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Applying Due Process to Defendant's Right to Subpoena Documents from Third Parties - *Client Newsletter*

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Due Process requires equality between the parties in criminal discovery. *Wardius v. Oregon*, 412 U.S. 470 (1973), is the lynchpin to a defendant's constitutional right to access to relevant documents and data that is equal to the government's rights to access those documents as it prepares its case for indictment. Shockingly, *Wardius* and its constitutional holding has not appeared in any of the litigation over a defendant's efforts to subpoena third parties. F.R.Cr.P. 17(c).

In a unanimous opinion authored by Justice Marshall, the *Wardius* court struck down an Oregon discovery statute as violating the Due Process Clause of the United States Constitution because it did not treat the prosecution and the defense equally. The Supreme Court had previously upheld the requirement that the defense provide notice of an alibi defense and identify its witnesses against a Fifth Amendment attack because the statute had required the prosecution to furnish to the defendant the names of its rebuttal witnesses. *Williams v. Florida*, 399 U.S. 78 (1970). However, where the defendant is not treated equally because the prosecution is *not* required to reveal its rebuttal witnesses, making a defendant provide his alibi defense in advance could not pass constitutional muster. "We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." *Wardius*, 412 U.S. at 472.

The holding in *Wardius* leads to an analysis of the overall guarantees of our Constitution. Justice Douglas, in a concurring opinion, wrote, "The Bill of Rights does not envision an adversary process between two equal parties. ... [T]he Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the

advantage that inheres in a government prosecution." *Id.* at 480; *see also id.* at 480 n.9 (listing the different aspects of that prosecutorial advantage).

Justice Marshall wrote tellingly, "[T]he Due Process Clause ... *does speak to the balance of forces between the accused and his accuser*." *Id.* at 474 (emphasis added). "This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State *when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.*" *Id.* at 474 n. 6 (emphasis added).

Thus, the unanimous Supreme Court held that in the absence of defendant's right to the identity of the prosecution's rebuttal witnesses, a defendant cannot, consistent with the Due Process Clause, be compelled to reveal his alibi defense. The remainder of this article explores how the holding of *Wardius* should be applied in the litigation over a defendant's right to subpoena relevant material from third parties.

Prosecution's Right to Subpoena Materials from Third Parties

Prosecutors are widely understood to wield tremendous power in their ability to prepare and present cases for trial, and such power principally includes the right to subpoena documents and data from third parties before the grand jury. Although both trial subpoenas and grand jury subpoenas are governed by F.R.Cr.P. 17(c), a grand jury subpoena issued to third parties for documents enjoys a presumption of validity, and places the burden of proving unreasonableness "on the recipient who seeks to avoid compliance," not on the government. *United States v. R. Enterprises,* 498 U.S. 292, 301 (1991).

Moreover, a third party moving to quash a grand jury subpoena based on relevance faces a substantial hurdle in convincing the district court that "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.*

R. Enterprises reversed a Fourth Circuit ruling that had quashed the grand jury subpoena based on the judicially imposed requirements of *United States v. Nixon*, 418 U.S. 683 (1974). The Supreme Court reversed and held that the *Nixon* rules were not applicable to grand jury subpoenas, and that a grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Id.* at 298 (citation omitted). The court recognized that "the subpoena recipient is likely to find it exceedingly difficult to persuade a court that 'compliance would be unreasonable.'" *Id.* at 300. "*[T]he motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation.*" *Id.* at 301 (emphasis added).

Thus, a prosecutor stands virtually unobstructed when seeking to obtain documents and data from third parties during the grand jury investigation that will ultimately be used to prepare the government's case for trial.

'Nixon' Rule Denies Defendant's Right to Subpoena Materials from Third Parties

District courts uniformly evaluate subpoenas applied for by defendants to obtain documents and other materials from nongovernmental third parties using the stringent *Nixon* standard. *Nixon* famously involved a subpoena duces tecum issued pursuant to F.R.Cr.P. 17(c) by the Watergate Special Prosecutor to President Nixon following a grand jury's indictment of several of his advisers. 418 U.S. at 688. The Supreme Court held that a post-indictment F.R.Cr.P. 17(c) subpoena shall only issue upon a showing by the moving party that:

(1) the documents are evidentiary and relevant; (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."

Id. at 699. Hence, defendants are routinely deprived of the right to subpoena documents and data from third parties in preparing their cases for trial by failing to clear the *Nixon* evidentiary hurdles of relevancy, admissibility and specificity. While that rigorous standard was legitimately applicable to a post-indictment subpoena issued *by the prosecutor,* who otherwise has the ability to use grand jury subpoenas to obtain documents from nonparties during an investigation, we will demonstrate that applying such a standard to a defense subpoena to third parties violates Due Process.

The 'Nixon' Rule Violates Due Process

Justice Marshall emphasizes in *Wardius* that "[W]e do *hold* that in the absence of a strong showing of state interests to the contrary, *discovery must be a two-way street.* The State may not insist that trials be run as a 'search for the truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." *Id.* at 475 (emphasis added).

Thus, the rule we can take and apply from *Wardius* is that absent a strong prosecutorial interest in keeping the particular discovery a one-way street, *Due Process requires that discovery must be a "two-way street" or provide for equality of the burdens placed on the respective parties.* We must then analyze the current discovery rules applied to both the prosecution's and the defense's ability to obtain documents and data from third parties in order for each to prepare its case for trial from a Due Process perspective.

The analysis has complexity because the government obtains material from third parties by issuing grand jury subpoenas, while the defense can do so only after indictment. All circuits and the overwhelming number of district courts have applied the *Nixon* rule to determine whether to grant the subpoena. By contrast, it is clear that the

government's grand jury subpoena does *not* have to make the showing that a defendant's post-indictment subpoena must. The government does not have to show: 1) that the data is evidentiary and relevant; 2) that it is not otherwise procurable; 3) that the government could not properly prepare its case without such production; or 4) that the subpoena is not a fishing expedition.

As the cases demonstrate, the *Nixon* barriers have been and are formidable, resulting in the unfair denial of resources to a defendant in the preparation of its case for trial while the prosecution can easily obtain the same data from third persons for its preparation.

It seems undisputable that a federal criminal defendant seeking documents and data from a third party in order to prepare for trial is not treated even close to equally with a prosecutor's efforts to obtain the same documents and material in order to prepare the prosecution's case for trial. Under *Wardius*, a court using the *Nixon* formulation to determine whether or not a defendant can obtain the data from a third party violates Due Process and requires granting the subpoena on the identical terms that would apply to a prosecutor's grand jury subpoena for the material from a third party.

As *Wardius* makes clear, this Due Process requirement applies to both state and federal prosecutions. Let us remember the Due Process Clause when we seek documents and data for our clients from third parties.