition of cooperation may find themselves in 'control' of such material for purposes of an individual defendant's discovery requests."[41]

Consider the facts of *Stein* itself. There, KPMG entered a deferred-prosecution agreement with the government following an extensive investigation into unlawful tax-avoidance advice that KPMG provided its clients.[42] KPMG's agreement required it to admit certain wrongdoing, pay a hefty $456 million fine, accept limitations on its tax-advice practice, and—importantly—assist the government in follow-on investigations by complying with discovery demands.[43] Among other stipulations, the agreement required KPMG to (1) "cooperate fully and actively" with the government "regarding any matter related to [its] investigation"; (2) "[c]ompletely and truthfully disclose all information in its possession" to the government "about which [the government] may inquire," including

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control over documents pursuant to an agreement."); United States v. Sigelman, No. 14-00263-1 (JEI), 2015 U.S. Dist. LX 201731, at *1 (D.N.J. Apr. 1, 2015) (ordering government to obtain, do an "expedited review" of, and produce relevant records from "a computer hard drive currently in the possession of" one of its cooperators); United States v. Stoll, No. 10-60194-CR, 2011 WL 703875, at *1 (S.D. Fla. Feb. 21, 2011) (government was responsible for two individual cooperators' spoliation, and an adverse inference instruction was warranted, because, "[c]ontrary to the Government's position, the Court finds cooperating witnesses to be under the unique control of the Government").

[40] *Stein*, 488 F. Supp. 2d at 363 ("The rule requires that the government produce all documents material to preparing the defense that are within its possession, custody or control. The text [of Rule 16] affords the government no greater discretion in determining whether to ask [a third-party cooperator] for the documents than it would have if the documents were in the hands of an Assistant United States Attorney. Once control is established, the obligation exists."); *accord Tomasetta*, 2012 WL 896152, at *5 (only when "there is no deferred prosecution agreement . . . , or any agreement of its kind, giving the Government the legal right to obtain materials" from such witnesses does the government lack "control" over those materials); *see also Coventry Cap.*, 333 F.R.D. at 65 ("case law indicates that [the] contractual obligation" of one party to provide information to another "is dispositive as to control" for discovery purposes).

[41] Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1482 (2007); *see also id.* at 1494–99 ("[P]rosecutors are using [deferred-prosecution agreements] to achieve complete, unfettered and legally binding access to the documents and information of corporations. This great prosecutorial advantage, however, may come with a price; as such provisions may be viewed as affording the government 'control' of a corporation's documents and information for purposes of discovery and *Brady* obligations.").

[42] *Stein*, 488 F. Supp. 2d at 352–53.

[43] *Id.* at 353.

information about its employees and affiliates; and (3) promptly give the government "all documents, records, information, and other evidence in KPMG's possession, custody, or control as may be requested by [the government]."[44] KPMG also agreed to "continue to fulfill the[se] cooperation obligations" in future related investigations.[45] If KPMG refused to comply with a government discovery demand, it would risk charges on conduct that it admitted to in the agreement.[46] As the Second Circuit later concluded, "[t]he government's threat of indictment was easily sufficient to convert [KPMG] into its agent."[47]

The government eventually brought criminal charges against several KPMG partners in connection with the tax-sheltering scheme, including Jeffrey Stein.[48] During that prosecution, the defendants sought discovery from KPMG that they claimed would support their defenses, and asked the government to get that discovery from KPMG under its cooperation agreement, pursuant to Rule 16(a)(1)(E).[49] Under this rule, the court first held that the discovery requested was "material."[50] It then held that the government had "control" over the discovery sought from KPMG because the cooperation agreement gave the government "the unqualified right to demand from KPMG the production of [virtually] any documents within KPMG's control."[51] The court explained that "control" over a person or document for discovery purposes "is broadly construed" and includes "the legal right to obtain the documents requested upon demand."[52] Because the court found that the cooperation agreement gave the government "control" of KPMG's documents, the court allowed the defendants to obtain those documents from KPMG through the government under Rule 16(a)(1)(E), rather than forcing the defendants to use Rule 17(c) subpoenas.[53] In so holding, the court rejected as "untenable" the

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44 *Id.* (citation modified).

45 *Id.* at 354 (citation modified).

46 *See id.* at 353–54.

47 United States v. Stein, 541 F.3d 130, 151 (2d Cir. 2008).

48 *Stein*, 488 F. Supp. 2d at 354–55.

