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A Creative Approach for Obtaining Documentary Evidence From Third Parties

In all criminal cases, but especially in white collar cases, the importance of a defense lawyer's ability to have and study documents in the early stages of trial preparation is hard to overstate. If documents material to the preparation of the defense are in the possession of the government, defense counsel will have access to them. However, if the same documents that the defense lawyer needs to examine (to understand if they are helpful or harmful) are in possession of a third party, defense counsel faces unjustified barriers to obtaining the documentary evidence. This article addresses the outdated jurisprudence that has created the obstacle course as well as the reform advocated by commentators and judges.

A hypothetical dramatizes and illustrates the invalid basis of the current jurisprudence most frequently applied to evaluate a defendant's discovery demands on third parties.

The Hypothetical

The defendant is the CFO and 25 percent owner of a family-owned business. He is indicted for utilizing his position to embezzle several million dollars from that business by creating both a wholly owned company and false invoices from it to the family-owned business. He then used his position of trust to pay the false invoices to his own company from the family business.

The defendant advises his counsel of the wrongdoing of his accuser and other exculpatory facts that, if true, could constitute a defense at trial, mitigation of punishment, and/or impeachment of the government's primary accuser. The family-owned business uses a highly sophisticated, respected financial software package that is fraud resistant (i.e., it is difficult to change entries). The defense forensic accountant concludes that the truth or falsity of the defendant's allegations would be fully disclosed by the accounting software and its data.

The lawyer, of course, has no way of knowing if defendant's allegations are true. Does the defendant have a defense? Does evidence that might mitigate the potential punishment exist? Will the data yield evidence that will severely impeach the government's star witness? Without access to the financial data of the family business in the software, the lawyer is flying blind. Thus, defense counsel moves under Federal Rule of Criminal Procedure 17(c) for the production of the software and data. It is neither oppressive nor time-consuming for the third party to comply since defense counsel has the software program and needs only to copy the data into it, which is a relatively short and easy process. The program will then permit the preparation of a variety of reports that will disclose whether the defendant's allegations have documentary support.

BY ALAN SILBER AND LIN SOLOMON

The Procedure

A subpoenaed third party will, in all probability, have two bites at the apple. While there is a split of authority, it seems the majority rule requires application to the district court if a defendant wants the subpoenaed material to study and review in advance of trial rather than merely at trial. Thus in the first instance, the court will evaluate whether the defendant may even serve such a subpoena. Many cases arise in that procedural context. If the court grants the 17(c) subpoena, the third party may still file a motion to quash addressing the specific details of the actual subpoena served. Should the third party fail to produce the subpoenaed records without filing a motion to quash, that third party risks contempt.[1]

Material to the Preparation of the Defense

For purposes of this article, it should be assumed that the data sought "might" be favorable to the defense, but also might not be. There is no way to know whether the data is exculpatory or valuable without reviewing the contents of the family business's financial software. Of course, every defense lawyer knows that it is just as important to be fully aware of harmful evidence as well as favorable. Either type of evidence is "material to the preparation of the defense."

If the software and data were in the client's possession and given to his lawyer, who ignores the material and fails to analyze it, that lawyer without question would be providing ineffective assistance of counsel.

Of course, if the software and data were in the government's possession, the material would be discoverable under Fed. R. Crim. P. 16.

The Majority Rule of *United States v. Nixon*

Fed. R. Crim. P. 17(c)(2) authorizes a court to deny a defendant such a subpoena *only* "if compliance would be unreasonable and oppressive." Critically, in *United States v. Nixon* the U.S. Supreme Court held that Rule 17(c) was not a rule of discovery, and added several requirements for a subpoena served *by the government prosecutors* on the president of the United States *after a grand jury investigation* had resulted in the indictment of presidential advisors.[2] Most courts have applied the requirements added by *Nixon* when evaluating subpoenas applied for by defendants when seeking materials from nongovernmental third parties, even though the Court issued the *Nixon* opinion in a unique procedural and political setting, and even though the Court specifically reserved the question regarding whether its test applied in its full vigor when the object of defendant's subpoena *duces tecum* is a nongovernmental third party.

