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Revisiting the Criminal Defense Subpoena

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It's time to revisit the criminal defense subpoena. Too often, government disclosures aren't getting defendants the information they need to meaningfully counter the prosecution's version of the facts and avoid wrongful conviction or excessive punishment. Recent exonerations and disclosure shortfalls in state and federal courts highlight this risk. Rather than rely exclusively on prosecutors to remedy this problem, criminal defendants can and should be empowered to use compulsory process to uncover the truth themselves.

This is not just about prosecutorial misconduct. The National Registry of Exonerations, for example, found that official misconduct was a contributing factor in only slightly more than half of the wrongful convictions it analyzed, a statistic that includes misconduct by law enforcement agents which may have been hidden from prosecutors.

Defendants may not receive information favorable to them for other reasons. Prosecutors can credit witnesses who are deceptive or whose memories are mistaken. They can rely on bad forensic science or admissions from defendants who falsely confess due to age, mental illness, or other factors. Government investigators may fail to pursue potentially exculpatory leads, depriving prosecutors of important information that might have affected their view of a case. Investigations involving electronic evidence can produce millions of records that may be searched by others, leaving prosecutors ill-equipped to flag favorable evidence themselves.

These problems cannot be addressed solely through broader discovery rules and enforcement of *Brady v. Maryland*'s requirement that prosecutors produce favorable information to the defense. Expansive disclosure rules won't give the defense favorable information if prosecutors don't have it in the first place, or if it is hidden due to mistake, misconduct, or misunderstanding.

The only real solution is to give defendants sufficient power to investigate, including investigative subpoena power, so they are not reliant on the prosecution to gather


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and produce favorable evidence that may be obtainable only by subpoena. Using subpoena power and other tools, defendants can follow leads that were not pursued by the prosecution team; obtain favorable information from third parties; and effectively expose misconduct when it does occur.

Defendants are guaranteed subpoena power by the Sixth Amendment's Compulsory Process Clause, which requires that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor." While the prosecution alone can access powerful tools at the investigation stage of a case, the Compulsory Process Clause has been interpreted to secure par-

ity of access to subpoenas prior to and during trial.

The promise of subpoena parity historically has rung hollow for defendants, however, due to restrictive judicial interpretations and prosecutorial resistance. I explain here how recent changes to New York law, and the proper interpretation of federal subpoena rules, can help defendants use subpoenas more effectively and empower them to obtain important favorable information themselves.

New York

In civil litigation, plaintiffs and defendants have equal access to subpoena power. But in New York, a criminal defendant faced unique burdens until recently. Judicial rulings required defendants to "proffer a good faith factual predicate sufficient for a court to draw an inference that specifically identified materials are reasonably likely to contain information that has the potential to be both relevant and exculpatory" before being able to subpoena the materials. *People v. Kozlowski*, 11 N.Y.3d 223, 241 (2008). Thus, defendants could not subpoena information unless they had advance knowledge of it and could articulate its exculpatory nature. There was no equivalent decision requiring prosecutors to know the contents of records they sought and articulate their *inculpatory* nature before subpoenaing them.

New York state ended that disparity in 2019's criminal justice reform legislation, which became effective on Jan. 1, 2020. Subpoena reform was proposed in the same bill that contained bail and discovery reforms. The bill's purpose was to end practices that forced criminal defendants to "choose between facing lengthy prison sentences or a speedy return to society without providing them with sufficient information regarding the case against them." N.Y. FY 2020 Exec. Budget, Pub. Prot. & Gen. Gov't Art. VII Leg. Part AA §1.

The legislation creates a new CPL §610.20(4) that supplies a universal standard for criminal subpoena enforcement: "The showing required to sustain any subpoena under this section is that the testimony or evidence sought is reasonably likely to be relevant and material to the proceedings, and the subpoena is not overbroad or unreasonably burdensome."

This language, and its inclusion in legislation intended to enhance defendants' access to evidence, reflect legislative intent to abrogate *Kozlowski* and related decisions that imposed special burdens on defense subpoenas. Now, the same limited showing must be made to "sustain *any subpoena*" under §610.20, whether issued by the prosecution or the defense.

