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WMurphylaw@aol.com
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To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject Comments on proposed amendments to Criminal Rules of Procedure

To whom it may concern;

I am attaching an article relevant to your consideration of proposed amendments to the Federal Rules of Criminal Procedure. Please accept my apologies for the lack of precision in formatting. It is primarily an article addressing the problems in Massachusetts related to the overbroad application of Rule 17 as a tool of pretrial "discovery". For reasons that will become clear when you read my article, I strongly urge to to restrict any and all attempts to interpret or amend Rule 17 in a manner that allows discovery against private third-parties in criminal litigation.

My article takes no position on the defendant's right of access to information in the custody, possession or control of his opponent, the state.

Thank you for your kind attention.

Wendy J. Murphy
New England School of Law
154 Stuart Street
Boston, MA 02116
617-422-7410

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Wendy J. Murphy
Adjunct Professor, Perspectives in Sexual Violence
New England School of Law
Boston, MA 02116
617-422-7410
WMurphy@fac.nesl.edu

UNPACKING CONSTITUTIONAL CONFUSION MIRED IN THE VOICELESSNESS OF THIRD-PARTIES IN CRIMINAL CASES: A fair proposal to prevent pretrial discovery of privileged third-party files while preserving fair trial rights for the accused.

Wendy J. Murphy, JD
(legal research assistance provided by Harvard Law student Katherine Ross)

The past 20 years of criminal law and practice has produced much heat but little light on the issue of when, if ever, the accused in a criminal case can, as a constitutional matter, legitimately seek disclosure of privileged files that exist exclusively in the custody of a private third-party. Much of the confusion comes from three basic problems: first - lack of clarity on the important difference between "discovery" of unknown information and "production" of known evidence; second - failure of nearly every court to differentiate between "trial rights" and "pretrial rights"; and third, the fact that third-parties have no standing as parties in criminal cases which has allowed the law to evolve often without the voice of those most affected by the doctrinal developments.

This article is an attempt to outline the legal and policy interests of third-parties in this debate, with a particular emphasis on private, confidential and privileged information.

The confusion began with the United States Supreme Court's decisions in Davis v. Alaska, 415 U.S. 308(1974) and Pennsylvania v. Ritchie, 480 U.S. 39 (1987), seminal rulings on the due process right of an accused to seek access to certain confidential files. Davis involved a defense request for the confidential juvenile delinquency files related to a prosecution witness. In Ritchie, the material at issue was an investigative file of a child protective services agency. In both cases, the files were in the custody of the state. In Ritchie, the material sought directly related to the crimes for which the accused was facing prosecution. In both cases, the Court ruled that despite statutory protection granting confidentiality to those files, the accused had a right to seek access to information that was relevant and material to guilt or punishment. Ritchie, 480 U.S. at 57-8; Davis, 415 U.S. at 320. In Ritchie, the court was clear about three important limitations on its ruling: 1-the information was subject to the defendant's due process demands because it was in the prosecutor's file and was NOT a private third-party

file. 2-the accused had a "trial" right, not a "pretrial right," to request the information and 3-defense access was permissible because the records were protected by a confidentiality statute but not an absolute privilege. The Court nowhere ruled the defendant could obtain material directly from a private third-party and expressly left open the question whether access would be granted under any standard if the accused sought material protected by an absolute statutory privilege. Ritchie, 480 U.S. at 53-61.[1]

In the aftermath of Ritchie, Massachusetts courts were particularly prolific, responding favorably to defense efforts to stretch Ritchie far beyond its parameters to include defense motions for files protected by absolute statutory privileges as well as those that were not even Brady material because they were not in the prosecutor's custody or control but existed in the exclusive custody of private third-parties. Commonwealth v. Stockhammer, 409 Mass. 867 (1991). Massachusetts also allowed defense attorneys to send subpoenas directly to private third-parties without any showing of need or judicial approval. Commonwealth v. Figueroa, 444 Mass. 1107 (2005).

[1] In a subsequent case raising this last point, the court denied cert, indicating its unwillingness to extend its ruling to absolutely privileged material. See Commonwealth v. Wilson, 529 Pa. 268 (1992), cert. denied, 504 U.S. 977 (1992).

(1996), to an apparent softening of the standard such that discovery could be had if target files were "likely to be relevant," Fuller at 225, to a frustrating stalemate where a divided court created a special panel to study the issue, Commonwealth v. Pelosi, 411 Mass. 257, 258 n.1 (2004) (a panel that could not reach a consensus), ending with a case where the court solicited amicus briefs from interested third parties in the hope of crafting a workable standard. Commonwealth v. Dwyer (I), 448 Mass. 122 (2006). Interestingly, the court in Dwyer (I) asked potential amici to choose between three options, none of which set out the option addressed in this article which argues three basic points: that all "discovery" of third-party material, whether privileged or not, is improper whether during the trial or pretrial period; all "production" of *privileged* third-party material is improper, whether during the trial or midtrial period; and finally that "production" of *non-privileged* material is appropriate but only during the mid-trial period and only after a hearing during which the third-party has a right to be heard and at which the court should balance relevancy, need, cumulativeness, materiality, specificity of proffer and admissibility of the evidence sought against the interests of the third-party in preventing disclosure and use of the target

information. In certain circumstances, the trial right of "production" can be executed during the pretrial period but only in extremely rare cases where production midtrial would prove constitutionally impracticable. United States v. Nixon, 418 U.S. 683 (1974).

This article argues that other states should steer clear from Massachusetts law given the wealth of caselaw that evolved from the erroneous premise that there exists a constitutional right of discovery between the accused and third-parties in criminal litigation. As the Massachusetts Supreme Judicial Court finally recognized in Dwyer II, defendants enjoy no such discovery rights which means states should *not* be seeking to develop a balancing test as the very concept of "balancing" presumes constitutional authority on the part of the accused. As there is no such authority, courts need not struggle to construct a balancing test but should, instead, develop bright-line rules expressly to protect all third-party records from "discovery" in criminal cases.[3] This prohibition should

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[3] "Discovery" should be distinguished from a pre-charge "investigation" by the police or prosecution. Clearly, there are circumstances where the state will need access to private records related to a victim or witness in order to fully investigate a crime and determine whether charges should be brought. To the extent an individual resists voluntary disclosure, a grand jury subpoena can be issued and a judge can balance the competing interests in determining whether to compel compliance.

apply whether the accused seeks "discovery" of privileged counseling records or non-privileged grocery receipts.