49 *See id.* at 356 ("[T]he Court inquired whether the defendants were seeking an order, pursuant to Rule 16, compelling the government to produce the documents that are the subject of the subpoena to KPMG. They answered affirmatively. The Court then inquired whether there was any objection to treating the defendants as having made that motion. The government stated that it had no objection.").

50 *Id.* at 356–60.

51 *Id.* at 360 (noting limited disclosure exceptions for certain privileged material).

52 *Id.* at 361 (citation modified).

53 *See id.* at 361–64; *see also id.* at 356 (explaining the court's holding on "control" under Rule 16 would obviate the need to apply the stricter discovery standards for Rule 17 subpoenas); *infra* Part III.A (outlining the standards for pretrial document subpoenas under Rule 17(c)).

government's position that the cooperation agreement did not give it "control" over the KPMG materials at issue under Rule 16(a)(1)(E).[54]

Once the *Stein* defendants obtained this discovery from KPMG through the government, they used it with devastating effect, achieving the dismissal of the charges against them with prejudice. Among the documents that the defendants sought from KPMG, through the government, were communications "between KPMG or its outside counsel and" various federal prosecutorial agencies in connection with the broader investigation.[55] The court ordered the government to procure those documents from KPMG through the cooperation agreement and then produce them to the defendants.[56] When the defendants reviewed those documents, they uncovered troubling evidence that the government had improperly strong-armed KPMG into withholding the advancement of legal fees to KPMG partners who refused to cooperate with the government, in violation of their Sixth Amendment right to counsel.[57] The district court responded forcefully by dismissing the indictment with prejudice.[58] The Second Circuit affirmed.[59]

In other words, the *Stein* defendants used Rule 16(a)(1)(E) to obtain from the government material discovery in the physical custody and possession of a third-party cooperator (KPMG). That discovery was within the government's "control" under that rule because of the terms of the cooperation agreement, and the government accordingly had to produce that discovery to the defense well before trial. The defendants then used that cooperator discovery to obtain the complete dismissal of the charges. *Stein* accordingly does not just explain how defendants can use Rule 16(a)(1)(E) to obtain cooperator discovery—it underscores that doing so can lead to powerful, even case-critical evidence for the defense.

B. Cooperator Discovery Is Critical When Preparing for and at Trial

While *Stein* shows that securing pretrial discovery from cooperators can—in rare cases—lead to dismissal, other recent prosecutions demonstrate that such discovery can more routinely reveal important information that defendants need to prepare for trial and put forward their best defenses. This article briefly discusses two such cases in which the authors participated, which underscore the need for defendants to think creatively, well before trial, about what cooperator discovery they may need and how best to get it.

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54 *Id.* at 360.
55 *See id.* at 357 (citation modified).
56 *See id.* at 369.
57 *See* United States v. Stein, 435 F. Supp. 2d 330, 352–53 (S.D.N.Y. 2006).
58 *See id.* at 381–82.
59 *Stein*, 541 F.3d at 158.

United States v. Peter Brand & Jie "Jack" Zhao.[60] In this "Varsity Blues"-spinoff prosecution in the District of Massachusetts, the defense learned before trial that the government's principal cooperator had committed additional bad acts that he had not disclosed to the government—including potential financial fraud against the government and others. But the defense rightly feared (including for reasons described below in Part III) that it would be futile to try to subpoena non-cooperator third parties (including banks and government agencies) whose documents might prove those undisclosed offenses—much less get those records long enough before trial to make good use of them.

Instead, the defense sent a discovery demand to the government, requesting that the government leverage its cooperation agreement to obtain and produce evidence in the cooperator's possession that showed the cooperator had committed undisclosed crimes that greatly undermined his credibility. The government—although disclaiming any obligation to do so—ultimately complied with this demand and produced the requested materials before trial.

At trial, the defense used the cooperator's own evidence to show that he was a repeat criminal and habitual liar and that the government had given him a free pass on several crimes in exchange for favorable testimony. This key evidence was previewed in opening arguments, used extensively during cross-examination, and highlighted during closing statements to argue that the cooperator—and thus the government—could not be trusted. The jury evidently agreed, as it acquitted both defendants on all counts.

United States v. Javier Aguilar.[61] In this recent foreign-bribery case in the Eastern District of New York, the defense sought and obtained two important forms of cooperator discovery using Rule 16(a)(1)(E).

