

WEAPONS OF CHOICE FOR THE DEFENSE: USING OPEN RECORDS LAW, DOCUMENT SUBPOENAS AND *BRADY* DEMANDS TO OBTAIN “SMOKING GUN” EVIDENCE

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As a professor of constitutional law, my job is to teach these sleights-of-hand to a fresh crop of young innocents each year so that they understand the true meaning of federalism today. I am always chagrined, therefore, when I hear complaints about the underhandedness of lawyers. People don't seem to appreciate that this professional competency is the result of hard work. Creating constitutional scholars is no easy task.

Professor Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129 (1993).

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I. The Role of a Defense Lawyer and Your Obligation to Your Client

A. A Prosecutor's Role

1. *The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

Berger v. United States, 295 U.S. 78, 88 (1935)(emphasis supplied).

2. A prosecutor has the responsibility as a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

WISCONSIN SCR 20:3.8, *Comment*.

B. A Criminal Defense Lawyer's Role

1. "The part I took in defense of Cptn. Preston and the soldiers, procured me anxiety, and obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country." - John Adams on his decision to defend British soldiers charged with killing Americans in the Boston Massacre.

2. “[A] first office of a lawyer in our society is to protect individual rights, especially those secured to people accused of trespassing society's laws.” - Justice William Brennan, Jr. (1962)
3. “Those who expect to reap the blessings of freedom must [...] undergo the fatigue of supporting it.” - Thomas Paine
4. The zealous defense attorney is the last bastion of liberty - the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in power justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves.

ALAN DERSHOWITZ, THE BEST DEFENSE 415 (1982).

5. Defense lawyers are an egotistical lot - and the challenge of “getting off” an obviously guilty defendant is a great ego trip. It is also a great source of future clients; and clients mean money; and money means the good life that so many defense lawyers crave.

ALAN DERSHOWITZ, THE BEST DEFENSE 118 (1982).

6. Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. *But defense counsel has no comparable obligation to ascertain and present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we must also insist that he defend his client whether he is innocent or guilty.* The state has the obligation to present the evidence. He need not present any witnesses to the police, or reveal any confidences

of his client, or furnish any other information to help the prosecutor's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. *Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.*

United States v. Wade, 388 U.S. 218, 256 (1967) (Justice White, concurring and dissenting)(emphasis supplied).

7. I personally despise criminals and always root for the good guys except when I am representing one of the bad guys.

ALAN DERSHOWITZ, LETTERS TO A YOUNG LAWYER 51 (2001).

8. The defense attorney comes close to being a pure one-sided advocate for his generally guilty client. His job - when his client is guilty - is to prevent, by all lawful and ethical means, the "whole truth" from coming out. He is not concerned about "justice" for the general public or about the rights of victims. He is supposed to try to get his guilty client the best deal possible, preferably an acquittal.

ALAN DERSHOWITZ, LETTERS TO A YOUNG LAWYER 149 (2001).

9. [P]rosecutors are supposed to be advocates for justice, while defense attorneys are not even permitted to try to achieve justice, if by doing so they would disserve the legitimate interests of their clients. Again, since most criminal defendants are, as a statistical matter, guilty, defense attorneys are not usually engaged in the business of serving justice - at least not in the short run. But by zealously defending their clients, guilty or innocent, they help preserve a system of justice that only rarely convicts the innocent.

ALAN DERSHOWITZ, REASONABLE DOUBTS: THE CRIMINAL JUSTICE SYSTEM AND THE O.J. SIMPSON CASE 181 (1996).

10 American Bar Association Standard 4.1

4.1 Duty to investigate. It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

See, generally, *State v. Thiel*, 264 Wis.2d 571, 665 N.W.2d 305 (2003).

II. Understanding Wisconsin Open Records Law

A. *A summary of the law*

1. *First*, to better understand Wisconsin's Open Record Law, print and read WIS. STAT. §§ 19.31 - 19.39. *Second*, download a copy of the WISCONSIN DEPARTMENT OF JUSTICE 2008 PUBLIC RECORDS COMPLIANCE OUTLINE, available online at: http://www.doj.state.wi.us/dls/2008-PRCO/2008_Pub_Rec_Outline.pdf. Print and read this as well.
2. An open records request is a request for information held by an authority.
 - a. An "authority" includes: a state or local office, an elected official, a governmental or quasi-governmental corporation, any court of law, the assembly or senate, and any agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order. See WIS. STAT. § 19.32(1).

