Pace Law Review

Volume 14
Issue 2 *Summer 1994*

Article 6

June 1994

Discovery Sanctions against the Criminal Defendant: Preclusion, Judicial Discretion and Truth-Seeking

Matthew R. Atkinson

Comment

Discovery Sanctions Against the Criminal Defendant: Preclusion, Judicial Discretion and Truth-Seeking

I. Introduction

Discovery rules in criminal proceedings were introduced to further truth-seeking. Promulgation of these rules has created an enforcement problem for the courts. The severest sanction for a discovery violation is the preclusion of the testimony which the defense seeks to admit in violation of the rules.[1] However, when the testimony is exculpatory, and possibly critical to the defense, the harshness of the preclusion is apparent in the context of the policy the discovery rules seeks to advance.[2] Enforcement of truth-seeking rules by preclusion of exculpatory testimony may also preclude truth finding and clash with constitutional rights of the criminal defendant. On the other hand, an inviolable right of the defense to introduce testimony weakens the courts' ability to enforce compliance with discovery rules and consequently undercuts the efficacy and aim of discovery, truth-seeking.

Prior to *Taylor v. Illinois*,[3] the courts wrestled with this tension by selecting a sanction only after balancing the circumstances of the violation with the consequences of admitting the

1. Enforcement of these rules against the defense is alternately effected by empowering the court to impose disciplinary sanctions on the defense attorney, granting a continuance or a mistrial, or fashioning a remedy as justice requires. *See, e.g.*, FED. R. CRIM. P. 12.1, 16(d)(2); MASS. R. CRIM. P. 14(c)(2); ILL. S. CT. RULE 415(g); N.Y. CRIM. PROC. LAW 250.2.

2. *See generally infra* part II.

3. 484 U.S. 400, *reh'g denied*, 485 U.S. 983 (1988).

proffered testimony and its probative value.[4] The principal factor considered was the importance of the proffered testimony to the defendant.[5] Because preclusion was considered constitutionally suspect under the Compulsory Process Clause of the Sixth Amendment,[6] motions to preclude were closely scrutinized and rarely granted.[7]

In *Taylor v. Illinois*, the United States Supreme Court resolved the uncertainty over the constitutionality of preclusion[8] by holding that preclusion was constitutional, at least where discovery violations were the result of egregious misconduct sufficient to raise a presumption that the proffered testimony was perjured.[9] Nonetheless, *Taylor* intentionally left the precise contours of constitutional preclusion undefined.[10] Courts purportedly following *Taylor* have emphasized the bad faith of the defense,[11] delay tactics,[12] and prejudice to judicial process[13] to justify preclusion.[14] *Taylor*, by holding that preclusion is a constitutional sanction with undefined, and therefore elastic contours, has encouraged appellate court deference to trial court determinations that preclusion is warranted.[15]

This article suggests that the narrowed constitutional rights of the criminal defendant under *Taylor*, and the resulting

4. Fendler v. Goldsmith, 728 F.2d 1181, 1187 (9th Cir. 1984), enunciated the leading balancing test. *See infra* notes 88-98 and accompanying text.

5. *Fendler*, 728 F.2d at 1188. *See infra* note 203 and accompanying text.

6. *Fendler*, 728 F.2d at 1188. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI. The right to compel attendance of witnesses is empty if the defense has no right to present them. *Taylor*, 484 U.S. at 409. The Supreme Court has held that this right applies to state as well as federal criminal prosecutions. *See infra* notes 39-40 and accompanying text.

7. *See infra* notes 200-02 and accompanying text.

8. *See infra* notes 100-01 and accompanying text.

9. *Taylor*, 484 U.S. at 416-17. *See infra* notes 110-14 and accompanying text. In Michigan v. Lucas, 500 U.S. 145 (1991), the Court suggested that *Taylor* authorized preclusion without the inference that proffered testimony is perjurious. *Id.* at 153. *See infra* notes 236-37 and accompanying text.

10. *See infra* notes 233-34 and accompanying text.

11. *See, e.g., infra* notes 240-43 and accompanying text.

12. *See infra* note 244 and accompanying text.

13. *See infra* note 153 and accompanying text.

14. United States v. Johnson, 970 F.2d 907 (D.C. Cir. 1992); Escalera v. Coombe, 826 F.2d 185 (2d Cir. 1987); Commonwealth v. Zimmerman, 571 A.2d 1062 (Pa. Super. Ct. 1990).

15. *But see* State v. Ben, 798 P.2d 650 (Or. 1990) (ignoring the *Taylor* analysis); *see infra* notes 293-95 and accompanying text.

expansion of trial judge discretion, should be reconsidered. The premises upon which *Taylor* were built are faulty, and the legitimate goals of truth-seeking could be better accomplished by alternate means.

Part II of this Comment outlines the history and policies of present discovery rules. Part III examines the appellate standard of review for trial court preclusion and reviews the *Taylor* decision, as well as pre-*Taylor* and post-*Taylor* cases that have considered the use of preclusion as a discovery sanction. Part IV analyzes the inconsistency of the courts' treatment of preclusion as a sanction for discovery violations. Part V concludes that the present vague standard for preclusion is inconsistent with the truth-seeking values it purports to advance.

II. The History and Policy of Discovery Rules

Discovery of the defense began with the adoption of notice-of-alibi statutes by various states in the 1920s.[16] The stated policy of the statutes was to prevent tactical surprise, perjured testimony, and mid-trial delays occasioned by the prosecution's request for a continuance to investigate the proffered alibi defense.[17] Discovery rules have evolved considerably since the first notice-of-alibi statutes.

The California Supreme Court fashioned reciprocal discovery rules without legislative mandate in *Jones v. Superior Court*.[18] *Jones*, written by Chief Justice Traynor, held that the prosecution could discover expert testimony that the defense intended to introduce at trial.[19] By arguing that the disclosure of the testimony was only accelerated and not compelled, the court reasoned that discovery did not violate the Fifth Amendment protection against self-incrimination.[20] As the policy behind

16. Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1574 & n.16 (1986).

17. *Id.* at 1574-75.

18. 372 P.2d 919 (Cal. 1962). The California Supreme Court required the defendant to disclose witnesses he intended to call to testify to establish his affirmative defense. *Id.* at 922.

19. *Id.* at 922.

20. *Id.* "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

discovery was truth-seeking, the court reasoned that it should be a two-way street.[21]

The truth-seeking function of reciprocal discovery was subsequently advocated by Supreme Court Justice William J. Brennan.[22] Justice Brennan argued that a defendant would, and should, benefit from liberal discovery rules, albeit with adequate safeguards.[23] He recognized that the prosecution had a clear advantage over the defense because of the relatively vast resources of the district attorney's office compared to those of the typically indigent defendant represented by court-appointed counsel.[24] Justice Brennan believed that liberal discovery would even the playing field.[25]

The United States Supreme Court first addressed the constitutionality of the discovery of a criminal defendant in *Williams v. Florida*.[26] The Court held that Florida's notice-of-alibi discovery rule did not violate the Fifth Amendment right

---

21. *Jones*, 372 P.2d at 922. California's experiment with judicial discovery rule-making finally proved unworkable. First, unwilling to assist the prosecution's case-in-chief, the California Supreme Court refused to permit discovery of all defense witnesses' names, addresses, and the substance of intended testimony. Prudhomme v. Superior Court, 466 P.2d 673, 677 (Cal. 1970). Second, the court refused to develop an alibi notice rule, arguing that the court's proper role is to protect constitutional rights and not to devise merely socially desirable rules which test constitutional limits. Reynolds v. Superior Court, 528 P.2d 45, 52-53 (Cal. 1974). Following the logic in *Reynolds*, the court finally held that all reciprocal discovery rule-making relating to testimony should be left to the legislature. People v. Collie, 634 P.2d 534, 541 (Cal. 1981). The legislature responded by enacting discovery rules in 1990. CAL. PENAL CODE § 1054 (West Supp. 1994). The constitutionality of the Act was subsequently affirmed by the California Supreme Court in *Izazaga v. Superior Court*, 815 P.2d 304, 309 (Cal. 1991).

22. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 291.

23. *Id.* at 294-95.

24. *Id.* at 285-87; *see also* NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 3 n.4 (1982) (of seven million felony and non-traffic misdemeanor arrests in 1971, approximately 3.4 million required appointed counsel); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 16 (1963) (approximately 60-70% of all felony defendants are classed as indigent).

25. Brennan, *supra* note 22, at 291-95. Brennan's concern for the rights of the criminal defendant was in marked contrast to Judge Learned Hand's earlier contention in United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923) that the defense has unwarranted protections because of the illusion that an innocent party may be convicted. The *Garsson* court held that the defense may not inspect grand jury minutes for evidence of prejudice. *Id.* at 649.

