Note

"*Taylor v. Illinois*: Supreme Court Approves Preclusion of Defense Witnesses for Discovery Violation"

I. INTRODUCTION

In criminal procedure, notice-of-alibi rules require the defense to identify to the prosecution, in advance of trial, any witnesses whose testimony will be used to establish an alibi defense.[1] Notice-of-alibi rules were approved by the United States Supreme Court in *Williams v. Florida*,[2] over challenges based on due process and the fifth amendment privilege against self-incrimination. The rationale supporting such notice rules is, simply stated, that surprise alibi witnesses are of dubious credibility.[3] The Florida rule upheld in *Williams* provided a preclusion sanction for noncompliance.[4] Noting that such a sanction posed sixth amendment issues, the Court never-

1. *See generally* Annotation, *Validity and Construction of Statute Requiring Defendant in Criminal Case to Disclose Matter as to Alibi Defense*, 45 A.L.R. 3d 958, §§ 1,3 (1972).

2. 399 U.S. 78 (1970).

3. The Supreme Court stated in *Williams* that "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh hour defense is both obvious and legitimate." *Id.* at 81. The Court went on to write that the rules are "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id.* at 82. Alibi had been called the "hip pocket" defense. Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 29, 31 (1964).

4. "If a defendant fails to file . . . notice . . . the court may exclude evidence offered by such defendant for the purpose of providing an alibi, except the testimony of the defendant himself." FLA. R. CRIM. P. 3.200 (West 1975)(formerly codified at FLA. R. CRIM. P. 1.200).

theless expressly declined to consider them.[5] Inasmuch as the preclusion sanction was not applied in *Williams*, there was "no occasion to explore"[6] the sixth amendment questions.

Eighteen years after *Williams*, the Court found an "occasion to explore" the constitutionality of preclusion sanctions. In *Taylor v. Illinois*,[7] the Court reviewed the Illinois rule that permits a trial judge to preclude a criminal defense witness if the defense fails to identify the witness in response to a pre-trial discovery motion by the prosecution.[8]

Justice Stevens, writing for a majority of five,[9] framed the question as whether preclusion of a defense witness as a sanction for noncompliance with a discovery rule "violated the petitioner's constitutional right to obtain the testimony of favorable witnesses."[10] The five justices held that preclusion of defense witnesses for discovery violations "is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and [found] no constitutional error

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5. In *Williams*, the Court noted:

> We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore.

399 U.S. 78, 83 n.14 (1970).

6. *Id.* The defendant made a pre-trial motion to be exempted from the rule. The motion was denied, so the defendant named his alibi witness. On appeal, the rule and the preclusion sanction were challenged. *Id.* at 80-81.

The Court also declined to explore the same sixth amendment issues in Wardius v. Oregon, 412 U.S. 470 (1973), in which Oregon's notice-of-alibi statue was deemed an unconstitutional abridgement of due process because it made no provision for reciprocal discovery by defendants of the State's alibi rebuttal witnesses. Wardius argued that even if such one-way discovery were valid, to enforce it with a preclusion sanction would be unconstitutional. The Court again left the question open: "[I]n light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced." *Id.* at 472 n.4.

7. 108 S. Ct. 646, *reh'g denied* 108 S. Ct. 1283 (1988).

8. The Illinois rule is at ILL. ANN. STAT. ch. 110A, 415 (g)(i)(Smith-Hurd 1985). *See also*, 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.4(f) (1984)("approximately fifteen states . . . require the defendant to disclose before trial the names and addresses of those persons he expects to call as defense witnesses"); Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123, 123 n.1 (1983) (listing thirty-six jurisdictions with some provision for prosecutorial discovery). Blumenson highlights the need for the Court to consider the constitutionality of preclusion sanctions with an observation that such sanctions "vastly exceed the scope of the only prosecutorial discovery order ever approved by the Supreme Court . . . [i.e.,] . . . *Williams v. Florida*." *Id.* at 124. There is no pre-trial prosecutorial discovery in California criminal cases. *See* Tomlinson, *Constitutional Limitations on Prosecutorial Discovery*, 23 SAN DIEGO L. REV. 993, 1020-22 (1986).

9. Joined by Rehnquist, C.J., and White, O'Connor, and Scalia, JJ. The dissent by Justice Brennan was joined by Justices Marshall and Blackmun. At the time, the Court had only eight members because the vacancy left by Justice Powell had not been filled.

10. *Taylor*, 108 S. Ct. at 648-49.

on the specific facts of this case."[11]

II. BACKGROUND

The Compulsory Process Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[12] The modern view of compulsory process originated in *Washington v. Texas*,[13] three years before *Williams*. In *Washington*, the Supreme Court unanimously invalidated a Texas rule that barred persons charged as co-participants in the same crime from testifying for one another. The rule could not be defended on the ground that it excluded the testimony of persons likely to commit perjury because the rule permitted an accused accomplice to testify for the prosecution, and "common sense"[14] indicated that a codefendant, especially one awaiting trial or sentencing, would be more likely to lie in favor of the prosecution. A key passage both interpreted the Compulsory Process Clause and applied it to the states by incorporation into fourteenth amendment due process:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[15]

The Court could see no difference between a hypothetical rule barring all defense witnesses and "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[16] Such rules did not comport with compulsory process because "[t]he Framers . . . 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."[17]

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11. *Id.* at 649.
12. U.S. CONST. amend. VI.
13. 388 U.S. 14 (1967).
14. *Id.* at 22.
15. *Id.* at 19. For the historic interpretations of the Compulsory Process Clause, *see* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Bradley, *Havens, Jenkins, and Salvucci, and the Defendant's Right to Testify*, 18 AM. CRIM. L. REV. 419 (1981).
16. Washington v. Texas, 388 U.S. 14, 22 (1967).
17. *Id.* at 23.

An important corollary to *Washington* is *Chambers v. Mississippi*,[18] in which the Supreme Court, by an 8-1 decision, reversed a murder conviction because of constitutional error in evidentiary rulings. The trial judge had excluded exculpatory testimony as hearsay, even though the hearsay declarant was in the courtroom and under oath. Also, the defendant was not allowed to call the hearsay declarant as an adverse witness subject to cross-examination. The Court concluded that these evidentiary rulings deprived the accused of "a trial in accord with traditional and fundamental standards of due process."[19] Although the holding was based solely on due process, the Court cited *Washington* for the statement that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[20]

Chambers is important in the present context because the Court recognized that the right to present a defense, although certainly essential to a fair trial, is not unlimited. The Court wrote that "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[21] Thus, that dictum from *Chambers* adumbrates the holding in *Taylor*.