3. How to make an Open Records Request.
 - a. The request does not need to be in writing.
 - b. The requester does not have to identify herself.
 - c. The requester does not need to state the purpose of the request. WIS. STAT. § 19.35(1)(h) & (i).
 - d. The request must be reasonably specific as to subject matter and length of time involved. WIS. STAT. § 19.35(1)(h).

4. What the responding authority is to do upon receipt of an Open Records request.
 - a. The response must be made “as soon as practicable and without delay.” WIS. STAT. § 19.35(4)(a).
 - b. If the response is in writing, a denial or partial denial must also be in writing. WIS. STAT. § 19.35(4)(b). Reasons for the denial must be specific. A record can be redacted, but the disclosable portion of the record must be disclosed. WIS. STAT. § 19.36(6).
 - c. The subject of the request has the right to notice and to have an opportunity to object.
 - d. The standard that the authority is to use in interpreting a request is described in WIS. STAT. § 19.31:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers

and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

5. Addressing the wrongful denial of an Open Records request.
 - a. Bring a mandamus action for a court order for release of the record. *See* WIS. STAT. CH. 781 and 783. Also, see WISCONSIN DEPARTMENT OF JUSTICE 2008 PUBLIC RECORDS COMPLIANCE OUTLINE at pages 34 - 36.

Submit a written request to the District Attorney (where the record is located) or to the Attorney General requesting that they bring the mandamus. WIS. STAT. § 19.37(1).

You must have made a written request for the record before you can bring a mandamus action. WIS. STAT. § 19.35(1)(h).

You can get attorney fees, damages and costs. WIS. STAT. § 19.37(2). You can also seek punitive damages. WIS. STAT. § 19.37(3).

- b. File a John Doe complaint (assuming the District Attorney will not prosecute) for concealment of public records with intent to injure or defraud. WIS. STAT. § 946.72.

B. *Using it to your advantage*

1. In defending clients, a lawyer will most likely make the request in writing. While you do not have to state a reason for making the request, sometimes it is to your benefit to do so. For example, this is usually the case when seeking the disciplinary file of a particular officer.
2. If you are seeking closed police files about a possible witness, or attempting to find out about closed investigative files involving your client, you may want to make inquiries about several “red herring” subjects as well as the actual subject of your inquiry.

This can help maintain discretion as to the identity of your client or the nature of your investigation related to a prosecution witness. You may even ask another person (perhaps a lawyer with a different firm) to file the Open Records request for you.

III. Understanding the limits of *Brady v. Maryland* demands

A. *What Brady says and what it doesn't say*

1. First, print and read *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitney*, 514 U.S. 419 (1995). You ought also read *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 473 U.S. 667 (1985) and *United States v. Ruiz*, 536 U.S. 622 (2002). Also read *State v. Harris*, 307 Wis. 2d 555, 585-86, 745 N.W.2d 397, 411-12 (2008) and *State v. Heine*, 2008AP501-CR (Court of Appeals, decided April 14, 2009).

2. What does *Brady*, and its progeny, say?

No cheating, you still need to read *Brady* and *Kyles*.

- a. *Brady* requires prosecutors to provide evidence to criminal defendants that tends to negate their guilt or reduce their punishment.

That right is violated “when favorable evidence is suppressed by the State either willfully or inadvertently, and when prejudice has ensued. Prejudice means that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In other words, strictly speaking, there is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” *State v. Harris*, 307 Wis. 2d 555, 585-86, 745 N.W.2d 397, 411-12 (2008)(internal quotations omitted).

- b. If only a general request for information or if no request is made, a prosecutor is still required to disclose information that was likely to lead to a different verdict or judgment. *United States v. Agurs*, 427 U.S. 97 (1976).
- c. This includes evidence that could impeach a witness. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985).
- d. Evidence is material if there is a reasonable probability (“a probability sufficient to undermine confidence in the outcome”) that, had the evidence been disclosed to the defendant, the result of the proceeding would have been different. *Bagley*, 473 U.S. at 682; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

3. What is the scope of *Brady*?

a. The obligation of a prosecutor is broadly construed...

