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Sixth Amendment--Preclusion of Defense Witnesses and the Sixth Amendment's Compulsory Process Clause Right to Present a Defense

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SIXTH AMENDMENT—PRECLUSION OF DEFENSE WITNESSES AND THE SIXTH AMENDMENT'S COMPULSORY PROCESS CLAUSE RIGHT TO PRESENT A DEFENSE

Taylor v. Illinois, 108 S. Ct. 646 (1988)

I. INTRODUCTION

In *Taylor v. Illinois*,[1] a majority of the United States Supreme Court determined that the compulsory process clause of the sixth amendment[2] was not violated by the preclusion of a witness's testimony as a sanction for the violation of discovery rules.[3] The Court affirmed an Illinois Appellate Court decision[4] that upheld the trial court's exclusion of the testimony.[5] In reaching this conclusion the Court ostensibly declined to establish a set standard for when discovery violations warranted such an extreme sanction, instead promoting a balancing of the interests involved.[6] These interests include the defendant's right to present testimony as guaranteed by the compulsory process clause and the state's interest in orderly, fair, and accurate criminal trials.[7]

In deciding *Taylor*, however, the Court failed to actually apply such a balancing test. Instead, it established a standard for the discretionary use of preclusion when a willful violation of discovery rules exists.[8] This Note reviews the *Taylor* opinion and concludes that the Court failed to properly define or consider all the important factors to be balanced. Additionally, the Court's willful violation

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1 108 S. Ct. 646 (1988).

2 The sixth amendment to the United States Constitution provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. This sixth amendment right is applicable in state and federal prosecutions. Washington v. Texas, 388 U.S. 14, 17-19 (1967).

3 *Taylor*, 108 S. Ct. at 656.

4 State v. Taylor, 141 Ill. App. 3d 839, 491 N.E.2d 3 (1st Dist. 1986).

5 *Taylor*, 108 S. Ct. at 657.

6 *Id.* at 655.

7 *Id.*

8 *Id.* at 656.

standard can act to improperly deprive a defendant of his right to present testimony. This Note further suggests a more detailed balancing test that would better protect the defendant's right to present testimony.

II. FACTS

Ray Taylor was convicted by a jury for the attempted murder of Jack Bridges during a street fight that occurred on August 6, 1981.[9] The incident took place on the south side of Chicago and was witnessed by twenty or thirty bystanders.[10] The prosecution presented testimony from four witnesses, including the victim Bridges, that a twenty minute argument had occurred between Bridges and a man named Derrick Travis over an hour before the violent confrontation.[11] The violent confrontation involved Travis and several of his friends, including the defendant Taylor, against Bridges and his brother.[12] It was undisputed that at least three members of Taylor's group carried pipes and clubs that were used to beat Bridges.[13]

The prosecution's witnesses also testifed that as Bridges attempted to flee, Taylor shot him once in the back and then unsuccessfully attempted, due to the weapon misfiring, to shoot him in the head.[14] The only two witnesses called for the defense, two sisters who were friends of Taylor, testified that Bridges' brother, and not Taylor, was the one carrying the gun and that he had shot into the group and accidentally struck his brother.[15]

Prior to the trial, Taylor's lawyer responded to a discovery motion that had requested a list of witnesses by identifying the two sisters, as well as two other men who subsequently did not testify.[16] Defense counsel was allowed to amend that answer on the first day of trial, and added two more names, Derrick Travis and a member of the Chicago Police Department, both of whom were not subsequently called to testify.[17] Defense counsel made an oral motion to amend the witness list again on the second day of the trial after two of the prosecution's main witnesses had testified.[18] The defense claimed that it had just learned of two additional witnesses, Alfred

9 *Id.* at 649.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

Wormley and Pam Berkhalter.[19]

As an explanation for the late production of the new names, defense counsel told the court that the defendant had actually informed him of these witneses earlier, but that the defendant could not locate Wormley.[20] The court noted that counsel should have supplied the names earlier even if the addresses were unknown and also expressed concern as to whether the witnesses were actually present during the incident.[21] The judge then directed that the two additional witnesses be brought into court the next day at which time he would rule on the admissibility of their testimony.[22] The following day the judge discussed the ramifications of violating discovery rules, but allowed defense counsel to make an offer of proof by presenting Wormley's testimony while the jury was removed.[23]

Wormley testified that he had not witnessed the confrontation itself, but that he had seen Bridges and his brother carrying two guns under a blanket and heard them say they were after Taylor and his friends.[24] Wormley further testified that he later saw Taylor's group and warned them that the Bridges' group was armed.[25] Upon cross-examination Wormley revealed that he had met Taylor about four months prior to that day, approximately two years after the incident, and that defense counsel had visited him at his home the week before the trial began.[26]

Based upon Wormley's testimony, the trial judge decided that the exclusion of his testimony was an appropriate sanction for the discovery violation.[27] The judge stated that it was a willful and blatant violation of the rules of discovery and that he doubted the veracity of Wormley's testimony.[28] Furthermore, the judge noted a pattern of blatant discovery violations in the last three or four cases in his courtroom and expressed his desire to put a stop to that pattern.[29] Taylor was subsequently convicted and that conviction was affirmed by the Illinois Appellate Court.[30]

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19 *Id.*

20 *Id.* The record has no further mention of Berkhalter.

21 *Id.* at 650.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* At the trial court level, the only objection to the preclusion of Wormley's testimony came in Taylor's "motion for new trial, stating '[t]he Court erred by not letting a witness for defendant testify before the jury.' " *Id.* at 658 (quoting Record at 412).

29 *Id.* at 650.

30 State v. Taylor, 141 Ill. App. 3d 839, 844-845, 491 N.E.2d 3, 7 (1st Dist. 1986).

The Appellate Court ruled that the severity of a sanction imposed against a party for the violation of a rule of discovery was within the discretion of the trial court and that the preclusion of Wormley's testimony was within that discretion.[31] The Illinois Supreme Court denied leave to appeal.[32] The United States Supreme Court then granted certiorari to consider whether the preclusion of a defense witness as a sanction for the infraction of a pretrial discovery rule violated the defendant's sixth amendment right to compulsory process.[33]

III. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Justice Stevens wrote the majority opinion affirming Taylor's conviction by a five-to-three vote.[34] Justice Stevens first determined that a discovery sanction that precludes a defense witness from testifying may violate the defendant's sixth amendment compulsory process clause rights, which confers on the accused the right to subpoena witnesses and the right to present witnesses in his own defense.[35] The Court held that this sixth amendment right to present witnesses, however, is not absolute and the discovery sanction of preclusion is justified when a discovery violation is willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony.[36]

Justice Stevens began his analysis by examining the nature of the right to present witnesses and the role of the compulsory process clause in protecting that right.[37] He reasoned that the compulsory process clause's "right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard."[38] The Court noted that the State's contention that the compulsory

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[31] *Id.* The Appellate Court noted that the only witness preclusion issue before it was whether "the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for violation of the discovery rules." *Id.* at 839, 491 N.E.2d at 4-5. The Appellate Court did not, however address either the compulsory process claim implied in the briefs, or the due process claim expressly asserted in the briefs concerning witness preclusion.

[32] *Taylor*, 108 S. Ct. at 648.

[33] 107 S. Ct. 947 (1987).

[34] *Taylor*, 108 S. Ct. at 648. Justice Stevens was joined by Chief Justice Rehnquist, Justice White, Justice O'Connor, and Justice Scalia.

[35] *Id.* at 652-53.

[36] *Id.* at 655-56.

[37] *Id.* at 651-53.

[38] *Id.* at 652.

process clause had no role in supporting this right or in determining the constitutionality of the infringement of this right by a discovery sanction was "supported by the plain language of the [compulsory process] Clause,[39] . . . by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law,[40] by some scholarly comment,[41] and by a brief excerpt from the legislative history of the Clause."[42] Justice Stevens then noted, however, that the Court had consistently interpreted the compulsory process clause in a broader manner more in line with state constitutional provisions which legislatures had drafted during the same time period and gave the defendant the right to present evidence advantageous to his defense.[43]

Justice Stevens stated that " '[o]ur 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.' "[44] Justice Stevens characterized previous Supreme Court cases as establishing that "[f]ew rights are more fundamental than that of an accused to present his own defense"[45] and that such a right "is an essential attribute of the adversary system itself."[46] Because of this important role, Justice Stevens reasoned that the right to "compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact,"[47] and therefore the right to offer testimony can be implicitly found in the sixth amendment.[48]

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39 *See supra* note 2.

