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DISCOVERY SANCTIONS AND THE COMPULSORY PROCESS CLAUSE: *Taylor v. Illinois**

I. INTRODUCTION

America's criminal justice system, in theory, is premised upon "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."[1] In practice, however, the criminal justice system is hard pressed to live up to such lofty aspirations. On a daily basis, friction inevitably arises when abstract idealism and pragmatic efficiency collide in this nation's criminal courts. When the ramifications of these clashes reach constitutional dimensions, the United States Supreme Court often must strike a precarious balance between individual rights and state interests to resolve such conflicts. Such a balance is the essence of *Taylor v. Illinois*.[2]

In *Taylor*, the Court considered the constitutionality of Illinois' criminal discovery rules when measured against the sixth amendment's compulsory process clause. The Court held that the compulsory process clause does not create an absolute bar to the preclusion of defense witness testimony as a sanction for a discovery violation.[3]

This Note will analyze the Supreme Court's decision in *Taylor* and consider whether the "balancing-test" approach adopted by the Court sufficiently articulates a reasonable balance between the State's interest in the orderly administration of criminal trials and the defendant's sixth amendment right to compulsory process.

II. BACKGROUND

The compulsory process clause of the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."[4] Throughout its history, the United States Supreme Court "has had little occasion to discuss the contours of the Compulsory Process Clause."[5] The cases that purportedly dealt with or mentioned the subject

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* Richard J. Cipolla, Jr.

[1] In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[2] 108 S. Ct. 646 (1988).

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

[4] U.S. CONST. amend. VI.

[5] Pennsylvania v. Ritchie, 480 U.S. 39, 55 1987).

failed to provide an extensive analysis of the clause.[6] Whenever possible, the Court traditionally has sought to utilize precedents concerning fair trials under the fourteenth amendment's due process clause to forego specific sixth amendment compulsory process analyses.[7] In the last two decades, however, the Court has made a pronounced effort to identify and define the specific rights implicitly secured by the compulsory process clause.

Washington v. Texas[8] initiated the contemporary resurrection of the compulsory process clause. In *Washington*, the Court held that the clause was applicable to state criminal trials through the fourteenth amendment.[9] As to the scope of a defendant's rights under the compulsory process clause, the Court ruled as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *This right is a fundamental element of due process of law.*[10]

Accordingly, in *Washington* the Court ruled that two Texas evidentiary statutes that precluded persons charged as coparticipants in the same crime from testifying for one another were violative of the defendants' sixth amendment rights under the compulsory process clause.[11]

Three years later, the Court recognized the potential conflict between state criminal discovery rules and other provisions of the federal Constitution in *Williams v. Florida*.[12] In *Williams*, the Court found that the application of Florida's "notice-of-alibi" criminal discovery rule[13] was constitutional.[14] Although it did not pass on the issue, the *Williams* Court, in dictum, foresaw and expressly reserved for later review the issue of whether a discovery sanction that precluded a defendant's presentation of relevant evidence would violate the compulsory process clause of the sixth amendment.[15]

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[6] *Id.* n.12.

[7] *See id.*

[8] 388 U.S. 14 (1967).

[9] *Id.* at 18.

[10] *Id.* at 19 (citing *In re* Oliver, 333 U.S. 257 (1948)) (emphasis added).

[11] *Id.* at 23.

[12] 399 U.S. 78 (1970).

[13] FL. R. CRIM. P. 1.200, 33 FLA. STAT. ANN. § 33-1.200 (West 1967).
That rule requires a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intends to claim an alibi, and to furnish the prosecuting attorney with information as to the place where he claims to have been and with the names and addresses of the alibi witnesses he intends to use.
Williams, 399 U.S. at 79.

[14] *Id.* at 82, 86.

[15] *Id.* at 83-84 n.14.

The Supreme Court considered the potential limits of the compulsory process clause in *Chambers v. Mississippi*,[16] in which the Court struck down a particular application of Mississippi's hearsay rule as well as its evidentiary "voucher" rule in general.[17] In *Chambers*, the Court stated that when an accused asserts his rights under the compulsory process clause, "as is required of the State, [he] must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[18] The Court also felt that a defendant's sixth amendment rights under the confrontation clause were not absolute, and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[19] Unfortunately, the *Chambers* Court failed to establish any specific guidelines concerning when a defendant's sixth amendment rights may be validly superseded by countervailing interests, and thus left the matter open.

