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**COUNTY COURT OF NEW YORK
WESTCHESTER COUNTY**

People v. Zherka¹
(decided February 25, 2009)

On October 31, 2008, Selim Zherka was arrested and charged “with two counts of disorderly conduct.”² He filed a cause of action in federal district court pursuant to 42 U.S.C. § 1983, alleging that his constitutional rights were violated as a result of the disorderly conduct charges.³ Zherka “issued a subpoena for the Westchester County District Attorney [(“DA”), Janet DiFiore,] to . . . testify” regarding the incident that led to his arrest.⁴ Subsequently, the government moved to quash the subpoena.⁵ In opposition, Zherka filed a motion and argued that denying his motion would in effect violate his constitutional right under the Compulsory Process Clause of the Sixth Amendment.⁶ Ultimately, the court granted the government’s motion and quashed the subpoena.⁷

“Zherka was charged . . . with two counts of disorderly conduct” that arose out of an incident that took place at “1 Roosevelt Square [in] Mount Vernon, New York.”⁸ On November 10, 2008, he filed a § 1983 claim in the Southern District of New York relating to the alleged disorderly conduct.⁹ Zherka claimed that there was “a conspiracy by numerous Mount Vernon city officials to violate [his]

¹ No. 08-5013, 2009 WL 482366, at *1 (Westchester County Ct. Feb. 25, 2009).

² *Id.* (citation omitted).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Zherka*, 2009 WL 482366, at *1. *See also* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .”). *See also* *Washington v. Texas*, 388 U.S. 14, 18 (1967) (noting that the United States Supreme Court has extended the Sixth Amendment compulsory process right to the states through the Due Process Clause of the Fourteenth Amendment).

⁷ *Zherka*, 2009 WL 482366, at *1.

⁸ *Id.*

⁹ *Id.*

federal constitutional rights.”¹⁰

Prior to trial, Zherka issued a subpoena for the DA to testify as to the circumstances surrounding his October arrest.¹¹ The government opposed the subpoena and filed a motion to quash it.¹² In response, Zherka filed his own motion with the Westchester County Court, but the court granted the government’s motion and quashed the subpoena.¹³

Under the Sixth Amendment of the United States Constitution, the accused has the right to subpoena “witnesses in his favor.”¹⁴ Even though the DA presented a signed affirmation that she was not at the scene when the arrest took place and did not “have any personal knowledge of the events that led to the defendant’s arrest,” Zherka subpoenaed her to testify as to the circumstances surrounding his arrest.¹⁵ It is well established that a court may prevent a witness from testifying where the witness does not have first hand knowledge regarding the facts and circumstances surrounding the charges brought against the defendant.¹⁶ Because of the DA’s physical absence at the event that led to Zherka’s arrest and her lack of personal knowledge, the court found that she was a hostile witness with “no relevant information to offer.”¹⁷ Therefore, the court granted the government’s motion and quashed Zherka’s subpoena because he failed to offer any evidence why “the [DA’s] testimony would be relevant.”¹⁸

Although the Bill of Rights was ratified in 1791, the United States Supreme Court did not address “the right of an accused to have compulsory process for obtaining witnesses in his favor” until 1967

¹⁰ *Id.*

¹¹ *Id.*

¹² *Zherka*, 2009 WL 482366, at *1.

¹³ *Id.*

¹⁴ U.S. CONST. amend. VI, states, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor”

¹⁵ *Zherka*, 2009 WL 482366, at *2 (noting that Zherka and the Mount Vernon City Mayor, Clinton Young, had a reported but unsworn conversation concerning alleged misconduct by the DA, which influenced his decision to subpoena her).

¹⁶ *Id.* at *1 (“If the court has discretion to limit cross-examination of a witness, then concomitantly, it has the authority to preclude a witness from testifying where that witness lacks any direct or first hand information about the charges against the defendant.”).

¹⁷ *Id.* at *2.

