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NIXON MAY HAVE BEEN WRONG, BUT IT IS DEFINITELY MISUNDERSTOOD (OR, A FEDERAL CRIMINAL DEFENDANT'S PRETRIAL SUBPOENAS DUCES TECUM PROPERLY REACHES POTENTIALLY ADMISSIBLE EVIDENCE)

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*321 I. THE PRETRIAL REACH OF RULE 17(C)SUBPOENAS IS UNDULY LIMITED BY MISUNDERSTANDING *UNITED STATES V. NIXON*

A Rule 17(c) subpoena is a traditional subpoena duces tecum and it is the federal criminal defendant's only means of compelling the production of evidence from anyone other than the prosecutor.[1] *United States v. Nixon* is the United States Supreme Court's last word on when a defendant can compel pretrial production of evidence with a Rule 17(c) subpoena.[2] The *Nixon* Court distilled lower court case law and identified "specificity," "relevancy," and "admissibility" as the three hurdles to pretrial production under Rule 17(c).[3] Together, they form the "*Nixon* Standard."

This article addresses the meaning of the *Nixon* Standard when defendants direct Rule 17(c) subpoenas that are returnable

prior to trial, to third parties (Third Party Subpoenas). *Nixon* left the meaning of "admissibility" open in this context. Courts applying the *Nixon* Standard to Third Party Subpoenas fall into two camps.

The first camp correctly interprets *Nixon* as requiring only a showing that the item sought is potentially admissible at trial. A showing of "potential" admissibility is sufficient because the defendant may have never seen the item before and may not even know if he wants to offer it into evidence at trial. Further, its precise relevance may depend on the evidence he faces at trial, which he cannot know in advance. Or, the item may be important because it can be used to obtain other admissible evidence. This practical approach was first explained long before *Nixon* by former Chief Justice Marshall in the trials of former Vice President Aaron Burr.[4]

The second camp strictly interprets the *Nixon* Standard as demanding a showing that the precise evidence sought is actually admissible into evidence at trial.[5] The strict reading of *Nixon* is a flawed aberration of traditional federal practice. It burst forth from the Third and Fifth Circuits with no solid legal foundation.[6] These courts seemingly assumed *Nixon* requires strict admissibility, despite ***322** the fact the Court expressly left the issue open.

A strict reading of the *Nixon* Standard should also be rejected because it begs a serious constitutional question that federal courts should avoid if possible.[7] At a minimum, the Sixth Amendment's Compulsory Process Clause gives a defendant the right to subpoena witnesses and evidence at trial.[8] The Court *in* Nixon stated that the Sixth Amendment also requires production of all reasonably identifiable material evidence in third-party hands when third-parties are properly subpoenaed.[9] Because material evidence need not be admissible evidence, strictly reading *Nixon* to require that subpoenaed items actually be admissible into evidence at trial could mean that a Rule 17(c) subpoena is insufficient to meet the demands of the Compulsory Process Clause.[10]

Numerous courts and commentators have criticized the application of the *Nixon* Standard to Third Party Subpoenas.[11] Lower courts have devised alternative and less demanding standards.[12] Commentators state that *Nixon* renders Rule 17(c) subpoenas useless.[13] They argue *Nixon* should be limited to its facts, *i.e.* limited to government subpoenas.[14] Most of these courts and commentators argue that Third Party Subpoenas should be enforceable if they are not unduly burdensome and seek evidence that is "material to the defense."[15] While these outright rejections of the *Nixon* Standard address its serious shortcomings, the U.S. Supreme Court has shown no inclination to completely abandon the *Nixon* Standard for Third Party Subpoenas. Instead, it has recognized only that a sufficient showing of the "evidentiary nature" of the subpoenaed items may be less for a Third Party Subpoena.[16] Therefore, this article proposes a more incremental approach to fixing the problem by addressing the correct meaning of admissibility--an approach that is consistent with Supreme Court precedent and supported by numerous federal circuits.

A defendant need only establish that an identified item is ***323** potentially admissible into evidence to justify a Third Party Subpoena. The Court acknowledged this in *Nixon*,[17] Justice Marshall stated this in *Burr*,[18] and it makes sense if the goal is a fair trial. Once this element of the *Nixon*Standard is correctly understood and applied, then Rule 17(c) can serve its intended purpose.

II. BACKGROUND

A. A Criminal Defendant's Limited Tool Kit for Compelling Production of Defense Evidence

Understanding how a defendant obtains evidence is necessary to understanding Rule 17(c)'s proper reach.

The Federal Rules of Criminal Procedure govern federal criminal cases.[19] Rule 16 governs discovery.[20] Under Rule 16, defendants may demand all "documents and objects" in the government's "possession, custody or control"[21] that the government intends to use in its case in chief at trial, are "material"[22] to preparing a defense, or were obtained from or belong to the defendant.[23]

Prior to 1966, Rule 16 did not permit discovery of anything except items the government intended to use at trial, that it seized ***324** from the defendant, or that it compelled the defendant to produce.[24] A Rule 17(c) subpoena was a defendant's only means for obtaining items from the government that were voluntarily produced to the government but that it did not intend to

offer into evidence at trial.[25] For example, defendants needed a Rule 17(c) subpoena to reach documents from government witnesses that could be used to impeach their testimony.

Since 1966, Rule 16 has been broadened many times to permit defendants to obtain more documents in the government's possession, custody or control.[26] Defendants can now demand production of almost any helpful (non-privileged) item the government possesses.[27] There is usually no need to use a Rule 17(c) subpoena to obtain anything from the government.[28]

As first explained in *Brady v. Maryland*, all prosecutors must disclose to the defense anything that is "material" to a defendant's guilt or punishment.[29] Undisclosed evidence is "material" if, considered with all other evidence offered or suppressed, the prosecutor's failure to produce it undermines the reviewing court's confidence in the outcome of the proceeding.[30] Undisclosed evidence undermines confidence where there is a "reasonable probability" that it could have changed the outcome.[31] Showing a reasonable probability requires something less than a preponderance of the evidence.[32] Most circuits hold that inadmissible evidence may be material so long as it "could lead to admissible evidence" or "would be an effective tool in disciplining witnesses during cross-examination."[33] This right "exists without regard to whether that information has been recorded in tangible form."[34]

The Court has said that *Brady* does not establish a right to ***325** discovery.[35] A defendant's right to *Brady* material is self-executing--no demand is necessary.[36] *Brady*'s materiality standard is applied after trial when all the evidence can be weighed to determine whether there is a reasonable chance the undisclosed information could have made a difference.[37] A *Brady* violation does not require prosecutorial misconduct; rather, "an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment."[38] A prosecutor's *Brady* obligations extend to information known to police investigators and anyone else on the prosecution's "team," even if the prosecutor has no actual knowledge of the information.[39]

While *Brady* may not confer a right to discovery, courts can and do order pretrial production of evidence under *Brady* when defendants bring specific items to the district court's attention.[40] Evidence that is material under *Brady* (i.e., potentially outcome determinative) is necessarily helpful to the defense and discoverable under Rule 16.[41]

Rule 17 governs subpoenas and thus controls defendant's ability to obtain evidence from third parties, i.e. anyone besides the government.[42] Rule 17(c)(1) provides:

> A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.[43]

***326** A Rule 17(c) subpoena is a traditional subpoena duces tecum for the production of items at trial.[44] But it also permits items to be "brought into court in advance . . . so that they may then be inspected in advance, for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it."[45] A Rule 17(c) subpoena is not a means of discovery.[46]

B. The History of Rule 17(c)'s Ptretrial Reach

1. The Prosecutions of Vice President Burr

The opinions of Supreme Court Chief Justice John Marshall from the trials of former U.S. Vice President Aaron Burr describe the federal courts' traditional understanding of the pretrial reach of subpoenas duces tecum.[47] Burr was charged with and acquitted of treason after President Thomas Jefferson accused him of raising an army to instigate war with Spain.[48] He was then charged and acquitted of a misdemeanor for the same conduct.[49]

Prior to the treason trial, Burr sought a subpoena duces tecum for President Jefferson.[50] Jefferson claimed to possess a letter, written to Jefferson by General James Wilkenson, that showed Burr's guilt.[51] In granting the subpoena for the letter, Chief Justice Marshall observed that the right to a subpoena "to prepare" a defense was required by "the uniform practice of this country,"[52] federal statute, and the ***327** defendant's constitutional right to compulsory process.[53] The only difference between

a witness subpoena and a subpoena duces tecum was that the latter required the witness to bring something to court.[54]

In response, government counsel offered to produce a partial copy of the letter that omitted passages he claimed were irrelevant and inadmissible.[55] Burr demanded the whole letter because it *could* be material to his defense.[56] Chief Justice Marshall agreed with Burr, ordering that the President's privilege claim be resolved after the full document was produced.[57] The issue became moot when Burr was acquitted of treason.[58]

Prior to the misdemeanor trial, Burr subpoenaed a second letter from General Wilkinson to President Jefferson.[59] Again, Chief Justice Marshall overruled the President's objections.[60] First, it was not necessary for Burr to recite what the omitted passages actually said.[61] "It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"[62] A person who does not have something and may not "precisely know[[] its contents" should not be required to give a "statement of its contents or applicability."[63] Second, a defendant may not be able to fully explain the importance of the subpoenaed evidence because that depends upon events at trial.[64] But even if Burr could explain the exculpatory nature of the evidence, a defendant should not be required to disclose his defense just to obtain evidence.[65] Marshall ordered that the entire letter be produced to the defense, that no copies be made, and he deferred the decision on whether the contested passages could be disclosed to the jury or made public until after the defense had seen it.[66]

***328** 2. Bowman Dairy v. United States: Defendants May Subpoena the Government for Documents When Necessary, But Defendants May Not Fish Through the Government's Files

The seminal Supreme Court authority on the reach of a Rule 17(c) subpoena is *Bowman Dairy v. United States*. Bowman Dairy Co. was indicted for anti-trust violations.[67] Rule 16 was then limited to material that the government had obtained through official process and items belonging to the defendant.[68] Because Rule 16 would not reach much of the evidence that the government possessed, Bowman Dairy served the government with a Rule 17(c) subpoena broadly seeking all documents it obtained by means other than "seizure or process."[69] This included documents that: (1) were obtained in the course of the grand jury investigation; (2) were shown to the grand jury; or (3) would be offered as evidence.[70] The subpoena also had a "catch-all" demand for all documents relevant to any allegation in the indictment.[71] The government offered to produce all such documents except work product, interview memoranda, and documents furnished by confidential informants.[72] Bowman Dairy pressed its claim and the district court ordered production of all subpoenaed items.[73] Government counsel refused and was held in contempt.[74] The court of appeals reversed and the Supreme Court granted certiorari.[75]

The Court observed that Rule 16 provides the only means for a defendant to "inform himself" about what documents are in the government's possession.[76] Rule 17(c) subpoenas cannot be used "as an additional means of discovery."[77] But if the defendant knows the government possesses items that he needs for trial and the government is unwilling to produce them, then a defendant can use a Rule 17(c) subpoena to obtain them:

> ***329** No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence . . . .[78]

The subpoena was enforceable to the extent it sought "evidence," including documents the government withheld, *e.g.* documents from informants.[79] Such evidence could be put to a myriad of uses at trial, though the defendant need not actually offer the items into evidence at trial.[80] However, the subpoena's catch-all demand was not enforceable because it was a "fishing expedition"[81]; that is, it sought discovery.