United States v. Nobles[20] perpetuated the Court's post-*Washington* tendency to qualify the rights embodied in the compulsory process clause and served as the prototype for its decision in *Taylor*. In *Nobles*, defense counsel sought to impeach the credibility of government witnesses through a defense investigator's testimony regarding prior inconsistent statements obtained from the witnesses by the investigator.[21] After the prosecution completed its case, the investigator was called as a defense witness. At that time, the district court required defense counsel to deliver a copy of the investigator's written report to the prosecution upon the completion of the investigator's testimony.[22] When defense counsel indicated that he would not produce the report, the court ruled that the investigator would not be allowed to testify.[23] The Court held that such a ruling was within the trial court's discretion and concluded 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."[24]

Thus, as a result of these cases, the groundwork had been laid and the infrastructure provided for the Supreme Court's decision in *Taylor*.

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[16] 410 U.S. 284 (1973).

[17] *Id.* at 302-03 (trial court refused to allow: (1) three of defendant's witnesses to testify concerning a third party's confessions to them, under hearsay rule; and (2) defendant to cross examine third party whom defendant had called as a witness when State failed to do so, under "voucher" rule, which prohibits a party from impeaching his own witness]).

[18] *Id.* at 302.

[19] *Id.* at 295 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)).

[20] 422 U.S. 225 (1975).

[21] *Id.* at 227-29.

[22] *Id.* at 229.

[23] *Id.*

[24] *Id.* at 241.

III. *Taylor v. Illinois*

A. Facts and Case History

Well in advance of Taylor's trial for attempted murder, the prosecutor filed a discovery motion requesting a list of defense witnesses in compliance with Illinois law.[25] The defendant's answer failed to list potential eyewitness Alfred Wormley, as did the defendant's amended answer, which was submitted on the first day of trial.[26] On the second day of trial, after the prosecution's two key witnesses had completed their testimony, defense counsel made an oral motion to once again amend the answer to include Wormley.[27] In support of his motion, defense counsel told the court that Wormley had probably witnessed the entire incident, and that, although the defendant had informed counsel about Wormley earlier, the defendant had been unable to locate Wormley.[28]

Although the trial judge indicated that he was concerned about the possibility "that witnesses are being found that really weren't there,"[29] he allowed defense counsel to make an *in camera* offer of proof in the form of Wormley's testimony.[30] The proceeding revealed that Wormley had not in fact witnessed the incident itself.[31] More significantly, Wormley testified that defense counsel had visited him at his home and served him with a subpoena *five days before the trial began*.[32]

Subsequently, the trial court found that defense counsel's conduct constituted "a blatant violation of the discovery rules, [and a] willful violation of the rules."[33] After commenting that "I have a great deal of doubt in my mind as to the veracity of this young man,"[34] and expressing concern about discovery violations in other trials, the trial judge concluded that the appropriate sanction would be to preclude

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[25] *Taylor*, 108 S. Ct. at 649; *see also* ILL. SUP. CT. R. 413(d), ILL. ANN. STAT. ch. 110A, § 413(d) (Smith-Hurd 1985), which states that

> [s]ubject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and 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* together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him . . . .

Id. (emphasis added).

[26] *Taylor*, 108 S. Ct. at 649.

[27] *Id.*

[28] *Id.* at 649-50.

[29] *Id.* at 650.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

Wormley from testifying.[35] The defendant was convicted, and the Appellate Court of Illinois affirmed.[36] Foregoing even a rudimentary sixth amendment analysis, the appellate court found that the preclusion sanction was statutorily authorized as well as "within the sound discretion of the trial court."[37] The United States Supreme Court, in an opinion written by Justice Stevens, affirmed the decision.[38]

B. United States Supreme Court

In *Taylor v. Illinois*, the Supreme Court framed the issue to be resolved in terms of the constitutionality of Illinois' preclusion sanction for discovery violations under the compulsory process clause of the sixth amendment.