The first came from the United States and Switzerland branches of the defendant's former employer, both of which—like KPMG in *Stein*—signed a deferred-prosecution agreement with the government requiring them to provide discovery to the government on demand and threatening charges if they refused to comply. Thus, evidence in those branches' possession was deemed to be within the government's "control," allowing the defense to access it through the government under Rule 16(a)(1)(E). Among that evidence were materials tending to show that the defendant understood his alleged conduct to be noncriminal because very senior personnel at the company had approved it. Some of those records came from the company's Swiss branch, which—were it not for the government's broader discovery powers—might otherwise have been practically inaccessible to the defense if sought through Rule 17(c) subpoenas and letters rogatory.

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[60] No. 20 Cr. 10306 (GAO) (D. Mass).

[61] No. 20 Cr. 390 (ENV) (E.D.N.Y.).

The second was a series of communications involving two formal cooperators the government alleged were foreign-government officials whom the defendant had bribed. The government originally obtained a selection of incomplete screenshots of critical instant messages between those cooperators—a cherrypicked set of images that deprived the defense of important context and potentially material and exculpatory information. At the defense's insistence (and to moot a potential motion to compel), the government eventually agreed to require its cooperators to provide the defense with more complete records of those communications. At trial, those communications helped show that the cooperators acted in a private (*i.e.*, nongovernmental) capacity, and that they provided information to the defendant that was both public and non-advantageous; both of which went to the heart of the foreign-bribery charges at issue.

These recent examples (among many others) highlight why it is so important for defendants to seek cooperator discovery proactively—and why defendants need to do so long before the government deluges the defense with *Giglio* and Jencks Act discovery on the eve of trial. In both these cases, the government's pretrial disclosures were mountainous and burdensome to review. The defense's ability to obtain, probe, and incorporate those cooperator disclosures into their trial preparations therefore proved critical to their defense strategies.

C. Some Courts Resist this Rule, But the Issue Remains Open

To be sure, decisions like *Stein* and those it cites have not been uniformly accepted.[62] Some contrary district court decisions have instead required defendants to use Rule 17 subpoenas to seek cooperator discovery that the government had yet to obtain.

Yet those contrary decisions involved cooperation agreements that gave the government less-robust discovery control than in *Stein* and suffer from many other flaws. Some decisions have improperly relied on precedent from the *Brady* context, in which actual possession (rather than "control") determines whether the government has a duty to disclose.[63]

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[62] *See, e.g.*, *Roger Ng*, 2021 WL 11723583, at *55–62 (E.D.N.Y. Sept. 3, 2021), *aff'd*, No. 23-6333, 2025 WL 3492484 (2d Cir. Dec. 5, 2025) (rejecting defendant's request for discovery from bank subject to deferred-prosecution agreement with government under Rule 16(a)(1)(E) and finding, contrary to *Stein*, that the bank was not subject to government "control"); United States v. Carson, No. SACR 09-0077 JVS, 2009 WL 10793880, at *1–4 (C.D. Cal. Dec. 8, 2009) (similar). Although the Second Circuit recently affirmed the defendant's conviction in *Roger Ng*, the appeal did not touch on Rule 16(a)(1)(E). *See generally* No. 23-6333, 2025 WL 3492484 (2d Cir. Dec. 5, 2025).

[63] *See Roger Ng*, 2021 WL 11723583, at *59–60 (relying on several *Brady* decisions to hold that the government need not "produce materials possessed by another entity," even though Rule 16(a)(1)(E) uses the term "control" separate from "possession" and "custody" (citation modified)). *Contra, e.g.*, United States v. Meregildo, 920 F. Supp. 2d

Another decision tried to define "control" in criminal cases differently than in civil cases,[64] flouting the rule that when the same term is used in two related provisions, it should be construed the same way in both.[65] One decision ignored that "[t]he 'possession, custody, or control' inquiry is fact-intensive and must be resolved on a case-by-case basis."[66] And, worse, the government took the position in other cases that it could refuse to obtain pro-defense records from cooperators to avoid having to disclose them under Rule 16,[67] thereby either burying such evidence or forcing defendants to walk the difficult Rule 17 tightrope in the hope of obtaining potentially critical evidence.[68]