¹⁸ *Id.*

in *Washington v. Texas*.¹⁹ In *Washington*, the Court determined that an individual's right to compel witnesses to testify is a vital part of that individual's ability to build a defense.²⁰ The *Washington* Court stated that "[j]ust as an accused has the right to confront the [government's] witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense."²¹ The Court determined that the trial court did not allow the defendant to put on "a witness who was physically and mentally capable of testifying to events that he had personally observed," and who was able to offer testimony that was "relevant and material to [his] defense."²² Therefore, the *Washington* Court concluded that the defendant's right to compel witnesses in his favor was violated.²³

Evidentiary rules have played an important role in the Court's treatment of a criminal defendant's constitutional right to compulsory process. In *Chambers v. Mississippi*,²⁴ the United States Supreme Court held that a defendant is not afforded a fair trial when evidentiary rules preclude him from calling witnesses in his favor.²⁵ In that case, the witnesses for the defense would have testified that another suspect, McDonald, had made inculpatory statements on the night of the shooting that implicated him as the shooter, which would have exonerated Chambers.²⁶ The Supreme Court of Mississippi denied Chambers' request to cross-examine McDonald based on the "common-law rule that a party may not impeach his own witness."²⁷ This common-law rule is supported by the notion that when a party calls a witness to testify on his behalf, he "vouches for [the witness's] credibility."²⁸ However, the Supreme Court found this voucher rule to be obsolete and not practical in modern-day criminal trials.²⁹ The

¹⁹ *Washington*, 388 U.S. at 17.

²⁰ *Id.* at 19.

²¹ *Id.* (recognizing that "[t]his right is a fundamental element of due process of law").

²² *Id.* at 23 (footnote omitted) ("The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.").

²³ *Id.*

²⁴ 410 U.S. 284 (1973).

²⁵ *Id.* at 302-03.

²⁶ *Id.* at 289.

²⁷ *Id.* at 295.

²⁸ *Id.* (quoting *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966)).

²⁹ *Chambers*, 410 U.S. at 296. The Court stated:

Court also noted that although the evidentiary rule against hearsay is crucial in jury trials, hearsay exceptions have been created for situations where testimony is likely to be trustworthy and crucial to the defendant's case.³⁰ According to the Court, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."³¹

Fifteen years later in *Taylor v. Illinois*,³² the Court's ruling was quite the opposite from the *Chambers* decision. The *Taylor* Court considered the issue of whether a defendant's constitutional rights are violated when he is barred from calling a witness in his favor because of a violation of a discovery rule.³³ In *Taylor*, the defendant contended that the Sixth Amendment is an absolute right and that a preclusion sanction is never permissible.³⁴ However, the Court did not agree with this argument when it noted that the accused does not have an unlimited right to compel witnesses in his favor.³⁵ For example, the Court stated that defendants do not have an absolute right to compel "testimony that is incompetent, privileged, or otherwise inadmissible."³⁶ The accused cannot exercise his Sixth Amendment right without restrictions because there are public interests that must be taken into account, such as the integrity of the adversarial process, fairness, upholding justice, and the potential for unfair prejudice at trial.³⁷ The Court held that the Compulsory Process

Whatever validity the "voucher" rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law But in modern criminal trials, defendants are rarely able to select their witnesses: they must make them where they find them.

Id. (internal footnotes omitted).

³⁰ *Id.* at 302.

³¹ *Id.* *But see* *Maness v. Wainwright*, 512 F.2d 88, 92 (5th Cir. 1975) (noting that based on the trial record, the unreliability of hearsay testimony and the unavailability of evidence, that the application of the voucher rule "did not deprive [the defendant] of a trial in accord with notions of fundamental fairness embodied in the due process clause").

³² 484 U.S. 400 (1988).

³³ *Id.* at 401-02.

³⁴ *Id.* at 410.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Taylor*, 484 U.S. at 414-15.