26. 399 U.S. 78 (1970).

against self-incrimination.[27] The Court employed the same argument advanced by Justice Traynor in *Jones*, that the required acceleration of disclosure under the rule did not "compel" disclosure as would be prohibited by the Fifth Amendment.[28] This decision provided the constitutional basis for the subsequent proliferation of discovery statutes which required, in the extreme, full disclosure of any defense and supporting evidence the defendant intended to introduce at trial.[29] Despite Justice Brennan's advocacy of discovery for the benefit of the defense in 1963,[30] discovery since *Williams* has arguably eroded the criminal defendant's Fifth and Sixth Amendment interests.[31]

In *Williams*, the discovery rule was reciprocal but the Court did not decide the question of whether reciprocity was constitutionally required.[32] The Court subsequently answered this question in *Wardius v. Oregon*,[33] and held that notice-of-alibi statutes must provide for reciprocal discovery.[34] In its analysis, the Court underscored the policy considerations in favor of liberal discovery: "discovery devices [are] a salutary development which, by increasing the evidence available to both parties, enhance[ ] the fairness of the adversary system."[35] The Court reasoned that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."[36]

27. *Id.* at 83; "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

28. *Williams*, 399 U.S. at 85.

29. Mosteller, *supra* note 16, at 1579-84.

30. *See supra* note 23 and accompanying text.

31. *See, e.g.*, Mosteller, *supra* note 16, at 1585-92.

32. *Williams*, 399 U.S. at 82-83 & n.11.

33. 412 U.S. 470 (1973).

34. *Id.* at 472.

35. *Id.* at 474.

36. *Id.* at 475.

III. Enforcement of Discovery Rules Against the Defense

A. *Standard of Review*

Williams laid the constitutional foundation for the states to enact truth-seeking discovery rules for criminal proceedings.[37] Ultimately, the sanction of preclusion to enforce the discovery rules came into conflict with the constitutional interest in presenting exculpatory testimony formulated in the Supreme Court decision, *Washington v. Texas*.[38] It is the scope of this constitutional interest which determines the standard of appellate review for preclusion of exculpatory testimony as a sanction for violating discovery rules.

In *Washington*, the Court held that the Compulsory Process Clause of the Sixth Amendment was incorporated into the Due Process Clause of the Fourteenth Amendment[39] and therefore applied to the states.[40] In *Washington*, the Court reviewed a Texas statute which disqualified an alleged accomplice from testifying on a defendant's behalf on the premise that such testimony was perjured.[41] After holding that a defendant had the constitutional right to present exculpatory testimony, the Court found that the Texas statute violated this right: "the Constitution is . . . violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[42]

The Court in *Williams* specifically did not rule on whether the sanction of preclusion for violation of a discovery rule would violate the Sixth Amendment right to Compulsory Process.[43] Subsequent Supreme Court decisions also reserved this question.[44] The relation between the constitutional right of the de-

37. *See supra* notes 26-29 and accompanying text.

38. 388 U.S. 14 (1967).

39. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

40. *Washington*, 388 U.S. at 17-19.

41. *Id.* at 16-17.

42. *Id.* at 22. The Court also noted that the Texas statute permitted the prosecution's use of accomplice testimony on the irrational presumption that an accomplice would lie to protect a defendant but be truthful to assist the prosecution. *Id.*

43. *Williams*, 399 U.S. at 83 n.14.

44. *E.g.*, Smith v. Jago, 470 U.S. 1060, 1061 (1985) (White, J., dissenting from denial of certiorari); Taliaferro v. Maryland, 461 U.S. 948, 949 (1983); Wardius v. Oregon, 412 U.S. 470, 472 n.4 (1972).

fense to present exculpatory testimony and the preclusion sanction was not addressed by the Supreme Court until *Taylor v. Illinois*.[45] Until *Taylor*, therefore, a defendant's interest in presenting probative testimony, made constitutional under *Washington*, generally outweighed a government's interest in enforcing the preclusion sanction.[46] In such circumstances, appellate courts were very likely to reverse a conviction where a trial court committed constitutional error by precluding exculpatory testimony.[47] Reversal is likely because the standard of review for constitutional error is far more rigorous than for non-constitutional error.[48]

A judge may make numerous decisions during a trial concerning the admissibility of evidence and procedural matters. An appellate court normally reviews these decisions on the deferential standard of whether the trial judge abused her discretion.[49] Where the constitutional rights of a criminal defendant are implicated, however, the trial judge's decisions may be subjected to heightened scrutiny and the appellate court may review the factual basis for the preclusion in addition to the trial court's application of the law.[50] When an appellate court finds non-constitutional error, the appellate court may not reverse the trial court's judgment unless the error affects the "substantial rights of the parties."[51] When constitutional error is found, the appellate court on direct review inquires whether the preclusion is harmless beyond a reasonable doubt.[52] The burden of

45. 484 U.S. 400 (1987). In United States v. Nobles, 422 U.S. 225 (1975), the Supreme Court approved of the trial court's placing a condition on the admission of defense testimony and precluding that testimony when the defense refused to comply with the condition. *See infra* note 60 and accompanying text.

46. *See, e.g., infra* notes 200-02 and accompanying text.

47. *See, e.g.*, Escalera v. Coombe, 826 F.2d 185, 189-94 (2d Cir. 1987).

48. LISSA GRIFFIN, FEDERAL CRIMINAL APPEALS § 5.2(4) (June 1993).

49. *Id.* §§ 5.4, 5.4(1).

50. *Id.* § 5.2(4).

51. 28 U.S.C. § 2111 (1988). *See also* FED. R. CRIM. P. 52(A); CAL. PENAL CODE § 1258 (West 1982 & Supp 1994). The judicial test for this standard as articulated in Kotteakos v. United States, 328 U.S. 750, 776 (1946) is whether "the error had substantial and injurious effect or influence in determining the jury's verdict."

52. Chapman v. California, 386 U.S. 18, 24 (1967). The Supreme Court has recently held that the *Chapman* "harmless error" rule does not apply to collateral, or habeas corpus, review. Brecht v. Abrahamson, 113 S. Ct. 1710, 1713-14 (1993). The Court in *Brecht* instead decided that the standard for habeas relief is whether the error "had substantial and injurious effect or influence in determining the

proving error harmless beyond a reasonable doubt is nearly insurmountable. On the other hand, if no constitutional right is at stake, the trial judge has considerable latitude in determining whether to admit otherwise probative testimony.[53] The tension between the preclusion sanction, a non-constitutional procedural rule, and the constitutional right of the defense to present witnesses in its favor, therefore turns on the extent to which that constitutional right is qualified and possible error is scrutinized.

B. *Cases before* Taylor v. Illinois

In *United States v. Nobles*,[54] a federal prosecution for armed bank robbery, the United States Supreme Court held that preclusion of a defense investigator's testimony as a sanction under the federal discovery rule[55] was constitutional.[56] There, the defense had refused to provide the prosecution with the investigator's report for purposes of cross-examination.[57] The trial court only required disclosure of those portions of the report pertinent to the proferred testimony.[58] The Court stated: "[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."[59] The Court did not bar the proffered testimony for the violation of a discovery rule, but rather conditioned the admissibility of the proferred testimony because truth-seeking would be enhanced by "full disclosure of all the [relevant] facts."[60]

On the other hand, in another federal prosecution for armed bank robbery, the Court of Appeals for the Ninth Circuit

jury's verdict." *Id.* (quoting *Kotteakos*, 328 U.S. at 776). This new limitation on habeas relief does not affect the analysis of whether constitutional error occured nor whether relief is available on direct appeal. *See id.* at 1721. *Brecht*, however, does render the analysis moot in collateral review when prejudice does not rise to the *Kotteakos* standard. *See id.* at 1722.

53. *See, e.g., infra* notes 61-72 and accompanying text.

54. 422 U.S. 225 (1975).

55. FED. R. CRIM. P. 16.

56. *Nobles*, 422 U.S. at 241.

57. *Id.* at 228.

58. *Id.* at 240.

59. *Id.* at 241.

60. *Id.* at 231 (quoting United States v. Nixon, 418 U.S. 683, 700, 709 (1974)).

in *United States v. Barron*[61] affirmed the district court's preclusion of an alibi defense with only passing reference to truth-seeking values.[62] The defense had answered the prosecution's notice-of-alibi discovery request one day late and one day before the trial began.[63] Even with a timely notice of an alibi defense, the prosecution would have had only one day to prepare a rebuttal before trial.[64] Nonetheless, the appellate court held that since the "parties agree[d] [that] abuse of discretion [was] the proper standard of review,"[65] no Sixth Amendment issue was raised on appeal,[66] and because notice was late, preclusion of the alibi defense was justified.[67] The court reasoned that since the defendant was responsible for the delay,[68] even though the non-compliance could be attributed to ignorance of the rule,[69] it was still reasonable to sanction the defendant for failure to comply.[70] The Ninth Circuit also held that the preclusion was appropriate, in part, because the district court did not finally rule on preclusion until after the prosecution had made a very strong case.[71] The Ninth Circuit inferred that the strength of the prosecution's case, combined with the violation of the rule, suggested that the proffered alibi testimony was perjured.[72]

The Court of Appeals for the Fifth Circuit addressed the constitutionality of the preclusion sanction for the violation of a discovery rule in *United States v. Davis*.[73] In this federal prosecution for possession with intent to distribute marijuana, the defense failed to disclose, pursuant to a discovery request, the names of two witnesses the defense sought to call to impeach

61. 575 F.2d 752 (9th Cir. 1978).

62. *Id.* at 758.

63. *Id.* at 755-56.

64. *Id.* at 756-57.

65. *Id.* at 757.

66. *Id.* at 757 n.5.

67. *Id.* at 757.

