The Compulsory Process Clause and the "Sporting Theory of Justice": The Supreme Court Evens the Score

Alfredo Garcia
I. INTRODUCTION

Over eight decades have elapsed since Roscoe Pound delivered an iconoclastic address entitled "The Causes of Popular Dissatisfaction with the Administration of Justice" to the twenty-ninth annual meeting of the American Bar Association. A conspicuous deficiency of our adversary system of adjudication, according to Pound, derives from its inordinate emphasis on procedure to the detriment of substantive justice. This stress on procedure results in an adjudicatory process that resembles a game in which the primary objective is to ensure scrupulous adherence to procedural rules rather than to achieve substantive justice. The outcome of such a process, Pound maintained, is that our system of adversary adjudication transforms the law into a "mere game"; as Pound eloquently put it, "[Our] sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play."

The theme Pound elaborated in that momentous address has

* Assistant Professor of Law, St. Thomas University School of Law. B.A. Jacksonville University; M.A. University of Florida; J.D. University of Florida. Professor Garcia formerly served as Assistant State Attorney, Narcotics Division in Miami, Florida. He would like to thank Mike Bloom, for his generous research assistance. "The author is also indebted to his colleague, Ellen Podgor, for her assistance and helpful comments on earlier drafts."

2. Id. at 404-06.
3. Id. at 406.
been echoed by legal scholars, particularly in the context of our criminal justice system. Indeed, the resiliency of Pound's message, which centered on the deleterious effects of our adversary system of adjudication, is evidenced by the spate of legal commentary on the relative merits or disadvantages of the adversary process.

The debate over the effectiveness of the adversary system as a mechanism for arriving at the truth has gained considerable attention in the context of our criminal justice process. A salient feature of that controversy focuses on whether procedural protections accorded to criminal defendants impede the "search for truth" by excluding probative, relevant evidence. The centerpiece of this

4. It should be pointed out that Pound limited his comments to the civil area, specifically excluding the criminal realm, because he thought the civil arena more worthy of concern. Id. at 396. For three examples of the application of Pound's theory to the criminal process, see Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417, 1440-43 (1985) (arguing that the sporting theory gives the defendant an undue advantage); Grano, Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason, 24 Am. Crim. L. Rev. 243, 267 (1986) (sporting theory as applied in Miranda leads to unwarranted formalism to the detriment of justice); Grano, Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure- Part I, 32 Wayne L. Rev. 1007, 1019-22 (1986) (attacking the sporting theory of justice in the criminal context).

5. Pound explained that the adversary process undermined public confidence in the legal system by fostering the skewed notion that procedure was a means toward evasion of substantive justice. He noted that, "The effect of our contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it." Pound, supra note 1, at 406.


7. Compare, e.g., Saltzburg, supra note 6 at 651 (arguing that "The American adversary system is misdescribed as a search for truth"); with Steffen, supra, note 6 at 803 (contending that "truth should be the reigning objective of every trial"). The specific application of the adversary system to the criminal sphere has multiple facets; that is, a criminal trial allegedly serves the varied objectives of finding the truth, producing a fair decision, protecting the defendant from possible governmental abuse, and generating norms accepted by the public. These goals are not mutually exclusive; rather, they shade into one another. See Goodpaster, On the Theory of American Adversary Criminal Trial, 78 J. Crim. L. & Criminology 118, 121-44 (1987).

8. See, e.g., Grano, Miranda v. Arizona and the Legal Mind, supra note 4, at 276 ("Under the dictates of Miranda's black letter formalism, we have thus reached a point in our jurisprudence that judges feel constrained to suppress reliable statements even though
controversy, of course, is the exclusionary rule, which affords criminal defendants the benefit of the suppression of otherwise relevant, material evidence as a remedy for the violation of protections delineated in the Fourth, Fifth, and Sixth Amendments to the United States Constitution.\(^9\)

The rationale supporting the exclusionary remedy is grounded upon three fundamental tenets: the interest in individual dignity, the requirement of judicial integrity and the need to curb official power.\(^{10}\) Although the primary function of the exclusionary remedy is to deter police misconduct, the ancillary purposes of the preservation of judicial integrity and of individual dignity are equally compelling bases for the rule. The Supreme Court, however, has completely discarded these rationales, maintaining that the sole object of the rule is the deterrence of official misconduct.\(^{11}\) Furthermore, the Court has held that the rule is not mandated by the Constitution, arguing that it is merely a "judicially created remedy" designed to achieve a deterrent effect instead of being a personal constitutional right of the party whose rights are violated.\(^{12}\)

Within the past decade and a half, the Court has significantly narrowed the scope of the rule by employing a balancing approach which weighs the costs of excluding material evidence against the

---

\(^9\) The rule was initially applied by the United States Supreme Court in the seminal case of Weeks v. United States, 232 U.S. 383 (1913). In Mapp v. Ohio, 367 U.S. 643, 655 (1961), the Court made the application of the rule a constitutional requirement. The rule was invoked for a fourth amendment violation in Mapp. It was also applied with respect to the Fifth Amendment initially in Bram v. United States, 168 U.S. 532, 542-43 (1897) (Fifth Amendment privilege against self-incrimination bars the use of involuntary confessions in federal court) and also in Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court held that any inculpatory or exculpatory statements in response to police questioning made by a defendant in custody without the appropriate Miranda warnings and a proper waiver of the Miranda rights is inadmissible. Id. at 444-45. The Court has also applied the rule with regard to the sixth amendment. See, e.g., United States v. Wade, 388 U.S. 218, 237-39 (1967) (excluding identification by witness because post-indictment lineup conducted without counsel in violation of the sixth amendment); and Massiah v. United States, 377 U.S. 201, 206-07 (1964) (excluding statements deliberately elicited by government agent after the defendant had been indicted and secured counsel).


benefits derived from the application of the exclusionary remedy.\textsuperscript{13} Given the Court's restrictive interpretation of the purposes served by the exclusionary rule, such a balancing test tips the scale in a manner that clearly favors the admission of evidence gathered in violation of a criminal defendant's constitutional rights. A corollary of this perspective is that it supposedly furthers "the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."\textsuperscript{14} Of course, such a view rests on the cornerstone of Pound's critique of the "sporting theory" of justice: that is, that the adjudicatory process should determine the outcome of a controversy on the substantive merits rather than on the slavish enforcement of procedural rules.

It is evident, therefore, that the exclusionary rule has come under increasing negative scrutiny by the Court in recent years in large part due to its "costs": that is, the rule excludes probative, relevant, evidence. In \textit{Taylor v. Illinois},\textsuperscript{15} however, the Court excluded probative, material evidence offered by a defendant in a criminal trial.\textsuperscript{16} Paradoxically, the \textit{Taylor} decision relies heavily on the integrity rationale, previously jettisoned by the Court as a basis for the exclusionary rule, to support the exclusion of relevant, probative evidence.\textsuperscript{17} The decision, moreover, portends an ominous abridgment of a defendant's right to present a defense by administering the exclusionary remedy, previously applied only to vindicate an aggrieved defendant's constitutional rights, to prevent a criminal defendant from offering exculpatory evidence.

In effect, the \textit{Taylor} Court elevated procedure over substance, thereby succumbing to the "sporting theory" of justice. This Article argues that the \textit{Taylor} decision reflects a result-oriented jurisprudence that decisively alters the balance of power in a criminal trial by denying a defendant the right to present critical evidence.

\textsuperscript{13} See, e.g., United States v. Leon, 468 U.S. 897 (1984), crafting a "good-faith" exception to the rule for evidence obtained by police officers relying on a search warrant later determined to be lacking probable cause. The Court's reasoning was that the exclusionary rule would not deter police misconduct under such circumstances. \textit{Id.} at 920-21.

\textsuperscript{14} In holding that constitutional rights are personal and that the exclusionary rule is not applicable to a party whose rights are not violated by public officials, the Court noted in \textit{Alderman v. United States}, 394 U.S. 165 (1969), that: [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them convicted on the basis of all the evidence which exposes the truth." \textit{Id.} at 174-75.

\textsuperscript{15} 108 S.Ct. 646, \textit{reh'g denied} 108 S.Ct 1283 (1988).

\textsuperscript{16} \textit{Id.} at 655-56.

\textsuperscript{17} \textit{Id.} at 656.
The decision, moreover, is inconsistent with our adversary system of adjudication and runs counter to precedent. Further, Taylor flies in the face of the Court’s previous derogation of reliability and integrity as attributes worthy of constitutional concern.\textsuperscript{18}

The Taylor decision is grounded upon a strained construction of the sixth amendment’s Compulsory Process Clause.\textsuperscript{19} Therefore, Part II of this Article delves into the historical background and modern doctrinal basis of the clause. Part III will undertake a detailed critique and analysis of Taylor, emphasizing its departure from precedent and its logically flawed analysis. In turn, Part IV will juxtapose Taylor’s premises with the Court’s recent devaluation of the twin goals of integrity and reliability as values meriting constitutional protection.

\section{II. Historical Background and Modern Basis of Compulsory Process}

\subsection{A. The Emergence of Compulsory Process}

As the architect of the Sixth Amendment to the United States Constitution, James Madison included within its parameters the right of the criminal defendant to obtain compulsory process of witnesses in his favor.\textsuperscript{20} In comparison with other provisions of the Bill of Rights, the sixth amendment was passed without major modifications and with little controversy.\textsuperscript{21} It is also apparent that the provision of the sixth amendment relating to compulsory process had gained wide acceptance at an early date in our history. As the foremost authority on the Compulsory Process Clause persuasively demonstrates, by 1791 the right of compulsory process was firmly entrenched within the American criminal process and “represented the culmination of the long-evolving principle that the

\begin{footnotesize}
\footnotesize
\begin{itemize}
\item \textsuperscript{18} In Colorado v. Connelly, 479 U.S. 157, 166 (1986), the Court did not object to the admission of a presumptively unreliable confession. See part IV, infra. For a critique and analysis of Connelly, see Garcia, Mental Sanity and Confessions: The Supreme Court’s New Version of the Old “Voluntariness” Standard, 21 Akron L. Rev. 275 (1988).
\item \textsuperscript{19} The sixth amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI.
\item \textsuperscript{20} Madison drafted all of the provisions incorporated in the sixth amendment with the exception of the part dealing with trial in the state and district where the crime was committed. See, e.g., Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 76, n. 7 (1974) (citing J. Goebel, 1 History of the Supreme Court of the United States 430-31, 437-38, 442-43, 449, 455 (1971)); F. Heller, The Sixth Amendment to the Constitution of the United States 29-30 (1951).
\item \textsuperscript{21} See Westen, supra note 20, at 77; Heller, supra note 20, at 30-34.
\end{itemize}
\end{footnotesize}
defendant should have a meaningful opportunity, at least on a par with the prosecution, to present a case in his favor through witnesses.\textsuperscript{22}

The vitality of the clause, moreover, was made clear in its forceful application less than two decades after the passage of the Bill of Rights in the misdemeanor and treason trials of former Vice President Aaron Burr.\textsuperscript{23} A harbinger of the \textit{Burr} decisions had been provided by Justice Chase in \textit{United States v. Cooper}.\textsuperscript{24} In that case, the defendant was on trial for libeling the President and he requested that the court issue a letter to members of Congress imporing their attendance as witnesses on his behalf. Chase sum-
marily denied the defendant's request, explaining that the defendant could rely on the Compulsory Process Clause. The clause, he believed, applied to members of Congress, thus rendering superfluous the issuance of the letter since members of Congress could be ordered to appear at trial.