Those and other flaws in contrary decisions may explain why the Second Circuit recently declined to disturb the rule, set out in cases like *Stein*, permitting securing discovery from certain cooperators through the government under Rule 16(a)(1)(E).[69] In *United States v. Bradley*, the Second Circuit reaffirmed that Rule 16(a)(1)(E) requires the government to produce not only documents "in its physical possession, custody, or control," but also documents it "ha[s] a duty to obtain from a third party."[70] In so holding, the Court of Appeals expressly cited *Stein* and declined to "examine this line of cases" because "no such [cooperation] agreement existed here between the [cooperators] and the government."[71]

This rule thus remains alive and well in the Second Circuit and elsewhere. As of the time of publication, the authors are unaware of any

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434, 443 (S.D.N.Y. 2013) ("Government's [Rule 16] discovery obligations and *Brady* obligations are not coterminous.").

64 *See Carson*, 2009 WL 10793880, at *4 (rejecting "the concept of constructive custody" as applied to the government in criminal cases).

65 *See, e.g.*, Pereira v. Sessions, 585 U.S. 198, 211 (2018); *see also, e.g.*, United States v. Stein, 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007) ("[c]ommon sense, not to mention settled principles of construction, suggests a uniform construction" of the term "control" in both civil and criminal discovery rules); United States v. Skeddle, 176 F.R.D. 258, 261 n.5 (N.D. Ohio 1997) (similar).

66 United States v. Libby, 429 F. Supp. 2d 1, 8–9 (D.D.C. 2006).

67 *See* United States v. Weaver, 992 F. Supp. 2d 152, 157 (E.D.N.Y. 2014) (government acknowledged that it should "ma[k]e a broad request that each cooperating witness provide the government with any materials in the witness' possession relevant to the investigation," "provide[ ] the defense with everything cooperating witnesses provided in response," and follow up with "any additional materials produced by cooperating witnesses," while maintaining that it need not produce discovery that cooperators "withheld . . . in response to [the government's] request" (citation modified)); *see also* United States v. Hutcher, 622 F.2d 1083, 1088 (2d Cir. 1980) (even in the narrower context of discovery under *Brady* and the Jencks Act, "possession" excludes "materials the prosecution never had in its files" and "never inspected" *only* when the government "never knew about" those materials).

68 *See infra* Part III.A.

69 United States v. Bradley, 105 F.4th 26 (2d Cir. 2024).

70 *Id.* at 34 (citation modified).

71 *Id.* at 35 n.5.

Court of Appeals decision specifically rejecting the interpretation of Rule 16(a)(1)(E) set out in *Stein* and other cases. Admittedly, the Tenth Circuit in *United States v. Bullcoming* stated that "Rule 16 does not require the Government to 'take action to discover information which it does not possess,' . . . [or] to secure information from third parties."[72] But neither *Bullcoming* nor the decisions on which it relies involved a cooperator subject to government control through an agreement requiring it to produce discovery to the government on demand, which is the premise of *Stein* and similar decisions.[73] Thus, those cases are inapt.

Defendants and their counsel—and courts—should also bear in mind that published decisions on this issue are likely to be one-sided, in the government's favor, for structural reasons. In light of *Stein* and related decisions, the government often agrees to procure cooperator discovery for defendants without being ordered to do so by the court—as in cases like *Zhao* and *Aguilar*, discussed above in Part II.B. Such agreements reflect the durability of the rule discussed in *Stein* and similar cases but creates no documented precedent. By contrast, only when the government resists such discovery—for example, when its control over a cooperator is weaker, informal, or less settled under a cooperation agreement—will the issue result in a documented decision, making outcomes unfavorable to the defendants more likely.

III. GETTING PRETRIAL DISCOVERY FROM COOPERATORS THROUGH THE GOVERNMENT IS OFTEN SUPERIOR TO USING RULE 17 SUBPOENAS

A key reason why defendants should consider seeking cooperator discovery through the government under Rule 16(a)(1)(E) are the "difficult" standards defendants must satisfy to obtain pretrial discovery from third parties, including cooperators, through Rule 17(c) subpoenas.[74] Part III starts with a discussion of those strict standards and ends with an

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[72] United States v. Bullcoming, 22 F.4th 883, 889–90 (10th Cir. 2022) (quoting United States v. Tierney, 947 F.2d 854, 864 (8th Cir. 1991), and citing United States v. Gatto, 763 F.2d 1040, 1048 (9th Cir. 1985)).

