THE RIGHT TO PRESENT A DEFENSE

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Acknowledgments

My deep debt to Professor Peter Westen, of the University of Michigan Law School, will be appreciated by those who make the wise investment of time necessary to study his series of three articles on the Compulsory Process Clause: The Compulsory Process Clause, 73 Michigan L. Rev. 71 (1974); Compulsory Process II, 74 Michigan L. Rev. 191 (1975); Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harvard L. Rev. 867 (1978). All of what I have written here about the history of compulsory process, and the theoretical outline of the five components of a right to present a defense are abstracted directly from the first of the articles.

My first version of this work was presented in 1980. I have continued revising and expanding it since then, attempting to continue the work of Professor Westen, so far as it both traces the contours of and encourages understanding of the compulsory process clause by lawyers and judges.

I again thank Professor Peter Westen for his encouragement more than three decades ago as I began this project. Professor Edward Imwinkelried also gave me much material to use prior to the publication of his book "Exculpatory Evidence," and much encouragement since. I also enthusiastically recommend readers to the extremely helpful works related to this topic by Prof. Imwinkelried, "Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence " (with Norman M. Garland) and "Criminal Evidentiary Foundations." These are essential publications, and he is an "authority" and I am not.

Many of the judicial decisions analyzed here were first brought to my attention by colleagues such as Ed Nowak, my college classmate and the former Public Defender for Monroe County, New York, Janet Lee Hoffman of Portland, Oregon, outlines of cases by Richard Levitt and Herb Greenman. The most significant source of cases has been through my many close friends and colleagues withing the NACDL and NYSACDL through listserve contributions – far too many to mention here – but I have to single out Stanley Greenberg, famous at least as one of the founders of the wonderful Aspen Advanced Criminal Law Seminar, as a person who regularly sends me links to new cases.

I am inspired by the many stories I hear back from colleagues about the impact of this monograph on their case work, those who seriously study the right to "compulsory process," and are responsible for new favorable cases being decided, and wrongful convictions avoided in the process. These stories serve as constant reminders of the importance of continuing this project and of insuring that the right to present a defense is preserved and developed by the only ones capable of the task, my fellow criminal defense lawyers.

Preface

This monograph on the "Right to Present a Defense" began as a chapter entitled "The Right to Compulsory Process" in the volume "Basic Course for Criminal Defense Lawyers" published by the Bureau of Prosecution and Defense Services in 1980. Some of the materials have also appeared in "The Whole Motion Catalog", which I created and which was published in 1988 and 1990 by the New York State Association of Criminal Defense Lawyers and a similar monograph distributed at the New York State Defenders Association 1989 Annual Summer Meeting.

It is most critical to understand the Right to Present a Defense as one of the few individual rights which continue to evolve under both federal and state constitutional doctrine. Though emerging in the same time period as other constitutional rules of criminal procedure which are often dismissed as "technicalities" which interfere with the "search for truth," the Right to Present a Defense recognizes the right of the accused to participate in that "search." While it would seem logical enough to assert that the accused should have at least the same right as the prosecution to participate in the "search for truth," it would trivialize the significance of the recognition of this as a fundamental constitutional right to think of it as the balancing side of some logical equation. That is because, as we all know, the "search for the truth" is less reality than it is myth. It is an aphorism used to justify a social system which does not depend upon "truth" for its proper functioning, in either psychological, anthropological or even legal sense (*e.g. Herrera v. Collins*). Indeed, that system has always mistrusted the accused, her defenders, and her evidence, precisely because, when seen in its complexity, "the truth"is an obstacle to the underlying ritualistic function served by singling out members of the community for punishment.

Explaining the ritualistic nature of the criminal process is not the point of this monograph. I bore people with that elsewhere. But, when one understands the true breakthrough represented by the constitutionalization of the Right to Present a Defense, one has to also understand that, like all true breakthroughs in human social evolution, the forces overcome are still strong. The doctrine cannot be taken for granted. It must be exercised, preserved, and advanced, else it will be tragically forgotten.

I warn advocates that the primary artifice used to defeat the defendant's right to advance the defense lies in the attempt to restrict seminal cases, like *Washington v. Texas* and *Chambers v. Mississippi*, to the facts of those cases, and to dilute the Right to Present a Defense by equating it with mere "due process" or "fair trial." In order to protect and advance this right in any specific context, it is incumbent on the advocate to educate the court to the broadest contours of the right, as outlined here. It is plainly not enough to simply mouth the words "Right to Present a Defense." To make a *difference*, counsel has to be prepared to articulate why in makes a difference – at trial and on appeal – that the issue concerns this fundamental right. That is the point of this work.

It is hard to believe that more than four decades have passed since *Washington v. Texas* and *Chambers v. Mississippi* were decided. And yet the Right to Present a Defense still enjoys far more recognition in the courts than in the law school curriculum where it should be as basic a component of the education of young lawyers as any of the other fundamental rights associated with the criminal trial. While 4th Amendment doctrine is terribly important, search and seizure questions rarely affect the outcome of real cases. But every case that is tried presents challenges to the defense case being developed, presented, heard, and credited. Nevertheless relatively little, if any, attention is given to this latter right in the criminal procedure course.

I continue to hope that this ongoing work will help make up for that deficit.
Mark Mahoney, Buffalo, NY, November 17, 2016

About the Author

Mark Mahoney has been a criminal defense lawyer in Buffalo, New York, since 1975. Between 1983 and 1990 he taught Advanced Criminal Procedure at the State University of New York at Buffalo Law School and has lectured frequently on a variety of topics related to the practice of criminal defense and criminal law. He is a Past-President of the New York State Association of Criminal Defense Lawyers, as is his law partner, James P. Harrington. Mark is a member of the Criminal Justice Section of the New York and American Bar Associations, and of the Criminal Lawyers Association (Canada). He has served two terms on the Board of Directors of the National Association of Criminal Defense Lawyers. He has received "Outstanding Practitioner" awards from both the New York State Bar Association, NYSACDL and NYSDA. He is the author of two chapters in "New York Criminal Defense Practice" (NYSBA).

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Introduction

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. (U.S. Const. Am. VI)

Constitutional criminal procedure in the United States for the past several decades has been heavily concerned with *pretrial* adjudication associated with the application of the exclusionary rule and other issues arising in the context of a system where more than 90% of cases are disposed of without trial.

The critical difference between those rights sought to be enforced in the pretrial stage and those which make a trial fair is that the immediate benefit of the former almost always runs to those who are in fact guilty.[1] By contrast, the largest proportion of those who are *wrongfully* accused of criminality will only be vindicated, if ever, at trial.

The danger inherent in this state of affairs is that judicial enforcement of rights associated primarily with the criminal *trial* will suffer, from inattention or a tendency to compromise these rights intentionally or inadvertently in the course of limiting the scope of the non-trial rights.

The two great rights of the accused at trial are the right to challenge the evidence brought forward by the state and the right to affirmatively make a defense. This latter right, really the right to "compulsory process", but better understood when called the "right to present a defense," *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *People v. Hudy,* 73 N.Y.2d 40, 538 N.Y.S.2d 197 (1988), is the right most directly concerned with ensuring that innocent persons are not convicted. Fundamental through this right is, it has been under utilized and misunderstood. The primary reason for this, I suggest, is that criminal procedure courses in law schools, and case books, for decades, have emphasized "exclusionary rule" cases and the wide spectrum of police citizen encounters on which those cases are based. Such cases reflect a "rule-based" doctrine ready-made for a law school curriculum. The compulsory process cases, in contrast, establish an overarching principle, and applicable throughout the criminal process, operating in derogation of rules — rules of discovery, procedure, and evidence — and is not as easy to encapsulate. This, like every other right of citizenship which can be implicated in the investigation and prosecution of criminal cases, is ultimately dependent, for its vitality and development, not on some appellate court, but on the knowledge and skill of our criminal defense bar, whose responsibility it is to recognize, articulate and protect this right. It is toward this challenge that this booklet is directed.

The rallying cry of those who advocate the elimination of the exclusionary rule has been the concern that relevant evidence (of guilt) not be excluded from the jury, emphasizing the "criminal justice system's truthfinding function." *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, 688 (1984). And yet, as every experienced criminal practitioner has observed, and as evidenced by the history described by the cases discussed herein, one of those

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[1] Of course the major exception to this is in the area of eyewitness identification where the theory of exclusion of evidence is to prevent the conviction of potentially innocent persons. It is also true that the enforcement of rules requiring probable cause for police intrusions is ultimately intended to protect innocent persons, who are often the victims of mistaken suspicion of misconduct.

deeply embedded, but unarticulated and unacknowledged principles of criminal adjudication is that defendants and the evidence they offer is mistrusted, and any opportunity to fully participate in either discovery or presentation of evidence is an invitation to defraud the court.[2] One does not have to go far to find cases where probative defense evidence has been excluded because it does not *prove innocence*, e.g. *People v. Johnson*, 62 A.D.2d 555, 405 N.Y.S.2d 538 (4th Dept. 1978), while evidence merely consistent with guilt, but otherwise lacking in probative value is admitted, *People v. Mountain*, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985).[3]

It is precisely against the underlying mistrust of defendants and their efforts to discover and demonstrate the truth that the "right to present a defense" stands. This appears from the history of the federal and state constitutional provisions, and in the cases where alert defense attorneys have preserved the issues for review.[4]

The decisions of the United States Supreme Court and the various high courts in each state construing the compulsory process clauses of the Sixth Amendment and the correlative provisions of state Constitutions[5] are among the most important in the development of the rights

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[2] Apart from the more obvious reasons to mistrust defense evidence there is another reason I think that judges are stingy in accommodating efforts to present a defense by the offering of evidence. Some, believe, or seem to believe, that the standard of proof imposed on the prosecution is so great that the proper role of the accused is to simply attack the prosecution's case. Of course this is what many defendants do.