This important limitation on the rights of the accused has been overlooked in jurisdictions where the analysis lacks attention to whether "discovery" rights exist and instead jumps to a discussion of "balancing" and analysis of "competing rights". See, e.g., United States v. Hansen, 955 F. Supp. 1225 (D. Mont. 1997); State v. Heemstra, 721 N.W 2d 549 (Iowa 2006); Zaal v. State, 326 Md. 54 (1992). Some of the blame for this surely lies with Massachusetts and its notoriously flawed 1991 Stockhammer decision.

In Stockhammer, the Massachusetts Supreme Judicial Court announced an extraordinarily overbroad rule allowing unbridled access to privileged third-party files without so much as in camera screening by the judge to prevent gratuitous harm. Though rejected or ignored by many courts, Massachusetts latched on to the idea despite the lack of constitutional justification. This was curious given that the section of the Stockhammer decision that dealt with defense access to a victim's private records was mere dictum and had nothing to do with the evidence that led to the defendant's conviction. 409 Mass. at 883-84.

Jonathan Stockhammer was the son of influential parents and a college student at Brandeis University when

he was convicted of raping a female freshman after a jury-waived judge trial. The victim and the defendant testified at trial and the judge determined that the victim was credible and that the prosecution had proved its case beyond a reasonable doubt. Stockhammer was sentenced to 20 days incarceration but won a stay of that sentence pending appeal during which he argued his rights were violated when, during trial, he was denied direct access to the victim's post-incident counseling records. Accompanied by a court order, Stockhammer's attorney issued a "trial subpoena," not a "pretrial discovery subpoena," citing Ritchie and seeking production of the victim's therapeutic counseling file. The judge conducted an in camera review of the records and determined that they contained no exculpatory material. On this basis, the judge declined to release the records to defense counsel and the trial continued.

On appeal, the Supreme Judicial Court reviewed the victim's records itself and did not dispute that the counseling records were not exculpatory; however, the conviction was reversed on other grounds.

In dictum, although the Court agreed with the trial judge that there was no exculpatory evidence in the victim's counseling file, the Court went out of its way to

strike down the practice of judicial in-camera review, writing that a private judicial screening of records was inadequate to protect the rights of the accused because a judge does not have the same critical eye of defense counsel. "The Federal standard requiring only an in camera review by the trial judge of privileged records requested by the defendant rests on the assumptions that trial judges can temporarily and effectively assume the role of advocate when examining such records; and that the interests of the State and complainant in the confidentiality of the records cannot adequately be protected in any other way. Neither assumption withstands close scrutiny. . . . [W]e are not persuaded that allowing counsel access to the treatment records at issue in this case would do great violence to the less firmly based policies represented by [statutory privileges]. In these circumstances, those policies must give way to the defendant's need to examine the complainant's . . . records." 409 Mass. at 882-884.

This gratuitous language in the appellate decision was treated as a substantive holding and quickly became the means by which defense counsel routinely demanded automatic access to the private files from every victim in every sexual assault case. See Murphy, Wendy, "Minimizing the Likelihood of Discovery of Victims' Counseling Records and

Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality" 32 New Eng. L. Rev. 983 (1997-1998).

Defense counsel would either send subpoenas directly to third-parties or stand up in court and, simply for the asking, receive a court order to obtain "pretrial discovery" of a lifetime's worth of the victim's private records. From pediatric to marriage counseling and prescription medicine files, this unbridled "pretrial discovery" practice became commonplace even though Ritchie and Stockhammer authorized none of it.

As explained further herein, the fact that third-parties had no natural role in the criminal process, and Stockhammer ignored the interests of third-parties, led to little restraint from trial judges in the application of Stockhammer. This generated confusion, inconsistent rulings, unlawful court orders and needless violations of victims' privacy rights without even minimum due process or opportunity for judicial oversight. See also, Murphy, Wendy, "The Victim Advocacy and Research Group: Serving a Growing Need to Provide Rape Victims with Personal Legal Representation to Protect Privacy Rights and to Fight Gender Bias in the Criminal Justice System," 10 J. Soc. Distress & the Homeless 123 (2001).

In some cases, serious criminal charges were dismissed or victims were forced to abandon therapeutic treatment when the issue forced victims to choose between privacy and justice. The harmful consequences of this practice are not speculative. Serious criminal cases have been dismissed as a result of needless privacy invasions. See e.g., Commonwealth v. Munkenback, Middlesex Superior Court Docket No. 2001-237, SJC Docket No. SJ-2002-0167, where a trial judge allowed a defense discovery request and ordered entire case files from private third-parties delivered to court despite the fact that it was a statutory rape case with DNA evidence supporting the minor victim's credibility and establishing that the defendant had sexual contact with the victim. A single justice upheld the trial judge's decision even though it included a provision allowing disclosure of private information pertaining to the minor victim's parents. The family ultimately decided that the process itself had become unbearable. The charges were dismissed.

Other judges cite Bishop/Fuller as justification for ordering third-parties to appear during the pretrial discovery phase to answer interrogatories on behalf of defense counsel regarding the nature and content of certain files though no constitutional authority permits

"discovery", much less interrogatories. See Commonwealth v. Tingle, Essex Superior Court Docket No. ESCR2002-70, where judge ordered a representative of a private third-party to appear in court and answer interrogatories on behalf of the defendant seeking revelation of the nature of information contained in a privileged counseling file.

In another case, a judge issued an order compelling a rape crisis center to produce records of a child victim of indecent assault who had sought counseling at a local rape crisis center. When the center appeared in response to that order, the judge inexplicably ruled the center "had no standing" to be heard because the rape crisis center did not file its own affirmative motion to quash. The judge ignored the fact that the accused had no constitutional authority to conduct "discovery" and that whatever "trial right" of "production" he could legitimately assert, it was his burden of proof to justify an intrusion into privileged third-party files. Requiring the third-party to file an affirmative motion to quash improperly shifted the burden of proof to the third-party as there had not yet been a determination that the accused had satisfied any showing as to the contents of the target files or why evidence contained therein should be subpoenaed for use at trial.

Commonwealth v. Caceres, Lawrence District Court Docket Nos. 0118CR8967, 0218CR7761. In Caceres, several judges over a six month period declined to entertain the merits or allow the rape crisis center to be heard illustrating another important point: the potential for misuse of these third-party matters to generate needless delay in criminal cases, usually to the strategic advantage of the defense. See In the Matter of a Grand Jury Subpoena, 414 Mass 104 (1993)(noting that strategic delays can cause memories to fade, evidence to disappear).