The teaching of *Washington* and *Chambers* was reaffirmed in a 1987 case, *Rock v. Arkansas*.[22] Relying heavily on those two cases, a 5-4 Court invalidated an Arkansas Supreme Court ruling that barred all hypnotically refreshed testimony. Reasoning from *Washington*, the Court concluded that per se exclusion of such testimony "infringes impermissibly on the right of a defendant to testify on his or her own behalf."[23] The Court acknowledged the *Chambers* idea that the right to present a defense is not unlimited, and synthesized *Washington* and *Chambers* by writing that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."[24]

Rock is distinguishable from *Taylor*. *Rock* concerned the defendant's right to testify, where *Taylor* concerned the defendant's right to the testimony of favorable witnesses. Nevertheless, *Rock* is important for at least two reasons: (1) the alignment of the votes in the two cases reveals that the author of *Taylor*, Justice Stevens, cast the decisive vote; and (2) the dissent in *Taylor* relies heavily on *Rock*,

18. 410 U.S. 284 (1973).
19. *Id.* at 302.
20. *Id.*
21. *Id.*
22. 107 S. Ct. 2704 (1987).
23. *Id.* at 2714-15.
24. *Id.* at 2711.

whereas the majority opinion omits it completely.

As noted above, the Supreme Court twice expressly refused to address the witness preclusion issue.[25] Moreover, the Court has declined to review other cases raising the issue.[26] In the eighteen years that the Court left open the question of the preclusion sanction's constitutionality, the lower courts considered the question and worked out the law for themselves. Some of the lower courts have adopted an *ad hoc* balancing approach.[27] Other courts consider the preclusion sanction to be within the realm of trial court discretion and appellate review is conducted in those terms.[28] Only two courts have held that compulsory process absolutely bars the preclusion sanction.[29]

Defense witness preclusion has been persuasively criticized on both constitutional and utilitarian grounds.[30] Also, exercise of the

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25. *See supra* notes 5-6.

26. The Court has recently denied certiorari at least four times on this issue. *See* Lane v. Enoch, 475 U.S. 1053 (1986); United States *ex rel.* Robinson v. McGinnis, 593 F. Supp. 175 (C.D. Ill. 1984), *aff'd*, 753 F.2d 1078, *cert. denied* 471 U.S. 1116 (1985); Smith v. Jago, 470 U.S. 1060 (1985) (White, J., dissenting from denial of certiorari); Taliaferro v. Maryland, 461 U.S. 948 (1983).

27. *See, e.g.*, Fendler v. Goldsmith 728 F.2d 1181, 1187-88 (9th Cir. 1983); Braunskill v. Hilton, 629 F. Supp. 511, 522-23 (D.N.J.), *aff'd*, 808 F.2d 1515 (3d Cir. 1986); *Robinson*, 593 F. Supp. at 181-83; State v. Smith, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979); State v. Francis, 128 N.J. Super. 346, 351, 320 A.2d 173, 176 (1974); State v. Mai, 294 Or. 269, 280, 656 P.2d 315, 320-21 (1982).

28. *See, e.g.*, People v. Rayford, 43 Ill. App. 3d 283, 356 N.E.2d 1274 (1976); State v. Johnson, 524 S.W.2d 97 (Mo. 1975) (en banc); Ray v. State, 262 So.2d 475 (Fla. Dist. Ct. App. 1972).

29. *See* United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981) ("[T]he compulsory process clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."); United States *ex rel.* Veal v. Wolff, 529 F. Supp. 713, 722 (N.D. Ill. 1981) (same).

30. The constitutional argument against the preclusion sanction is that it lies outside the modern view of the Compulsory Process Clause as "the right to present a defense." Washington v. Texas, 388 U.S. 14, 19 (1967). The disutility argument is that preclusion "undercuts the very purpose of the [notice] rule . . . . Excluding the accused's evidence regarding an affirmative defense is a peculiarly ironic and inappropriate way to further 'the search for truth.'" Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 836 (1976). A persuasive argument against the preclusion sanction is at Note, *The Preclusion Sanction — A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342 (1972). *See also* 2 ABA Standards for Criminal Justice, ch. 11, § 4.7(a) (commentary at 11.67-68)(2d ed. 1980) ("The exclusion sanction is not recommended because its results are capricious. Thus, exclusion of prosecution evidence may produce a disproportionate windfall for the defendant, while exclusion of defense evidence may lead to an unfair conviction. Either result would defeat the objectives of discovery. In addition, the exclusion of defense raises significant constitutional issues.").

Several states have adopted verbatim the ABA Standards. Thus preclusion is not ex-

preclusion sanction can yield harsh results.[31] Nevertheless, preclusion has been accepted in many lower courts.[32] In those courts, the cases reveal some troublesome constitutional questions.

First, methods other than preclusion usually are available for dealing with the credibility problem of undisclosed witnesses. For example, when a surprise witness appears during trial, the court could grant a continuance for the prosecution to investigate the witness and prepare rebuttal testimony, or the court could allow the testimony subject to comment by the prosecutor on the fact of a discovery violation and its implications relative to the witness's credibility. The possibility of alternative sanctions[33] leads to an argument that compulsory process requires a "less drastic means" test before exercise of the preclusion sanction.[34] Another vexing question is whether compulsory process prohibits the preclusion sanction where the accused is blameless for the discovery rule violation.[35]

Taylor is an important case in constitutional law and criminal procedure. In holding that compulsory process does not absolutely bar the preclusion sanction, the Court has taken a major step in de-

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pressly authorized. *See, e.g.*, MINN. R. CRIM. P. 9.03(8); WASH. CRIM. R. 4.7(h)(7)(i). In those states, the rules follow the ABA language that authorizes a trial judge to enter an order that is "just, under the circumstances." *See, e.g.*, State v. Lindsey, 284 N.W.2d 368 (Minn. 1979) (allowing preclusion); *Contra* State v. Thacker, 94 Wash.2d 276, 616 P.2d 655 (1980).

31. In Taliaferro v. State, 295 Md. 376, 456 A.2d 29, *cert. denied*, 461 U.S. 948 (1983), the accused did not want to testify because he would have been subject to impeachment as a result of a prior criminal record. The defense was an alibi, but the witness was excluded, even though the prosecutor did not object to a continuance. Thus, the defendant was deprived of any meaningful defense because of a procedural default.

32. *See generally* Annotation, *Sanctions Against Defense In Criminal Case For Failure to Comply With Discovery Requirements*, 9 A.L.R. 4th 837, § 5 (1981) (collecting cases "where the defendants had failed to comply . . . with general discovery requirements to disclose the identity of defense witnesses to the prosecution.").

33. Continuance is referred to as a sanction for convenience. It arguably is not a sanction because if a surprise witness "pops-up" just as the prosecution rests, the delay can benefit the defense, as the prosecution's evidence fades in the jury's memory. *See* Epstein, *supra* note 3, at 36.