The *Nixon* Court relied on the 1951 case of *Bowman Dairy v. United States*[3] for its jurisprudential underpinning that 17(c) was not a rule for discovery. The defense subpoena in *Bowman Dairy* was served on *the prosecution* (not a third party) for materials in its possession that were not discoverable under the restrictive 1951 version of Rule 16. The *Bowman Dairy* Court had written, "[n]o good reason appears to us why [records held by the government but not discoverable under the 1951 version of Rule 16] may not be reached by subpoena under Rule 17(c) as long as they are evidentiary."[4] Hence, this is the birth of the requirement that the subpoenaed documents be "evidentiary" to avoid the evisceration of (then) Rule 16's discovery limitations by an otherwise expansive reading of Rule 17(c). The *Nixon* Court adopted the evidentiary requirement of *Bowman Dairy* for a postindictment subpoena issued by the prosecution, and adopted a four-part test for determining what constitutes "evidentiary" material for a 17(c) subpoena:

- the documents are evidentiary and relevant;
- the documents are not otherwise procurable in advance of trial by the exercise of due diligence;
- the party cannot properly prepare for trial without such production and inspection in advance of trial, and that failure to obtain such inspection would unreasonably delay the trial; and
- the application is made in good faith and is not a "fishing expedition."

That four-part test was boiled down by the Court to a simple three-part requirement: (a) relevancy; (b) admissibility; and (c) specificity.[5] Trial and circuit courts have used the *Nixon* factors to deprive defendants of access to documents and data that were clearly material to the preparation of the defense under a Fed. R. Crim. P. 16 standard.

If the Same Documents Were in Possession of Government, Defendant Would Be Entitled to Production Pursuant to Rule 16(a)(1)(E)(i)

Fed. R. Crim. P. 16(a)(1)(E)(i) requires that the government make available the material described in the hypothetical "if the item is within the government's possession, custody or control and (i) is material to preparing the defense." Since materiality of the sought documents is not only obvious, but also stipulated in the hypothetical, there is no argument that if the documents were in the government's possession, a defendant would have access to them. The pertinent issue for courts deciding subpoena applications under Fed. R. Crim. P. 17(c) is what justifies the imposition onto a defendant of a more demanding barrier to obtain documents material to preparing a defense simply because the documents are in the hands of a third party rather than the government.

The *Nixon* Standard Is Not Appropriate Where a Defendant Applies for the Subpoena

Courts and commentators have criticized the Supreme Court admonition that Rule 17(c) is not a discovery device. They have decried the rationale for such a pronouncement as no longer procedurally or jurisprudentially supportable, and perhaps even constitutionally defective. The prosecutors in *Nixon* served the subpoena after a grand jury had returned the indictment. A prosecutor's ability to use grand jury subpoenas for obtaining relevant documents during the investigation justified a more rigorous postindictment standard. However, a defense attorney has no process that is in any manner analogous to a grand jury subpoena to obtain data from third parties for trial preparation. This justifies a less rigorous standard when it is the defense seeking the documents pursuant to Rule 17(c).

In *United States v. Nachamie*, Judge Shira Scheindlin held that the *Nixon* standard did not apply to cases in which defendants were seeking documents from a third party, and instead applied the standard set out in Fed. R. Crim. P. 17(c) itself. The court observed:

> [The] high [*Nixon*] standard, of course, made sense in the context of a government subpoena, especially one seeking evidence from the president. It must be recalled that the government's use of a subpoena

> occurs after the completion of a grand jury investigation. Indeed, the Supreme Court has held that "the *Nixon* standard does not apply in the context of grand jury proceedings. ..." *United States v. R. Enterprises*, 498 U.S. 292, 299-300, 112 L. Ed. 2d 795, 111 S. Ct. 722 (1991). 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 nonparty to meet this same [*United States v. Nixon*] standard. Unlike the government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena. Because the rule states only that a court may quash a subpoena "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. As one court has noted, "The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties." [quoting *United States v. Tomison*, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997)][6]