40 *Taylor*, 108 S. Ct. at 651. In support, the Court cited Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials*, 9 IND. L. REV. 711, 767 (1976).

41 *Taylor*, 108 S. Ct. at 651. (Court cited 8 J. WIGMORE, EVIDENCE § 2191, at 68-70 (J. McNaughton rev. ed. 1961)(compulsory process clause does not support a defendant's right to present a defense)).

42 *Id.* at 651-652 n.12. The Congress defeated a proposed amendment to the compulsory process clause that would have allowed the defendent a continuance when he could show that a witness who was material to his defense and for whom process had been granted had not been served. 1 ANNALS OF CONG. 756 (1789).

43 *Taylor*, 108 S. Ct. at 652.

44 *Id.* at 652 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)(criminal defendant's conviction reversed and remanded because he was not allowed to examine government documents that may have affected the outcome of the trial)).

45 *Id.* (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

46 *Id.* (citing United States v. Nixon, 418 U.S. 683 (1974)(President's duty to disclose tapes of personal conversations with defendants based in part on defendants' compulsory process clause rights)).

47 *Id.*

48 *Id.* Justice Stevens also quoted from Washington v. Texas, 388 U.S. 14 (1967), in

The Court next addressed Taylor's contention that the compulsory process clause created an absolute bar to the preclusion of defense evidence as a sanction for the violation of a discovery rule and concluded that it was "just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[49]

In reaching that conclusion, the Court differentiated several rights protected by the sixth amendment.[50] Justice Stevens first noted that while the privileges of most sixth amendment rights were automatically bestowed on a defendant in order to protect him from prosecutorial abuses, the "right to compel the presence and present the testimony of witnesses . . . . may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant."[51]

Justice Stevens further explained that the principle underlying the right to present evidence was also the source of necessary limitations on that right.[52] He stressed that "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case." [53] Furthermore, Justice Stevens continued, absolute control of the presentation of witnesses' testimony by either party would seriously undermine the entire trial process.[54] Toward that end, he said, the State is justified in imposing and enforcing rules of evidence that control the identification and presentation of witnesses.[55]

The Court determined that the defendant's right to compulsory process was intended to "vindicate the principle that the 'ends of criminal justice would be defeated if judgments were to be founded

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which it was determined that the right to present a defense consisted of the right to compel the attendance of witnesses and offer their testimony and that such a right " 'stands on no lesser footing than other Sixth Amendment rights that we have previously held applicable to the states.' " *Taylor*, 108 S. Ct. at 652-653 (quoting Washington v. Texas, 388 U.S. 14, 18 (1967)).

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

50 *Id.* at 653.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* Justice Stevens discussed the act of interrupting the opposing party's case or the jury's deliberation to present newly discovered evidence as examples of unacceptably disruptive actions. *Id.*

55 *Id.*

on a partial or speculative presentation of the facts.' "[56] Procedural rules, including pretrial discovery and cross-examination, further minimize "the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony."[57]

In support of the importance of the State's interest in a full disclosure of the facts, Justice Stevens noted *Brown v. United States*,[58] in which the Court held that "even the defendant may not testify without being subjected to cross-examination."[59] The Court also acknowledged *United States v. Nobles*[60] as supporting this state interest by upholding the exclusion of an expert witness because the defendant did not permit discovery of the expert's written report.[61] The Court emphasized its language in *Nobles* that " '[t]he 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.' "[62]

Taylor had argued that preclusion was too drastic a sanction to ever be imposed for failure to include a witness on a pretrial list, because other less drastic sanctions are available for violations of pretrial discovery rules.[63] Such sanctions could be imposed against either the defendant or defense counsel, and prejudice to the prosecution could be limited by allowing a continuance or mistrial to allow further time for investigation of the proposed witness.[64]

Justice Stevens responded to this argument by noting that while alternative sanctions may be adequate in most cases, they would,

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56 *Id.* (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

57 *Id.* at 654. The Court also discussed the dangers to the state of an eleventh hour defense given the ease with which an alibi can be manufactured and the longstanding existence of notice-of-alibi rules in a large number of states to help reduce such surprises at trials. *Id.* at 653-654 nn.16-17 (citing Williams v. Florida, 399 U.S. 78, 81-82 (1970)).

58 356 U.S. 148 (1958)(defendant waived her fifth amendment right to not answer questions on cross-examination when she testified at her own denaturalization proceedings).

59 *Taylor*, 108 S. Ct. at 654 (quoting *Brown*, 356 U.S. at 156).

60 422 U.S. 225 (1975).

61 *Taylor*, 108 S. Ct. at 654 (citing *Nobles*, 422 U.S. at 241).

62 *Id.* at 654 (quoting *Nobles*, 422 U.S. at 241 (emphasis omitted)). The Court in *Nobles* precluded the expert's testimony as a "method of assuring compliance" with its discovery order. The district court in that case "did not bar the investigator's testimony .... It merely prevented [the defendant] from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights." *Nobles*, 422 U.S. at 241.

63 *Taylor*, 108 S. Ct. at 654. For a discussion of such alternatives, see *infra* notes 227-243 and accompanying text.

64 *Id.* at 654-655.

nonetheless, be less effective than preclusion and there would be instances in which these alternative sanctions would fail to properly protect the state interest protected by discovery rules.[65] Justice Stevens described one such instance to be the attempted use of fabricated testimony through a series of discovery rule violations.[66] In such a case, he said, "[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."[67]

In declining to establish a comprehensive set of standards to control the proper use of discretion in such cases, the Court emphasized the defendant's basic right to present testimony.[68] However, the Court continued, "mere invocation of that right cannot automatically and invariably outweigh countervailing public interests."[69] The countervailing public interests considered by Justice Stevens were the "integrity of the adversary process," " the interest in the fair and efficient administration of justice," and "the potential prejudice to the truth-determining function of the trial process."[70]

Justice Stevens stated that when a trial judge learns that a failure to disclose all witnesses prior to trial "was willful and motivated by a desire to obtain a tactical advantage . . . it would be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony."[71]

In rejecting Taylor's assertion that preclusion is an inappropriate sanction regardless of the severity of the discovery violation, Justice Stevens concluded that "[i]t would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow pre-

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65 *Id.* at 655.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 655-656. The Court acknowledged that while there may be legitimate reasons for not wishing to disclose a witness' name, such concerns should be raised prior to trial. Additionally, the Court stated that there was no indication that Taylor had objected to the discovery request on any grounds. *Id.* at 656 n.20. The Court further noted that the difficulty or "simplicity of compliance with the discovery rule [was] also relevant." *Id.* at 656. Because the invocation of the compulsory process clause by the defendant already requires planning and affirmative actions by the defendant and defense counsel, including locating, interrogating, and serving subpoenas upon witnesses, identifying them in advance does not require much additional effort. *Id.*

sumptively perjured testimony to be presented to a jury."[72]

In rejecting Taylor's argument that the preclusion of Wormley's testimony was unnecessarily harsh, Justice Stevens looked past any potential prejudice that might have occurred to the prosecution if the court had permitted Wormley to testify.[73] Justice Stevens expressed a concern for "the impact of this kind of conduct on the integrity of the judicial process itself."[74] The Court agreed with the trial judge that this was a case of willful misconduct, and that the defense counsel had attempted to gain a tactical advantage through violation of the discovery rules.[75] The Court justified the preclusion sanction both on the grounds that, generally, categories of inadmissible evidence may properly be excluded by the rules of evidence even though the particular testimony offered may not be prejudicial and, specifically, that enough doubts were raised by the record to question Wormley's veracity.[76]

The Court then addressed Taylor's argument that he should not be punished for his attorney's mistakes because the preclusion of favorable testimony was not actually a sanction against the lawyer who violated the discovery rules, but only served to penalize Taylor by hurting his chances for acquittal.[77] The Court stated that a lawyer must have full authority to speak for his client at trial in order to preserve the adversarial system and that in such situations Taylor must accept his attorney's decisions in managing the trial, with the exception of cases in which counsel is ineffective.[78] Furthermore, requiring a determination of the relative culpability of the lawyer and the defendant prior to the sanction of preclusion would require extensive investigation that would be "highly impracticable."[79]

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72 *Id.* at 656.

73 *Id.*

74 *Id.*

75 *Id.* The Court placed emphasis on the fact that defense counsel had actually interviewed Wormley one week prior to the trial, did not identify Wormley in the amended Answer to Discovery on the first day of the trial, and identified but failed to place on the stand two actual eyewitnesses. *Id.* The Court also noted that the trial court was concerned about discovery violations in previous cases. Justice Stevens acknowledged that this was an appropriate concern only if Taylor's attorney had been involved in these previous violations. Otherwise, this was an improper consideration for justifying an infringement upon Taylor's constitutional right to present a defense. *Id.*

76 *Id.* at 657. The Court noted that "[t]he pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference 'that witnesses are being found that really weren't there,' to justify the sanction of preclusion." *Id.* (quoting Record at 13-14).