Similarly, Justice Marshall concluded in the \textit{Burr} cases that the clause must be implemented even when the President of the United States is the subject of its reach.\textsuperscript{25} Marshall enshrined the clause by asserting that "[T]he right given by this article must be deemed sacred by courts, and the article should be so construed as to be something more than a dead letter."\textsuperscript{26} In placing such a high value on the protections afforded by the right to compulsory process, Marshall rejected President Jefferson's interest in secrecy. Although recognizing the President's need for secrecy, Marshall remarked that such an interest must give way to the defendant's need for information "absolutely necessary in [his] defense."\textsuperscript{27}

\textsuperscript{22} Westen, \textit{supra} note 20, at 78, 79-101.
\textsuperscript{24} 4 Dall. (4 U.S.) 341 (Cir. Ct., D. Pa., 1800). Justice Chase, of course, was "riding circuit" when he decided this case.
\textsuperscript{25} The compulsory process Burr sought revolved around two crucial letters that formed the heart of the case against him. The letters allegedly exposed Burr's plot to create a separate country under his control by invading Mexico and dissolving the states west of the Alleghenies. These letters were allegedly in President Jefferson's possession, since he had used them to inform Congress of Burr's plot and to establish Burr's supposed guilt in the matter. As a result of Jefferson's message, Burr was arrested and bound over to a grand jury in Richmond, Virginia. See Westen, \textit{supra} note 20, at 102-03.
\textsuperscript{26} United States v. Burr, 25 F. Cas. at 33.
\textsuperscript{27} Marshall noted that: "Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on [the privilege], unless such letter could be shown to be absolutely necessary in the defense... But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be
course, the claim of executive privilege would be pitted against the demands of compulsory process over a century and a half later in United States v. Nixon.28

B. The Modern Doctrinal Basis of Compulsory Process

Despite the forceful manner in which Marshall construed the Compulsory Process Clause in the Burr case, the clause lay dormant for a considerable period of time,29 until the Supreme Court resurrected it in the landmark case of Washington v. Texas.30 In light of the significance of the decision, and the Taylor Court's flawed and incomplete application of Washington's doctrinal imperatives, it is worthwhile to examine in detail that seminal decision.

The Washington Court gave new impetus to the right to compulsory process by equating it with the right to present a defense and by characterizing compulsory process as a "fundamental element of due process of law."31 The Court thereby invalidated two Texas statutes that prohibited persons charged or convicted as coparticipants in the same crime from testifying for one another, although the same restriction was not applicable to the prosecution.32 The factual predicate of Washington, therefore, must be examined in order to derive the doctrinal essence of the decision.

Jackie Washington was charged and convicted by a jury of murder. His defense rested on the contention that he did not shoot the victim, but that he unsuccessfully attempted to dissuade the codefendant, Fuller, from shooting the victim.33 The record clearly indicated that the codefendant would have been willing to testify at Washington's trial and would have corroborated Washington's testimony. However, since Fuller had been previously convicted of the murder, the Texas statutes precluded him from testifying on essential to the . . . case." United States v. Burr, 25 F. Cas. at 192.


29. As Professor Westen notes, until 1967, the Supreme Court dealt with the clause on five occasions, twice in dictum and three times in refusing to construe it. Westen, supra note 20, at 108. Those five cases were: Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966); Blackmer v. United States, 284 U.S. 421, 442 (1932); United States v. Van Duzee, 140 U.S. 169, 173 (1891); Ex parte Harding, 120 U.S. 782 (1887); United States v. Reid, 53 U.S. (12 How.) 361, 363-65 (1851), overruled in Rosen v. United States, 245 U.S. 467 (1918). Id. n.164.


31. Id. at 19.

32. Id. at 22-23.

33. Id. at 15-16.
Washington's behalf.\footnote{Id. at 16-17.}

The Court first determined that the Compulsory Process Clause was applicable to the states through the operation of the Fourteenth Amendment's Due Process Clause.\footnote{Id. at 17-19.} In arriving at this conclusion, the Court revitalized the right to compulsory process by placing it on an equal footing with such other Sixth Amendment guarantees as the right to confrontation, the assistance of counsel, and the right to a speedy and public trial.\footnote{Id. at 18.} In strong terms, the Court defined the clause as implicating, "[t]he right to offer the testimony of witnesses, and to compel their attendance . . . [and] the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies."\footnote{Id. at 19.}

The rationale undergirding the Washington decision is based on the principle that our adversary system of adjudication values the introduction of relevant, probative evidence over a court's "interest in preventing perjury."\footnote{Id. at 21 (quoting Benson v. United States, 146 U.S. 325, 335 (1892)).} In rejecting the reasoning behind the Texas rule, namely that if alleged accomplices to a crime were permitted to testify for one another, "each would try to swear each other out of the charge,"\footnote{Id. at 22.} the Court instead opted for a rationale that placed trust on jurors to weigh the credibility of relevant testimony. Indeed, the Washington Court believed that if truth were one of the fundamental goals of the adversary system, it was "[m]ore 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 such a case, leaving the credit and weight of such testimony to be determined by the jury or by the court."\footnote{Id. at 21 (quoting Benson v. United States, 146 U.S. 325, 335 (1892)).}

Given the Washington Court's emphasis on the need to present relevant, crucial evidence to a jury, despite the risk that such testimony might be tainted, it was natural that the Court would find the violation of Jackie Washington's right to compulsory process. As the Court cogently put it:
We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to his defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.¹¹

Implicit in the majority opinion is the notion that the defendant ought to have an equal opportunity to present her version of events, given the prosecution's inherent power to present its case. To the degree that arbitrary rules designed to prevent perjury forestall crucial witnesses from testifying for the defendant, the ends of justice are not served. In essence, the Washington Court nullified the Texas rules that prevented Fuller from testifying on Washington's behalf by classifying them as arbitrary because they "[p]revent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them worthy of unbelief."⁴² Indeed, Justice Harlan's concurring opinion was premised not on the Compulsory Process Clause but rather on the notion that fairness dictated that the defense ought to have the same opportunity as the prosecution for presenting a copartner's crucial testimony.⁴³

The principal teaching of Washington is that testimony on a critical issue must be presented to the trier of fact even if the possibility exists that such testimony might be perjured.⁴⁴ A by-

---

41. *Id.* at 23. The Court qualified its holding by asserting in a footnote that "Nothing in this opinion should be construed as disapproving testimonial privileges. . . which are based on entirely different considerations from those underlying the common law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them." *Id.* n. 21.

42. *Id.* at 22. The Court correctly observed that the testimony of an accomplice who testified for the prosecution had a greater likelihood of being perjured, since such an accomplice obviously had a tremendous inducement to lie. *Id.* Moreover, the majority exposed the faulty logic of the statutes by stating that: "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." *Id.* at 22-23.

43. *Id.* at 24-25 (Harlan, J., concurring).

44. *Id.* at 21. In rejecting the justification for the Texas statutes disqualifying coparticipants of a crime from testifying for each other, the Court remarked that such rules "[r]ested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." *Id.*
product of this precept is that the finder of fact ought to be trusted with the decision of ferreting out the relative weight and credibility of testimony that is relevant and probative rather than being shielded from such testimony because it might be tainted. The Washington Court, in fact, quoted approvingly from Benson v. United States\(^46\) for the proposition that the common law notion that only disinterested parties should be allowed to testify ought to be rejected. The reason for this common law rigid rule was that, "[t]he courts were afraid to trust the intelligence of jurors."\(^46\) In effect, the Washington Court made the clear choice that the presentation of crucial evidence in a criminal trial superseded a court's interest in precluding a jury from hearing testimony that might be perjured.

The main teaching of Washington was foreshadowed in Hoffa v. United States.\(^47\) In Hoffa, however, the principle was applied to the prosecution rather than to the defendant. Hoffa's conviction hinged on the testimony of a government informer whose credibility was subject to question. The defendant thus contended that the prosecution's use of such an informer, who had a great motive to lie, violated the Fifth Amendment's Due Process Clause.\(^48\) The Court agreed with Hoffa's argument that the informer had a great incentive to lie.\(^49\) Nevertheless, it rejected Hoffa's Due Process argument because the testimony of the informant was not *ipso facto* untrue and because the built-in safeguards of the adversarial system, namely cross-examination and the ability of the jury to assess the weight and credibility of the testimony, counterbalanced the probability that the informers' testimony was perjured.\(^50\)

---

45. 146 U.S. 325 (1892).
48. *Id.* at 310-11.
49. *Id.* at 311.
50. *Id.* at 311-12. It should be pointed out that the trial judge in Hoffa instructed the jury on weighing the informer's testimony. The judge gave the following instruction to the jury:

You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, his motives, state of mind, his demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case. . . . All evidence of a witness whose self-interest is shown from either benefits received, detriments suffered, threats or promises made, or any attitude of the witness which might tend to prompt testimony either favorable or unfavorable to the accused should be considered with caution and weighed with care.
The results of both Washington and Hoffa are in accord with our adversarial system of adjudication, which places responsibility on the fact-finder to determine the truthfulness and credibility of witnesses. This burden is shouldered by the fact-finder, in most criminal cases the jury, because the parties in an adversarial system are primarily entrusted with the task of weakening their opponent's case through the impeachment of presumptively false or inconsistent evidence. In fact, the United States Supreme Court has asserted that cross-examination is the most effective means of exposing false testimony. The risk of admitting testimony that might be false, therefore, is outweighed by the benefit of permitting the fact-finder to assess its weight and credibility assisted by the inherent protections afforded by the adversarial system.

C. Application of Washington

The vigorous implementation of the right to compulsory process in Washington continued unabated as the Court on several occasions in the 1970s applied, either directly or tangentially, the principal teachings of Washington. It is instructive, therefore, to analyze the decisions construing Washington. This examination is necessary to counterpoise these decisions with the Court's misapplication of Washington in Taylor.

1. Cool v. United States

In a per curiam opinion, the Court in Cool v. United States held that a defendant was deprived of his right to compulsory process when the trial court instructed the jury that the exculpatory testimony of an accomplice should be disregarded unless the jury deemed that such testimony was true beyond a reasonable doubt. In applying Washington to the facts in Cool, the Court concluded that such an instruction impermissibly infringed upon a criminal defendant's right to compulsory process and violated Washington's mandate because it excluded relevant evidence absent the jury's

---

Id. at 312 n.14.
52. See, e.g., Pointer v. Texas, 380 U.S. 400, 404 (1965); Bronston, 409 U.S. at 358-60.
53. 409 U.S. 100 (1972).
54. Id. at 104.
The Cool Court correctly construed Washington by emphasizing the defendant's right to present exculpatory evidence over the trial court's interest in preventing a jury from reaching a verdict based on testimony that might be "tainted." The Court thereby stressed the primary teaching of Washington that in a criminal trial the defendant's right to present relevant exculpatory evidence takes precedence over the trial court's interest in preventing the jury from hearing testimony that might be perjured. Implicitly, the Cool Court also implemented the precept enunciated in Washington that the fact-finder should determine the weight and credibility of possibly false testimony rather than being preempted from considering such testimony by the trial judge or, alternatively, by instructions issued by the court.

It is also natural to draw the inference from the Cool decision that the Court viewed the impermissible jury instruction as conflicting with Washington's prohibition against assuming that some witnesses' testimonies are not worthy of belief. To the extent that the trial court's instructions in Cool clearly suggested to the jury that the accomplice's testimony was not credible, the message conveyed to the jury was unmistakable: that is, accomplices fit the category of witnesses who are a priori "suspect" and thus not credible.

The second prong of the Cool decision relied on the fundamental principle established by In re Winship that the prosecution must prove the defendant's guilt beyond a reasonable doubt. Through its instruction on how to weigh the accomplice's testimony, the trial court in essence "[created] an artificial barrier to the consideration of relevant defense testimony putatively credible by a preponderance of the evidence. . . [reducing] the level of proof neces-

55. Id. The trial judge issued the following instruction to the jury: "[I] charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true beyond a reasonable doubt, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source." Id. at 102 (emphasis added by the Court).

56. In effect, the trial court suggested to the jury that the accomplice's testimony was not worthy of belief by stating in its instruction that the jury should not disregard the testimony because it derived from a "tainted" source. Id. at 102.

sary for the Government to carry its burden." The upshot of the trial judge's instruction was to require the defendant to prove his innocence beyond a reasonable doubt, since the defendant's case relied almost exclusively on the accomplice's testimony.

2. Webb v. Texas

In a similar vein, the Court in Webb v. Texas affirmed Washington's dictates, although it decided the case on Due Process grounds rather than on the Compulsory Process Clause. In Webb the defendant was prevented from presenting a witness when the trial judge in effect intimidated the witness into not testifying. The sole defense witness in Webb had a previous criminal record and was serving a prison term when he was called by the defense. The trial judge proceeded to issue a stern warning to the witness in which he suggested that the witness could face perjury charges if he testified for the defense. The witness did not testify, and the defendant could not present a defense given the trial judge's successful effort in dissuading the witness from testifying.

The Webb Court quoted approvingly from Washington in holding that the defendant's Due Process rights under the Fourteenth Amendment were violated by the judge's coercion of the defense witness. Specifically, the Court affirmed the proposition established by Washington that the defendant has a right to present

58. Cool, 409 U.S. at 104.
59. Id.
60. 409 U.S. 95 (1972) (per curiam).
61. Id. at 98.
62. Id. at 95.
63. Id. at 96. The judge told the witness:
   If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The Court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazards you are taking.