Clause does not prohibit a court from imposing a sanction (i.e. preventing the testimony of a potential defense witness) in response to a discovery rule violation.³⁸

Once a court conducts an *in camera* review and determines that a file contains material information, a defendant is entitled access to such documents.³⁹ In *Pennsylvania v. Ritchie*, the defendant was charged with, *inter alia*, rape and incest against his thirteen-year-old daughter.⁴⁰ The government alleged that Ritchie assaulted his daughter several times a week and that she had reported the assaults to law enforcement and Children and Youth Services (“CYS”).⁴¹ Ritchie subpoenaed CYS for the records relating to his daughter, but CYS refused to turn over any files on the ground that the records were privileged and confidential.⁴² However, under Pennsylvania law, privileged records are subject to eleven exceptions, one of which requires “agenc[ies to] disclose . . . reports to a ‘court of competent jurisdiction pursuant to a court order.’ ”⁴³ Ritchie argued that he had a right to the information because the files may have contained the identification of witnesses that would testify in his favor or would provide exculpatory evidence.⁴⁴ In addition, he specifically requested a medical file that CYS compiled in 1978, but the trial judge refused his request, finding credibility in a CYS employee’s statement that the file did not contain the medical information Ritchie was looking for.⁴⁵ Subsequently, Ritchie was convicted on all charges and sentenced to three to ten years’ imprisonment.⁴⁶

After a series of appeals, the Pennsylvania Supreme Court determined that Ritchie’s Sixth Amendment right to compulsory process was violated when CYS did not turn over the requested med-

³⁸ *Id.* at 409. There is a need for limits because the purpose of the Compulsory Process Clause would be offended if it were interpreted to include an absolute right to even allow suspected perjury testimony at trial. *Id.* at 416.

³⁹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 (1987).

⁴⁰ *Id.* at 43.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 43-44 (internal citation omitted).

⁴⁴ *Ritchie*, 480 U.S. at 44.

⁴⁵ *Id.* The trial judge even acknowledged that he did not actually study the whole file to verify that the medical report was not in the record. *Id.* at 44 n.3.

⁴⁶ *Id.* at 45.

ical file.⁴⁷ Ritchie argued that the trial court precluded him from accessing the names of favorable witnesses and other potentially exculpatory evidence that was contained in the file.⁴⁸ It is well-established Sixth Amendment jurisprudence that a criminal defendant must be afforded with the government's assistance in obtaining favorable witnesses at trial or evidence that might have an impact on the defendant's guilt or innocence.⁴⁹ According to the Court, the government is "obligat[ed] to turn over evidence in its possession that is both favorable to the accused and *material* to guilt or punishment."⁵⁰

The Court recognized the policy implications in protecting this information, but also noted that the public interest should not override the possibility of disclosure in all cases.⁵¹ Without any clear governmental policy precluding disclosure in every criminal prosecution, the Court found that relevant information should be disclosed so that "a court of competent jurisdiction [can] determine[] [if] the information is 'material' to the" defendant's case.⁵² Therefore, the Court concluded that Ritchie was entitled to access the CYS file subject to an *in camera* examination by the trial court to decide whether the file contained material information.⁵³

The right to compulsory process is not absolute and, in order to compel a witness to testify on his behalf, the defendant must make a reasonable showing of how the testimony is "material and favorable to his defense."⁵⁴ In *United States v. Valenzuela-Bernal*, the defendant claimed that the deportation of two eyewitnesses violated "his Sixth Amendment right to compulsory process for obtaining favora-

⁴⁷ *Id.* at 55.

⁴⁸ *Ritchie*, 480 U.S. at 44.

⁴⁹ *Id.* at 56.

⁵⁰ *Id.* at 57 (emphasis added) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The Court found that "'[e]vidence is *material* only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* (emphasis added) (alteration in original) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

⁵¹ *Id.*

⁵² *Ritchie*, 480 U.S. at 58.

⁵³ *Id.* (noting that if the file contained information that was material the defendant must be given a new trial, but if the file did not contain any material information the prior conviction may be reinstated by the lower court).