“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitney*, 514 U.S. 419, 437 (1995). The prosecutor’s obligation has been given an expansive scope. See, as examples, *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (holding that exculpatory material in the possession of the Food and Drug Administration (“FDA”) files was within the constructive knowledge and possession of the prosecutors because the FDA was involved in the investigation and the FDA was the agency charged with administering the statute at issue); and *United States v. McVeigh*, 954 F. Supp. 1441, 1450 (D. Colo. 1997) (holding that, in their search for *Brady* material, prosecutors must “inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial”).

b. ... But, it is questionable whether it applies to information that the defense could or should have been able to obtain on her own.

See *United States v. Crawford*, 211 F.3d 125 (5th Cir. 2000), cert. denied sub nom. *Lewis v. United States*, 531 U.S. 874 (2000); see also *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (“there is no *Brady* violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if

the information was available to him from another source"); *United States v. Brothers Constr. Co.*, 219 F.3d 300 (4th Cir. 2000). Compare with *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000).

B. Using it to your advantage.

1. Don't rely on *Brady* exclusively. Continue to file a *Brady* demand as part of your discovery demand and motion. However, if you can find out the information on your own, you ought do so. Don't rely on the prosecutor to do your work for you. Also, if you find the desired records through other tools, then you can use it at trial and not show your hand.
2. In felony cases, when you have a good faith basis, you ought consider filing the *Brady* demand prior to the preliminary hearing.

Argue that it is not a motion that may only be made after a preliminary hearing. See WIS. STAT. § 971.31(5)(b). (A careful reading of *State ex rel. Lynch v. Circuit Court*, 82 Wis.2d 454, 262 N.W.2d 773 (1978) provides support.) Also, argue that a prosecutor's ethical obligation to disclose favorable evidence and the accused's due process right to obtain *Brady* evidence can not be delineated by statute. See WIS. STAT. § 971.23(1)(h). Also, argue that failure to provide *Brady* evidence upon demand, would deny the accused the right to effective assistance of counsel at the preliminary hearing. (However, this argument could be challenged upon the premise that *Brady* does not require pretrial disclosure of exculpatory evidence. *Brady* instead requires that the prosecution disclose evidence to the defendant in time for its effective use at trial. See *State v. Harris*, 307 Wis. 2d 555, 586-87, 745 N.W.2d 397, 412 (2008).)

IV. Use of a *subpoena duces tecum*

A. *When can you use a subpoena duces tecum*

1. A subpoena may be used to obtain documents not in the possession of the prosecution or subject to discovery rules and documents the Government does not intend to introduce at trial. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219 (1951).
2. WIS. STAT. § 885.01 authorizes the production of witnesses and their products of lawful instruments and “any active *matter or proceeding pending* before any person authorized to take testimony in the state.” WIS. STAT. § 885.02 prescribes the form of the subpoena, including a subpoena requiring the production of documents. WIS. STAT. § 972.11 specifically mandates the application of WIS. STAT. CH. 885 in “all criminal proceedings.”
3. Except under limited circumstances, no person has a privilege to: (1) refuse to be a witness; or (2) refuse to disclose any matter; or (3) refuse to *produce any object or writing*; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing. WIS. STAT. § 905.01 (emphasis added).
4. WIS. STAT. § 805.07(2) makes clear that “a subpoena may command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein.” The defense does not have the power to generally subpoena documents, unlike the State under WIS. STAT. § 968.135, and therefore the defense must subpoena materials to a court date.
5. U.S. CONST. amend. VI.; WISCONSIN CONST., Art. 1, § 7.

B. Who has standing to challenge a subpoena duces tecum

1. The individual served with the subpoena.
2. The District Attorney?
 - a. The argument against the District Attorney's standing to challenge a subpoena issued to a third-party.

The district attorney represents the State of Wisconsin, it does not represent witnesses, even law enforcement officers, as its private clients. Wisconsin Statutes describe the limited duties of the district attorney. The statutes do not provide that the district attorney may bring actions on behalf of potential witnesses. *See* WIS. STAT. § 978.05. Additionally, nothing in WIS. STAT. CH. 950 describes that a district attorney may represent a witness in a criminal proceeding as its client. Should the Dane County District Attorney's Office wish to represent a third-party, inconsistent with its authority under WIS. STAT. § 978.05, then it ought be ordered to recuse itself from representing the State of Wisconsin in the prosecution.

- b. The argument for the District Attorney's standing to challenge a subpoena issued to a third-party.

- (i) An alleged victim

This position may be premised upon a broad reading of WISCONSIN CONST., ART. 1, § 9m. (However, a careful reading does not provide direct support.)