[73] *See Bullcoming*, 22 F.4th at 888–89 (defendant sought to inspect trailer then in possession of third party not subject to cooperation agreement); *Tierney*, 947 F.2d at 863–64 (rejecting *Brady* claim when government failed to obtain diary of witness who the court did not state was bound by cooperation agreement); *Gatto*, 763 F.2d at 1047–48 (holding that federal prosecutors did not "control" state agencies for discovery purposes, while noting that "the prosecutor's actual possession [of discovery] is not necessary in all cases" under Rule 16).

[74] United States v. Tucker, 249 F.R.D. 58, 64 (S.D.N.Y. 2008) (collecting authorities sharing this concern); *see also, e.g.*, Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 647 (1999) (explaining how courts "make it unnecessarily difficult by imposing a high threshold for invoking Rule 17(c) that focuses on the evidentiary nature of the requested documents without reference to the defense at trial," which "denigrates the concept of a fair criminal trial").

examination of recently proposed amendments to Rule 17 that aim to ease those standards.

A. Defendants Must Clear Complex Procedural and Substantive Hurdles to Obtain Third-Party Discovery Under Rule 17

The chief hurdle defendants face when seeking pre-trial subpoenas under Rule 17(c) is the Supreme Court's demanding *Nixon* standard.[75] Under *Nixon*, "to require production prior to trial" from third parties, defendants must generally satisfy these four requirements:[76]

1. *Relevance*: There must be some "tendency" that the discovery sought makes a fact at issue at trial "more or less probable."[77] Defendants must show only "a rational inference" that the discovery sought "relate[s] to the offenses charged."[78]
2. *Admissibility*: The discovery sought must be "at least potentially admissible" at trial,[79] whether for substance or "to impeach a witness for the prosecution."[80] This is sometimes called the "evidentiary" requirement.[81]

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[75] United States v. Nixon, 418 U.S. 683, 699–700 (1974). Some courts have observed that "[a] real question remains as to whether it makes sense to require a defendant's use of Rule 17(c) to obtain material from a non-party to meet [the *Nixon* standard]" because, "[u]nlike the Government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena." United States v. Nachamie, 91 F. Supp. 2d 552, 562–63 (S.D.N.Y. 2000). Because Rule 17(c) permits courts to quash subpoenas only "if compliance would be unreasonable or oppressive," the "judicial gloss that the material sought must be evidentiary—defined as relevant, admissible and specific—may be inappropriate in the context of a defense subpoena of documents from third parties." *Id.*; *accord Tucker*, 249 F.R.D. at 66 (raising similar concerns). *Nixon* also arose from unique circumstances—a special prosecutor sought to subpoena recordings and documents from the sitting President, who moved unsuccessfully to quash on various grounds, including under Rule 17(c) and executive privilege. *See* 418 U.S. at 686–88, 698–99, 703.

[76] *Nixon*, 418 U.S. at 699–700. Some courts collapse those elements by asking whether the discovery sought is "reasonable, construed using the general discovery notion of material to the defense," and "not unduly oppressive for the producing party to respond." *Nachamie*, 91 F. Supp. 2d at 563. Animating those collapsed standards is the imperative that "a defendant must have the ability to obtain [ ] evidence" to enforce his right to a fair trial. *Tucker*, 249 F.R.D. at 65.

[77] Fed. R. Evid. 401.

[78] *Nixon*, 418 U.S. at 700.

[79] United States v. Orena, 883 F. Supp. 849, 868 (E.D.N.Y. 1995).

[80] United States v. James, No. 02 CV 0778(SJ), 2007 WL 914242, at *29 (E.D.N.Y. Mar. 21, 2007) (collecting cases).

[81] The term "evidentiary" in this context derives from the Honorable Edward Weinfeld's opinion in United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952), which the Supreme Court relied on in *Nixon*, 418 U.S. at 699.

3. *Specificity*: Defendants must show that their requests are "not unduly oppressive for the producing party to respond,"[82] though defendants "need not have prior knowledge of specific documents."[83] This is the often the hardest requirement for defendants to satisfy.[84]
4. *Necessity*: Defendants also must show that they cannot get the discovery sought by other means, why they "cannot prepare for trial without" that discovery, and why the trial might get delayed if the court does not order pretrial production.[85]

To meet their burden on these four requirements—or to overcome a motion to quash[86]—defendants typically must file motions and other supporting papers with the court. In doing so, defendants may have to reveal potential trial strategies.[87] Thus, courts may—and often do—permit a defendant to seek Rule 17(c) subpoenas under seal and ex parte, so as to avoid premature disclosure of trial strategies to the government.[88]

But when courts do not permit sealed and ex parte submissions, defendants may be understandably reluctant to seek third-party discovery for fear of revealing potential trial strategies. And even when courts do permit such submissions, the government may seek permission to access them to learn the defense's strategy. In fact, the government has in recent

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[82] United States v. Nachamie, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000).