⁵⁴ *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (footnote omitted).

ble witnesses.”⁵⁵ The defendant, a citizen of Mexico, was indicted for transporting an individual in violation of federal law.⁵⁶ After interviewing the defendant and other passengers, an Assistant United States Attorney determined that the passengers did not offer any material information for the government or any supporting evidence for the defense.⁵⁷ Thus, the government deported the two passengers back to Mexico.⁵⁸ The defendant asserted that the government’s deportation of the passengers did not afford him a sufficient opportunity to speak to them “to determine whether they could aid in his defense.”⁵⁹ However, the defendant failed to make an effort to explain how the deported passengers could aid in his defense.⁶⁰

The Court found that the Sixth Amendment does not guarantee a criminal defendant the right to ensure the appearance and “testimony of any and all witnesses,” but rather “it guarantees him ‘compulsory process for obtaining *witnesses in his favor.*’”⁶¹ Therefore, the defendant could not argue that his Sixth Amendment right to compulsory process was violated by “merely . . . showing that [the] deportation of the passengers deprived him of their testimony.”⁶² Rather, the Court explained that the defendant must make some reasonable “showing of *how* their testimony would have been both material and favorable to his defense.”⁶³ As a result of the defendant’s failure to show how the testimony he wished to offer would have been material and favorable, the Court concluded that he did not prove an infringement of his Sixth Amendment right.⁶⁴

The New York Constitution does not contain an analog to the

⁵⁵ *Id.* at 861.

⁵⁶ *Id.* at 860.

⁵⁷ *Id.* at 861.

⁵⁸ *Id.*

⁵⁹ *Valenzuela-Bernal*, 458 U.S. at 861.

⁶⁰ *Id.* (noting that Valenzuela-Bernal’s defense was that he was unaware that the individual he transported was an illegal alien).

⁶¹ *Id.* at 867 (quoting U.S. CONST. amend. VI).

⁶² *Id.*

⁶³ *Id.* (emphasis added) (footnote omitted). See also *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990) (holding that the right to compulsory process “is not absolute”); *People v. Hendrix*, 820 N.Y.S.2d 411, 417 (Sup. Ct. Kings County 2006) (holding that the defendants did not establish any “[Sixth Amendment] compulsory process right to compel a non-governmental agency to turn over prior witness statements”).

⁶⁴ *Valenzuela-Bernal*, 458 U.S. at 874.

Compulsory Process Clause of the United States Constitution, but the United States Supreme Court extended the right of criminal defendants to subpoena “witnesses in [their] favor” to the states through the Due Process Clause of the Fourteenth Amendment in *Washington v. Texas*.⁶⁵ Even though the New York Constitution does not contain its own version of the Sixth Amendment’s Compulsory Process Clause, it is important to analyze how New York courts have interpreted the federal provision. In reaching its conclusion, the *Zherka* court primarily relied on *People v. King*.⁶⁶ In *King*, the defendants were accused of participating in a protest inside Saint Patrick’s Cathedral during a mass where Archbishop John Cardinal O’Connor was present.⁶⁷ As a result of their demonstration, the defendants were arrested and charged with disorderly conduct, trespass, resisting arrest, and disruption of religious service.⁶⁸ The defense subpoenaed Cardinal O’Connor to testify at trial and, in response, the Cardinal moved to quash the subpoena claiming that he did not have relevant knowledge.⁶⁹ In support of his motion to quash the subpoena, Cardinal O’Connor argued that the subpoena was a form of harassment.⁷⁰ On the other hand, the defendants contended that Cardinal O’Connor’s testimony was relevant and essential “because he [was] the person they [were] alleged to have disrupted.”⁷¹

The *King* court noted that if the Cardinal’s testimony was considered to be material and relevant to the defendants’ guilt or innocence, the defendants’ Sixth Amendment right to call witnesses in their favor could not be denied.⁷² The defendants asserted that Cardinal O’Connor’s state of mind as to whether he believed to have been disrupted was a material and relevant issue for trial.⁷³ However, the court found that Cardinal O’Connor’s testimony pertaining to his

⁶⁵ *Washington*, 388 U.S. at 18 (“The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.”).