34. *See, e.g.*, State v. Smith, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979) ("Prohibiting the calling of a witness should be invoked only in those cases where other less stringent sanctions are not applicable to effect the ends of justice."); State v. Mai, 294 Or. 269, 280, 656 P.2d 315, 321 (1982) (preclusion is unconstitutional absent prejudice to prosecution and only if other sanctions are unavailing). *Contra* State v. Roberts, 226 Kan. 740, 602 P.2d 1355 (1979); People v. Jackson, 71 Mich. App. 395, 249 N.W.2d 132 (1976). The language of the Kansas and Michigan statutes makes preclusion of undisclosed alibi witnesses mandatory. *See* KAN. STAT. ANN. § 22-3218(4) (1981); MICH. COMP. LAWS ANN. § 768.21(1) (West 1982).

35. *See, e.g.*, Robbins v. Cardwell, 618 F.2d 581, 583 n.4 (9th Cir. 1980)(questioning whether defendant could be subject to sanctions absent a showing that she had been informed of discovery rules and sanctions); Hackett v. Mulcahy, 493 F. Supp. 1329, 1336 (D.N.J. 1980) ("The testimony of a defense witness may not be precluded because of defense counsel's failure to comply with court rules, unless the record reveals some complicity on the part of the defendant."). *Contra* State *ex rel.* Simos v. Burke, 41 Wis. 129, 140, 163 N.W.2d 177, 182 (1968).

lineating the contours of the sixth amendment. Also, the Court clearly reveals that it is immaterial whether the defendant had any personal involvement in the notice rule violation.[36]

However, *Taylor* has substantial shortcomings. On the question of the necessity of less drastic means, the Court's answer is unclear. Moreover, holding that compulsory process does not absolutely bar the preclusion sanction implies that under some circumstances compulsory process *does* bar the preclusion sanction, which necessitates adopting a balancing test. The Court purports to adopt a test, but its formula is cast in such vague terms that it cannot be of much help in resolving hard cases.[37] In addition, the Court sends a contradictory message: despite the harshness of its dicta toward discovery violators, the Court signals as an example of the balancing approach *Fendler v. Goldsmith*,[38] a case in which willfulness of the violation is subordinate to the importance of the excluded witness's testimony in the court's balancing. By undercutting its harsh dicta with *Fendler*, the Court appears to limit its analysis to the particular facts in *Taylor*. Therefore, *Taylor* may have little impact on the law.

A. The Illinois Court

Illinois Practice Rules provide for reciprocal discovery in all criminal cases in which conviction is "punishable by imprisonment in the penitentiary."[39] Both the state and defense must disclose, upon motion by the other, the names and addresses of all witnesses they intend to call.[40] Rule 415 authorizes the trial judge to deal with noncompliance by ordering the noncompliant party to disclose the withheld information; by granting a continuance; by excluding the undisclosed evidence; or by entering whatever order the judge "deems just under the circumstances."[41] In addition, willful violation of the discovery rules or pursuant orders may subject the offending

36. *Taylor*, 108 S. Ct. at 656-57.
37. *See infra* text accompanying note 76.
38. 728 F.2d 1181 (9th Cir. 1983).
39. ILL. ANN. STAT. ch. 110A, para. 411 (Smith-Hurd 1985).
40. Rule 412 requires the State, upon written motion by the defense, to disclose the "names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements . . ." *Id.* at para. 412(a)(i). Rule 413 requires the defense to reciprocate; upon written motion by the State, defense counsel must disclose the "names and last know addresses of persons he intends to call as witnesses together with their relevant written or recorded statements . . . ." *Id.* para. 413(d)(i).
41. *Id.* at para. 415(g)(i).

counsel to "appropriate sanctions by the court."[42]

Ray Taylor was convicted of attempted murder in 1984, for the shooting of Jack Bridges during a street fight on Chicago's south side on August 6, 1981.[43] Taylor was sentenced to ten years imprisonment. His conviction was affirmed by the Appellate Court of Illinois in 1986.[44]

The incident began after Bridges slapped Derrick Travis for sitting on Bridges' car. Taylor intervened on Travis' behalf.[45] Tempers flared, and a twenty-minute argument ensued. Bridges left the scene in order "to cool off."[46] Apparently, tempers did not cool enough, because a violent encounter arose when Bridges returned, about an hour later.[47]

At trial, Bridges testified that he and his brother, Maurice Bethany, were accosted by a group consisting of Taylor, Travis, and several others. Bridges testified that he fled, but Taylor chased him and when about four feet away fired four shots, the last of which struck him in the back. Bridges also testified that, as he lay in the street, Taylor pointed the gun at his head and pulled the trigger, but the gun misfired.[48]

Two sisters, Hattie and Regina Algood, both friends of Taylor's, testified for the defense. They claimed that the gun was in the hands of Bridges' brother Bethany, who fired into the crowd, hitting his own brother by mistake.[49]

Twenty-two months after the melee, Taylor was indicted on a charge of attempted murder.[50] On the second day of trial, defense counsel requested leave to add the names of Alfred Wormley and

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42. *Id.* at para. 415(g)(ii).
43. *Taylor*, 108 S. Ct. at 649.
44. People v. Taylor, 141 Ill. App. 3d 839, 842, 491 N.E.2d 3, 5 (1986).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* The delay in indictment was the basis for a pre-trial motion to dismiss, in which Taylor claimed that the delay violated due process because it "made it impossible . . . to reconstruct his activities on the date in question and prepare his defense." *Id.* at 843, 491 N.E. 2d at 5 (1986). The motion was denied, and the denial was affirmed on appeal because:

> Despite the requirement of a clear showing of substantial prejudice, the defendant here failed to present any evidence of actual prejudice. Defense counsel stated that he was unable to locate witnesses because they had moved from burned-out buildings. Counsel did not identify the witnesses or make any showing that their testimony would be helpful . . . . Counsel did state that from a list of 20 potential witnesses, he had spoken to 10. The defendant has demonstrated only a possibility of prejudice. That is not enough to shift the burden to the State to show the reasonableness or necessity for the delay.

Id. at 844, 491 N.E.2d at 6.

Pam Berkhalter to the defense witness list.[51] By that time, the prosecution's two principal witnesses had already testified.[52]

The trial judge then asked defense counsel why Taylor had not previously mentioned these two witnesses. Counsel replied that Taylor had informed him about Wormley, but that Taylor had not been able to locate Wormley.[53] The trial judge, after expressing his concern about the credibility of eleventh-hour witnesses, directed counsel to bring the additional witnesses to court the next day, at which time he would decide whether to allow them to testify.[54]

The next day, Wormley's testimony was presented as an offer of proof outside the presence of the jury. Wormley testified that he had not seen the fight, but that he had seen Bridges and Bethany with two guns prior to the shooting. Wormley also testified that he "happened to run into Ray and them"[55] and warned them about the guns.