[3] *Mountain* first allowed evidence of "ABO" blood typing in New York to suggest a connection between the accused and the offense. In *Mountain* the Court of Appeals observed:

> Although blood grouping may only serve to show that the defendant and the assailant are part of a large group having that particular characteristic, *it does not follow that such proof completely lacks probative value*. When identity is in issue, proof that the defendant and the perpetrator share similar physical characteristics is not rendered inadmissible simply because those characteristics are also shared by large segments of the population.

The *Johnson* case is discussed *infra* at note 134

[4] It is well to reflect on, and frequently important to remember when arguing for enforcement of the rights of the accused at the trial level, why the reported appellate decisions on these issues are so typically "bad". Owing to the fact that only the accused can appeal from most trial determinations, the appellate courts do not review cases where the accused was acquitted, nor do they typically review rulings of the trial court upholding the claims of right of the accused. Therefore the appellate courts are always confronted with cases where human nature or institutional pressure are compelling them to contrive to circumvent, rather than enforce, claims of right by an accused who has been found guilty, and most likely *is guilty*. As a result, the rulings on defense claims found in the appellate cases present the most conservative statement possible of the contours of these claims.

[5] What must be considered the "Constitution" of New York, for purposes of understanding the current "New Federalism", are not only the several articles of the New York State Constitution containing provisions relevant to the adjudication of criminal cases, but also certain provisions of the Criminal Procedure Law and the Civil Rights law which state fundamental procedural rights enacted to parallel provisions of the Bill of Rights. *See*, Mahoney, *The Whole Motion Catalog*, (NYSACDL 1991).

However, despite the importance of reliance on the provisions of the state constitution, often to the exclusion of increasingly less helpful provisions of the federal constitution, I still find it convenient to refer to individual rights by the name of the relevant Bill of Rights provision. This is less of a problem in the "Sixth Amendment" compulsory process area than others, because this is one of the few federal provisions where the possibility of future federal expansion has not been shut tight.

of the accused. Taken as a whole they constitutionalize a "Right to Present a Defense" which encompasses the discovery of relevant information, the obtaining and presenting of defense evidence, notwithstanding rules of evidence, privileges, and statutory limitations. Critical as it is to understand the contours of "the right to present a defense," it is equally critical to acquire a methodology of constitutional adjudication best designed to activate theses rights at the trial level and, if need be, on appeal.

One of the most difficult things for advocates to understand and communicate to judges is what the incantation of the "right to present a defense" affords the accused, beyond what the rules of discovery and evidence, and vague notions of "due process" already provide. There must be something, of course, because it would not be much of a fundamental "right" if it did not mean something more than the fair and non-arbitrary application of the rules already in existence. So, at this point, I focus the reader's attention on the simple statement by professor Westen, summarizing import of the watershed cases defining the Right to Present a Defense:

> A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether.[6]

Determinations by trial courts against the admissibility of relevant evidence which is favorable to the accused may not be justified by pretending to "balance" the fundamental rights of the accused against social policies or political or third party interests. More surely, appellate courts, should not insulate trial court determinations which exclude relevant defense evidence by assuming that trial judges have the "discretion" to violate fundamental rights. And, finally, the right of the accused to present a defense may not be limited to parity with the state's ability to discover, produce, and have admitted, evidence.

I. The History of Compulsory Process

Knowledge of the history of compulsory process in English-speaking common law can often provide a powerful context for explaining the constitutional and historical forces behind the evolution of the Right to Present a Defense.

A. Compulsory Process in English History

For a period of time prior to the 18th century, criminal cases were tried, in the various available tribunals of England, without the benefit of testimony from the defendant or his witnesses. During the period of 1066 to 1450, the jury trial emerged from a world where guilt of criminal offenses was determined by combat, compurgation, and ordeal. The jury trial as we

[6] Westen, The Compulsory Process Clause, 73 MICH. L. R. 71, 159 (1974)

know it began without the use of witnesses at all, with jurors drawn on the basis of their knowledge of the case. Although the defendant could be examined at trial, he could not testify or even make a statement in his own behalf.

In the 15th century the practice of calling independent witnesses to testify for the Crown became common, as jurors became more judges of the facts than witnesses themselves. This development was due in part to the growing difficulty of finding 12 persons who had sufficient knowledge of the facts to serve as jurors.

During the period from 1450 to 1600 the Crown could interrogate the defendant, even sometimes with torture, and hold its own witnesses in custody pending trial. The defendant had few of the rights now guaranteed. He had no power to subpoena; he could not present witnesses; he could not testify under oath, although he was allowed to make an unsworn statement. At this time the defendant could be tried by the use of depositions rather than confronted with live witnesses.

By the middle 1600's witnesses for the accused were usually allowed to give unsworn testimony. The defendant was unable, by subpoena, to compel the attendance or testimony of reluctant witnesses. It is no surprise than many concededly innocent defendants were executed during this time, being unable to compel testimony in their favor.

The advantage given the prosecution was great at this time because sworn testimony was considered as having much greater credibility and jurors were so instructed. Allowing the accused however, to given an unsworn statement, not subject to cross examination, was considered very generous to the accused.

By 1702, after a revolutionary century during which Englishmen of every class had experienced the injustice of the criminal courts, the defendant was permitted to subpoena witnesses and have them testify under oath on his behalf.

Not long before the American Revolution, Sir William Blackstone, in his famous *Commentaries* noted that the law of England required that

> in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him,...that he shall have the same compulsive process to bring in witnesses for him, as is usual to compel their appearance against him.

4 W. Blackstone, Commentaries, at 354.

At this time the defendant was still not allowed to testify under oath.[7]

B. Compulsory Process In The United States

Many charters and laws of the colonial and revolutionary period were apace with or ahead of the development in England of the defendant's right to present his defense. William Penn, himself the accused in a famous trial under Charles II, was the generator of the *Frame of Government* (1682) and the *Charter of Liberties* (1701). Both provided for the swearing of defense witnesses in all cases. By the year 1700 in New York the defendant was allowed to

[7] The accused was, however, entitled to make an unsworn statement to the jury on his own behalf. While it did not carry the force of testimony offered under oath, it also was not subject to cross examination! Too bad that accused cannot do that still. Or *can they*?

subpoena and swear his witnesses in all cases. By 1750 this was also the rule in Maryland, Massachusetts, Pennsylvania and Virginia.

Various provisions of the new States' Constitutions provided for the right of the accused to subpoena witnesses and to have them testify under oath, at least on a par with the prosecution. Two states particularly emphasized the right to produce "all proofs that may be favorable." (Massachusetts, 1780; New Hampshire, 1783). These various state provisions evidence the "original" intent that the defendant must have a meaningful opportunity, at least on a par with the prosecution, to present his defense.

The source of Madison's language in the Sixth Amendment is unclear, but the language was adopted without substantial change, and only once mentioned in the constitutional debates. Although the wording was more narrow than that proposed by some states who specifically provided for the right of the accused to present witnesses in his favor (Virginia, North Carolina, and the Pennsylvania minority), it appears that the working was designed to get the support of New York which had given more emphasis to subpoena power, though having the same meaning as the other proposals.

Indeed, no significance appears to have been placed on this narrower wording; certainly no suggestion was made that the provision was limited to the simple issuance of subpoenas on behalf of the defendant. For example, though not specifically providing for the use of sworn testimony, and although some state provisions did, it has always been considered that the Sixth Amendment includes the swearing of defense witnesses as a matter of constitutional right.

In the same summer that the Bill of Rights was being considered, Congress enacted a statute, now found in 18 U.S.C. §3005, providing that the accused in cases of treason or capital cases:

> shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have like process of the Court to compel his witnesses to appear at this trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

This statutory provision has been treated as identical in import to the Sixth Amendment, e.g., *Wallace v. Hunter*, 149 F.2d 59 (10th Cir. 1945).

Indeed, the Supreme Court has held that the Sixth Amendment is not limited to its literal terms, but that its meaning must be understood from the context in which it was adopted. *Gompers v. United States*, 223 U.S. 604, 34 S.Ct. 693, 58 L.Ed.2d 1115 (1914). The principles of the Sixth Amendment have been understood to be the same as the previously adopted state provisions, even though they provided, in an explicit sense, more guarantees. *United States v. Reid*, 53 U.S. 361, 13 L.Ed 1023 (1851).

1. The Case of Aaron Burr

The trial of Aaron Burr presented an early opportunity for the construction of compulsory process clause. *United States v. Burr*, 25 F. Cas. 30 (No. 14692D) (C.C.D.Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14, 694) (C.C.D.Va. 1807). Burr brought motions for subpoenas to compel the production of letters originally sent to President Jefferson, one of which was in the custody of the Attorney General.

With respect to the motion to subpoena, granted for one of the letters, the government

argued in opposition (1) that a *subpoena duces tecum* was not covered by the Sixth Amendment, which related only to witnesses and not documents; (2) that the defendant's showing was insufficient, having only stated that the letter *may* be material to his defense; (3) the motion was premature because the defendant was not yet indicted; (4) the motion was invalid with respect to a United States President who is privileged from subpoena.

