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Due Process

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CRIMINAL COURT

NEW YORK COUNTY

People v. Cabon³⁴⁶
 (decided August 14, 1990)

This case involved a request by the New York City Police Department to quash subpoenas *duces tecum* issued by the court to the Legal Aid Society for their representation in ten separate cases.³⁴⁷ The subpoenaed materials for each case involved routine, non-confidential police reports "concerning the defendants' charges, and their arrest photographs."³⁴⁸ The New York City Police Department argued that the routine reports were "not legally available to [the] defendants under pretrial discovery rules, or as *Rosario* material[,] until a hearing or trial"³⁴⁹ and therefore, should not be made available through the use of a subpoena.³⁵⁰ The defense claimed that the materials "are essential for trial preparation" since the reports may contain exculpatory evidence that may never reach trial.³⁵¹ Thus, if the subpoenas are quashed invalidly, a due process violation would result.³⁵²

The court held that it would be improper to quash the subpoenas because a defendant is entitled to know before trial the existence of any exculpatory evidence, including potential evidence that may be contained in the police reports.³⁵³ The subpoenaed material must be specifically requested by the defense and must meet the materiality standard defined in *People v. Vilardi*,³⁵⁴ which is a showing of a reasonable possibility that the material

346. 148 Misc. 2d 260, 560 N.Y.S.2d 370 (N.Y. Crim. Ct. 1990).

347. *Id.* at 260-61, 560 N.Y.S.2d at 371.

348. *Id.* at 261, 560 N.Y.S.2d at 371.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 264, 560 N.Y.S.2d at 373.

353. *Id.* at 272, 560 N.Y.S.2d at 378.

354. 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

would make a difference in the outcome of the trial.³⁵⁵

The court began its reasoning by noting that New York shares the federal view³⁵⁶ that the trial judge possesses the discretion “to grant pretrial access of subpoenaed materials to both defendant and prosecutor for trial preparation.”³⁵⁷ Additionally, the court stated that the general rule in New York requires subpoenaed evidence to be both “relevant and material to the determination of guilt or innocence.”³⁵⁸ The most essential element of materiality is whether “the information subpoenaed would make a favorable difference to the seeking party in the outcome of the trial if disclosed.”³⁵⁹ If the seeking party meets this burden of materiality, the court is not bound by “statutory discovery limitations,”³⁶⁰ but, rather, may grant the subpoenas under considerations of due process.

The court likened the defense requests in the present case to the requests in *Pennsylvania v. Ritchie*.³⁶¹ Both cases involved requests for materials that might be favorable to defendants and that might never reach trial if not subpoenaed. The *Cabon* court noted that requests must be for specific materials and may not be for generalized, unsupervised searches of the government’s materials.³⁶²

Because the police reports contain exculpatory evidence and were specifically requested, the court evaluated the requests in light of the court of appeals’ holding in *People v. Vilardi*.³⁶³ In *Vilardi*, materiality was defined as a “reasonable possibility” that the requested evidence could contribute to the verdict.³⁶⁴ The prosecution’s failure to disclose the material after a specific request will lead to reversible error in New York if it is shown

355. *Id.* at 77, 555 N.E.2d at 920, 560 N.Y.S.2d at 523.

356. FED. R. CRIM. P. 17(c).

357. *Cabon*, 148 Misc. 2d at 262, 560 N.Y.S.2d at 371.

358. *Id.* at 262, 560 N.Y.S.2d at 372 (citing *People v. Gissendanner*, 48 N.Y.2d 543, 548, 399 N.E.2d 924, 927, 423 N.Y.S.2d 893, 896 (1979)).

359. *Id.* at 263, 560 N.Y.S.2d at 372.

360. *Id.* at 265, 560 N.Y.S.2d at 373.

361. 480 U.S. 39 (1987).

362. *Cabon*, 148 Misc. 2d at 264, 560 N.Y.S.2d at 373.

363. 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990).

364. *See supra* note 209-10 and accompanying text.

“that the failure to disclose contributed to the verdict.”³⁶⁵ This places a heightened duty on the prosecutor during pretrial discovery.³⁶⁶ In *Cabon*, Judge Leibovitz specifically stated that “[t]he *Vilardi* rule, in my view, applies not only to pretrial discovery, but now places a newly heightened responsibility on the court, as well as the prosecution, when the defense makes a specific request for police records by subpoena.”³⁶⁷ Additionally, the prosecutor must err on the side of disclosure because of the *Vilardi* holding.³⁶⁸

The court ended its opinion by specifically detailing the procedure to be followed regarding materials subpoenaed specifically by a defendant.³⁶⁹ First, the materials will be received by the court’s clerks but will not be delivered to the defense until three days later so that the prosecutor may have a reasonable inspection period.³⁷⁰ Second, within that three day period the prosecutor may make any necessary redactions to protect his witnesses.³⁷¹ Third, after the three day period, the materials will be delivered to the defense unless the prosecutor “affirmatively represents to the court on the record that [the prosecutor] has inspected the subpoenaed items and that they contain nothing material to the defense under the test of materiality in *People v. Vilardi*.”³⁷²

365. *Cabon*, 148 Misc. 2d at 265, 560 N.Y.S.2d at 374.

366. *Id.* at 266, 560 N.Y.S.2d at 374.

367. *Id.*

368. *Id.* at 270, 560 N.Y.S.2d at 376. Judge Leibovitz also discussed the types of exculpatory information that may be available in police reports, for example, testimony from witnesses who may not appear at trial and, therefore, may remain unknown to the defendant. *Id.* He also evaluated the debate concerning whether police reports are actually evidence or only potential evidence, and concluded that any potentially exculpatory material should be disclosed, including “exculpatory leads.” *Id.* at 270, 560 N.Y.S.2d at 377; see *People v. Morrison*, 148 Misc. 2d 61, 559 N.Y.S.2d 1013 (Crim. Ct. New York County 1990); *People v. Lumpkin*, 141 Misc. 2d 581, 533 N.Y.S.2d 792 (Crim. Ct. Kings County 1988).

369. *Cabon*, 148 Misc. 2d at 272-73, 560 N.Y.S.2d at 378.

370. *Id.* at 272, 560 N.Y.S.2d at 378.

371. *Id.* at 272-73, 560 N.Y.S.2d at 378.

372. *Id.*