⁶⁶ 561 N.Y.S.2d 395 (N.Y. City Crim. Ct. 1990).

⁶⁷ *Id.* at 396.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *King*, 561 N.Y.S.2d at 396.

⁷² *Id.*

⁷³ *Id.* at 397.

state of mind in abruptly ending his homily and changing the direction of the service was not relevant or material to the questions at trial.⁷⁴ Instead, the court stated that “[t]he issue . . . is whether the alleged actions of [the] defendants caused a disturbance which interfered with the ability to celebrate the mass of those gathered at the cathedral.”⁷⁵ Furthermore, the court held that the testimony of Cardinal O’Connor was neither relevant nor material to any of the crimes, and therefore, granted the motion to quash the defense’s subpoena.⁷⁶

For criminal defendants to call witnesses in their favor, they must show some close connection between the potential witness and their defense.⁷⁷ In *People v. Monroe*, the defendant asserted that he was deprived of his Sixth Amendment right to call witnesses in his favor when the court did not allow the guidance counselor of an adverse witness to appear and testify to matters concerning the witness’s domestic affairs.⁷⁸ The court found that the testimony of the guidance counselor was too remote from the question of the “witness’s bias or motive to fabricate.”⁷⁹ The Appellate Division, Second Department, concluded that the lower court appropriately exercised its discretion in not allowing the defendant to present the testimony of the guidance counselor.⁸⁰

Additionally, a defendant is not entitled to compel documents if they are solely sought to impeach the witness’s credibility.⁸¹ In *People v. Gissendanner*, the defendant issued subpoenas duces tecum to obtain the personnel records of two police officers who were the main witnesses testifying against him.⁸² Officer Ronald Eisenhauer testified that he acted as an undercover investigator who negotiated with Gissendanner to purchase illegal drugs.⁸³ Gissendanner’s testimony was inconsistent with Officer Eisenhauer’s testimony in that he

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *King*, 561 N.Y.S.2d at 397.

⁷⁷ *See People v. Monroe*, 817 N.Y.S.2d 150, 152 (App. Div. 2d Dep’t 2006).

⁷⁸ *Id.* at 151, 152.

⁷⁹ *Id.* at 152.

⁸⁰ *Id.*

⁸¹ *People v. Gissendanner*, 399 N.E.2d 924, 927 (N.Y. 1979).

⁸² *Id.* at 926.

⁸³ *Id.*

denied ever selling drugs to him.⁸⁴ The defense sought to introduce the officers' personnel records as trial strategy to impeach their credibility and sway the jury into believing that they conjured up a story.⁸⁵ The court noted that the guarantee of compulsory process, when balanced with the confidentiality of police personnel records, does not always prevail.⁸⁶ In the court's view, "though access must be afforded to otherwise confidential data [that is] relevant and material to the determination of guilt or innocence, . . . there is no such compulsion when requests to examine records are motivated by nothing more than impeachment of witnesses' general credibility."⁸⁷ Defense counsel made no inquiry into which of the records might have had some bearing on the guilt or innocence of the defendant.⁸⁸ Therefore, the court was justified in denying the application.⁸⁹

Likewise, a defendant is entitled to access surveillance tapes when they depict events leading to his arrest, but not if they are sought exclusively for impeachment purposes.⁹⁰ The principle set forth in *Gissendanner*, that "there is no compulsion when requests to examine records are motivated by nothing more than impeachment of witnesses' general credibility,"⁹¹ was of important application in *People v. Giler*.⁹² In *Giler*, the defendant was "charged with resisting arrest, attempted assault in the third degree, and disorderly conduct" for an incident that took place outside the 14th/Midtown South Police

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Gissendanner*, 399 N.E.2d at 927.

[T]he constitutional roots of the guarantees of compulsory process and confrontation may entitle these to a categorical primacy over the State's interest in safeguarding the confidentiality of police personnel records, [but] it is not to be assumed that, . . . police confidentiality must always yield to the demands of a defendant.

Id.

⁸⁷ *Id.*

⁸⁸ *Id.* at 928.

