The Constitutional Case for Incarcerated Persons' Access to *DefenseMap.com*

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A problem well-stated is half-solved.
—inventor Charles Kettering

A. Introducing the constitutional issue

As the progressive leadership at the Saint Joseph County Jail has demonstrated, there is ample reason for jails and prisons to voluntarily afford inmates access to this revolutionary tool. See Some of DefenseMap.com's Compelling Benefits for the Criminal Justice System. It is hoped very few jails and prisons will demand legal proof of a right to it.

Still, that proof is supplied here. This article shows how the unanimous "balance of forces" discovery decision in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) actually requires access to DefenseMap.com as against the current system of overwhelming prosecutorial advantage in the interviewing of incarcerated persons.

In sum, while prosecutors and police are routinely interviewing incarcerated witnesses by transporting them to safe, private, and technology-rich interview rooms, defense attorneys and their delegates are just as routinely forced to interview even their own clients either (a) in medically unsafe, privacy-compromised, and technology-starved jail and prison settings or (b) in telephonic or video exchanges equally devoid of prosecutors' advantages. As a consequence, in every American jurisdiction the prosecution enjoys even with mere witnesses a vast advantage over what defense attorneys must endure with their clients, persons to whom the system ostensibly owes constitutional guarantees of due process and effective legal assistance.

In making the case for incarcerated persons' access to this new resource, this article assumes an acquaintanceship through A Comprehensive Introduction to DefenseMap.com with the following.

1. Defense Maps' crucial breadth and powerful benefits.
2. Early attorney reviews of (and successes with) this resource.
3. These Maps' manner of overcoming Six Hidden Barriers to client sharing.
4. These Maps' potential for bringing essential capacities to the defense approximating the superior investigative capacities of the prosecution.

B. The transformative potential of Defense Maps in the representation of incarcerated persons.

The efficacy of Defense Maps in individual cases has led to discussions about implementing inexpensive and highly feasible systems allowing incarcerated persons to create their Defense Maps.

The developers of *DefenseMap.com* are available through the website's *Helpline* to help choose from a variety of methods of implementation that afford both these invaluable Maps and also security for jails and prisons. Here are some of those methods.

1. As shown by the successful pilot program at the Level I St. Joseph County Jail, jails and prisons can now provide inmates with access to Chromebooks accessing only DefenseMap.com. Inmates are completing their Defense Maps and instantly placing them on their counsel's professional accounts with DefenseMap.com.
2. The growing number of prisons issuing tablets to inmates from firms such as Securus Technologies, https://securustech.net, and GTL Corporation, https://www.gtl.net, can have those tablets networked for cost-free inmate use of *DefenseMap.com*.
3. And, of course, attorneys as officers of the court could even be entrusted with working with inmates on standard Internet-connected laptops to complete Defense Maps and not venture to any other sites or programs during their client visit.

Other methods can be considered. The only requirement is a simple commitment to implement the conclusion in *Wardius* that the Due Process Clause guarantees the defense at least a balance of forces with the prosecution (which never has to struggle with a denial of resources of this sort).

Some preliminary thoughts on accomplishing this can be found at Outline of Steps to Implementing DefenseMap.com in a Jail or Other Secure Facility. If jails and prisons refuse to cooperate, sample motions are available through the DefenseMap.com Helpline.

The public policy reasons for this access to DefenseMap.com are overwhelming, even if based on just two considerations: (a) the sheer number (commonly over 400,000) presumed-innocent persons held in American jails awaiting a trial, dismissal, or plea agreement and (b) the inability of many American jails and prisons to assure appropriately complete attorney-client communications, not to mention physical, psychological, and epidemiological safety.

A disturbing string of studies is calling for attention to this crisis in an age of unprecedented incarceration, but we would recommend an examination of even just the one documentary from Bill Moyers and Schumann Media Center documentary on one demonstrably disastrous jail site. See Rikers: An American Jail on Mr. Moyers' website (also available on *YouTube* at Rikers Island).

At least five systemic improvements would follow immediately from the implementation of *DefenseMap.com* in America's jails and prisons.