In his seminal article on defense discovery, Professor Peter J. Henning has argued persuasively that Rule 17(c) should be construed as the operative discovery rule for obtaining documents from third parties, analogous to Rule 16(a)(1)(E)(i) for obtaining documents from the government. He argues that the limiting factor should be identical for each rule — "material to preparing the defense."[7]

Judge Scheindlin rejected the *Nixon* test in *Tucker*, another well-reasoned opinion.[8] She found the *Nixon* standard inappropriate where a criminal defendant subpoenas material from a third party, and "where the defendant has *an articulable suspicion* that the documents *may* be material to his defense. A defendant in such a situation need only show that the request is (1) reasonable, construed as 'material to the defense,' and (2) not unduly oppressive for the producing party to respond."[9] This formulation adequately addresses situations where there is an articulable suspicion that the documents may shed light or lead to documents that shed light — one way or another — on relevant issues for trial.

Judge Lewis Kaplan criticized the *Nixon* test in *United States v. Stein*:

> There is no question that courts confronted with subpoenas in criminal cases, at least subpoenas seeking pretrial production, have applied *Nixon* almost without exception. The Court has done so itself. But it is vitally important never to let the frequent repetition of a familiar principle obscure its origins and thus lead to mindless application in circumstances to which the principle never was intended to apply. ... But *Nixon* should not so readily be divorced from the concerns that produced it.
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> The Federal Rules of Criminal Procedure became effective in 1946. Rule 16 created only a narrow right of pretrial discovery from the government. Rule 17 provided for the issuance of subpoenas requiring pretrial production without specifying the circumstances in which such pretrial disclosure might be appropriate subject only to the ability of the court to quash subpoenas if compliance would be unreasonable or oppressive. The question quickly arose whether the seemingly generous availability of Rule 17 subpoenas returnable before trial would trump Rule 16's limitations on pretrial disclosure from the government.
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> In *Bowman Dairy Co. v. United States,* the Supreme Court, unsurprisingly, held that Rule 17 must be read in light of Rule 16: "It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms."[10]

In *United States v. Rajaratnam*,[11] Judge Holwell denied a third-party motion to quash a defense subpoena under 17(c), analyzing the material sought under the *Nixon* standard. Even though Judge Holwell denied the third-party motion to quash under the *Nixon* standard in *Rajaratnam*, he supplied a well-reasoned footnote, supporting Judge Scheindlin's rationale of Rule 17(c) and quoting Judge Kaplan's analysis in *Stein*:

> Judge Scheindlin's "material to the defense" would ensure that the defendant has a right to obtain evidentiary material from a third party that is no broader — but also no narrower — than the defendant's right to obtain such material from the government. *Cf.* Fed. R. Crim. P. 16(a)(1)(E) (requiring government to turn over to defendant all documents "material to preparing the defense").[12]

In *United States v. Nosal*,[13] the court ordered production of subpoenaed material, granting most of David Nosal's motion for a 17(c) subpoena. The *Nosal* court noted that there was no binding Ninth Circuit precedent prohibiting an evaluation on the pure language of 17(c) without considering the *Nixon* additional requirements, but conceded the circuit had applied the *Nixon* factors in cases where the issue had arisen. Nevertheless, the *Nosal* opinion reflects the more lenient standard was applied in granting the subpoena request, and added another potent argument — equality with the civil rule:

> Furthermore, applying a more relaxed standard to third-party subpoenas will address the disparity between criminal and civil cases in access to discovery. It is "ironic that a defendant in a breach of contract case can call on the powers of the court to compel third parties to produce any documents 'reasonably calculated to lead to the discovery of admissible evidence,' while a defendant on trial for his life or liberty does not even have the right to obtain documents 'material to the defense' from those same third parties." *United States v. Rajaratnam*, 735 F. Supp. 2d 317, 320 (S.D.N.Y. 2011).[14]

The stark discrepancy between the broad rights of discovery a civil litigant is entitled to and the limited access a criminal defendant has to documents concededly material to the defense can be a powerful additional argument.