77 *Id.*

78 *Id.*

79 *Id.*

B. JUSTICE BRENNAN'S DISSENTING OPINION

Justice Brennan dissented from the majority opinion[80] and argued that when there is no evidence of the defendant's involvement in a discovery rule violation, "the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence."[81] Justice Brennan thought that the question in this case was "not whether discovery rules should be enforced but whether the need to correct and deter discovery violations requires a sanction that itself distorts the truthseeking process by excluding material evidence of innocence in a criminal case."[82]

The dissent agreed with the majority opinion that Taylor's constitutional claims were not waived in the Appellate Court of Illinois.[83] Justice Brennan did not agree, however, that these claims were properly preserved at trial and concluded that Taylor had waived his constitutional rights as a matter of Illinois law.[84]

Justice Brennan noted that Taylor had only claimed at the trial court level that the court erred in precluding Wormley's testimony.[85] Justice Brennan argued that the Appellate Court of Illinois, in a previous case,[86] had already held that the claim that the court erred preserved only an abuse of discretion claim and waived any constitutional claims.[87] However, Justice Brennan continued, the Illinois Appellate Court's determination that federal constitutional claims were waived as a matter of Illinois state law does not mean that they are waived as a matter of federal law.[88]

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80 *Id.* at 657. Justice Brennan was joined by Justices Marshall and Blackmun in dissent.

81 *Id.* at 658 (Brennan, J., dissenting).

82 *Id.* at 657-658 (Brennan, J., dissenting).

83 *Id.* (Brennan, J., dissenting). Justice Brennan agreed with this conclusion based on his opinion that Taylor's appellate brief properly presented the compulsory process clause claim and the fact that the analysis regarding Taylor's claims "would essentially be the same under the due process clause." *Id.* (Brennan, J., dissenting). Justice Brennan later noted that both the compulsory process clause and the due process clause "require courts to conduct a searching substantive inquiry whenever the government seeks to exclude criminal defense evidence." *Id.* at 660 (Brennan, J., dissenting). *See supra* note 31 and accompanying text for further discussion of the Illinois Appellate Court decision.

84 *Id.* at 659 (Brennan, J., dissenting). *But see supra* note 28 for the objection that Taylor raised at trial.

85 *Id.* (Brennan, J., dissenting).

86 People v. Douthit, 51 Ill. App. 3d 751, 366 N.E.2d 950 (1977)(claim that court erred in precluding defense witness testimony "raises only the nonconstitutional question whether the trial court abused its discretion in exercising the exclusion").

87 *Taylor*, 108 S. Ct. at 658 (Brennan, J., dissenting).

88 *Id.* at 659 (Brennan, J., dissenting). Justice Brennan stated that "it is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in a particular case does

Justice Brennan then considered the merits of the case itself. Starting from the premise that the compulsory process clause grants the defendant a substantive right to present exculpatory evidence, Justice Brennan stated his agreement with the part of the majority opinion that rejected the State's argument that the compulsory process clause only granted the power to subpoena witnesses.[89] However, Justice Brennan disagreed with the majority that the plain language of the compulsory process clause supported the state's position.[90] Justice Brennan argued that such an interpretation would result in making the subpoena power meaningless if subpoenaed defense witnesses were not allowed to testify.[91]

Justice Brennan asserted that the compulsory process clause and the due process clause require the courts to conduct a substantive inquiry whenever an attempt is made to exclude defense evidence,[92] because the exclusion of such evidence "undermines the central truthseeking aim of our criminal justice system because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person."[93] Justice Brennan recognized, however, that there still existed valid restrictions on the presentation of evidence that are not made unconstitutional under the compulsory process clause.[94]

Justice Brennan reviewed the Court's prior analysis in cases in which the government sought to exclude criminal defense evidence[95] and promoted the standard recently articulated in *Rock v.*

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not bar review in this Court." *Id.* (Brennan, J., dissenting) (citing Williams v. Georgia, 349 U.S. 375, 383-384 (1955)). Justice Brennan noted that Illinois appellate courts do possess this power under Illinois Sup. Ct. Rule 615(a), which provides: "[p]lain errors affecting substantial rights may be noticed [on appeal] even though they were not brought to the attention of the trial court." ILL. ANN. STAT. ch. 110A, para. 615(a) (Smith-Hurd 1985). As a result, the United States Supreme Court is free to address the merits of the case. *Id.* at 659 (Brennan, J., dissenting).

89 *Id.* at 659 (Brennan, J., dissenting).

90 *Id.* (Brennan, J., dissenting).

91 *Id.* (Brennan, J., dissenting). Justice Brennan noted that the Supreme Court had stated that " '[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.' " *Id.* (Brennan, J., dissenting)(quoting Washington v. Texas, 388 U.S. 14, 23 (1967)). Furthermore, 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.' " *Id.* at 660 (Brennan, J., dissenting)(quoting *Washington*, 388 U.S. at 23).

92 *Id.* (Brennan, J., dissenting).

93 *Id.* (Brennan, J., dissenting)(citations omitted).

94 *Id.* (Brennan, J., dissenting). Justice Brennan noted three such restrictions: irrelevant evidence; testimony by "persons who are mentally infirm;" and evidence that "represents a half-truth." *Id.* (Brennan, J., dissenting).

95 *Id.* (Brennan, J., dissenting). Justice Brennan relied on Crane v. Kentucky, 476 U.S. 683, 690 (1986)(the exclusion of evidence bearing on the credibility of a voluntary

Arkansas[96] that restrictions on the right to present evidence can be constitutional only if they " 'accomodate other legitimate interests in the criminal trial process' and are not 'arbitrary or disproportionate to the purposes they are designed to serve.' "[97]

Justice Brennan then reviewed the present case using the standard announced in *Rock*, framing the issue as "whether precluding a criminal defense witness from testifying bears an arbitrary and disproportionate relation to the purposes of discovery."[98]

Justice Brennan began this part of his analysis by noting that discovery helps to "develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise" from deciding the ultimate outcome of a case.[99] Justice Brennan maintained that these goals are met by compliance with the rules, not exclusion of evidence.[100] Therefore, discovery sanctions should serve to meet these same goals by "correcting for the adverse effects of discovery violations and deterring future discovery violations from occuring."[101] As a result, Justice Brennan argued that sanctions which meet these goals and do not purposely distort the fact-finding process, as preclusion does, should be used.[102]

Justice Brennan examined the objectives of the preclusion sanction first as a corrective, as opposed to a punitive, sanction. Under this classification, preclusion "is asserted to have two justifications: (1) it bars the defendant from introducing testimony that has not been tested by discovery, and (2) it screens out witnesses who are inherently suspect because they were not disclosed until trial."[103]

Justice Brennan argued that the first justification was not applicable because Taylor did not question the right to have Wormley's testimony first heard out of the presence of the jurors, or to have a

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confession held unconstitutional); Chambers v. Mississipi, 410 U.S. 284, 300 (1973)("an application of the hearsay rule to statements that 'were originally made and susequently offered at trial under circumstances that provided considerable assurance of their reliability' " also held unconstitutional); and *Washington*, 388 U.S. at 23 ("rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief" are unconstitutional). *Id.* at 660 (Brennan, J., dissenting).

96 107 S. Ct. 2704, 2709 (1987)("a per se rule excluding all post-hypnosis testimony" held unconstitutional).

97 *Taylor*, 108 S. Ct. at 661 (Brennan, J., dissenting)(quoting *Chambers*, 410 U.S. at 295).

98 *Id.* at 661 (Brennan, J., dissenting).

99 *Id.* (Brennan, J., dissenting).

100 *Id.* (Brennan, J., dissenting).

101 *Id.* (Brennan, J., dissenting).

102 *Id.* (Brennan, J., dissenting).