3. Key Post-Bowman Dairy/Pre-Nixon Authority: Defendants' Right to Subpoena Evidence Under Rule 17(c) from the Government Limited Because Rule 16 Governs Discovery From Government

In *Nixon*, the opposing parties both argued that *Bowman Dairy* supported their position. Both parties also cited fifteen lower court decisions on the requirements for Rule 17(c) subpoenas.[82] Of those, thirteen involved subpoenas or motions directed at the government.[83] ***330** One involved a defense subpoena to several federal agencies to gather the government's entire investigative file.[84] Another was a government subpoena to the defendant.[85] Each of these cases involved a demand for documents between the parties, a relationship governed by Rule 16. So, these courts needed to interpret Rule 17(c) consistent

with Rule 16. In *Nixon*, the government reasonably asserted that those cases did not address Rule 17(c)'s application to third parties.[86] "Applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena duces tecum."[87]

Of the fifteen lower court opinions the parties cited in their briefs, the *Nixon* Court gave the district court's opinion in *United States v. Iozia* the greatest weight.[88] Iozia was charged with tax evasion.[89] He served a Rule 17(c) subpoena on the government that sought all documents produced to the government by a former employee of his company.[90] The government resisted this portion of the subpoena and the court found that Rule 17(c) did not authorize a defendant to "rummage" through the government's files or circumvent the "limited right to discovery" provided by Rule 16.[91] Instead, inspection would only be permitted if:
(1) The items sought were "evidentiary and relevant";

(2) They could not otherwise be obtained before trial through "due diligence";

(3) They were necessary for defendant's pretrial preparation or the failure to permit pretrial inspection could delay the trial;

(4) The application was in "good faith" and not a "fishing expedition."[92]

***331** As explained in the following section, the Court distilled these five factors into the three hurdles of the *Nixon* Standard.[93]

C. United States v. Nixon *: Subpoena From Government to Sitting U.S. President Results in the "Nixon Standard"*

The Watergate Special Prosecutor, representing the United States, sought to enforce a Rule 17(c) subpoena for President Nixon's recordings of conversations with various aides and advisors, some of whom were charged with conspiracy and obstruction of justice.[94] President Nixon was named as an unindicted co-conspirator.[95] He moved to quash the subpoena citing the President's general need for confidentiality, *i.e.* "Executive Privilege."[96] The district court denied the motion and ordered the tapes produced for *in camera* review.[97]

Both parties sought Supreme Court review. After disposing of jurisdiction and justiciability issues, the Court observed that subpoenas duces tecum are for obtaining evidence for trial; not for discovery.[98] Rule 17(c) simply incorporated existing law while adding a means for pretrial review of the subpoenaed material.[99]

The Court summarized the *Nixon* Standard's "three hurdles" of: "(1) relevancy; (2) admissibility; and, (3) specificity."[100] As to relevance, the Court stated "[o]f course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a *sufficient likelihood* that each of the tapes contains conversations relevant to the offenses charged in ***332** the indictment."[101] Some of the conspirators (who by that time were cooperating with the Special Prosecutor's investigation) had described what was on some of the tapes.[102] As to other tapes, the "total context [including the identity of the participants and the time and place of the conversations] permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment."[103]

As to admissibility, there was "a sufficient *preliminary showing* that each of the subpoenaed tapes contain[ed]" admissible evidence.[104] They were likely admissible as admissions--either admissions by the speaker himself or "admissions" by a co-conspirator that could be used against a defendant.[105] The taped statements would also be useful for impeachment, although "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."[106]

The Court noted that Nixon was technically a third party,[107] and the admissibility hurdle might not apply with "equal vigor" to third party subpoenas.[108] But the Court concluded that "[w]e need not ***333** decide whether a lower standard exists because we are satisfied that, the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena" under Rule 17(c).[109]

As to specificity, the subpoena specifically sought "certain tapes, memoranda, papers, transcripts or other writings relating to

certain precisely identified meetings between the President and others."[110] Pretrial production was justified because "the subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown."[111]

The Court then weighed President Nixon's Executive Privilege claim against the government's need to compel production. On the government's side was the need to develop all relevant facts to ensure justice and the public's confidence in the judicial system.[112] Further, the right to compulsory process is explicit in the Sixth Amendment and required by the Fifth Amendment and thus supported the special prosecutor's demand.[113] While these rights belong to criminal defendants and not the government,[114] the Court was citing them in support of the constitutional right of both parties to "due process of ***334** law in the fair administration of criminal justice."[115] The needs of the criminal justice system outweighed President Nixon's general right to confidentiality.[116]

Since *Nixon*, the Court has not offered further instruction on the requirements for a Rule 17(c) subpoena. The Court has only repeated the *Nixon* standard,[117] and offered general observations on the constitutional basis for the right to compel the production of evidence.[118]

III. FEDERAL APPELLATE COURTS' EVOLVING AND CONTRADICTORY APPLICATION OF THE *NIXON* STANDARD

A detailed description of the *Nixon* Standard's evolution in the circuit courts reveals that the strict interpretation is based on two unexamined and incorrect premises: (1) *Nixon* held that Third Party Subpoenas must seek evidence that is actually admissible; and, (2) there is no reason to relax the admissibility requirement for Third Party Subpoenas. But *Nixon* did not hold that actual admissibility is required and there are good reasons for interpreting admissibility to include potentially admissible evidence. In fact, there was a long standing federal practice *not* to require a showing of actual admissibility. The courts advocating a strict interpretation of *Nixon* have never confronted these facts.

***335** *A. Fifth Circuit (1978 and Later)*

In *Thor v. United States*, Thor was charged with lying on a federal firearms application to purchase a gun.[119] Thor claimed someone else purchased the gun using his identification.[120] Thor attempted to subpoena witnesses who would support his claim, but the subpoena was denied because he did not have an address.[121] Thor claimed there was an address book that would provide their addresses,[122] but the district court concluded "that the address in the book would probably not be current."[123] The Fifth Circuit held Thor "was not entitled to subpoena the address book pursuant to Rule 17(c) . . . because it was not evidentiary."[124]

The court interpreted "evidentiary" as admissible in evidence at trial. Otherwise, it would have recognized that Thor could have used the address book to support issuance of a witness subpoena. It may have even served other purposes at trial, such as proving an address. *Thor* is the poster child for problems with the strict interpretation of the *Nixon* Standard. Assuming there really was an address book with the location of a person Thor could have subpoenaed to establish his innocence, then to deny his access to that address book was to deny him a fair trial.

Another influential Fifth Circuit opinion is *United States v. Arditti.* Arditti was a lawyer who, along with a securities broker, was being investigated by the IRS for laundering drug money.[125] Defendants claimed they were entrapped and subjected to outrageous government conduct. Both defenses focus on whether the government crossed ethical lines in its criminal investigation. Before and at trial, Arditti subpoenaed IRS documents including those showing the "nature, goals and targets of its operation," asserting their relevance to his lack of predisposition to commit the crime (which is ***336** important to an entrapment defense).[126] The district court quashed the subpoena as improper discovery and a fishing expedition.[127]

The Fifth Circuit affirmed because Arditti was trying to circumvent Rule 16.[128] In fact, the subpoena was directed to the IRS, the federal agency involved in the investigation, so Rule 16 controlled.[129] But the court went further: the "specificity and relevance elements [of the *Nixon* Standard] require more than the title of a document and conjecture as to its contents."[130] And, Arditti "failed to establish with sufficient specificity the evidentiary nature of the requested materials."[131] But because *Arditti* did not even involve a Third Party Subpoena, this was not an occasion to reject a strict interpretation of the *Nixon*

Standard. Nonetheless, the opinion has been incorrectly applied by other courts as support for the strict interpretation of the *Nixon* Standard in the Third-Party-Subpoena context.

B. Second Circuit (1979)

The *In re Irving* defendants were charged with threatening and/or bribing a union organizer to stop organizing their workers.[132] Defendants subpoenaed documents showing their workers' supposed interest in union representation, e.g. membership applications and authorization cards.[133] Defendants claimed the authorizations were fake.[134] The union and the government moved to quash the subpoenas on the ground that the union records were privileged.[135] The district court enforced the subpoena[136] and the Second Circuit found no abuse of discretion:[137]

***337** If the cards are in fact forged or otherwise fraudulent, they may provide the defendants with a basis for asserting an entrapment defense. Additionally, the defendants could certainly utilize the cards in attempting to impeach [the allegedly threatened local union's president's] credibility. [Rule 17's requirements were satisfied because] . . . the documents subpoenaed bear on the transaction underlying the instant indictment and are material to adequate preparation of [the] defense . . . .[138]

While the cards were potentially admissible--if they were actually "forged or otherwise fraudulent"--that could not be determined until they were produced. Admissible was thus read to mean potentially admissible.

C. Third Circuit (1980 and Later)

The Third Circuit's poorly reasoned *Cuthbertson* decisions endorsed a strict interpretation of the *Nixon* Standard. In *Cuthbertson I*, the defendant was charged with a crime that had been the subject of a *60 Minutes* investigation.[139] The defendant issued two subpoenas to CBS: one for all interviews, notes of interviews and most other material related to the *60 Minutes* episode; and, a second subpoena for all verbatim statements by one hundred listed persons, mostly employees and owners or potential owners of other businesses in the same industry.[140] The district court modified the first subpoenas to cover only verbatim statements of the persons named in the government's witness list and ordered their production to the court for *in camera* inspection.[141] The district court likewise modified the second subpoena to require only return to the court for *in camera* inspection.[142] CBS refused to comply, was held in contempt, and appealed.[143]

The Third Circuit held that *Bowman Dairy* limits Rule 17(c) to items that are "admissible as evidence."[144] The court then found that impeachment material meets this standard,[145] but not until the witness ***338** actually testifies. Otherwise, there was no way to know if the evidence was actually admissible to impeach the witness.[146] *In camera* inspection before trial would be appropriate because it would aid the district court's trial preparation.[147] So the order enforcing the first subpoena for *in camera* production was appropriate.[148] The second subpoena sought information about people who were not on the government's witness list, so the items were not sought for impeachment. Defendants instead made the "general assertion that this material might contain exculpatory material."[149] The Third Circuit characterized this as a "discovery" request that should have been quashed.[150] In short, and contrary to the Second Circuit's approach in *In re Irving*,[151] the Third Circuit drew a sharp distinction between "evidence" (items that will be admitted into evidence and considered by the jury) and "discovery" (everything else).

After remand in *Cuthbertson I*, the district court reviewed the subpoenaed material, found that it was inadmissible, but still held that it had to be turned over because it was exculpatory and the due process clause required its production.[152] CBS appealed again.