Id.
64. Id.
65. Id. at 98.
66. Id.
a defense coextensive with the prosecution's right to present its case and that the jury serves the function of determining "where the truth lies."\(^6\)

3. Chambers v. Mississippi

In *Chambers v. Mississippi*,\(^6^8\) the Court again relied on the underlying premises of *Washington* while deciding that the defendant was denied Due Process of law under the Fourteenth Amendment. The defendant in that case was denied the right to present the testimony of three witnesses who would have testified that someone else committed the crime with which Chambers was charged.\(^6^9\) The trial court excluded this testimony on the basis that it violated the hearsay rule.\(^7^0\) Noting that a defendant's right to compulsory process is "essential to Due Process,"\(^7^1\) the *Chambers* Court reasoned that the right of the defendant to present witnesses on his behalf, as set forth in *Washington*, *Webb*, and *Oliver*,\(^7^2\) overrides the "mechanistic" application of the hearsay rule.\(^7^3\)

Although the *Chambers* majority acknowledged the need for evidentiary rules that ensure fairness and reliability in the ascertainment of guilt, the Court nonetheless rejected the procrustean application of such rules to "defeat the ends of justice."\(^7^4\) *Chambers*, therefore, rejected the "sporting theory" of justice and instead favored a result grounded in substantive justice. In effect, the right to present a defense triumphed over strict fealty to procedure.

4. United States v. Nixon

The apotheosis of the Compulsory Process Clause in the 1970s occurred when the Court issued its decision in *United States v. Nixon*.\(^7^5\) The Court harkened back to the basic postulate an-

---

67. *Id.* (quoting *Washington* v. Texas, 388 U.S. 14, 19 (1967)).
68. 410 U.S. 284 (1972).
69. *Id.* at 292-93.
70. *Id.*
71. *Id.* at 294.
74. *Id.* The hearsay evidence in this case bore assurances of trustworthiness since it was corroborated by other evidence in the case: to wit, the confession of Gabe McDonald, who Chambers claimed committed the crime, the testimony of eyewitnesses to the shooting (Chambers was charged with murdering a policeman), testimony establishing that McDonald owned a revolver of the same caliber as the murder weapon, and testimony that McDonald was seen with a gun at the scene of the crime. *Id.* at 300.
ounced by Chief Justice Marshall in the *Burr* cases\(^7^6\) that the Compulsory Process Clause takes precedence over claims of executive privilege. Underscoring the importance of compulsory process to the attainment of a correct result in a criminal trial, the majority noted that,"[t]o ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."\(^7^7\)

More importantly, the Court stressed the constitutional aspect of compulsory process,\(^7^8\) noting that implicit in the notion of a fair trial was the "constitutional need" that the outcome be based upon the weighing of all relevant evidence.\(^7^9\) The claim of executive privilege, therefore, had to give way to the "specific need for evidence in a criminal trial."\(^8^0\)

If *Nixon* represents the culmination of the Court’s expansive interpretation of the Compulsory Process Clause, a series of cases dealing with the tension between the demands imposed by discovery rules and the right to compulsory process in the 1970s reflected a certain ambivalence by the Court. Those cases did not resolve the issue of whether discovery rules could, in certain instances, take precedence over a criminal defendant’s constitutional right to compulsory process. A discussion and analysis of those cases will be reserved and will constitute a backdrop to the discussion of *Taylor*, since in that case the Court grappled with the question posed by the conflict between discovery rules and the Compulsory Process Clause.\(^8^1\)


D. The Countertrend of the 1980s

The fidelity to *Washington*’s dictates manifested in the robust application of its fundamental premises waned with the advent of the 1980s and concluded with the Court’s apathy and, indeed, antipathy toward *Washington* in *Taylor*. The Court’s decision in *United States v. Valenzuela-Bernal*\(^8^2\) heralded the attenuation of the expansive application of the Compulsory Process Clause that

---

\(^7^6\) See supra notes 23-27 and accompanying text.

\(^7^7\) Nixon, 418 U.S. at 709.

\(^7^8\) Id. at 711. The Court affirmed that: "The right to the production of all evidence in a criminal trial similarly has constitutional dimensions."

\(^7^9\) Id. at 713.

\(^8^0\) Id. at 713.

\(^8^1\) See Part III A infra.

\(^8^2\) 458 U.S. 858 (1982).
had prevailed the previous decade.

In signaling its retreat from Washington, the Valenzuela-Bernal Court held that when the government deports witnesses who may possess evidence relevant to the defense, such a procedure does not necessarily violate the Compulsory Process Clause absent a showing that "[t]he evidence lost would be both material and favorable to the defense."83 Moreover, the Court also evinced its willingness to undertake a balancing approach in which governmental administrative considerations would be weighed against the defendant's right to compulsory process.84

In Valenzuela-Bernal, the defendant was charged with knowing transportation of an illegal alien into the United States.85 He was arrested at a Border Patrol checkpoint with three other passengers of the car he drove.86 Two of those passengers were deported to Mexico on the determination by an Assistant United States Attorney that the passengers were not material witnesses either for the prosecution or the defense.87 The defendant, who did not have an opportunity to interview the two passengers before they were deported, maintained that the deportation violated his right to compulsory process pursuant to the Sixth Amendment and his right to Due Process of law under the Fifth Amendment.88

The reasoning adopted by the Valenzuela-Bernal Court was in part based upon the administrative burdens shouldered by the government as a result of not deporting aliens who "possess no material evidence relevant to a criminal trial."89 Giving free rein to prosecutorial discretion,90 the majority deemed that the prosecution could be entrusted with the task of deciding whether a witness was material and relevant to the defense.91 The Court thus dimin-

83. Id. at 872-73.
84. Id. at 864-65.
85. Id. at 860. Specifically, the defendant was indicted for violating 8 U.S.C. § 1324 (a)(2), which prohibits the transportation of "any alien," "knowing that [the alien] is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior" to the transportation or attempted transportation with which the person is charged. Id., n.1.
86. Id. at 861.
87. Id. A third passenger was detained to establish the defendant's violation of the statute. Id.
88. Id. at 860-61.
89. Id. at 865.
90. The majority was concerned with restricting prosecutorial discretion to deport aliens, noting that the "conceivable benefits" rule "significantly constrains the Government's prosecutorial discretion." Id. at 865.
91. The Court rejected as overly broad the "conceivable benefits" rule embodied in United States v. Mendez-Rodriguez, 450 F.2d 1, (9th Cir. 1971), which found a constitu-
ished the value of the right to compulsory process by counterbalancing the defendant's need for evidence with governmental, bureaucratic considerations.

The primary rationale of *Valenzuela-Bernal* rests on the dubious proposition that the defendant can depend on the prosecution to determine the materiality of the evidence; and that the defendant bears the burden of proving, without any means of interviewing the witness, that the witness' testimony would have been material and favorable to the defense.\

Furthermore, the majority in *Valenzuela-Bernal* misconstrued the core meaning of *Washington* by relying on a crabbed reading of the case. The *Valenzuela-Bernal* Court quoted *Washington* to support its holding that the defendant had not established that the testimony of the deported witnesses would have been material, relevant, and vital to the defense. The majority noted that, "[i]n *Washington*, this Court found a violation of the [Compulsory Process] Clause of the Sixth Amendment when the defendant was arbitrarily deprived of 'testimony [that] would have been relevant and material, and . . . vital to the defense.'" In essence, the *Valenzuela-Bernal* Court not only quoted *Washington* out of context, but it also clearly missed the holding and the underlying message conveyed by *Washington*.

The clear holding of *Washington* is that the prosecution may not arbitrarily deny a criminal defendant the right to "put on the stand a witness who [is] physically and mentally capable of testifying to events that he [has] personally observed, and whose testimony [is] relevant and material to the defense." It is discernible that the word "vital" is conspicuously missing from the Court's holding. Although the testimony excluded from *Washington*’s trial was vital, the Court's holding was not circumscribed to the facts of *Washington*’s case, but rather stands for the broad principle that the Compulsory Process Clause protects a criminal defendant's right to present any relevant and material evidence.

In fact, the majority in *Valenzuela-Bernal* was acutely aware of

---

92. *Id.* at 867.
93. *Id.*
94. *Id.* (emphasis added by the Court) (*quoting* from *Washington v. Texas*, 388 U.S. 14, 16 (1967)).
the fact that Washington did not provide a firm basis for its holding. Consequently, the Court resorted to Roviaro v. United States\textsuperscript{96} to bolster its rationale. In Roviaro, the Court held that the government's interest in shielding an informant's identity must yield to a criminal defendant's right to the informant's testimony.\textsuperscript{97} Although the Roviaro Court's holding was not constitutionally based, the Valenzuela-Bernal Court cited Roviaro for the precept that "while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one."\textsuperscript{98}

As Justice Brennan aptly pointed out in dissent, the Valenzuela-Bernal Court's reliance on Roviaro is also misplaced.\textsuperscript{99} Roviaro emphasized, according to Justice Brennan, the accused's right to decide whether a witness might be helpful to the defense.\textsuperscript{100} Accordingly, the Court in Valenzuela-Bernal should have allowed the defendant, not the prosecution, the option of determining whether the illegal-alien eyewitnesses could have furnished testimony material and favorable to his defense.\textsuperscript{101}

The Valenzuela-Bernal decision underscored the Court's deviation from the principles sustaining Washington. The ruling also marked a disturbing trend in which governmental administrative concerns are given equal, if not greater, weight than a criminal defendant's constitutional rights.\textsuperscript{102} In effect, the Valenzuela-Bernal Court bowed to the "sporting theory" of justice by allowing administrative reasons to play a role in determining a criminal defendant's right to present a defense. The ultimate glorification of the "sporting theory" of justice and of procedure over substantive justice, however, occurred in Taylor v. Illinois.\textsuperscript{103}

\begin{flushleft}
\textsuperscript{96} 353 U.S. 53 (1957).
\textsuperscript{97} \textit{Id.} at 64-65. In Roviaro, the informer was the only witness, other than the defendant, to the crime (a drug sale). \textit{Id.}
\textsuperscript{98} Valenzuela-Bernal, 458 U.S. at 871.
\textsuperscript{99} \textit{Id.} at 883-84 (Brennan, J., dissenting).
\textsuperscript{100} \textit{Id.} at 884.
\textsuperscript{101} \textit{Id.} at 884-85.
\textsuperscript{102} See, e.g., Richardson v. Marsh, 481 U.S. 200 (1987). In that case, the Court placed emphasis on administrative considerations (i.e., the efficiency of a joint trial for the smooth operation of the criminal justice system) in denying a criminal defendant the right to confront her accuser (that is, her codefendant). See Garcia, The Winding Path of Bruton v. United States: A Case of Doctrinal Inconsistency, 26 Am. Crim. L. Rev. 401, 420 (1988) for a critique of Marsh.
\textsuperscript{103} 108 S.Ct. 646 (1988).
\end{flushleft}
III. TAYLOR v. ILLINOIS

In Taylor, the Court decided a question it had left unanswered in both Williams v. Florida\(^\text{104}\) and in Wardius v. Oregon\(^\text{105}\) and on which it had refused to grant certiorari on several prior occasions:\(^\text{106}\) that is, whether the Compulsory Process Clause prohibits the exclusion of admissible evidence as a sanction to enforce discovery rules against criminal defendants. The Taylor Court answered the question negatively, thereby championing the "sporting theory" of justice and detracting from the ideal of a criminal trial: to seek justice and truth based on all of the relevant, material evidence available to the fact-finder. Moreover, the Court in Taylor completely ignored the teachings of Washington and related cases.\(^\text{107}\) Before analyzing Taylor, however, it is necessary, as a point of departure, to discuss its background.

A. Discovery and the Compulsory Process Clause

In Williams v. Florida,\(^\text{108}\) the Court came to grips with the issue of whether Florida's pretrial discovery rule requiring the defendant, in response to the prosecution's demand, to give notice of an alibi defense prior to trial was constitutional.\(^\text{109}\) The Court held that the rule was constitutional and hence not violative of the defendant's Fifth Amendment right against self-incrimination because it did not compel him to reveal any information but merely accelerated the timing of his disclosure.\(^\text{110}\) More important for our purposes, however, is the Court's discussion of the relationship between discovery rules and the defendant's right to compulsory process under the Sixth Amendment.