In his decision of June 13, 1807, Justice John Marshall ruled against all these objections and the subpoena issued to Jefferson. Jefferson complied by the delivery of a letter, dated October 21, 1806.

When Burr learned that a second letter to Jefferson, dated November 12, 1806, had been delivered to the Attorney General, George Hay, with instructions to assert such privileges as might be proper, he applied for another subpoena to the Attorney General to produce the letter. Marshall ruled that any Presidential privilege must be personally asserted, otherwise the case would be continued until a subpoena was complied with. Marshall also stated, contemplating the assertion of the presidential privilege, that the President's privilege must be balanced against heavy concern for the accused, and that it would be

> a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it.

He further ruled that, without regard to the interests of Presidential secrecy, the defendant is entitled to any information, "absolutely necessary in the defense" or "essential to the justice of the case." 25 F. Cas. at 192. If the President refused to disclose such information, the courts would halt the prosecution. 25 F. Cas. at 191-2. Burr dropped his request for the subpoena prior to Jefferson's response. The principles contained in the Burr case are accepted and enlarged upon in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

From the *Burr* case until 1967, the Supreme Court referred to the compulsory process clause only five times, never in a holding. But in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948), the Court described what it regarded as the most basic ingredients of due process of law, all taken from the Sixth Amendment:

> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 U.S., at 273, 68 S.Ct. at 507 (footnote omitted)

With the emergence of incorporation into the 14th Amendment "due process" clauses of principles of substantive due process, and the applicability of these principles to the states, the emphasis, in cases involving impairment of a defendant's right to a fair trial, was too often on the notion of "due process," and "fair trial," provisions of the Bill of Rights despite what may be the more particular applicability of the compulsory process clause. For example, many cases involving denials of defense evidence or adjournments in order to assist in the obtaining of witnesses was decided by simple reference to due process clause, even though the due process clause was merely the vehicle for application of the terms of the Sixth Amendment. *See, e.g.*

People v. Peterkin, 151 A.D.2d 407, 543 N.Y.S.2d 438 (1st Dept. 1989) (Smith, J., dissenting).[8]

Similarly, in *Ferguson v. Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961), the Court struck down a Georgia statute, which codified the common law rule which only allowed the defendant to make an unsworn statement of his behalf. As originally argued and as decided, the statute was held to be a denial of the right to counsel, because it did not permit the defendant to be assisted by the examination of the defendant by his lawyer to elicit his version of the events. At the time only the right to counsel had been "incorporated" into the 14th Amendment due process clause. But later the Court, citing Professor Westen, recognized that the case was in fact a case protecting the right to present a defense.[9] The real defect in this statute was not just that the statement would be unassisted by counsel, but that it would be unsworn; *i.e.*, the defendant would not be able to present his testimony on a par with witnesses for the prosecution.

2. Washington v. Texas - The Right to Present the Defense"

In 1967 the United States Supreme Court decided *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The Texas rule considered in *Washington*, formerly in wide acceptance under the common law and in federal courts, held accomplices incompetent to testify *for* one another, although the state was free to use an accomplice *against* the accused. Washington was charged with murder to which one named Fuller was willing to confess. Fuller was the only other eyewitness to the event and there was some corroboration of his guilt. Since Fuller was incompetent to testify under the Texas statute, Washington was convicted and sentenced to 50 years. He was represented on appeal by Charles W. Tessmer, of Dallas, later a President of the NACDL.

There were two questions before the Court and both had to be answered in favor of the Petitioner: (1) Does the Sixth Amendment compulsory process clause apply to the states? (2) Was the Texas rule of evidence violative of that right. The Supreme Court stated:

> We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witness on the stand, as well as the right to compel their attendance in court.

Id., 388 U.S. at 19, 87 S.Ct. at 1923. The Supreme Court recognized that the compulsory process clause was designed to secure more than the presence of the defendant's witnesses:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present the defense, the right to present the defendant's version of the facts as well as the

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[8] "Finally, the defendant's right to call the complaining witness is the essence of *due process*." (citing *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973))

[9] *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) ("The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor,' "). (*Rock* is discussed further below at p. 45) Whether the common law practice established a "right" of the accused *today* to make only an unsworn statement, no one has tried to establish as far as I know.

> prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. *Ibid*.

The Supreme Court first held that the Sixth Amendment is applicable to the states, and then that the Texas accomplice rule was invalid because it

> 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 the defense.

Id., 388 U.S. at 23, 87 S.Ct. at 1925. The Texas rule was considered arbitrary, the Court said, because it prevented

> whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

Id., 388 U.S. at 22, 87 S.Ct. at 1925.

It should be noted that the Texas rule was invalidated as being arbitrarily applied, rather than being irrational. The statute, like many rules of competency, was designed to prevent perjury, and each accomplice attempting to swear the other accomplice out of the charge. *Benson v. United States*, 146 U.S. 325, 335, 13 S.Ct. 60, 36 L.Ed. 991 (1892). However, the exclusion of the accomplice testimony is a means more drastic than necessary for the accomplishment of this purpose since it is

> the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge about the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. *Ibid*.

Thus, the State of Texas had no "compelling interest" in using the disqualification of accomplice testimony as a means of avoiding perjury; the weight and credibility of the testimony should have been left with the jury to determine.

Since most of the rules and practices which limit the ability to discover evidence, particularize charges, and put evidence before the jury are founded on suspicion that defendants will commit or support perjury whenever they can, this is an extremely important constitutional principle to have in mind in persuading courts.

Of particular interest is the fact that the Supreme Court did not determine the case simply on the basis that the rule discriminated against the defendant, the prosecution being allowed to use accomplice testimony to establish its own case, whereas a defendant was not. The Court rejected Justice Harlan's proposed theory that the matter should have been remanded so that Texas could have the choice of whether to invalidate the statute, making accomplices competent for *all* parties or to invalidate that part of the statute which allowed the state to use accomplices as witnesses where the accused was not. In Harlan's view, the interest of the defendant under the

Sixth Amendment would have been satisfied in having parity with the prosecution in the power to compel the production of evidence, cf. 388 U.S. at 24-25, 87 S.Ct. at 1926, Harlan, J., dissenting).

The rejection by the Court of Harlan's approach is of critical and lasting significance. The Court determined not only that the state's rule could not be spared by making it equally applicable to the accused, whatever the rule was, but that certain evidence must be available to the accused, without regard to *whether or not the same evidence is available to the prosecution.* This final observation, which has to do with the fact that, far from holding the accused to parity with the state in respect to rights, obligations and advantages within our adversary system of criminal justice, will be explored further below in the section entitled "The accused is not limited to parity with the state" at page 171.

C. Compulsory Process under state constitutions

The most significant development in constitutional law in the United States since the implementation of the "incorporation" of various Bill of Rights provisions into the Due Process clause of the Fourteenth Amendment, reflected in *Mapp v. Ohio*, is the development of state constitutional interpretations which now eclipse the range of many federal guarantees. This topic generally described as entitled The "New Federalism" has been widely discussed. In this article on the Right to Present a Defense I will try to point out decisions from state courts providing more protection in this area.

The reader simply has to keep in mind that in all litigation of criminal cases in state courts there are two constitutions that are to be reckoned with. In some areas, like search and seizure, there is almost no advantage to the assertion of federal claims, and indeed there can be distinct *disadvantages* to relying on federal claims of right. At least to this point, one is well off also arguing these claims of the Right to Present a Defense as federal claims as well. Therefore, federal cases are also liberally utilized in these materials and they should be, where applicable, by advocates.

D. Compulsory Process in Canada

In Canada, § 7 of the Charter of Rights and Freedoms guarantees the right to make a "full answer and defense." The evolution of rights under the Canadian Charter, enacted in 1982, closely parallels the evolution of the right to compulsory process, all of which arise out of the same English-speaking common law traditions.

The decision in *R. v. Seaboyer*, 7 C.R.(4th) 117 (1991) involved the constitutionality of the Canadian "rape shield" statute. The Court describes the fundamental nature of the right of the accused to make his or her defense:

> The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(d) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case" [citations omitted]. . . Thus, our Courts

> have traditionally been reluctant to exclude even tenuous defense evidence: David H. Doherty, " `Sparing' the Complainant `Spoils' the Trial" (1984) 40 C.R. (3d) 55, at p. 58, citing *R. v. Wray,* [1971] S.C.R. 272, 11 C.R.N.S. 235, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 373, and *R. v. Scopelliti* (1981), 34 O.R. (3d) 524, 63 C.C.C. (2d) 481 (C.A.).

R. v. Seaboyer, 7 C.R.(4th) at 136.

> The right of the innocent not to be convicted is dependent on the right to present full answer and defense. This, in turn, depends on being able to call the evidence necessary to establish a defense and to challenge the evidence called by the prosecution. As one writer has put it:
>
> > "If the evidentiary bricks needed to build a defense are denied the accused, then for that accused the defense has been abrogated as surely as it would be if the defense itself was held to be unavailable to him." [Doherty, at p. 67 [40 C.R. (3d)]]
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defense to which the law says one is entitled. The defense which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

R. v. Seaboyer, 7 C.R.(4th) at 137.

Relying in part on the due process requirement and in part on the right of the accused to "make full answer and defence," "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted," the Supreme Court's landmark ruling in *R. v. Stinchcombe*, 3 S.C.R. 326, 68 C.C.C. (3d) 1 (1991) held that the Crown is under a general duty to disclose all information within its control unless it is clearly irrelevant or privileged. *Id.* at p. 339. Thus, there is tremendous untapped potency in the compulsory process right.