68. *Id.* at 756. Barron did not trust his government-paid public defender, who moved to substitute private counsel just before the jury was impaneled on the grounds that Barron would not confide in him. The court denied the motion. *Id.* at 755.

69. *Id.* at 757-58.

70. *Id.* at 758.

71. *Id.*

72. *Id.*

73. 639 F.2d 239 (5th Cir. 1981).

the credibility of the government's key witness.[74] The district court precluded the testimony because of the defense's failure to comply with the discovery rule and on the grounds that the proffered testimony was "merely cumulative and impeaching."[75]

On appeal, the Fifth Circuit held "that the [C]ompulsory [P]rocess [C]lause of the [S]ixth [A]mendment forbids the exclusion of otherwise admissible evidence *solely as a sanction* to enforce discovery rules or orders against criminal defendants."[76] The Fifth Circuit reasoned that unlike other evidentiary orders, such as sequestration,[77] "discovery orders are designed to prevent surprise, not to protect the integrity of the evidence sought to be presented."[78] The Fifth Circuit further held that the testimony was crucial to the defense and that the preclusion was, therefore, not harmless beyond a reasonable doubt.[79]

The Court of Appeals for the Ninth Circuit, in *Fendler v. Goldsmith*,[80] considered, but did not find it necessary to adopt, the holding in *Davis*.[81] The Ninth Circuit construed *Davis* to hold that the preclusion sanction was unconstitutional *per se*.[82] In *Fendler*, the court reviewed a prisoner's petition for habeas corpus from a state conviction for falsifying bank records.[83] The petitioner argued that the preclusion of defense witnesses who would testify that his bank reports were accurate, in at least some respects, violated his Sixth Amendment right to compulsory process.[84] After the defense had repeatedly failed to comply with the reciprocal discovery provisions of the Arizona

74. *Id.* at 241-42.

75. *Id.* at 242.

76. *Id.* at 243 (emphasis added).

77. Sequestration is the practice whereby succeeding witnesses are prevented from hearing the testimony of former witnesses to prevent the subsequent testimony from conforming to prior testimony, whether by perjury or unconsciously. The practice preserves the integrity of the testimony and is recorded as early as the apocryphal story of Susanna and the Elders. THE NEW ENGLISH BIBLE WITH APOCRYPHA 180 (Oxford 1976). *See also* Holder v. United States, 150 U.S. 91 (1893) (holding that the testimony of a witness who violated a sequestration order may be excluded under certain circumstances).

78. *Davis*, 639 F.2d at 243.

79. *Id.* at 245.

80. 728 F.2d 1181 (9th Cir. 1984).

81. *Id.* at 1188.

82. *Id.*

83. *Id.* at 1182-83.

84. *Id.*

Rules, the trial court granted the prosecution's motion to preclude testimony from those witnesses for whom the defense had not provided addresses.[85]

After summarizing the merits of the *Davis* holding,[86] the Ninth Circuit discussed the balancing test employed by some state courts to determine whether the sanction was necessary.[87] The court described a four part balancing test as follows: 1) the effectiveness of less severe sanctions; 2) the probable impact of the precluded evidence on the outcome; 3) the degree of prejudice or surprise to the prosecution had the evidence been admitted; 4) the willfulness or bad faith on the part of the defense.[88] The court found doctrinal support for the balancing test, weighted in favor of admitting probative evidence, in an earlier Supreme Court case, *Chambers v. Mississippi*[89]:

> the [S]ixth [A]mendment right to call and examine witnesses is "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process . . . . But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined."[90]

The *Fendler* court found that it did not have to choose between the balancing test or the *Davis* rule as the preclusion sanction against Fendler failed constitutional scrutiny under either test.[91] The court applied the balancing test to the facts of the case as follows: 1) a brief continuance would have been adequate; 2) the proffered testimony only needed to be "helpful" to the defense; 3) there was no unfair surprise to the prosecution; 4) although the violation was willful, little weight should be given to this factor.[92] The court allocated little weight to the willfulness of the violation because it found that "[t]he determi-

85. *Id.* at 1183. The defense first partially complied with the discovery order by providing the names for over 1,000 witnesses, but failed to provide the addresses of some witnesses, including those precluded, even after the defense had amended its discovery response. *Id.*

86. *Id.* at 1185-87.

87. *Id.* at 1187.

88. *Id.*

89. 410 U.S. 284 (1973).

90. *Fendler*, 728 F.2d at 1187 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

91. *Id.* at 1188.

92. *Id.* at 1188-90.

native factor here is that Fendler was deprived of the testimony of a witness who was important to his defense on a material issue."[93] The court nonetheless remanded to the district court to determine whether the preclusion was "harmless beyond a reasonable doubt."[94] The court specifically rejected the abuse of discretion standard utilized in *Barron*[95] where no constitutional issue was raised.[96] Instead, the court held that the heightened scrutiny of a presumption against preclusion was appropriate.[97] The *Fendler* type balancing test was thereafter generally adopted by the courts and preferred to the *per se* rule of *Davis*.[98]

C. Taylor v. Illinois[99]

Taylor was the first United States Supreme Court case to deal directly with the constitutionality of preclusion.[100] The Court held that preclusion for not complying with a general discovery request is not always a violation of compulsory process under the Sixth Amendment and found no constitutional error on the facts of the case.[101]

---

93. *Id.* at 1190.

94. *Id.*

95. *See supra* note 65 and accompanying text.

96. *Fendler*, 728 F.2d at 1187.

97. *Id.* at 1188.

98. *See, e.g.*, Eckert v. Tansy, 936 F.2d 444 (9th Cir. 1991); Escalera v. Coombe, 826 F.2d 185 (2d Cir. 1987), *vacated and remanded*, 484 U.S. 1054 (1988); United States *ex rel.* Enoch v. Hartigan, 768 F.2d 161 (7th Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); Braunskill v. Hilton, 629 F. Supp. 511 (D.N.J. 1986), *aff'd*, 808 F.2d 1515 (3d Cir.), *vacated*, 822 F.2d 52 (3d Cir. 1987); United States *ex rel.* Robinson v. McGinnis, 593 F. Supp. 175 (C.D. Ill. 1984), *aff'd*, 753 F.2d 1078 (7th Cir.), *cert. denied*, 471 U.S. 1116 (1985); State v. Delgado, 848 P.2d 337 (Ariz. Ct. App. 1993); People v. Edwards, 22 Cal. Rptr. 2d 3 (Cal. Ct. App. 1993); People v. Pronovost, 756 P.2d 387 (Colo. Ct. App. 1987); McCarty v. New Mexico, 763 P.2d 360 (N.M. 1988); City of Lakewood v. Papadelis, 511 N.E.2d 1138 (Ohio 1987); *cf.* People v. Hayes, 364 N.W.2d 635, 640 (Mich. 1984) (holding *Fendler* balancing not appropriate where preclusion sanction employed under state law was necessary to preserve integrity of the evidence in situation similar to sequestration).

99. 484 U.S. 400 (1988).

100. The Court in *Nobles* did not affirm absolute preclusion of the testimony, but rather the conditional admissibility of the testimony. *See supra* note 60 and accompanying text. *See also Escalera*, 826 F.2d at 189 (citing United States Supreme Court decisions declining to address the constitutionality of unconditional preclusion); *Braunskill*, 629 F. Supp. at 521 (citing United States Supreme Court decisions reserving the question whether exclusion of testimony violates the defendant's right to Compulsory Process).

101. *Taylor*, 484 U.S. at 409, 416-18.

The defendant, Taylor, was convicted in Illinois of attempted murder for shooting the victim during a street fight.[102] At trial, the defense offered testimony that the victim's brother shot the victim by accident.[103] On the second day of trial, the defense counsel moved to amend his "Answer to Discovery" by including two more witnesses, one of whom never appeared.[104] Defense counsel explained his late request by asserting that he had just learned of the witnesses.[105] At the *voir dire* of the proferred witness, Wormley, it came to light that defense counsel had lied regarding when he had first learned of the witness.[106] The trial judge excluded the testimony because the discovery violation was blatant, discovery violations were a problem in prior cases before his court,[107] and because both factors led to an inference that the proffered testimony was suspect.[108] The substance of the witness' testimony was that the victim, and his brother, had guns and were "after" the defendant and others.[109]

The United States Supreme Court held that the preclusion was constitutional because the defendant was liable for his attorney's misconduct;[110] the misconduct was willful and blatant, permitting a "sufficiently strong inference" that the testimony was fabricated;[111] and because the defense was seeking a tactical advantage.[112] Although the Court referred to the *Fendler* balancing test in a footnote,[113] the Court deemed the admission of the testimony and the imposition of alternate sanctions inadequate where the misconduct justified a presumption that the defense was seeking to introduce perjured testimony.[114] The

102. *Id.* at 402.
103. *Id.* at 402-03.
104. *Id.* at 403-04.
105. *Id.*
106. *Id.* at 404-05.
107. *Id.* at 405. The trial court did not disclose whether the prior cases had any relation to the instant case. *Id. See also infra* notes 272-73 and accompanying text.
108. *Taylor*, 484 U.S. at 405.
109. *Id.* at 404.
110. *Id.* at 417-18.
111. *Id.* at 417.
112. *Id.* at 415.
113. *Id.* at 415 n.19.
114. *Id.* at 417. The Court's apparent reliance on the inference of perjury to justify preclusion does not necessarily mean that such an inference is required. In