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51. *Taylor*, 108 S. Ct. at 649-50. The dialogue is reported:
During the direct testimony of the witness, your Honor, called by the State, I was informed of some additional witnesses which could have, and probably did, in fact, see this entire incident. We at this time would ask to amend our Answer to include two additional witnesses.
THE COURT: Who are they?
MR. VAN: One is a guy named Alfred Wrdely of which —
THE DEFENDANT: Excuse me. W-r-d-e-l-y.
MR. VAN: Whose address I do not have. I'm going to have to see if I can locate him tonight. And Pam Berkhalter.
Id. at 649 n.4.

52. *Id.* at 649.

53. *Id.* at 650. The trial judge complained:
THE COURT: Yeah, but the defendant was there, and the defendant is now telling you Pam Berkhalter, and he's now telling you Alfred Wrdely. Why didn't he tell you that some time ago? He's got an obligation to tell you.
MR. VAN: That is correct, Judge. He, in fact, told me about Alfred some time ago. The problem was that he could not locate Alfred.
Id. at 650, n.5.

54. *Id.* at 650. The judge commented:
There's all sorts of people on the scene, and all of these people should have been disclosed before. When you bring up these witnesses at the very last moment, there's always the allegation and the thought process that witnesses are being found that really weren't there. And it's a problem in these type of cases, and it should be — should have been put on that sheet a long time ago. At any rate, I'll worry about it tomorrow.
Id. at 650 n.6.

55. *Id.* at 650. Wormley's voir dire testimony included the following:
Q. What, if anything, did you learn by standing there in the crowd?
A. Well, Jack [Bridges] had a blanket. It was two pistols in there and he gave it to —
Q. And then what, if anything, did they say at that time, if you can recall?
A. Well, they were saying what they were going to do to the people. Say they were after Ray and the other people.
Q. What, if anything, did you do at that time?

However, on cross-examination, Wormley testified that he first met Taylor "about four months ago."[56] Wormley also "rather dramatically contradicted defense counsel's representations to the trial court"[57] by stating that he had been visited at home by defense counsel, five days before trial began.[58]

The trial judge excluded Wormley's testimony, explaining the exclusion as a sanction for blatant, willful violation of Rule 413.[59] The judge also expressed his vexation that "defense attorneys have been violating discovery in this courtroom in the last three or four cases blatantly and I am going to put a stop to it and this is one way to do so."[60]

The Appellate Court of Illinois affirmed the conviction, rejecting an argument that preclusion of Wormley was an abuse of discretion.[61] The Illinois Supreme Court denied rehearing and the United States Supreme Court granted certiorari.[62]

A. At that time I left. I was on my way home and I happened to run into Ray and them and so I told them what was happening and to watch out because they got weapons.

Id. at 650, n.8.

56. *Id.* at 650.

57. *Id.*

58. *Id.* Defense counsel actually served Wormley with a subpoena during the visit. *Id.* at 664 n.6 (Brennan, J., dissenting).

59. *Id.* at 650. The judge explained:

THE COURT: Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.

At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom.

Id.

60. *Id.* at 650-51.

61. People v. Taylor, 141 Ill. App. 3d 839, 491 N.E.2d 3 (1986). The Appellate Court stated:

We find unpersuasive defendant's argument that his counsel was justified in violating the discovery rules. The testimony of Wormely establishes that counsel had spoken with him, knew his identity and served him with a subpoena prior to trial. Yet counsel failed to list him as a witness. Defense counsel had the opportunity to list the names of witnesses in his answer to discovery and, if necessary, indicate that their addresses were unknown. We, therefore, believe the trial court was within its discretion in refusing to allow the additional witnesses to testify.

Id. at 845, 491 N.E.2d at 7.

The Appellate Court also rejected Taylor's claim of denial of effective assistance of counsel, stating: "The record as a whole reveals that defense counsel represented defendant sufficiently ably to preclude a finding of incompetency." *Id.* at 847, 491 N.E. 2d at 7.

62. Taylor v. Illinois, 107 S. Ct. 947 (1987).

B. The Supreme Court Decision

After brushing aside a jurisdictional question,[63] the Court rejected as "extreme and . . . unacceptable"[64] arguments that compulsory process entails either an absolute bar to the preclusion of a criminal defense witness for any reason, or merely the bare subpoena power devoid of a concomitant right to the testimony of summoned witnesses. The Court quoted the key passage from *Washington v. Texas*,[65] to explain that compulsory process is more than a simple subpoena power.[66] On the obverse proposition, that compulsory process always bars preclusion of a defense witness, the Court observed that the right to present testimony is clearly limited by the rules of evidence.[67]

In order to mediate these extreme positions, the Court looked to what it considered the common rationale of compulsory process and the exclusionary rules of evidence, i.e., the need to protect the integrity of the adversary system of adjudication:

> The principle that undergrids the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not function effectively without adherance to rules of procedure that govern the orderly presentation of facts and arguments . . . . The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules . . . . Discovery . . . minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated

63. Justice Stevens relegated to a footnote the State's contention that Taylor waived his sixth amendment claim by failing to present it adequately in the state court. Stevens noted that although Taylor expressly asserted only a due process violation, his reliance on an Illinois case that was based on Supreme Court compulsory process precedents "[made] it appropriate to conclude that the [sixth amendment] constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Taylor*, 108 S. Ct. at 651 n.9.

On the other hand, Justice Brennan, in his dissent, felt "constrained to conclude that . . . the Appellate Court of Illinois deemed the constitutional claims waived as a matter of Illinois law." *Id.* at 659 (Brennan, J., dissenting). However, Brennan pointed out that even if Taylor's sixth amendment claims had been waived as a matter of state law, they were not necessarily waived as a matter of federal law. Under the doctrine of Williams v. Georgia, 349 U.S. 375, 383-84 (1955), where a state court has the authority to, but fails to exercise its power to disregard a procedural shortcoming in constitutional claims, the Supreme Court can review the constitutional issues in spite of the state court waiver. *Id.*

64. *Taylor*, 108 S. Ct. at 653.

65. *Id.* at 651. *See supra* text accompanying note 15.

66. *Taylor*, 108 S. Ct. at 651.