Initially, the Court rejected the State's argument that the compulsory process clause merely guaranteed that the accused shall have the power to subpoena witnesses and therefore was inapplicable to rulings on the admissibility of evidence. The Court chastised the narrow reading of the compulsory process clause advocated by the State, and noted that the Court had "consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions."[39] The Court cited many of its prior decisions that defined the scope and fundamental character of the compulsory process clause and concluded that "[w]e cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness."[40]

The Court then found the defendant's claim that the compulsory process clause created an absolute bar to the preclusion of the testimony of a surprise witness was just as extreme and unacceptable as the State's argument of irrelevancy.[41] As opposed to other rights guaranteed by

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[35] *Id.*; *see also* ILL. S. CT. R. 415(g), ILL. ANN. STAT. ch. 110A, §415(g) (Smith-Hurd 1985) providing that

> [i]f at any time during the course of 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 discovery 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) Wilful [sic] violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

Id. (emphasis added).

[36] People v. Taylor, 141 Ill. App. 3d 839, 491 N.E.2d 3 (1986).

[37] *Id.* at 844-45, 491 N.E.2d at 7.

[38] Taylor v. Illinois, 108 S. Ct. 646, 657 (1988).

[39] *Id.* at 651-52 (citing Western, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 94-95 (1974)).

[40] *Taylor*, 108 S. Ct. at 652-53 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987); United States v. Nixon, 418 U.S. 683, 709 (1974); Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14, 19 (1967)).

[41] *Taylor*, 108 S. Ct. at 653.

the sixth amendment, the Court characterized compulsory process rights as weaponry available only at the defendant's initiative but subject to the legitimate demands of the adversarial system.[42] The Court explained that the primary justifications which supported a defendant's right to present exculpatory evidence also constituted a source of essential limitations on the right.[43]

Accordingly, the Court next elaborated upon the specific countervailing interests that could properly outweigh a defendant's compulsory process rights. The Court felt that the adversary process could not function effectively without adherence to rules of procedure designed to provide each party a fair opportunity to present its case.[44] The Court asserted that the State's interest in the orderly conduct of criminal trials was sufficient to justify the imposition and enforcement of firm procedural and evidentiary rules.[45] The majority reasoned that the defendant's right to compulsory process itself "would be defeated if judgments were to be founded on a partial or speculative presentation of facts."[46] Finally, the Court equated the discovery process with the right to compulsory process and concluded that both "minimize[d] the risk that a judgment [would] be predicated on incomplete, misleading, or even deliberately fabricated testimony,"[47] and thus "serve[d] the same high purpose"[48] of upholding the integrity of the adversarial system.[49]

The Court next sought to articulate a set of standards to guide the exercise of discretion at the trial court level. Specifically, the Court advocated trial court analysis of the issue pursuant to a balancing test comprised of the following factors: (1) the effectiveness of less severe sanctions; (2) the impact of preclusion on the evidence at trial and the outcome of the case; (3) the extent of prosecutorial surprise or prejudice; (4) the simplicity of compliance with the discovery rule; and (5) whether the violation was intentional.[50] Generally, the Court added that "[t]he 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 must also weigh in the balance."[51]

The Court emphasized that the willfulness of the violation was perhaps the most crucial factor to be considered by trial courts.[52] To this extent, the Court stressed that regardless of the adequacy of

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[42] *Id. See also* United States v. Nobles, 422 U.S. 225, 241 (1975).
[43] *Taylor*, 108 S. Ct. at 653.
[44] *Id.*
[45] *Id.*
[46] *Id.* (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).
[47] *Taylor*, 108 S. Ct. at 654.
[48] *Id.* at 653.
[49] *Id.* at 653-54.
[50] *Id.* at 655-56 (citing Fendler v. Goldsmith, 728 F.2d 1181, 1188-90 (9th Cir. 1983)).
[51] *Taylor*, 108 S. Ct. at 655.
[52] *Id.*

alternative sanctions, preclusion would be entirely consistent with the purposes of the sixth amendment if (1) a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony;[53] or (2) a violation was "willful and motivated by a desire to obtain a tactical advantage."[54]