1. The 400,000+ presumed-innocent defendants held in American jails awaiting justice could have a dramatically elevated experience in the development of their attorney-client relationships, in the effective preparation of their cases, and in the handling of the myriad issues of justice and fairness in their cases.

2. Those 400,000+ presumed-innocent defendants could have the immediate benefit of Defense Maps' inclusion of a page addressing 14 commonly overlooked reasons for their pretrial release and the circumstances making release a sensible option.

3. Entire public defender programs could consider support staff arranging for the prompt availability of Defense Maps in all felony and juvenile cases.

4. Millions of people (adults and juveniles) with involvement in the American legal system could benefit from Defense Maps' prompt wide-ranging review of their lives for purposes of self-improvement, reentry, and other goals ostensibly inherent in America's criminal justice system.

5. An appreciable percent of America's prison population of over 2 million could make beneficial use of Defense Maps in developing and conveying legitimate claims for overdue sentencing and clemency relief, and a smaller but still significant number could have essential help in preparing legitimate cases of actual innocence.

With basic cooperation between any jail or prison on the one hand and the defense bar or public defender office on the other, virtually any incarcerated person could create his or her Defense Map within a day or two of a charge and have it immediately in the hands of their legal representatives. The developers of *DefenseMap.com* are offering their assistance in implementing this plan in any interested jurisdiction or facility, including on the technical requirements. All of these requirements are highly manageable.

C. The constitutional case for incarcerated persons' access to DefenseMap.com

But the reasons for incarcerated persons' access to *DefenseMap.com* go beyond the already-compelling ones of public policy, as a fair application of constitutional law plainly requires that access.

The analysis here is confined to the relevant *federal* constitutional requirement that every accused person have "a *meaningful* opportunity to present a *complete* defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (emphasis added). Many state constitutional and statutory provisions are even more exacting, but the federal constitutional demands alone suffice.

Again, for any jail or prison refusing to afford inmate access to this tool, sample motions are available from the Helpline of DefenseMap.com.

The constitutional question here begins with acknowledging the striking difference between the witness interviewing opportunities of the two sides in the adversarial contest between the

prosecutors and police on the one hand (prosecutors and police being uniformly treated as one entity for this analysis, see *State v. Warren*, 746 P.2d 711, 304 Or. 428 (Or. 1988)) and defense counsel on the other.

Prosecutors and police today (who, of course, have custody and control of incarcerated persons) enjoy the entirely unfettered and routine use of all manner of computer, Internet, and even video- and audio-taping technology in their interviews of incarcerated witnesses. By contrast, defense attorneys are customarily denied even the comparatively modest option of having their clients use an Internet-connected computer even if networked to access only *DefenseMap.com*.

This disparity offends two specific lines of constitutional authority.

That first line of constitutional authority follows from the rule in *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) that the Due Process Clause guarantees to the defense discovery *at least* equal to that afforded the prosecution and police working with them.

Of prime significance is the subject of the *Wardius* Court's unanimous condemnation: a state statute affording the state a relatively miniscule advantage over the defense. At issue was the requirement that the defense, but not the state, give notice of its contentions and witnesses on alibi defenses. But even that quite rare and modest advantage was determined in *Wardius* to offend Due Process.

The Court reasoned as follows. "Although the Due Process Clause has little to say regarding the amount of discovery the parties must be afforded, *but cf. Brady v. Maryland,* 373 U.S. 83 (1963), it does speak to the balance of forces between the accused and his accuser. *Cf. In re Winship*, 397 U.S. 358, 361-364 (1970)." *Wardius v. Oregon*, 412 U.S. 470, 474-75, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). Thus, even on the comparatively infrequent matter of part of a witness list (namely those witnesses speaking to issues of the defendant's presence *vel non* at a location), Due Process does not tolerate an imbalance of forces favoring the prosecution.