---

107. See infra Section III C.
109. Id. at 79. Rule 1.200 of the Florida Rules of Criminal Procedure provided that the defendant, before trial, must furnish, upon a written request by the prosecution, notice of her intent to rely on an alibi and to provide the prosecution with information of the place she claimed to have been and with the names and addresses of witnesses she intends to use at trial. The rule also required the prosecution to disclose to the defense the names of witnesses it intended to use to rebut the alibi. Id. at 80. The full text of the rule is published in Williams, 399 U.S. at 104.
110. Id. at 85. The Williams Court also rejected the defendant's contention that the Sixth Amendment's guarantee of a jury trial mandates a twelve-person jury. Id. at 103.
Noting that "the adversary system of trial is hardly an end in itself," the Court legitimized notice-of-alibi rules as consistent with the search for truth and as congruent with the rational concern of the prosecution to prevent "eleventh hour" defenses based on false testimony. The Court, however, qualified its holding by stressing that Florida's notice-of-alibi rule was "carefully hedged with reciprocal duties requiring state disclosure to the defendant."

The Williams Court did not rule on the constitutionality of the sanction imposed by the Florida notice-of-alibi rule because the defendant complied with the rule. The sanction stipulated in the rule involved the exclusion at trial of the defendant's alibi evidence, with the exception of his own testimony. In a footnote, the Court unequivocally stated that it was not deciding whether the prosecution could enforce discovery rules against the defendant who failed to comply with such rules by excluding "probative, relevant evidence."

It is significant, moreover, that the Williams decision set forth the appropriate solution to the problem notice-of-alibi rules are intended to protect against: unfair surprise to the prosecution. In the event that a jurisdiction lacked a notice-of-alibi provision similar to Florida's statute, the adequate resolution to the prejudice suffered by the prosecution is for the trial court to grant a continuance as soon as the alibi witness is called. The continuance would negate the strategic advantage sought by the defense because the prosecution would then have an opportunity to take the deposition of or interview the alibi witness and thus discover rebuttal evidence. In fact, the Williams Court averred that such a procedure would comport with the Constitution. The Taylor

111. Id. at 82.
112. Id. at 81-82.
113. Id. at 81.
114. Id. at 80.
115. Id. at 83, n.14. The footnote, in its entirety, reads as follows:

We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. Cf. Brief for Amicus Curiae 17-26. It is enough that no such penalty was exacted here.

Id.
116. Id. at 85.
117. Id. at 86.
118. Id. at 85.
Court, however, arbitrarily rejected this solution as a means of remedying a discovery violation by the defense.\(^{119}\)

In contrast to the Court's approval of Florida's notice-of-alibi rule, Oregon's alibi statute was found constitutionally deficient in *Wardius v. Oregon*.\(^{120}\) The Court in *Wardius* held that nonreciprocal alibi rules violate the Due Process Clause of the Fourteenth Amendment.\(^{121}\) The defendant in *Wardius* was not permitted to present an alibi defense at his trial either through a witness he called or through his own testimony.\(^{122}\)

Once again, like the Williams Court, the Wardius Court declined to rule on the constitutionality of the preclusion sanction as applied to the defendant in a criminal trial. The defendant in *Wardius* contended that the exclusion of his testimony or that of other defense witnesses at trial would be unconstitutional, even conceding the validity of Oregon's notice-of-alibi rule. The Court, however, did not decide the issue, arguing that the matter was rendered moot in light of the unconstitutionality of the Oregon statute.\(^{123}\)

In an enlightening analysis of the purposes served by discovery rules, the Wardius Court viewed such rules as helpful devices that "by increasing the evidence available to both parties, [enhance] the fairness of the adversary system."\(^{124}\) More important, the Court grounded its decision on the essential premise that the Due Process Clause of the Fourteenth Amendment required a "balance of forces" between the prosecution and the defense.\(^{125}\) The majority emphasized the importance of discovery for the defense as well as for the prosecution.\(^{126}\) Indeed, the majority in *Wardius* clearly inti-

---

119. *See Part III C infra.*
120. 412 U.S. 470 (1972).
121. *Id.* at 472.
122. *Id.* at 472-73. The defendant called one witness to establish an alibi. When the witness testified, the prosecution moved to strike the testimony on the grounds that the defendant had not filed a notice of alibi. The trial judge granted the prosecution's request. The defendant then attempted to bring forth the alibi through his testimony, but the prosecution objected and the trial judge excluded the evidence. *Id.*
123. *Id.* at 472, n.4. The full text of the footnote is as follows:
   Petitioner also argues that even if Oregon's notice-of-alibi statute were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced (citation omitted).
124. *Id.* at 474.
125. *Id.*
126. *Id.* at 475. The Court observed that discovery is a "two-way street" and that "[t]he State may not insist that trials be run as a 'search for truth' so far as defense wit-
mated that discovery rules should favor the defense given the superior advantages in resources the prosecution enjoys over the defendant.127

In a trenchant concurring opinion, Justice Douglas elaborated on the suggestion by the Wardius majority that discovery rules should favor the defense. He assailed the development of discovery rules, such as notice-of-alibi statutes, that compelled the defendant to reveal information to the prosecution. The trial-related rights afforded criminal defendants in the Bill of Rights,128 according to Douglas, "[do] not envision an adversary proceeding between two equal parties."129 Instead, those rights acknowledge the "awesome power of indictment and the virtually limitless resources of government investigators."130 In essence, the rights enjoyed by the defendant under the United States Constitution are "designed to redress the advantage that inheres in a government prosecution."131

Although both the Williams and the Wardius decisions deferred resolution of the constitutionality of the preclusion sanction as a remedy for a defendant's violation of a discovery rule, they suggest that the Court would have been loath to uphold such a drastic measure. The Williams Court outlined the pragmatic solution to the problem by approving a continuance for the prosecution to nullify any strategic advantage the defendant sought to gain by "ambushing" the prosecution. Similarly, it is possible to infer from the Wardius decision that the Court would have been reluctant to augment the prosecution's decisive advantage over the defendant by excluding relevant, material defense witnesses from testifying.

The Court's affirmation of the defendant's right to present a defense in Wardius was contrasted with the obligation of the defendant to make available all of her evidence to the prosecution in United States v. Nobles.132 Nobles presented the issue of whether the defense had the right to offer a selective portion of certain facts, thus thwarting the prosecution's right to cross-examination.

127. Id. at 475, n.9.
128. The rights encompass the Fifth Amendment privilege against self-incrimination, Sixth Amendment rights to a trial by jury, to confront adverse witnesses, to Compulsory Process for obtaining favorable evidence, to the assistance of counsel, and, of course, Fifth and Fourteenth Amendment Due Process rights. See U.S. Const. amends. V, VI and XIV, § I.
130. Id.
131. Id.
The defendant in that case attempted to question the credibility of prosecution witnesses through the use of the testimony of his investigator, who had interviewed the witnesses.133 The trial court did not allow the investigator to testify, however, because the defense refused to disclose the written report of the investigator, which summarized the interviews.

Upholding the trial court's exclusion of the investigator's testimony, the Court determined that the defendant's right to compulsory process was not implicated in the case because, "[t]he District Court did not bar the investigator's testimony. ... [i]t merely prevented [defendant] from presenting to the jury a partial view of the credibility issue. ..."134 The Court referred to the restriction on the prosecution's opportunity to cross-examine the investigator by remarking that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."

The Nobles decision is crucial to our analysis because the majority in Taylor patently misconstrued its import.135 The Nobles Court did not impose the exclusionary sanction, as the previous discussion demonstrates; rather, it merely prevented the defendant from presenting a partial view of the testimony free from the constraints imposed by cross-examination. The majority in Taylor, however, would employ Nobles for the proposition that the exclusion of relevant, probative defense evidence is constitutionally permissible.136 Such an application of Nobles is fundamentally flawed.137

B. Prelude to Taylor: Crane, Ritchie, and Rock

Although the Court in Nobles did not undermine the key elements of Washington and its progeny, it did intimate in Valenzuela-Bernal that it was willing to dilute the protections embodied in Washington to accommodate governmental interests.138 Nevertheless, the Court gave no hint immediately before the Taylor decision that it would employ Nobles for the proposition that the exclusion of relevant, probative defense evidence is constitutionally permissible.139

133. Id. at 227-29.
134. Id. at 241.
135. Id.
137. Id.
139. See supra notes 82-103 and accompanying text.
lor decision that it was willing to decimate the doctrinal underpinnings of Washington to the degree it did in Taylor. In fact, the three rulings bearing on the Compulsory Process Clause rendered by the Court prior to Taylor strongly reasserted the basic rationale underlying the defendant’s right to compulsory process. It is instructive, therefore, to examine these three decisions as a basis of comparison with the Taylor Court’s distorted perspective of the Compulsory Process Clause.

1. Crane v. Kentucky

In Crane v. Kentucky, the Court held that a sixteen-year old defendant was deprived of a fair trial when the trial court prohibited the admission of testimony relating to the circumstances under which his confession was given to the police. The Court cited the Sixth Amendment guarantees of Compulsory Process and Confrontation, as well as the Due Process Clause of the Fourteenth Amendment, for the proposition that the Constitution entitles the defendant to “a meaningful opportunity to present a complete defense.” Since the government’s case relied almost exclusively on the defendant’s confession, a unanimous Court concluded that the opportunity to present a defense would be hollow indeed if the “[s]tate were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to a defendant’s claim of innocence.”

Not only did the Crane Court vigorously uphold the right of a criminal defendant to present a “complete” defense, but it also did so when that right clashed with a state evidentiary rule. Though the Court acknowledged the right of states to craft their evidentiary and trial procedural rules, it also recognized that, given the factual predicate of Crane, the exclusion of testimony regarding the circumstances of the defendant’s confession did not afford him a fair trial.

141. Id. at 690.
142. Id. (citations omitted) (citing Strickland v. Washington, 466 U.S. 668, 684-85 (1984)).
143. Id. at 685. The defendant unsuccessfully attempted before trial to suppress the confession. After the opening statement, during which defense counsel questioned the credibility and reliability of the confession, the prosecution convinced the trial court to prevent any testimony about the circumstances surrounding the confession. Id. at 684-86.
144. Id. at 690.
145. Id. at 689-90. The Court noted that, “[W]ithout signaling any diminution in the respect traditionally accorded to the States in the establishment and implementation of
2. Pennsylvania v. Ritchie

In the second case in which the Court had the opportunity of addressing the scope of the Compulsory Process Clause, Pennsylvania v. Ritchie, a majority expounded a restricted view of the Compulsory Process Clause; in effect, the Ritchie Court equated the Compulsory Process Clause with the Due Process Clause of the Fourteenth Amendment, thus diminishing the status of the clause established by Washington. The Court expressed this narrow conception of the right to compulsory process by declining to "decide . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment." It seems that the Ritchie Court conveniently ignored the fact that in Washington the specific protections of the Compulsory Process Clause were made applicable to the states through the operation of the Fourteenth Amendment's Due Process Clause.