II. The Right to Present a Defense

In the 1972 term of the Supreme Court four convictions were reversed with reference to the Court's holding in *Washington*, demonstrating a broad view of the compulsory process clause.[10] Taken together these and other cases may be taken to establish the modern kernel for articulating the "right to compulsory process," or, as we shall say, the "right to present a defense." It was based on these cases that Professor Westen observes:

> Although still vacillating between compulsory process and due process as a ground for its decisions, the Court has said and done enough to support the conclusion that it recognizes a comprehensive right of the accused to present a defense through witnesses... [T]he right entitles a defendant to discover the existence of potential witnesses; to put them on the stand; to have their testimony believed; to have their testimony admitted into evidence; to compel witnesses to testify over claims of privilege; and to enjoy an overall fair balance of advantage with the prosecution with respect to the presentation of witnesses.

Westen, Compulsory Process, 73 Michigan L. Rev. 71 (1974) at 120-21 (footnotes omitted).

Each of these separate components of the Right to Present a Defense are presented in the sections which follow. To this list I have added the "right to compel the attendance of witnesses and production of documents," a more obvious category in which the actual business of obtaining the presence of witnesses from in and out of state and in and out of prison are discussed.

I note here that there is great resistance among many judges to the idea—no matter how well established in the history of this doctrine—that the defendant can "break the rules" regarding the admission of evidence, or have any advantage over the prosecution. They will grasp at declarations like that by Justice Scalia in *Montana v. Egelhoff*, 518 U.S. 37, 42, 135 L. Ed. 2d 361, 116 S. Ct. 2013 (1996), that "the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" and a moment's reflection on the exaggerated and desperate tone of these statements—provides a powerful lesson on the real contention that the "mere invocation of that right cannot *automatically and invariably* outweigh countervailing public interests," *Taylor v. Illinois*, 484 U.S. at 414, the power of this 6th Amendment right. No one is arguing for such "unfettered rights." No cases have acted "automatically" on the mere mention of the Right to Present a Defense. But the *perceived need* on the part of Justice Scalia to so exaggerate what the Right to Present a Defense is all about, can only be taken as indicative of his understanding of the true reach of this doctrine.

Nevertheless, many courts grasp at these pronouncements, essentially to nullify the Right to Present a Defense, by reducing it to the right to a "fair trial" with evenhanded application of the rules of evidence – as if this fundamental constitutional right provided no more protection that the non-arbitrary application of the rules of evidence. It is the job of the advocate to demonstrate that the Right to Present a Defense, as reflected in the numerous cases reflected herein, provides much more protection than that, or there is no point to having such a right to

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[10] *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L.Ed.2d 82 (1973); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Cool v. United States*, 409 U.S. 100, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972).

begin with.

Although the focus of this article is on trial level proceedings, there can be no doubt that the right to compulsory process applies as well to all pretrial hearings, sentencing, and any post-conviction proceedings in which the accused has the right to a due process inquiry into the facts.[11]

III. The Right To Discover Favorable Evidence

Certain kinds of discovery have roots in the compulsory process clause. Although *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 15 (1963) concluded a line of cases dealing with the improper suppression of evidence favorable to the accused by the prosecution, *Brady* and those cases following it are clearly "discovery" cases, requiring the production by the prosecution, on request, of evidence favorable to the accused. "Good faith" is no excuse for the failure to turn over such information. New York preceded the Supreme Court in the announcement of this right,[12] and has stated it in the most affirmative fashion by requiring the prosecution to surrender its file to the court or defense counsel for examination where there is "some basis for argument that material in the possession of the prosecutor **might be**" favorable to the accused and has not been disclosed. *People v. Consolazio*, 40 N.Y.2d 446, 453, 387 N.Y.S.2d 62 (1976).

A full discussion of *Brady* cannot be undertaken here. However it is important to note that many prosecutors, notably the Department of Justice, who cling to a retrospective view of the holding in *Brady* as simply a "suppression" case — providing a remedy for the suppression of what they narrowly construe as "exculpatory evidence" — and not as a prospective holding granting discovery rights. But, consistent with the latent compulsory process underpinnings of *Brady*, it is important to fight against any claims that favorable evidence is not "material"

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[11] The New York decision in *People v. Chipp*, 75 N.Y.2d 327, 553 N.Y.S.2d 72 (1990), which held that the right to compel the attendance of a youthful complainant to a *Wade* hearing was outweighed by other interests, was clearly designed to avoid the accused from having a preview of the witness' testimony at trial and to protect the youthful witness. Discussed below at n. 248, *Chipp* must be regarded as an aberration.

I have found no cases specifically ruling on compulsory process grounds on the issue of subpoenas in connection with sentencing, but in general courts recognize the right of the accused to present evidence in relation to sentencing, at least on statutory or "due process" grounds. *E.g.* *United States v. Davenport*, 445 F.3d 366, 372 (4th Cir. 2006); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989). In *United States v. Olhovsky*, No. 07-1642 (3rd Cir. 2009) the denial of a subpoena to the defense to produce a treating psychiatrist as a witness at the sentencing hearing. In none of these cases does it appear that the defense raised compulsory process as an issue, however.

There do not appear to be any cases involving the denial of compulsory process in New York post-conviction proceedings (brought under CPL §§ 440.10). And the Advisory Committee Notes to Federal Habeas Rule 8 recognize that subpoenas, and payment of witness fees, where needed, are available to federal habeas petitioners. *See* Hertz & Liebman, Federal Habeas Corpus Practice and Procedure (4th Ed) at §21.1(c)

[12] *People v. Savvides*, 1 N.Y.2d 554, 154 N.Y.S.2d 885 (1956)

because it does not prove innocence. [13] The standard of materiality must be any information which might, in the mind of a reasonable juror, create reasonable doubt. *State v. Osborne*, 345 S.E.2d 256, 258 (S.C. Ct. App. 1986).[14]

The right to discovery of favorable evidence must necessarily include the right to get discovery in sufficient time for the defense to make use of it. *State ex rel. Donnley v. Connall*, 257 Or. 94, 475 P.2d 582 (Or. 1970). And in that calculation, the demands on counsel at the eve

[13] Assistant United States Attorneys only refers to "exculpatory evidence" as the subject of its "Brady" obligation. The word "exculpatory" does not define that which must be disclosed. The word "exculpatory" is nowhere found in the Supreme Court's main opinion in Brady. Justice White's concurring opinion contains the word, but only as part of a direct (and irrelevant) quote from the opinion of the Maryland court! Only the term "favorable information" accurately conveys the terminology of *Brady*, 373 U.S. 83, 87, and the admissibility of the information as evidence is irrelevant to whether it must be disclosed. Finally, *Brady* provides no rationale for delaying disclosure of favorable information, but in this district, contrary to the DOJ's announced policy, the government has zealously fought for the power to withhold disclosure until as close to trial as it thinks it can get away with, giving as little chance to the defense to use the information as possible.

To make it absolutely clear that the government does not agree with the courts when conceptualizing for itself what its "Brady" obligation is, one need go no further than the 2006 revisions to the United States Attorneys Manual. These revisions were made in the face of proposals to codify Brady because of systemic failure of the government to live up to its Brady obligation. *See*, The Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, by Laural Hooper and Sheila Thorpe, "Brady v. Maryland Material in the United States District Courts: Rules, Orders, and Policies," Federal Judicial Center, May 31, 2007, ("Judicial Center Report") But rather than advance to a position more consistent with the courts, the government has retrenched. They make it clear that "exculpatory" and "favorable" is a chasm of constitutional denial. In the Manual, the official DOJ position is that Brady does not reach information which "may not, on its own, result in an acquittal." USAM 9-5.001 "Policy Regarding Disclosure of Exculpatory and Impeachment," section "C." <<www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm>> Thus, "exculpatory, for the federal prosecutor, does not mean "favorable" and does not even mean "tending to exculpate." It means evidence which "may on its own result in an acquittal."

And the manual is also clear that the government views information which it deems "inadmissible" as not within its Brady obligation. This would undoubtedly include "inadmissible" information of the type the Supreme Court has ruled error to exclude under the compulsory process clause of the 6th Amendment in such cases as *Washington v. Texas, Chambers v. Mississippi, Green v. Georgia*, and, most recently, *Holmes v. South Carolina*. All these famous cases involved reversal of convictions where evidence was in fact inadmissible under the rules of evidence, but where its exclusion nevertheless violated the Right to Present a Defense found in the compulsory process clause. See generally, Westen, Compulsory Process , 73 Michigan L. Rev. 71 (1974) at 120-21.

The extreme to which the government goes in clinging to its "actual innocence" approach to *Brady* is reflected in what it offers as generous extensions of its Brady policy. In Section C of the policy the DOJ takes the position that it will "voluntarily" disclose (1) evidence that is "inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense" (2) "information that either casts a substantial doubt upon the accuracy of any evidence – including but not limited to witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence" and (3) including information which may not be admissible. But the DOJ maintains that this is not required by Brady, which is limited in its view to admissible evidence that would require an acquittal.