67. The Court mentioned incompetent and privileged testimony as examples. *Id.* at 653. Obviously, preclusion of witnesses under the rules of evidence is the daily work of trial judges. The question here involves the preclusion of probative and material testimony that would be admissible under the law of evidence.

testimony.[68]

As an example of the State's interest in the orderly conduct of a criminal trial surmounting the sixth amendment right to present a defense, the Court advanced *United States v. Nobles*.[69] In *Nobles*, the Court approved a trial judge's refusal to allow the testimony of the defense's investigator, absent disclosure by the defense of the investigator's complete report. Quoting a long passage from *Nobles*, the Court emphasized the following sentence: "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."[70]

Having examined the sixth amendment precedents, the Court considered the argument that the availability of sanctions other than preclusion makes preclusion "so drastic that it should never be imposed."[71] The Court acknowledged the availability of other methods for dealing with the problems created by eleventh-hour witnesses: a continuance or mistrial, which could alleviate the credibility problem by allowing the State time to investigate, or disciplinary sanctions against the defendant or defense counsel, as a deterrent against future violations of the discovery rules.[72] However, the Court discounted the necessity of resorting to alternative sanctions:

> It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process.[73]

For example, a contempt sanction would be ineffective against a defendant facing a long jail term. Moreover, a desperate defendant "can mislead an honest attorney."[74] Therefore, "[i]f a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited."[75]

The Court concluded its exposition on illicitly motivated discovery

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68. *Id.* at 653-54.
69. 422 U.S. 225 (1975).
70. *Taylor*, 108 S. Ct. at 654 (emphasis deleted) (quoting *Nobles*, 422 U.S. at 241).
71. *Taylor*, 108 S. Ct. at 654.
72. *Id.* at 655. The Court omits the prosecutorial comment as an alternative sanction, in which the eleventh-hour witness is allowed to testify subject to impeachment by the prosecution.
73. *Id.*
74. *Id.*
75. *Id.*

violations by declining to advance instructions as to all the circumstances under which exclusion would be appropriate. Rather, Justice Stevens stated that tension between the right to present a defense and the State's interest in the orderly conduct of a criminal trial should be resolved as a question of balance within the discretion of the trial court.

> [A] trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.[76]

After articulating these general statements, Justice Stevens moved on to the more specific facts in *Taylor*. Taylor argued that preclusion was unnecessarily harsh because the voir dire examination of Wormley eliminated any danger of prejudice to the prosecution from surprise, and that it was unfair to penalize him for defense counsel's violation of the rules.[77]

Justice Stevens rejected the first argument because prejudice to the prosecution was not the only factor supporting the preclusion sanction. The majority felt that preclusion was appropriate because of the willful misconduct of the defendant's attorney.[78]

The defendant's second argument was rejected as a strike "at the heart of the attorney-client relationship."[79] Also, Justice Stevens saw ethics problems in determining whether the client was an accomplice in the discovery violation. Moreover, a client is ordinarily bound to the consequences of his or her attorney's decisions during trial, and there is no reason why the circumstances leading to preclusion should warrant any different treatment. In conclusion, Justice Stevens proposed that "[w]henever a lawyer makes use of the sword

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76. *Id.*
77. *Id.* at 656.
78. *Id.* at 656-57.

> We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself . . . . [T]he discovery violation . . . was both willful and blatant. Regardless of whether prejudice to the prosecution could have been avoided . . . it is plain that the case fits into the category of willful misconduct in which the most severe sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony.

Id.

79. *Id.* at 657.

provided by the Compulsory Process Clause, there is some risk that he may wound his own client."[80]

C. *The Supreme Court Dissent*

Justice Brennan argued that witness preclusion is an "arbitrary and disproportionate penalty."[81] He believed that alternative sanctions could correct the harm to the truth-seeking process and deter future violations[82] better than preclusion, which "distorts the truth-seeking process by excluding material evidence. . . ."[83] Justice Brennan, also troubled by preclusion where there is no evidence of complicity in the violation by the defendant,[84] "would [have held] that, absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause per se [barred] discovery sanctions that exclude criminal defense evidence."[85]

Brennan agreed with the majority that compulsory process is not an absolute right. He relied on the same passage from *Washington v. Texas* as the majority,[86] and then acknowledged that compulsory process "does not invalidate every restriction on the presentation of evidence."[87] However, he argued that the proper method to evaluate the constitutional question here was through the standard of *Rock v. Arkansas*,[88] which guarded against arbitrary or disproportionate restriction of a defendant's right to testify.

In Justice Brennan's view, the evidentiary purpose of discovery rules is best achieved by granting continuances or allowing prosecutorial comment on the nature of discovery and the existence of a violation.[89] The deterrent function is best achieved by direct sanctions against defense counsel.[90] These methods are superior to preclusion because they do not offend the fundamental right to pre-

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80. *Id.*
81. *Id.* at 658 (Brennan, J., dissenting).
82. *Id.* at 664.
83. *Id.* at 658.
84. *Id.* at 664.
85. *Id.* at 658.
86. *Id.* at 660.
87. *Id.*
88. 107 S. Ct. 2704 (1987). *See supra* text accompanying note 24.
89. *Taylor*, 108 S. Ct. at 664-65 (Brennan, J., dissenting).
90. *Id.* at 665. Brennan observed that the language of Rule 415 required that disclosure be made by "defense counsel." *Id.* Other discovery rules require the "defendant" to make disclosure. *See, e.g.*, ARIZ. R. CRIM. P. 15.2(c); MASS. R. CRIM. P. 14(b)(1)(A). In one case reversing a trial judge's preclusion decision, an imaginative judge, estimating the daily cost of the Superior Court at $1,583 and defendant's discovery violation at one-half day of court time, suggested that an appropriate sanction would be to assess the errant counsel an amount equal to the value of the delay that he had caused. *See* Chappee v. Commonwealth of Mass., 659 F. Supp. 1220, 1226-28 nn. 9, 10 (D. Mass. 1987).

sent a defense and they do not distort the truth as does preclusion.[91] These considerations indicate that preclusion violates the *Rock v. Arkansas* prohibition against arbitrary and disproportionate restrictions on the right to present a defense.[92]

Justice Brennan went on to state that "[t]he arbitrary and disproportionate nature of the preclusion sanction is highlighted where the penalty falls on the defendant even though he bore no responsibility for the discovery violation."[93] Moreover, the record indicates that the trial judge excluded Wormley's testimony not only for the instant discovery violation, but also in response to violations by other attorneys in other cases.[94] Brennan argued that this was an "improper basis"[95] for preclusion and that the majority had not adequately addressed the issue. In regard to the majority's position that the client must accept the consequences of the attorney's trial management, Justice Brennan averred that "[t]he rationales for binding defendants to attorneys' routine tactical errors do not apply to attorney misconduct. An attorney is never faced with a legitimate choice that includes misconduct as an option."[96]

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91. *Taylor*, 108 S. Ct. at 664 (Brennan, J., dissenting).