Wardius went on to note that if there is to be *any* imbalance in discovery rights, it cannot be in favor of the already heavily favored prosecution. "Indeed, the State's inherent information-gathering advantages suggest that, if there is to be any imbalance in discovery rights, it should work in the defendant's favor," *Id.*, 412 U.S. at 475 fn. 9.

But the prosecution's daily advantages in interviewing incarcerated persons is both institutionalized and overwhelming. Indeed, in interviewing incarcerated persons, prosecutors and police make routine use of transfer of those persons to facilities awash with computer and Internet assistance, and it is constitutionally indefensible that defense counsel not have equal technology assistance in working with their own incarcerated clients (where, by the way, the necessity of a thorough understanding of not just the charged facts but clients' backgrounds is all the more crucial).

It is the height of constitutional moment that amidst all the defense attorneys one may find fumbling through necessarily incomplete interviews of their clients in technology-starved, virus-infested, and privacy-compromised jails and prisons, one virtually never encounters a prosecutor,

prosecution staff member, or police officer interviewing a witness, all of whom conduct their interviews in technology-rich, safe, and private facilities.

Of what moment is it to say, "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive, *Taylor v. Illinois*, 484 U.S. 400, 408-409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), if the vast majority of the 350-850 possibly vital questions in a case can never be effectively asked of an accused?

Or if the accused is deprived of a reasonable opportunity to reflect in private and effectively respond?

Of what moment is it to say, "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging testimony, he has the right to present his own witnesses to establish a defense," *Id.*, at 409, if the defense is effectively deprived of the resources necessary to uncover and develop meritorious defenses and identify necessary witnesses and exhibits?

And especially when those essential resources are ones in daily use by virtually all prosecution-police teams?

The sad reality is that this is not a matter of mere inconvenience to the defense. Vital defenses and mitigation are habitually lost—and not primarily through lack of defense effort but through the inevitable consequences of the resource disparities unconstitutionally hamstringing the defense in every American jurisdiction, and especially in the cases of indigent defendants.

We again draw attention to Rikers: An American Jail on Bill Moyers' website (also available on *YouTube* at Rikers Island) for a picture of the actual circumstances of countless presumed-innocent persons whose defenses currently have not even a remote approximation of the interview technology of the prosecution.

Indeed the case comparisons and defense attorney assessments in A Comprehensive Introduction to DefenseMap.com suggest that the vast bulk of exculpatory and mitigation information in these clients' cases is simply never uncovered. And with that failure follow wholesale losses in the most vital of defendant rights, including the effective assistance of counsel, the effective discovery of defenses and witnesses, cross-examination, and more.

The second line of applicable constitutional authority establishes that, whenever necessary, the prosecution and even courts must actually assist the defense in its case preparation. "Our cases establish, at a minimum, that 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." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

A sampling of the relevant cases under *Wardius* and *Ritchie* suffices to understand the constitutional deficit involved.

Sample *Wardius* cases

1. In *State v. Norris*, 236 P.3d 225, 157 Wash. App. 50 (2010), the Court of Appeals of Washington relied *inter alia* on *Wardius*, 157 Wash. App. at 76 fn. 21, in requiring that the defense have pretrial access to photographic evidence equal to that of the prosecution in cases of alleged child sex abuse, all despite the confidentiality provisions of the federal Adam Walsh Act. Similarly, in both *State v. Boyd*, 158 P.3d 54, 160 Wash.2d 424 (2007) and *State v. Grenning*, 234 P.3d 169, 169 Wash.2d 47 (2010), the Washington Supreme Court overturned child sex offense convictions for the same withholding of access to this evidence under the Adam Walsh Act.

2. The United States Court of Appeals for the Seventh Circuit relied on *Wardius* in *United States v. Shrake*, 515 F.3d 743 (7th Cir. 2008) in finding error in the refusal of the district court to require the government to afford the defendant's computer expert the same access to evidence that it gave to its own expert. The court refused to reverse given that the only relief requested by the defense had been the exclusion of the government expert's testimony while the correct remedy would have been access on equal terms. But the court was unwavering that, "[a]access provided to private experts retained by the prosecution must be provided to private experts retained by the defense." *Id*. at 747.