United States v Ferguson points out the same irrational anomaly.[15]

Professor Henning summed up his seminal article by urging that the limitation of Rule 16 discovery ("materiality to the defense, not whether the document subject to disclosure meets the prerequisites for admission into evidence at trial") should be the Rule 17(c) standard because it is actually the counterpart to Rule 16 discovery, as applied to third parties.[16]

All of the documents sought in *Bowman Dairy*, which were not discoverable under Rule 16 in 1951, *would be given to a defendant under today's Rule 16 as part of normal discovery*. There is no longer a gap between the plain language of what Rule 17(c) authorizes — reasonable (which should be equated with material to the preparation of the defense) and what Rule 16 authorizes. The situation that existed 64 years ago no longer exists. There is no philosophical, jurisprudential or practical reason to make the Rule 17(c) standard any different from the current Rule 16 standard, which is "material to the preparation of the defense." Moreover, that standard may be constitutionally compelled.

The Subpoenaed Material Is Constitutionally Necessary to Vindicate a Defendant's Right to Present a Defense

The U.S. Constitution mandates an accused's right to present a defense. The two great rights of the accused at trial are the right to challenge the evidence brought forward by the prosecution and the right to affirmatively make a defense. The former is the "Confrontation Clause" while the latter is the "Compulsory Process Clause," but is better understood as the "right to present a defense."[17] That right — whether identified as the right to present a defense or the right to compulsory process — is the right most directly concerned with ensuring that innocent persons are not convicted. In *Washington v. Texas*, the Supreme Court recognized that the Compulsory Process Clause was designed to secure more than the presence of the defendant's witnesses:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present the defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.[18]

The leading case, *Taylor v. Illinois*,[19] held the compulsory process clause applicable to admissibility of evidence and discovery issues. Likewise, in *Pennsylvania v. Ritchie*,[20] the Court held "at a minimum, ... criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and *the right to put before a jury evidence that might influence the determination of guilt*."

Because it is undisputed that the hypothetical accuser will be a government witness, the Confrontation Clause is also relevant because the documents are the very stuff of impeachment:

> The Constitution guarantees criminal defendants the right to confront their accusers, and "the right to cross-examination has been held to be an essential purpose of the Confrontation Clause." The right is meaningless if a defendant is denied the reasonable opportunity to obtain material evidence that could be crucial to that cross-examination.[21]

A defendant has a right to subpoena data and documents from third parties that impeach or impact a government witness's credibility. The Third Circuit said in *Cuthbertson* that "Rule 17(c) permits a party to subpoena materials that may be used for impeaching a witness called by the opposing party, including prior statements of the witness."[22] When evidence relevant to guilt or punishment is in a third party's possession and is too complex for the defendant to adequately review unless obtained well prior to trial, pretrial production through Rule 17(c) is necessary to preserve the defendant's constitutional right to obtain and effectively use such evidence at trial.[23]

Access to the subpoenaed material is necessary to vindicate the constitutional right to both compulsory process and confrontation. The documents sought in the hypothetical may enable a defendant to confront the main accuser with his own wrongdoings; there is no way to tell until the lawyer examines the documents. The data could enable the hypothetical defendant to demonstrate he was entitled to the funds at issue and that his accuser

knew and acquiesced in the defendant's distribution of the family corporation's funds to a corporation controlled by the defendant. Should there be a conviction, the documents could enable the defendant to contest the amount of restitution and to make the appropriate arguments about the nature of the offense and the amount of loss to reduce the offense level. Judge Scheindlin's formulation — articulable suspicion — provides defendants with their valuable constitutional rights without visiting any unnecessary hardship on the judiciary, prosecutors, or third parties.