103 *Id.* (Brennan, J., dissenting)(citations omitted).

continuation to allow the prosecution time for further discovery concerning Wormley's testimony.[104] Thus, he asserted that both *United States v. Nobles*[105] and *Brown v. United States*,[106] which the majority relied upon, are not on point.[107]

Justice Brennan maintained that because the preclusion in *Nobles* was not permanent it was not pertinent to *Taylor*, for the "authority of trial courts to prevent the presentation of a 'half-truth' by ordering further discovery is not at issue here," as it was in *Nobles*.[108] Justice Brennan stated that *Brown* was also inappropriate for the same reasons.[109]

Justice Brennan found the exclusion of inherently suspect witnesses equally inappropriate.[110] Justice Brennan noted that the trial court did not even rely on this in precluding the testimony, but instead included it after the ruling had already been made,[111] and gave no indication that this ground alone would have been sufficient to exclude the testimony.[112]

Furthermore, Justice Brennan argued that precluding evidence because of its apparent lack of credibility was not available under Illinois law,[113] under which judges are not even allowed to comment on the credibility of witnesses.[114] Justice Brennan also noted that no cases that interpreted Illinois Supreme Court Rule 415(g)[115] sug-

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104 *Id.* (Brennan, J., dissenting).

105 422 U.S. 225 (1975).

106 356 U.S. 148 (1958).

107 *Taylor*, 108 S. Ct. at 661 (Brennan, J., dissenting).

108 *Id.* at 662 (Brennan, J., dissenting).

109 *Id.* (Brennan, J., dissenting). Justice Brennan stated that "[f]or similar reasons, the holding in *Brown* . . . can have no bearing on this case." *Id.* (Brennan, J., dissenting).

110 *Id.* at 662 (Brennan, J., dissenting).

111 *Id.* (Brennan, J., dissenting). Justice Brennan noted that the trial judge stated: "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 . . . ." *Id.* (Brennan, J., dissenting)(emphasis added by Justice Brennan).

112 *Id.* (Brennan, J., dissenting).

113 *Id.* (Brennan, J., dissenting)(citing People v. Van Dyke, 414 Ill. 251, 254, 111 N.E.2d 165, 167, *cert. denied*, 345 U.S. 978, (1953)(the credibility of the witnesses presented to be left to the jury, not the judge); Village of Des Plaines v. Winkelman, 270 Ill. 149, 159, 110 N.E. 417, 422 (1915)(jury to determine the weight given to each witness)).

114 *Id.* at 662 n.3 (Brennan, J., dissenting)(citing People v. Santucci, 24 Ill. 2d 93, 98, 180 N.E.2d 491, 493 (1962)(decisions of fact left to the jury so it is not within the province of the judge to convey his or her opinions to the jury); People v. Heidorn, 114 Ill. App. 3d 933, 936, 449 N.E.2d 568, 572 (1983)(a judge is not allowed to comment on the credibility of a witness by word or conduct)).

115 Illinois S. Ct. Rule 415(g) states:

> Sanctions (i) If at any time during the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discov-

gested "that the rule gives a trial judge special authority to exclude criminal defense witnesses based on their apparent or presumed unreliability."[116]

Justice Brennan also stated that precluding evidence "based on its presumptive or apparent lack of credibility would be antithetical to the principles laid down"[117] in *Washington*, in which the Court asserted that the testimony of witnesses was beneficial to the truth finding process and expressed the opinion that the jury should be left to determine the veracity and weight of such testimony.[118]

Justice Brennan pointed out that the *Washington* Court "concluded that 'arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief' are unconstitutional."[119] Therefore, in discussing the class of witnesses not identified by defense until trial, "any presumption that they are so suspect that the jury can be prevented from even listening to their testimony is at least as arbitrary as presumptions excluding an accomplice's testimony, hearsay statements bearing indicia of reliability, or a defendant's post-hypnosis testimony—all of which have been declared unconstitutional."[120] Justice Brennan argued that the proper method to use with such witnesses under the *Washington* doctrine and Illinois law is to let the jury hear the testimony and then allow "the prosecutor to inform the jury about the circumstances casting doubt on the testimony."[121]

Justice Brennan then addressed the punitive objectives and the deterrence of future discovery violations, which the sanction is also intended to accomplish.[122] Instead of preclusion, Justice Brennan argued that direct sanctions such as contempt or disciplinary pro-

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ery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. (ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

ILL. ANN. STAT. ch. 110A, para. 415(g) (Smith-Hurd 1985).

116 *Taylor*, 108 S. Ct. at 662-663 (Brennan, J., dissenting).

117 *Id.* at 663 (Brennan, J., dissenting).

118 *Id.* (Brennan, J., dissenting). Justice Brennan noted that the Court there held that:

> [T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury . . . . [W]e believe that [the latter] reasoning [is] required by the Sixth Amendment.

Id. (Brennan, J., dissenting)(quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).

119 *Taylor*, 108 S. Ct. at 663 (Brennan, J., dissenting)(quoting *Washington*, 388 U.S. at 22).

120 *Id.* (Brennan, J., dissenting)(citations omitted).

121 *Id.* (Brennan, J., dissenting).

122 *Id.* at 664 (Brennan, J., dissenting).

ceedings can be made more proportionate to the severity of the discovery rule violation.[123] In contrast, he said, preclusion can be quite disproportionate[124] and arbitrary.[125] Justice Brennan noted that this is particularly true when the defendant is penalized through the exclusion even though he was not personally responsible for the violation.[126]

Justice Brennan acknowledged that while it was clear that Taylor's attorney had willfully violated Illinois Supreme Court Rule 413(d),[127] there was no evidence that the defendant had participated in that violation in any way and no investigation into that matter was conducted.[128] Instead, Justice Brennan got the "impression that the main reason the trial court excluded Wormley's testimony was the belief that the defense counsel had purposefully lied about when he had located Wormley."[129]

Furthermore, Justice Brennan noted that the trial court excluded the testimony at least partially in response to discovery violations by different defense attorneys in different cases.[130] The Court's response that this would not normally provide proper grounds for exclusion without further application of the analysis to this case was not, in Justice Brennan's view, an adequate response to this problem.[131]

Justice Brennan proposed that when there exists no evidence of the defendant's involvement in an attorney's willful violation, then a direct sanction against the attorney is "not only fairer but *more* effective in deterring violations than [would be] excluding defense evidence."[132] Instead, personal sanctions such as "disciplinary proceedings, fines, or imprisonment will likely influence attorney behavior to a far greater extent than the rather indirect penalty

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123 *Id.* (Brennan, J., dissenting).

124 *Id.* (Brennan, J., dissenting). Preclusion could "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." *Id.* (Brennan, J., dissenting).

125 *Id.* (Brennan, J., dissenting). Preclusion "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 a suspended sentence." *Id.* (Brennan, J., dissenting).

126 *Id.* (Brennan, J., dissenting).

127 *Id.* (Brennan, J., dissenting). Illinois S. Ct. Rule 413(d) states: "defense counsel . . . shall furnish the state with the following material and information within his possession or control: (i) The names and last known addresses of persons he intends to call as witnesses . . . ." ILL. ANN. STAT. ch. 110A, para. 413(d)(i) (Smith-Hurd 1985).

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

129 *Id.* (Brennan, J., dissenting).

130 *Id.* at 664-665 (Brennan, J., dissenting).

131 *Id.* at 665 (Brennan, J., dissenting).

132 *Id.* (Brennan, J., dissenting)(emphasis in original).

threatened by evidentiary exclusion."[133]

Justice Brennan also made a distinction between tactical errors an attorney makes during the course of a trial and attorney misconduct.[134] In doing so, Justice Brennan criticized the Court's determination that because a client is not permitted the power to question all tactical decisions, so too the client cannot question the attorney's decisions regarding violations of discovery rules.[135] Justice Brennan defined tactical errors to be those that result from a legitimate choice between different options that, in hindsight, turn out to have been mistakes.[136] Justice Brennan admitted that penalizing attorneys for such mistakes would be impractical and futile[137] and that with these types of errors the defendant necessarily must be penalized.[138]

In contrast, Justice Brennan maintained that attorney misconduct is never the result of a choice between legitimate options and is visible without the aid of hindsight.[139] Because direct punitive sanctions are available against the attorney in such situations, these should be applied exclusively unless the defendant somehow willfully participated in the rule violation.[140]

Finally, Justice Brennan argued that the Court's decision created a conflict of interest in that the attorney's best argument against preclusion of the witness in cases of willful misconduct is to argue for personal sanctions against himself.[141] Given such a standard, it is impossible to "expect defense counsel in this or any other case to act as vigorous advocates for the interests of their clients when those interests are adverse to their own."[142]

In conclusion, Justice Brennan stated that the Court, in upholding the discovery rules that are meant to assist the criminal system in ascertaining the truth, in fact subverted that ultimate goal of the criminal system by allowing convictions based on an incomplete representation of the facts.[143]

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133 *Id.* (Brennan, J., dissenting).
134 *Id.* (Brennan, J., dissenting).
135 *Id.* (Brennan, J., dissenting).
136 *Id.* at 666 (Brennan, J., dissenting).
137 *Id.* (Brennan, J., dissenting).
138 *Id.* (Brennan, J., dissenting).
139 *Id.* (Brennan, J., dissenting).
140 *Id.* (Brennan, J., dissenting).
141 *Id.* at 667 (Brennan, J., dissenting).
142 *Id.* (Brennan, J., dissenting).
143 *Id.* (Brennan, J., dissenting).