The perception that "discovery" against third-parties is constitutionally mandated has led to unbridled fishing expeditions and predictably harmful and unjust results such as when a defense investigator harassed a victim's grandmother to elicit answers to probing questions about irrelevant personal information. See Commonwealth v. Valverde, Essex Superior Court Docket No. CR-2001-0132, Appeals Court No. SJ-2003-J-0027. (Not knowing she had a right not to answer, the victim's grandmother was repeatedly contacted and harassed by an investigator for the accused causing her ultimately to answer questions in order to put a stop to the harassment. Approached a final time while lying down sick on a sofa, the grandmother relented and in response to a question about whether the

victim had ever sought counseling, the grandmother answered that she'd received trauma counseling at a nearby facility in the aftermath of the rape. This led to a defense request for full access to the victim's privileged counseling file and caused harm to the victim, her grandmother and their relationship. There can be little doubt this harassment occurred primarily because the defense expected to receive immediate and full discovery access to any and all information revealed by the grandmother as the investigator asked the grandmother to sign a release allowing the victim's counseling file to be disclosed to the defense. The grandmother resisted but the investigator admonished her that it would only expedite the matter as the judge would force disclosure in any event.

Allowing the use of Rule 17 as a "discovery" device will lead to a burdensome and predictable extension into other areas of private third-party material. For example, if counseling records are "discoverable" because they may reflect a victim's "statements", what would stop a judge from ordering other third-parties, such as friends and family members of witnesses to robbery and drunk-driving cases, to submit to courthouse interrogations where the accused would use the power of the state to compel private persons to answer questions regarding their knowledge of

"statements" related to the crime? And if "discovery" of private files and information is allowed when deemed potentially "relevant", what would the lesser standard be that would apply to nonprivileged material? Keeping in mind that "discovery" of irrelevant material is not even permitted as against the state, it hardly makes constitutional sense to allow broader access to material held in the exclusive custody of a private person.

If restrictions are not imposed, what would stop a judge from ordering disclosure of the diary of a victim's mother or the letter of a victim's father seeking assistance from his health insurance provider to facilitate his injured child's healing process?

Allowing any form of "discovery" would substantially bog down systemic efficiency by triggering the due process rights of third-parties, requiring "subhearings", collateral proceedings and appellate review. That defendants often rely on experts to justify their professed need for access to third-party material on issues of suggestibility and other matters of victim credibility, the proceedings are likely to become even more burdensome as was the case in Commonwealth v. Munkenback, Middlesex Superior Court Docket No. 2001-237, SJC Docket No. SJ-2002-0167; Miller v. Commonwealth, SJC No. SJ-2001-0251,

Plymouth Docket No.YO103809-12.14 where experts submitted affidavits claiming a "need" to see certain third-party files. Such experts, if they purport to justify "discovery", will need to submit to hearings where their opinions will be challenged for scientific reliability and admissibility under Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1994). This will create a very costly and time consuming process that can be avoided in most cases if Rule 17 is restricted to properly function as a rule limited to production of nonprivileged evidence, for trial purposes only -- rather than as a pretrial "discovery" tool.

The experience in Massachusetts was caused in part by the unfortunate reality that many third-parties would respond even to obviously illegal subpoenas by sending in whole files rather than objecting or even asserting a privilege. That many third-parties would comply rather than ascertainin the propriety of a court order should not be seen as evidence that the law was working properly or that third-parties did not have strong concerns about intrusions into sensitive files. Unlike the New York Times which routinely hires counsel to respond to third-party subpoenas in criminal cases to protect the confidentiality of its sources, many victims and care providers simply did

not have the resources to hire private counsel to get involved as advocates for their patients' privacy rights.

Likewise, many victims and care providers were simply unaware of their rights to privacy and confidentiality and had no understanding about how to advocate for protection. It bears adding the obvious point that while defendants have rights of appeal, victims and third-parties had to depend on the discretionary authority of the state and/or rely on onerous contempt proceedings to seek judicial review.

For all these reasons, the missing voice of third-parties at the trial level and in criminal appellate matters involving third-party discovery issues in Massachusetts and other states should not be misunderstood as evidence that society has little interest in protecting the privacy rights of victims and other third-parties in criminal cases. In fact, people are deeply concerned about this issue as was apparent in Commonwealth v. Valverde, Appeals Court No. SJ-2003-J-0027, where 500 individuals signed a petition and submitted it to the appellate court agreeing to each spend a night in jail as a way of expressing their discontent with an unreasonably high fine of $500 per day, which fine was imposed on an impoverished rape crisis center after it refused to obey a court order

that required the center to disclose the counseling records of a rape victim based on nothing more than the defendant's desire to conduct a fishing expedition.

Furthermore, it should be clear that advocates for victims of sex crimes are particularly concerned given the predisposition of defendants to request, and judges to grant, disproportionate access to the therapeutic counseling records of sexual assault victims.

This disparity threatens the ability of victims to heal and the capacity of the justice system adequately to respond to sex crimes allegations given the importance of therapeutic care for victims in the aftermath of sexual violence. Statistics reveal that sexual violence causes profound harm to the individual as 80% of victims experience post-traumatic-stress-disorder ("PTSD") compared to 39% of victims of non-sexual aggravated assault. Kilpatrick & Resnick, PTSD Associated With Exposure to Criminal Victimization in Clinical and Community Populations in Post-Traumatic Stress Disorder: DMS IV and Beyond, 113-143, (J.R. T. Davidson & E.B.Foa Eds. 1993), cited in Sandra Bloom & Michael Reichart, Bearing Witness: Violence and Collective Responsibility 55 (1998).

PTSD is a psychological pattern of response that develops in response to life-threatening trauma. Untreated

PTSD leads to myriad social and economic costs. Victims are more likely to become dependent on drugs or alcohol, have difficulty maintaining steady employment, and develop myriad medical and psychological problems, increasing their need for medical services. Bloom & Reichart, Bearing Witness, at 227-228.

Prompt therapeutic care following psychological trauma is just as important as prompt medical attention to physical trauma. Allowing access to post-incident counseling records effectively forces crime victims to participate in meaningless nonconfidential therapy or forego counseling until the conclusion of legal action. This is inconsistent with the United States Supreme Court's recognition of the "transcendent importance" of mental health for all people. Jaffee v. Redmond, 518 U.S. 1, 11 (1996).

In light of the foregoing, it should be clear that if rules are to be modified, they should be clarified and restrained so as to expressly prohibit third-party "discovery" as this is the only appropriate way to protect the trial rights of the accused without causing gratuitous harm to victims and while being mindful of the need to optimize judicial efficiency in a constitutionally appropriate manner.

The Massachusetts courts failed for more than a decade to develop clarity and bright-line rules, which is the most likely explanation for why other states did not embrace the Stockhammer rule. The case proposed an irrational idea not rooted in constitutional legitimacy and obviously harmful as a matter of social policy.