[14] "The proper standard of materiality [of evidence that was not disclosed by the State after *Brady* motions] must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."

of trial must be taken into account. *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002)[15]; *Leka v. Portuondo*, 257 F.3d 89, 101 (2nd Cir. 2001); *United States v. Washington*, 263 F.Supp.2d 413 (D.Conn. 2003) (Excellent decision granting new trial on account of late disclosure of impeachment evidence, analyzing the prejudice even where the defense has the material "in time" to use it at trial, but not to reflect on trial strategy) and 294 F.Supp.2d 246 (D.Conn. 2003) (Adhering to determination on reconsideration); Hollander and Bergman, Every Trial Criminal Defense Resource Book, § 14:7. Timing of disclosure (West 2005)

The compulsory process clause provides the best constitutional foundation for these post-*Brady* cases. Cf. *United States v. Augenblick*, 393 U.S. 348, 356, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). But compare *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Unlike the right of confrontation, which is strictly a trial right, the compulsory process clause applies prior to trial and even prior to indictment, to the efforts of the defendant to obtain impeaching evidence, and independent witnesses. But Cf. *People v. Simone*, 92 Misc.2d 306, 401 N.Y.S.2d 130 (Sup. Ct. Bronx 1977).

However, the pattern of discovery practices in the United States has not yet reflected the full reach of the compulsory process requirement as it ought to be interpreted. The discovery process still remains a "sporting contest" because there is considered to be no common law right to discovery prior to trial and the statutes are restricted to certain categories of material. The so-called "*Brady*" requirement is read stingily by prosecutors who erroneously use the catchphrase "exculpatory material" to limit their obligations.

However, there is an even more basic proposition to be explored — the right to discover at all. It is often said that discovery is a creature of statute, as if, without statutes providing for it, it would not exist. I think that if statutory discovery were eradicated this moment, the next moment judges would realize that the constitution could not tolerate eradicating discovery – a constitutional right would be discovered in the statutory entrails. In Canada, there is a right to discover all relevant evidence.[16] This is as it should be in the United States.

In California the seminal case applying due process to defense discovery is *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974):

> [A]n accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. *Cash v. Superior Court*, 53 Cal.2d 72, 75 (1959); *Powell v. Superior Court*, 48 Cal.2d 704, 707

[15] "When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case."

[16] In Canada, relying in part on the due process requirement and in part the right of the accused to "make full answer and defence," "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted" the Supreme Court's landmark ruling in *R. v. Stinchcombe*, 3 S.C.R. 326, 68 C.C.C. (3d) 1 (1991) held that the prosecution had to turn over to the defense all material relevant to the charges, whether the prosecution intended to use it or not.

> (1957) The requisite showing may be satisfied by general allegations which establish some cause for discovery other than 'a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime.' [Citations omitted]

11 Cal.3d at 536-537.

In a later application of *Brady/Kyles* principles, the California court said: "[T]he prosecutor has ready access to a veritable storehouse of relevant facts and... this access must be shared 'in the interests of inherent fairness." *In Re Brown* 17 Cal.4th 873, 882 (1998)

A. Access to witnesses

A fundamental premise of the rights to compulsory process ("the right to present a defense") and to a fair trial is that the defense be able investigate the charges so as to prepare to call or confront material witnesses.

1. The State cannot hide witnesses

It is a familiar proposition that the state cannot hide witnesses from the defense or otherwise make them inaccessible. Thus the prosecutor may not tell witnesses to not talk to the defense attorney or investigator. *Gregory v. United States*, 369 F.2d 185 (DC 1966). Judge J. Skelly Wright's opinion is most instructive even 40 years later:

> [3] We accept the prosecutor's statement as to his advice to the witnesses as true. But we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct: 'A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.' Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision.
>
> [4] We do not, of course, impugn the motives of the prosecutor in giving his advice to the witnesses. Tampering with witnesses and subornation of perjury are real dangers, especially in a capital case. But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit unless the prosecutor is present to monitor the interview. We cannot indulge the assumption that this tactic on the part of the prosecution is necessary. Defense counsel are officers of the court. And defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury. In fact, the Government's motivation in disallowing defense counsel to interview witnesses apparently stems from factors other than fear of tampering. Recent records in this court

> reveal that the same policy followed in this case is followed even when the witness involved is a member of the police force. See Holmes v. United States, 125 U.S.App.D.C. , 370 F.2d 209 (No. 19, 519, decided July 21, 1966), Tr. pp. 138-139.
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> [5] A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. [FN7] A related development in the criminal law is the requirement that the prosecution not frustrate the defense in the preparation of its case.

"The equal right of the prosecution and the defense in criminal proceedings to interview witnesses before trial is clearly recognized by the courts." *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 509 (9th Cir. 1994)("Abuses can easily result when officials elect to inform potential witnesses of their right not to speak with defense counsel.")(quoting *United States v. Rich*, 580 F.2d 929 (9thCir. 1978)); *United States v. Cook*, 608 F.2d 1175, 1180 (9th Cir. 1979); *Callahan v. United States*, 371 F.2d 658, 60 (9th Cir. 1967); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Munsey*, 457 F.Supp. 1 (E.D. Tenn. 1978); *Rhodes v. State*, 386 S.E.2d 857 (Ga. 1989), *State v. Mussehl*, 408 N.W.2d 844 (Minn. 1987); *United States v. Rodgers*, 624 F.2d 1303 (5th Cir. 1980); *United States v. Carrigan, 804 F.2d 599 (10th Cir. 1986); United States v. King, 368 F.Supp. 130 (D.C. Fla.* 1973) Therefore, "absent a fairly compelling justification, the government may not interfere with defense access to witnesses" *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985); *United States v. Henricksen*, 564 F.2d 197 (5th Cir.1977) (defense witness intimidated by terms of plea bargain); *United States v. Hammond*, 598 F.2d 1008 (5th Cir.1979) (defense witness intimidated by remarks of Federal Bureau of Investigation agent). "Substantial [government] interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants." *Demps v. Wainwright*, 805 F.2d 1426 (11th Cir.1986) (citing *United States v. Goodwin*, 625 F.2d 693, 703 (5th Cir.1980)).

This doctrine extends to less direct action by the prosecutor. In *State v. Williams*, 485 S.E.2d 99 (S.C. 1997) the witness' *counsel* refused to allow interview without consent of the prosecutor, who discouraged the interview, and said it would not be in his client's "best interest" to consent to an interview. This constituted improper intimidation and "substantial government interference with a defense witness' free and unhampered choice to testify," resulting in reversal of the murder conviction, even though the decision to cooperate was, at least in theory left up to the witness. *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir.1990).

Remedies

In *United States v. Peter Kiewit Sons' Co.*, 655 F.Supp. 73 (D.Colo.,1986) the trial court ordering depositions "where prosecution's advice at least strongly implied that witnesses should decline requested defense interviews."). *United States v. Carrigan*, 804 F.2d 599 (10thCir.1986) sustained the district court's order granting discovery depositions as a proper sanction for

prosecutorial misconduct in preventing defense counsel's access to government witnesses); Muldoon, Handling a Criminal Case in NY, §1:78; Some courts have also applied harmless error analysis to this situation if the witness in fact submits to an interview. *United States v. Wellman*, 830 F.2d 1453 (7th Cir.1987)

One district court case dismissed a criminal case because the prosecutor required as a condition of a plea agreement that a co-defendant not cooperate with the defense. *United States v. Lung*, 351 F.Supp.2d 992 (C.D.Cal. 2005); *United States v. Cook*, 608 F.2d 1175, 1180 (9th Cir.1979) (en banc) ("As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial.")

2. Witnesses cannot disinvolve themselves

The defendant's right to access to other witnesses would include access by his attorney to a co-defendant, notwithstanding the refusal of the co-defendant's attorney. *People v. Caparelli*, 21 A.D.2d 882, 251 N.Y.S.2d 803 (2d Dept. 1964). Even where the witness is the victim of the crime or a potential victim of a retaliatory crime, the defendant must be given access, even if the People do not intend to call this person as a witness. *People v. Peterson*, 98 Misc.2d 637, 414 N.Y.S.2d 436 (N.Y.C.Crim.Ct. Bronx Co. 1978) (defendant had the right to access to the victim in a jostling prosecution, although the prosecution claims she had no knowledge of the attempted offense and feared retaliation). Although the witness has a right to refuse to be interviewed, it must be the witness' choice free from the prosecutor's influence.

3. Protection of witnesses notwithstanding

The access to witnesses can be *regulated* in exceptional circumstances, which have almost exclusively constituted cases where there was a credible showing of a threat to the witnesses if their identity or whereabouts were disclosed. *E.g., People v. Ancrum*, 281 A.D.2d 295, 722 N.Y.S.2d 152 (1st Dept. 2001); *People v. Sweeper*, 122 Misc.2d 386, 471 N.Y.S.2d 486 (N.Y. Sup. 1984) . *People v. Robinson*, 200 A.D.2d 693, 606 N.Y.S.2d 908 (2d Dept. 1994). The results in these cases were permissive of disclosure in such a way that the witness' safety, not just privacy, was protected, even though other constitutional concerns might still be presented. *People v. Mojica*, 244 A.D.2d 138, 677 N.Y.S.2d 100 (1st Dept. 1998) (Gag order on defense counsel to not discuss witness' identity with client).

The prosecution may have less of a choice with respect of witnesses under its control, and may be compelled to produce such witnesses under circumstances which preserve their safety, or suffer dismissal. *People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571 (1974); *People v. Jenkins*, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977). (*Goggins* held that the prosecution must disclose the name of an "informant" who played a material role in gathering the evidence against the accused. *Jenkins* extended that rule to also require production of that informer witness when he was under the control of the prosecutor).