C. JUSTICE BLACKMUN'S DISSENTING OPINION

Justice Blackmun filed a separate dissenting opinion, making it clear that he joined Justice Brennan's dissent only as confined to "general reciprocal-discovery rules"[144] and not "for any position as to permissible sanctions for noncompliance with rules designed for specific kinds of evidence as, for example, a notice-of-alibi rule."[145]

IV. DISCUSSION AND ANALYSIS

In *Taylor v. Illinois* the Court first held that the compulsory process clause of the sixth amendment and not the due process clause of the fifth amendment provided the constitutional basis for a defendant's right to present testimony in his favor. That distinction determines the proper test to be used in establishing when the infringment of the right to present testimony is a violation of a criminal defendant's constitutional right to present a defense.[146] A balancing test of the competing interests involved is used for questions concerning the sixth amendment, whereas a more general fairness standard is used for fifth amendment due process concerns.[147]

While the Court in *Taylor* acknowledged the appropriateness of the use of a balancing of interests test, it did not clearly establish or utilize such a test in its determination of whether the preclusion of the defense witness in *Taylor* was a contitutional violation. Instead, the Court based its decision in *Taylor* on a willful violation standard that appeared to operate as an exception to the balancing of interests test.[148] The Court's lack of adherance to the analytical framework provided by precedent is unsound and, more importantly, may lead to future violations of a criminal defendant's sixth amendment right to present a defense.

This Note suggests that a more clearly defined balancing test should be applied in determining when the preclusion of a defendant's witness as a discovery sanction violates his sixth amendment compulsory process clause rights.

A. COMPULSORY PROCESS VERSUS DUE PROCESS

The holding in *Taylor* that the compulsory process clause provided the constitutional basis for a criminal defendant's right to present a defense resolved a previously open question. Prior to *Tay-*

144 *Id.* (Blackmun, J., dissenting).
145 *Id.* at 667-668 (Blackmun, J., dissenting).
146 *See infra* notes 171-180 and accompanying text for discussion of the balancing test.
147 *See infra* note 181 and accompanying text.
148 *Taylor*, 108 S. Ct. at 655.

lor, it was unclear whether the right to present a defense rested solely on the sixth amendment's compulsory process clause or the fifth amendment's due process clause.

Before *Taylor*, the Supreme Court had decided a number of cases that dealt with the right to present a defense and had determined that a defendant clearly has a constitutionally protected right to present a defense.[149] However, those cases did not clearly establish whether that right was based on the compulsory process clause[150] or due process.[151]

In *Washington v. Texas*,[152] the Court held a Texas statute unconstitutional because it arbitrarily prohibited the defendant from offering the testimony of an accomplice.[153] In so ruling, the Court based its decision on the compulsory process clause, noting that it would be meaningless if the defendant had the right to compel the attendance of witnesses but was powerless to have those witnesses testify.[154] Although that decision appeared to have resolved the role of the compulsory process clause in the right to defend,[155] the Supreme Court backpeddled in *Brooks v. Tennessee*.[156]

In *Brooks*, the Supreme Court held unconstitutional a rule that

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149 For a survey of the pre-*Taylor* cases regarding the right to present a defense, *see generally*, Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials*, 9 IND. L. REV. 711, 756-792 (1976)(Cases clearly establish that a criminal defendant has a constitutionally protected right to present a defense that controls even partial exclusion of defense testimony. The constitutional basis for this right, however, was unclear.); Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 127-131 (1974)(Cases had based the right to defend on both the the compulsory process clause and due process. While it was not irrational to do so on due process grounds, the more specific compulsory process clause is preferable.).

150 Cases basing the right to present a defense on compulsory process include: Rock v. Arkansas, 107 S. Ct. 2704 (1987); Cool v. United States, 409 U.S. 100 (1972); Washington v. Texas, 388 U.S. 14 (1967).

151 Cases basing the right to present a defense on due process include: Chambers v. Mississippi, 410 U.S. 284 (1973); Webb v. Texas, 409 U.S. 95 (1972); *In re* Oliver, 333 U.S. 257 (1948). In addition, the Supreme Court has also grounded the right to present a defense in the privilege against self-incrimination (Brooks v. Tennessee, 406 U.S. 605 (1972)), the right to counsel (*Brooks*, 406 U.S. 605; Ferguson v. Georgia, 365 U.S. 570 (1961); Gibbs v. Burke, 337 U.S. 773 (1949)), and the right to confront witnesses (Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973)).

152 388 U.S. 14 (1967)(arbitrary exclusion of accomplice's testimony held unconstitutional because it violated defendant's sixth amendment right to compel the attendance of witnesses and offer testimony).

153 *Id.* at 23.

154 *Id.* at 19, 23 ("The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.").

155 *See* Westen, *supra* note 149, at 117.

156 406 U.S. 605 (1972). *See also* United States v. Lacouture, 495 F.2d 1237 (5th Cir. 1974)(defendant's compulsory process rights limited to the physical presence of the witness in the courtroom).

required defendants to testify in their own defense at the beginning of their case or be precluded from doing so later.[157] The parties failed to raise the issue of compulsory process or the *Washington* decision, and the Court based its decision on the fifth amendment's privilege against self-incrimination and right to counsel.[158] The dissent in *Brooks* demonstrated the shortcomings of both of these arguments.[159]

One commentator has noted that even though the Court was "still vacillating between compulsory process and due process as a ground for its decisions, the Court [had] said and done enough to support the conclusion that it recognize[ed] a comprehensive right of the accused to present a defense through witnesses."[160] In so doing, the Court referred to compulsory process in dictum[161] or in reversing convictions[162] "by reference to *Washington*[163] and on grounds consistent with a broad view of compulsory process."[164]

The importance of basing the defendant's right to present a defense on the sixth amendment rests in the different tests that have developed for protecting sixth amendment rights as opposed to fifth

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157 *Brooks*, 406 U.S. at 612.

158 *Id.* at 612-613.

159 *Id.* at 617 (Rehnquist, J., dissenting). The Court ruled that the defendant's privilege against self-incrimination was violated because the statute penalized him for remaining silent at the beginning of his case. The dissent noted that the defendant never took the stand, so it was difficult to understand how his right to remain silent was infringed upon. *Id.* at 617 (Rehnquist, J., dissenting). The Court also held that the statute violated the defendant's right to counsel because it interfered with his lawyer's "tactical decision" regarding when he should be called to testify. *Id.* at 612. The dissent noted that counsel was not really prevented from doing anything for his client, but that the defendant's ability to present his own defense was infringed upon. *Id.* at 618 (Rehnquist, J., dissenting).

160 Westen, *supra* note 149, at 120.

161 United States v. Augenblick, 393 U.S. 348, 356 (1969). The Supreme Court ruled that, had the government failed to produce certain evidence during Augenblick's court martial, it could have amounted to a denial of compulsory process rights. It was not clear from the record, however, whether this had actually occurred, so the Court ruled that no constitutional question was presented.

162 *See, e.g.*, Wardius v. Oregon, 412 U.S. 470 (1973)(exclusion of defendant's alibi evidence due to his failure to meet the requirements of a notice-of-alibi statute amounted to denial of compulsory process rights); Chambers v. Mississippi, 410 U.S. 284 (1973)(exclusion of testimony under the hearsay rule that was critical to Chambers' defense found to be an unconstitutional infringement upon his right to present a defense); Cool v. United States, 409 U.S. 100 (1972)(overturning lower court holding that allowed the jury to ignore testimony for the defense unless it believed the testimony to be true beyond a reasonable doubt as inconsistent with compulsory process rights as established in *Washington*); Webb v. Texas, 409 U.S. 95 (1972)(trial judge's intimidation of a defense witness that kept the witness from testifying held to be unconstitutional infringement of defendant's right to offer testimony as expressed in *Washington*).

163 388 U.S. 14 (1967).

164 Westen, *supra* note 149, at 120.

amendment due process rights. Sixth amendment rights, being specifically guaranteed under the Bill of Rights, are analyzed under a balancing of interests test whereas due process concerns are resolved by general fairness standards.