(ii) Another third-party

There is some support for a prosecutor's authority to act in such circumstance from other jurisdictions. As examples, see, *State v. Decaro*, 252 Conn.228, 254, 745 A.2d 800 (Conn. 2000), *United States v. Segal*, 276 F.Supp.2d 896 (D. Ill. 2003), *People v. Ellman*, 137 Misc.2d 946, 947-48, 523 N.Y.S.2d 13 (N.Y. Misc. 1987). However, none of these cases address Wisconsin law.

C. *Understanding the "unreasonable and oppressive" standard to challenge a subpoena*

1. **805.07 Subpoena.**

(1) Issuance and service. Subpoenas shall be issued and served in accordance with ch. 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding.

[...]

(3) Protective orders. Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, the court may (a) quash or modify the subpoena if it is unreasonable and oppressive or (b) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things designated therein.

2. You can not go fishing. *United States v. Nixon*, 418 U.S. 683, 699 (1974).

Records sought must have a reasonable probability that the subpoenaed information will lead to relevant evidence. *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 113 Wis. 2d 411, 421-22, 335 N.W.2d 367, 373 (1983). See also *State v. Washington*, 83 Wis.2d 808, 844, 266 N.W.2d 597, 614-15 (1978); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002), *cert.*

denied, 535 U.S. 1119 (2002). You have the burden of demonstrating this if the subpoena is challenged. *Green Bay Newspaper, Co*, 113 Wis.2d at 420-22, 335 N.W.2d at 372-73.¹

3. A subpoena *duces tecum* is not available until after the preliminary hearing, unless it is “a narrow attempt to secure essential information to rebut the State’s showing of probable cause.” *State v. Schaeffer*, 308 Wis.2d 279, 300-01, 746 N.W.2d 457, 468 (2008).
4. The subpoena *duces tecum* must be returnable to a court date. You can ask the judge’s clerk for a “subpoena return date” for that purpose or have the documents returnable to a scheduled court date. You may not request a “return date” until after the preliminary examination. See *Schaeffer*, 308 Wis.2d at 303, 746 N.W.2d at 469.

D. Beware of a misreading of *State v. Schaeffer*, 308 Wis.2d 279, 746 N.W.2d 457 (2008).

1. *Schaeffer* held that a criminal defendant does not have a statutory or constitutional right to compel production of police reports and other non-privileged materials by subpoena *duces tecum* prior to the preliminary hearing.
2. The Legislative References Bureau mischaracterizes the holding of *State v. Schaeffer* in the Wisconsin Statutes Annotated.

¹ Compare with *Anderson v. Anderson*, 147 Wis.2d 83, 88, 432 N.W.2d 923, 926 (Ct.App. 1988) (party seeking relief has the burden of proving that such relief is warranted); *Long v. Long*, 127 Wis.2d 521, 527 n.4, 381 N.W.2d 350, 353-54 (1986) (“The general rule is a party using the judicial process to advance a position carries the burden of persuading the court.”); *Currie v. DILHR*, 210 Wis.2d 380, 387, 565 N.W.2d 253, 257 (Ct. App. 1997) (“The party seeking relief through judicial process bears the burden of proof.”)

a. Here is the language in the Wisconsin Statutes Annotated:

972.11 - ANNOT.

This section does not allow a criminal defendant access to the civil subpoena duces tecum power embodied in s. 805.07(2). State v. Schaefer, 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457, 06-1826.

b. Plain and simple: the Legislative Reference Bureau is wrong.

3. The interpretation of the Legislative Reference Bureau is not an accurate description of the *Schaefer* decision. It is not the law. Further, the expansive reading would clearly violate a defendant's right to compulsory process. **Call me if a prosecutor makes this argument.** In addition to it being a clear misreading of *Schaefer*, here is why the Legislative Reference Bureau's interpretation can not stand:

a. An accused has the right under the Compulsory Process Clause of the Sixth Amendment to compel the production of the requested materials. *See U.S. v. Hubbell*, 530 U.S. 27, 54-55 (2000) (concurring opinion of Justice Thomas) (containing an interesting discussion of Chief Justice Marshall's recognition of the scope of the Compulsory Process Clause to obtain documents by subpoena as sought by Aaron Burr in defense of his treason case in 1807 [*United States v. Burr*, 25 Fed. Cas. 30 (C.C.D.Va. 1807)] and the Supreme Court's reaffirmation of the scope of the Compulsory Process Clause in *United States v. Nixon*, 418 U.S. 683, 711 (1974)).

b. The Wisconsin Constitution may give the Compulsory Process Clause an even broader scope, in favor of an accused, than the federal analogue has been given by the United States Supreme Court. It certainly provides no less protection to a defendant.