4. Access to favorable witnesses

The issue of the right to access to witnesses was also raised in *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), where the government deported the aliens claimed to have been smuggled into the country by the defendant. Given the responsibility of the government to deport the aliens, the Court required some showing of materiality before dismissal would be warranted. "Some explanation" of how the testimony "would have been favorable and material." This is a relatively low threshold – it is not proof by a preponderance of evidence or even "probable cause," but merely "some showing." Where there is no countervailing obligation, as in the case of the requirement to deport aliens, it is reasonable for the government to be required to preserve, if not the witness, at least the identity of witnesses so that the accused can locate them.

The state has to reveal witnesses whose evidence is favorable, like the non-identifying eyewitness. See, *People v. Roberts*, 203 A.D.2d 600 (2nd Dept. 1994) (witness whose statement to police indicated she could not identify defendant created *Brady* obligation for prosecution); *People v. Hoover*, 162 A.D.2d 710 (2nd Dept. 1990) (although insufficient evidence of prejudice was show for new trial because evidence in question was eventually disclosed prior to trial, failure of witness to identify defendant as the perpetrator was *Brady* material); *United States v. Colyer*, 571 F.2d 941 (5th Cir. 1976) (evidence of witnesses failure to identify the defendant as the perpetrator was *Brady* material). *People v. White*, 606 N.Y.S.2d 172 (N.Y.App.Div. 1994). (Convictions vacated under *Brady* where undisclosed statement indicated that prosecution witness said he could not identify person who shot victim). But see, *United States v. Rhodes*, 569 F.2d 384, 388 (5th Cir.), cert. denied, 439 U.S. 844, 99 S.Ct. 138, 58 L.Ed.2d 143 (1978) (holding prosecutor had no Brady duty to disclose that a certain witness could not positively identify the defendant).

B. Access to physical evidence

Valenzuela-Bernal is a good model for evaluating other cases where physical evidence, material to the case, is lost by the state. *People v. McCann*, 115 Misc.2d 1025, 455 N.Y.S.2d 212 (Sup.Ct.Queens 1982) (loss of blood from scene).

Even where the physical evidence must be kept secret, if it is material the defense must have access to it. *People v. Darrosa*, 177 Misc.2d 837, 676 N.Y.S.2d 922 (Nassau Co. 1998) (Videotape which was purported to portray actual occurrence of sexual acts between defendant and two-year-old victim).

The right exists even if the evidence is in the hands of a third person. *People v. Harte*, 99 Misc.2d 86, 415 N.Y.S.2d 390 (Sup.Ct. Bronx Co. 1979) (Subpoena to OTB); *People v. Trocchio*, 107 Misc.2d 610, 435 N.Y.S.2d 639 (N.Y.Co.Ct. 1980) (Court granted reciprocal "discovery" of the complainant's blood and saliva as a condition for the prosecution's "discovery of defendant's blood and saliva"); *Haynie v. State* (Ga. 1977)(Bullet lodged in victim material to defense); *State v. Lee*, 461 N.W.2d 245 (Minn. 1990) (Approved access to a private home that was a crime scene, the control of which was returned to the victim's family at the time the defendant sought discovery.) Other cases recognize the right, even if they find reasons to not enforce it in a particular case. *People v. Nicholas*, 157 Misc.2d 947, 599 N.Y.S.2d 779

(S.Ct.Bronx 1993)[17]; *People v. Chambers*, 134 Misc.2d 688, 512 N.Y.S.2d 631 (Sup.Ct.N.Y.Co. 1987).

1. Prosecutor's duty to preserve evidence

In New York

> [a] public prosecutor in the State of New York is under a mandatory duty to preserve evidence gathered during a criminal investigation. The purpose of this particular rule is so that such evidence will be available for the purpose of discovery by the defendant when his right to such discovery arises. *People v. Martinez*, 71 NY2d 937 (1988); *People v. Kelly*, 62 NY2d 516 (1984). Since the duty to preserve such evidence is already well established, a duty readily acknowledged by the Otsego County District Attorney's Office, the court order requested by the defendant is totally unnecessary. The District Attorney is already under an obligation to preserve any material which may arguably fall within the ambit of *Brady* [*footnote omitted*] or *Rosario*[18] or any material which may remotely be discoverable under CPL 240. Accordingly, defendant's motion for an order directing the People to preserve any and all evidence is denied.

People v. Gordon M. Mower, Jr. 5/24/96 N.Y.L.J. 36, (col. 4) (Otsego Co. Ct.) See also *People v. Molina*, 121 Misc. 2d 483 (N.Y. Crim. Ct. 1983); *State v. Benton*, 136 Ohio App.3d 801, 737 N.E.2d 1046 (2000). See also, THE SEDONA GUIDELINES: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (The Sedona Conference, September 2005) ("the common law creates obligations to preserve evidence (whether designated as records or not) when actual or reasonably anticipated litigation is involved.")

There are criminal cases premised on the supposed exclusively legislative basis for discovery — which the entire treatise disproves — which do not require dismissal for the loss or destruction of evidence "[U]nless 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." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S.Ct. 333,337(1988) (6-3 decision). Of course, Youngblood was ultimately exonerated by DNA, a fact of which any court relying on the Supreme Court's decision – rendered before DNA analysis was available — should be reminded.

My primary observation here is that the petitioner in that case raised the question as one of "due process" and not a more specific right under the 6th Amendment compulsory process

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[17] Although the trial judge in this case recognizes the right, he then confuses it to be a only a "due process" claim and undertakes to "balance" this against the third party's privacy interest. Cases from other jurisdictions are cited in support of this analysis. This evidences the analytical mistakes to which trial judges are prone as discussed at pages 157 and 166 below.

[18] [*in original*] *People v. Rosario*, 9 NY2d 286 (1961)

clause. (*Valenzuela-Bernal* recognizes the distinction between the two claims, though not necessarily reaching a different standard of analysis. But again, in *Valenzuela-Bernal* the government had a "duty" to deport, which gave it the edge. In the normal case the government does not have a duty to dispose of biological evidence or the seized drugs, etc.)

And a number of states have not followed *Youngblood* because of the unfairness of requiring the accused to prove bad faith or that the evidence would in fact have been favorable. *Tennessee v. Ferguson*, 2 S.W.3d 912 (1999) (Rejecting *Youngblood* "bad faith" analysis, and discussing cases which have similarly adopted a "fair trial" analysis in accordance with Stevens' concurring opinion.)

Certainly showing that the prosecution ignored a request to preserve evidence would establish the requisite "bad faith." *State v. Lopez*, 156 Ariz. 573, 754 P.2d 300 (1987) (presumption that the evidence was material, the accused has been prejudiced and the state acted in bad faith where the evidence was lost or destroyed after the request was received). *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994) (destruction of radio tower legs defendants were accused of improperly constructing); *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993) (destruction of "meth lab" equipment); *United States v. Belcher*, 769 F. Supp. 201 (Va. 1991) (destruction of marihuana); *Columbus v. Forest*, 36 Ohio App. 3d 169, 173 522 N.E.2d 52 (1987); *State v. Benton*, 136 Ohio App.3d 801, 737 N.E.2d 1046 (2000) (destruction of videotape of police stop – "we therefore hold that the state has the burden of showing that the tape was not exculpatory."); *People v. Newberry*, 166 Ill.2d 310, 652 N.E.2d 288 (1995); *Commonwealth v. Henderson*, 411 Mass. 309, 582 N.E.2d 496 (1991)("The fact that the police did not act in bad faith when they negligently lost the potentially exculpatory evidence cannot in fairness be dispositive of the issue.");

C. Access to documents

Depending on your jurisdiction and the structure of the law enforcement agencies involved, the question of obtaining documents may come up under the category of "discovery" or "subpoena." There are persistent questions about whether discovery can be denied because the defendant could issue a subpoena, or whether a subpoena can be denied because it seeks to "circumvent" discovery.

And within each sector, compulsory process concerns arise, affecting both the applicable procedures and the scope reach of the accused. Somewhat arbitrarily the discussion here focuses on document discovery, and subpoenas are discussed below, at p.35.

1. Police records

An exemplary New York case is *People v. Cabon*, 148 Misc.2d 260, 560 N.Y.S.2d 370 (N.Y.City Crim.Ct. 1990) the New York City Police Department moved to quash subpoenas duces tecum obtained by defense counsel seeking specific routine police reports. The defendant relied on the right to compulsory process of witnesses and documentary evidence that might be favorable to him. Relying on *United States v. Burr*, 25 Fed.Cas. 30 (C.C.Va. 1807), CPL § 610.25 (as amended in 1979) and Rule 17(c) of the Federal Rules of Criminal Procedure, the court upheld the defendant's right to acquire information by subpoena duces tecum so long as the

evidence is relevant and material, the test being whether there is a "reasonable possibility" that the records would make a difference in the outcome of the trial.

The Police Department's argument that items not discoverable under CPL § 240.20 and 240.40, like police reports, may not be acquired indirectly by subpoena was rejected. The court held that the compulsory process of police reports is based on the materiality of those reports to the defense, and is not dependent upon new statutory discovery limitations. Even highly confidential material which is not subject to discovery is available by subpoena if material (see, *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924, *Pennsylvania v. Ritchie, supra*, *United States v. Nixon, supra*).

