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

Almost half a century ago, the Supreme Court unanimously struck down a state statute for affording the prosecution more discovery than the defense even though only on a minor measure (the opposing party's claims and witnesses regarding an alibi defense). *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973).

This article shows how the reasoning in *Wardius*—that the Due Process Clause guarantees a "balance of forces" between the prosecution and defense with an imbalance being permissible only if in favor of the defense—cannot tolerate the current 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 forced to interview even their own clients either (a) in 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, 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 the effective assistance of counsel.

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 capacitates 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—and to immediately place their Maps on the professional accounts of the attorneys or public defender offices representing them.

These systems would require comparatively little to function.

1. Some inexpensive computers (basic chromebooks, desktops, or other devices might be selected, and it is possible that jails and prisons could ask for donation assistance in their procurement).
2. Simple networking so that the devices reach only *DefenseMap.com*. IT staff have some easy options for this, including articles such as *Chron*, How to Block All Websites Except One and Chromebook Answers: Change Site Permissions and products such as NetLimiter.com. Additionally, 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. Access to a printer for inmates' own copies of their Maps.
4. A page of instructions for inmates' work.
5. A room where the website work can be done, with approximately 3-4 hours allocated for completion of the work and some opportunity to return to make later additions.
6. We believe incarcerated clients should have the right to use all features of DefenseMap.com. However, any objection of jail or prison administrators to clients' ability to transfer completed Defense Maps directly to attorneys' professional accounts can be easily accommodated. The facility's IP address related to the client computers or tablets can simply be used to create a Security Zone that would disable (i) any access to the subject Maps except within that Security Zone and (ii) any ability to share the subject Maps with attorneys except by mailing printed copies. This Security Zone version (sometimes called "Jail/Prison version") and its removal of all security issues are explained in FAQ #25 and can be implemented in less than a day.

Some preliminary thoughts on accomplishing this can be found at Outline of Steps to Implementing DefenseMap.com in a Jail or Other Secure Facility.

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.

The Posts link of the website offers this Sample Motion for Inmate Access to DefenseMap.com.

The constitutional question here begins with acknowledgement of 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, 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. (See *State v. Warren*, 746 P.2d 711, 304 Or. 428 (Or. 1988) on the uniform treatment of prosecutors and police as a joint entity in these *Wardius* issues.)

Of prime significance is the subject of the *Wardius* Court's unanimous condemnation: a state statute affording the state a comparatively 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 b 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)." 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 prosecutorial side. "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 advantages in interviewing incarcerated persons is both institutionalized and overwhelming. Indeed, in interviewing incarcerated persons, prosecutors and police make routine use of 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 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 convenience.

At stake is nothing less than an institutionalized failure to provide millions of accused persons access to basic technology that is, in fact, much more essential to accused persons. Attention must again be directed to the indispensability of this new technology in the uncovering and development of important defenses, as shown in A Comprehensive Introduction to DefenseMap.com.

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 can never be effectively asked of an accused? Or if the accused is deprived of a reasonable opportunity to reflect in private and adequately 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 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 practical and inevitable consequences of the resource disparities unconstitutionally hamstringing the defense. 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 certainly not early enough to be of reasonable benefit.

The second line of applicable constitutional authority establishes that, when 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).

This constitutional right could scarcely have a clearer application than in the present circumstances where the government has the fortuitous advantage of exclusive care, custody, and control of incarcerated persons—and through that advantage affords wildly disparate access to technology-assisted inmate interviews based merely on who is seeking that access.
A sampling of the relevant cases under *Wardius* and *Ritchie* should suffice to understand the constitutional deficit involved.

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 directing a trial court to afford the defense precisely equal pretrial access to photographic evidence in a prosecution for alleged child sex offenses, despite the confidentiality provisions of the federal Adam Walsh Act. 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 such withholding of access 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 access to, and failure to make its own *in camera* inspection of, the files of the state's Children's Services Division. *Warren*, by the way, is helpful for making explicit something that is correctly assumed by all cases reaching the issue: namely, that the police and prosecution are treated as a joint entity with regard to the investigation and presentation of cases. *Id.*, at 433.

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. That the prosecution had sole access to the state Attorney General's cooperation in this regard made the matter clear under *Wardius*. The court also 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. 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.

7. 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.

8. 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 this rather 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 sentiments of the momentarily recalcitrant witness to themselves and thus deprived the defense of the assistance it required to present the testimony.

9. *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 such as confidential informants. *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).

10. In *Void v. State*, 601 A.2d 124, 325 Md. 386 (1992), the Maryland Supreme Court reversed the defendant's convictions for allegedly kidnapping and robbing a former police officer. The reversal resulted from 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. "The proper time for the judge to determine the admissibility was upon their examination." *Void v. State*, at 392.

In sum, these authorities make hash out of the current state of affairs whereby the prosecution has superior access to mere witnesses than defense attorneys have to their 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. As shown in Sections B-D above, 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 information discussed in *Carpenter v. United States*, 585 U.S. (2018).
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.

Again, to address this longstanding disparity, attorneys are invited to use, improve on, and network about this Sample Motion for Incarcerated Clients' Access to DefenseMap.com.

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.

Jails and prisons can even elect implementing DefenseMap.com in either (a) an open system with all the usual electronic features (Helpline, Contact link, and the opportunity for clients to place their finished Maps on the professional accounts of their attorneys) or (b) a Jail and Prison Version (also called a Security Zone Version among IT people) where these features are unavailable. (Information on Security Zones can be found on numerous websites, including Juniper Networks on Security Zones; Security Zones: Definition and Purpose; and Network Security Zones.)

Administrators of facilities interested in a Security Zone version can do so in less than a day simply by contacting the Defense Map Team through its Helpline or Info@DefenseMap.com.

Our plan is to implement the Jail and Prison Version in a number of facilities with forward-thinking administrations, so we enthusiastically invite defense attorneys interested in this option to (1) consider whether they have a sympathetic ear at their favorite jail or prison and then (2) be in touch with us on how to make this happen. Imagine having a Map like one of these Sample Maps in virtually all our cases, even when clients are incarcerated.

A concise summary of the Jail and Prison Version of DefenseMap.com is available at FAQ #25.