In *Cutherbertson II* the Third Circuit again noted that under *Bowman Dairy*, Rule 17(c) was limited to material "admissible as evidence." The appellate court "reasoned" that the *Nixon* "Court extended the admissibility requirement of Rule 17(c) to materials held by third parties . . . ."[153] So, "naked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within the rule."[154] The Third Circuit prohibited the district court from releasing the material to defendants until after it found them actually admissible.[155]

***339** The Third Circuit's conclusion that *Nixon* extended its strict interpretation of the admissibility hurdle to third parties

was wrong. The *Nixon* Court expressly refused to decide the issue. *Bowman Dairy* involved a subpoena to the government and so its reasoning does not govern Third Party Subpoenas.[156] Instead, there are substantial arguments that defendants should be provided with the means to obtain "naked exculpatory material" held by third parties."[157] These arguments are buttressed by considering the impact of the Compulsory Process Clause.[158]

D. Ninth Circuit (1981)

The Ninth Circuit initially had a broad understanding of *Nixon*.[159] But following the *Cuthbertson* decisions, the Ninth Circuit adopted a strict admissibility requirement. In *United States v. Fields*, the district court refused to quash a subpoena for pretrial production of impeachment material.[160] The Ninth Circuit reversed because impeachment evidence is not actually admissible until the witness testifies.[161] "[W]e see no basis for using a lesser evidentiary standard merely because production is sought from a third party rather than from the United States."[162] Rather than explain why there was "no reason" for a lesser admissibility requirement for Third Party Subpoenas, the court simply cited to *Cuthbertson II*.[163]

***340** *E. Eleventh Circuit (1984)*

In *United States v. Silverman*, a lawyer was charged with trying to extort his client for a $25,000 fee to "fix" his case.[164] The government served a Rule 17(c) Subpoena requiring Silverman to produce complaints against him by former clients or the state bar. The subpoena was "contingent" upon Silverman testifying at trial--then the subpoenaed complaints would be relevant to impeachment.[165] Silverman testified, the documents were produced and he was convicted.[166]

On appeal, he argued the subpoena did not seek evidentiary material.[167] The Eleventh Circuit disagreed.[168] After citing the *Bowman Dairy* and *Nixon* standards, the court found:

> The subpoenaed complaints clearly possessed evidentiary potential for impeachment purposes if Silverman, in his testimony, denied that he had ever taken advantage of a client as he allegedly did in Munoz' case.[169] Also, the complaints would have evidenced the prosecutor's good faith in cross-examining Silverman's character witnesses concerning specific incidents.[170]

Evidence that simply supports a prosecutor's good faith is not admitted into evidence. Even if the prosecutor's good faith were questioned, proof of good faith would be offered outside the jury's presence.[171] Thus, the second basis shows a broad reading of *Nixon.*

F. First Circuit (1988)

In *United States v. LaRouche Campaign*, individuals associated ***341** with Lyndon H. LaRouche's presidential campaign were indicted.[172] NBC had previously interviewed a key government witness, which resulted in about one minute of on-air footage and 100 minutes of outtakes.[173] Defendants subpoenaed the "outtakes" and any record of payments to the witness.[174] NBC moved to quash.[175]

The district court denied the motion to quash and ordered an *in camera* inspection.[176] In affirming, the First Circuit noted that *Nixon* only requires a "sufficient likelihood" that the evidence is relevant, and a "sufficient preliminary showing" that the evidence is admissible.[177] These standards were met. It appeared the witness would offer important testimony against defendants at trial. The witness's role in the LaRouche organization and his prior testimony suggested that he had important information and the fact there were 100 minutes of outtakes suggested the subpoenaed material covered a wide range of relevant topics.[178] Even his "facial expressions might well be directly relevant to showing animus against defendants."[179] Finally, because recorded interviews are unique evidence, the material was not available from any other source.[180]

While the outtakes' relevancy was clear, their admissibility was not. Neither the defendants nor the district court knew what was on those tapes before they reviewed them, so defendants could not prove they were admissible. *LaRouche*, therefore, interprets admissibility standard as potentially admissible.

G. Fourth Circuit (1988)

In re Martin Marietta Corp involved an indictment against William Pollard, a former Martin Marietta employee, for allegedly defrauding the Department of Defense (DOD).[181] Martin Marietta ***342** had already conducted an internal audit, pled guilty to criminal charges and settled with the DOD.[182] Pollard sought three categories of documents: (1) Martin Marietta's audit papers for subsidiaries involved in the fraud; (2) key witness statements obtained in the audit; and, (3) the Martin Marietta-DOD settlement materials.[183] After reviewing the documents *in camera*, the district court ordered disclosure.[184] Martin Marietta refused and was held in contempt.[185]

On appeal, Martin Marietta's primary objection was that the documents were not admissible. The Fourth Circuit rejected this argument reasoning that the documents would not have to be actually admitted into evidence. "It is only required that a good faith effort be made to obtain evidence."[186]
Since Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit . . . . The audit is clearly of evidentiary value. Pollard seeks interview notes, transcripts and electronic recordings concerning the audit. They are of evidentiary value. Pollard seeks correspondence and notes relating to the Administrative Settlement Agreement between DOD and Martin Marietta. They are of evidentiary value to Pollard's defense that he was made a scapegoat. Part of that administrative settlement was agreement by Martin Marietta no longer to fund Pollard's defense. Pollard was not indicted until after Martin Marietta had solved its problems: It pled guilty to criminal charges and administratively settled with the DOD. A subpoena of the administrative agreements is at least a good faith effort to acquire evidence by Pollard for a defense that Martin Marietta hung him out to dry while protecting its own interest.[187]

The items sought were clearly central to the charges. But there is no way Pollard could prove more than that they were potentially admissible.[188]

***343** *H. Sixth Circuit (1990)*

In *United States v. Hughes*, a defendant was convicted of distributing controlled substances for his role in a medical clinic that illegally prescribed narcotics to patients.[189] The government's case included a "pharmacy expert"[190] who testified that the medical clinic was criminal because "it would be virtually impossible for a legitimate medical clinic to give out Tylenol with codeine to every patient."[191]

Defendant subpoenaed the pharmacy expert to produce six months-worth of invoices from his pharmacies' drug suppliers[192] (which amounted to "thousands of invoices from fifty-three different pharmacy stores").[193] Defendant asserted that the invoices were relevant because they *might* establish that the expert's pharmaceutical operations paralleled his own.[194] The district court granted the government's motion to quash the subpoena because defendant failed to establish relevance, admissibility, specificity and because it was unreasonable and oppressive.[195]

The Sixth Circuit agreed that defendant had no right to the pretrial production of impeachment evidence,[196] and that the documents were not otherwise admissible.[197] Granted, the subpoena was extremely broad and burdensome and probably could have been quashed on that ground alone. The problem is that defendant sought the expert witness's own invoices which are the type of business record that is admitted into evidence every day. So, they were potentially admissible. Accordingly, the Sixth Circuit's reliance on the admissibility hurdle to uphold quashing the subpoena ***344** demonstrates a strict interpretation of the *Nixon* Standard.[198] Further, by unnecessarily relying on a strict interpretation, the Sixth Circuit lent credibility to *Nixon's* misapplied standard.

I. Seventh Circuit (1993)

In *United States v. Ashman*, several defendants--floor traders on the Chicago Board of Trade--were charged with manipulating the market for personal gain.[199] One defendant (the "cooperator") pled guilty and agreed to testify against the others.[200] The remaining defendants subpoenaed the cooperator's attorney's notes of his meetings with prosecutors. They argued that "counsel's notes of his meetings with 'prosecutors might have assisted in refreshing [the cooperator's]

recollection and disclosing the process by [which] his memory was reconstructed."'[201] However, the district court accepted the cooperator's counsel's representation that the notes contained only his "analyses, thoughts, and strategies," were protected work product and therefore the court quashed the subpoena without even reviewing the notes *in camera*.[202]

Affirming, the Seventh Circuit stated:

> Federal Rule of Criminal Procedure 17(c) restricts subpoenas to specified, evidentiary items that are relevant and admissible. Without that requisite specificity, the district court in the instant case found that [[the] subpoena was 'fishing' for exculpatory information.[203]

But the *Ashman* subpoena was directed at specific notes. The notes concerned the cooperator's meetings with prosecutors about the case and were therefore very relevant. The real problem was the admissibility of attorney work product.[204] But work product is a ***345** qualified protection that can be overcome,[205] so the notes were potentially admissible. While it is (extremely) unlikely that defendant could have overcome that protection,[206] neither the district court nor the Seventh Circuit addressed the issue. Instead, they relied on a strict interpretation of the *Nixon* Standard and thereby lent further support to this misapplied standard.

J. Eighth Circuit(1996)

The Eighth Circuit initially had a broad understanding of *Nixon*.[207] After *Arditti* and *Cuthbertson*, however, the Eighth Circuit turned. In *United States v. Hang*, an employee of a public housing authority (Hang) was convicted of accepting bribes in exchange for finding poor immigrants eligible for federal housing assistance.[208] Prior to trial, Hang sought various Rule 17(c) subpoenas, including one for the hospital records of one of the victim-witnesses who spent ***346** four weeks in a hospital for an unspecified mental illness.[209] The district court denied the subpoena and the Eighth Circuit affirmed quoting *Arditti*: "[t]hese specificity and relevance elements require more than the title of a document and conjecture as to its contents."[210] Quoting *Cuthbertson I*, the court added "a Rule 17(c) subpoena cannot properly be issued upon a 'mere hope.'"[211]

The subpoena sought medical records for a specific patient and covered a discreet period of time, so it was specific enough to identify responsive documents. The subpoena was an effort to obtain impeachment information, so it sought relevant items. Hospital records of a government witness were potentially admissible,[212] but Hang could not establish they were actually admissible in advance of trial. So the Eighth Circuit was strictly interpreting the *Nixon* Standard.

K. Summary of the Circuits

The First, Second, Fourth and Eleventh Circuits correctly interpret the *Nixon* Standard as requiring only a showing that the item sought is potentially admissible. While the Third, Fifth, Sixth, Seventh, Eighth and Ninth Circuits wrongly require that defendant establish the items sought are actually admissible.[213] The erroneous ***347** actual admissibility requirement is built on the unexamined and erroneous assumption that *Nixon* requires it. So these courts have never grappled with the facts that: *Nixon* actually left that question open; the United States argued in *Nixon* that there was no actual admissibility requirement for Third Party Subpoenas; long-time federal practice did not impose an actual admissibility requirement for Third Party Subpoenas; and, all of the cases the *Nixon* Court relied upon in formulating the *Nixon* Standard (including *Bowman Dairy*) involved the inapposite situation of a subpoena between the parties.

Moreover, these courts have not confronted the constitutional implications of denying a defendant his only means of compelling the production of material items from third parties. These implications are addressed in the next section.

IV. THE COMPULSORY PROCESS CLAUSE'S IMPACT ON RULE 17(C)'S PRETRIAL REACH

In 1807, during the prosecution of former United States Vice President Aaron Burr, Chief Justice Marshall (sitting as a trial court judge) observed that the right to a subpoena duces tecum to prepare a defense is protected by the Compulsory Process Clause.[214] While Chief Justice Marshall may have reliably described then-existing federal practice, *Burr* was not the opinion of the whole Court. In *Nixon*, the full Court noted that the Compulsory and Due Process Clauses require at least that "all

relevant and admissible evidence be ***348** produced."[215] But the full reach of a criminal defendant's right to compulsory process was not at issue. In *Pennsylvania v. Ritchie*, the Court described the minimum and potential maximum reach of the Compulsory Process Clause, but it has been largely ignored in Rule 17(c)'s interpretation.[216]

A. Pennslyvania v. Ritchie

Ritchie was charged with raping his daughter. He subpoenaed a file from Pennsylvania's Children and Youth Services (CYS), which treated his daughter after the alleged crime.[217] Ritchie argued the CYS file "might" contain the identities of favorable witnesses or other "exculpatory evidence."[218] CYS refused to comply because the records were[219] privileged under state law. There was a statutory exception to the privilege if a court ordered production of the records, but the trial court refused.[220] Ritchie was convicted, and he appealed. The Supreme Court of Pennsylvania reversed and held that defense counsel had the right to review the file under the Sixth Amendment's Confrontation and Compulsory Process Clauses. The U.S. Supreme Court granted certiorari.[221]

The Court found that while Ritchie did not have the right to have his counsel personally review the file, he did have the right to have the trial court conduct an *in camera* review of the file for exculpatory material. A plurality of the Court rejected Ritchie's argument that production was required under the Confrontation Process Clause.[222] A majority of the Court then described the Compulsory Process Clause's potential impact, but found the law "unsettled."[223] At a minimum, "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[224] At most, they have the right to compel ***349** production of all material items.[225]

Ultimately, the Court decided the issue under the Fourteenth Amendment's Due Process Clause. "Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review."[226] Under the Due Process Clause, a criminal defendant has the right to material evidence in the prosecutor's possession.[227] Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[228] "A reasonable probability is a probability sufficient to undermine confidence in the outcome."[229] Even though the subpoenaed file was not in the prosecutor's possession, Ritchie was entitled to any material evidence in it.