A growing sense of outrage at a grass roots level led to the initiation of impact litigation by victims and their advocates in an effort to overturn Stockhammer. In a series of cases, ultimately known as the Bishop-Fuller rule, see Commonwealth v. Fuller 423 Mass. 216 (1996); Commonwealth v. Bishop 416 Mass. 169 (1993), Stockhammer appeared to be overruled in that the process of in camera review was reinstated in Bishop, 416 Mass. 169, and stricter procedural and substantive standards were added such that whole files could no longer be disclosed to the defense, simply for the asking. Fuller, 423 Mass. 216. Still, certain judges ignored these restrictions and because victims had no right of appeal, the violations of privacy rights went unredressed. And even with the benefit of tougher access standards, needless harm was caused to victims and other third-parties because the appellate courts in Massachusetts were silent on whether there was a legitimate statutory or constitutional basis for the

accused to even *ask* for "discovery" from private third-parties. This was a critical gaping hole that caused significant confusion in the trial courts given that caselaw was clear that the accused enjoys no constitutional right of "discovery" even as against his opponent, the state. How could he possibly have even greater rights against private persons?

The absence of doctrinal justification for the idea that third-party "discovery" was constitutionally required, coupled with political leanings of certain activist judges and the lack of bright-line rules to guide the courts in applying the idea with any sense of consistency led to predictably disastrous results - as set forth above.

While the trial courts were struggling, the Supreme Judicial Court was losing members to retirement and death and after a few new judges joined the bench; judges who hadn't been involved in the development of Bishop/Fuller, thus lacked a robust understanding of all the issues, suggested a return to the Stockhammer rule. Commonwealth v. Sheehan, 435 Mass. 183, 199 (2001) (Sosman, J., concurring). The lead jurist interested in returning to the simplicity of the harmful Stockhammer rule had no experience as a criminal attorney, thus may not have appreciated the important reasons why people accused of

crime are not entitled to use the power of the government to conduct fishing expeditions against private persons. In any case, tension in all the courts led to the creation of a committee, headed by the justice who was lobbying for a return to Stockhammer, which committee was charged with the task of proposing an acceptable protocol that defendants and victims could agree would best protect all interests. Pelosi, 411 Mass. At 258 n.1.

Unfortunately, though unsurprisingly given that the committee assumed, incorrectly, that defendants enjoy "discovery" rights, a consensus could not be reached. Indeed, the committee produced three different proposals ranging from a reversion back to Stockhammer, to a restatement of Bishop-Fuller - and one option suggesting a rule somewhere in the middle. The court ultimately adopted a fourth position, roughly akin to that which is set forth in this article; a position submitted to the court in an amicus brief rejecting the three options proposed by the committee and suggesting, instead, that the court announce with clarity that the accused enjoys no right of "discovery" against private third-parties. Dwyer, 448 Mass. 122. Fortunately, the court acknowledged this important point and stated clearly and unequivocally that there can be no "discovery" between the accused and any private

third-party. Id. at 140 n.22. The court even went so far as to denounce the power of a recently adopted rule purporting to create such a right. Id. Apparently persuaded by an amicus brief that argued a Rules Committee has no constitutional authority to create substantive rights, the court expressly rendered meaningless a provision in the Criminal Rules of Procedure stating that defendants could seek discovery from private third-parties. Id.

This article is designed to discourage other states from following the messy Massachusetts path by providing a clear, fair and simple structure for courts dealing with constitutionally-based defense requests for "trial production" of third-party evidence. This article does not address the law in states were the legislature has enacted a statute giving an affirmative right of "discovery" to criminal defendants,[4] but is instead aimed at providing a

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[4] In jurisdictions where the legislature has already created a right of "discovery", third parties should take steps to ensure that courts interpret these statutes consistent with due process. Advocates can and should intervene in criminal cases to make all appropriate constitutionally-based objections, many of which are outlined here, and/or they should lobby their legislature for reforms to ensure maximum protection for victims' privacy rights by preventing all gratuitous intrusions into protected files. Advocates should also consider using the political process to repeal laws authorizing "discovery". To do this, they should first develop a database of real cases to demonstrate the needless harm caused to victims as a result of defendants engaging in "pretrial discovery" against third-parties.

proposal for states faced with constitutionally-based claims through the courts.

This article urges states to take a lesson from the federal courts which have plenty of experience in this area and have clear guidelines that strictly prohibit "fishing expeditions" and limit the ability of the accused to use his status as a criminal defendant to impose the power of the government, in the form of a subpoena or court order, into the private space of private persons.

Roughly reflective of Federal Rule 17, as modified by the Supreme Court's Nixon decision, the proposal set forth in this article requires only minimal burdens on the system while ensuring protection for the constitutional rights of the accused and without causing gratuitous harm to important third-party privacy rights.

I. ANY PROPOSAL REGARDING ACCESS TO THIRD-PARTY MATERIAL MUST RECOGNIZE TWO FOUNDATIONAL POINTS: 1. THE ACCUSED ENJOYS NO CONSTITUTIONAL RIGHT OF "DISCOVERY" FROM PRIVATE THIRD-PARTIES AND 2. SUBPOENAS AND COURT ORDERS ISSUED TO THIRD-PARTIES IN CRIMINAL CASES CONSTITUTE STATE ACTION, THUS DUE PROCESS IS REQUIRED.

The law in Massachusetts has developed in a constant state of confusion primarily because it has always rested

on the unwritten and false premise that criminal defendants enjoy a constitutional right of "discovery" as against private third parties. This problem was made worse by a recent and stunning observation of the Massachusetts Supreme Judicial Court that subpoenas and court orders for third-party files do not constitute state action and therefore do not implicate the due process rights of third-parties. See In re Jansen, 444 Mass. 112, n.11 (2005).

Massachusetts got it exactly wrong.

1. Not only is there no basis in law for a "right" of discovery for criminal defendants, the assertion of such a "right" impinges on actual statutory and constitutional rights of third parties which means, if nonconstitutionally-justified "discovery" is imposed against the constitutionally-protected private material of a third-party, only the third-party, and not the accused, is entitled to due process protections.

It is well settled that the accused enjoys no federal constitutional "right" of "discovery" at all, even as against his opponent, the state. United States v. Ruiz, 536 U.S. 622, 629 (2002); Weatherford v. Bursey, 429 U.S. 545, 559 (1997). The accused has rights of due process and compulsory process, which he can assert at trial, not during the pretrial period. And these rights obligate

others to "produce" evidence, but do not authorize the accused to conduct "discovery". Even mid-trial, the obligation of production cannot be misused as a vehicle thrugh which the accused can conduct "discovery".

