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PROTECTING, ENFORCING & ADVANCING VICTIMS' RIGHTS

Discovery Versus Production: There is a Difference

In criminal cases, especially those involving rape or sexual assault, defendants routinely attack victims' privacy by seeking personal records, such as counseling, mental health, medical, employment, educational, and child protective services records. The law governing when these records must be disclosed to a defendant is complex, touching on a number of factors, including whether the records have been provided to the prosecutor; whether they are protected by a privilege; whether any applicable privilege is absolute or qualified; whether a victim has waived any privilege in full or in part; the scope of the jurisdiction's constitutional or statutory protections for victims; and the jurisdiction's statutes and rules governing discovery and production.

This article is the first in a series of articles to address a defendant's ability to obtain disclosure of a victim's records, and the devices a victim may use to prevent such disclosure. Specifically, this article discusses the basic differences between discovery and production when a defendant seeks access to a victim's records, and the importance of that difference to the victim. The distinction is the difference between the defendant's wide-ranging access to information possessed by the prosecutor on the mere hope of unearthing something useful, and the defendant's limited right to already identified evidence from a nonparty at the time of trial. Understanding the fundamentals of this difference, while often overlooked, is critical to protecting a crime victim's privacy.

The Legal Tools Available to a Defendant Seeking Privileged or Private Records

Absent voluntary disclosure, a criminal defendant may obtain a victim's privileged or otherwise private records in one of two ways. First, if the records sought are properly in the possession or control of the prosecutor, a defendant may be entitled to those records pursuant to his constitutional, statutory, or rule-based rights to discovery. Second, if the records are not in the possession of the prosecutor, a defendant must subpoena those records pursuant to the

jurisdiction's statutes and rules governing production of documents from a nonparty. While courts and practitioners sometimes refer to the defendant's receipt of materials from both the prosecutor and nonparties as "discovery," this imprecise use of the term confuses a defendant's right to discovery from the prosecutor with a defendant's right to production from a nonparty. The difference is vital to crime victims.

Discovery

In a criminal prosecution, the term "discovery" refers to the exchange of information between parties to the case – in other words, the defendant and prosecutor. *See, e.g.*, FED. R. CRIM. P. 16 (entitled "Discovery and Inspection," the rule explicitly and exclusively governs discovery between the government and the defendant). It does not govern the defendant's ability to obtain information directly from a crime victim.

With regard to discovery from the prosecutor, a criminal defendant has no federal constitutional right to general discovery from the prosecutor. *See Weatherford v. Busey*, 429 U.S. 545, 559 (1977). The prosecutor, instead, is only constitutionally required to disclose information that is exculpatory and material to the issue of guilt, *see Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), and which is within the custody or control of the prosecutor. *See United States v. Agers*, 427 U.S. 97, 106-07 (1976); *Commonwealth v. Beal*, 709 N.E.2d 413, 415-16 (Mass. 1999). Absent a defendant specifically identifying exculpatory material in a prosecutor's possession or control, the prosecutor retains the authority to determine which material is exculpatory and, therefore, must be disclosed. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (concluding that a state's obligation to disclose certain *Brady* material does not provide defendant with the right to unfettered access to search the state's files for exculpatory evidence).

Beyond that material to which a defendant is constitutionally entitled, a prosecutor's obligation to disclose information is governed by statute or procedural rule. *See, e.g.*, CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL PROCEDURE § 334, at 547 (13th ed. 1990); LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 20.2. A criminal defendant is often entitled to additional discovery materials from the prosecutor pursuant to these statutes or rules, though discovery statutes and rules vary widely between jurisdictions. Many jurisdictions, even those imposing very limited rule-based discovery obligations, arguably require disclosure of a victim's records if they are within the prosecutor's control. *See, e.g.*, S.C. R. CRIM. P. 5(a)(1)(D) (requiring disclosure of reports of physical or mental examination). Therefore, where a victim voluntarily discloses records to the prosecutor, pursuant to the prosecutor's *Brady* obligations or applicable discovery statutes and rules, disclosure by the prosecutor to the defendant may be required. *But see People v. Reynolds*, 633 A.2d 455, 461 (Md. Ct. Spec. App. 1993) (concluding, "The execution of a limited waiver, giving the prosecutor pretrial access to the patient's treatment records, did not automatically entitle [defendant] to inspect those records.").