The fundamental right to subpoena documents that may be material to the preparation of the defense was appreciated and enshrined in American jurisprudence as far back as the early 19th century. Justice John Marshall wrote two opinions in *United States v. Burr*,[24] the case in which Aaron Burr was being tried for treason. Professor Peter Westen, in the first of his three definitive articles on the right to present a defense,[25] described the situation as not a propitious moment for reasoned adjudication. Burr, a former senator and vice president of the United States, was arrested because President Thomas Jefferson accused him of planning to precipitate war with Spain and set up a separate government in the western states by force. Jefferson's evidence was based in part on his correspondence with General James Wilkinson. Burr subpoenaed letters from President Jefferson to Wilkinson. The government argued in opposition that (1) a subpoena *duces tecum* was not covered by the Sixth Amendment, which related only to witnesses and not documents; (2) the defendant's showing was insufficient, having only stated that the letter may be material to his defense; (3) the motion was premature because the defendant was not yet indicted; and (4) the motion was invalid with respect to a U.S. president, who is privileged from subpoena.

In his decision of June 13, 1807, Justice John Marshall ruled against all these objections and the subpoena issued to Jefferson. Marshall resolved all doubts in favor of Burr's right of compulsory process: "[T]he right given by this article must be deemed sacred by courts, and the article should be so construed as to be something more than a dead letter."[26] Burr applied for another subpoena to produce a second letter to Jefferson, dated Nov. 12, 1806, as to which the attorney general claimed Executive Privilege. The subpoena issued, in a decision warning that the Executive Privilege does not trump that right of an accused to compulsory process, observing that "it would be a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it."[27]

A powerful argument exists for abandoning the *Nixon* standard so that defendants are granted 17(c) subpoenas if they seek documents that are relevant to the preparation of the defense (not unreasonable) and not oppressive for third parties to produce. This powerful argument has yet to be accepted by any circuit court of appeal. The Fourth Circuit forcefully rejected any encroachment on the *Nixon* standard in *United States v Rand*.[28] On Nov. 28, 2016, the Supreme Court denied certiorari.[29]

Nevertheless, defense attorneys should articulate the reform jurisprudence in their arguments for discovery from third parties, and preserve the record for appellate review. In most circuits no binding precedent exists to prohibit the argument. This change ultimately needs to be, and will be, accomplished.

Notes

1. Motions to compel seem to be exclusively used by the government when subpoenaing third parties.

2. *United States v. Nixon*, 418 U.S. 683, 698 (1974).

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

4. *Id.* at 219.

5. *Nixon* at 699-700. It has been noted (correctly) that the boiled down *Nixon* test is actually a two-part test, since relevancy is subsumed in admissibility.

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

7. Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601 (1999).

8. *United States v. Tucker*, 249 F.R.D. 58 (S.D.N.Y. 2008).

9. *Id.* at 66.

10. *United States v. Stein*, 488 F. Supp. 2d 350, 365 (S.D.N.Y. 2007).

11. *United States v. Rajaratnam*, 753 F. Supp. 3d 317 (S.D.N.Y. 2011).

12. *Id.* at 321 n.1.

13. *United States v. Nosal*, 291 F.R.D. 403 (N.D. Cal. 2013).

14. *Id.* at 408.

15. *United States v Ferguson*, 2007 WL 457303 (D. Conn. 2007).

16. Henning, *supra* note 7, at 647.

17. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

18. *Id.*

19. *Taylor v. Illinois*, 484 U.S. 400 (1988).

20. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (emphasis added).

21. *Tucker*, 249 F.R.D. at 67.

22. *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980).

23. *United States v. Murray*, 297 F.2d 812, 821 (2d Cir. 1962).

24. *United States v. Burr*, 25 F. Cas. 30 (No. 14692D) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807).

25. Professor Peter Westen's three articles are *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); *Compulsory Process II*, 74 MICH. L. REV. 191 (1975); and *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 867 (1978).

26. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 102 (1974).

27. *Id.*

28. *United States v. Rand*, 835 F.3d 451 (4th Cir. 2016).

29. *Rand v. United States*, 137 S. Ct. 535; *United States v. Pacific Gas and Electric Company*, 2016 WL 3350326 (N.D. Cal. 2016) (same).

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