The Court concluded by refuting the defendant's argument that a client should not be held responsible for his attorney's misconduct. The Court reasoned that because a client has a duty to be candid with his lawyer, when the lawyer responds to discovery requests, the lawyer "speaks for the client."[55] Thus, the Court held that a defendant must accept the consequences of his attorney's tactical decision not to disclose the identity of certain witnesses in advance of trial.[56]

Justice Brennan, in a dissenting opinion joined by Justices Marshall and Blackmun, rejected the majority's interpretation of the sixth amendment compulsory process clause.[57] Justice Brennan vehemently argued that "absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause per se bars discovery sanctions that exclude criminal defense evidence."[58]

IV. ANALYSIS

Many courts and commentators believe that the compulsory process clause "forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants."[59] An analysis of the Court's decision in *Taylor* would seem to

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[53] *Id.*

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

[55] *Id.* at 657.

[56] *Id.*

[57] *Id.* at 658 (Brennan, J., dissenting).

[58] *Id.*

[59] United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981). *See also* Braswell v. Florida, 400 U.S. 873 (1970) (Black, J., dissenting from denial of certiorari) (would "hold that Florida cannot enforce a mere procedural rule by denying a criminal defendant his constitutional right to present witnesses on his own behalf"); Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 HARV. C.R.-C.L. L. REV. 123, 157 (1983) (sixth amendment right to present a defense proscribes enforcement by the preclusion sanction); ABA STANDARDS FOR CRIMINAL JUSTICE § 11-4.7(a) (2d ed. 1980) ("The exclusion sanction is not recommended because its results are capricious . . . . [It] . . . raises significant constitutional issues"); Pulaski, *Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Unconstitutional Considerations*, 64 IOWA L. REV. 1, 53 (1978) ("using a preclusion sanction to enforce [a discovery rule] may be constitutionally excessive"); Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 839 (1976) ("applying the preclusion sanction to the accused would in most cases be constitutionally suspect"); Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1364 (1972) (witness preclusion violates sixth amendment right to present a defense) [hereinafter *Preclusion Sanction*]; Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276, 1294 (1966) ("Precluding a defendant from introducing materials essential to his defense is a drastic

lend credence to the constitutional concerns of such commentators.

The Court stakes its decision in *Taylor* upon the premise that "countervailing public interests"[60] such as the "integrity of the adversary process"[61] and the "interest in the fair and efficient administration of justice"[62] are served through the implementation and enforcement of discovery rules.[63] Thus, the Court advocates the view that a defendant's compulsory process rights may be superseded by the public's interests in a discovery process designed to facilitate a "full and truthful disclosure of critical facts."[64] Yet it seems unlikely that such a purpose can be served through the utilization of a preclusive sanction "that itself constitutes a conscious mandatory distortion of the fact-finding process whenever applied."[65] In fact, the preclusion sanction, in its practical operation, impairs individual constitutional rights and the adversarial process as a whole by preventing defendants from presenting potentially exculpatory evidence.

One year prior to its decision in *Taylor*, the Court in *Pennsylvania v. Ritchie* stated that "[o]ur cases establish, at a minimum, that criminal defendants [under the compulsory process clause] 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.*"[66] The historic role of the jury in the adversarial system has been to hear all relevant yet nonprejudicial evidence as the trier of fact.[67] To the extent the jury's function is superseded by the operation of a preclusive sanction, a criminal defendant's sixth amendment right to a jury trial is correlatively usurped.[68]

As evidenced by the facts of *Taylor*, the veracity of surprise witnesses may often be doubtful. As the trier of fact, however, the jury should

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sanction and should be employed only as a last resort against a particularly flagrant violation"); Note, *Criminal Law: Constitutionality of Conditional Mutual Discovery Under Federal Rule 16*, 19 OKLA. L. REV. 417, 424 (1966) ("Such a sanction would probably constitute a denial of due process in and of itself").

[60] Taylor v. Illinois, 108 S. Ct. 646, 655 (1988).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 654-55. *See also* United States v. Nixon, 418 U.S. 683, 709 (1974).

[65] Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 237 (1966).

[66] Pennsylvania v. Ritchie, 480 U.S. 39, 55 (1987) (emphasis added).