Court found the trial judge's concern for discovery violations in prior trials relevant if the defense attorney had been guilty of those violations, or if the violations in other trials were somehow relevant to the credibility of the proffered evidence in the present case.[115]

D. *The Effect of* Taylor v. Illinois

1. *Federal Courts*

The history of *Escalera v. Coombe*[116] illustrates the effect of *Taylor*. In *Escalera*, the defendant was convicted of felony murder and petitioned for a writ of habeas corpus on the grounds, *inter alia*, that he was unconstitutionally denied the right to compulsory process when an alibi witness was precluded as a sanction for the defense's violation of the New York notice-of-alibi statute.[117] The district court held that the surprise and potential prejudice to the prosecution, the lack of good excuse for the delay in offering the alibi defense, and the inadequacy of alternate sanctions outweighed the defendant's interest in his brother's alibi testimony which the court presumed the jury would be "likely to discount."[118] The district court, therefore, denied the petition.[119]

The Second Circuit reversed[120] after weighing again the interests at stake and finding that the proffered testimony was crucial to the defendant.[121] The court also noted that there was no showing of bad faith on the part of the defendant.[122] The

---

Michigan v. Lucas, 500 U.S. 145 (1991), the Court characterized *Taylor* as holding that preclusion was permissible when the defense's violation was willful and calculated to gain a tactical advantage. *Id.* at 153. The omission of any reference to the inference of perjury in *Lucas* suggests that such an inference is unnecessary. *See infra* notes 263-65 and accompanying text for an analysis of the application of *Taylor* without finding an inference of perjury.

115. *Taylor*, 484 U.S. at 416 n.22. The Court does not explain the relevance of prior violations. For further discussion *see infra* notes 273-74 and accompanying text.

116. 826 F.2d 185 (2d Cir. 1987), *rev'g* 652 F. Supp. 1316 (E.D.N.Y. 1987), *vacated by* 484 U.S. 1054 (1988), *modified by* 852 F.2d 45 (2d Cir. 1988).

117. *Escalera*, 826 F.2d at 188.

118. *Id.*

119. *Id.* at 188-89.

120. *Id.* at 194.

121. *Id.* at 191-92.

122. *Id.* at 191.

defendant's constitutional right to compulsory process should, therefore, take precedence over the sanction of preclusion.[123] Subsequent to the Second Circuit's decision, the United States Supreme Court decided *Taylor*, as well as granting the prosecution's petition for certiorari and vacating *Escalera* for reconsideration in light of *Taylor*.[124]

On remand, the Second Circuit determined that it was unable to apply *Taylor* on the record, as it was unable to determine whether the trial court's finding of an "absence of a good excuse" for the discovery violation was equivalent to willful misconduct "motivated by a desire to gain a tactical advantage."[125] The Second Circuit, therefore, remanded to the district court for an evidentiary hearing.[126] The court also stated, without citing any authority, that the Supreme Court's holding that a defense attorney's conduct could be imputed to the defendant did not include error produced by the attorney's "mere inadvertence or even gross negligence."[127]

The Second Circuit's concerns in *Escalera* were not apparent in *United States v. Cervone*,[128] where the Second Circuit heard the appeals of six defendants variously convicted for RICO[129] conspiracy, obstruction of justice, labor bribery, extortion, and perjury.[130] One defendant, Bernesser, argued that the preclusion of medical testimony was an unconstitutional infringement on his Sixth Amendment right to present a defense.[131] The testimony, tending to show his loss of short term memory,[132] was proffered after a six month delay in violation of the discovery rule.[133] Citing *Taylor* for the proposition that procedural rules validly limit the constitutional right, the Second

123. *Id.*

124. Coombe v. Escalera, 484 U.S. 1054 (1988).

125. Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988).

126. *Id.*

127. *Id.*

128. 907 F.2d 332 (2d Cir. 1990).

129. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988).

130. *Cervone*, 907 F.2d at 335-36.

131. *Id.* at 346.

132. *Id.* at 340. The testimony was proffered to show that the defendant had not intentionally committed perjury. The testimony was unrelated to his conviction for obstruction of justice. *Id.*

133. *Id.* at 346.

Circuit concluded that Bernesser's "failure to assure [the] admissibility [of the evidence] by timely notice is inconsistent with the crucial significance he now ascribes to it."[134]

The petitioner in *Chappee v. Vose*[135] was similarly defeated by *Taylor*. The defendant in *Chappee* was convicted for trafficking in cocaine under Massachusetts law.[136] After the prosecution rested, the defense attorney sought permission to call three expert witnesses to impeach the state's testing of the allegedly controlled substance.[137] Because the defense had failed to disclose these witnesses, the Superior Court of Massachusetts precluded the testimony finding it was proffered in bad faith to surprise the prosecution.[138]

On review of the petition for habeas corpus, the district court applied a modified *Fendler* balancing test.[139] The district court found that the defense counsel acted in bad faith and that the prejudice to the prosecution was severe.[140] Nonetheless, it held that the lack of evidence showing defendant's complicity in the attorney's misconduct tipped the scales in favor of the defendant's right to present the testimony and, therefore, granted the writ of habeas corpus.[141]

The First Circuit noted that the district court had heard the petition prior to the *Taylor* Court's decision that it was constitutionally permissible to punish the defendant for his attorney's misconduct.[142] In addition, the court decided that *Taylor* called for a balancing of the defendant's interest in compulsory process against "countervailing public interests."[143] These interests consisted of the "integrity of the adversary process . . .

134. *Id.*

135. 843 F.2d 25 (1st Cir. 1988), *rev'g* 659 F. Supp. 1220 (D. Mass. 1987).

136. *Chappee*, 843 F.2d at 26.

137. *Id.* at 27. The First Circuit termed the testimony an "isomer defense." The purpose of the testimony was to show that the state's testing methodology was inconclusive because the test would be positive for illegal cocaine as well as for legal isomers. The court found the defense "widely rejected," although still admissible in Massachusetts. *Id.* at 33 n.6.

138. *Id.* at 33-34.

139. *Id.* at 28-29. The district court applied the four part *Fendler* test, *see supra* notes 87-88 and accompanying text, plus a fifth factor, the defendant's complicity in the violation. *Chappee*, 843 F.2d at 28-29.

140. *Id.*

141. *Id.* at 29.

142. *Id.*

143. *Id.*

the fair and efficient administration of justice . . . [and] the potential prejudice to the truth-determining function of the trial process."[144] The First Circuit also construed *Taylor* to hold that, in order to protect the integrity of the adversary process, preclusion was desirable when, as in the instant case, the discovery violation was especially egregious.[145] The court held that, pursuant to *Taylor*, preclusion was the appropriate sanction and so quashed the writ.[146]

The Court of Appeals for the District of Columbia in *United States v. Johnson*[147] considered whether preclusion of alibi witnesses was a permissible sanction in the conviction of the defendant, Johnson, for wire fraud.[148] The defendant's first trial ended in a hung jury after he had defended with a partial alibi.[149] Approximately one week before the retrial, the prosecution received late notice of two additional alibi witnesses, the defendant's brother and a friend. In addition to being late, the notice was incomplete pursuant to the discovery rule.[150] "[T]he trial court ordered the proposed witnesses' testimony excluded. The judge noted that Johnson's attorney had acted in good faith, but addressed neither the defendant's possible lack of good faith nor any other factors that may have guided his choice."[151]

The District of Columbia Circuit rejected bad faith as an absolute condition for preclusion.[152] The court also rejected a "least restrictive analysis" of alternate sanctions, noting that *Taylor* held that the preclusion sanction may be appropriate to protect the judicial process even if alternate sanctions would

144. *Id.* (citing *Taylor*, 484 U.S. at 414-15 & n.19). The cited footnote 19 in *Taylor* recites the *Fendler* balancing test.

145. *Id.* The violation was egregious because the defense could have complied with the non-onerous discovery rule, but decided to violate the rule as a "cutthroat" tactic. *Id.* at 30-32.

146. *Id.* at 34.

147. 970 F.2d 907 (D.C. Cir. 1992).

148. *Id.* at 908.

149. *Id.* at 909.

150. *Id.* at 909-10. The notice did not specify as to what times and places the proffered testimony was relevant, thereby limiting the prosecution's opportunity to prepare a rebuttal. *Id.*

151. *Id.* at 910.

152. *Id.* at 911 (citing *Cervone*, 907 F.2d at 346). *Cervone* did not discuss bad faith at all, however, *Cervone* is a doubtful authority for the proposition that bad faith is not a requirement for preclusion. *See infra* note 254.

cure prejudice to the prosecution.[153] The court finally adopted a *Taylor* balancing test in which bad faith was an "important factor."[154] Applying the test, the court considered the five month delay in providing notice of the alibi suspicious, especially since the witnesses were a friend and a brother of the defendant.[155] The court reasoned that the insufficient explanation for the delay and the burden to the government in holding over the prosecution's witnesses[156] and the jury, would normally be sufficient grounds to affirm the preclusion.[157] The court's emphasis on the delay and status of the alibi witnesses suggests that the court either suspected that perjury was possible, or that the jury would not find the witnesses credible.[158] Because bad faith was an "important factor," however, the court remanded to the district court for the explicit application of *Taylor* on the grounds that the district court's only factual finding was the defense attorney's "good faith."[159] It can be inferred that the District of Columbia Circuit would affirm preclusion if, on remand, the district court found bad faith on the part of the defendant.