92. *Id.* As Justice Brennan explained:

> The central point to keep in mind is that witness preclusion operates as an effective deterrent only to the extent that it has a possible effect on the outcome of the trial. Indeed, it employs in part the possibility that a distorted record will cause a jury to convict a defendant of a crime he did not commit. Witness preclusion thus punishes discovery violations in a way that is both dispproportionate — it might result in a defendant charged with a capital offense being convicted and receiving a death sentence he would not have received but for the discovery violation — and arbitrary — it might, in another case involving an identical discovery violation, result in a defendant suffering no change in verdict or, if charged with a lesser offense, being convicted and receiving a light or suspended sentence. In contrast, direct punitive measures (such as contempt sanctions or, if the attorney is responsible, disciplinary proceedings) can graduate the punishment to correspond to the severity of the discovery violation.

Id.

93. *Id.*

94. *Id.* at 650.

95. *Id.* at 664-65.

96. *Id.* at 666. Justice Brennan draws a distinction between tactical decisions and misconduct. A tactical decision is whether to introduce evidence at a certain point in the trial. Failure to comply with a discovery rule is misconduct. *Id.* at 665-66. However, willful failure to comply with the discovery rule can also be viewed as a tactical decision reached by weighing the danger of preclusion against the value of insulating a witness from the prosecution's investigatory power.

III. ANALYSIS

Taylor upholds the Illinois rule both on its face and as applied. The first holding is entirely sound; the qualified nature of the dissenting opinion suggests that the Court could unanimously approve exercise of the preclusion sanction where an accused instigated a discovery violation.[97]

The second holding is the divisive issue in *Taylor*. Although preclusion may be sound where the defendant personally withheld discovery, preclusion where the defendant was not involved provokes a sense of fundamental unfairness. Because the record in *Taylor* shows no rule-breaking by the defendant, it seems that there would be no case in which the court would recognize unfairness in exercise of the preclusion sanction.

Nevertheless, situations are conceivable in which bona fide reasons exist for failure to identify a witness during discovery. An obvious example is when an honest witness actually is found or comes forth immediately prior to or during trial. Preclusion of such a witness would clearly distort the truth-seeking process and upend the quest for fairness in the trial process. Any omniscient observer must be offended. Yet, a trial judge is not all-knowing, and thus, with acumen sufficient to withstand voir dire cross-examination, may discredit the witness (and proponent counsel) as a mere perjurer.

The Court's refusal to emphasize, let alone insist on, less drastic means of testing witness veracity allows unjust and counter-productive preclusion. In effect, the Court has created a rule of evidence — a presumption that witnesses not named in discovery are untrustworthy. Notions of fundamental fairness demand, of course, that the presumption be rebuttable. Rebuttal, however, poses profound difficulties. At a minimum, the proponent is called on to prove a negative, that is, lack of prior contact with the undisclosed witness. Rebuttal would also entail convincing the trial judge of the witness' truthfulness.

This second factor is the most troubling aspect of witness preclusion. Resort to the sanction substitutes a trial judge's estimate of a witness's veracity for that of a jury. Though judges routinely must determine whether proffered testimony is incompetent, privileged, or unduly prejudicial, evaluation of veracity should be solely within the jury's purview.

To many, judicial preclusion of discredited eleventh-hour witnesses will not seem egregious. In that sense, *Taylor* was an easy case; the State's voir dire cross-examination of Wormley severely disparaged

97. In such circumstances, preclusion protects the adversary system analogously to preclusion where the accused violated the sequestration of intended witnesses. *See* J. WIGMORE, 6 EVIDENCE IN TRIALS AT COMMON LAW § 1842 (J. Chadbourn ed. 1976).

his testimony. But in a harder case, where voir dire does not or cannot reveal any lack of credibility, preclusion can only hinder the truth-seeking process by keeping from the jury relevant, probative evidence. A linchpin of the adversary system reserves evaluation of conflicting testimony for the jury.[98] Considering how difficult rebuttal of the presumption would be, a better view of compulsory process would require review of the feasibility of sanctions other than preclusion.

Indeed, the Court acknowledged that alternative sanctions "may well be . . . appropriate in most cases. . . ."[99] *Taylor*, implied the Court, was not like most cases. The transparent "plan to present fabricated testimony"[100] foreclosed any need for a sanction other than preclusion. That leaves an open question whether an 'appropriate' sanction is required in 'most cases.'

The Court's balancing formula sheds no light on the question. The listed factors cut both ways as to granting a continuance, which would be the likely response to surprise witnesses if preclusion were available only as a last resort in most cases. First, the Court spoke to the rejection of unreliable evidence, which seems to require a recess to enable the prosecution to depose and investigate the eleventh-hour witness.[101] The third listed factor, concerning possible prejudice to the prosecution, argues against a recess because the jury's attention would focus on the surprise witness as their recollection of the state's witnesses faded.

The Court's other criterion seems less an element in a balancing test than a platitude and splits internally on the question whether compulsory process requires a continuance in the absence of an obvious plan for perjury. We are told that a trial judge must consider "the fair and efficient administration of justice."[102] If efficient administration of justice means speedy disposition of cases, then con-

98. Even if an undisclosed witness substantially loses credibility during voir dire cross-examination, it is more consonant with compulsory process to permit the testimony subject to impeachment for prior inconsistent statements than to simply preclude the witness. Moreover, counsel whose witness has been destroyed during voir dire would be more likely to withdraw the witness rather than prejudice the rest of the case by presenting easily impeached testimony. Thus, the end result would be the same as if the judge had precluded the witness, without any infringement on compulsory process rights.

99. *Taylor*, 108 S. Ct. at 655.

100. *Id.*

101. This analysis assumes that veracity judgments are reserved for the jury rather than the trial judge. A recess would enable the prosecution to plan its cross-examination strategy.

102. *Taylor*, 108 S. Ct. at 655.

tinuance should not be required. On the other hand, if fair administration of justice means presentation of all relevant, probative and not demonstrably perjurious testimony, then continuance should be required. Thus, the holding in *Taylor* that compulsory process does not absolutely bar preclusion provides little guidance for trial court procedure where a defendant can make a *prima facie* showing that a surprise witness is not unreliable. In other words, would compulsory process require a continuance if Wormley had not been impeached during *voir dire* cross-examination?

The Court's work in *Taylor* extends to all witnesses the presumption from *Williams* that undisclosed alibi witnesses are unreliable. Extending the presumption to all witnesses includes extension to the defendant, which is problematic and anachronistic.