Because the subpoenaed file was confidential, an *in camera*[230] review for material information was necessary to protect both Ritchie's right to material items and the state's interest in confidentiality.[231] Excluding defendant from the initial review was consistent with enforcement of a defendant's *Brady* rights, for which he must usually rely on the prosecutor to review and disclose items.[232]

B. Fallout From Ritchie

Ritchie is an enigmatic opinion that has been inconsistently interpreted. While the documents Ritchie subpoenaed were possessed by an arm of the state, they were not in the prosecutor's control. They were confidential and the prosecutor would have needed a court order to access them--not a typical *Brady/*due process case. Moreover, the Court clearly described the minimum requirements of the Compulsory Process Clause (put evidence before the jury that could influence its verdict), and its potential outer limits (obtain all material items from third parties). These factors have caused confusion as to whether ***350** *Ritchie* is just another "*Brady" (*or due process) case involving a defendant's right to obtain material items from the government, or a case addressing and describing a defendant's right to obtain material items from third parties.

1. Most Courts Mistakenly Treat Ritchie as just another Due Process Case

The Second,[233] Sixth,[234] and Eighth Circuits[235] and other federal courts[236] have read *Ritchie* as an extension of the prosecutor's *Brady* obligations to search for and disclose material items in government agency files--not as support for the right to obtain items from third parties.[237] Likewise, many state courts interpret *Ritchie* as involving subpoenaed documents that fell within the prosecutor's traditional *Brady* obligation.[238]

***351** These courts overlook or ignore three facts. First, in *Ritchie,* the prosecutor did not have possession, custody or control over the records. Instead, the Court explicitly noted that when the subpoena was issued, the files were even confidential as to

law enforcement.[239] Accordingly, the *Ritchie* Court left it to the trial court (not the prosecutor) to review the records for items that must be disclosed to the defense. Second, while a prosecutor's *Brady* obligation is self-executing, Ritchie used a subpoena. If he had not, the outcome may have been different. Third, the *Ritchie* Court's delineation of the minimum requirements and maximum potential reach of the Compulsory Process Clause[240] describe a serious constitutional issue.

The most compelling reason for not limiting *Ritchie* to evidence in the government's possession is that such a limitation is arbitrary and inconsistent with a search for the truth.[241] The better argument is that "[j]ust as a defendant has a right pursuant to the Due Process Clause of the Fourteenth Amendment to seek such *in camera* review when records are in possession of the State, so too a defendant must be allowed to seek *in camera* review of records that are possessed by a private entity, pursuant to the Compulsory Process Clause of the Sixth Amendment."[242]

***352** 2. Fifth and Tenth Circuit Authority Cite Ritchie as Support for the Right to Subpoena Exculpatory Material from Third Parties

The Fifth Circuit cited *Ritchie* as support for a Sixth Amendment right to compel the production of evidence from a third party upon a showing of "necessity."[243] The case was an extension of pre- *Ritchie* Fifth Circuit law recognizing a Compulsory Process Right to subpoena witnesses necessary to an adequate defense.[244]

The Tenth Circuit reads *Ritchie* in a way that supports a compulsory process right to subpoena exculpatory documents from third parties. In *United States v. Robinson*, Robinson's conviction turned on a confidential informant's credibility.[245] Prior to trial, the government disclosed that the informant had been involuntarily committed to a state mental hospital. Robinson obtained a subpoena for the informant's hospital records.[246] The district court reviewed the subpoenaed material, but refused to disclose them to the ***353** defense.[247] On appeal, the Tenth Circuit found that the file was material and the failure to disclose it violated Robinson's right to due process under *Ritchie*.[248]

The issue was not the federal prosecutor's disclosure obligations. It does not appear that the hospital was part of the "prosecution team" and the prosecutor apparently did not possess the hospital records. Accordingly, Robinson used a subpoena. *Robinson* is factually similar to *Ritchie*. Both involved confidential records in a state agency's possession that were not within the prosecutor's control. But *Robinson* is a further stretch for the Due Process Clause because it involved a *federal* prosecutor and documents in the possession of a *state* entity that was not even involved in the prosecution. While the decision is an extension of a prosecutor's disclosure obligations, it fits squarely within a Compulsory Process Clause right to subpoena material items from third parties.

3. Some State Courts find a Compulsory-Process Right to Subpoena Material Items from Private Third Parties

One state court interprets *Ritchie* as establishing compulsory-process right to subpoena material items from private third parties. In *Burns v. State*, Burns was charged with raping his nieces.[249] Burns' request to subpoena his niece's therapy records, which were held by a private third party, was denied.[250] Reversing, the Delaware Supreme Court held that *Ritchie* controlled.
The State contends that Ritchie is inapposite because that case involved records held by a state agency. That is a distinction without a difference. Although Ritchie involved the disclosure of records in the possession of the State, nothing in the Ritchie Court's holding or analysis limits its application to records held by the State. Moreover, other jurisdictions have held that Ritchie applies to privately held records. From the standpoint of the privilege holder it is immaterial whether the holder's therapy records are in the possession of a private party or the State. In either circumstance, the privilege holder has the identical interest ***354** in non-disclosure. Therefore, Ritchie applies here.[251]

Accordingly, the Compulsory Process Clause required the trial court to review the records *in camera*.[252]

The Kentucky Supreme Court relied on a different rationale, but found a criminal defendant has a compulsory-process right to obtain exculpatory evidence from third-parties. In *Commonwealth v. Barroso*, Barroso was charged with raping his former girlfriend.[253] He moved to subpoena her privileged psychological records.[254] The trial court reviewed the records *in camera*, but concluded they did not contain exculpatory evidence and did not disclose them to the defense.[255]

On appeal, the Kentucky Supreme Court concluded that because the records were not in the Commonwealth's possession,

Ritchie did not control.[256] The state court proceeded to analyze the right to subpoena third party records under *Washington v. Texas*,[257] and *Nixon*. Under *Washington*, the Compulsory Process Clause not only requires that a defendant be permitted to subpoena the attendance of defense witnesses, "*but also the right to introduce their testimony into evidence.*" [258] Under *Nixon*, "the fair administration of justice requires that privileged inculpatory evidence in the hands of a third party be turned over to the prosecution."[259] Together, these cases support the conclusion "that the Compulsory Process Clause affords a criminal defendant the right to obtain and present exculpatory evidence, including impeachment evidence, in the possession of a third party that would otherwise be subject to the psychotherapist- ***355** patient privilege."[260]

4. Constitutional Avoidance: Federal Courts Should Not Interpret Rule 17(c) In a Manner That Calls Its Constitutionality Into Question Under the Compulsory Process Clause

There are strong arguments for the compulsory-process right to subpoena exculpatory evidence from third parties. Interpreting *Nixon* to require that subpoenaed items be actually admissible would burden that right because not all exculpatory evidence is actually admissible.[261] The point of this article--that a strict interpretation of *Nixon* should be rejected--does not depend upon there being such a compulsory-process right. Rather, the point is that courts should avoid such a serious constitutional issue by interpreting the *Nixon* standard as only requiring a showing of potential admissibility for Third Party Subpoenas.

Pursuant to the doctrine of constitutional avoidance, federal courts avoid deciding the constitutionality of acts of Congress when they can.[262] The Federal Rules of Criminal Procedure are drafted by the Supreme Court and submitted to Congress.[263] Congress then has seven months to "reject, modify or defer the rule changes" or they take effect as a matter of law.[264] "Congress . . . always retains the authority to approve, disapprove, or modify any proposed new rules or rule changes."[265] Courts' reluctance to unnecessarily confront constitutional issues has led them to avoid interpretations of federal regulations that raise constitutional issues.[266] Commentators have ***356** relied on the doctrine of constitutional avoidance to support a broad interpretation of the Federal Rules of Evidence.[267] Similarly, the doctrine supports rejecting the strict interpretation of the *Nixon* Standard for potentially not meeting minimum requirements of the Compulsory Process Clause.

For example, in *Thor v. United States*, the Fifth Circuit held that a Rule 17(c) subpoena for an address book that contained the address of a key witness was inappropriate because the book itself would not be admitted into evidence.[268] Likewise, in *Cuthbertson*, the Third Circuit ruled that "naked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within the rule."[269] But if the Compulsory Process Clause requires that a defendant be able to subpoena exculpatory material from third parties, then under the reasoning of *Thor*, *Cuthbertson* and the Circuits that blindly follow those decisions, a Rule 17(c) subpoena does not meet the minimum requirements of the Compulsory Process Clause.

Interpreting the admissibility hurdle to mean potentially admissible should allay these constitutional concerns. The elements of relevance and specificity should not be a problem. If the material sought is not even relevant, it cannot be exculpatory.[270] Specificity should require no more than describing responsive documents with sufficient particularity so that they can be identified without an unreasonable burden. Rule 17(c)(2) already provides that a subpoena can be quashed "if compliance would be unreasonable or oppressive."[271] If a subpoena does not identify responsive documents, it should be subject to quashing on that ground regardless of the *Nixon* Standard. In fact, courts are well versed in applying the unreasonable or oppressive standard to civil subpoenas[272] and this ***357** standard has sufficed to protect the rights of third parties.

V. ARGUMENTS THAT EITHER *NIXON* SHOULD NOT APPLY TO THIRD PARTY SUBPOENAS AT ALL OR THE ISSUE IS TOO TRIVIAL TO ADDRESS

A. District Courts Critical of the Nixon *Standard*

The thrust of this article is that the admissibility hurdle of the *Nixon* Standard should be interpreted as potentially admissible, not actually admissible. However, district courts have criticized the application of any form of the *Nixon* Standard to Third Party Subpoenas. One even formulated a different standard.

In *United States v. Tomison*, the district court for the Eastern District of California found defendants' Third Party Subpoena

cleared the *Nixon* Standard, but the government still objected that defendants sought "discovery."[273] The court observed that "Rule 17(c) may well be a proper device for discovering documents in the hands of third parties."[274] It soundly reasoned that Rule 16's control of discovery could not prohibit the use of Rule 17(c) as a discovery device where defendant seeks information that is not in the government's control.[275]

United States v. Nachamie also concerned a Third Party Subpoena.[276] The district court first noted that Rule 17(c)'s drafters believed its reach was the same as Rule 45(b) of the Federal Rule of *Civil* Procedure, which permits "discovery" from third parties.[277] *Bowman Dairy* did not involve a Third Party Subpoena, and *Nixon* involved a *government* subpoena. So, neither prohibited using a Rule 17(c) subpoena for discovery. The Court then adopted its own standard. A Rule 17(c) subpoena will be enforced where it is: "(1) reasonable, construed using the general discovery notion of 'material to the defense;' and (2) not unduly oppressive for the producing party to respond."[278] Ultimately, the district court found that the subpoena met both the *Nixon* Standard and its own.[279]

***358** The same judge again applied its standard in *United States v. Tucker*.[280] The defendant subpoenaed the recorded conversations of a government informant from the Bureau of Prisons covering the time that the informant was in pretrial detention before he agreed to cooperate with the government.[281] After a thorough discussion of a criminal defendant's right to discovery in a federal prosecution, the district court applied the "material to the defense" and "not unduly oppressive" standard it first adopted in *Nachamie*.[282] After limiting the subpoena to the informant's jail house conversations that occurred after he was contacted by the government, the district court found that the Confrontation Clause required production of responsive documents.[283] The right to cross-examination would be "meaningless if a defendant is denied the reasonable opportunity to obtain material evidence that could be crucial to that cross-examination."[284] The court also stated that although the documents were only admissible for impeachment, given the volume of responsive documents, requiring Tucker to wait until trial for production would unreasonably delay proceedings.[285]

Another district court judge from the Southern District of New York raised this argument in *United States v. Rajaratnam*.[286] After noting that Rajaratnam's subpoena met the *Nixon* Standard, the court explained why the *Tucker* Court's "material to the defense" standard made sense.[287] While *Nixon* cited *Bowman Dairy* for the proposition that Rule 17 subpoenas should not be used for discovery, *Bowman Dairy* was actually concerned about "distinguishing Rule 17 from Rule 16."[288] Further, *Bowman Dairy* quoted a statement from Rule 17's Advisory Notes:

[Under Rule 17] the court may, in the proper case, direct that [[documents] be brought into court in advance of the time that they are offered in evidence, so that they may then be inspected in advance for the purpose of enabling the party to see whether he ***359** can use it or whether he wants to use it.[289]

The district court was most troubled by the "specificity" hurdle of the *Nixon* Standard. "[R]equiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity."[290] The court found that the *Tucker* Court's "material to the defense" standard would address this issue.[291] Finally, applying the "material to the defense standard" would solve the "puzzle" of why a civil litigant in a breach of contract action can use a subpoena to obtain documents that are beyond the reach of a criminal defendant who is fighting for his freedom.[292]

Rajaratnam, *Nachamie*, and *Tomison* all involved subpoenas that met the *Nixon* Standard, so their criticisms of it are dicta. Because of the broad discretion given district courts on enforcing subpoenas, an appeal from their (gratuitous) decisions to apply something other than the *Nixon* Standard would not require a reviewing court to address the correctness of their proposed rules. While their reasoning is sound, these opinions are not strong support for the wholesale rejection of the *Nixon* Standard for Third Party Subpoenas, because: (1) the standards they propose are inconsistent with the law in their respective circuits; and, (2) they were insulated from review because the subpoenas actually met the *Nixon* Standard. *Tucker* involved the actual application of a different standard, but the subpoena was to a government agency--the BOP. While the *Tucker* court described the BOP as a "third party," the BOP is covered by the government's *Brady* obligations.[293] Because *Tucker* did not actually involve a Third Party Subpoena, it is not solid support for rejecting the *Nixon* Standard's application to them.[294]

These courts' rejection of the *Nixon* Standard demonstrate the problems with applying the *Nixon* Standard to Third Party ***360** Subpoenas. But because the Supreme Court has never suggested that it will completely abandon the *Nixon* Standard for Third Party Subpoenas, they are unlikely to affect any broad change in the short run. Accordingly, this article suggests a more nuanced and practical reading of the *Nixon* Standard that can help criminal defendants obtain a fair trial now.

B. Academic Criticism of Nixon

Commentators have observed that the *Nixon* Standard prevents defendants from obtaining evidence that is necessary to their defense. One laments that it so restrictive that Rule 17(c) subpoenas are "rarely useful" to defendants.[295] Professor Peter Henning persuasively argues that *Nixon* should be limited to its facts; that is, the *Nixon* Standard only applies where a *prosecutor* seeks a pretrial Rule 17(c) subpoena for evidence he could have obtained with a grand jury subpoena.[296] The professor notes that the only "express" limit on a Rule 17(c) subpoena is that it not be "unreasonable or oppressive" and the Court interprets that standard differently in different contexts.[297] Like the district courts in *Nachamie, Tucker,* and *Rajaratnam,* he proposes that Rule 17(c) subpoenas are reasonable so long as they seek items that are "material to the defense."[298] "Imposing a materiality requirement similar to Rule 16(a)(1)(C) for evaluating defense subpoenas to third parties is another form of the reasonableness analysis, allowing the court to compel pretrial production only after the defendant shows that the information is significantly helpful to a defense to the charges at trial."[299]

Like the district court opinions discussed in the preceding section, these criticisms and alternative tests point out the problems with the *Nixon* Standard. But they are unlikely to affect any significant change because the Supreme Court seems unwilling to completely reject the *Nixon* Standard's application to Third Party Subpoenas. So, again, this article suggests a more limited correction ***361** to the clearly incorrect interpretation of *Nixon*'s admissibility hurdle.

C. If Defendants Have the Confrontation-Clause Right to All Items Necessary to an Effective Cross Examination, then Any Application of Nixon *Would Burden That Right*

The Pennsylvania Supreme Court reversed Ritchie's conviction because denying his subpoena for his alleged victim's psychiatric records violated his Sixth Amendment rights to confrontation and compulsory process.[300] Two Justices expressed support for the right to subpoena items under the Sixth Amendment's Confrontation Clause.[301] But a plurality of the Court (Powell, White, O'Connor and Chief Justice Rehnquist) found that the right to confrontation is a "trial right" satisfied by the full opportunity to cross examine the witness; not encompassing the right to "any and all information that might be useful in contradicting unfavorable testimony."[302]

Justice Blackmun concurred in the judgment, but not the Plurality's claim that the right to confrontation was a "trial right."[303] Justice Blackmun argued that the right to confrontation could be violated by the denial of access to information necessary to an effective cross-examination.[304] He concurred in the judgment, however, finding that the majority's procedure for *in camera* review was sufficient to ensure the Ritchie received evidence that could be used to impeach his daughter.[305]

Justice Brennan wrote separately "to challenge the Court's narrow reading of the Confrontation Clause as applicable only to events that occur at trial."[306] He asserted that the right to confrontation included the right to pretrial production of material necessary to a thorough cross examination.[307] Moreover, limiting the trial court's disclosure to information that is material under the Due Process Clause (i.e., information that *a judge* found could affect the outcome of the case) was insufficient because defense counsel were in the best position to determine what was necessary to an effective ***362** cross examination.[308]

Any formulation of the *Nixon* Standard would be insufficient to protect such a right to confrontation where: (1) items necessary to an adequate cross examination are in the possession of third parties; and, (2) the items are voluminous and/or difficult to describe in advance. But a wholesale rejection of the *Nixon*Standard is not yet required because the Court has not yet recognized such a broad right to confrontation.

C. Tempest in a Teapot--Does Rule 17(c)'s Proper Interpretation Matter When District Courts Have Almost Unbridled Discretion?

District courts have very broad discretion in issuing and enforcing Rule 17(c) subpoenas.[309] Of the cases cited in the body of this article, all opinions recognizing that potentially admissible evidence meets the *Nixon* Standard were affirming the district court. Five of the seven opinions requiring actual admissibility were also affirming the district court. This begs the question: is the correct interpretation of the *Nixon* Standard important enough to warrant the energy required to fix it when district

courts have almost unbridled discretion, anyway?

The issue is still important for at least three reasons. First, appellate courts do not always defer to the district court's decision that a defendant needs exculpatory material. In *Cuthbertson* and *Fields*, the appellate courts reversed the district courts' granting of a subpoena for potentially exculpatory evidence.[310] The appellate courts' misunderstanding of the *Nixon* Standard had real consequences.

Second, even when they defer, appellate courts may be deferring to a clearly erroneous decision. In *Thor*, the court affirmed the denial of a subpoena for an address book defendant claimed was necessary to locate key witnesses.[311] The subpoena was specific, sought relevant evidence and the evidence could be put to use in court, i.e. was potentially admissible. It should have met the *Nixon* Standard.

Third, when a district court applies the wrong standard in ***363** exercising its discretion, it is necessarily committing error.[312] Courts strictly applying the *Nixon* Standard are committing systemic error. So this issue warrants attention.

VI. CONCLUSION

The correct interpretation of the *Nixon* Standard is that a Third Party Subpoena is appropriate if the evidence sought is relevant, identified with sufficient specificity that it can be located and is *potentially* admissible at trial. Under the plain language of Rule 17(c), a subpoena meeting this standard could still be quashed if it was unreasonably burdensome.

On the other hand, a strict (and incorrect) interpretation of the *Nixon* Standard means requiring proof that the evidence sought with a pretrial Third Party Subpoena will actually be admissible at trial. This popular approach is wrong because: (1) it is only supported by poorly reasoned circuit authority; (2) it is inconsistent with long-standing federal practice; (3) the United States advocated a contrary position to the *Nixon* Court; (4) *Bowman Dairy* is inapposite and the *Nixon* Court expressly refused to decide this issue; and (5) denying defendants access to identifiable exculpatory evidence is inconsistent with the goal of a fair trial. Additionally, a strict interpretation of the *Nixon* Standard begs the constitutional question: does a defendant have the compulsory process right to subpoena exculpatory information? Rule 17(c) should not be interpreted to confront this issue.

Rule 17(c) is fine as written, but a strict reading of the *Nixon* Standard neuters it. Either federal circuit courts applying a strict standard should rectify their interpretations, or the Supreme Court should correct them.

Footnotes

1 FED. R. CRIM. P. 17(c). All Rule references are to the Federal Rules of Criminal Procedure unless otherwise noted.

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

3 *Id.* at 698-700.

4 *See generally* United States v. Burr, 25 F. Cas. 30, 32-34 (Cir. Ct. D. Va. June 13, 1807) (No. 14.692d); United States v. Burr, 25 F. Cas. 187, 189-92 (C.C.D. Va. Sept. 3, 1807) (No. 14,694) (discussing how the materiality sought might depend on the trial).

5 *See* discussion *infra* Parts III.A. & C.

6 *See* discussion *infra* Parts III.A. & C.

7 *See* discussion *infra* Part IV.B.4.

8 *See infra* p. 16 and note 111.

9 *Nixon*, 418 U.S. at 711; *see infra* p. 16 and note 111.

10 *See infra* p. 16 and note 111.

11 *See* discussion *infra* Part V.A.1-2.

12 *See* discussion *infra* Part V.A.1-2.

13 *See* discussion *infra* Part V.A.2.

14 *See infra* Part V.A.2.

15 *See* discussion *infra* Part V.

16 *Nixon*, 418 U.S. at 699 & n.12.

17 418 U.S. at 700.

18 25 F. Cas. at 191.

19 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1 (4th ed. 2014) ([hereinafter FED. PRAC. & PROC. CRIM.]. The Rules were first enacted in 1946. *Id.* Congress has ultimate authority to approve, disapprove, or modify the Rules. Next is the federal judiciary which has the authority to write Rules for the federal courts. For an explanation of the Rule amending process, see *id.* at §2.

20 Bowman Dairy Co. v. United States, 341 U.S. 214, 218-19 (1951); s *ee also* United States v. Fort, 478 F.3d 1099, 1102 (9th Cir. 2007) (Wardlaw, J., dissenting) ("Rule 16... governs criminal discovery). Rule 16 also governs expert witness disclosures. FED. R. CRIM. P. 16(a)(1)(G), (b)(1)(C).

21 Courts have held that the prosecutor actually possesses material if the prosecutor "has knowledge of and access to the documents," including "anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." United States v. Santiago, 46 F.3d 885, 893 (9th Cir. 1995) (citing United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989)). Conversely, prosecutors do not have to turn over material in the possession of state agencies, *Santiago*, 46 F.3d at 893, unless the state agency actually provided the materials to the federal prosecutor. *Fort*, 478 F.3d at 1100.

22 As used in Rule 16, "a threshold showing of materiality" means "facts which would tend to show that the Government is in possession of information helpful to the defense." *Santiago*, 46 F.3d at 894 (quoting United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990)). This is different than materiality under Brady v. Maryland, 373 U.S. 83 (1963) . *See* Kyles v. Whitley, 514 U.S. 419, 441-54 (1995).

[23] FED. R. CRIM. P. 16(a)(1)(E).

[24] 2 FED. PRAC. & PROC. CRIM. § 275.

[25] *Id.*

[26] *Id.* at § 251.

[27] *Id.* at § 275.

[28] *Id.*

[29] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[30] United States v. Bagley, 473 U.S. 667, 682 (1985); *id.* at 685 (White, J., concurring).

[31] Kyles v. Whitley, 514 U.S. 419, 433-34 (1995).

[32] *Id.* at 434.

[33] United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002) (citations omitted). *See also* Johnson v. Folino, 705 F.3d 117, 130 (3d Cir. 2013) (citations omitted) ("[W]e believe, as do a majority of our sister courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence.").

[34] United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007).

[35] *Bagley*, 473 U.S. at 675 n.5; *see also* 2 FED. PRAC. & PROC. CRIM. § 256, n.51.