[83] United States v. Weisberg, No. 08-CR-347 (NGG)(RML), 2011 WL 1327689, at *7 (E.D.N.Y. Apr. 5, 2011).

[84] *See, e.g.*, United States v. Carollo, No. 10 CR 654(HB), 2012 WL 1195194, at *1 (S.D.N.Y. Apr. 9, 2012) ("the necessary level of specificity" is "normally the more difficult hurdle in a Rule 17(c) subpoena [application]").

[85] *Nixon*, 418 U.S. at 699.

[86] "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). The government ordinarily lacks standing to try to quash a third-party subpoena in a criminal case. *See Nachamie*, 91 F. Supp. 2d at 558 ("A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a propriety interest in the subpoenaed matter."); *see also Tucker*, 249 F.R.D. at 60 n.3 (that rule applies with full force to the government).

[87] *See, e.g.*, United States v. Boyle, No. 08 CR 523(CM), 2009 WL 484436, at *3 (S.D.N.Y. Feb. 24, 2009) ("[T]he Court will allow ex parte applications where a party can demonstrate that it would be required to prematurely disclose its trial strategy, witness list, or other privileged information in its [Rule 17(c)] application.").

[88] *See, e.g.*, United States v. Kravetz, 706 F.3d 47, 53 n.4 (1st Cir. 2013) (collecting cases where "courts have found [ex parte Rule 17 subpoena requests] to be permissible"); United States v. Ray, 337 F.R.D. 561, 571 (S.D.N.Y. 2020) (district courts "have long followed the practice of permitting both the defense and the Government to submit ex parte applications" to compel discovery from third parties to avoid prematurely revealing potential strategies for trial); United States v. Colburn, No. 19-10080-NMG, 2020 WL 6566508, at *2 (D. Mass. Nov. 9, 2020) ("[C]ommon sense dictates that where a defendant cannot make the required showing of relevancy, admissibility, and specificity without revealing trial strategy and other protected work product, he must be permitted to make the request ex parte.").

cases taken the position that defendants may *never* submit ex parte filings when seeking pretrial Rule 17(c) subpoenas, despite the established precedent to the contrary.[89] Fortunately, that extreme position lacks support: it would force defendants to make a "constitutionally-prohibited Hobson's choice" between prematurely disclosing their trial strategies or forgoing their Sixth Amendment right to seek helpful discovery from third parties, in violation of their constitutional right to a fair trial.[90] Even so, defendants may be concerned that the government's position could affect the court's willingness to keep all or parts of those materials from the government.

Even when courts do permit sealed and ex parte submissions, a subpoena recipient who is also a cooperator is almost certain—perhaps even obligated—to tell the government what it learns from the defense through subpoena papers, discovery conferrals, and the like. By contrast, the government may learn less about a defendant's strategies through a Rule 16(a)(1)(E) request because its materiality threshold is easier to satisfy than the *Nixon* requirements.[91]

All those concerns are compounded by the unfortunate fact that some judges take such a hardline approach to the *Nixon* requirements that securing a useful Rule 17(c) subpoena before them is all but impossible, even if the defense is able to bolster that showing with sealed and ex parte submissions. Indeed, even within the same courthouse, judges often espouse radically different views of what sorts of requests are sufficiently "specific" or "necessary" to pass muster under *Nixon*. For example, some judges have held that defendants may not request "any and all" documents or communications, even between specific persons or about specific topics, while others permit such requests because defendants cannot know for certain what materials a third party might have.[92] Courts also disagree

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[89] *See, e.g.*, U.S.' Resp. to Def.'s Notice of Ex Parte Filing at 1–3, United States v. Nadarajah, No. 23 Cr. 891 (CCC) (D.N.J. July 17, 2024) (ECF No. 67) (asserting that defendants cannot make "ex parte applications for Rule 17(c) subpoenas regardless of the circumstances").