The importance of the compulsory process clause of Article I, Section 7 in the Wisconsin Constitution was highlighted in *Blest v. The State*, 1 Wis. 186 (1853), just five years after the ratification of the State constitution. The court explained its view that the constitution's procedural guarantees were secure because of the difference in power and resources between the state and citizen:

The justice and humanity of this rule must be apparent to everyone. The state, when it becomes a party in a criminal prosecution, occupies a very different position from a party plaintiff in a civil action. It is as much interested in vindicating the innocence of one wrongfully accused, as in convicting one who is really guilty. The sole object of the prosecution is, to ascertain the truth, and to maintain the law. This process should be as ready therefore, in behalf of the accused, as against him, for the sole purpose of such process is, to procure the attendance of witnesses, by whom the truth is to be established.

The right of compulsory process, secured by the provisions of the constitution, above referred to, cannot be taken away by legislative enactment, and ought not to be hampered by judicial construction.

Id., at 205-06.

- c. An accused has the due process right to present a complete defense and to have a fair opportunity to defend against the state's accusations. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also, Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).
- d. Forty-five years ago, Justice Brennan asked: "[D]oes not the denial of adequate discovery set aside the presumption of innocence - - is not such denial blind to the superlatively important public interest in the acquittal of the innocent? To shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but

his absolute right seems to me seriously to imperil the bedrock presumption of innocence.” 33 F.R.D. 47 (1964).

- e. “‘The defendant knows what he did, and, therefore, has all the information necessary.’ This argument could be valid only if the defendant is presumed to be guilty. For only if he is presumed guilty could he know the facts and details of the crime. Instead of being presumed guilty, he is presumed to be innocent. Being presumed to be innocent, it must be assumed ‘that he is ignorant of the facts on which the pleader founds his charges.’ ...This conclusion seems to me to be elementary, fundamental, and inescapable.” *United States v. Smith*, 16 F.R.D. 372 (W.D. Mo. 1954) (opinion of Judge, later Justice, Charles Evans Whittaker).
- f. A criminal defendant has a right to use subpoenas to procure evidence which may or may not be used during the criminal proceedings or at trial. *United States v. Thomson*, 969 F.Supp. 587, 593 (E.D. Cal. 1997) citing *United States v. Murray*, 297 F.2d 812, 821 (2nd Cir. 1962).
- g. The fact that criminal defendants are provided a statutory right to limited discovery following an arraignment from the district attorney does not limit the right of a defendant to seek information from third parties by use of a statutory and constitutional right to compulsory process.
- h. The importance of the ability to obtain documents by subpoena is explained by the United States Supreme Court when it discussed why even the President of the United States is not immune from subpoena:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in this system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1974).

E. *Using it to your advantage.*

A subpoena *tueces decum* is an important and necessary tool for an accused's counsel. A defendant does not have the ability to issue a search warrant. The uses are numerous. Get creative.

V. *Discovery demand and motions*

A. *What the form demand does not get you and why?*

A form discovery demand will not get you information that the District Attorney does not have access to and practically is unlikely to get you things that are not in the prosecutor's file. You need to think about all of the potential records that can help you defend your client and figure out how to get them.

VI. Getting the Good Stuff

A. *Police officer disciplinary files*

Through Wisconsin Open Records Law (See ERG 001 - ERG 006)

Try an Open Records Demand first. The enclosed materials outline the argument to obtain the records. ABA Standards adopted by the Wisconsin Supreme Court assume counsel will prepare by seeking information directly from the law enforcement agencies as well as the prosecution. *State v. Harper*, 57 Wis. 2d 543, at 553 n. 3 (1973).

Wisconsin's Open Records Law is premised upon "the public policy of the state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." WIS. STAT. § 19.31. That statute further provides that "[t]he denial of public access generally is contrary to the public interest, and only an exceptional case may be denied." WIS. STAT. § 19.31. *See, Local 2489 v. Rock County*, 277 Wis. 2d 208 (Ct.App. 2004) (holding that investigations into misconduct by sheriff's employees were not exempt from Wisconsin's Open Records Law and in fact "should be more subject to public scrutiny"); *see also, Kroeplin v. Wis. Dept. of Nat. Resources*, 297 Wis. 2d 254 (Ct.App. 2006) (holding that "documents related to the misconduct investigation and subsequent disciplinary actions taken against a law enforcement officer" were not exempted from Wisconsin's Open Records Law").