[36] *Kyles*, 514 U.S. at 433; *see also* 2 FED. PRAC. & PROC. CRIM. §256.

[37] *See* United States v. W.R. Grace & Co., 401 F. Supp. 2d 1069, 1076-77 (D. Mont. 2005) ("Indeed, it is not possible to apply the materiality standard in *Kyles* before the outcome of the trial is known.") (quoting United States v. McVeigh, 954 F. Supp. 1441, 1450 (D. Colo. 1997)). *But see* United States v. LaRouche Campaign, 695 F. Supp. 1290, 1306 (D. Mass. 1988) (citing Proposed Amendments to Federal Rules of Criminal Procedure, 62 F.R.D. 271, 311 (1974) as support for concluding that "[m]ateriality for purposes of Rule 16 essentially tracks the *Brady* materiality rule.").

[38] Strickler v. Greene, 527 U.S. 263, 288 (1999).

[39] *Kyles*, 514 U.S. at 438. *See also* 2 FED. PRAC. & PROC. CRIM. § 256 n.22.

[40] *See, e.g.*, United States v. Starusko, 729 F.2d 256, 261-62 (3d Cir. 1984). *See also* 2 FED. PRAC. & PROC. CRIM. § 256, n.19.

41 2 FED. PRAC. & PROC. CRIM. § 256.

42 *Id.* at § 271.

43 FED. R. CRIM. P. 17(c)(1).

44 Bowman Dairy Co. v. United States, 341 U.S. 214, 219-20, & n.5 (1951).

45 *Id.* at 220 n.5 (quoting Honorable G. Aaron Youngquist, Member of Advisory Committee, Federal Rules of Criminal Procedure, Statement at the Proceedings of the Institute on Federal Rules of Criminal Procedure, *in* N.Y. UNIV. SCH. OF LAW INST., 6 FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS 167-68 (1946)).

46 *See, e.g.*, United States v. Nixon, 418 U.S. 683, 699 (1974). There is persuasive criticism of this not-a-discovery-device rule by lower courts and academia. *See* discussion *infra* sections V.A.1-2 . But the point of this article is that even under the *Nixon* Standard a defendant can obtain pretrial production of things that are important for trial; not just things that are demonstrably admissible as evidence at trial.

47 *See* United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. June 13, 1807) (No. 14,692d); United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. Sept. 3, 1807) (No. 14,694).

48 *Burr*, 25 F. Cas. 187.

49 *Id.* at 201.

50 Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 24 (1974).

51 *Id.*

52 *Burr*, 25 F. Cas. at 32.

53 *Id.* at 34

54 *Id.* at 35.

55 *Burr*, 25 F. Cas. at 190.

56 *Id.* at 190-91.

57 Freund, *supra* note 50, at 26-27.

58 *Id.* at 27.

59 *Id.*

60 *Id.*

61 *Burr*, 25 F. Cas. at 191.

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at 192.

67 Bowman Dairy v. United States, 341 U.S. 214, 215 (1951).

68 *Id.* at 218-19. *See also* discussion *supra* section II.A.1.

69 *Bowman Dairy*, 341 U.S. at 216.

70 *Id.* at 217.

71 *Id.*

72 *Id.* at 218.

73 *Id.* at 217

74 *Id.*

75 *Id.* at 217-218.

76 *Id.* at 219.

77 *Id.* at 220. Courts reasoned it would be unfair to provide a criminal defendant with more discovery, because the defendant had no

discovery obligations under Rule 16. United States v. Palermo, 21 F.R.D. 11, 15 (S.D.N.Y. 1957).

78 *Bowman Dairy*, 341 U.S. at 219-20.

79 *Id.* at 221.

80 *Id.* at 219-20 ("That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence.").

81 *Id.* at 221.

82 The United States cited *Monroe v. United States*, 234 F.2d 49 (D.D.C. 1956), *United States v. Soloman*, 26 F.R.D. 397, 407 (S.D. Ill. 1960), *United States v. Gross*, 24 F.R.D. 138, 140 (S.D.N.Y. 1959), *United States v. Jannuzzio*, 22 F.R.D. 223 (D. Del. 1958), *United States v. Carter*, 15 F.R.D. 367, 371 (D.D.C. 1954), *United States v. Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952), and *Burr*, 25 F. Cas. 187, 191. *See* Brief for the United States, at 122-31, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834). President Nixon also cited *Gross*, *Carter*, and *Iozia*, in addition, the President cited *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970), *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965), *United States v. Murray*, 297 F.2d 812, 821-22 (2d Cir. 1962), *United States v.* Frank, 23 F.R.D. 145 (D.D.C. 1959), *United States v. Brockington*, 21 F.R.D. 104, 106 (E.D. Va. 1957), *United States v. Palermo*, 21 F.R.D. 11, 13 (S.D.N.Y. 1957), *United States v. Winkler*, 17 F.R.D. 213 (D.R.I. *1955*), and *United States v. Hiss*, 9 F.R.D. 515 (S.D.N.Y. 1949). *See* Brief for Respondent, Cross Petitioner, at 122-30, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834).

83 *Marchisio*, 344 F.2d at 669; *Murray*, 297 F.2d at 819-20; *Monroe*, 234 F.2d at 55-56; *Solomon*, 26 F.R.D. at 404; *Frank*, 23 F.R.D. at 147; *Jannuzzio*, 22 F.R.D. at 225; *Carter*, 15 F.R.D. at 368; *Palermo*, 21 F.R.D. at 12; *Winkler*, 17 F.R.D. at 214; *Iozia*, 13 F.R.D. at 337; *Hiss*, 9 F.R.D. at 516; *Burr*, 25 F. Cas. at 32.

84 Brockington, 24 F.R.D. at 105.

85 *Gross*, 24 F.R.D. at 139. And one involved a subpoena for testimony (not a subpoena duces tecum). *Conder*, 423 F.2d at 910 (evaluating Rule 17(b) motion for trial witness and discovery motion under Rule 16).

86 Brief for the United States, at 128-29, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766 & 73-1834).

87 *Id*. at 129.

88 United States v. Nixon, 418 U.S. 683, 698-702 (1974).

89 United States v. Iozia, 13 F.R.D. 335, 337 (S.D.N.Y. 1952).

90 *Id.*

91 *Id.* at 338.

92 *Id.*

93 *See Nixon*, 418 U.S. at 699-700.

94 *Id.* at 687-88.

95 *Id.*

96 Critically, Nixon did not cite national security as a basis for withholding production. Had he done so, the tapes may have been absolutely privileged, or subject to such a high evidentiary threshold that would render production unlikely. *Id.* at 710-11.

97 *Id.* at 688. The other cases followed *Iozia*, although some courts questioned how stringently the "evidentiary" standard should be applied. In *Soloman*, the court recognized that *Bowman* interpreted Rule 17(c) to permit a type of discovery since a defendant cannot know if he can or wants to use a subpoenaed item until he has reviewed it. *Soloman*, 26 F.R.D. at 406 (quoting Youngquist Statement). In *Gross* the court noted the government could not be expected to establish that sought after evidence was actually admissible until it inspected the item. United States v. Gross, 24 F.R.D. 138, 141 (S.D.N.Y. 1959).

98 *Nixon*, 418 U.S. at 698-99.

99 *Id.* at 699.

100 *Id.* at 700.

101 *Id.* (emphasis added).

102 *Id.*

103 *Id.*

104 *Id. (*emphasis added) .

105 *Id*. at 700-01.

106 *Id*. at 701 (citations omitted).

107 Of course, Nixon was no ordinary third party, since he was the head of the executive branch of government that brings all federal criminal prosecutions.

108 Footnote 12 provides:
The District Court found here that it was faced with 'the more unusual situation... where the subpoena, rather than being directed to the government by defendants, issues to what, as a practical matter, is a third party.' The Special Prosecutor suggests that the evidentiary requirement of *Bowman Dairy Co*. and *Iozia* does not apply in its full vigor when the subpoena duces tecum is issued to third parties rather than to government prosecutors. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the

District Court's refusal to quash the subpoena.
Id. at 700 n.12 (internal citations omitted). In its Brief, the United States argued:
Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial discovery embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena duces tecum. Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.
Brief for the United States at 128-29, United States v. Nixon, 418 U.S. 683 (1974) (Nos. 73-1766, 73-1834).

109 *Nixon*, 418 U.S. at 700 n.12.

110 *Id.* at 688.

111 *Id.* at 702 (citations omitted).

112 *Id.* at 709.

113 "The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor. Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *Id.* at 711.

114 *See* U.S. CONST. amend. VI. ("[T]he accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor....").

115 418 U.S. at 713 ("We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.").

116 *Id.*

117 *See* Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 386-87 (2004) ("The criminal subpoenas in *Nixon* were required to satisfy exacting standards of '(1) relevancy; (2) admissibility; (3) specificity' and were 'not intended to provide a means of discovery."'). *See also* United States v. R. Enterprises, Inc ., 498 U.S. 292, 299-300 (1991) ("In *Nixon*... [w]e determined that, in order to require production of information prior to trial, a party must make a reasonably specific request for information that would be both relevant and admissible at trial").

118 *See* Taylor v. Illinois, 484 U.S. 400, 411 (1988) (*Nixon* recognized that the right to compulsory process clause is "designed to vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."') (quoting *Nixon*, 418 U.S. at 709); Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (*Nixon* "suggest[ed] that the Clause may require the production of evidence").

119 Thor v. United States, 574 F.2d 215, 217 (5th Cir. 1978).

120 *Id.* at 219.

121 *Id.* at 219-20.

122 *Id.* at 219.

123 *Id.* at 220.

124 *Id.* (citing United States v. Nixon, 418 U.S. 683, 699 (1974)). The court did go on to state that the "better course would have been to subpoena the book if only to determine to a certainty whether the witnesses who had relevant testimony... could be located despite their nomadic predilections. But considering the slight likelihood that they could have been located, the failure to subpoena the book does not constitute an abuse of discretion." *Id.* at 221.

125 United States v. Arditti, 955 F.2d 331, 333-36 (5th Cir. 1992).

126 *Id.* at 345.

127 *Id.*

128 *Id.* at 346.

129 *Id.* at 345. *See also* United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989) (Rule 16 applies to documents in IRS's possession where prosecutor has knowledge of them and access to them).

130 *Arditti*, 955 F.2d at 345.

131 *Id.* at 346.

132 *In re* Irving, 600 F.2d 1027, 1030 (2d Cir. 1979).

133 *Id.*

134 *Id.* at 1034.

135 *Id.* at 1030.

136 *Id.* at 1034.

137 *Id.* at 1036-37.

138 *Id.* at 1034 (internal quotations omitted).

139 United States v. Cuthbertson, 630 F.2d 139, 142 (3d Cir. 1980) (*Cuthbertson I*).

140 *Id*. at 143.

141 *Id*.

142 *Id.*

143 *Id.*

144 *Id.* at 144.

145 *Id*.

146 *See id*. at 144-45.

147 *Id.* at 145.

148 The Third Circuit also found such production was appropriate despite CBS's privilege claim because the district court actually needed to review the material to determine if the qualified journalist privilege applied. *Id.* at 148.

149 *Id.* at 146.

150 *Id*.

151 *See In re* Irving, 600 F.2d 1027, 1034 (2d Cir. 1979) (Rule 17(c) subpoena proper where district court determined "that the documents subpoenaed bear on the transaction underlying the instant indictment and are material to adequate preparation of IDC's defense....").

152 United States v. Cuthbertson, 651 F.2d 189, 192 (3d Cir. 1981) (*Cuthbertson II*).

153 *Id.* at 195 (citing United States v. Nixon, 418 U.S. 683, 699-700 n.12 (1974)).

154 *Id*.

155 *Id*.