[90] United States v. Beckford, 964 F. Supp. 1010, 1027 (E.D. Va. 1997); *see supra* notes 86–87 (collecting similar cases).

[91] *Compare supra* pp. 13–14, *with supra* Part I.A.

[92] *Compare, e.g.*, United States v. Bergstein, No. 16 Cr. 746 (PKC), 2018 WL 9539775, at *1 (S.D.N.Y. Feb. 1, 2018) ("Requests for any and all communications, even if tied to specific documents and topics, are potentially 'fishing expeditions' for unspecified materials and insufficiently specific under . . . *Nixon*[.]"), *with, e.g.*, United States v. Rajaratnam, 753 F. Supp. 2d 317, 320 n.1 (S.D.N.Y. 2011) (Rule 17(c) is not reserved for "documents that a defendant can identify in advance, but rather . . . [permits] a defendant to examine documents he believes to exist that would be relevant to, and therefore [are] presumptively admissible in, his defense"), *and id.* ("[R]equiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity." (citations omitted)), *and* United States v. Zangrillo, No. 19-10080-NMG, 2020 WL 102781, at *5 (D. Mass. Mar. 3, 2020)

on whether defendants can use Rule 17(c) to obtain potential impeachment material from third parties before trial, and sometimes delay such productions until trial.[93] Courts' inconsistent applications of these inconsistent standards often frustrate defendants' ability to obtain critical cooperator discovery long enough before trial to make real use of it at trial.

All these and other hurdles that courts have imposed on pretrial Rule 17(c) subpoenas underscore why defendants should, when possible, try to obtain cooperator discovery through the government itself under Rule 16(a)(1)(E)'s comparably relaxed standards. Because prior "good faith effort[s] to seek" cooperator discovery from the government "does not foreclose" defendants from later seeking "subpoenas [for] similar records,"[94] defendants can try to obtain cooperator discovery first under Rule 16(a)(1)(E) before resorting to the more burdensome Rule 17(c) subpoena process if necessary.

B. Proposed Amendments to Rule 17 Could Ease Defendants' Burdens to Obtain Third-Party Discovery

Recently proposed amendments to Rule 17 have drawn renewed attention to the convoluted and burdensome standards that courts often impose on criminal defendants when they seek discovery from third parties, including cooperators.[95] In May 2025, the Advisory Committee on the Federal Rules of Criminal Procedure circulated proposed amendments to Rule 17 for written comment that aim to address these very problems

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(denying motion to quash Rule 17(c) subpoena, lodged at ECF No. 532-2, seeking "[a]ny and all documents" and "[a]ll communications" concerning certain topics or between certain persons), *and* United States v. Gas Pipe, Inc., No. 14-cr- 298-M, 2018 WL 5262361, at *2–3 (N.D. Tex. June 18, 2018) (similar).

93 *Contrast, e.g.*, United States v. Skelos, No. 15-CR-317 (KMW), 2018 WL 2254538, at *2 (S.D.N.Y. May 17, 2018) ("[M]any courts have held that production of impeaching evidence pursuant to Rule 17(c) is not required until after the witness testifies."), *with, e.g.*, United States v. LaRouche Campaign, 841 F.2d 1176, 1180 (1st Cir. 1988) (pretrial discovery of impeachment material is permitted under Rule 17(c) subject to "the sound discretion of the district court," and is particularly appropriate when the third-party witness's likely trial testimony is generally known such that delaying disclosure would unreasonably delay trial), *and* United States v. Cusick, No. 11cr10066-LTS, 2011 WL 5036008, at *1 (D. Mass. Oct. 20, 2011) (denying motion to quash defendant's Rule 17(c) subpoena seeking pretrial production of "what appear to be at this time relevant, admissible, and specific documents concerning an impeachment matter").