3. In *State v. Warren*, 746 P.2d 711, 304 Or. 428 (Or. 1988), the Oregon Supreme Court vacated sodomy and sexual abuse convictions for the trial court's *Wardius* error in denying the defense equal access to the files of the state's Children's Services Division.

4. In *Hill v. Superior Court*, 518 P.3d 1353, 10 Cal.3d 812, 112 Cal. Rptr. 257 (1974), the California Supreme Court ruled in a mandate action that despite claims of financial cost and extreme inconvenience, the prosecution was obligated under *Wardius* to use its statutory access to criminal records to comply with a defense request for the rap sheets of the prosecution witnesses. The court curtly rejected the state's position that it could dictate alternative measures for the defense, such as cross-examining state witnesses about their criminal records. *Hill*, at 817-19.

5. *State v. Boot*, 697 P.2d 1034, 40 Wash. App. 215 (1985) held that in the proper circumstances, a defendant has the right under *Wardius* and other authorities to demand an identification lineup, though no error occurred in the case given that the defense simply failed to follow through on the lineup ordered by the trial court.

6. In *Evans v. Superior Court*, 522 P.2d 681, 11 Cal.3d 617, 114 Cal. Rptr. 121 (1974), the California Supreme Court found a *Wardius* violation in a trial court's denial of a defense-requested identification lineup. The California Supreme Court cited *Wardius* in reversing the trial court's denial based on its belief it lacked the authority to order a lineup despite finding fair and reasonable in the circumstances. "Because the People are in a position to compel a lineup and utilize what favorable evidence is derived therefrom, fairness requires that the accused be given a reciprocal right to discover and utilize contrary evidence." *Id.*, 11 Call.3d at 623.

7. In *United States v. Bahamonde*, 445 F.3d 1225 (9th Cir. 2006), a split panel of the United States Court of Appeals for the Ninth Circuit reversed a marijuana importation conviction on *Wardius* Due Process grounds for the trial court's bar to the defendant's attempt to present the testimony of the government's case agent. The trial court had relied on a government assertion the defense had not complied with regulations of the Department of Homeland Security. Those regulations required nongovernment parties (but not the government) to "set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought" and limited the resulting Department employee testimony to "those matters which were specified in writing and properly approved by the appropriate Department . . . ." 6 C.F.R. Sec. 5.45(a). And consistent with the flood of cases treated in this article, it emphasized, "Nothing in *Wardius* limits its reasoning to alibi defenses . . . ." *Id*., at 1230.

Sample *Ritchie* cases

8. The Georgia Supreme Court in *Davenport v. State*, 711 S.E.2d 699, 289 Ga. 399 (2011) reversed a conviction for the trial court's failure to sufficiently assist a defendant in procuring the testimony of an out-of-state witness, citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) on the government's obligation to assist the defense.

9. A distinctly similar *Pennsylvania v. Ritchie* analysis led to the reversal by the Maryland Supreme Court of a heroin possession conviction in *Wilson v. State*, 693 A.2d 344, 345 Md. 437 (1997) for the failure of the trial court to assist the defense in enforcement of a subpoena for a witness's attendance.

10. The United States Court of Appeals for the Third Circuit reversed a conviction in *Government of Virgin Islands v. Mills*, 956 F.2d 443 (3d Cir. 1992) on a similar analysis under *Pennsylvania v. Ritchie*. In colorful case, within minutes of being taken into custody for refusing to testify, a defense witness told the Marshals he regretted his behavior on the witness stand and was willing to testify. Unfortunately for the verdict, the Marshals and judge kept these witness sentiments to themselves and thus deprived the defense of the assistance it required to present the testimony.

11. *Pennsylvania v. Ritchie*'s obligation of government assistance to the defense has been extended to cases where the prosecution refuses to accept service of a subpoena for the testimony of witnesses they effectively control. *United States v. Collins*, 551 F.3d 914, 927 (9th Cir. 2009); *United States v. Gonzalo Beltran*, 915. F.2d 487, 488-89 (9th Cir,. 1990).