156 *See* discussion *supra* section II.B.2. Numerous district courts agree. *See also* United States v. Rajaratnam, 753 F. Supp. 2d 317, 321 (S.D.N.Y. 2011) (reasoning of *Bowman Dairy* inapplicable to Third Party Subpoenas); United States v. Nachamie, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000) (same); United States v. Tomison, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997) (same). These cases are discussed in section V.A., *infra.*

157 *See* discussion *supra* section II.B.1, and *infra* sections IV.A., IV.B.2-3, and V.A.

158 *See infra* section IV .

159 In the earlier decision of *United States v. MacKey*, 647 F.2d 898 (9th Cir. 1981), the Ninth Circuit upheld district court's refusal to quash a Rule 17(c) subpoena from the government that sought a defendant's diary and calendar. *Id.* at 901. First, the court noted it could not overturn the district court's decision unless it was "clearly arbitrary or without support in the record." *Id.* Second, defendants were charged with conspiracy to rig bids and the "diary and calendar" were sought to establish "that he did indeed meet with competitors and engage in discussions that the Sherman Act prohibits." *Id.* Third, "[b]ecause the government had not yet seen the documents, it would be unreasonable to expect a more detailed connection be provided between the contents of the documents and the ultimate issue in the case." *Id.*

160 United States v. Fields, 663 F.2d 880, 881 (9th Cir. 1981).

161 *Id.*

162 *Id. (*citing United States v. Cuthbertson, 651 F.2d 189, 195 (3d Cir. 1981)).

163 *Id.*

164 United States v. Silverman, 745 F.2d 1386, 1390 (11th Cir. 1984).

165 *Id.* at 1396.

166 *Id.* at 1391-92.

167 *Id.* at 1397.

168 *Id.*

169 *Id*. (citing United States v. Cuthbertson, 630 F.2d 139,144 (3d Cir. 1980).

170 *Id. (*citations omitted).

171 Michelson v. United States, 335 U.S. 469, 481 n.18 (1948). Similarly, there are many types of material that parties routinely submit to trial courts that are never admitted into evidence or submitted to a jury, e.g. applications for subpoenas, continuances or investigative funds. Such items could also be evidentiary under the Eleventh Circuit's reasoning. First, they are necessarily submitted to the court. Second, any of them could potentially come into evidence at trial, e.g., to explain the *absence* of a witness.

172 United States v. Larouche Campaign, 841 F.2d 1176, 1177 (1st Cir. 1988).

173 *Id.*

174 *Id.*.

175 *Id.*

176 *Id.* at 1179.

177 *Id.*

178 *Id.* at 1179-80.

179 *Id.*

180 *Id.* at 1180. The First Circuit also upheld the district court's *in camera* procedure. *Id.* at 1180 n.7. The court specifically disagreed with *Cuthbertson II*'s assertion that "the admissibility requirement of Rule 17(c) strictly prohibits pretrial production of impeachment material evidence by a third party for use by a criminal defendant in preparation for trial." *Id.*

181 *In re* Martin Marietta Corp., 856 F.2d 619, 620 (4th Cir. 1988).

182 *Id.* at 621.

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at 622 (citing Bowman Dairy Co. v. United States, 341 U.S. 214, 219-20 (1951)). Pollard was basically charged with obstructing an audit. He sought the audit and documents concerning the audit (e.g. notes, transcripts, and recordings).

187 *Id.* at 622.

188 The Fourth Circuit arguably abandoned its broad reading of *Nixon* in *United States v. Caro*, 597 F.3d 608 (4th Cir. 2010) (upholding denial of Rule 17(c) subpoena to ADMAX and BOP that was under strict interpretation of *Nixon*, even though documents would be "evidentiary" under *Martin Marietta*.), and *United States v. Mehta*, 594 F.3d 277 (4th Cir. 2010) (upholding quashing of subpoena for tax returns of government witnesses because he could not substantiate they would be useful for impeachment). On the other hand, these decisions may simply exemplify the broad discretion afforded to district courts. *See infra* section V.B.

189 United States v. Hughes, 895 F.2d 1135, 1139 (6th Cir. 1990).

190 *Id.* at 1142 n.9.

191 *Id.* at 1143.

192 *Id.* at 1145.

193 *Id.* at 1145 n.17.

194 *Id.* at 1145 n.18.

195 *Id.* at 1145-46.

196 *Id.* at 1146.

197 *Id.* at 1146 n.19.

198 The Sixth Circuit also summarily rejected defendant's claim that his right to compulsory process was violated because he failed to establish the items sought were material and favorable to his defense. *Id.* at 1145 n.15 (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867-72 (1982)).

199 United States v. Ashman, 979 F.2d 469, 474-76 (7th Cir. 1992).

200 *Id.* at 495.

201 *Id.*

202 *Id.*

203 *Id.* (internal citation omitted).

204 *Id.* quoting Upjohn Co. v. United States , 449 U.S. 383, 399 (1981) (holding attorney interview notes are protected work product)).

205 United States v. Nobles , 422 U.S. 225, 239 (1975) ("The privilege derived from the work-product doctrine is not absolute.").

206 Arguably, the notes could have: demonstrated a good faith basis of a particular line of cross examination of the cooperating defendant; provided a good faith basis to call the cooperating defendant's attorney as a witness; could have been used to refresh the recollections of any participant in the meeting; or, been admissible as recorded recollections of the attorney. Alternatively, there could have been a waiver issue. Because the court decided the issue under the *Nixon* Standard, the court never addressed these other issues.

207 *United States v. Grady*, 508 F.2d 13 (8th Cir. 1974), involved a defendant who was charged with misapplying money belonging to an Indian tribal organization. *Id.* at 15. He served a Rule 17(c) subpoena on the tribal organization. *Id.* at 17. The organization produced many documents, but sought to withhold some "sensitive" correspondence. *Id.* After an *in camera* review, the district court granted the organization's request finding the "material was cumulative and sensitive." *Id.* But the Eighth Circuit found that non-privileged material could not be withheld because it was sensitive. *Id.* at 18.
Nor do we believe that this order denying disclosure may be upheld on the ground that the correspondence subpoenaed was cumulative. While the court has wide discretion in excluding proffered evidence at trial on the ground that it is merely cumulative, we find no authority for the proposition that it may quash a subpoena *duces tecum* in a criminal case on that ground.... [T]he appellant ought to have been given the opportunity to examine the material himself to see if it was truly cumulative.
Id. This rejects a strict admissibility requirement for a Rule 17(c) subpoena because "cumulative" evidence is not admissible. The appellate court also recognized that defendant's right to subpoena evidence was protected by the Sixth Amendment's Compulsory Process Clause. *Id.* at 18 n. 5. Nonetheless, the appellate court found the error was harmless beyond a reasonable doubt (the appellate standard when constitutional rights are violated, *id.* at 18 and n.5) because the records actually *were* cumulative. *Id.* at 19.

208 United States v. Hang, 75 F.3d 1275, 1277-79 (8th Cir. 1996).

209 *Id.* at 1278.

210 *Id.* at 1283.

211 *Id.*

212 This case is similar to *Ritchie v. Pennsylvania*, 480 U.S. 39 (1987) (discussed *infra*), in which the Supreme Court found a Due Process and possibly a Compulsory Process clause violation because Ritchie was denied a subpoena for a victim's psychiatric records.

213 There are no published cases from the Tenth or D.C. Circuits demonstrating how they interpret the *Nixon* Standard. But a concurring opinion by Judge Silberman of the D.C. Circuits supports a broad reading:
In *Nixon*, the Watergate Special Prosecutor sought to subpoena tapes from President Nixon that he had reason to believe contained relevant conversations between the President and various targets of the investigation. The district court in *Nixon* issued the subpoena, and, rather than comply voluntarily, President Nixon moved to quash it on several grounds, including a formal claim of executive privilege. The district court rejected his claim of privilege, and the Supreme Court agreed to hear the appeal directly. After concluding that the Court had jurisdiction and that the case was justiciable, the Court determined whether the Special Prosecutor satisfied the requirements for the issuance of a pretrial subpoena duces tecum under Rule 17(c) of the Federal Rules of Criminal Procedure. That portion of the Court's analysis did not place any special significance on the fact that the subpoena was served on the President. The Court said only that "[a]ppellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied." 418 U.S. at 702, 94 S.Ct. at 3104. The Court affirmed the district court's conclusion that the Special Prosecutor had met his burden, which the Court described as consisting of three components: relevancy, admissibility, and specificity. *See id.* at 700, 94 S.Ct. at 3103. In light of my discussion above about the relevance and materiality of Mr. Reagan's possible testimony, I think it instructive to note how easily the Court was satisfied that the tapes sought by the Special Prosecutor in *Nixon* were relevant. The Court first observed that "[o]f course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment." *Id.* As to some of the desired tapes, it was sufficient that "the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment ." *Id.*
United States v. North, 910 F.2d 843, 951-52 (D.C. Cir. 1990), *opinion withdrawn and superseded in part on reh'g*, 920 F.2d 940 (D.C. Cir. 1990) (Silberman, J., concurring in part and dissenting in part).

214 United States v. Burr, 25 F. Cas. 30, 34 (1807) (No. 14.692d).

215 United States v. Nixon, 418 U.S. 683, 711 (1974).

216 Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

217 *Id.* at 43.

218 *Id.* at 44.

219 *Id.* at 45.

220 *Id.*

221 *Id.* at 46.

222 *Id.* at 50-54. The impact of the Confrontation Clause on the proper interpretation of Rule 17(c) is discussed in section V.A.3., *infra*.

223 *Id*. at 56.

224 *Id.*

225 "[C]ompulsory process provides no *greater* protections in this area than those afforded by due process." *Id. (*emphasis in original).

226 *Id.*

227 *See* discussion *supra* section II.A.2.

228 *Id.*

229 *Ritchie*, 480 U.S. at 57 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (internal quotations omitted)).

230 In an *in camera* review, the trial court reviews items outside either parties' presence and decides whether the items should be disclosed.

231 *Id.* at 60.

232 *Id.* at 59.

233 United States v. Zagari, 111 F.3d 307, 320 (2d Cir. 1997) (*Ritchie* assumed without discussion that state prosecutor's office had imputed knowledge of information available to state child services division's investigative officers, even though prosecutor had no actual knowledge of information); United States v. Kiszewski, 877 F.2d 210 (2d Cir. 1989) (finding a *Brady* violation where no *in*

camera review of government witness's personnel file).

234 United States v. White , 492 F.3d 380 (6th Cir. 2007) (*Ritchie* sets standard for *in camera* review of potential *Brady* material).

235 United States v. Hach, 162 F.3d 937 (7th Cir. 1998) (*Ritchie* does not require government to produce items it does not possess).

236 United States v. Shrader, 716 F. Supp.2d 464 (S.D. W.Va. 2010) ("The possibility of *in camera* review under *Ritchie* is also inappropriate in this case because, unlike in *Ritchie*, the VCS records are not in possession of the government or a government agent; *Ritchie's Brady* analysis is inapplicable here.").

237 The Ninth and D.C. Circuits have used *Ritchie* to support the extension of a prosecutor's *Brady* obligations. *See* United States v. Alvarez, 358 F.3d 1194, 1209 (9th Cir. 2004) (holding a defendant was entitled to have trial court do *in camera* review of key informant's probation file for *Brady* material); United States v. Brooks, 966 F.2d 1500, 1503-05 (D.C. Cir. 1992) (holding that *Ritchie* extends prosecutor's *Brady* obligation to state law enforcement files). Supporting an extension of a prosecutor's *Brady* obligations can be consistent with using *Ritchie* to support a compulsory process right to exculpatory evidence because *Ritchie* addresses both.