[67] *See* Brooks v. Tennessee, 406 U.S. 609, 611 (1972) ("our adversary system reposes judgment of the credibility of *all* witnesses in the jury") (emphasis added).

[68] *See* U.S. CONST. amend. VI; Blumenson, *supra* note 59, at 162 (rationale behind preclusion sanction "appears to trespass on the province of the jury to judge credibility and find facts as guaranteed by the sixth amendment right to jury trial"); Pulaski, *supra* note 59, at 57 (procedural limitations that artificially restrict the factfinder's truth-seeking function are usually frowned upon by the Court, as is apparent from its contemporary decisions regarding the fourth amendment exclusionary rule); Clinton, *supra* note 59, at 836 ("modern trend . . . admits suspect evidence and leaves its weight and credibility to the trier of fact"); Rezneck, *supra* note 59, at 1294 (preclusion sanction inconsistent "with the historic willingness of courts to afford defendants in criminal cases an untrammeled right to be heard").

have the opportunity to determine the probative force and value of such tenuous evidence. It should not be preemptively determined by an evidentiary sanction that functions to preclude, rather than include, relevant evidence concerning crucial issues. Accordingly, the Court's decision in *Taylor* seemingly disparages

> the conviction of our time that the 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 . . . .[69]

The fallacy of the Court's logic lies in the possibility that the preclusion sanction may undermine "the central truth-seeking aim of our criminal justice system"[70] to a greater degree than the discovery abuse it was designed to rectify.[71] As the Court previously cautioned in *Chambers v. Mississippi*, the "denial or significant diminution"[72] of any defendant's sixth amendment rights "calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined."[73]

Of course, the adversary system of trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."[74] Criminal discovery rules play an integral role in the truthseeking process, and their abuse or violation should never be condoned. Few could refute, however, the proposition that the compulsory process clause plays an equally significant if not superior role in the adversarial fact-finding process.[75] Yet it appears that the Court in examining these competing interests ignores its past precedents as well as its recent admonition to those who would abrogate compulsory process rights that restrictions on such rights "may not be arbitrary or disproportionate to the purposes they are designed to serve."[76] The preclusion sanction of *Taylor* fails on both counts.

The preclusion sanction can be considered arbitrary in two ways. First, the preclusion sanction could result in an innocent defendant's

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[69] Washington v. Texas, 388 U.S. 14, 22 (1967) (quoting Rosen v. United States, 245 U.S. 467, 471 (1918)).

[70] Taylor v. Illinois, 108 S. Ct. 646, 660 (1988) (Brennan, J., dissenting).

[71] *Id.* (citing United States v. Nixon, 418 U.S. 683, 709 (1974)); *see* Pulaski, *supra* note 59, at 63 (theory that preclusion sanction "facilitate[s] the truth-seeking function is a constitutionally misguided notion"); Clinton, *supra* note 59, at 836 ("sanction undercuts the very purpose of the rule" and "is a peculiarly ironic and inappropriate way to further 'the search for truth'" because it "inhibits the search for truth by rendering the criminal trial virtually an *ex parte* proceeding in which only the prosecution's case is presented").

[72] Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[73] *Id.*

[74] Williams v. Florida, 399 U.S. 78, 82 (1970).

[75] *See Nixon*, 418 U.S. at 709 ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense").

[76] Rock v. Arkansas, 107 S. Ct. 2704, 2711 (1987) (striking down Arkansas' preclusion of hypnotically-induced testimony).

conviction due to the commission of a separate wrong (i.e., the failure to comply with pretrial discovery).[77] Second, the preclusion sanction could impose a penalty upon a defendant who bore no responsibility for the discovery violation of his attorney, who may very well have been court appointed.[78]

The preclusion sanction could also produce a disproportionately harsh penalty. For example, the preclusion sanction could result in an erroneous conviction and death sentence for an innocent defendant charged with a capital offense based on a pretrial discovery violation.[79] Moreover, an array of less drastic and less constitutionally offensive alternative sanctions is usually available to redress any potential prejudice suffered by the prosecution. These include (1) continuance or recess; (2) prohibition of further discovery by the defendant; (3) criminal sanctions for failure to comply; (4) contempt against counsel; and (5) prosecutorial or judicial comment on defendant's failure to comply.[80] Such alternative sanctions should be flexible enough to provide trial courts with the means to effectively "safeguard against surprise and insure a trial on the merits."[81]

Such observations point out the constitutional deficiencies inherent within the *Taylor* opinion. *Taylor*'s general holding that the sixth

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[77] *See Preclusion Sanction, supra* note 59, at 1361; Weinstein, *supra* note 65, at 237 ("strange . . . to see the risk of conviction of the innocent deliberately proposed as a matter of policy").