As Justice Brennan discussed in his dissent, the Supreme Court in *Rock v. Arkansas*[165] determined, in effect, that a balancing of interests analysis is required in order to uphold an infringement of a criminal defendant's constitutional rights.[166] The Court in *Rock* held that courts "must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."[167] In addition, a balancing test was implicit in the *Washington* decision, in which the Court determined that the state's interest in preventing perjury did not warrant infringing upon the defendant's constitutional right to present testimony because there existed an alternative that adequately protected the state's interest and did not infringe upon the defendant's rights.[168]

The Supreme Court in *United States v. O'Brien*[169] held that a balancing test relies on the recognition that constitutional rights are not absolute and there may exist justifications for infringing upon those rights.[170] The balancing test, when properly defined, determines when such infringements are justified.

The interests that should be balanced in evaluating the defendant's right to present a defense were not clearly defined in *Taylor*, nor had the Court previously established them due to its vacillations between compulsory process and due process as the basis for the right to present a defense. The Supreme Court's previous cases indicate, however, that the relevant interests to be balanced include, on one side, the fundamental nature of the constitutional guarantee to present a defense,[171] and the importance of the offered testimony

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165 107 S. Ct. 2704 (1987).

166 *Taylor*, 108 S. Ct. at 660-661 (Brennan, J., dissenting)(citing *Rock*, 107 S. Ct. at 2711).

167 *Rock*, 107 S. Ct. at 2711.

168 *See* Westen, *supra* note 149, at 115-117, 128-129 (commenting on *Washington*, 388 U.S. 14). Professor Westen viewed *Washington* as based upon a balancing test and commented that the balancing test required by the compulsory process clause "more clearly identifies not only the particular interests being weighed, but the appropriate (compelling interest') standard for weighing them." *Id.* at 129. *See also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (Court stated that a denial of a sixth amendment right "calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined.")(citation omitted).

169 391 U.S. 367 (1968)(upholding the infringement of a defendant's first amendment rights due to a compelling state interest in the preservation of draft cards).

170 *Id.* at 376-377.

171 *Chambers*, 410 U.S. at 302.

to the defendant's ability to present a defense.[172] On the other side, the Court should weigh the importance of the state's interest in orderly, fair, and accurate criminal trials[173] as protected by the rules of discovery.[174]

This structure without further definition does not, however, provide the appropriate weight courts should give to these various interests. An appropriate way to measure the extent of the government's interests in a balancing of interests analysis is by looking to see if there is a compelling state interest.[175] If the state interest is not found to be compelling, then it will never outweigh the defendant's constitutional right.[176] If it is found to be compelling,[177] then infringement of fundamental constitutional rights could be allowed if infringement is essential to protecting the compelling state interest.[178] Even if the state interest is compelling, the Court should still determine whether alternative means exist that adequately protect the state's interest but which infringe less upon the defendant's constitutional right.[179] These alternative means do not have to protect the state interest equally well, just so long as they do so "adequately."[180] If such alternatives adequately protect the state interest, then the balance shifts back to protecting the defendant's constitutional right and the infringement should not be allowed. As a result, the infringement should be allowed only if it protects a

172 *See id.* at 302 (Court was influenced by the fact that the excluded evidence was "critical to Chambers' defense"); *Washington*, 388 U.S. at 16 (Court was influenced by the fact that the excluded evidence was "vital to the defense").

173 United States v. Nobles, 422 U.S. 225, 241 (1975)(sixth amendment "does not confer the right to present testimony free from the legitimate demands of the adversarial system").

174 *Chambers*, 410 U.S. at 302 ("The accused, as is required of the State, must comply with established rules of procedure and evidence . . . .").

175 *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969)(a compelling state interest required to infringe constitutionally guaranteed rights concerning social security laws). *See also* Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 82 YALE L.J. 1342, 1353-1361 (1972)(general discussion of the applicability of the compelling state interest analysis to the compulsory process clause).

176 *See* Dunn v. Blumstein, 405 U.S. 330 (1972)(voting requirements that denied some citizens the right to vote held unconstitutional because they were not necessary to further any compelling state interest).

177 The Court has defined a "compelling interest" as one that is important or substantial. United States v. O'Brien, 391 U.S. 367, 377 (1968).

178 *See Nobles*, 422 U.S. at 241; *O'Brien*, 391 U.S. at 376-377.

179 *See* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

180 Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964)(A federal act limiting members of Communist parties from travelling violated their right to liberty because "national security can be adequately protected by means which, when compared with [the act], are more discriminately tailored to the constitutional liberties of individuals.").

compelling state interest and no effective, less infringing alternative exists.

In contrast, due process rights are protected by a general fairness approach, sometimes called a totality of the circumstances test, that looks to the facts and circumstances of each case.[181] That less defined standard, therefore, necessarily limits those decisions to particular factual situations, thereby eliminating potentially useful guidelines and reducing a case's precedential value.[182]

Justice Stevens' declaration in *Taylor* that "[t]he right to offer testimony is thus grounded in the Sixth Amendment"[183] should further aid in resolving the existing confusion over the constitutional basis for the right to offer testimony and present an argument in favor of the compulsory process clause over due process. That declaration would be more encouraging if not for the Court's lack of adherance in *Taylor* to the balancing of interests analysis that it had previously enunciated.

In deciding *Taylor*, Justice Stevens outlined, but failed to define and apply, a substantive sixth amendment balancing of interests analysis. In fact, the balancing test Justice Stevens' purported to use was so loosely defined that it is barely distinguishable from the totality of the circumstances test that has been held appropriate for fifth amendment due process rights.[184] Furthermore, Justice Stevens based the Court's decision in *Taylor* on a novel willful violation standard that appears to operate independently of any balancing test and would allow for automatic preclusion when its requirements are met.[185]

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181 *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In ruling on a prosecutorial comment, the Court stated:

> When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark . . . so infected the trial with unfairness as to make the resulting conviction a denial of due process.

Id. See also Spencer v. Texas, 385 U.S. 554, 565 (1967)(In affirming defendants' felony convictions despite evidence that informed jury of defendants' prior convictions, Court held that "no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach.").

182 *See, e.g.*, United States v. Walling, 486 F.2d 229, 238 (9th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974)(discussing lack of precedent set by Chambers v. Mississippi, 410 U.S. 284 (1973), a case decided on the general fairness standards of due process).

183 Taylor v. Illinois, 108 S. Ct. 646 (1988).

184 *See supra* note 181.

185 *See infra* notes 196-220 and accompanying text for a discussion of the willful violation standard.

B. *TAYLOR*'S FLAWED ANALYTICAL FRAMEWORK

1. The Court's Balancing Test

Justice Stevens in *Taylor* appeared to indicate his adoption of a balancing test to be applied in determining the constitutional use of preclusion as a discovery sanction.[186] Justice Stevens further appeared to have laid a strong analytical framework for establishing a balancing test when he declared that a "trial court may not ignore the fundamental character"[187] of a defendant's compulsory process clause right to present testimony, but at the same time such right could not "automatically and invariably outweigh countervailing public interests."[188] The Court listed three public interests to be protected: "the integrity of the adversary process;" "the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process."[189] The Court asserted that all three factors must "weigh in the balance."[190] In addition, Justice Stevens also concluded, consistent with the Court's prior balancing of interests analysis,[191] that there

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186 *Taylor*, 108 S. Ct. at 655. In concluding that the compulsory process clause does not create an absolute bar to the use of preclusion as a discovery sanction, the Court resolved another previously unanswered question. *Compare* United States v. Davis, 639 F.2d 239 (5th Cir. 1981)(preclusion an impermissible infringement on a defendant's constitutional right to present a defense) *with* Ronson v. Commissioner of Correction, 604 F.2d 176 (2d Cir. 1979)(right to present a defense not absolute, but the State's interest in restricting that right closely scrutinized); United States *ex rel.* Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985), *cert. denied*, 475 U.S. 1053 (1985)(adopting balancing test to determine whether preclusion permissible). The Seventh Circuit had also ruled that the defendant cannot be precluded from testifying due to a discovery violation. Alicea v. Gagnon, 675 F.2d 913, 925 (1982). The Ninth Circuit did not endorse either a balancing test or a per se prohibition of preclusion. Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1984)(The court did not choose between the two alternatives because it found that "under either of these approaches, the Arizona courts erred in excluding the testimony of an important defense witness."). The Tenth Circuit upheld the constitutionality of preclusion based on a state statute. Rider v. Crouse, 357 F.2d 317 (10th Cir. 1966). Several circuit courts had allowed preclusion but did not address the sanction's constitutional aspects. United States v. White, 583 F.2d 899 (6th Cir. 1978); United States v. Fitts, 576 F.2d 837 (10th Cir. 1978); United States v. Barron, 575 F.2d 752 (9th Cir. 1978); United States v. Smith, 524 F.2d 1288 (D.C. Cir. 1975). Two district courts had rejected the adoption of a per se rule. Escalera v. Coombe, 652 F. Supp. 1316 (E.D.N.Y. 1987); Braunskill v. Hilton, 629 F. Supp. 511 (D.N.J. 1986), *appeal pending*, No. 86-5204 (3d Cir.). Prior to *Taylor*, the Supreme Court had twice expressly reserved its judgment on the constitutionality of precluding a criminal defendant's witness as a sanction for violating discovery rules. *See* Wardius v. Oregon, 412 U.S. 470, 472 n.4 (1973); Williams v. Florida, 399 U.S. 78, 83 n.14 (1970).