Nevertheless, the Ritchie Court in dicta reasserted the basic postulates of the Compulsory Process Clause. Referring to the precedent set forth in Washington, Chambers, Cool, and Webb, the Court observed that criminal defendants have "the right to the Government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Furthermore, the Court in Ritchie affirmed a criminal defendant's right to discover material exculpatory evidence even though such evidence is shielded by a state evidentiary privilege. In Ritchie, the defendant was charged with the rape of his thirteen year old daughter and attempted to discover records about his daughter kept by a state agency that investigated children mistreatment cases. Invoking a state statute, the prosecutor convinced the trial judge that the

---

their own criminal trial rules and procedures, we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." Id. at 690 (citing Chambers v. Mississippi, 404 U.S. 284, 302-03 (1973)).
147. Id. at 56.
148. Id.
149. See supra note 35 and accompanying text.
151. Id. at 43.
152. Id.
153. A Pennsylvania statute provided that records of the Pennsylvania Children and Youth Services were confidential subject to certain exceptions. One exception authorized disclosure to a "court of competent jurisdiction pursuant to a court order." Id. at 44 n.2 (quoting Pa. Stat. Ann. tit. 11, § 2215 (a) (5) (Purdon Supp. 1986) ).
records the defendant sought were privileged.\textsuperscript{154} The Court held that the Due Process Clause of the Fourteenth Amendment entitled defendant to a review of the file by the trial court to determine whether it contained "information that probably would have changed the outcome of the trial."\textsuperscript{155}

3. \textit{Rock v. Arkansas}

The ambiguity concerning the appropriate boundaries of the Compulsory Process Clause evident in \textit{Ritchie} was dispelled by the Court's decision in \textit{Rock v. Arkansas}.\textsuperscript{156} In \textit{Rock}, the Court held that an Arkansas evidentiary rule that \textit{per se} excluded any testimony that was hypnotically refreshed contravened a criminal defendant's right to testify on her behalf.\textsuperscript{157} The \textit{Rock} Court perceptively analyzed the issue it confronted as involving a dichotomy between a state evidentiary rule designed to ensure reliability in fact-finding and the right of the defendant to present a defense by offering material testimony.\textsuperscript{158}

More importantly, the majority in \textit{Rock} correctly interpreted the major doctrinal underpinning of \textit{Washington}: that evidentiary rules based on the need for reliability in the fact-finding process are subservient to a criminal defendant's right to present a defense.\textsuperscript{159} In fact, the Court likened the statute at issue in \textit{Rock} with the rule of competence it declared unconstitutional in \textit{Washington}.\textsuperscript{160} Moreover, the Court quoted \textit{Chambers v. Mississippi} for the principle that a rule of evidence that prevents a criminal defendant from presenting a complete defense by excluding material parts of his testimony is constitutionally impermissible.\textsuperscript{161}

The \textit{Rock} Court recognized that the "right [of a criminal defendant] to present relevant evidence is not without limitation."\textsuperscript{162} Nonetheless, the Court was careful to stress that restrictions on

\begin{itemize}
\item \textsuperscript{154} \textit{Id}.
\item \textsuperscript{155} \textit{Id} at 58.
\item \textsuperscript{156} 483 U.S. 44 (1987).
\item \textsuperscript{157} \textit{Id} at 62.
\item \textsuperscript{158} \textit{Id} at 53. Citing \textit{Washington v. Texas}, the majority noted that "[t]his is not the first time this Court has faced a constitutional challenge to a state rule, designed to ensure trustworthy evidence, that interfered with the ability of the defendant to offer testimony." \textit{Id}.
\item \textsuperscript{159} \textit{Id} at 53-55. It is significant that the Court quoted at length from \textit{Washington} to reaffirm this proposition.
\item \textsuperscript{160} \textit{Id}.
\item \textsuperscript{161} \textit{Id} at 55.
\item \textsuperscript{162} \textit{Id}.
\end{itemize}
the defendant's right to testify must not "be arbitrary or dispro-
portionate to the purposes they are designed to serve." Rather,
the Court proposed a deliberate balancing approach in which the
burden rests with the state to justify an evidentiary rule that limits
a defendant's "constitutional right to testify." Moreover, the Court in Rock allayed concerns about the reliabil-
ity of hypnotically refreshed testimony by pointing to the potent
weapon of cross-examination, which constitutes an "effective tool
for revealing inconsistencies." Therefore, the Court enunciated
the fundamental tenet expressed in Hoffa that cross-examination
in our adversary system of adjudication serves to bring to light the
truthfulness, or lack thereof, of a witness’ testimony.

Standing in stark contrast to the Rock Court's sound interpreta-
tion of the Compulsory Process Clause is the Court's egregious
misinterpretation of the clause as well as its disdainful indifference
to Washington's mandate in Taylor. The irony of the decision is
that the author of Rock, Justice Stevens, produced the diametri-
cally opposed opinion in Taylor.

C. Taylor v. Illinois

In Taylor, the Supreme Court allowed the preclusion of testi-
mony by a defense witness as a sanction for a discovery violation
by the defense. Unlike the situation in Washington, a rule of
competence did not disqualify the witness from testifying. Neither,
for that matter, did a rule creating a privilege, such as the
rule in Roviaro protecting the identity of government informers,
or the statute creating a privilege for certain juvenile records in
Ritchie, pose an obstacle to the testimony the defendant sought
to present in Taylor. Rather, the testimony was excluded by the
trial court on the basis of a violation of a reciprocal discovery rule
which required the defendant, before trial, to reveal the names and
addresses of witnesses he intended to call.

---

163. Id. at 55-56.
164. Id. at 56.
165. Id. at 61.
166. See supra notes 49-50 and accompanying text.
168. See supra notes 32-34 and accompanying text.
169. See supra notes 96-100 and accompanying text.
170. See supra notes 152-55 and accompanying text.
171. Taylor, 108 S.Ct. at 649. The rule the defense violated is Illinois Sup.Ct. Rule
413(d), which provides in pertinent part that:
Subject to constitutional limitations and within a reasonable time after the filing of a
Furthermore, unlike the notice-of-alibi statutes in *Williams* and *Wardius*, whose primary goal was to prevent the likelihood of fabricated testimony engendered by an alibi defense, the discovery rule which the defense violated in *Taylor* was not chiefly designed to prevent perjury through the means of an "eleventh hour" defense. Therefore, the *Taylor* Court applied the exclusionary sanction to otherwise relevant, admissible evidence merely for the violation of a discovery rule.

Given the foregoing analysis, it is imperative to scrutinize the reasoning of *Taylor* and to critique its faulty logic. A starting point for such an exercise is the factual predicate of the decision. Following an exposition of the facts, the *Taylor* decision will be analyzed against the backdrop of the three fundamental premises of *Washington v. Texas*: that a defendant's right to present relevant, probative evidence outweighs a trial court's interest in preventing perjury; that, as a corollary to this principle, a jury ought to be allowed to assess relevant testimony rather than being "protected" from weighing the credibility of such testimony by exclusion of the testimony; and that to the extent that evidentiary rules prevent defense witnesses from testifying based on "*a priori* categories that presume them worthy of unbelief," such rules violate the defendant's right to compulsory process.

After undertaking an examination of *Taylor* from this vantage point, the analysis will proceed to critique the part of the decision that penalizes the defendant for the violations of discovery rules committed by his defense counsel. Finally, the last section will deal with the impact of *Taylor* on the criminal adversarial process: that is, the extent to which *Taylor* affects the balance of power in a criminal trial and contradicts the fundamental premises of the criminal justice system.

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.* n.2 (emphasis added by the Court).

172. *See supra* notes 108-23 and accompanying text.

173. *See supra* notes 32-46 and accompanying text.

The defendant, Ray Taylor, was charged with and convicted (by a jury) of the attempted murder of Jack Bridges. The conviction rested on the testimony of Bridges, his brother and three other witnesses. These witnesses described an altercation that began when Bridges slapped one Derrick Travis for sitting on Bridges' car. Taylor came to the aid of Travis. After a twenty-minute argument, Bridges left the scene "to cool off." Bridges apparently did not "cool off" because he returned to the scene about an hour later.

Bridges testified at trial that when he returned to the scene with his brother, Maurice Bethany, they were confronted by Taylor, Travis, and several other individuals. Bridges testified that he fled, but that Taylor pursued him and ultimately fired four shots at Bridges, the last of which struck Bridges in the back. After he was struck by the bullet, Bridges testified that Taylor pointed the gun at his (Bridge's) head and pulled the trigger, but that the gun misfired.

The altercation was supposedly witnessed by twenty or thirty bystanders. Two of those eyewitnesses, Hattie and Regina Algood, who were sisters and friends of Taylor, testified for the defense. Their version of the event in question differed from the prosecution's account in one significant respect: they testified that Bridges's brother, not Taylor, had a gun and fired into the group, hitting his brother by mistake.

Before trial, the prosecutor filed a discovery motion pursuant to Illinois rules that requires the defense to disclose the names and addresses of witnesses it intends to call at trial. This was in accordance with Illinois Practice Rules, which provide for reciprocal discovery in all felony criminal cases. Part of that reciprocal discovery includes a provision that requires the disclosure by both sides, upon written motion by either the prosecution or defense, of

175. Id. at 649.
176. Id.
178. Id.
179. Id.
180. Id.
184. Id. See supra note 171 to see a partial text of the rule.
the names and addresses of all witnesses they intend to call at trial. 186

In the response to the prosecution’s request, defense counsel in Taylor provided the names of the two sisters who testified as well as the names of two men who did not testify. 187 He was permitted to amend his answer on the first day of trial by adding the name of two witnesses who did not testify. In fact, the only two witnesses who testified for the defense at trial were the two sisters. 188

The source of the controversy arose on the second day of trial. After the prosecution’s two main witnesses completed their testimony, defense counsel sought to add the names of two witnesses to his answer to discovery. One of those two witnesses was Alfred Wormley, 189 whose testimony the trial judge would ultimately exclude. 190 To justify his addition of the two witnesses, defense counsel explained that “he had just been informed about them and that they had probably seen the ‘entire incident.’ ” 191

The trial judge questioned the late revelation of these two witnesses. Defense counsel explained that the defendant had informed him of these witnesses in advance of the trial but maintained that he had been unable to locate Wormley. 192 The judge was not satisfied with defense counsel’s explanation, stating that the witnesses’s names could have been furnished to the prosecution, even though their addresses were unknown. At that particular point in the trial, the trial court then told defense counsel to produce the two new witnesses the next day, at which point he would decide whether they would testify. Further, the trial judge made the statement that “witnesses are being found that really weren’t there.” 193

---

186. Rule 412 obligates the State to disclose the names and addresses of its witnesses upon written motion by the defense. Id. at para. 412 (a) (i). Rule 413 requires the defense to reciprocate. Id. para. 413 (d) (i).
188. Id.
189. Id.
190. Id. at 650.
191. Id. at 649.
192. Id. at 649-50.
193. Id. at 650. The judge told defense counsel:
There’s all sorts of people on the scene, and all of these people should have been disclosed before.

When you bring up these witnesses at the very last moment, there’s always the allegation and the thought process that witnesses are being found that really weren’t there. And it’s a problem in these types of cases, and it should be—should have been put on that sheet a long time ago.

At any rate, I’ll worry about it tomorrow.

Id. n.6 (quoting appellate record at 13-14).
The next day Wormley appeared in court, whereupon the trial judge allowed defense counsel to make an offer of proof with Wormley's testimony outside the jury's presence.\textsuperscript{194} Wormley testified that he had not witnessed the incident but that before the altercation he saw Jack Bridges and his brother with two guns in a blanket. Wormley also asserted that he heard Bridges and his brother say "they were after Ray [Taylor] and the other people," and that prior to the incident he had run into Taylor and his group and warned them "to watch out because they got weapons."\textsuperscript{195}

The prosecutor, on cross-examination, elicited from Wormley that he first met the defendant (formally) two years after the incident occurred. He also admitted that defense counsel had visited him at his home the week before the trial began.\textsuperscript{196} At the end of Wormley's testimony, the trial judge excluded Wormley's testimony as a sanction for the discovery violation.\textsuperscript{197}

The trial judge's justification for excluding Wormley's testimony is instructive because it strikes at the core of the Compulsory Process Clause and, specifically, at the precedent established by Washington. The trial judge's reasons for excluding the testimony were threefold: as a sanction for a "blatant" and "willful" violation of discovery rules; to deter future violations of discovery rules because of previous discovery violations by other defense attorneys in his courtroom; and because he seriously questioned the credibility of Alfred Wormley.\textsuperscript{198}

It is also worthwhile to note that the trial judge chose to impose the most drastic remedy for noncompliance provided by the Illi-
nois discovery rules. Illinois Practice Rule 415 stipulates the penalties a trial judge may impose for violation of reciprocal discovery: the judge may order the noncomplying party to disclose the withheld information; she may grant a continuance; she may exclude the undisclosed evidence; and finally, the trial judge may enter whatever order she deems "just under the circumstances." The conclusion one may draw from a full reading of the remedies provided by the rule is that exclusion is reserved for cases in which the evidence remains "undisclosed." In the Taylor case, however, the evidence was disclosed: Wormley was produced and testified subject to cross-examination, though admittedly he was produced late in the trial.

The Illinois Appellate Court affirmed Taylor's conviction, holding that exclusion of evidence was a permissible sanction for the violation of discovery rules and leaving to the unfettered discretion of the trial judge the severity of the sanction imposed. The court thus reasoned that the trial court in Taylor "was within its discretion in refusing to allow the additional witnesses to testify." After the Illinois Supreme Court rejected Taylor's appeal, the United States Supreme Court granted certiorari.