Through Brady demands (See ERG 007 - ERG 017)

You also have the right to make a *Brady* demand for this type of material. However, you should have a good faith basis for the request. To try to find a good faith basis, consider: a WACDL listserve post asking for information about the officer, searching for the officer on CCAP, contacting the local

Public Defender's Office, a background search through Accurint (www accurint.com), doing an Open Records request for complaints made to the Police and Fire Commission regarding the officer and Google searches for incidents involving the officer.

With a good faith basis, make the *Brady* demand.

Argue that you are entitled to *Brady* material prior to a preliminary hearing in a felony case.

B. *Juvenile court records*

Through Brady demands. (See ERG 018 - ERG 031)

The defense cannot obtain a juvenile record through an Open Records request. The juvenile record of a witness can be important evidence. WIS. STAT. § 906.09 provides that “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.”

As described by the United States Supreme Court:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.

Davis v. Alaska, 415 U.S. 308, 320 (1974).

Try to find independent support for the existence of a possible juvenile record of a potential witness through the defense investigation.

Then, ask the prosecutor to obtain it for you with reference to WIS. STAT. § 938.396(2g)(d).

WIS. STAT. § 938.396(2g)(d) provides as follows:

(2g) CONFIDENTIALITY OF COURT RECORDS; EXCEPTIONS.

Notwithstanding sub. (2), records of the court assigned to exercise jurisdiction under this chapter and ch. 48 and of courts exercising jurisdiction under s. 938.17(2) may be disclosed as follows:

[...]

(d) *Bail; impeachment firearm possession. Upon request of a court of criminal jurisdiction or a district attorney to review court records for the purpose of setting bail under ch. 969, impeaching a witness under s. 906.09, or investigating and determining whether a person has possessed a firearm in violation of s. 941.29(2) or body armor in violation of s. 941.291(2) or upon request of a court of civil jurisdiction or the attorney for a party to a proceeding in that court to review court records for the purpose of impeaching a witness under s. 906.09, the court assigned to exercise jurisdiction under this chapter and ch. 48 shall open for inspection by authorized representatives of the requester the records of the court relating to any juvenile who has been the subject of a proceeding under this chapter.* (Emphasis supplied)

The juvenile record of a witness or complainant is *Brady* material. See WIS. STAT. § 906.09. WIS. STAT. § 938.396(2g)(d) makes juvenile records readily available to a district attorney, but does not provide the same method for access to the information to criminal defense counsel, despite inexplicably allowing an attorney for either side of a civil proceeding to request and obtain this information. Given that a criminal defense lawyer can not obtain these records under WIS. STAT. § 938.396(2g)(d), a *Brady* demand is the appropriate vehicle to obtain the records.

The enclosed materials will show you how to get these records.

C. *School records*

Ex parte subpoena procedure. (See ERG 032 - ERG 044)

School records may be obtained through use of the procedure set forth by the legislature in WIS. STAT. § 118.125(2)(f), for obtaining pupil records for purposes of impeachment of witnesses. This procedure is discussed in an *unpublished* Wisconsin Court of Appeals opinion. *State. v. Rudoll*, 276 Wis.2d 864, 688 N.W.2d 784 (Ct. App. 2004)(unpublished disposition). The statute states:

Pupil records shall be provided to a court in response to a subpoena by parties to an action for in camera inspection, to be used only for purposes of impeachment of any witness who has testified in the action. The court may turn said records or parts thereof over to parties in the action or their attorneys if said records would be relevant and material to a witness's credibility or competency.

The procedure would be to: issue a subpoena *duces tecum* to the education institution returnable to the Court, provide the Court with a summary by letter (with a copy to opposing counsel), provide the Court with a memorandum (under seal) explaining the relevance of the documents and provide the Court with a copy of the letter given to the educational institution.

The enclosed materials will show you how to do this.