94 United States v. Ray, 337 F.R.D. 561, 572 (S.D.N.Y. 2020).

95 *See* Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence: Report of the Advisory Committee on Criminal Rules*, 68–99 (May 15, 2025) [hereinafter "Proposed Amendments"] https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf [https://perma.cc/6BLS-U8JJ].

and make it easier for defendants to obtain discovery from third parties before trial.[96] A summary of the relevant changes is provided below.[97]

1. *Easier Discoverability Standard*: The Proposed Amendments would replace the demanding *Nixon* standard (discussed above) with a new four-part test: (1) the defendant's subpoena must describe the discovery sought with only "reasonable particularity"; (2) the defendant must show only that the target is "likely to [] possess" the requested discovery; (3) the defendant must show only that the discovery sought is "not reasonably available . . . from another source"; and (4) the defendant must show only that the discovery sought either is "likely to be admissible" or "contain[s] information that is . . . likely to be admissible."[98] This new standard would likely prove to be easier for defendants to satisfy than the *Nixon* test.
2. *Motion Generally Not Required*: The Proposed Amendments provide that "[a] motion and order are not required before service" of a pretrial subpoena unless the subpoena seeks confidential information about victims, the defendant is proceeding *pro se*, or a local rule or court order requires a motion.[99] This should decrease the likelihood that defendants will have to reveal their trial strategies prematurely just to seek discovery from third parties.
3. *Ex Parte Treatment Favored*: The Proposed Amendments state that, in the narrow circumstances in which a motion is required, "[t]he court must, for good cause, permit the party to file the motion ex parte."[100] The proposal adds that "[w]hen no motion is required," the defendant generally "need not disclose to [the government] that it is seeking or has served the subpoena."[101]

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[96] *See id.*

[97] The Proposed Amendments also improve Rule 17 in other ways, including by clarifying that defendants may seek subpoenas not just for trial, but for "evidentiary hearings" including hearings "on detention, suppression, sentencing, or revocation." *See id.* at 74–75, 81 (proposed Fed. R. Crim. P. 17(c)(2)(A)). Several courts had already reached that conclusion under current Rule 17. *See, e.g.*, United States v. Pierre, No. (S2) 22 Cr. 19 (PGG), 2023 WL 7004460, at *16 (S.D.N.Y. Oct. 24, 2023) ("the decision to permit a hearing and, in anticipation thereof, to authorize a subpoena . . . , lies largely in the trial judge's discretion" (quoting United States v. Berrios, 501 F.2d 1207, 1212 (2d Cir. 1974))); United States v. Taylor, No. 14 Cr. 117 (JST), 2014 WL 5786535, at *2 (N.D. Cal. Nov. 5, 2014) ("many courts . . . have held that Rule 17(c) subpoenas may properly issue in connection with [pretrial] hearings, such as pre-trial motions to suppress.").

[98] Proposed Amendments at 75–76, 81–82 (proposed Fed. R. Crim. P. 17(c)(2)(B)); *see also id.* at 83 (proposed Fed. R. Crim. P. 17(c)(2)(D)).

[99] *Id.* at 76, 82 (proposed Fed. R. Crim. P. 17(c)(2)(C)).

[100] *Id.* at 77, 83 (proposed Fed. R. Crim. P. 17(c)(2)(E)).

[101] *Id.* at 83 (proposed Fed. R. Crim. P. 17(c)(2)(F)).

This should further decrease the likelihood that trial strategies will be revealed prematurely.

4. *Easier Production Process*: The Proposed Amendments impose a default rule that, unless the defendant is proceeding *pro se*, the third party must produce the requested discovery directly to the defendant's counsel, rather than to the court.[102] The proposal adds that the defendant "must disclose to [the government] an item [he] receives from a subpoena's recipient only if the item is discoverable."[103] This too should help protect a defendant's trial strategies from the government's prying eyes.

The authors welcome the Proposed Amendments to Rule 17—and the Committee's recognition that some courts had applied the *Nixon* test against defendants "too rigidly"[104]—and hope that the Supreme Court swiftly adopts them under the Rules Enabling Act.[105] But even if the Proposed Amendments are adopted, and even if courts faithfully apply them to make it somewhat easier for defendants to obtain third-party discovery under Rule 17, there will often be situations in which Rule 17 imposes greater burdens on the defense than Rule 16.

CONCLUSION

Cooperator discovery is critical for criminal defendants. The sooner and more efficiently they can get it, the better. In some cases, Rule 16(a)(1)(E) may provide a more effective and expedient way to get that critical discovery before trial than Rule 17 subpoenas. It thus is important for defendants and their counsel to understand when and how Rule 16(a)(1)(E) permits them to seek discovery from cooperators through the government itself.

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102 *Id.* at 77, 85 (proposed Fed. R. Crim. P. 17(c)(5)).
103 *Id.* at 86 (proposed Fed. R. Crim. P. 17(c)(6)).
104 *Id.* at 75.
105 *See* 28 U.S.C. §§ 2071–77.