The Florida rule approved in *Williams* required notice only of alibi witnesses, and excepted the accused. The Illinois rule approved in *Taylor*, however, requires notice of all witnesses and makes no exception for the defendant. The Court in *Taylor* does not discuss these distinctions.[103] Thus, under *Taylor*, an accused who had initially decided to remain silent at trial, but reconsidered as the trial progressed, could be precluded from testifying.

A trial judge who precluded an accused from testifying based on the reasoning of *Taylor*, that an undisclosed witness is presumptively untrustworthy, would be reverting to ideas that became obsolete in the 19th century. The old idea, extant when the Bill of Rights was framed, was that a criminal defendant was disqualified from testifying because of his interest in the outcome.[104] Through the evolution of law that idea was discarded.

In 1961, in *Ferguson v. Georgia*,[105] the Court outlined the historic development of a defendant's right to testify, observing that "[d]isqualification for interest was . . . extensive in the common law when this Nation was formed."[106] The old view was discarded because the Court read into the fourteenth amendment a defendant's "right to have his counsel question him to elicit his statement."[107]

Considering *Ferguson* in *Rock v. Arkansas*, the Court wrote that "[t]here is no justification today for a rule that denies an accused

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103. In a paragraph-long separate dissent, Justice Blackmun stated that his agreement with Justice Brennan's dissent was limited to general reciprocal discovery rules. Justice Blackmun's view is that the state's interest in a notice-of-alibi rule "might well occasion a result different from what should obtain in the factual context of the present case." *Taylor*, 108 S. Ct. at 667-68 (Blackmun, J., dissenting).

104. *See* Bradley, *supra* note 15 at 420-21.

105. 365 U.S. 570 (1961).

106. *Id.* at 574 (citation omitted).

107. *Id.* at 596. Although the opinion did not expressly recognize a defendant's right to testify, two concurring Justices suggested the right, and the case has been read for that suggestion. *See* Bradley, *supra* note 15 at 421.

the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common law rule, can be tested adequately by cross-examination."[108]

Thus, precluding the testimony of a defendant because of a failure to give pre-trial notice certainly repudiates *Rock* and suggests a return to discredited common law rationales. In a post-*Taylor* case, the accused was allowed to testify, but was not permitted to speak about an alibi because he had not given the required pre-trial notice.[109] The court discussed *Taylor* with approval. If such preclusion will be the result of *Taylor*, then *Taylor* was wrongly decided.

Restricting in part or in whole the testimony of a defendant who decided to testify only after the trial had begun demonstrates the folly of the preclusion sanction. After all, the prosecution must prove its case; to argue that preclusion prevents prejudice to the state simply misconceives the allocation of the burden of proof in a criminal trial.[110] To prevent a defendant from testifying, "I did not commit the crime with which I am charged" or "I was alone in my car driving around town when this crime took place" overlooks the burden of proof placed on the prosecution.[111]

Generally, if anyone would commit perjury, it would most likely be the accused. If the law has rejected a presumption that defendants are not credible in favor of jury evaluation of a defendant's testimony, then surely a presumption that other, less directly motivated witnesses are not trustworthy is unsound, discovery violation notwithstanding. Moreover, whatever merit there may be in such a presumption should be extinguished by the constitutional guarantee of

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108. 107 S. Ct. at 2709.

109. *See* State v. Gonzalez, 223 N.J. Super. 377, 538 A.2d 1261 (1988).

110. This point is discussed in Alicea v. Gagnon, 675 F.2d 913, 924 (7th Cir. 1982) ("As an essential part of its case, the state must prove a defendant's presence during the commission of an alleged crime, proof which invariably requires pretrial investigation and preparation . . . . [T]he state is in a formidable position to refute a defendant's unexpected alibi testimony, particularly where . . . such testimony is uncorroborated by other defense witnesses. We doubt that a defendant's unsupported explanation will overcome testimony by state witnesses placing him at the scene of the crime.").

111. This is not to suggest that a defendant is entitled to testify falsely, because it is "crystal clear that there is no right whatever—constitutional or otherwise—for a defendant to use false evidence." *Nix v. Whiteside*, 475 U.S. 157, 173 (1986). Rather, the idea is that because the burden of proof is on the prosecution, it makes little sense to condition a defendant's right to present uncorroborated testimony on compliance with a notice rule. By extension, it also is unnecessary to condition the defendant's right to present other eyewitness testimony as a method of 'protecting' the adversary system. Adversity is built into the trial by placing the burden of proof on the state.

compulsory process as defined in *Washington v. Texas.*

Taylor certainly stands to make the criminal trial more efficient, if efficiency is measured by speed rather than accuracy. By neither emphasizing nor insisting on less drastic means analysis, the Court allows preclusion without requiring a recess for investigation of the surprise witness. Though efficiency is a desirable goal, it is in tension with fairness; thus, our courts are adversarial, not inquisitorial. Increasing efficiency at the expense of fairness is not laudable.

The provisions of the sixth amendment are guarantees of fairness in the criminal trial. Conversely, there are no constitutional guarantees of efficiency. One wonders how the Court can elevate efficiency to constitutional stature sufficient to overcome the requirements of the Compulsory Process Clause. The answer is found, perhaps, in the following passage, which in the *Taylor* opinion immediately follows the Court's balancing test:

> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony.[112]

The Court's meaning is unclear. Considering that the constitutional discussion in the opinion is otherwise devoted to the Compulsory Process Clause, it is strange to see mentioned, and without the customary footnote, the Confrontation Clause.[113] This clause, like the Compulsory Process Clause, a component of the sixth amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[114]

This confusion of clauses could simply be a mistake. The passage reads better with "Compulsory Process Clause" in place of "Confrontation Clause." If the words are correct as printed in the interim edition Supreme Court Reporter, then the Court in a strange reversal seems to bestow on the prosecution the benefit of the Confrontation Clause. Yet, by the plain words of the sixth amendment, the benefit of the Confrontation Clause belongs to the accused; the state must protect itself by means other than that constitutional language.

This the state has done by enacting the discovery rule. As taught in *Williams*, the rule itself is sound.[115] However, there seems little merit in approving the preclusion sanction as a means of enforcing discovery rules, as against compulsory process, by implying the exis-

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112. *Taylor*, 108 S. Ct. at 655-56 (footnote omitted).
113. U.S. CONST. amend. VI.
114. *Id.*
115. Discovery is sound only if reciprocal. *See supra* note 6.

tence of some right in the state analogous to the Confrontation Clause. One can only hope that trial judges faced with discovery violations will place more weight on the side of the balance that the Court labeled "the fundamental character of the defendant's right to offer the testimony of witnesses"[116] than did the Court in *Taylor*.

Fortunately, the opinion leaves much leeway for the lower courts. Indeed, it appears that the useful teaching in *Taylor* is only the simple fact that compulsory process does not absolutely bar the preclusion sanction. This fact, which the dissent does not seriously contest, implies that under some circumstances compulsory process does bar the preclusion sanction.