Finally, the District of Columbia Circuit held that the constitutional error, if any, was not harmless.[160] It emphasized that credible alibi evidence could jeopardize the effectiveness of the prosecution's eye-witnesses.[161] The court then noted that *Taylor* balancing also tested the credibility of the evidence, which it deemed an "overlapping" function.[162]

---

153. *Johnson*, 970 F.2d at 911.

154. *Id.* at 911. The court, citing Chappee v. Vose, 843 F.2d 25 (1st Cir. 1988), decided that *Taylor* established a balancing test in which bad faith was an important factor. *Id. See supra* notes 143-45 and accompanying text for a description of the *Taylor* test described in *Chappee*.

155. 970 F.2d at 912.

156. The witnesses were called from "all over" the United States. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id. Contra* Poo v. Hood, No. 89 CIV.7874, 1992 WL 30617 (S.D.N.Y. Feb. 12, 1992), *aff'd*, 970 F.2d 896 (2d Cir. 1992) (holding that even if the preclusion of alibi testimony was constitutional error, the error was harmless because the jury would be unlikely to believe the testimony).

162. *Johnson*, 970 F.2d at 912. The court did not elucidate what it meant by an "overlapping" function. *See infra* note 263 and accompanying text. The district court was annoyed by the remand: "The [c]ourt feels obliged to note that the appellate opinion evidences a troubling lack of deference for this [c]ourt's *implicit* assessment of the facts." United States v. Johnson, 815 F. Supp. 492, 494 (D.D.C.

2. *State Courts*

State courts have had a mixed response to *Taylor*. In *Commonwealth v. Zimmerman*[163] the Superior Court of Pennsylvania upheld the trial court's preclusion of an alibi defense as a sanction for "deliberately fail[ing] to comply with the mandatory provisions [of the discovery rule] in an attempt to delay an already lengthy litigation."[164] The court held that this finding, supported by the record,[165] met the "willful" test in *Taylor* as expounded by *Escalera*.[166]

In contrast to *Zimmerman*, in *State v. Ben*[167] the Supreme Court of Oregon reversed the trial court for precluding exculpatory testimony in a prosecution for driving under the influence of intoxicants, reckless endangerment, and criminal mischief.[168] The defense had failed to disclose the names of two witnesses until the morning of the trial.[169] One witness was going to testify that he, and not the defendant, was driving the car.[170] The other witness offered corroborating testimony.[171] During the court's lunch recess, the witnesses refused to talk to the prosecutor outside the presence of the defense attorney who was not immediately available.[172] After the state had rested, the prosecutor objected to the proffered testimony on the grounds that the defense had violated discovery by the late proffer of testimony and by instructing the witnesses not to speak to the pros-

---

1993) (emphasis added). The district court, nonetheless, made specific findings to justify preclusion, holding that the alibi testimony was perjurious and the late proffer was designed to "prevent the Government from challenging the alibi testimony effectively at trial." *Id.* The district court also found that a continuance to provide the government with time to prepare a rebuttal was "not feasible given the Court's trial schedule." *Id.* Thus the district court ticked off several elements of *Taylor*: deference to the trial court, a probability of perjury and impermissible trial tactics. *Id.*

163. 571 A.2d 1062 (Pa. Super. Ct. 1990), *appeal denied*, 600 A.2d 953 (Pa. 1991), *cert. denied*, 112 S. Ct. 1498 (1992).

164. *Zimmerman*, 571 A.2d at 1068 (quoting from the trial court opinion).

165. *Id.* (citing trial record enumerating the specific delays to the trial).

166. *Id.*

167. 798 P.2d 650 (Or. 1990).

168. *Id.* at 651.

169. *Id.*

170. *Id.*

171. *Id.* at 652.

172. *Id.*

ecutor.[173] The trial judge specifically found that the defense was employing a strategy to "circumvent" the truth.[174]

On appeal, the Supreme Court of Oregon agreed that the defense had violated the discovery statute.[175] Nonetheless, the court found that prejudice, if any, could have "conceivably" been obviated by a recess or postponement, that the proffered testimony was crucial to the defense, and that preclusion denied the defendant a "fair trial."[176] The court, however, did not characterize the preclusion as unconstitutional, nor did it specify its standard of review.[177] The court only referred to *Taylor* in passing, holding that the defendant could be liable for his attorney's actions.[178]

The Supreme Court of Indiana has also declined to address *Taylor* in the context of a defendant's right to personally testify to an alibi despite failure to comply with the notice-of-alibi statute.[179] In *Campbell v. State*, a prosecution for burglary and battery, the defendant was convicted after the trial court had precluded the defendant's own alibi testimony.[180] The defense had provided notice of an alibi defense, by the testimony of the defendant and the defendant's sister, two days before trial.[181] The notice-of-alibi statute, however, required notice at least twenty days before trial.[182] On motion by the prosecution, the trial court precluded any alibi testimony for failure to comply with the statute.[183] Although the appeal contended that the preclusion of the defendant's own testimony violated the defendant's federal constitutional rights, the Indiana Supreme Court ordered the parties to file supplemental briefs to argue the defendant's claim under the state constitution.[184] Declining to consider defendant's claims under the federal Constitution in

173. *Id.*
174. *Id.* at 652-53.
175. *Id.* at 653-54.
176. *Id.* at 655-56.
177. The basis for the decision is undisclosed. The court merely held that the trial court had "erred." *Id.* at 655.
178. *Id.*
179. Campbell v. State, 622 N.E.2d 495, 497-98 (Ind. 1993).
180. *Id.* at 497.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 497-98.

light of *Taylor*,[185] the court adopted what appears to be a *per se* rule that "the exclusion of a defendant's own testimony of alibi . . . is an impermissible infringement upon the right of the accused to testify [under the state constitution]."[186]

The Supreme Court of Rhode Island in *State v. Bowling*[187] affirmed the trial court's preclusion of alibi testimony in a prosecution for arson. The defense proffered the alibi two years after the prosecution had requested notice of any alibi defense and after the state had rested at trial.[188] The defense argued that the availability of an alibi defense was not apparent until after a fire inspector had testified.[189] The state supreme court disagreed, noting that the inspector's testimony was consistent with the prosecution's prior notice as to when the crime occurred.[190] The state supreme court agreed with the trial court that the defense "employed a last-minute switch in tactics"[191] and that a continuance was not an appropriate remedy since the state had already rested its case.[192] The Rhode Island Supreme Court quoted *Taylor* for the proposition that, when a violation is "willful and motivated by a desire to obtain a tactical advantage" prejudicial to the prosecution, preclusion is constitutional.[193]

Neither the trial court nor the state supreme court, however, found such willful misconduct, but only a "switch in tactics."[194] On habeas corpus review, the First Circuit noted the trial court's insufficient *Taylor* analysis.[195] The First Circuit also concluded that, although the fire inspector's testimony was consistent with the prosecution's notice of when the crime allegedly occurred, the fire department's report indicated that the fire began slightly earlier, thereby making the alibi relevant.[196]

---

185. *Id.*
186. *Id.* at 499 (citing IND. CONST. art. I, § 13).
187. 585 A.2d 1181 (R.I. 1991).
188. *Id.* at 1184.
189. *Id.*
190. *Id.*
191. *Id.* at 1185.
192. *Id.* at 1184.
193. *Id.* at 1185.
194. *Id.*
195. Bowling v. Vose, 3 F.3d 559, 562 n.6 (1st Cir. 1993).
196. *Id.* at 560 & n.2. The inspector testified that the fire began thirty to forty-five minutes before it was discovered at 11:46 p.m. *Id.* This testimony was

Because of the change in the relevant time frames, and because the defense counsel's failure to provide notice was at most negligent,[197] the First Circuit held that the circumstances of the late proffer did not suggest "willfulness" or fabricated testimony, and thus the preclusion was unconstitutional.[198]

IV. Analysis

> The right to offer the testimony of witnesses . . . 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 . . . . This right is a fundamental element of due process of law.[199]

This principle became the point of departure for subsequent courts when analyzing the constitutionality of preclusion. "At the outset we emphasize that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of otherwise admissible defense evidence."[200] This presumption called for the close scrutiny of preclusion.[201] The courts developed a balancing test to determine whether the sanction of preclusion was constitutional and, when constitutional error was raised, they invariably found a violation of the constitutional right.[202]

Under *Fendler*, the most important factor to be weighed was the significance of the precluded testimony.[203] "The determinative factor here is that Fendler was deprived of the testi-

---

consistent with the prosecution's notice to the defendant that the fire began between 11:00 p.m. and 12:00 a.m. *Id.* at 560. The First Circuit, however, noted that the fire department's report stated that the fire was reported at 11:34 p.m. *Id.* at 560 n.2. Deciding that the fire department's report provided the most "definitive" evidence, *id.*, the First Circuit decided that the fire was probably set between 10:49 and 11:04 p.m., or before the noticed time. *Id.* at 562.