2. Reliability and Integrity vs. Compulsory Process

It utterly defies reason that the majority in Taylor only refers to Washington v. Texas once in the main body of the opinion. The answer to the Taylor Court's glaring lack of reliance on Wash-

199. See supra notes 184-86 and accompanying text.
200. ILL. ANN. STAT. ch. 110A, para. 415 (g) (i) (Smith-Hurd 1985).
201. 141 III.App.3d 839, 491 N.E.2d 3 (1986).
202. Id. at 844-45, 491 N.E.2d at 7.
204. Justice Stevens wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justice Brennan wrote the dissenting opinion and was joined by Justices Marshall and Blackmun. At the time Taylor was decided, Justice's Powell replacement on the Court had not been confirmed.
205. Taylor, 108 S.Ct. at 652. The Court employs Washington to establish the proposition that the Compulsory Process Clause embraces the right to offer testimony and not merely the empty right to subpoena witnesses. The Court therefore rejected the State of Illinois' contention that the Compulsory Process Clause merely guarantees the right of the defendant to subpoena witnesses. Id. at 651. The other references to Washington in the majority opinion are contained in footnote 1, in which Washington is cited for the proposition that the Compulsory Process Clause is applicable to the states. Taylor, 108 S.Ct. at 649 n.1; and in footnote 9 to resolve the issue of whether Taylor had preserved a constitutional issue at the trial level because he only invoked a Due Process violation though he relied on Washington and Chambers to support his position. The Court concluded that such reliance on the sixth amendment was "clear." Id. at 651 n.9.
The Compulsory Process Clause

ington, however, is transparently evident. The Court did not emphasize Washington because it blithely ignored the basic postulates of the decision. In fact, the Taylor Court conveniently missed the primary lesson of Washington: that the defendant’s right to present exculpatory evidence outweighs the court’s interest in preventing perjured or otherwise potentially unreliable testimony.

The rationale of the Taylor decision is predicated upon a balancing perspective that weighs the “fundamental” right of the defendant “to offer the testimony of witnesses in his favor” against “countervailing public interests.” Those competing “interests” are the integrity of the adversary system, which depends on the admissibility of reliable evidence and the rejection of unreliable evidence; the need for the “fair” and “efficient” administration of justice; and the axiom that the ascertainment of truth is the ultimate objective of a trial.

The linchpin of the Taylor decision is the Court’s concern with the values of reliability and integrity as indispensable to the operation of the criminal justice system. The Court rejected Taylor’s contention that the exclusion sanction should never override a criminal defendant’s right to compulsory process by claiming that the public “has an interest in a full and truthful disclosure of critical facts” and that the central feature of the discovery rule at issue in Taylor was “to minimize the risk that fabricated testimony will be believed.” At one juncture in Taylor the majority opinion stresses that the trial court has a “vital interest in protecting the trial process from the pollution of perjured testimony.”

Of course, this reasoning is at variance with the principal teaching of Washington. When the Washington Court invalidated the Texas competence statute disqualifying accomplices from testifying for one another, it unmistakably rejected the logic behind the rule. The underlying basis of the statute was to shield the jury from hearing potentially perjured testimony. The Washington Court repudiated such a rationale; in essence, it deemed the court’s interest in preventing perjury as subordinate to defendant’s right to compulsory process. Moreover, this fundamental axiom was

207. Id.
208. Id. at 654.
209. Id. at 655.
210. Id. at 656-57.
211. See supra notes 38-44 and accompanying text.
Duquesne Law Review

applied to the prosecution in Hoffa v. United States.\textsuperscript{212}

Admittedly, one may raise the objection that the testimony barred in Washington bore a certain indicia of reliability because it was consistent with the defendant’s testimony that the codefendant had fired the fatal shot that killed the victim.\textsuperscript{213} On the other hand, Wormley’s testimony in Taylor was regarded as “suspect” because he was identified by the defense at the “eleventh hour.”\textsuperscript{214} However, if one examines the testimony of Wormley, it does not seem as tainted as the Taylor Court implies.

Wormley testified that he saw the victim and his brother with guns wrapped in a blanket prior to the altercation.\textsuperscript{215} In response to cross-examination by the prosecutor, Wormley admitted that he had met Taylor four months before the trial, or over two years after the shooting occurred. Wormley also acknowledged during cross-examination that defense counsel had visited him the week before the trial began.\textsuperscript{216}

Given this testimony, the likelihood that Wormley’s testimony was not reliable or was “polluted” by perjury is negligible. If Wormley wanted to help Taylor by lying, he would not have admitted during cross-examination that he had not witnessed the shooting. Nor, for that matter, is it likely that Wormley would have acknowledged that he had formally known Taylor for four months and that defense counsel had visited him before the trial. Further, if Wormley would have been properly coached by defense counsel, perhaps he would have verified the sisters’ account who testified on Taylor’s behalf at trial. Finally, Wormley appears to have had little incentive to lie for Taylor, since they had known each other for a relatively short period of time. The bonds of friendship did not seem to have solidified to the point of giving Wormley a strong inducement to lie in Taylor’s behalf.

Indeed, it is anomalous that the Taylor majority adopted the trial court’s reasoning that “witnesses are being found that weren’t there” to uphold the court’s exclusion of Wormley’s testimony.\textsuperscript{217} In fact, Wormley admitted that “he wasn’t there.” Nevertheless, his testimony was critical to the defense.

In fact, the crucial issue the Taylor majority chose to ignore was

\textsuperscript{212.} See supra notes 47-50 and accompanying text.
\textsuperscript{213.} See supra notes 32-34 and accompanying text.
\textsuperscript{214.} Taylor, 108 S.Ct. at 655.
\textsuperscript{215.} Id. at 650.
\textsuperscript{216.} Id.
\textsuperscript{217.} Id. at 657.
the critical nature of Wormley’s testimony for Taylor’s defense. As Justice Brennan aptly pointed out in dissent, the jury that convicted Taylor was “not permitted to hear evidence that would have both have placed a gun in Bridges’ brother hands and contradicted the testimony of Bridges and his brother that they possessed no weapons that evening.” This testimony did not threaten the “integrity” of the criminal justice system, as the majority maintains.

Furthermore, Wormley’s testimony was not cumulative or duplicative of the testimony of the other two defense witnesses. In effect, Wormley’s testimony added a crucial ingredient to Taylor’s defense: it established that the victim might have been armed. Moreover, the testimony was bolstered by the fact that Wormley was, by all indications, a relatively disinterested party. As the Taylor Court observed, the sisters who testified on Taylor’s behalf were the defendant’s “friends.” On the other hand, Wormley could hardly be classified as Taylor’s “friend” because they had met a mere four months before the trial. Thus, Wormley’s testimony would have corroborated the sisters’ version of the incident and served to exculpate Taylor.

Even if the stringent criterion applied in Valenzuela-Bernal was employed by the Taylor Court, Wormley’s testimony would not have been excluded. Of course, in Valenzuela-Bernal the Court stated that for the defendant to make a prima facie showing of a violation of compulsory process, she must establish the evidence was material and favorable to the defense. As the preceding discussion and analysis clearly indicates, the testimony excluded in Taylor was material and favorable to the defense.

Wormley’s testimony, moreover, suffered from no infirmity that would have warranted its exclusion under evidentiary rules. It is baffling that the Taylor Court, in rejecting the defendant’s argument that the sixth amendment absolutely bars the exclusion of a defense witness’ testimony, raised the objection that a criminal defendant “does not have the unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” As previously mentioned, however, the testimony excluded in Taylor did not suffer from any of those deficiencies. Rather, the only reason Wormley’s testimony was ex-

---

218. Id. at 667 (Brennan, J., dissenting).
219. Id. at 649.
220. See supra notes 92-101 and accompanying text.
221. Taylor, 108 S.Ct. at 653.
222. See supra notes 168-72 and accompanying text.
cluded was for the violation of the Illinois reciprocal discovery rule.

As a result of the trial court's exclusion of Wormley's testimony, Taylor was prevented from presenting a "complete" defense. One may contrast the Taylor ruling, therefore, with the Court's holding in Crane v. Kentucky that the right to present a defense is superior to state evidentiary and procedural rules when such rules exclude competent, reliable evidence that supports a criminal defendant's claim of innocence.223

The Taylor majority upheld the trial court's exclusion of Wormley's vital testimony by rejecting Taylor's contentions that the Compulsory Process Clause absolutely precludes the exclusion of defense evidence as a sanction for the violation of a discovery rule; and that even conceding the lack of an absolute preclusion of defense evidence, the exclusion of Wormley's testimony was inconsistent with the right to compulsory process.224

It is possible to argue, as Professor Westen has ably done, that a criminal defendant has a constitutional right to introduce any material evidence, regardless of whether or not it is protected by an evidentiary privilege.225 As Professor White reminds us, however, such an approach might not be "pragmatic" in light of the current make-up of the Supreme Court.226 Nonetheless, the defendant's second argument, that is, that given the specific facts of Taylor the preclusion of Wormley's testimony was constitutionally impermissible, is well-founded. It is worthwhile, therefore, to explore further the justifications for such an argument.

The underlying rationale of Taylor's argument that the preclusion sanction was unnecessary in the context of his case rests on the commonsense notion that less drastic alternatives than exclusion were available to the trial court. Indeed, the majority readily acknowledged that Taylor was correct in making such an assumption.227 The Court recognized that such alternative sanctions as a continuance, declaration of a mistrial, or disciplinary sanctions against defense counsel could have minimized any harm to the

223. See supra notes 140-45 and accompanying text.
225. See Westen, supra note 20, at 161-77. See also United States v. Davis, 639 F.2d 239, 243 (5th Cir. 1981). The court in Davis held that "the Compulsory Process Clause of the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against defendants." Id. at 243.
prosecution.\textsuperscript{228} In effect, the prosecution suffered little harm in \textit{Taylor} because it was given the opportunity of cross-examining Wormley. In fact, the prosecution was able to discover more evidence than it would have under the discovery rule Taylor’s counsel violated.\textsuperscript{229} Under that rule, all the prosecution was entitled to discover before trial was the name of defense witnesses and any “relevant written or recorded statements.” Admittedly, the prosecution may have been “surprised” by the defense’s “eleventh-hour” witness, but any disadvantage the state may have endured was redressed when it was given the chance of cross-examining Wormley outside of the jury’s presence.

Although the \textit{Taylor} majority could not seriously rely on the argument that the prosecution suffered prejudice when Wormley was produced the second day of trial, it resorted again to its primary rationale: that the integrity of the adversary process required the drastic sanction of exclusion to prevent potentially perjured or unreliable evidence from tainting the outcome of the trial.\textsuperscript{230} Of course, as the preceding discussion has demonstrated, such a rationale is totally without foundation.

The proper solution to the trial court’s problem in \textit{Taylor} is suggested by the Court’s discussion of the remedies available to cure unfair surprise to the prosecution in \textit{Williams v. Florida}.\textsuperscript{231} In that case the Court suggested the remedy of a continuance to negate the strategic advantage sought by the defense when it failed to reveal an alibi witness prior to trial.\textsuperscript{232} In this connection, moreover, the Supreme Court of Mississippi has devised a solution that the trial court in \textit{Taylor} could have profitably employed.

In \textit{Houston v. State},\textsuperscript{233} the Mississippi Supreme Court discussed a procedure it has developed that reconciles the conflicting goals of the utilization of relevant, admissible evidence and the imperative of fairness to the party surprised by the late production of evidence or witnesses.\textsuperscript{234} The standard summarized and applied in \textit{Houston} directs the trial court to use a three-step procedure when confronted with any discovery violation. The procedure entails the following process: 1) upon objection by a party, the aggrieved party

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at 654-55.
\item \textsuperscript{229} \textit{See} note 171 for the text of the rule.
\item \textsuperscript{230} \textit{Taylor}, 108 S.Ct. at 654-55.
\item \textsuperscript{231} \textit{See supra} notes 116-119 and accompanying text.
\item \textsuperscript{232} \textit{Id.}
\item \textsuperscript{233} 531 So.2d 598 (Miss. 1988).
\item \textsuperscript{234} \textit{Id.} at 611.
\end{itemize}
should be afforded a reasonable opportunity to become familiar with the undisclosed evidence; 2) if after this opportunity is offered, the objecting party still believes that it might suffer prejudice, it must request a continuance (failure to do so constitutes a waiver of the party's objection to the evidence); and 3) if the objecting party requests a continuance, the discovery violator may choose to proceed with the trial and forgo the use of the undisclosed evidence (if, however, the discovery violator is not willing to proceed without the evidence, the court must grant the requested continuance).