The McKinney's commentary on §610.20 properly concludes that this amendment and other changes to discovery laws "substantially abrogate the rule that in general, the subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence" (internal quotation marks omitted). Defendants in New York state courts thus have access to investigative subpoenas meeting the new §610.20(4) standard at any time after charges are filed, enabling them to obtain and make use of favorable information early on in a case.

Federal

Federal Rule of Criminal Procedure 17, which regulates all federal criminal subpoenas, also can support effective defense investigations. One key to more effective use of federal criminal subpoena power is to appreciate Rule 17's distinction between subpoenas with return dates *prior to trial or hearing* (i.e., pretrial subpoenas) and those with return dates *of trial or hearing* (i.e., trial subpoenas).

A pretrial subpoena may be issued only by court order under Rule 17(c)(1). Most courts draw on *United States v. Nixon*, 418 U.S. 683 (1974), for the applicable standard, although a minority apply a more relaxed standard in view of *Nixon*'s unique facts and its acknowledgment that the standard it applied was dictum, see id. at 699 n.12. Courts that apply the *Nixon* standard require proof of "(1) relevancy; (2) admissibility; [and] (3) specificity." Id. at 700. Defendants also must be prepared to explain why production before trial is necessary. Many courts have permitted this showing to be made ex parte.

Defendants should work with investigators as part of a defense team before seeking pretrial subpoena authority under *Nixon*. The defense team should first understand and exploit discovery material and information available through open-source investigation, interviews, and other methods. It can satisfy *Nixon*'s specificity prong by using what it learns to identify specific information unavailable without a subpoena that could aid the defense if obtained prior to trial. The defense team can in turn use subpoenaed information to develop more evidence and support additional subpoenas and investigation.

Preparation also can enable the defense team to satisfy *Nixon*'s relevancy requirement. *Nixon* does not require advance knowledge of the information sought or certainty about its relevance. *Nixon* itself involved a subpoena for recordings that the Special Prosecutor had not heard and thus could not demonstrate would be relevant, but the Supreme Court nonetheless found the standard met because "there was a sufficient likelihood" of relevance. Id.

Nixon's admissibility prong should not deter the defense team from pursuing pretrial subpoena authority. Many pretrial subpoenas seek material that would be admissible as records of a regularly conducted activity. Thoughtful analysis can develop theories of admissibility for other records that raise hearsay concerns. In *Nixon*, for example, the recordings at issue were found to be admissible as co-conspirator statements or for impeachment purposes. Id. at 700-02.

Some impeachment material (e.g., prior bad acts of a witness), however, may not be admissible, and *Nixon* indicated that a pretrial subpoena generally is not necessary to obtain it. Id. at 701-02. Accordingly, defendants must rely more heavily on investigators to obtain this material by making connections between discovery and other available sources of information. The defense team's investigation also may support pretrial subpoenas for records that could be admissible to demonstrate the falsity of a witness's testimony (e.g., through business records that contradict a witness's account of events) if obtained with sufficient time for analysis before trial.

Defendants should issue trial subpoenas in advance of hearing or trial to obtain important information, including collateral impeachment material, where pretrial subpoenas or other investigative methods are not available options. Trial subpoenas for records (other than those seeking victim-sensitive information, see Fed. R. Crim. P. 17(c)(3)) may be issued without any judicial approval and are not subject to *Nixon*'s requirements. They may be quashed later only if they are unreasonable or oppressive. Fed. R. Crim. P. 17(c)(2). Evidence sought by a properly-issued trial subpoena can be returned prior to hearing or trial without invalidating the subpoena. See, e.g., *United States v. Amirnazmi*, 645 F.3d 564, 594-96 (3d Cir. 2011). Thus, defendants should consider issuing trial subpoenas when they are notified of a trial or hearing date at which the material may be used.

Conclusion

Participants in the criminal justice system should heed Alexander Hamilton's warning that "[c]aution and investigation are a necessary armor against error and imposition." *The Federalist* No. 31. Defendants should review the information they receive about a case with caution and prepare to conduct their own investigation, using the subpoena power to which they are entitled and other methods, as a necessary armor against error and imposition of wrongful conviction or excessive punishment.

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