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

188 *Id.*

189 *Id.*

190 *Id.*

191 *See supra* notes 169-180 and accompanying text for a discussion of the appropriate balancing test.

was a compelling state interest involved in *Taylor*, namely the orderly conduct of a criminal trial, which involves the imposition of rules of evidence.[192]

As Justice Brennan's dissent noted, however, the Court failed to finish this analysis in that it never engaged in an in-depth analysis of available alternative sanctions.[193] The *Taylor* Court's decision was flawed in that it failed to adequately consider the alternatives available to preclusion and their effectiveness in protecting the acknowledged state interest,[194] as previously required for infringing upon a specific Bill of Rights constitutional guarantee,[195] such as the sixth amendment's right to present a defense. Without such an analysis, it was impossible for the Court to properly weigh the necessary protection required by the compelling state interest in orderly trials against the defendant's constitutional right to present a defense. In effect, the interests that Justice Stevens himself had noted earlier in the *Taylor* opinion were never really balanced.

2. *The Court's Willful Standard Test*

Despite Justice Stevens' enunciation of a balancing test in *Taylor*, he actually appeared to disregard the balancing test when he announced a standard that allows for the preclusion of a defense witness as a sanction for a willful discovery violation.[196] Justice Stevens' disregard of his own balancing test became clear when he determined that a willful violation of a discovery rule intended to either gain a tactical advantage[197] or to conceal fabricated testi-

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192 108 S. Ct. at 653 ("The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of . . . rules . . . of evidence.").

193 *Id.* at 664 (Brennan, J., dissenting). The Court's consideration of alternative sanctions follows:

> 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.

Taylor, 108 S.Ct. at 655. However, given the Court's holding that the exclusion of presumably fabricated testimony is a goal of discovery, the Court's abrupt analysis of the alternatives is more understandable. If excluding presumably perjured testimony is a primary goal of discovery rules, then alternative sanctions are clearly inadequate because they allow the testimony to be admitted and so could influence the jury. In that respect, no alternative sanction could effectively protect this compelling state interest and the Court would appear justified in ruling that preclusion does not constitutionally violate a defendant's compulsory process clause right to present a defense.

194 *See infra* notes 233-243 and accompanying text for a discussion of alternative sanctions.

195 *See supra* notes 169-180 and accompanying text for a discussion of the appropriate balancing test.

196 *Taylor*, 108 S. Ct. at 655-657.

197 *Id.* at 655-656. Justice Stevens noted that when a violation "was willful and moti-

mony[198] would allow preclusion of the testimony regardless of the alternative sanctions[199] available or any actual prejudice that would be done to the state if the testimony was admitted.[200]

While the balancing test established in *Taylor* is, at best, only inadequately defined, this willful violation standard appears fundamentally inconsistent with the Court's holding in *Washington v. Texas*.[201] This inconsistency can be attributed to the emphasis Justice Stevens' placed on evidentiary goals in his opinion in *Taylor*.[202]

There are two commonly held justifications for the preclusion of a witness's testimony: the evidentiary justification and the punitive justification.[203] The punitive justification relies on the belief that preclusion is the only effective sanction for enforcing a state's discovery rules given the circumstances of a particular case.[204] Because that conflict will be decided within the balancing of interests analysis, the punitive justification resolves itself into the balancing test discussed previously because it involves determining the importance of the state's interest in enforcing the discovery rule, the importance of admitting the particular testimony at issue to the defendant's case, and the effectiveness of alternative sanctions.[205] Alternatively, the evidentiary justification is based on the concept that preclusion should be used to disqualify incompetent evidence.[206] This view found support from the Supreme Court in *Hammond Packing Co. v. Arkansas*.[207] In *Hammond*, the Court upheld

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vated by a desire to obtain a tactical advantage . . . it would be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony."

198 *Taylor*, 108 S. Ct. at 655. Where "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." *Id.*

199 *Id.* Justice Stevens held that when the discovery violations revealed the purpose of gaining a tactical advantage or concealing fabricated testimony, it "would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." *Id.*

200 *Id.* at 656. Justice Stevens stated that, "[r]egardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate." *Id.*

201 388 U.S. 14 (1967).

202 108 S. Ct. at 655-657.

203 *See* Note, *supra* note 175, at 1343-1344.

204 *See, e.g.*, United States v. Nobles, 422 U.S. 255, 241 (1975). The exclusion of a defendant's witness due to a discovery rule violation was justified in order to uphold the state's interest in presenting the whole truth to the jury.

205 *See supra* notes 169-180 and accompanying text.

206 *See* Note, *supra* note 175, at 1344.

207 212 U.S. 322 (1909). *See* 28 U.S.C.A. § 37 (West 1968) advisory committee and historical notes, which regarded this case as support for the preclusion sanction in Rule 37 of the Federal Rules of Civil Procedure.

the constitutionality of an Arkansas statute that imposed preclusion of evidence on the defendant for willfully refusing to comply with an order that required him to produce evidence.[208] In deciding this case on due process grounds, the Court held that the willful refusal gave rise to a presumption of "bad faith and untruth"[209] and that the failure "was but an admission of the want of merit in the asserted defense."[210] *Hammond* suggests that a violation of discovery rules makes otherwise admissible evidence "presumptively unworthy of belief and the resulting incompetency of the evidence justifies its inadmissibility."[211]

This doctrine was overturned, however, in *Washington*, when the Supreme Court held unconstitutional on compulsory process grounds a Texas statute that prohibited accomplices from testifying based on the presumption that each would lie for the other.[212] The Court ruled that this statute violated the compulsory process clause because it contained "arbitrary rules that prevent[ed] whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief."[213]

As a result, the exclusion of witnesses due to an a priori classification that presumes their testimony to be untrustworthy was held unconstitutional. As Justice Brennan noted in his dissent in *Taylor*, that ruling should be applicable to the *Taylor* analysis.[214]

In *Taylor*, it seems clear that Justice Stevens relied primarily on an evidentiary justification for allowing preclusion as a discovery sanction.[215] Justice Stevens noted that discovery "minimizes the risk that a judgement will be predicated on . . . deliberately

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208 *Hammond*, 212 U.S. at 354.

209 *Id.* at 350.

210 *Id. Accord* State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 163 N.W.2d 177 (1968)(failure to meet notice-of-alibi statute requirements brought into question the truth of defendant's testimony and warranted preclusion of his testimony).

211 *See* Note, *supra* note 175, at 1345.

212 388 U.S. 14, 23 (1967).

213 *Id.* at 22.

214 *Taylor*, 108 S. Ct. at 663 (Brennan, J., dissenting). Justice Brennan argued that the holding in *Washington*, 388 U.S. at 23 (pertaining to a statute that disqualified witnesses for interest incompetency), was not limited to incompetency issues. He based this reading of *Washington* on the Court's analysis in *Washington* and Rosen v. United States, 245 U.S. 467 (1918)(Court held unconstitutional a common law disqualification based on moral incapacity) that disqualifying a witness for any reason was a sixth amendment concern. *Taylor*, 108 S. Ct. at 663 (Brennan, J., dissenting).