Similarly, courts have consistently ruled that no such "right" of "discovery" obtains under the state constitution. Commonwealth v. Bing Sial Liang, 434 Mass. 131 (2001) (characterizing pretrial disclosure of certain information as derived from an affirmative constitutional obligation on the part of the prosecution rather than a right of the defendant to demand "discovery.") This absence of discovery "rights" is reflected in the fact that under rules of criminal procedure, the prosecutor is mandated and empowered to assess and determine on his own whether information in the state's file must be disclosed. Commonwealth v. Beal, 429 Mass. 530, n. 4. The accused is not allowed direct access to the state's file, either directly or via judicial in camera review, to conduct "discovery" or otherwise search for information.

It follows that where defendants have no federal or state constitutional "right" of discovery as against the government, there can be no such right, as a constitutional matter, against third parties. Despite contrary rulings, Massachusetts jurisprudence supports this conclusion by

logical inference as the Supreme Judicial Court has repeatedly admonished defendants that Mass. R. Crim. P. 17 does not authorize a "fishing expedition" in the hope that the records of third parties may contain useful information. See, e.g., Commonwealth v. Lampron, 441 Mass. 265 (2004); Fuller, 423 Mass. 216; Bishop, 416 Mass. 169. Subversive attempts to use a rule governing production of documentary evidence and records to acquire de facto discovery would hardly be necessary if a right of discovery existed de jure. At no time prior to the 2004 revision of Rule 14(a)(2) did the Massachusetts courts invoke a rule to the contrary. See In re Jansen, 444 Mass. at 112 n.11.

2. Rules generated by committee which purport to create a right of discovery for criminal defendants as against private third parties, where such a right has not been granted by the legislature, are invalid because they exceed the governmental authority of such bodies.

In apparent recognition of the fact that the courts lack common-law or constitutional authority to grant criminal defendants "discovery" rights against third-parties, a procedural rules committee in Massachusetts revised Rule of Criminal Procedure 14(a)(2) in 2004 in an attempt to create such a right. Mass. R. Crim. P. 14(a)(2)

as revised; see also Jansen, 444 Mass. at 112 n.11. However, as the Massachusetts Supreme Judicial Court recently acknowledged, Dwyer II, 448 Mass. at 140 n.22, the newly revised rule has no legal force. This is an apparent recognition of the fact that the committee lacks statutory or constitutional capacity to create substantive law as both the United States Supreme Court and the Supreme Judicial Court in Massachusetts have long recognized that rule-making bodies are not empowered to create rights. "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. . . . [N]o rule of court can . . . abrogate or modify the substantive law." Washington-Southern Navigation Co. v. Baltimore & Philadelphia S.B. Co., 263 U.S. 629, 635 (1924). See also Laroche v. Flynn, 55 Mass. App. Ct. 419 (2002) ("Though one statute may override another, a court rule generally may not override a statute."); Farnham v. Lenox Motor Car. Co., 229 Mass. 478, 481 (1918) (power of the Superior Court to make rules regulating practice and procedure cannot override the Constitution).

Not only did a rules committee attempt by revised Rule 14(a)(2) to create rights in defendants without the authority to do so, it also sought substantively to impair the rights of third parties, expressly granted to them by

the legislature, in several ways. First, it sought to abrogate multiple statutory privileges, some of them absolute. See, e.g., G. L. c. 233 § 20B (psychotherapist-patient privilege); G. L. c. 233 § 20J (sexual assault counselor privilege); G. L. c. 112 § 129A (psychologist-patient privilege); G. L. c. 112 § 135A (social worker-client privilege). It also attempted to directly contravene the mandate of Massachusetts General Law chapter 276 § 1, which provides that search warrants for privileged material should be denied unless, in addition to probable cause to issue the warrant, there is a separate showing that target evidence will be destroyed unless seized without advance notice to the owner.

In addition, the rule endeavored to violate the fourth amendment and other constitutional privacy rights of third parties, as established by an extensive body of federal law recognizing that therapeutic counseling communications are protected by such a right. Daury v. Smith 842 F.2d 9, 13 (1st Cir.1988) (the constitutional right to privacy in therapeutic counseling communications is "now well established"); Borucki v. Ryan, 827 F.2d 836, 845 n.14 (1st Cir. 1987) (constitutional right of privacy for criminal defendant in court-ordered psychiatric examination); Caesar v. Mountanos, 542 F.2d 1064, 1067-68 (9th Cir. 1976); In re

August 1993 Regular Grand Jury (Clinic Subpoena), 854 F.Supp 1375, 1378 (S.D. Ind. 1993); National Transportation Safety Board v. Hollywood Memorial Hospital, 735 F.Supp. 423, 424 (S.D. Fla. 1990); Hawaii Psychiatric Society v. Ariyoshi, 481 F.Supp 1028, 1039 (D.Hawaii 1979); see Crosby v. Reynolds, 763 F.Supp. 666, 668-669 (D. Maine.1991) citing Roe v. Wade, 410 U.S. 113, 152-154 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965); Whalen v. Roe, 429 U.S. 589 (1973); Planned Parenthood Inc. of Mass. v. Blake, 417 Mass. 467 (1994); see Commonwealth v. Tripolone, 425 Mass. 487 (1997).

These attempted incursions far exceed the authority of the rules committee. Laroche, 55 Mass. App. Ct. 419 ("Though one statute may override another, a court rule generally may not override a statute."), Farnham, 229 Mass. at 481 (power of the Superior Court to make rules regulating practice and procedure cannot override the constitution).

Moreover, to the extent the power of a rules committee depends upon enabling legislation, rules purporting to create rights are invalid under state non-delegation doctrines. The legislature has authorized the judicial branch to "make and promulgate rules, consistent with law,

for regulating the practice and business of [the] courts." Massachusetts General Law chapter 213 §3, (emphasis added). It cannot authorize the courts to engage in law-making. In re Opinion of Justices, 336 Mass. 765, 770 (1957). As the Massachusetts Supreme Judicial Court has stated, "no legislative or executive power can be constitutionally conferred upon the courts. That is strictly forbidden by art. 30 of the Massachusetts Declaration of Rights." Selectmen of Milton v. Justice of Dist. Court, 286 Mass 1, 4 (1934). The creation of rights, such as the "right" of criminal defendants to discovery against third parties, is a legislative act, as is the abrogation of the rights of third parties necessary to effect defendants' discovery "rights". Miller v. State, 262 Ark. 223 (1977) ("Substantive law . . . 'creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion.'" [quoting Roberts v. Love, 231 Ark. 886 (1960)). As such, it is constitutionally prohibited.