The court also stated that

> [i]nsofar as other New York trial court decisions have summarily quashed subpoenas for routine police reports and have not determined their materiality, I respectfully disagree with those holdings as being contrary to the procedure supported by *Pennsylvania v. Ritchie, supra*.

People v. Cabon, supra, at 377-378. Summarily quashing the subpoenas in this case was held to be improper.

> As a matter of law, the defendants are entitled to know before trial any exculpatory evidence, including potential evidence or leads to evidence, in the subpoenaed materials if there is a reasonable possibility that it would make a difference in the outcome of their trial.

People v. Cabon, supra, at 378. *Accord*, *People v. Bagley*, 183 Misc. 2d 523, 705 N.Y.S.2d 488 (Sup. Ct. 1999) (Yates, J.)[19]:

> The right of compulsory process is a fundamental right guaranteed by our Federal and State Constitutions and by statute. The ability to compel the production of evidence is "essential to the very existence of a court of justice in any civilized community" (*Matter of Makames*, 238 App Div 534, 536 [4th Dept 1933]). Free exercise of that right is not, and was not intended to be, circumscribed by enactment of CPL article 240.

Judge Yates, whose authoritative knowledge of New York criminal law and procedure is unsurpassed, went on:

> In *People v Colavito*(87 NY2d 423 [1996]), the defendant complained that money orders were introduced as evidence at his larceny trial without prior disclosure. (He had, to his detriment, relied upon an unfulfilled promise by the prosecutor to voluntarily disclose the items in advance of trial.) Judge Bellacosa, writing for the Court, noted that, although the defendant could have moved for court-ordered disclosure pursuant to CPL 240.20, as well, he should have moved for a subpoena, citing CPL 610.20 (3). (Supra, at 428.) The Court denied the appeal, condemning defense counsel's "lack of initiative." (Supra, at 428.) Not only did the Court feel that a subpoena was appropriate and authorized

[19] Although the order was reversed, *People v. Bagley*, 279 A.D.2d 426 (1st Dept 2001), it was reversed on technical grounds of the sufficiency of the papers in support of the *subpoena*, and not the doctrinal assertions of Judge James Yates.

> as an auxiliary way of obtaining discoverable materials, it found a fault in the defendant's failure to pursue a subpoena.
>
> By its own terms, the plain language of CPL 610.20 (3) authorizes a court-ordered subpoena to "any department, bureau or agency of the state or of a political subdivision thereof"--which includes movant. (Emphasis added.) There is no exception for police reports. The statute coexists with article 240 as a separate and independent basis for acquisition of NYPD records.

He noted that the New York legislature had actually *removed* an exemption of police reports from discovery in the 1979 revision of the CPL, and that "[n]onetheless, such material could be subpoenaed for use at trial if relevant, material and not privileged." *People v Gissendanner*, 48 NY2d 543, 551 [1979].) *People v. Jovanovic*, 263 A.D.2d 182, 700 N.Y.S.2d 156, 4 ILRD 318 (1st Dept 1999) (Reversing of kidnaping 1st degree, sexual abuse 1st degree (three counts), and assaults, and 15 to life and remanded for a new trial); *Matter of Bernard C.*, 168 Misc. 2d 813, 640 N.Y.S.2d 962 (Fam. Ct. 1996); *People v. Burnette*, 160 Misc. 2d 1005, 612 N.Y.S.2d 774 (Sup. Ct. 1994); *People v. Cortez*, 149 Misc. 2d 886, 564 N.Y.S.2d 963 (N.Y.C. Crim. Ct. 1990)

2. Other police records

There are non-investigative materials in the possession of the police, such as policy manuals, analytical manuals for drug analysis, Breathalyzer documents, and so on, which are records of the business of the police department. Since these may he accessible by the prosecutor, there is no reason for a judge not to direct that discovery be provided of such material.

However, these materials may also be sought by subpoena, *People v. Kelly,* 288 A.D.2d 695, 732 N.Y.S.2d 484 (3rd Dept. 2001), or under a FOIL request to the agency.

3. Police internal files

We must draw a distinction between police investigative records, and police documents of a general nature, on the one hand, and police files which might have some sort of special privilege or privacy protection, on the other hand. The latter documents deserve, and are given, greater protection than the former, and so it would be a mistake to apply the same restrictions to all records just because they come from the police.

Despite privacy and privilege claims, the defendant is entitled to access to records from police department personnel, disciplinary, or civilian complaint files relevant to the credibility of police officers or the material facts of the case.[20] *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979) observes, at 548:

> . . . the constitutional roots of the guarantees of compulsory process and confrontation may entitle these to a categorical primacy over the State's

[20] It is important to comply with the terms of Civ. Rts. Law § 50-a in obtaining such records. See, *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979).

> interest in safeguarding the confidentiality of police personnel records.

Disclosure of these records is required if there is some showing

> in good faith of some factual predicate which would make it reasonable likely that the file will bear such fruit and that the quest for its contents is not merely a desperate grasping at a straw.

48 N.Y.2d at 550. However, the Court found that the record showed "nothing better than conjecture" that relevant material would be found in the subpoenaed files, resulting in an affirmance of the denial of the subpoena.

See also *People v. Cwickla*, 46 N.Y.2d 434, 414 N.Y.S.2d 102 (1979); *People v. Puglisi*, 44 N.Y.2d 748, 405 N.Y.S.2d 680 (1978) (defense attorney had information that narcotics cop had previously improperly handled "buys"); *People v. Vasquez*, 49 A.D.2d 590, 370 N.Y.S.2d 144 (2d Dept. 1975) (testifying police officer had previously been convicted for "shaking down" narcotics dealers); *People v. Sumpter*, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sup.Ct.N.Y.Co. 1973) [see Civil Right Law §50-a]; *People v. Szychulda*, 57 N.Y.2d 719, 454 N.Y.S.2d 705 (1982); *People v. Morales*, 97 Misc.2d 733, 412 N.Y.S.2d 310 (N.Y.C.Crim Ct. N.Y.Co. 1979); *People v. Gutterson*, 93 Misc.2d 1105, 403 N.Y.S.2d 998 (N.Y.Vill.Ct. 1978) (personnel files pertaining to officers ability to estimate speed of automobiles); *People v. Miranda*, 454 N.Y.S. 236 (Bronx Co.1982) (Court to examine file).[21]

4. Expert evidence

While every jurisdiction provides for discovery of documents related to scientific tests or physical examinations of evidence, the practice, and remedies for violations vary. For example, while the disclosure of actual reports is routine, prosecutors rarely spontaneously disclose the underlying "lab notes," or the equivalent, which are absolutely necessary to evaluate the protocol used to determine the scientific reliability of conclusions reached. Prosecutors also have attempted to evade discovery obligato is by foregoing reports from experts, receiving their opinions orally, or through secret grand jury testimony. Prosecutors also attempt to delay disclosure of the necessary scientific documents by treating them as "*Jenks*" material, that is, as merely "prior statements" by a witness which is only triggered by the witness being called.

In the face of these efforts judges have required that "lab notes" be disclosed as also constituting "documents concerning" scientific tests or experiments, and, in lieu of that, disclosure of any grand jury testimony, or even allowing a deposition of the expert. See *United States v. Bel- Mar Laboratories*, 284 F.Supp. 875 (E.D.N.Y. 1968); *United States v. Yee*, 129 F.R.D.629, 635-36 (N.D. Ohio 1990); *People v. DaGata*, 86 N.Y.2d 40, 652 N.E.2d 932, 629

[21] In California, the request is made by way of a motion called a *Pitchess* motion based on the California case of the same name. In Federal cases in California, the request is a *Henthorn* Request, usually made by letter to the AUSA--based on the federal case by the same name, *United States v. Henthorn*, 931 F.2d 29, 31 (9th Cir. 1990), citing to *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984). The defendant need not make any initial showing of materiality upon making this request. *Henthorn*, 931 F.2d at 31..

N.Y.S.2d 186 (1995);[22] *People v. Slowe*, 125 Misc.2d 591, 479 N.Y.S. 2d 962 (Tompkins Co. 1984); Note, 38 SYR. L. R. 255. In *United States v. Mannarino*, 850 F. Supp. 57, 59 (D. Mass. 1994) the judge cited "a pattern of sustained and obdurate indifference to, and un-policed subdelegation of, disclosure responsibilities by the United States Attorneys Office," and ordered both a new trial and the deposition of the government's principal witness by the defense.