I provide the memorandum under seal because the defendant in a criminal case is not required to provide to the State its theories and strategy as to the cross-examination and impeachment of the State's witnesses. See WIS. STAT. SCR 60.04(10)(g); *State v. McClaren*, 313 Wis.2d 398, 407, 756 N.W.2d 802, 806 (Ct. App. 2008) (the discovery statute does not require a defendant to divulge the details of his or her own case), *review granted*, 315 Wis.2d 55, 759 N.W.2d 771 (2008). I advise the court that the statutory procedure does not address this

concern, and I note that an *ex parte* communication is authorized for the subpoena of healthcare provider records pursuant to WIS. STAT. § 908.03(6)(m)(c2).

Also, a similar procedure is available to the State when seeking an order for a pen register or a trap and trace device. See WIS. STAT. § 968.36(1).

D. *Police video*

Through Wisconsin Open Records Law. (See ERG 044)

Generally, this can be easily obtained by letter.

Supplemental discovery demand.

If there is a problem obtaining this by letter, then contact the prosecutor by letter or with a supplemental discovery demand.

E. *Policy and Procedure Manuals used by a law enforcement agency.*

For example, you could seek manuals or other memorandum detailing procedure for collection of evidence and procedure for conducting and recording interviews and preparing reports of interview. This is a remarkably valuable tool for cross-examination of a police officer.

Through Wisconsin Open Records Law. (See ERG 046)

This is a record that can be easily obtained through an Open Records request. You can obtain it as easily as the prosecutor, so don't use a *Brady* demand. *Brady* is also unlikely to be in play as it is arguably not *Brady* material. Plus, you don't need to show your hand by alerting the prosecutor to the request and the useful documents you are likely to receive.

F. *Employment records.*

WIS. STAT. § 103.13(2) provides that employers are obligated to permit their employees to inspect their personal record. Alternatively, an employee may also request a photocopy of their employment record. WIS. STAT. § 103.13(7). (See ERG 047 - ERG 048)

Employment records of a third-party may be obtained through a subpoena *duces tecum* (where the employer is a private entity) or by subpoena *duces tecum* or an Open Records request (where the employer is a public entity).

G. *Probation files and department of corrections files of witnesses.*

Through an Open Records request. (See ERG 049 - ERG 052)

Generally, this can be easily obtained by letter referencing Wisconsin's Open Records law.

Defense counsel's failure to obtain client's prison records was part of a finding of ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

H. *Cellular phone records.*

Through a subpoena duces tecum. (See ERG 053 - ERG 068)

Send a "preservation letter" as soon as you become aware that a cellular phone company may have records that would be useful in your case. A "preservation letter" is important even if you are seeking records from your client's account. A sample letter is attached.

You can obtain records from your client's account with a simple release and a cover letter.

The cellular phone records of a third-party can be obtained through a subpoena *duces tecum*. However, you may need to obtain a court order based upon the reading of a federal law by some cellular phone companies. See 47 U.S.C. § 222. (A cellular phone company is not a government “authority” (WIS. STAT. § 19.32(1)) so Open Records law does not apply.)

47 U.S.C. § 222(c)(1) provides that:

Except as required by law or with the approval of the customer, telecommunications carriers that receives or obtains customer proprietary network information by virtue of its provision of a telecommunication service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of A (the telecommunications service from which such information is derived), or B (services necessary to, or used in, the provision of such telecommunication service, including the publishing of directories.

I. Medical or mental health records.

You can obtain records regarding your client with a release and a cover letter.

Obtaining medical or mental health records of a third party is more complicated. The enclosed materials will show you how to do this.

Through a subpoena duces tecum and Motion. (See ERG 069 - ERG 096)

First, you need to print and read *State v. Shiffra*, 175 Wis.2d 600 (Ct. App. 1993); *State v. Solberg*, Wis.2d 372, 564 N.W.2d 775(1997); *State v. Green*, 253 Wis. 2d 356, 646 N.W.2d 298 (2002) and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

In order to obtain the medical or mental health records of a third party, you must demonstrate a specific factual basis demonstrating a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or

innocence and is not merely cumulative to other evidence available to the accused. *State v. Green*, 2002 WI 68, ¶ 34, 253 Wis. 2d 356, 381, 646 N.W.2d 298, 310 (2002).

To make this showing, you will need to (1) file a motion seeking the records and (2) prepare a memorandum outlining the specific factual basis that supports the need for the records. The factual basis is best made by demonstrating what you anticipate to find in the records based upon the defense investigation or other materials from police interviews. It is also recommended that you prepare draft court orders for return of the records. The court will then review the records, so you need to guide the judge, so that she knows what is relevant to the defense. As an example, see, *Sturdevant v. State*, 49 Wis.2d 142, 147, 181 N.W.2d 523, 526 (1970) (“Witnesses may be questioned regarding their mental or physical condition where such matters have bearing on their credibility.”)