Finally, to the extent the power of rules committees depends upon the inherent power of the judicial branch, the creation of "discovery rights" is invalid as a violation of the constitutional separation of powers. The state

constitution vests the prerogative of law-making in the legislature. Mass. Const. pt. 2, ch. I, § I, art. IV; see also, Opinion of Justices to Governor, 384 Mass. 840 (1981). Such power must not be usurped by the other branches of government. Mass. Const. pt. 1 art. 30. Moreover, "Article 30 of the Declaration of Rights is more explicit than the Federal Constitution in calling for the separation of the powers of the three branches of government, and [this Court has] insisted on scrupulous observance of its limitations." New Bedford Standard-Times Publishing Company v. Clerk of the Third District Court of Bristol & Another, 377 Mass. 404, 410 (1979). In short, rules committees purporting to create "rights" for criminal defendants are engaging in classic lawmaking as agents of the judicial branch and as such, these "rights" are constitutionally invalid.

B. **Court orders for "production" against third-parties constitute state action and therefore must comply with due process.**

Apart from prohibitions on "discovery", it is important to recognize that whenever a judge in a criminal case orders a third party to appear or produce information at the behest of the defendant, this constitutes state

action.[2] The United States Supreme Court has established that, in determining whether a particular action is governmental in character, it is relevant to consider 1) the extent to which the actor relies on governmental assistance and benefits, 2) whether the actor is performing a traditional governmental function, and 3) whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). Certainly, a defendant relies on governmental assistance and benefits to give effect to his demand for the production of documents and other items. Such a demand could not be carried out without the assistance of the court[3], which reviews defendant's motions for production and authorizes a subpoena. In the event of failure to comply it is the court that threatens the recipient with contempt. Moreover, in doing each of these things, a judge can clearly be said to perform a traditional governmental function, because each of these is a routine, and necessary, function of the judiciary. Finally, the injury to a third party is uniquely aggravated by this imposition, which exposes third-party materials to defense and often public scrutiny, and which, particularly in instances where the subpoenaed documents are privileged, could not be

accomplished without state action. See, e.g., Lampron, 441 Mass. at 265 n.1 (noting that defense "may not, without prior judicial approval, subpoena persons or documents to his office").

State action implicates federal and state rights of due process for the third parties. The Massachusetts' court's holding in Jansen erred in its failure to recognize this and in its failure to distinguish the Fourth Amendment ramifications of court orders in criminal cases from those in civil cases such as Jane Doe v. Senechal. 431 Mass. 78 (2000). In fact, in Senechal, the court went to great pains to confine to civil litigation only its holding that a discovery order does not implicate the Fourth Amendment.5 Moreover, in that case, the court acknowledged that even in civil cases, Fourth Amendment protections do apply to government litigants in certain circumstances, such as subpoenas duces tecum issued by grand juries or administrative agencies in the course of investigation. Id. at 85.

In cases in which criminal defendants are compelled by court order to produce books and papers, the Supreme Court has consistently held that such orders were within the scope of the Fourth Amendment. See, e.g., Boyd v. United States, 116 U.S. 616, 612 (1886) ("[A] compulsory

production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."); Hale v. Henkel, 201 U.S. 43, 75-6 (1906) ("While a search ordinarily implies a quest by an officer of law . . . still . . . the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena duces tecum, against which the person . . . is entitled to protection.") The Fourth Amendment is not only a right of criminal defendants, but a "right of the people" to be free from unreasonable searches of their "persons, houses, papers and effects." U.S. Const. amend. IV. Therefore, the Fourth Amendment protections extended to criminal defendants in Boyd must also be extended to the third parties impacted by criminal litigation. 116 U.S. 616

In summary, any attempt to create a right of "discovery" or "production" of third-party material without explicit enabling legislation and compliance with the due process rights of third-parties will fail to pass constitutional muster.

If a court, though the development of common law, or via a rules committee, adopts such an unconstitutional protocol, it will inevitably face a challenge via a federal suit under §1983, initiated by a private third-party, to enjoin the application of the rule. 42 U.S.C. 1983. Contrary to the critics of this strategy, such a lawsuit would not run afoul of the Rooker doctrine because while Rooker restricts federal injunctive relief against the enforcement of a state court rule, it operates only to the degree that the injunctive action would amount to an effort to review and reverse the adverse judgment itself. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). A suit to enjoin enforcement of an unconstitutional protocol for third-party production, in contrast, would seek review of the general rule of law created by the court rather than the specific ruling. The Eleventh Amendment would afford no protection against such a suit, because "an unconstitutional enactment is 'void' and therefore does not 'impart to [a state official] any immunity from responsiblity to the supreme authority of the United States.'" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984), quoting Ex parte Young, 209 U.S. 123, 160 (1908).

II. A PROPER BALANCE OF COMPETING INTERESTS IS BEST ACCOMPLISHED BY PROCEDURAL RESTRAINT, BRIGHT-LINE RULES EXPRESSLY FORBIDDING THIRD-PARTY "DISCOVERY" AND STRICT COMPLIANCE WITH DUE PROCESS

A just protocol must recognize at the outset that "discovery" by criminal defendants should always be expressly prohibited, as should defense access to privileged third-party material whether sought as a matter of "discovery" or "production". Third-parties should only be burdened with subponeae and court orders at the time of trial and only in limited circumstances when the material sought is not privileged and the burden is necessary to protect the rights of the accused. This approach minimizes the costs and procedural burdens on all parties, the court and private persons by providing clear lines to facilitate summary decisions in almost all circumstances except when a legitimate need arises for specifically identified non-privileged third-party material during the mid-trial period.

The following specific steps provide guidelines for how courts can analyze defense requests for third-party material quickly and with due regard for the rights of all involved. These guidelines are consistent with the

carefully considered opinions of the California Supreme Court and the ruling of a federal court that expressly endeavored to articulate a workable and fair standard for the issuance of subpoenas duces tecum "due to repeated difficulties in applying the standard." U.S. v. Jenkins, 895 F.Supp. at 1390 n.1.

A. Defense requests for privileged material in the exclusive custody of a private third party, whether during trial or the pretrial period, should summarily be denied.