238 People v. Turner, 109 P.3d 639, 647 (Colo. 2005) (Colorado Supreme Court interpreted *Ritchie* as holding "that compulsory process obligates the government (which necessarily includes state-created protective services) to turn over exculpatory evidence to the accused" where law enforcement has access to records); State v. Pinder, 678 So. 2d 410, 414 (Fla. Dist. Ct. App. 1996) (*Ritchie's* "due process analysis necessarily assumed that the Pennsylvania CYS was a government agency subject to the obligation to disclose *Brady* material"); *In re* Subpoena to Crisis Connection, Inc., 949 N.E. 2d 789, 799 (Ind. 2011) (Indiana Supreme Court rejected *Ritchie's* application to third-party subpoenas citing *Turner, Hach, Shrader*, and *Pinder*); Goldsmith v. State, 651 A.2d 866, 872 & 881 (Md. 1995) (majority distinguished *Ritchie* because it "was based at least in part on due process and the prosecution's obligation to turn over [[exculpatory] evidence in its possession..., while the dissent asserted that the majority's focus on whether the records belonged to a state agency or private party was a "distinction without a difference."); People v. Stanaway, 521 N.W.2d 557, 569 (Mich. 1994) (Michigan Supreme Court agreed with that ruling, characterizing *Ritchie* as: involving records possessed by a government agency; based on a criminal defendant's "due process right to obtain [exculpatory] evidence in the possession of the prosecutor...."; and, holding that "in camera inspection was to determine whether the investigatory records contained exculpatory material that should have been provided to him."); State v. Spath, 581 N.W.2d 123, 126 (N.D. 1998) (North Dakota Supreme Court distinguished *Ritchie* because the North Dakota privilege for medical records had stronger protections than the statute in *Ritchie*, and because neither the prosecutor or any other state agency possessed the records) .

239 *See* Pennsylvania v. Ritchie, 480 U.S. 39, 43 n.2 (1987). Notably, a dissent to the state court opinion suggests those records were available to law enforcement. Commonwealth v. Ritchie , 502 A.2d 148, 157-58 (Penn. 1985) (Larsen, J., dissenting). But in footnote 2, the *Ritchie* Court clarifies that Pennsylvania law was revised only after Ritchie's conviction to give law enforcement access to such files. *See also* Exline v. Gunter, 985 F.2d 487, 489 (10th Cir. 1993) (There "was no indication that the prosecutor had been given access to the agency records or that he was aware of the contents of those records.").

240 *Ritchie*, 480 U.S. at 56. *See also* Taylor v. Illinois, 484 U.S. 400, 407-09 (1988) (quoting *Ritchie*, 480 U.S. at 56, for the minimum requirements of the Compulsory Process Clause).

241 Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 28 (2007).

242 *Id.* at 62.

243 United States v. Soape, 169 F.3d 257, 269 (5th Cir. 1999). Soape was charged with fraudulent use of credit cards and other "access devices." *Id.* at 260-62. The credit cards and access devices were in the name of Alexander. *Id.* The evidence at trial tended to prove that Soape was taking advantage of Alexander and using the access devices without his permission. Conversely, Soape

claimed he had Alexander's permission and attempted to subpoena phone records from the Sheriff's Department to support his argument. *Id.* at 268-69. The appellate court rejected the claim. Because Alexander's permission was not a complete defense, the subpoenaed records were not "necessary." *Id.* at 269-70. It is not clear if "exculpatory" evidence will always satisfy the Fifth Circuit's necessary-to-the-defense standard. While demonstrating Alexander's consent was not a complete defense, it probably would have been helpful to undermine the prosecution's theory of the case.

244 After citing *Ritchie*, *Soape* cited *United States v. Gonzales*, 79 F.3d 413, 424 (5th Cir. 1996), for the proposition that the Compulsory Process Clause only requires production of evidence that is "necessary." *See* Soape, 169 F.3d at 268. *Gonzales*, in turn, cited *United States v. Webster*, 750 F.2d 307, 329 (5th Cir. 1984), and *United States v. Ramirez*, 765 F.2d 438, 441 (5th Cir. 1985), to support that proposition--both *Webster* and *Ramirez* were decided before *Ritchie*.

245 Robinson was convicted of selling a gun to a confidential informant. The informant entered Robinson's house, came out with a gun (which he gave to an ATF agent) and returned to the house to pay for it. Other than the informant's testimony, there was little evidence of what actually transpired in the house. United States v. Robinson, 583 F.3d 1265,1268-69 (10th Cir. 2009).

246 *Id.* at 1268. The informant was committed to Osawatomie State Hospital for drug problems, hallucinations, and potential suicide. Robinson obtained a subpoena for the records. The district court reviewed the materials *in camera* but refused to disclose them to the defense. At trial, the informant admitted that he had "a little bit" of a drug problem and was not "regularly" violating his agreement with the ATF by using drugs. *Id.* at 1267. He also claimed he could not remember some details of the offense because of the "passage of time." *Id.* at 1269. Robinson was prohibited from cross examining the informant about his psychiatric condition. *Id.* at 1268.

247 *Id.* at 1268.

248 *Id.* at 1273-74. The informant's psychiatric records actually revealed a long history of constant and serious drug abuse that continued through trial. The informant also had a long history of mental illness including audio and visual hallucinations. *Id.* at 1267.

249 Burns v. State, 968 A.2d 1012, 1014 (Del. 2009).

250 *Id.* at 1022.

251 *Id.* at 1024-25 (footnote omitted).

252 *Id.* at 1025-26; *see also* State v. Kelly, 545 A.2d 1048, 1056 (Conn. 1988) (suggesting *Ritchie* applies to third-party subpoenas but finding no violation); State v. Green, 646 N.W.2d 298, 304 n.4 (Wis. 2002) (holding *Ritchie* applies to subpoenas directed to third parties).

253 Commonwealth v. Barroso, 122 S.W.3d 554, 556 (Ky. 2003).

254 *Id.* at 557.

255 *Id.*

256 *Id.* at 559.

257 *Id.* at 561.

258 *Id.* at 560 (citing Washington v. Texas, 388 U.S. 14, 23 (1967)) (emphasis in original).

259 *Id.* at 561. While *Nixon* supported its holding with citations to the Compulsory Process Clause, that clause was not the basis of its decision. It only applies to "the accused." The Court "actually grounded its holding in the need for the 'fair administration of criminal justice."' *Id. (*citing *Nixon*, 418 U.S. at 711-12).

260 *Id.* at 561 (citing Matter of Farber, 394 A.2d 330, 337 (N.J. 1978) (*Nixon* and *Washington* support right to compel production of evidence for defense)); *see also* State v. Cressey, 628 A.2d 696 (N.H. 1993) (due process requires *in camera* inspection of records held by third parties because "a defendant's rights are no less worthy of protection simply because he seeks information maintained by a non-public entity.").

261 *See supra* note 34 and accompanying text .

262 *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (interpreting immigration statute to avoid serious constitutional question). *See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 n.8 (1936) (Brandeis, J., concurring) (citing numerous cases demonstrating the Court refrains from deciding constitutionality of statute where clearly constitutional interpretation of statute is reasonable).

263 28 U.S.C. §§ 2071-77.

264 *Id. See* 1 FED. PRAC. & PROC. CRIM. § 2 for a more complete description of the process. The U.S. Supreme Court does not usually write the rules or amendments; that task is handled by the Judicial Counsel using a layered drafting and vetting process. *Id.*

265 1 FED. PRAC. & PROC. CRIM. § 2.

266 Comet Enter. Ltd. v. Air-a-Plane Corp., 128 F.3d 855, 859 (4th Cir. 1997) (holding the court to be well advised to construe federal regulations to avoid serious constitutional questions).

267 *See* 23 FED. PRAC. & PROC. EVID. § 5390 (stating FED. R. EVID. 412 should be interpreted to avoid constitutional questions).

268 *See* discussion *supra* section III.A.

269 United States v. Cuthbertson, 651 F.2d 189, 195 (3d Cir. 1981).

270 There are substantial legal questions about the meaning of "relevant." Is it relevance under FED. R. EVID. 401 (likely to make a material fact more or less likely)? Or, relevant if it could lead to other relevant evidence? This issue is largely academic. Defendants are routinely denied relevant evidence (under either standard) because of a strict interpretation of the *Nixon* Standard.

271 FED. R. CRIM. P. 17(C)(2).

272 Prior to 1991, civil subpoenas duces tecum were subject to quashing when "unreasonable or oppressive" and federal court had little problem enforcing this standard. 9A FED. PRAC. & PROC. CIV. § 2459. The federal rules were revised to permit quashing when the subpoena imposed an "undue burden," but the change in wording was not meant to be a change in law. *Id.*

273 United States v. Tomison, 969 F. Supp. 587, 594 n.14 (E.D. Cal. 1997).

274 *Id.*

275 *Id.*

276 United States v. Nachamie, 91 F. Supp. 2d 552, 557 (S.D.N.Y. 2000).

277 *Id.* at 561.

278 *Id.* at 563.

279 *Id.*

280 United States v. Tucker, 249 F.R.D. 58 (S.D.N.Y. 2008).

281 *Id.* at 66.

282 *Id.*

283 *Id.* at 67.

284 *Id.*

285 *Id.* at 67 n.56.

286 United States v. Rajaratnam, 753 F. Supp. 2d 317 (S.D.N.Y. 2011).

287 *See id.* at 321 n.1.

288 *Id.*

289 *Id. (*quoting Bowman Dairy Co. v. United States, 341 U.S. 214, 220 n.5 (1951)) (emphasis in original).

290 *Id. (*citing Robert G. Morvillo, Barry A. Bohrer, & Barbara L. Balter, *Motion Denied: Systemic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 160 n.12 (2005)).

291 *Id.*

292 *Id.*

293 United States v. Santiago , 46 F.3d 885, 894 (9th Cir. 1995).

294 Other district courts have clearly advocated interpreting *Nixon's* admissibility hurdle as potentially admissible . *See, e.g.*, United States v. Libby , 432 F. Supp. 2d 26, 31 (D.C. 2006) (citing *Orena* for potentially admissible standard); United States v. Orena, 883 F. Supp. 849, 868 (E.D.N.Y. 1995) (using a potentially or arguably admissible standard).

295 Morvillo, Bohrer, & Balter, *supra* note 290, at 160 n.12 ("Theoretically, defendants may also obtain documentary evidence from third parties through subpoenas issued pursuant to Rule 17(c). However, courts have interpreted 17(c) so narrowly that it is rarely useful to criminal defendants.").

296 *See* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 640-41 (1999).

297 *Id.* at 645.

298 *See id.*

299 *Id*.

300 Pennsylvania v. Ritchie, 480 U.S. 39, 46 (1987).

301 *Id.* at 66 (Brennan, J., dissenting).

302 *Id.* at 52-53, 53 n.9 (majority opinion). Justice Brennan (along with Justices Stevens and Scalia) dissented on jurisdictional grounds.

303 *Id.* at 61 (Blackmun, J., concurring).

304 *Id.* at 61-62

305 *Id.* at 65.

306 *Id.* at 66 (Brennan, J., dissenting).

307 *Id.* at 66-72.

308 *Id.* at 71-72.

309 *See, e.g.*, United States v. Hughes, 895 F.2d, 1135, 1145 (6th Cir. 1990) (decision re quashing subpoena will be upheld unless

"clearly arbitrary or without support in the record").

310 *See* discussion *supra* sections III.C-D.

311 *See* discussion *supra* section III.A.

312 E.E.O.C. v. KarenKim, Inc., 698 F.3d 92, 99-100 (2d Cir. 2012); Bridgeport Music, Inc. v. Universal-MCA Publ'g., Inc., 583 F.3d 948, 953 (6th Cir. 2009); Sikes v. Teleline, Inc ., 281 F.3d 1350, 1359 (11th Cir. 2002), *abrogated by*, Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008); Gramercy Mills, Inc. v. Wolens , 63 F.3d 569, 573 (7th Cir. 1995).

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