It is helpful if there has been a partial disclosure of records by the third party to law enforcement. *State v. Solberg*, Wis.2d 372, 384, 564 N.W.2d 775, 780 (1997). This supports an argument that the confidentiality of the records has been waived.

The information will be “necessary to a determination of guilt of innocence” if it “tends to create a reasonable doubt that might not otherwise exist.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). This test essentially requires the court to look at the existing evidence in light of the request and inquire whether the records likely contain evidence that is independently probative to the defense. *State v. Schiffra*, 175 Wis. 2d 600, 608, 499 N.W.2d 719, 723 (Ct. App. 1993). Since the defendant will most often be unable to determine the specific information contained in the records, “the threshold showing necessary to trigger an *in camera* review is not unduly high.” *State v. Green*, 253 Wis. 2d 356, 376, 646 N.W.2d 298, 308 (2002).

The accused may, after making a preliminary showing that the sought after evidence is material to his defense, obtain review of records which may ordinarily be confidential concerning either the complainant or a witness. *State v. S.H.*, 159 Wis. 2d 730, 465 N.W.2d 238, 241 (Ct. Ap. 1990); *In the Interest of K.K.C.*, 143 Wis. 2d 508, 422 N.W.2d 142 (Ct. App. 1988).

If the third party declines to provide a release for the records, then the Court may preclude their testimony. *State v. Schiffra*, 175 Wis. 2d 600, 612, 499 N.W.2d 719, 724-25 (Ct. App. 1993)(“Under the circumstances the only method of protecting Schiffra’s right to a fair trial was to suppress [the complainant’s] testimony if she refused to disclose her records”).

About the author:

Erik R. Guenther is an attorney with Hurley, Burish & Stanton, S.C., in Madison, Wisconsin. He represents individuals and businesses in criminal inquiries from pre-charging/investigation to trial. He also takes on pardon applications, expungement petitions and post-conviction matters. Finally, he also represents business entities in internal investigations of possible employee misconduct. He is a graduate of Carthage College, *magna cum laude*, where he attended as a Lincoln Scholar, and the University of Wisconsin Law School.

To date, Erik has litigated felony matters in 25 of Wisconsin's counties. He has handled cases in both federal districts in Wisconsin and the Seventh Circuit Court of Appeals. He also served as a consultant in constitutional law and trial strategy issues in Michigan (resulting in dismissal of "disorderly house" citations against 94 individuals) and Afghanistan (resulting in acquittals on weapon smuggling charges for four defendants). In conjunction with the ACLU, Erik achieved dismissal of "disorderly house" citations issued to almost 450 individuals in the "Racine rave" case in 2002 and was recognized as the 2003 ACLU "Volunteer Attorney of the Year" for his *pro bono* work on the cases. To avoid a civil rights lawsuit, Racine also agreed to revise the flawed ordinance at issue and to provide training to the Racine Police Department on Fourth Amendment issues.

Erik has been recognized as a top litigator by the Wisconsin Law Journal, In Business magazine and repeatedly by peers in the *Wisconsin Super Lawyers*® survey. He was profiled in the 2007 *Wisconsin Super Lawyers*® magazine in an article titled "Peer Recognition: How Erik Guenther Gets Juries to Sympathize with Clients Accused of Sexual Assault."

Last year, the *Wisconsin State Journal* profiled Erik in a front-page story, describing him as a "rising star in the state legal establishment and already a teacher in cutting-edge legal issues and a civil liberties expert."

In 2007 - 2008, Erik's passion for the rule of law and individual rights took him to Afghanistan. He served as the Defense Mentor for the U.S. State Department funded Justice Sector Support Program, training Afghan defense lawyers. He was recognized as the Dane County Criminal Defense Bar Association "Warrior of the Year" for his service.

He is the current president of the American Civil Liberties Union of Wisconsin (ACLU-WI) board and a past chair of the State Bar of Wisconsin Individual Rights and Responsibilities Section. He serves, by appointment, on the State Bar Legislative Oversight Committee. He is accepted to practice before the International Criminal Court (The Hague, Netherlands) as part of the Assistants to Counsel registry.