⁸⁹ *Id.* Those seeking the records must make a "good faith [showing] of some factual predicate which would make it reasonably likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw." *Gissendanner*, 399 N.E.2d at 928.

⁹⁰ *People v. Giler*, No. 2008NY016624, 2008 WL 2169910, at *1, *2 (N.Y. City Crim. Ct. May 22, 2008).

⁹¹ *Gissendanner*, 399 N.E.2d at 927.

⁹² *Giler*, 2008 WL 2169910, at *2 (citing *Gissendanner*, 399 N.E.2d at 927).

Precinct in Manhattan.⁹³ The defendant issued a subpoena to retrieve all surveillance tapes that caught the incident on camera.⁹⁴ The non-party New York City Police Department (“NYPD”) moved to quash the subpoena asserting that the defendant could not obtain the surveillance footage because it was governed by the rules of discovery.⁹⁵ The defendant in *Giler* did not seek to subpoena routine police reports produced from the investigation of the crime, but rather sought to obtain surveillance footage portraying the actual confrontation “giving rise to the criminal charges.”⁹⁶ The surveillance tapes were “‘relevant and material to the determination of guilt or innocence’” because they depicted a live and comprehensive picture of the actual incident, and were “not sought solely in the speculative hope of unearthing possible ‘impeachment of witnesses’ general credibility.”⁹⁷ Thus, the defendant was entitled to obtain the surveillance tapes via a subpoena duces tecum.⁹⁸

Similar to the defendant in *Ritchie*, the defendant in *People v. Thurston*⁹⁹ sought to obtain records from a children’s center to help build a defense.¹⁰⁰ Following a jury trial, the defendant was convicted of sodomy, sexual abuse, and endangering the welfare of a child.¹⁰¹ On appeal, he argued that he was denied a fair trial because of erroneous evidentiary rulings.¹⁰² According to the defendant, the trial court denied him his Sixth Amendment protection when it denied his subpoena for the children’s center records of the two victims that would have disclosed the abuse.¹⁰³ In support of the subpoena, the defendant argued that the records were relevant and material to his defense.¹⁰⁴ However, the trial court found the records to be “illeg-

⁹³ *Id.* at *1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *2.

⁹⁷ *Giler*, 2008 WL 2169910, at *2 (quoting *Gissendanner*, 399 N.E.2d at 927).

⁹⁸ *Id.* at *3.

⁹⁹ 619 N.Y.S.2d 465 (App. Div. 4th Dep’t 1994).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 466.

¹⁰⁴ *Thurston*, 619 N.Y.S.2d at 466 (“[H]is defense [was] that the children were manipulated and that the sexual abuse allegations had been suggested to them by others who had a vendetta against him.”).

ible and contained nothing that would bolster or support anything that ha[d not] been said in [the] courtroom already.”¹⁰⁵ The appellate court agreed with the defendant and held that the records were material to his defense, and that the lower court erred in keeping the records from him.¹⁰⁶

A common thread throughout these cases is that in order to compel witnesses or produce documents in the defendant’s favor, the defense must show how the witnesses or documents are or would be “relevant and material . . . to [its] defense.”¹⁰⁷ The defendant must articulate *how* a witness meets this standard, which is not easy for defendants to do. For example, in *Valenzuela-Bernal* the potential witnesses were deported before the defense had an opportunity to interview them to determine the materiality of their potential testimony.¹⁰⁸ Even in the New York case of *King*, Cardinal O’Connor, who had first hand knowledge of the demonstration, was considered to not have relevant or material information because the court determined that the testimony the defense sought from him had no bearing on whether the demonstration caused a disturbance or actually impeded the ability to observe mass.¹⁰⁹ Although the defense in *King* put forth an argument as to how they believed his testimony would help their defense, the court did not find the reason to be sufficient or convincing. Quite possibly, Cardinal O’Connor was not the best witness for the defense to subpoena, considering the other duties that he was performing during mass. Even though the jury has the designated role of weighing the evidence, it appears that in many compulsory process cases the judges are weighing the evidence. Although the defendant may not be able to build a successful defense with the witnesses that he seeks, it should be up to the jury and not the judge to determine their value.