12. In *Void v. State*, 601 A.2d 124, 325 Md. 386 (1992), the Maryland Supreme Court reversal of kidnapping and robbery convictions was compelled by the trial court's quashing of defense subpoenas directed to three current police officers who might have given testimony that the alleged victim was dishonest and unreliable. Relying *inter alia* on *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987)'s holding that defendants are entitled to assistance, not obstacles, to their defenses, the Maryland

> Supreme Court ruled that reversal was required even though it was not clear that the subpoenaed officers' testimony would be admissible. *Void v. State*, at 394.

These authorities make hash out of the current state of affairs whereby the prosecution and police enjoy superior access to mere witnesses than defense attorneys have to either witness *or even their own clients*. To the constitutional wisdom in these cases, three observations specific to the question of access to *DefenseMap.com* are helpful.

First, the deprivations in virtually all these cases are near trifles compared with condemning defense counsel to proceed without the one tool that can pose up to 850 questions, provide a private setting for the fullest client reflection and responses, and assist in finding and highlighting the issues, defenses, and mitigation in each client's case. *Wardius* itself, while meriting Supreme Court unanimity, was concerned with only part of a witness list (and one limited to the relatively rare defense of alibi at that). By contrast, the unavailability of access to a Defense Map strikes at the heart of the defenses and mitigation in almost all cases.

Second, defense counsel often has responsibility for a breadth of inquiry far exceeding that of prosecutors. There are dozens of topics and hundreds of inquiries potentially relevant to the innocence and mitigation issues in each client's life, often an encyclopedia more than a prosecutor's burden of addressing a quite limited number of material elements of an offense.

Third, the disparity in resources already warned about in *Wardius* has not only endured but grown since 1973. Since *Wardius* explicitly cautioned, "Indeed, the State's inherent information-gathering advantages suggest that, if there is to be any imbalance in discovery rights, it should work in the defendant's favor," *Id.*, 412 U.S. at 475 fn. 9, the size and sophistication of police departments, prosecution-connected crime labs, and even entirely new fields of forensic science have all shown marked growth.

In fact, the current *Wikipedia* article on "Forensic science" lists 43 fields of forensic science, over half of which appear to have emerged since the *Wardius* decision in 1973. The following examples show this prosecutorial advantage expanding faster with every passing year.

1. The advent of tracking devices discussed in *United States v. Jones*, 565 U.S. 400 (2012).
2. The cell site location data discussed in *Carpenter v. United States*, 585 U.S. (2018), and broadly celebrated by prosecutors, including in "Diving into Data: Prosecutors Say New High-Tech Crime Units Will Be Beneficial; Public Defenders Not So Sure," *The Indiana Lawyer*, November 24, 2021.
3. The facial recognition technology twinned with the millions of government cameras in operation in the United States in Wikipedia on Clearview AI and Kashmir Hill, "Before Clearview Became a Police Tool, It Was a Secret Plaything of the Rich," *New York Times*, March 5, 2020.
4. The blending of previously "siloed" information so that police and prosecutors have access to data banks far outside their own. Michael Steinberger, *Does Palantir See Too Much*, New York Times Sunday Magazine, October 21, 2020.

D. The readily available assistance in implementing DefenseMap.com *in jails and prisons.*

The creators of this unprecedented tool make themselves available to consult with jurisdictions wishing to implement it (including jails, prisons, courts, and defense bars). They are even willing to assist pilot programs in seeking charitable donations from criminal justice reform organizations to place computers in these settings.

A pilot program with the visionary sheriff and staff at the Level I St. Joseph County Jail in South Bend, Indiana shows how easy and safe this vital website resource is. Defense attorneys in that jurisdiction can now simply send the jail warden a list of clients from whom they want Defense Maps—and within 48 hours completed Maps are on those attorneys' professionals accounts with DefenseMap.com. And with no security risk to the facility. A concise summary of the Jail and Prison Version of DefenseMap.com is available at FAQ #25.

There is now no legitimate excuse to withhold this tool from the defense.