[78] *Preclusion Sanction, supra* note 59, at 1361; *accord* Fendler v. Goldsmith, 728 F.2d 1181, 1187 (9th Cir. 1983).

[79] *See* Bedau, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). This recent empirical study conducted by Tufts University professor of philosophy Hugh Adam Bedau suggests that such a possibility may not be as remote as it may seem at first glance. Bedau's "study of erroneous convictions in which the defendant was, or might have been, sentenced to death" revealed "350 cases in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent." *Id.* at 23-24. Of the 350 cases in which defendants were found to have been erroneously convicted, 23 defendants were, in fact "innocent defendants who were executed." *Id.* at 72-73. As to the causes of the erroneous convictions, Bedau found that prosecutorial "suppression of exculpatory evidence" accounted for erroneous convictions in 35 out of 350 cases (10%), and "judicial denial of admissibility of exculpatory evidence" accounted for erroneous convictions in seven out of 350 cases (2%). *Id.* at 57. Thus, the preclusion of potentially exculpatory evidence has, in fact, caused innocent defendants to be erroneously convicted in capital cases. It should be noted that Bedau observed that "procedural reforms by themselves in capital trials . . . hold out little hope of significantly reducing or rectifying erroneous convictions." *Id.* at 89. *See generally* H. BEDAU, THE DEATH PENALTY IN AMERICA (3d ed. 1982).

[80] *See Preclusion Sanction, supra* note 59, at 1356-60; People v. Rayford, 43 Ill. App. 3d 283, 287, 356 N.E.2d 1274, 1278 (1976); *see also* ILL. S. CT. R. 415(d), (g), ILL. ANN. STAT. ch. 110A, § 415(d), (g) (Smith-Hurd 1985).

[81] *Rayford*, 43 Ill. App. 3d at 288, 356 N.E.2d at 1278 (Illinois case reversing trial court's abuse of discretion in imposing preclusion sanction); *see* Blumenson, *supra* note 59, at 170-71 ("None of these methods of enforcement risk transforming the trial into a non-adversary proceeding in which the defendant may be convicted by a jury unaware of her defense"); Pulaski, *supra* note 59, at 44-47 ("except when . . . peculiar circumstances . . . exist, one cannot say that the preclusion sanction is the only adequate enforcement device available"); Clinton, *supra* note 59, at 834-36 ("available remedial alternatives exist that are less violative of the right to defend and still protect the procedural interests in question").

amendment compulsory process clause does not create an absolute bar to the preclusion sanction is constitutionally sound. The lexicon of the law harbors little room for "absolutes." To operate fairly and efficiently, contemporary criminal discovery must be a two-way street, subject always to constitutional limitations. Yet a criminal defendant's constitutional rights could not have been intended, nor should they be judicially interpreted, to permit the accused or his attorney to engage in "cutthroat tactics"[82] designed to allow the defendant to "figuratively [thumb] his nose at applicable requirements of pretrial discovery."[83]

Elements of the majority's reasoning, however, as well as its rationale in support of *Taylor*'s holding are constitutionally unsound. Specifically, the Court's emphasis on the willfulness of a discovery violation—as opposed to the reasonableness of alternative sanctions—as the dispositive factor regarding imposition of the preclusion sanction is misguided. If at all possible, a remedial sanction that functions to *preserve* a defendant's constitutional rights should be preferred and utilized over a punitive sanction that functions to violate his constitutional rights.[84] Simply put, regardless of the willfulness of the discovery violation, if a reasonable alternate sanction exists under the circumstances, the compulsory process clause of the sixth amendment should require that such a sanction be imposed in lieu of the preclusion sanction.[85] In such cases, surely state discovery rules cannot usurp specifically delineated constitutional rights.