Production

In contrast to "discovery," the term "production" refers to the procedure by which a defendant can secure materials from nonparties, including crime victims. *See, e.g.*, FED. R. CRIM. P. 17 (entitled "Subpoena," the rule governs the production of material from nonparties, including nonparty crime victims). The United States Supreme Court has explained that the right to production flows from the Sixth Amendment's rights to confrontation and compulsory process, applicable to states through the due process clause of the Fourteenth Amendment. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

The Court has rejected the argument that the right to cross-examination – part of the right to confrontation – supports a request for production pursuant to a subpoena. *See Ritchie*, 480 U.S. at 52. In so doing, the Court explained that requiring production of all material that would render more effective the cross-examination of prosecution witnesses would have the effect of transforming the right to confrontation into "a constitutionally compelled rule of pretrial discovery." *Id.* Instead, the right to confrontation protects only a defendant's trial rights, *see State v. Watson*, 726 A.2d 214, 216 (Me. 1999), and "does not compel the pretrial production of information that might be useful in preparing for trial." *Ritchie*, 480 U.S. at 52.

Similarly, the right of compulsory process does not support a pretrial request for production pursuant to subpoena. Instead, the right of compulsory process is a trial right rather than a pretrial right. *See United States v. Ferguson*, 37 F.R.D. 6, 7-8 (D.D.C. 1965) (explaining that a "vital protection" against misuse of a subpoena *duces tecum* is that the subpoena may be returnable in advance of trial only in exceptional circumstances and only if directed by the court). The right of compulsory process provides a defendant with "the right to have the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put evidence before a jury that might influence the determination of guilt." *Id.* at 56. The Fifth Circuit has explained that, when asserting a constitutional right to compulsory process, "the defendant must at least make some plausible showing of how [the witness's] testimony would [be] both material and favorable to his defense."

United States v. Redd, 355 F.3d 866, 878 (5th Cir. 2003) (alterations in original) (internal quotations omitted). *See also Ritchie*, 480 U.S. at 56 (explaining that defendant's right to compulsory process provides no greater protection than the due process clause).

State and federal statutes and rules of criminal procedure may set forth rights to production that go beyond that to which a defendant is constitutionally entitled. *See, e.g.*, FED. R. CRIM. P. 17. In most jurisdictions, however, those statutes and rules governing production were not intended to provide an alternative or expansion to a defendant's right to pretrial discovery. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) (stating, "Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in FED. R. CRIM. P. 16."); ALA. R. CRIM. P. 17.3, Committee Comments (stating, "This rule is not intended to be a discovery device because Rule 16 provides for discovery."). The United States Supreme Court has explained that to warrant production of documents for use at trial, a moving party must show:

1. that the documents are evidentiary and reliable;
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 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.

Nixon, 418 U.S. at 699-700 (footnotes omitted). Thus, under Federal Rule of Criminal Procedure 17, "a subpoena *duces tecum* may be used only for the production of documents that *are admissible in evidence* . . . ." *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954) (emphasis added). *Accord United States v. Jackson*, 155 F.R.D. 664, 667 (D. Kan. 1994) (explaining that the proper use of a subpoena *duces tecum* under FED. R. CRIM. P. 17 is as a tool for "compulsory process for securing specific, identifiable evidence for trial").

Many states have rules of procedure akin to FED. R. CRIM. P. 17, and have followed federal precedent in interpreting their state's rules. *See, e.g.*, *Ex parte State v. Reynolds*, 819 So.2d 72 (Ala. Crim. Ct. App. 1999); *State v. Watson*, 726 A.2d 214, 216 (Me. 1994); *State v. Pacarro*, 595 P.2d 295, 298 (Haw. 1979); *Nabors v. State*, 565 S.W.2d 598, 598-99 (Ark. 1978).

CONCLUSION

The distinction between discovery among the parties to a criminal prosecution and production from nonparties is not insignificant. It is the critical difference between the defendant's wide-ranging access to information possessed by the prosecutor in the hope of finding possibly useful information, and the limited right to already identified evidence at trial.

The next article in this series of articles will further explore the importance of this difference in light of victims' constitutional and statutory protections, and identify arguments that a victim can make to prevent or limit the disclosure of privileged, confidential, or otherwise private records.[1]

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1 NCVLI has filed a number of *amicus curiae* briefs addressing victim privacy and the arguments available to prevent a defendant from piercing that privacy. If you are confronted with such an issue please contact us at www.ncvli.org.

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