197. *Id.*

198. *Id.* The First Circuit, however, remanded to the district court for a hearing to determine whether the error required reversal. *Id.* at 562-63. The First Circuit indicated that the "harmless error" test in a collateral, or habeas, review was governed by *Brecht*. *Id.* *See supra* note 52 and accompanying text.

199. Washington v. Texas, 388 U.S. 14, 19 (1967).

200. Fendler v. Goldsmith, 728 F.2d 1181, 1188 (9th Cir. 1984).

201. *Braunskill*, 629 F. Supp. at 522 (citing *Chambers*, 410 U.S. at 295).

202. *See Fendler*, 728 F.2d 1187; *Escalera*, 826 F.2d at 189-90 (analyzing the balancing test and reviewing decisions in other circuits).

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

mony 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 . . . ."[204] In *Davis* the court held that when the constitutional issue was properly raised on appeal, preclusion was *per se* unconstitutional, and the review should be limited to an analysis of whether the error was harmless beyond a reasonable doubt.[205]

On the other hand, *Barron*[206] typifies the deference accorded a trial judge's determination that preclusion is appropriate when a constitutional question is not raised. The violation in *Barron* was purely technical in nature.[207] The trial judge precluded alibi testimony because preclusion was permitted under the rule, and because the prosecution's case was so strong that the preclusion could not amount to an abuse of discretion.[208] *Barron*'s abuse of discretion standard may also be contrasted with the harmless error analysis in *Johnson* where the constitutional issue was raised.[209] In *Johnson*, despite the court's inclination to allow preclusion under *Taylor*,[210] it held that if the preclusion was constitutional error, such error could not be harmless because a credible alibi witness must put the prosecution's case in doubt.[211] *Barron*, in contrast, permits the trial judge to weigh the credibility of the proffered testimony based upon factors only circumstantially related to the integrity of that testimony, a technical violation of the notice-of-alibi rule and the strength of the prosecution's case.

Taylor revolutionized Compulsory Process Clause analysis. The Court held that the preclusion sanction does not necessar-

---

204. *Id.* at 1190.

205. United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981).

206. United States v. Barron, 575 F.2d 752 (9th Cir. 1978).

207. The response to the discovery order was one day late, and there was no showing of bad faith. *Id.* at 755-56.

208. *Id.* at 758. Had the constitutional issue been raised, the analysis, though not the outcome, would necessarily change. If the court found constitutional error, it could nonetheless hold the error harmless. Because a *jury* may find alibi testimony credible, a judge's threshold determination of credibility in harmless error analysis intrudes upon the defendant's right to a jury trial. *See supra* notes 160-61 and accompanying text.

209. *Johnson*, 970 F.2d at 912.

210. *See supra* note 157 and accompanying text.

211. *See supra* notes 160-61 and accompanying text.

ily run afoul of the Sixth Amendment.[212] This part of the decision overruled the *per se* unconstitutionality of preclusion held in *Davis*.[213] The Court stated: "[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 presumptively perjured testimony to be presented to a jury."[214] Since the proffer of perjured testimony has no constitutional protection anyway,[215] the significance of *Taylor* is that a trial judge may now make the "presumption" that the testimony is perjured on the basis of "a pattern of discovery violations."[216] The Court found that the facts in *Taylor* provided a sufficient pattern to justify such an inference.

Taylor's counsel moved twice to amend his list of witnesses in violation of the discovery rules.[217] The first motion was made and granted on the first day of trial, although the witnesses never testified.[218] The second motion was made on the second day of trial, and counsel explained the lateness of his request by saying that he had just learned of two new eyewitnesses.[219] Only one witness, Wormley, appeared to make an offer of proof the next day.[220] Wormley contradicted the defense counsel by testifying that he had not witnessed the actual fight and that he had spoken to defense counsel a week before trial.[221]

Therefore, the "pattern" in *Taylor* consisted of two motions, the first without effect, and the second accompanied by deceit. Assuming counsel's deceit, Wormley's testimony, impeaching the defense counsel, was irrationally accepted as truthful only in that regard.[222] If counsel were attempting to "fabricate testi-

212. *Taylor*, 484 U.S. at 402.

213. *Davis*, 639 F.2d at 243.

214. *Taylor*, 484 U.S. at 416.

215. Nix v. Whiteside, 475 U.S. 157 (1986) (holding that the defendant had no constitutional right to present perjured testimony).

216. *Taylor*, 484 U.S. at 414.

217. *Id.* at 403.

218. *Id.*

219. *Id.*

220. *Id.* at 404.

221. *Id.* at 405.

222. The assumption that Wormley's testimony was truthful when it discredited the defense attorney, but false when it helped the defendant, is remininscent of the flawed logic in the Texas statute found unconstitutional in Washington v. Texas, 388 U.S. at 22. *See supra* note 42.

mony,"[223] he was off to a poor start. In any event, the relationship between counsel's unethical method of attempting to introduce a witness and the veracity of that witness is attenuated. Counsel's methods are deserving of sanction,[224] but failure to sanction the culprit counsel, and instead sanctioning the defendant, hardly preserves faith in "the integrity of the judicial process"[225] from the perspective of the defendant.

The "pattern" also consisted of the events leading up to the motion to introduce Wormley's testimony. The Court found that since counsel was aware of Wormley prior to making the granted motion to add two eye-witnesses, "the inference that he was deliberately seeking a tactical advantage is inescapable."[226] The Court found it irrelevant whether such an advantage was achieved in fact.[227] "Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that this case fits into the category of willful misconduct in which the severest sanction is appropriate."[228] The Court held that if the failure to comply with a discovery request "was willful and motivated by a desire to obtain a tactical advantage . . . it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony."[229]

The Court's reasoning here subordinates truth-seeking to courtroom discipline. There was nothing about the proffered testimony which made it so intrinsically suspicious that a jury might not find it credible.[230] However, the Court also justified the preclusion sanction on the grounds that the misconduct "gives rise to a sufficiently strong inference that 'witnesses are

223. *Taylor*, 484 U.S. at 413.

224. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal."). The Court acknowledges that disciplinary action could be taken against the defense counsel, but notes that any sanction short of preclusion would not eliminate the risk of perjured testimony. *Taylor*, 484 U.S. at 413.

225. *Taylor*, 484 U.S. at 416.

226. *Id.* at 417.

227. *Id.* at 416.

228. *Id.*

229. *Id.* at 415.

230. Wormley's testimony would have corroborated the eyewitness testimony of the only other two witnesses for the defense. *Id.* at 402-03.

being found that really weren't there,' . . . ."[231] This inference that the proffered testimony is perjured, makes other sanctions inadequate since other sanctions would not preclude the testimony.[232]

The *Taylor* Court took pains not to develop a pat formula for preclusion.[233] Although the Court held that the specific facts of the case justified preclusion,[234] the Court's emphasis on improper trial tactics on one hand, and the probability of attempted perjury on the other, leaves the scope of the decision uncertain. Although, the Court certainly holds that preclusion is constitutional when both improper tactics and grounds for suspecting perjury are found,[235] the Court presents each factor independently as though each factor alone was sufficient grounds for preclusion. The independence of these factors is expressed in subsequent decisions.

The argument for characterizing *Taylor* as permitting preclusion without the inference of perjury is supported by the Court's subsequent decision, *Lucas v. Michigan*.[236] In *Lucas*, the Court cited *Taylor* as permitting preclusion for " 'willful misconduct' . . . designed to obtain 'a tactical advantage.' "[237] By not referring to those portions of *Taylor* which seem to require an inference of perjury, *Lucas* suggests that such an inference is either automatic or unnecessary. Other cases, purportedly following *Taylor*, also rely on the defense's bad faith to justify preclusion without making an inference that the proffered testimony is perjured.[238]

The Second Circuit in *Escalera*[239] decided that failure to comply with the discovery rule had to result from willful conduct "motivated by a desire to gain tactical advantage" to warrant preclusion under *Taylor*.[240] The Second Circuit's review of

231. *Id.* at 417.
232. *Id.* at 414.
233. *Id.*
234. *Id.* at 402.
235. *Id.* at 414.
236. 500 U.S. 145 (1991).
237. *Id.* at 152 (quoting *Taylor*, 484 U.S. at 417).
238. *E.g.*, Escalera v. Coombe, 852 F.2d 45 (2d Cir. 1988); State v. Passino, 640 A.2d 547 (Vt. 1994); Commonwealth v. Zimmerman, 571 A.2d 1062 (Pa. Super. Ct. 1990).
239. Escalera v. Coombe, 852 F.2d 45 (2d Cir. 1988).
240. *Id.* at 48.

Taylor focused on the deception and lateness by the defense attorney as evidence of the effort to gain a tactical advantage[241] and, therefore, evidently found an inference of perjury unnecessary for constitutional preclusion. The court remanded for an evidentiary hearing on the bad faith factor and did not instruct the district court to weigh the credibility or probative value of the proffered testimony in light of the bad faith.[242] Evidently the court interpreted bad faith to be the dispositive factor.[243]

The court in *Zimmerman*, citing *Escalera*, upheld the trial court's preclusion of an alibi defense since it found the discovery violation was a deliberate attempt to delay the trial.[244] Again, the *Zimmerman* court found it unnecessary to justify preclusion on the basis that the delay tactics made it likely that the proffered testimony was perjured.[245]

The court in *Chappee* also found that willful misconduct was the dispositive factor.[246] The expert testimony proffered in *Chappee* was unlikely to be perjured, and in its analysis the court did not even allude to its probative value.[247] Unlike the cool reception given to *Taylor* in *Escalera*, however, the *Chappee* court embraced *Taylor* as a salutary defense of trial court discretion.[248] The *Chappee* court determined that the egregious trial tactics employed by the defense justified preclusion under *Taylor*.[249] The First Circuit did not consider the distinction "critical" between the testimony in *Taylor*, which was treated as probably perjured, and the testimony in *Chappee*, which was almost certainly truthful.[250] The First Circuit found the use of

---

241. *Id.* at 47-48.