The Court seemed content to allow the lower courts autonomy in dealing with the preclusion sanction, as long as no courts hold that preclusion is absolutely barred by compulsory process. This deferential approach is evident in the Court's statement that "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case."[117] Immediately after that statement, the Court expounded its balancing text. Then, Justice Stevens undercut the generally severe tone of his dicta by choosing, as an example of balancing the competing interests, an opinion that is antithetical to the language in *Taylor*.

In a footnote to his balancing test, Justice Stevens signaled *Fendler v. Goldsmith*[118] as an example of a balancing approach applied. This is a surprising citation, because the tenor of *Fendler* is opposite to that of *Taylor*. Where *Taylor* downplays the accused's interests, *Fendler* emphasizes them. For example: first, Justice Stevens in *Taylor* stated that compulsory process will not adhere to "presumptively perjured testimony,"[119] whereas the 9th Circuit in *Fendler* "emphasize[d] that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of otherwise admissible defense evidence."[120] Second, the balancing test in *Taylor* omitted what is deemed in *Fendler* "the most significant fac-

116. *See supra* text accompanying note 76.
117. *Taylor*, 108 S. Ct. at 655.
118. 728 F.2d 1181 (9th Cir. 1983). Interestingly, the Ninth Circuit in *Fendler* determined that the proper approach to the constitutional issues in defense witness preclusion was either a flat prohibition on preclusion or a balancing test. The court expressly refused to adopt either approach, but proceeded to resolve the case by balancing the accused's sixth amendment rights against the state interest in efficient administration of justice. *Id.* at 1188.
119. *Taylor*, 108 S. Ct. at 656.
120. *Fendler*, 728 F.2d at 1188.

tor: how important was the witness?"[121] Third, where *Taylor* emphasized the "State's interest in the orderly conduct of a criminal trial"[122] and the "efficient administration of justice,"[123] *Fendler* averred that "[a]ny state interest . . . could have been accommodated by a brief continuance."[124] That these cases are diametrically opposed in tone is illustrated by this summary paragraph in *Fendler*:

> We assume that the failure to comply with the discovery orders was willful. We need not decide whether the willfulness was attributable to Fendler personally. The determinative factor here is that Fendler was deprived of the testimony of a witness who was important to his defense on a material issue. That is too high a price to exact for failure to comply with discovery orders issued pursuant to general discovery rules. We find that . . . Fendler's sixth amendment rights were violated by the witness preclusion order.[125]

Signaling *Fendler* as an example makes *Taylor* so equivocal as to render it useless as guiding precedent. An appellate court reviewing a trial judge's decision to preclude a witness could, if it were so inclined, affirm the preclusion by relying on any of the dicta in *Taylor*. Another appellate court, on the same facts, could reverse the preclusion by relying on the *Fendler* footnote.

Only one exception to the ambivalence of *Taylor* appears. In contrast to the facts in *Taylor*, where the precluded witness was a complete surprise at trial, in *Fendler* the defense had named the precluded witness in advance of trial, but violated the rules by repeatedly refusing to supply the prosecution with an address for the witness.[126] This factual difference suggests weakly that surprise may be the determinative factor. The suggestion is weak, because the deleterious effects of surprise could have been eliminated in *Taylor* by a continuance, which the 9th Circuit in *Fendler* considered to be a preferable alternative to preclusion.

A better idea is that the use of *Fendler* indicates Justice Stevens' individual attitude on the attorney's conduct in *Taylor*. Justice Stevens joined the majority in *Rock v. Arkansas*, so apparently he is not loath to the Court's invalidating a state rule of evidence. Moreover, Justice Stevens frequently is the fourth member of the dissent in cases narrowing the constitutional rights of criminal defendants, joining the three Justices who dissented in *Taylor*. Perhaps Justice Stevens, trying to support compulsory process yet appalled by the

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121. *Id.*
122. *Taylor*, 108 S. Ct. at 653.
123. *Id.* at 655.
124. *Fendler*, 728 F.2d at 1189-90 (footnote omitted). Moreover, *Fendler* argues that "there is every reason to believe that a preclusion order is no more effective than other available sanctions." *Id.* at 1186. This stands in sharp contrast to the Court's words that other sanctions "would be less effective than the preclusion sanction . . . ." *Supra* text accompanying note 73.
125. *Fendler*, 728 F.2d at 1190 (footnotes omitted).
126. *Id.* at 1183.

fabrication of testimony, used *Fendler* to indicate to lower courts that preclusion should be used only sparingly. The failure to insist on less drastic means is simply traditional deference to trial judge discretion, mitigated by *Fendler*, which is about as close as possible to a requirement of less drastic means without actually insisting on it.

On balance, the equivocation in *Taylor* makes Justice Brennan's dissent more persuasive than Justice Stevens' majority opinion. Where the majority opinion is filled with indignant generalizations, the dissent carefully shows that witness preclusion is not only more likely to distort the truth and less likely to deter future violations, but is also unnecessary and simply unfair to an accused who has not participated in the discovery violation. To conclude, it seems appropriate to repeat Justice Brennan's eloquent final paragraph:

> Discovery rules are important, but only as a means for helping the criminal system convict the guilty and acquit the innocent. Precluding defense witness testimony as a sanction for a defense counsel's willful discovery violation not only directly subverts criminal justice by basing convictions on a partial presentation of the facts . . . but is also arbitrary and disproportionate to any of the purposes served by discovery rules or discovery sanctions. The Court today thus sacrifices the paramount values of the criminal system in a misguided and unnecessary effort to preserve the sanctity of discovery. We may never know for certain whether the defendant or Bridges' brother fired the shot for which the defendant was convicted. We do know, however, that the jury that convicted the defendant was not permitted to hear evidence that would have both placed a gun in Bridges' brother's hands and contradicted the testimony of Bridges and his brother that they possessed no weapons that evening — and that, because of the defense counsel's five day delay in identifying a witness, an innocent man may be serving ten years in prison. I dissent.[127]

IV. CONCLUSION

The Supreme Court has been reluctant to tackle the constitutional questions raised by preclusion of criminal defense witnesses as a sanction for discovery violations. Now that the Court has finally addressed the issue, the law remains unchanged. The holding in *Taylor* that compulsory process does not absolutely bar the preclusion sanction will have limited impact, because few courts have held to the contrary. The Court's holding could be restated, that under some circumstances compulsory process bars the preclusion sanction. The

127. *Taylor*, 108 S. Ct. at 667 (Brennan, J., dissenting).

Court's equivocation provides little guidance to the lower courts for determining what those circumstances are.

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