Taylor should enjoy an extended life span. The recent addition of Justice Kennedy will most likely not disrupt the balance of power within the Court, which resulted in a five-to-three decision in *Taylor*. Despite fears that *Taylor* may have placed defendants' compulsory process rights wholly within the discretion of trial courts, the decision should not result in wholesale abuse of such rights. Indeed, the balancing-test analysis promulgated in *Taylor* represents perhaps the opinion's most redeeming quality in that the test endows trial courts with vast discretion concerning the imposition of the preclusion sanction. Inherent within a trial court judge's discretion to act is his correlative discretion to abstain from acting. As discussed previously, if such discretion is exercised in favor of the preclusion sanction only in those extremely rare cases in which no other alternative sanction could possibly redress the actual prejudice suffered by the State as a result of a defendant's blatant, calculated discovery violation, the Constitution will be well served. The *Taylor* test, therefore is only constitutionally reasonable to the extent that the opinion is narrowly and consistently interpreted in this restrictive manner at the trial court level. Thus, the logical and constitutional discrepancies as well as the long-range impact of the

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

[83] *Id.* at 28.

[84] *See supra* notes 59, 82; *see also infra* note 87.

[85] *See supra* notes 59, 82; *see also infra* note 87.

Taylor opinion in theory may very well be buffered by prudent trial court discretion in practice.[86]

V. CONCLUSION

In *Taylor v. Illinois*, the Supreme Court held that the compulsory process clause of the sixth amendment does not create an absolute bar to the preclusion of defense witnesses' testimony as a sanction for the violation of a discovery rule.[87] In so doing, the Court advocated a balancing-test analysis that weighs countervailing public interests against criminal defendants' constitutional guarantees under the compulsory process clause of the sixth amendment.[88] Such an approach intentionally entrusts trial courts with an expansive amount of discretion in the determination of whether countervailing public interests should justify an abrogation of specifically defined constitutional rights in any given case.

With great power there must also come great responsibility. The imposition of the preclusion sanction authorized by *Taylor* should pass constitutional muster only when utilized as a last resort in cases that involve the most aggravated and prejudicial discovery violations of criminal defendants. It should never be forgotten 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."[89] In light of the *Taylor* decision, it can only be hoped that when called upon to balance the public benefit against the costs of convicting innocent defendants, trial court judges will give consideration to the suggestion that "the Constitution itself, by commanding that the defendant be permitted to present his defense, may reflect a deliberate resolution of this balance."[90]

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[86] *See* Coombe v. Escalera, 108 S. Ct. 1004 (1988) (vacating second circuit's judgment and remanding case for consideration in light of *Taylor*); Escalera v. Coombe, 852 F.2d 45 (2d Cir. 1988) (post-*Taylor*) (remanding case for a "willfulness" hearing while commenting that lack of good excuse is not equivalent to the willfulness contemplated in *Taylor*); Chappee v. Vose, 843 F.2d 25, 31 (1st Cir. 1988) (post-*Taylor*) ("Exclusionary sanctions must appropriately be reserved for hard-core transgressions"); United States v. Fernandez, 780 F.2d 1573, 1576 (11th Cir. 1986) (trial courts should "impose the least severe sanction that will accomplish the desired result . . ."(quoting United States v. Sarcinelli, 667 F.2d 5, 7 (5th Cir. Unit B 1982)); Fendler v. Goldsmith, 728 F.2d 1181, 1187 (9th Cir. 1983) (under the balancing-test approach Supreme Court drew upon for *Taylor* opinion, reversing trial court's preclusion sanction); People v. Flores, 168 Ill. App. 3d 284, 293, 522 N.E.2d 708, 714 (post-*Taylor*) ("recess and continuance are to be thoughtfully considered and *preferred* to exclusion as a sanction [in Illinois]") (emphasis added).

[87] Taylor v. Illinois, 108 S. Ct. 646, 656 (1988).

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

[89] Washington v. Texas, 388 U.S. 14, 23 (1967).

[90] *Preclusion Sanction*, *supra* note 59, at 1361 (citing Williams v. Florida, 399 U.S. 78, 113-14 (1970) (Black, J., dissenting)).