Before the Taylor decision was rendered by the Court, in fact, most state courts had followed the "less drastic" means approach in dealing with discovery violations. Furthermore, as Justice Blackmun's dissent in Taylor makes clear, the discovery rule at issue in Taylor was merely a general reciprocal discovery rule and did not involve the dangers normally associated with alibi defenses that notice-of-alibi rules are designed to prevent. As Justice Brennan aptly put it in dissent, the harsh sanction of preclusion imposed by the trial court and ratified by the majority of the Court in Taylor, "distorts the truthseeking process by excluding material evidence of innocence in a criminal case." Furthermore, alternative sanctions "are not only adequate to correct and deter discovery violations but are far superior to the arbitrary and disproportionate penalty imposed by the preclusion sanction."

Finally, the majority opinion seems to find support for its hold-

235. Id. at 611-12. It is ironic that while the Houston case, decided after Taylor, reserves the exclusion sanction for extreme cases, it cites Taylor for the incorrect proposition that the sanction should ought to be applied only in cases in which the defendant (emphasis added) participates in some "cynical scheme to gain a substantial tactical advantage." Id. at 612. In Taylor, no evidence existed that the defendant participated in the decision to conceal Wormley's identity. See infra Part III C.4.


237. Taylor, 108 S.Ct. at 667-68 (Blackmun, J., dissenting). Justice Blackmun joined the dissent on the condition that it was confined to general reciprocal discovery rules and did not take a position with regard to sanctions for noncompliance with notice-of-alibi rules. Id. See also in this respect, Fendler v. Goldsmith, 728 F.2d 1181, 1190 n.19 (9th Cir. 1983) (distinguishing in its analysis general discovery rules from the federal notice-of-alibi rule, "which is a rule designed to deal with particular types of evidence").


239. Id. In reaching this conclusion, Justice Brennan relied on Rock v. Arkansas 483 U.S. 44, 55-56 (1987), for the proposition that the right to offer defense evidence can only be limited to the degree such limitations serve "legitimate interests in the criminal trial process" and are not "arbitrary or disproportionate to the purposes they are designed to serve." Id. at 660-61 (citations omitted). See supra notes 163-64 and accompanying text for a discussion of this standard enunciated in Rock.
The Compulsory Process Clause

ing in the "efficiency" rationale by noting that the state's interest in an "orderly conduct of a criminal trial" warrants the invocation of "firm" rules regarding the presentation of evidence. It is indeed perplexing that the Court values administrative efficiency to the extent of sacrificing a criminal defendant's right to present relevant, probative exculpatory evidence. This emphasis on "efficiency" and administrative concerns marks a disturbing trend by the Court in which it resorts to this reasoning to deny criminal defendants vital sixth amendment rights.

In sum, the Taylor Court's misguided emphasis on reliability and integrity to sustain the exclusion of materially, relevant evidence resulted in a "distortion" of the truth and the concomitant misapplication and denigration of the principal dictate of Washington v. Texas. The majority opinion, moreover, slighted the key corollaries of Washington's mandate.

3. Is a Jury "Intelligent" Enough to Weigh Credibility?

One of the maxims the Washington opinion embodied is the right of a criminal defendant to present exculpatory, relevant evidence to a jury despite the possibility that such evidence might be perjured or otherwise unreliable. The Court thereby renounced the assumptions of the common law rule that only disinterested parties should be permitted to testify because the "intelligence of jurors" could not be trusted. As Justice Brennan's dissent incisively asserts, by allowing the exclusion of Wormley's testimony because it was "presumably" unworthy of belief, the Taylor Court "usurped" the jury's chief function in our adversary system: to weigh the credibility of witnesses. Of course, such an arrogation of the jury's function also contradicts the teachings of Rock v. Arkansas, as well as Washington v. Texas, that rules which preclude a jury from hearing testimony because of its "presumptive unreliability" are constitutionally suspect.

240. Id. at 653.
241. The Court employed this rationale in Richardson v. Marsh, 481 U.S. 200 (1987). See Garcia, supra note 102, at 420 for a discussion of Marsh's implications. Furthermore, the Valenzuela-Bernal Court also employed this reasoning to bolster its holding. See supra notes 89-91 and accompanying text.
242. See supra notes 33-44 and accompanying text.
244. Taylor, 108 S.Ct. at 663, n.5 (Brennan, J., dissenting).
245. Id. For a discussion of Rock regarding this issue see supra notes 156-166 and accompanying text.
In our adversary system of adjudication, of course, the benefits of cross-examination serve as a bulwark to ferret out false or unreliable testimony. Therefore, in Taylor, had the trial court permitted Wormley's testimony, the prosecutor could have effectively brought out any inconsistencies and discovered the "real" story during cross-examination. In fact, the prosecutor accomplished this task when he cross-examined Wormley outside of the jury's presence. Instead, the jury's "intelligence" was called into question when the trial judge deprived it of the right to hear and assess the weight and credibility of Wormley's testimony.

4. A Priori Categories and Compulsory Process

Closely connected with the principle that the jury ought to determine the credibility of relevant, probative, and otherwise admissible evidence is Washington's holding that evidentiary rules designed to curtail perjury by precluding defense witnesses from testifying violate the Compulsory Process Clause. Of course, those rules are based on the notion that certain categories of defense witnesses are presumptively not worthy of belief. In effect, as Justice Brennan argues, the majority in Taylor ratified the concept repudiated in Washington by implying that a defense witness who is not identified until the trial has begun is presumptively unworthy of belief and thus should be barred from testifying.

Furthermore, the majority's exclusion of Wormley's testimony in Taylor contravenes the dictates of Chambers and Rock, which sanctioned the introduction of reliable hearsay statements as well as a defendant's post-hypnosis testimony despite evidentiary rules to the contrary. The proper course the trial court should have followed in Taylor would have been to admit Wormley's testimony but to have permitted the prosecutor to comment on the defense's late disclosure of Wormley. Rather than pursuing this sensible

246. See supra notes 215-16 and accompanying text.
247. According to Justice Brennan's dissent, the trial judge in Taylor did not exclude Wormley's testimony solely on its apparent lack of credibility because Illinois law forbade exclusion of testimony based on lack of credibility. Taylor, 108 S.Ct. at 662 (Brennan, J., dissenting) (citations omitted). On a reading of the appellate record, Justice Brennan concluded that the trial court excluded the testimony because of defense counsel's misrepresentation to the court as to when he had located Wormley. Id. at 664.
249. Id.
251. Id.
252. Id. The defendant conceded this point on appeal. Id.
approach to the problem, however, the trial court indulged in the presumption of unbelief that Washington and its progeny repudiated. Unfortunately, the Supreme Court endorsed the trial court’s arbitrary preclusion of Wormley’s testimony.

5. Visit the Sins of the Lawyer on the Client?

An intriguing part of the Taylor decision is the majority’s rejection of Taylor’s contention that his constitutional right to compulsory process should not be curtailed because of an ethical violation by his counsel. The majority’s response to this argument is disingenuous and utterly lacking in logic. In essence, the majority’s argument is that a criminal defendant is bound by the tactical decisions of his attorney because the lawyer must have “full authority to manage the conduct of the trial.” The efficiency rationale again rears its ugly head, as the Court maintains that “the adversary process could not function effectively if every tactical decision required client approval.”

As Justice Brennan argued in dissent, this argument presupposes that one may categorize defense counsel’s conduct in failing to identify Wormley as “tactical” in nature. An attorney does not have the freedom of engaging in conduct that “includes misconduct as an option.” Moreover, the Court’s perspective leads to a conflict of interest between the defendant and counsel. Justice Brennan observed that defense counsel in Taylor became less than zealous when the trial judge threatened to expose his actions to the bar disciplinary commission. In a case where a willful discovery violation by defense counsel occurs, therefore, it is unrealistic to expect that defense counsel will protect his client’s interests when those interests clash with counsel’s professional reputation.

More importantly, the majority’s position in this respect significantly abridges a criminal defendant’s personal constitutional right to compulsory process and to a complete and effective defense as a sanction for her counsel’s violation of a procedural rule and for her attorney’s possible violation of the professional code of

253. Id. at 657.
254. Id.
255. Id.
256. Id. at 666 (Brennan, J., dissenting).
257. Id. at 667.
258. Id. As Justice Brennan succinctly put it, “I cannot see how we can expect defense counsel in this or any other case to act as vigorous advocates for the interests of their clients when those interests are adverse to their own.” Id.
ethics. If we accept Justice Brennan's conclusion that the trial court excluded Wormley's crucial testimony to punish defense counsel for "purposely lying" about when he had located Wormley, then the sins of the defense attorney were visited upon the defendant. The upshot of this decision was that Taylor's personal constitutional rights were sacrificed as an atonement for his attorney's allegedly "ethical" violation.

Given the notion advanced by the Court that constitutional rights are personal and cannot be vicariously asserted, it is ironic indeed that the Taylor Court is willing to circumscribe a vital constitutional trial right of a criminal defendant in part to sanction defense counsel for a procedural or ethical violation. Indeed, as Justice Brennan remarks, such alternatives as the imposition of fines, or the threat of incarceration or disciplinary proceedings, are far more effective in deterring attorney misconduct than the exclusionary remedy.

In fact, the dissent in Taylor could have marshalled another effective argument to counter the majority's approval of the exclusionary sanction for defense counsel's discovery violation. The Court in United States v. Leon gave its approval to the "goodfaith" exception to the exclusionary rule. The majority's rationale centered on the assumption that a police officer who secured a search warrant in "good faith" reliance of its validity would not be deterred by the exclusionary sanction. The same argument could be applied to Taylor. That is, why should the defendant be penalized by the exclusionary sanction from presenting critical, probative exculpatory evidence when he acts in good-faith reliance on his counsel's representation? Further, if one accepts Leon's rationale, why impose the exclusionary remedy when the likelihood of deterrence is minimal, if not illusory?

Furthermore, the Court recently held in Arizona v. Youngblood that the good-faith rationale should apply when the government loses or destroys potentially useful evidence in good faith. In fact, the interesting aspect of Youngblood is that the Court em-

259. Id. at 664.
260. This, of course, is the concept of "standing" to assert a constitutional violation. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978) (standing explained as it relates to the fourth amendment); United States v. Wade, 388 U.S. 218 (1967) (standing concept employed as to fourth amendment applied by analogy to the sixth amendment).
263. Id. at 921.
The Compulsory Process Clause

ploys Valenzuela-Bernal to bolster its holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of Due Process of law." The Court clearly proposes a double-standard in which good-faith may be asserted by the prosecution to rebut a due-process claim by the defendant, but the defendant may not reciprocate by resorting to a good-faith argument in attempting to preserve a vital trial-related constitutional right.

Justice Brennan's dissenting opinion, therefore, is not only more consistent with precedent but also is grounded on a strong logical foundation. His position, briefly stated, is that if the defendant does not participate in the discovery violation, the exclusionary sanction is "arbitrary and disproportionate to the purposes of discovery and criminal justice and should be per se unconstitutional."

6. Taylor and the Criminal Justice System: An Assessment

The majority opinion in Taylor has distressing implications for criminal defendants as well as for the criminal process in general. It seems that the Court is willing to apply severe sanctions to the defense but is not as receptive to the idea as far as the prosecution is concerned. The Court's "misgivings" about the application of the exclusionary rule to prevent the prosecution from introducing otherwise admissible, probative evidence did not concern the majority in Taylor. More important, the Court's application of the exclusionary rule in Taylor alters the balance of power in a criminal trial by in effect facilitating the prosecution's task in obtaining a conviction.

The prosecution's advantage in Taylor may be readily discerned by examining the dynamics of the case and, in particular, the effect of the discovery rule at issue in the case. One may readily conclude that the discovery rule Taylor's counsel contravened clearly favored the prosecution. This proposition is supported by Justice

265. Id. at 337.
267. Justice Brennan did notice this irony by stating in his dissenting opinion that "It seems particularly ironic that the Court should approve the exclusion of evidence in this case when several of its members have expressed serious misgivings about the evidentiary costs of exclusionary rules in other contexts." Id. at 667. See Part IV infra for an elaboration of this argument.
Douglas' prescient concurring opinion in *Wardius v. Oregon.* In that opinion, Justice Douglas maintained that the guarantees accorded criminal defendants in the Bill of Rights do not contemplate an "adversary proceeding between two equal parties." Rather, these rights are designed to rectify the prosecution's enormous advantage in terms of investigation and other resources *vis-a-vis* the criminal defendant.