242. *Id.* at 48-49.

243. In *Cervone*, 907 F.2d at 346, the Second Circuit appeared to find the marginal value of the testimony determinative. *See infra* note 254 and accompanying text.

244. *Zimmerman*, 571 A.2d at 1068.

245. *Id.* at 1066-68.

246. Chappee v. Vose, 843 F.2d 25, 32 (1st Cir. 1988).

247. In the court's analysis of the ineffective counsel claim, it found the precluded isomer theory testimony a "slender straw" on which to base a defense. *Chappee*, 843 F.2d at 34. *See also supra* note 137.

248. *Chappee*, 843 F.2d at 32.

249. *Id.*

250. *Id.* at 31. The *Chappee* court did, however, disparage the probity of the proffered testimony when analyzing the separate claim for ineffective counsel. *Id.* at 33. If the court had employed *Fendler* balancing in its preclusion analysis, and weighed improper trial tactics heavily pursuant to *Taylor*, the court would have

surprise tactics equally inimical to the truth-finding process as perjury.[251] By finding preclusion constitutional, the First Circuit held that preclusion was not an abuse of discretion.[252]

On the other hand, the District of Columbia Circuit in *Johnson* construed *Taylor* as not requiring bad faith to constitutionally preclude exculpatory testimony.[253] "We think any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the *Taylor* Court's reference to trial court discretion and its extended discussion of the relevant factors."[254] The court's interpretation of *Taylor* is expansive. Though it is true that *Taylor* did not attempt to "draft a comprehensive set of standards to guide the exercise of discretion in every possible case,"[255] *Taylor*'s discussion of the factors, other than bad faith, relevant to *preclusion* of otherwise material and probative evidence, was limited to a sentence and a footnote citing the *Fendler* balancing test.[256]

Taylor held that where willful misconduct implicated the truthfulness of the proffered testimony, the testimony may be constitutionally precluded.[257] The *Johnson* court, however, is

---

been able to constitutionally preclude the testimony without adopting an expansive reading of *Taylor*.

251. *Id.* at 31.

252. *Id.* at 34.

253. United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992).

254. *Id.* The court cited *Cervone* for the proposition that the Second Circuit did not consider the "willful misconduct" factor as essential to preclude testimony, as might be inferred from *Escalera*. *Id.* In *Cervone*, the Second Circuit cited the six month delay in providing the required notice of expert testimony as demonstrating the defendant's apparent lack of true interest in the evidence. *Cervone*, 907 F.2d at 346. The Second Circuit also affirmed the district court's preclusion by merely noting that the proffered testimony was of marginal relevance and that preclusion was constitutional under *Taylor*. *Id.* *See also supra* note 145 and accompanying text. The court's cursory treatment does not reach the issue of "willful misconduct," and should be considered of little precedential value. *Cervone*, 907 F.2d at 345-46. It may be inferred that the court applied a short-hand balancing test and found that the defendant's marginal interest in the proffered testimony was outweighed by the defense's bad faith. That the court found bad faith may be inferred from its characterization of the delay as unexcused and unexplained. *Id.* at 346. The emphasis on the marginal relevance of the testimony suggests that the court found error, if any, to be harmless.

255. *Taylor*, 484 U.S. at 414.

256. *Id.* at 414-15 & n.19. The Court also discussed the preclusion sanction approved in *Nobles*. The court in *Nobles*, however, conditioned admissibilty of the testimony rather than barring it. *See supra* notes 54-60 and accompanying text.

257. *See supra* note 214 and accompanying text.

correct that *Taylor* never asserted that preclusion could *only* be constitutional where such conduct was manifest.[258] Nonetheless, the *Johnson* court held that preclusion would have been justified if the trial court had not made the contrary finding that the attorney's conduct was in *good* faith[259] because alternate sanctions would not lessen prejudice.[260]

This emphasis on prejudice, standing alone, has no textual support from *Taylor*. The *Taylor* Court asserted that alternate sanctions were inadequate because of the willful misconduct regardless of the prejudice to the prosecution.[261] *Johnson*, however, does not rest solely on the importance of prejudice. The court also noted the unexcused delay in the proffer of the testimony.[262] Finally, the District of Columbia Circuit suggested that *Taylor* balancing tests the credibility of the proffered testimony.[263] The *Johnson* court, therefore, while disclaiming bad faith as a necessary factor, suggested that an inference of perjury may somehow be automatically obtained where *Taylor* balancing otherwise permits preclusion.

Whether an inference of perjury is unnecessary, or automatic, *Taylor* balances with the single weight of the conduct of the defense attorney. Under either interpretation of *Taylor*, a court no longer needs to analyze the circumstances of the defense's misconduct to infer that the proffered testimony is perjured. In addition, the last vestige of *Fendler*'s paramount concern, the importance of the testimony to the defendant, is eliminated. Failure to consider the probative value of the testimony is antithetical to the truth-seeking justification for discovery. This failure has also reduced appellate scrutiny of the preclusion sanction. In *Fendler* balancing, the presumption was that preclusion was unconstitutional.[264] The abandonment of this presumption after *Taylor* is underscored by the rarity

258. *See supra* notes 233-35 and accompanying text.

259. *Johnson*, 970 F.2d at 911-12.

260. *Id.* at 912. *Cf.* People v. Gonzales, 28 Cal. Rptr. 2d 325, 333 (Ct. App. 1994) (holding that preclusion is only permissible where there is significant prejudice and willful misconduct).

261. *Taylor*, 484 U.S. at 417.

262. *Johnson*, 970 F.2d at 912.

263. *See supra* note 162 and accompanying text.

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

with which courts even consider the materiality of the proffered testimony.[265]

Aside from these decisions that arguably expand *Taylor*'s holding,[266] several premises of *Taylor* itself are flawed. The Court set forth a rule that, where a defense attorney willfully, and to gain a tactical advantage, fails to comply with a discovery rule, preclusion is an appropriate sanction.[267] It justified the rule by asserting that testimony proffered under such circumstances would probably be perjured.[268] To the extent that a trial court may exclude improperly proffered testimony on the grounds that it is presumed tainted, the Court has taken a long step towards the reintroduction of the type of *a priori* exclusory rules held unconstitutional by the Court in *Washington v. Texas*.[269] To the extent that material evidence may be excluded solely as a sanction for "bad faith" violation of the rules, it has made adherence to the rules a super-ordinate goal, transcending their purpose, truth-seeking.[270]

The Court further held that it is appropriate to "visit the sins of the lawyer upon his client."[271] The justification offered for this proposition is that to do otherwise would "strike[ ] at the heart of the attorney-client relationship."[272] The Court's obeisance to the attorney-client relationship is expressed in the proposition that a relevant factor allowing preclusion is the defense attorney's misconduct in unrelated trials.[273] The context of this extraordinary proposition is the Court's faith that a trial judge can divine, from a pattern of past misconduct, when a de-

265. *See supra* part III.D.

266. In Bowling v. Vose, the court did consider the relation between "willful misconduct" and the trustworthiness of the proffered testimony when holding that preclusion was unconstitutional in the case before it. 3 F.3d 559, 561-62 (1st Cir. 1993).

267. *Taylor*, 484 U.S. at 415. *See supra* notes 228-29 and accompanying text.

268. *Contra Fendler*, 728 F.2d at 1186 (quoting United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981)) ("[d]iscovery rules . . . have no effect on the probative value of otherwise admissible evidence. As the Fifth Circuit has noted, 'discovery orders are designed to prevent surprise, not to protect the integrity of the evidence sought to be presented.' ").

269. 388 U.S. 14. *See supra* notes 41-42 and accompanying text.

270. *See supra* part II. Neither the trial court in *Taylor*, nor any reviewing court, ever considered the importance of the proffered testimony to the defendant.

271. *Taylor*, 484 U.S. at 416.

272. *Id.* at 417.

273. *Id.* at 416 n.22.

fense attorney is seeking to introduce perjured testimony. If there is any justification for this argument, it is greater in civil litigation, where market forces check attorney conduct, and the penalty for egregious misconduct is merely monetary.[274] But, in the criminal process, the defendant's rights and remedies are very different.

The majority of criminal defendants are indigent and represented by court appointed attorneys or public defenders over whom the defendant has little control.[275] Outcome-determinative attorney error in civil litigation is grounds for an action in malpractice.[276] The incarcerated and indigent criminal defendant is unlikely to have the means for malpractice litigation and cannot thereby recover his liberty in any case.[277] Furthermore, since *Taylor* has held that it is constitutional to punish a defendant for the attorney's misconduct, the preclusion sanction cannot provide grounds for a claim of constitutionally deficient counsel.[278] The preclusion sanction in *Taylor* is premised, in part, on the necessity of maintaining the attorney-client relationship.[279] The premise underlying a claim for ineffective counsel is that an attorney has so breached his duty that the client should not be bound by the consequences of the attorney's acts or omissions.[280] To hold that a defendant should be liable

274. *See, e.g.,* Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979) (plaintiff's damages claim dismissed after four years of failing to comply with discovery).