When the defense request seeks "privileged" material in the exclusive custody of a private third-party, whether during the pre-trial or mid-trial period, the request should summarily be denied. See Jordon v. State, 607 So. 2d 333 (Ala. 1992) (defendant not entitled to the records of the victim's counselor); People v. Hammon, 15 Cal. 4th 1117 (1997) (trial court not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of the third party psychotherapists); People v. Webb, 6 Cal. 4th 494, 518 (1993) (given strong policy of protecting a patient's treatment history, it is likely that defendant has no constitutional right to examine the records even if they are "material" to the case); People v. Sisneros 55 P.3d

797, 800-801 (2002) (no defense access to rape victim's therapy records in the absence of a waiver); People v. Tauer, 1993 Colo. App. LEXIS 15 (defendant not entitled to access psychologist records); State v. Famiglietti, 2002 Fla. App. LEXIS 6199 (due process clause does not authorize the invasion of a victim's privileged communications with psychotherapist); Wilson, 529 Pa. at 277 (absolute privilege of rape crisis counseling records does not impinge on defendant's right to confrontation); State v. Gomez, 2002 UT 120 (2002) (14th Amendment rights of defendant yield to absolute statutory privilege of rape crisis counseling records). This recognizes that defendants' rights are not absolute and often give way to competing social interests such as the integrity of certain privileged relationships. The existence of a privilege, alone, is sufficient to allow a judge to deny a defendant's request for access, irrespective of the defendant's need for the information and regardless of whether the defendant seeks access during the pretrial or mid-trial period. See Hammon, 15 Cal. 4th 1117; Webb, 6 Cal. 4th at 518; Sisneros 55 P.3d at 800-801; Tauer, 1993 Colo. App. LEXIS 15; Famiglietti, 2002 Fla. App. LEXIS 6199; Wilson, 529 Pa. at 277.

B. Defense requests for "discovery" of material in the possession of third parties, whether characterized as "discovery" or not, should summarily be denied.

Although defendants have trial rights of production as to certain identified non-privileged evidence, it bears repeating that these are not "discovery" rights. Ruiz, 536 U.S. at 629; Weatherford, 429 U.S. at 559 (no general constitutional right to pretrial discovery); See Bing Sial Liang, 434 Mass. 131 (characterizing pretrial production of certain information, including witness statements, as a constitutional obligation of the prosecution to provide evidence rather than a constitutional right of the defendant to demand "discovery").

Thus, whether a defense motion is characterized as one seeking "discovery", "production", "access" or "disclosure", and whether it is filed during the pretrial or mid-trial period, it should summarily be denied if it in fact *seeks* to discover unknown information. That the defendant cannot identify with specificity the information sought makes a request a de facto motion for "discovery". Federal Rule of Criminal Procedure 17 forbids the use of subpoenas as a tool to facilitate harassment, intimidation and even "discovery" by expressly requiring that the moving

party demonstrate he is not using Rule 17 as a "discovery" tool. See Lampron, 441 Mass. 265. The only way to protect against the misuse of procedural rules that forbid "discovery" is to require the defendant to demonstrate credibly that specific exculpatory evidence exists and has been identified as to its precise nature and location. This will prevent court orders for third party material from facilitating unlawful "discovery" and circumventing the requirements of Fourth Amendment law. This specificity requirement is an essential aspect of Fourth Amendment jurisprudence, without which, unjustified abrogations of protected privacy will certainly occur. Groh v. Ramirez, 540 US 551, 557 (2004) (noting that the Fourth Amendment unambiguously requires that warrants describe the object of the search with particularity). In the absence of such a showing, a judge should conclude that the defendant is seeking improper "discovery" and the request should summarily be denied. U.S. v. Sawinski, 2000 U.S. Dist LEXIS 16536 (S.D.N.Y. Nov. 14, 2000) ("If the moving party cannot reasonably specify the information contained or believed contained in the documents sought but merely hopes that something useful will turn up, the requirement of specificity will not have been met).

C. Defense motions must be limited to non-privileged material only and must establish with credible extrinsic evidence that the information sought is evidentiary and is relevant and material to an issue legitimately in dispute.

In addition to specificity and particularity, defense motions should be limited to only non-privileged evidence and should be granted only when the information sought is "material", as well as "evidentiary and relevant," to an issue legitimately in dispute. Nixon, 418 U.S. 683; Lampron, 441 Mass. 265. During trial, the right of the accused to request a court order for non-privileged material is not in dispute, but he cannot claim any constitutional authority to demand access to privileged material. Wilson, 529 Pa. 268; Ritchie, 480 U.S. 39. Thus, if it is apparent the defendant seeks such protected material, the request should summarily be denied.

If the defense seeks production of non-privileged material, however, a hearing consistent with due process should be held prior to the issuance of a subpoena or court order, to determine whether the defendant has made an adequate substantive showing. The type of process due and showing required may vary depending on the nature of the information sought. At a minimum, the defendant must

satisfy the standards of relevancy and materiality as the right to compulsory process only extends only to evidence that is "material and favorable" to the defense. U.S. v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) and evidence is material "only if there is a reasonable likelihood that the [evidence] could have affected the judgment of the trier of fact". Id. At 874. A "reasonable likelihood" is "a probability sufficient to undermine confidence in the outcome". U.S. v. Bagley, 473 U.S. 667, 682 (1985). Thus, if it is apparent in the request that the accused seeks information not likely to affect the judgment of the fact-finder, the request should summarily be denied.

If the defense request appears to seek "materially" relevant non-privileged information, a hearing should be scheduled at which the third party's due process rights will be protected. The third party will be notified of the defendant's request by the subpoena or court order itself, which shall clearly state that it is not seeking production but only participation by the third-party at a hearing to determine whether production is necessary. Such subpoenas should inform the third party of their rights, including the right to appointed counsel if necessary, and of the date and time for hearing. During this hearing, the private third party should be represented by counsel. If

the third party is indigent, counsel should be appointed at no cost. If the information sought by the defendant is in the custody of a third party, such as a hospital, but might contain personal material pertaining to another third-party, such as a victim or witness, the subpoena/court order should be sent to the holder as well as the individual(s) whose personal data is contained therein. Properly applied, the proposal here obviates the need for special forms or the expensive and curious proposal some states are exploring for creation of a special court to handle such matters. In all but the rarest criminal trial, there is no legitimate need for disclosure of any private third-party material. When a legitimate need arises, state courts can follow the established practice of federal courts, which have experienced no need for special forms and special courts to handle third-party trial subpoenas duces tecum.

At the conclusion of the hearing, if the judge rules that the defendant has met his burden of showing that materially relevant non-privileged non-cumulative information with evidentiary value exists in the custody of the third-party, the judge shall, before ordering disclosure, inquire in the first instance of counsel for the third party as to whether the target evidence in fact

exists in the third party's file. If counsel for the third party as an officer of the court responds that no such evidence exists, disclosure of records and further involvement of the third party is unwarranted. If such information does exist, then that specifically identified evidence, and nothing more, shall be produced. If the information consists of or relates to sensitive material, the judge should issue appropriate protective orders to prevent needless harm.