Viewed from this perspective, the reciprocal discovery rule at issue in *Taylor* does not seem as neutral as it appears at first glance. By allowing the prosecution to discover the names and addresses of witnesses the defendant intends to call at trial and any statements made by the witnesses, the rule gives the government an insight into the defense's case. Therefore, the prosecution not only enjoys its inherent investigative advantage over the defendant but also gets a glimpse of the defendant's possible strategy at trial. Further, the reciprocal discovery rule in *Taylor* was not intended to prevent the last-minute fabricated testimony that notice-of-alibi rules supposedly guard against.

The exclusion of Wormley's testimony, moreover, diminished the prosecution's burden to establish Taylor's guilt beyond a reasonable doubt. *In re Winship* establishes the prosecution's burden of proof and delineates the fundamental tenet that our criminal adversary process prefers a wrongful acquittal over a mistaken conviction. Furthermore, in *Cool v. United States* the Court invalidated an instruction to the effect that an accomplice's testimony should be disregarded unless the jury believed that it was true beyond a reasonable doubt because the instruction reduced the government's burden of proof. The Court in *Cool* reached this conclusion on the ground that the instruction created "an artificial barrier" to the weighing by the jury of relevant, material exculpatory evidence.


270. *Id.*

271. See supra note 171 for the text of the rule.


273. *Id.* at 372 (Harlan, J., concurring). Justice Harlan stated that: "[T]he requirement of proof beyond a reasonable doubt in a criminal case... [is] bottomed on a fundamental value determination in our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.*

274. 409 U.S. 100 (1972).

275. See notes 53-59 and accompanying text for an extended analysis of *Cool.*

276. *Cool,* 409 U.S. at 104.
In Taylor, of course, the jury did not have the opportunity of hearing Wormley's material, exculpatory evidence linking the alleged victim's brother to the gun that injured the victim. This evidence could have created reasonable doubt in the jurors' minds and therefore led to an acquittal or, possibly, to a hung jury. The trial court's exclusion of Wormley's testimony, however, precluded the defendant from planting the seed of doubt in the jury's mind and thereby facilitated the prosecution's burden of proving guilt beyond a reasonable doubt.

The Taylor decision represents the crowning triumph of the "sporting theory" of justice. The ruling exalts procedure over substance to unparalleled heights. The Court engages in "doublespeak" when it quotes United States v. Nixon for the proposition that the ends of justice are ill-served if "judgments were to be founded on a partial or speculative presentation of the facts." By denying the defendant the right to present a "complete" defense, the Taylor Court permitted his conviction to rest on an incomplete presentation of the facts. In an effort to rigidly preserve the "sanctity of discovery," the Court upheld Taylor's conviction "in the interest of fair play." The Court's attempt to achieve "fairness" in the criminal justice process produced an eminently "unjust" result for Ray Taylor and for the criminal justice system.

IV. INTEGRITY, RELIABILITY, AND THE EXCLUSIONARY RULE: ARE THEY REALLY THAT IMPORTANT TO THE SUPREME COURT?

Paradoxically, the Taylor Court's ratification of the exclusionary remedy in Taylor is at odds with the Court's recent antipathy toward the exclusionary rule. In fact, Justice Brennan expresses this contradiction in his dissenting opinion in Taylor. Justice Brennan's analysis of this dichotomy, however, is rather conclusory. This section, therefore, will elaborate upon the dissent's exposition of this contradiction in light of the Court's devaluation of the exclusionary remedy as applied to the prosecution and will examine the enigmatic stress on integrity and reliability by the Taylor Court in light of the Court's recent depreciation of those values.

278. This is the apt phrase used by Justice Brennan in his dissent. Taylor, 108 S.Ct. at 667 (Brennan, J., dissenting).
279. This language is taken from Pound's address to the A.B.A. See, supra Part I, note 3.
A. The Exclusionary Rule and Taylor

The Supreme Court's hostility toward the effects of the exclusionary remedy reached its apogee in United States v. Leon.\textsuperscript{281} Leon was previously analyzed in the context of its relationship to the Taylor Court's imposition of the exclusionary remedy as a sanction for defense counsel's discovery violation.\textsuperscript{282} It is necessary to revisit Leon, however, in order to apply it in a broader context. Of course, in Leon the Court fashioned the "good-faith" exception to the exclusionary rule. In broad terms, Leon stands for the proposition that in circumstances wherein police officers obtain a search warrant in "good faith" and the warrant is subsequently invalidated because it was issued without probable cause, the exclusionary rule will not be applied.\textsuperscript{283} The policy rationale of the majority centered on the argument that the cost of suppressing such evidence far outweighed its benefits, since the deterrence objective underlying the exclusionary remedy would not be served when police officers obtain a warrant in the objectively reasonable "good faith" belief that is valid.

If the Taylor Court would have adhered to the reasoning upon which Leon is grounded, it would not have suppressed Wormley's testimony. Weighing the "costs" and "benefits" of exclusion in Taylor yields the unequivocal conclusion that the costs of excluding Wormley's testimony superseded the benefits derived from suppression. The costs of suppression were substantial: the exclusion of material, relevant evidence that exculpated the defendant and that might have swayed the jury by creating reasonable doubt. By contrast, the benefits of excluding Wormley's testimony pale in comparison with the costs. If the Court was seeking general deterrence of future discovery violations by defense counsel, it is unlikely that the suppression of Wormley's testimony had its desired effect. Defense counsel did not suffer any punitive sanctions for the violation; rather, Taylor paid the "costs" of his counsel's transgression through the exclusion of Wormley's testimony.

If the Taylor Court's concern with the integrity of the criminal process and the reliability of testimony is the focus of its decision, as this Article maintains, the benefits again fall short of the costs exacted by exclusion. Quite simply, the primary cost of suppression

\textsuperscript{282} See supra notes 262-63 and accompanying text.
\textsuperscript{283} Leon, 468 U.S. at 920-21.
The Compulsory Process Clause was significant: the jury that convicted Taylor was barred from hearing testimony that would have had an effect on the determination of guilt. The worst case scenario of this suppression is that, because of the delay in discovery, "an innocent man may be serving ten years in prison." The benefits, on the other hand, are minimal at best, nonexistent at worst. Apart from the Court's deviation from precedent, even if it believed that trial court was correct in keeping perjured or presumptively perjured testimony from the jury, the net effect of its ruling was to insult the intelligence of the jurors, who had the option of rejecting Wormley's testimony.

B. Integrity, the Exclusionary Rule, and Taylor

Not only is the Taylor Court's deprecation of its own doctrine regarding the exclusionary rule contradictory, but it also is rather baffling that the key reasoning of Taylor rests on the integrity rationale. Indeed, the Court weighs the right of the defendant to compulsory process against the "integrity of the adversary process" and finds that integrity is more important than compulsory process. By contrast, the Court has abandoned integrity as a rationale for the exclusionary rule.

As previously mentioned, the principal objective of the exclusionary rule is deterrence of police misconduct. However, another compelling rationale of the exclusionary rule is "the imperative of judicial integrity." Of course, the "imperative of judicial integrity" is predicated on the notion that courts condone the violation of the Constitution by admitting evidence that is tainted because it was illegally obtained. The erosion of the integrity rationale as support for the exclusionary rule, however, is unmistakable. It began with United States v. Calandra and has continued unabated, to the point that the Court has completely dispensed with integrity as a basis for the rule.

285. Id. at 655.
286. See part I supra.
287. This rationale was first expressed by the Court in Elkins v. United States, 364 U.S. 206 (1960).
288. 414 U.S. 338 (1974) (the majority focused solely on the deterrence rationale in holding that a grand jury witness may not refuse to answer questions because they are based on illegally seized evidence).
289. See, e.g., United States v. Leon, 468 U.S. 897 (1984). For an argument that the principal goal of the exclusionary rule is to maintain judicial integrity rather than to deter police illegality, see, e.g., Baldwin, Due Process and the Exclusionary Rule: Integrity and
In light of this eradication of the integrity rationale as a basis for the exclusionary rule, it is ironic that the Taylor decision relies so heavily on integrity to exclude the testimony of a witness who was willing to offer material, relevant evidence helpful to the defendant. One can only explain this manifest inconsistency by assuming that integrity is important to the Court when it adversely affects the defendant but is irrelevant when integrity might detract from the government's ability to secure a conviction.

C. Reliability, Connelly, and Taylor

The integrity of the adversary system, the majority in Taylor insists, "depends . . . on the presentation of reliable evidence and the rejection of unreliable evidence." What is truly remarkable about this statement is that the Court in Colorado v. Connelly rejected out of hand the notion that reliability was worthy of constitutional concern or protection under the Due Process Clause of the Fourteenth Amendment. The Connelly Court held that, absent coercion by the police, the confession of an insane defendant is "voluntary" and hence admissible into evidence and does not violate the Due Process Clause of the Fourteenth Amendment.

More important, the Connelly Court emphasized the considerable costs exacted by the exclusionary rule and cited the deterrence rationale as the sole basis for the rule. It is instructive, moreover, to juxtapose the Connelly Court's statement that it had "previously cautioned against expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries," with the Taylor decision.

The "truthful and probative" evidence the Court in Connelly declared constitutionally admissible into evidence was the confession of a defendant who suffered from chronic schizophrenia at the time he confessed. The Connelly Court readily acknowledged that such a confession might be less than "reliable." Nonetheless, although the Court recognized that Connelly's confession might "be proved to be quite unreliable," it deemed such an issue not
worthy of constitutional concern and best left to "the evidentiary laws of the forum."\(^{297}\) Indeed, the Court went as far as to declare that, "[t]he aim of the requirement of Due Process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."\(^{298}\)

A comparison of the evidence suppressed because of its putative "unreliability" in *Taylor* and the confession the Court in *Connelly* did not view as constitutionally suspect yields only one conclusion: reliability is important for the Court as far as the defendant is concerned but is of no consequence with regard to the prosecution. Wormley’s testimony was that of a sane, competent individual who was subject to cross-examination by the government. Although one might argue that Wormley’s testimony was tainted by its "eleventh-hour" nature, it surely bore as much, if not more, indicia of reliability as Connelly’s confession. In effect, the Court seems to be comfortable with a double-standard that favors the government and curtails a criminal defendant’s critical trial-related constitutional rights.

**V. Conclusion**

Is our adversary process of adjudication excessively procedural and therefore "blind" to justice, as Pound argued in his landmark address to the American Bar Association over eight decades ago? The Supreme Court seems to agree with Pound’s assessment of our adjudicatory system, at least insofar as it affects the criminal process and, particularly, to the degree it suppresses material, relevant evidence sought to be introduced by the prosecution at trial.

In *Taylor v. Illinois*, however, the Court subscribed to the "sporting theory" of justice with a vengeance. In the name of "procedural" consistency, the *Taylor* Court excluded relevant, probative, otherwise admissible exculpatory evidence that could have altered the course of the trial. In the process of doing so, the Court deprived the defendant of a vital constitutional right deeply embedded in our jurisprudence: the right of the defendant to compulsory process for obtaining and presenting witnesses in her favor.

It is a sad commentary on the jurisprudence of the Supreme Court that a state supreme court has shed more wisdom on the issue of the extent to which discovery rules should interfere with a defendant’s right to compulsory process than the *Taylor* Court’s

\(^{297}\) Id. at 167 (citations omitted).

\(^{298}\) Id (quoting Lisenba v. California, 314 U.S. 219 (1941)).
flawed analysis of the matter. In Houston v. State, the Mississippi Supreme Court eloquently described the function of a criminal trial as a "trial for life and liberty [and] not a game." The court put discovery rules in perspective by classifying them as "not an end in themselves but a means to the end that we dare call justice." More important, the court adhered to the principle first enunciated in Washington v. Texas, that procedural and, specifically, discovery rules ought to be applied with a view toward the fact-finder, whether judge or jury, receiving all "relevant and otherwise admissible" evidence.

The decision of the Court in Taylor represents the ultimate glorification of the "sporting theory" which a majority of the Court has deplored on many occasions. Procedural rigidity, however, seemed to suit the purposes of the Taylor Court because the aggrieved party was the defendant, not the government. In essence, the Taylor Court "evened" the score by reversing the trend begun in Washington that stressed substantive justice and eschewed strict procedural conformity.

299. 531 So.2d 598 (Miss. 1988).
300. Id. at 611.
301. Id.
303. Houston, 531 So.2d at 611.