275. *See supra* notes 24-25 and accompanying text.

276. Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980) (holding attorney liable for malpractice based on his failing to adequately research his client's claim and failing to inform his client of the statute of limitations).

277. A court-appointed attorney may, however, be liable to the criminal defendant for malpractice. Ferri v. Ackerman, 444 U.S. 193 (1979).

278. "[T]he accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The federal right is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The right to counsel implies that counsel must provide some minimum assistance in order to give the provision meaningful effect. For an exposition of this standard, *see infra* note 280.

279. *See supra* notes 271-72 and accompanying text.

280. *See* Strickland v. Washington, 466 U.S. 668 (1984). *Strickland* sets forth a two prong test for constitutionally ineffective counsel. The first prong is whether the counsel acted unreasonably given broad professional standards. *Id.* at 687. The second prong requires the unreasonable conduct to unduly prejudice the defendant. *Id. Taylor* limited *Strickland* by holding that if the attorney's unreasonable conduct is intentional, the defendant *should* be prejudiced by precluding the

for his attorney's acts for the purpose of sanctions cannot logically be reconciled with the argument that the same defendant should not be held liable for the same acts in an argument for ineffective counsel.[281]

It is true that it may be impossible to determine whether the defendant or the attorney is guilty of misconduct. Nonetheless, the holding in *Taylor*, that the defendant's complicity is irrelevant, runs counter to the movement in civil procedure to hold attorneys to a standard of reasonable conduct,[282] and to recent parallel developments in criminal procedure.[283] At best, it is inequitable to impose the preclusion sanction, which falls squarely on the defendant, for the attorney's independent violation of the rules, and not to punish the attorney as well.[284]

The Supreme Court also found the deterrence interest in imposing the preclusion sanction of only marginal relevance,[285] although deterrence was a major consideration of the trial judge imposing the sanction.[286] Preclusion is, at least in part, a punishment. Barring the inference that the main purpose of imposing the sanction is to gain retribution, the sanction must be predicated upon the theories that the proffered evidence is perjured or for the sake of trial efficiency. If the purpose were mere retribution, then imposition of the penalty without a finding of the defendant's fault would raise substantial due process questions unaddressed by the Supreme Court. Simple trial efficiency, without concern for the probative value of the evidence

---

proffered testimony. *Taylor*, 484 U.S. at 417-18. The Second Circuit in *Escalera* may have been considering *Strickland* when, in dicta, the court argued that *Taylor* did not require sanctioning the defendant for the defense counsel's negligence or inadvertence. *See supra* note 127 and accompanying text.

281. *See Chappee*, 843 F.2d at 33-34 (holding that where the defendant is liable for attorney tactics, permitting a claim for ineffective assistance of counsel would unfairly provide defendant with benefit of tactics or, failing success of same, with claim for ineffective counsel).

282. *See, e.g.*, FED. R. CIV. P. 11, 26(f), 37(g); N.Y. CT. R. 310.

283. *See, e.g.*, Young v. Nevada, 818 P.2d 844 (Nev. 1991) (imposing sanctions on criminal defense attorney for filing frivolous motion). Whether sanctions should have been imposed in *Young* is questionable, but irrelevant to the present discussion.

284. In *Taylor*, it is impossible to blame the defendant for the defense attorney's lying to the court about when the defense attorney had talked to Wormley.

285. Treatment of the deterrence interest is limited to one footnote. *Taylor*, 484 U.S. at 416 n.22.

286. *See generally supra* note 107 and accompanying text.

or the fault of the defendant, also raises due process concerns. It may be inferred that it is because of these concerns that the *Taylor* Court relied heavily on the presumption that the proffered testimony was perjured in order to justify the sanction.[287] Thereafter, apparently comfortable with the constitutionality of preclusion, the Supreme Court in *Lucas*[288] and other courts following *Taylor*,[289] have dropped the presumption upon which *Taylor* relied.

It has been suggested that the trial court could permit the suspicious testimony and impose an alternate sanction of allowing the prosecution, or the judge, to inform the jury of the circumstances under which the testimony is being permitted.[290] Such an instruction could be required as a condition to allowing the testimony and thus has some doctrinal support under *Nobles*.[291] The advantage of this alternate sanction is that it preserves the jury's fact-finding role while permitting the court to insure that the jury is fully informed. On the other hand, when the defense counsel is merely attempting to disrupt the proceedings to gain a tactical advantage, such an instruction would introduce extrinsic facts relevant to the character of the attorney, but having no bearing on the credibility of the proffered testimony. The instruction, therefore, is essentially evidence of the bad character of the defense counsel being used to impeach a witness and should, on the basis of relevance or unfair prejudice, be inadmissible.[292]

Two state supreme courts have not followed *Taylor*. The Supreme Court of Oregon in *State v. Ben*[293] ignored the central holding of *Taylor* and made only passing reference to that decision in regards to the liability the defendant could have for his attorney's actions.[294] The court in *Ben* had the requisite predicate to sustain the preclusion under *Taylor*. The trial court had found two discovery violations which it attributed to an intent

287. *See supra* notes 230-32 and accompanying text.

288. *See supra* notes 236-37 and accompanying text.

289. *See supra* notes 239-65 and accompanying text.

290. *See, e.g.*, Tom Stacy, *The Search For Truth In Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1446 (1991).

291. *See supra* notes 54-60 and accompanying text.

292. *See* FED. R. EVID. 401, 403.

293. 798 P.2d 650 (Or. 1990).

294. *See supra* note 178 and accompanying text.

by the defense to circumvent the truth.[295] It may be inferred that the court in *Ben* ascribed greater weight to the probative value of the testimony than to the one sided balancing test utilized in *Taylor*.

The Supreme Court of Indiana also declined to apply Compulsory Process Clause analysis under *Taylor* to a defendant precluded by the trial court from testifying to an alibi on his own behalf.[296] The court ordered the litigants before it to brief their arguments under the state constitution which, the court decided, prohibited the preclusion of the defendant's own testimony.[297] The decision evinced a distrust of the United States Supreme Court's willingness to defend what the Indiana Supreme Court deemed a fundamental right.[298]

V. Conclusion

Taylor's holding that the preclusion sanction is appropriate to protect the integrity of the judicial process and to exclude suspect testimony fails to give sufficient weight to truth-seeking values. *Taylor* permits the trial court to preclude testimony when it is proffered in violation of discovery rules on a presumption that the testimony is perjured. Since the preclusion is constitutional, abuse of discretion is the appellate standard of review. Equipped with this broad discretion, the trial court may withhold from the jury probative, and possibly crucial exculpatory evidence. The trial court is further empowered to impose this drastic sanction upon the defendant for misconduct

295. *See supra* note 174 and accompanying text.

296. Campbell v. State, 622 N.E.2d 495, 497-99 (Ind. 1993).

297. *Id.*

298. The United States Supreme Court in Michigan v. Lucas, 500 U.S. 145 (1991), struck down what it construed as a *per se* rule that a defendant in a prosecution for rape may always testify under the Sixth Amendment concerning prior consensual sexual relations with the victim despite violation of Michigan's rape shield statute. The Court held: "The Sixth Amendment is not so rigid. The [statute] serves legitimate state interests .... Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion." *Id.* at 152. Because *Campbell* suggests a *per se* rule prohibiting the preclusion of a defendant's own alibi testimony, it is probable the Indiana Supreme Court was seeking to insulate its decision from United States Supreme Court review by explicitly relying on the state constitution as the basis for its decision. *See* Michigan v. Long, 463 U.S. 1032 (1983) (holding that the United States Supreme Court has jurisdiction to hear an appeal from a state court where the state decision considered federal law and did not have a clearly independent basis in state law).

wholly attributable to the defense attorney. Moreover, the defense attorney's misconduct in *Taylor*, which set forth this rule, could as easily be explained by poor judgment, incompetence, and overwork as by the ascribed evil intent.

Taylor frees the hand of the trial judge to make independent determinations regarding motives behind misconduct, and consequently, the veracity of exculpatory testimony. This deference, applauded in *Johnson*, is antithetical to the constitutional interest in compulsory process which is to put all probative evidence before the jury. Furthermore, courts following *Taylor* have amplified the holding and discarded *Taylor*'s tenuous link between the misconduct and the veracity of the proffered testimony. The bad faith of the defense, or prejudice to the prosecution coupled with an insufficient explanation for the discovery violation, have become sufficient and independent grounds to preclude otherwise relevant testimony.

Undoubtedly, there is a strong institutional interest in trial discipline and efficiency. There may well be a legitimate, "real world" need to add weight in the balance to willful misconduct, a factor considered barely relevant in *Fendler*, but of legitimate concern in *Cervone* and *Chappee*. But *Taylor* and its progeny, by creating a test which ignores the defendant's culpability and interest in the testimony, has fashioned a sword to enforce discovery that strikes at the heart of discovery's purpose, to further truth-seeking.

Matthew R. Atkinson