215 *Id.* at 653-656. Prior to *Taylor*, discovery rules were understood to promote two underlying state interests. *See* Note, *supra* note 175, at 1354-1355. The first was to prevent surprise at trial. *See* Williams v. Florida, 399 U.S. 78, 81 (1970); State *ex rel.* Simos v. Burke, 41 Wis. 2d 129, 133, 163 N.W.2d 177, 182 (1968). This presumably furthers the truth-seeking function of the trial system. *See* Williams v. Florida, 399 U.S. 78, 81 (1970). The second was to reduce the trial load of the court system by eliminating the

fabricated testimony,"[216] and that "[o]ne of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed."[217] Justice Stevens went on to compare evidence found after the conclusion of trial to witnesses introduced once the trial had begun. He stated that just as there exists the presumption that evidence found after trial would not have affected the outcome, it is "equally reasonable to presume that there is something suspect about a defense witness who is not identified until after" trial has started.[218]

In addition, Justice Stevens noted that if a pattern of discovery rule 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."[219] In concluding that preclusion did not violate the compulsory process clause per se, Justice Stevens wrote that it "would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury."[220]

As Justice Brennan noted in his dissent, Justice Stevens statements are clearly inconsistent with the holding in *Washington* in that they support arbitrarily precluding, a priori, a category of witnesses.[221] In this case the preclusion rule keeps witnesses not identified until the commencement of trial from testifying on the arbitrary presumption that they are untrustworthy.

C. A MODIFIED BALANCING TEST

A more detailed balancing of interests analysis has been suggested that, although the Court declined to adopt in *Taylor*, nonetheless would provide a more practical guideline for determining the validity of constitutional infringements upon the compulsory process clause through the use of the preclusion sanction.[222] In

need for trial in many cases. *Id.* (Court contended that liberal discovery would lead to more frequent dismissals and more plea bargains).

216 *Id.* at 654.

217 *Id.* at 655.

218 *Id.*

219 *Id.*

220 *Id.* at 656.

221 *Id.* at 664 (Brennan, J., dissenting).

222 Fendler v. Goldsmith, 728 F.2d 1181, 1187 (9th Cir. 1984)(precluding the testimony of two defense witnesses due to defendant's failure to provide the addresses of the witnesses on a pre-trial witness list held to violate defendant's compulsory process clause rights).

Fendler v. Goldsmith, the Ninth Circuit Court of Appeals defined a balancing test that required a court to consider alternative sanctions, the importance of the offered testimony to the defendant's case, the actual prejudice against the state caused by the offered testimony, and whether the discovery violation was willful.[223]

Similar modified balancing tests had been adopted and applied in several federal courts prior to *Taylor*.[224] Such a modified balancing test starts with a presumption against the exclusion of what would otherwise be admissible evidence due to the fundamental importance attributed to the defendant's compulsory process clause rights.[225] Next, the Court should examine the effectiveness of other, less restrictive sanctions, the actual surprise or prejudice done to the prosecution, the materiality of the offered testimony to the defendant's case, and any evidence of bad faith in the discovery rule violation.[226]

Subsequent to undertaking this balancing test, a court could more effectively determine the appropriate sanction given the severity of the discovery violation. There exist a range of sanctions that can be tailored to more appropriately fit the extent and severity of the discovery violations that do not infringe upon the defendant's compulsory process clause rights to the extent that preclusion does. In evaluating these sanctions, the ability to protect the state's interest,[227] the degree of infringement on the defendant's compulsory process rights,[228] the potential to deter future violations,[229] and the cost to the state[230] should be factors considered in determining the effectiveness of each sanction.

As Justice Brennan noted in his dissent, disciplinary sanctions against defense counsel should prove effective when counsel willfully violates discovery rules.[231] These sanctions could include disciplinary proceedings, fines, or imprisonment.[232] The deterrent potential against future violations should be great because the lawyer generally stands to gain little from the violation while exposing himself to all the potential disciplinary actions.

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223 *Id.*

224 *See supra* note 186. *See also Fendler*, 728 F.2d at 1187 (listing of such cases).

225 *Fendler*, 728 F.2d at 1188.

226 *See id.*; Enoch v. Hartigan, 768 F.2d 161, 163 (7th Cir. 1985).

227 *See supra* note 173 and accompanying text.

228 *See supra* note 179 and accompanying text.

229 *Taylor*, 108 S. Ct. at 664 (Brennan, J., dissenting). *See also* Note, *supra* note 175, at 1356-1357 for a discussion of alternative sanctions and their deterrent effect.

230 *See* Note, *supra* note 175, at 1357.

231 *Id.* at 665 (Brennan, J., dissenting).

232 *Id.* (Brennan, J., dissenting).

A continuance could also protect the state's interest equally well as preclusion (if that interest is defined to be eliminating surprise at trial and not the exclusion of fabricated testimony), by allowing the prosecution time to prepare a rebuttal to any new evidence. However, it has been suggested that a continuance is not really a sanction at all in that it does not penalize the defendant for the violation and thus has little deterrent effect.[233] In addition, the cost of a continuance to the state could be substantial.[234]

Allowing either judicial or prosecutorial comment concerning the testimony in question would serve to eliminate some of the advantage of surprise that the defendant may have gained by the discovery violation,[235] and its impact on the jury would serve as a powerful deterrent in cases of willful violations.[236] This sanction also imposes no cost on the state. However, constitutional questions are raised over the legitimate use of comment, which may infringe upon a defendant's due process rights.[237]

Criminal sanctions against the defendant for willfull violations have questionable effectiveness. A defendant facing a long prison term may disregard the possibility of a short prison term being added to his sentence.[238] The lesser the length of the possible prison term, however, the greater the impact of an additional short prison term. An additional problem exists in that a second trial to determine the defendant's guilt would prove costly to the state.

Limiting further discovery by the defendant is based on a reciprocal approach to discovery rules.[239] Once the defendant has violated discovery procedures he could no longer enjoy the benefits of future discovery.[240] Although this sanction seems fair, it has constitutional problems itself.[241] Because discovery is also protected by the compulsory process clause, this sanction would infringe upon that right just as preclusion does.[242] It would also be counter-

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233 *See* Note, *supra* note 175, at 1357. *See also* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 29, 35-36 (1964).

234 *See* Rezneck, *New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1293 (1966).

235 *See* Note, *supra* note 175, at 1358.

236 *See* Griffin v. California, 380 U.S. 609, 614 (1965)(the impact of improper prosecutorial comment was so substantial that the defendant's conviction was reversed).

237 *See, e.g.*, Quercia v. United States, 289 U.S. 466 (1933)(there must exist a rational connection between the likely degree of veracity of the evidence and some characteristic of that evidence on which to base the comment in order to comply with due process).

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

239 *See* Note, *Criminal Law: Constitutionality of Conditional Mutual Discovery Under Federal Rule 16*, 19 OKLA. L. REV. 419, 424 (1966).

240 *See* Note, *supra* note 175, at 1358.

241 *Id.*

242 United States v. Nixon, 418 U.S. 683, 709 (1974).

productive to the state's interest in liberal discovery.[243] Additionally, this sanction is ineffective if the discovery violation is not discovered until trial, as in *Taylor*.

In *Taylor*, with the exception of the bad faith element, none of the above enumerated interests were given any consideration, nor even deemed relevant under the willful violation standard utilized. The willful violation standard in *Taylor* focused exclusively on the bad faith element suggesting that, in the future, the most significant factor in determining sanctions for discovery violations will be whether there has been a blatant disregard of the rules of the adversary system, regardless of the actual damage done. Furthermore, as Justice Brennan noted in his dissent, the *Taylor* court did not consider the materiality of Wormley's testimony to Taylor's defense. In this case, Wormley's testimony would have been the only testimony for Taylor that "would have both placed a gun in Bridges' brother (sic) hands and contradicted the testimony of Bridges and his brother that they possessed no weapons that evening."[244] Overall, the modified balancing test endorsed in this Note would provide a better safeguard of a defendant's still emerging compulsory process clause right to present a defense than *Taylor*'s willful violation standard. The greatest danger in the willful violation standard established in *Taylor* is the possibility that an innocent defendant may be convicted of a crime that he did not commit due to his attorney's violation of an independent discovery rule and the resulting preclusion of a material witness.[245] That potentiality certainly seems to conflict with "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[246]

V. CONCLUSION

In *Taylor v. Illinois*, the United States Supreme Court ruled that the preclusion of a criminal defendant's witness as a discovery sanction does not per se violate that defendant's right to present a defense. The majority persuasively reasoned that the sixth amendment's compulsory process clause is the constitutional basis for this right. However, the Court failed to apply the appropriate balancing test for determining sixth amendment questions in reach-

243 *See* Williams v. Florida, 399 U.S. 78, 82 (1970). The Court in *Williams* stated that liberal discovery allows the state and the defendant "ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Id.* at 82.

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

245 *See* Note, *supra* note 175, at 1361.

246 *In re* Winship, 397 U.S. 358, 372 (1970)(Harlan, J., concurring).

ing its holding on the constitutionality of the preclusion sanction. The "willful violation" standard that the Court used instead will fail to adequately protect a defendant's sixth amendment right to present a defense because it allows for the arbitrary exclusion of defense witnesses without requiring a balancing of the relevant interests involved.

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