Public policy, discovery rules, and rules of evidence have hindered many chances for defendants to subpoena witnesses in their favor, but the Constitution should certainly be given greater defe-

¹⁰⁵ *Id.* at 465-66.

¹⁰⁶ *Id.*

¹⁰⁷ *Washington*, 388 U.S. at 16.

¹⁰⁸ *Valenzuela-Bernal*, 458 U.S. at 861.

¹⁰⁹ *King*, 561 N.Y.S.2d at 397.

rence.¹¹⁰ In *Taylor*, the defendant was deprived of his compulsory process protection due to a discovery violation.¹¹¹ Understandably, discovery rules are in place to promote fairness and efficiency; but what seems to be blatantly unfair is the deprivation of one's constitutional protections.

Even though the *Zherka* court does not clearly articulate the underlying reason or reasons motivating Zherka to subpoena the DA, it appears that the defense hoped to uncover an alleged conspiracy. To this end, the defendant should have drafted the subpoena more broadly rather than confining it to the October 31, 2008 arrest. Zherka alleged misconduct on the part of the DA and wanted the chance to question her about it, but the DA signed a sworn affirmation that stated that she had no knowledge about the incident, which interfered with any chance of subpoenaing her.¹¹² It appears that the DA would only be considered a favorable witness for the defense once he could successfully impeach the DA on cross-examination (which would be hard to accomplish). By signing the affirmation, the DA protected herself from being called as a witness for the government or for the defense. This is certainly frustrating to the defendant, to say the least.

The Sixth Amendment establishes a division between material witnesses that are "against" the criminal defendant and those "in his favor."¹¹³ According to Peter Westen, this division places the burden to produce witnesses against the defendant on the government and witnesses in favor of the defense on the defendant.¹¹⁴ In *Zherka*, the

¹¹⁰ Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1301-02 (2002).

Indeed, the Court should not be involved in re-making the laws of evidence; that is the duty of legislators. . . . The rules of evidence should not dictate the substance of the Constitution, lest the Constitution have no higher meaning. . . . [T]he Constitution should have overriding principles that are easily and readily applied to evidentiary rulings, not for the purpose of relitigating the evidentiary issues--such as whether the evidence in the case was sufficiently reliable--but for injecting precepts of fundamental fairness that are broadly applicable.

Id. at 1301-02.

¹¹¹ *Taylor*, 484 U.S. at 401-02.

¹¹² *Zherka*, 2009 WL 482366, at *2.

¹¹³ Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 603 (1978) (internal quotations omitted).

¹¹⁴ *Id.*

allocation of this logical burden did not work in the defendant's favor. Since the government did not call the DA as a witness and because Zherka was unable to show that the DA's testimony would have been material to his defense, Zherka was in a lose-lose situation. According to Westen's analysis, Zherka should have been permitted to call the DA to the stand and ask leading questions, because such questions might have elicited "testimony in his favor."¹¹⁵

All things considered, the court got it right in the case. The criminal defendant's right to compel witnesses in his favor is not absolute and may be limited not only by evidentiary rules, but also "by the state's legitimate interest in efficient trials."¹¹⁶ To allow every possible witness to testify without establishing how the witness's testimony would be relevant and material at the outset of trial would hinder the effectiveness of the trial process as a whole. However, after analyzing the federal courts' and New York courts' decisions, it looks as if the Compulsory Process Clause has either been overlooked or undervalued in many decisions as a vital right of criminal defendants. Both the United States Supreme Court and New York courts have created an overwhelming amount of barriers for defendants who dare to exercise their rights under the Compulsory Process Clause.

Michelle Kliegman

¹¹⁵ *Id.* at 613 (internal quotations omitted).

¹¹⁶ Mary Jane Wilson-Bilik & Craig Douglas Mills, *Sixth Amendment Issues at Trial*, 78 GEO. L.J. 1190, 1212-13 (1990).