If the desired evidence does exist in the target file and the judge rules that disclosure is required - yet the holder of the material has a good faith non-frivolous objection to production, the third party must be afforded an opportunity for expedited judicial review without the necessity of contempt proceedings or sanctions.

D. Motions for legitimate pretrial "inspection" should be subject to all *Nixon/Lampron* requirements, with additional safeguards for sensitive material.

A defendant may be granted pretrial production and inspection of specifically identified non-privileged materially relevant non-cumulative evidence, provided he satisfies the standards for production as described above

and then demonstrates separately that "pretrial" inspection is necessary under all the factors set forth in Nixon. 418 U.S. 683. An assessment of this factor may not require advocacy on the part of the private third-party as the prosecutor and defense can ordinarily assess the likely volume of target evidence and impact on the trial, assuming the defense articulates with reasonable precision what he is looking for and where the target material is maintained.

If the judge determines that pretrial inspection of specifically identified non-privileged non-cumulative evidence is appropriate under Nixon-Lampron, a subpoena or court order should issue to the third-party holder and all personal data subjects requiring production of only that specifically identified information, and nothing more.

The subpoena/court order in this instance, as above, will serve as notice to the appropriate third-parties, but will differ in that it will also state that it is a "trial" subpoena being issued during the pretrial period "due to the volume of evidence requested" (or other Nixon-based exception). This will ensure that objections, if any, will not erroneously be based on the objection that "pretrial" subpoenas/court orders are procedurally unlawful.

In circumstances where pretrial production and inspection is justified, the defendant should be allowed to

inspect only the specifically identified and appropriately redacted non-privileged non-cumulative evidence; inspection must not involve production of whole files to the court or to the defense directly. Rather, an attorney for the third party should make the identified evidence, and only the identified evidence, available for inspection at his or her office. Requiring inspection to take place with the assistance of counsel for the third party, in his or her capacity as an officer of the court, is the most reliable and efficient way to maintain the integrity of third-party evidence during the pretrial period while facilitating appropriate inspection by the parties.

If the information sought is sensitive or confidential, the court should issue appropriate protective orders to prevent needless harm.

As with non-privileged material, when the inspection is concluded, portions of the material deemed "evidentiary and materially relevant" should be specifically identified and retained by the court, until needed for trial, unless the judge determines that further inspection by the parties is necessary during the pretrial period. Except when submitted as evidence, in all circumstances where confidential or sensitive evidence is inspected by or

produced to the parties, appropriate protective orders should issue to prevent needless harm.

E. Motions for production of non-privileged statements should be granted only where such statements satisfy all the criteria set forth in this proposal and meet the definition of "statements" as set forth in rule or statute.

In addition to the requirements set forth above, if it appears the defendant seeks production of non-privileged third-party "statements" rather than other types of evidence, the holder of records must confirm not only that a target file contains statements as specifically identified by the defense as existing in the file, but "statements" as that term is defined by rule of statute. For example, under Mass.R.Crim. P.23, a "statement is defined as: 1) a "writing made by a witness or another signed or otherwise adopted or approved by such witness"; 2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital or an oral declaration made by a witness and which is recorded contemporaneously with the making of the oral declaration"; or 3) "those portions of a written report which consist of the verbatim

declarations of a witness in matters relating to the case on trial."

If the target file contains only reflections or opinions of the writer, equivocal phrases, non-verbatim comments, observations or other writings that do not reliably reflect actual statements made by the witness at issue, the defendant's request should summarily be denied, irrespective of when the request is made and regardless of the strength of the defendant's proffer. To rule otherwise would be to create a constitutionally untenable situation where the accused has greater rights as against private third-parties than currently exist between the accused and the Commonwealth. See Bing Sial Liang, 434 Mass. 131 (limiting disclosure of victim "statements" in the custody of victim-witness advocates to those defined as "statements" under Rule 23).

Thus before any request for "statements" is even considered, assuming an otherwise valid subpoena or court order has issued for specifically identified materially relevant non-cumulative trial evidence under the appropriate standard, the judge shall inquire in the first instance of counsel for the third-party as to whether "statements" as defined by rule or statute in fact exist in the third-party's file. If no such evidence exists, the

subpoena can summarily be denied. This will work particularly well to insulate from disclosure, things like diaries, journals and other personal documents that are not designed to create a verbatim forensic record of information for use in any litigation.

CONCLUSION

Ensuring that the accused receives full access to potentially exculpatory evidence from the endless supply of private third-parties is a noble yet elusive goal. On the one hand, there is great discomfort in the idea that evidence that might free an innocent man is lurking in some unknown place. On the other hand, there is great discomfort in allowing all defendants to use the power of the state to compel every victim's mother, doctor, grandparent, etc. to appear for an interrogation by defense counsel on the off chance they might uncover something they can use against the victim at trial. Every robbery victim, every eyewitness to a drunk-driving case - every person who hears a friend or family member talk about their experience as a witness to or victim of crime, would be subjected to the interrogation demands of an individual against whom sufficient evidence has already been gathered to support a prosecutor's good faith belief that a crime has been

committed. In other words, the decision-making process that precedes the initiation of formal charges can be presumed to have vetted enough of the evidence that an entirely fraudulent prosecution is highly unlikely - which militates against the expenditure of resources to foster a state-sponsored defense-initiated and controlled investigation of private citizen victims and witnesses.

The real question is - should the justice system indulge speculation and effectively reward accused criminals with the power to force innocent citizens to submit to defense-generated fishing expeditions and interrogations in light of rules that obligate the prosecutor and police to investigate fully all allegations of criminal activity before bringing charges. To that end, the state has a responsibility to uncover - and turn over to the accused - even evidence that hurts their case. Essentially everything in the prosecutor's entire file gets turned over to the defense. This one-sided sharing of information means there will be no surprises for the defense at trial - though the defense is free to spring surprises on the prosecutor because the accused is only obligated to share certain specific types of evidence with the state. With such appropriately lopsided responsibilities clearly favoring the defense in terms of

disclosures and discovery of information and evidence, it makes no sense to develop a doctrine of law that is certain to cause needless harm to witnesses who are compelled to abide their civic responsibility and participate in criminal litigation.

In every criminal case, there exists the potential for information to exist about which neither the prosecutor nor the accused knows anything. This is not fixable by a rule of law that promises gratuitous harm without any guarantee of constitutional benefit.