D. Claims of privilege or confidentiality

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), concluded that the right of the accused to impeach a prosecution witness by eliciting otherwise confidential information about the witness' prior juvenile record "is paramount to the State's policy of protecting a juvenile offender." In this case the trial court had granted the state's motion to preclude cross examination of its witness concerning a prior juvenile offense. The case has correctly been interpreted on many occasions as also justifying the pretrial access by the defendant to such information, though confidential or privileged in some way, as is necessary to present the defense. The Supreme Court has minimized the Confrontation Clause aspect of *Davis* as a basis for *pretrial* discovery of such confidential records, *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40 (1987), where it nevertheless affirmed the compulsory process rights of the accused to discover favorable information in confidential child sex abuse reports. *State v. Sparkman*, 339 S.E.2d 865, 867 (S.C. 1986)

In *People v. Baranek*, ___ A.D.2d ____ 733 N.Y.S.2d 704, citing fundamental Sixth Amendment guarantees the court reversed because psychological records particularly those that would bear on the veracity of the complainant's testimony were wrongfully withheld from the accused, citing *Davis v. Alaska*. *See*, *People v. Freeland*, 36 N.Y.2d 518 (1975). There Chief Judge Breitel, writing for a unanimous Court, held that hospital records of a witness' heroin addiction would not be inadmissible under the collateral evidence rule if they had some bearing on the witness' testimonial capacity: Generally, evidence of narcotic addiction is admissible to impeach a witness' credibility if tending to show that she was under the influence of drugs while testifying, or at the time of the events to which she testified, or that her powers of perception or recollection, were actually impaired by the habit [citations omitted]. In such instances the collateral evidence rule is not applicable. (36 N.Y.2d at 525, 369 N.Y.S.2d 649, 330 N.E.2d 611). *Accord*, *People v. Perez*, 40 A.D.3d 1131 (2d Dept. 2007).[23]

In *People v. Bugayong,* 182 A.D.2d 450, 582 N.Y.S.2d 175 (1st Dept. 1992), the rape and other sexual offense conviction was reversed because of the failure to turn over the medical records of the complainant, even after review by the judge:

> Prior to trial, defense counsel requested permission to examine

[22] The Court of Appeals, Smith, J., held that defendant was entitled to access to FBI notes related to a one-page DNA testing report.

[23] Insofar as the defendant was precluded from recalling a detective, a prosecution witness, or from having admitted certain police reports, which would impeach a witness for the prosecution on a material issue in the case, the defendant was deprived of his constitutional right to present a defense.

> M.C.'s medical records in order to ascertain her physical condition when the subject incident occurred and the medication she was taking at the time. Before she took the stand, the District Attorney furnished several pages of her records and informed defendant's attorney that the testimony which he intended to elicit related only to her weakened state and not to the nature of her medical treatment. Further, the trial court examined the medical records in camera and supplied some additional information but determined that there was nothing else that should be turned over to the defense. This ruling, however, was incorrect. We have reviewed M.C.'s hospital records and believe that they should have been made available to defendant regardless of whether or not the Trial Judge would ultimately have allowed their contents to be used for cross-examination. At least defendant's lawyer would have had the opportunity to raise this matter with the court, particularly since there is material in the records which could arguably have provided some assistance to the defense. It is also possible that based upon these records, defendant might have endeavored to call his own expert witness. Accordingly, defendant is entitled to a new trial in connection with those counts dealing with the alleged attack upon M.C.

The claim of confidentiality of probation intake records must give way to the Sixth Amendment claims of the defendant to obtain evidence useful or favorable for the defense. In *People v. Price*, 100 Misc.2d 372, 419 N.Y.S.2d 415 (Sup. Ct. Bronx Co. 1979), the Department of Probation of New York City moved to quash a judicial subpoena duces tecum served by the defendant requiring the production of probation records of a juvenile who originally had been identified by the victim of the robbery with which the defendant was charged. When the defendant was arrested, the juvenile was set free and the records closed. This trial court affirmed that the defendant's right to confrontation [the use of the prior complaint of the victim to impeach her at trial] and compulsory process [the right to present all relevant evidence to establish a defense, e.g. that the witness was not clear in her identification, and that the juvenile actually committed the offense] outweigh the general confidentiality of probation intake records. See also, *Zaal v. State*, 326 Md. 54, 602 A.2d 1247 (Md. 1992)[24] (School records of 12 year old

[24] Defendant was charged with sexual abuse of his 12 year old granddaughter. Both the complainant's and the defendant's version of the incident were completely contradictory. The defendant subpoenaed the complainants educational records in order to effectively cross examine her concerning a possible motivation she might have for lying about the incident, to establish possible bias on her part, and to test her veracity. The trial court denied the defendant access, after an in camera review of the records at issue. The there was a long history of antagonism between the complainant's father and the defendant. Defendant claimed that the complainant identified with her father and was aware of the bad blood between them, and that this might have been the motive behind her fabricating this story. Defendant wanted access to the educational records, because he knew his grand daughter had been placed in a special classroom due to emotional disturbance. Defendant also suggested that the records might show a pattern of acting out to gain attention, or of lying, which would be directly relevant to the issue of the complainant's credibility. These records could possibly be used to attack her credibility. *Zaal v. State*, 602 A.2d at 1251, 1261.

The Court of Appeals stated that the defendant's request for the educational records should be granted. It held that the defendant had made at least a nominal showing of relevance so as to establish the need to inspect the educational records; trial court's in camera review of the educational records should not only have been aimed at

sex abuse complainant); *People v. Sharp*, 77 Misc.2d 855, 856, 355 N.Y.S.2d 294, 295 (Co.Ct.Nassau Co.1974): school records).

Disclosure might be required of otherwise confidential memoranda of an assistant district attorney, if she is to be called as a witness. *People v. Essner*, 125 Misc.2d 908, 480 N.Y.S.2d 857 (N.Y.Sup. 1984).

Likewise, the defendant's right to discover favorable evidence should overcome claims of privilege, even where the prosecutor would not be entitled to obtain the information in an analogous situation. This was the result in a lengthy decision on the defendant's discovery motion in *People v. Preston*, 13 Misc.2d 802, 176 N.Y.S.2d 542 (Kings Co. Ct. 1958, Nathan R. Sobel, J.), *Writ of Prohibition den., sub. nom. Silver v. Sobel*, 7 A.D.2d 728, 180 N.Y.S.2d 699 (2d Dept. 1958).

Even though grand jury testimony is "secret," it may be ordered disclosed, as in the case where the expert has only testified at the grand jury and not issued a "report." *People v. Delaney*, 125 Misc.2d 928, 481 N.Y.S.2d 229 (Suffolk Co. 1984) (County Court treats grand jury testimony of expert witness as "report" and requires disclosure).

Most importantly, the failure to specify the federal, or especially the state constitutional provisions as the basis for a claim for access to privileged documents can be fatal. *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988), involved a motion for discovery and a *Rosario*, 9 N.Y.2d 286, 213 N.Y.S. 448 (1961), request for social worker interview notes of child victims in a rape case. Such documents are privileged under CPLR 4508:

> Moreover, insofar as defendant failed to raise any additional basis upon which entitlement to the notes might rest [citing *Gissendanner* and *Davis v. Alaska*] . . . we have no occasion to decide what circumstances, if any, would suffice to overcome the statutory barrier to disclosure.

72 N.Y.2d at 79.

See the discussion below at page 171 of the principle that the accused may not be limited to "parity" with the prosecution.

E. Classified information – Government secrets

In cases involving the activities of former government agents, or those who claimed to be agents, the issue an arise of access to secret materials. Sometimes this relates to a possible defense that the defendant believed that he or she acting as a government agent, or was authorized by the government to engage in criminal acts, or where defendant relies on advice – even mistaken– that lead him to engage in the "criminal" acts.[25]

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discovering evidence directly admissible but also that which was usable for impeachment purposes, or that which lead to such evidence; and remand was required for the trial court to determine whether controlled access to the complainant's records should be in camera review with counsel present, or review by counsel, as officers of the court, followed by a hearing on the admissibility of those records sought to be admitted. *Zaal v. State,* 602 A.2d at 1260, 1264.

[25] See, Morvillo and Anello, "White Collar Crime," New York Law Journal, April 4, 2005, citing examples.

Prosecutors will argue that the request for such materials is a tactic to discourage or derail prosecutions, labeling it "graymail."[26] Indeed, a valid request for needed materials, if the government refuses to comply, can result in dismissal of charges, just like the refusal to produce the informant when required, or the refusal to particularize the charges, etc.[27]. On the other hand, the defense has a great deal of work to establish entitlement to classified information, and may have to suffer with impediments in reviewing it.

The Classified Information Procedures Act (CIPA),18 U.S.C. App. III (2000), was enacted to prevent "graymail" or restricting it, and to require the defense to disclose its strategy in order to demonstrate the need for and relevance of the material. It provides a procedural framework within which to raise and resolve claims of secrecy based on concerns of national security, limit or redact discovery, or utilize admissions of facts which the sought after classified information would have proven, limit the use of secrets at trial, and interlocutory appeal for th government.

While the statute is designed to, and does give advantage to the government, it does not obliterate the compulsory process concerns of the accused. Indeed, the statutes existence is a testament to the strength of the compulsory process right.

F. Remedies for *Brady* and discovery violations

Trial and appellate judges have been typically loathe to give real teeth to the *Brady* rule, and look the other way even when it is apparent that prosecutors have artificially construed their discovery obligations in a way to avoid disclosure of information they know would help the defense. See Bennett L. Gershman, Reflections on Brady v. Maryland, 47 S. Tex. L. R 685 (2005-06)

There are egregious cases where the trial judge had taken stern measures. See, e.g. *United States v. Mannarino*, 850 F. Supp. 57, 59 (D. Mass. 1994), discussed below at p. 23. And see In the face of trial court resistance, the defense must be creative about seeking remedies, and pursue a continuum of remedies from dismissal with prejudice to simple procedural advantages, such as an adjournment, discussed in the next section. Consider remedial jury instructions, such as instructing the jury that the prosecutor has violated the law, with an improper purpose to deprive the defense of access to, and use of evidence favorable to him, and that the the jury can infer from that a consciousness by the prosecutor of the weakness of their case, and understand that the defendant is laboring under an undue burden to try to catch up and make use of the evidence. See Note, A Fair Trial Remedy for Brady Violations, 115 Yale. L J 1450 (2006). (Recommending an instruction that the jury can find a reasonable doubt about guilt from the existene of a *Brady* violation.

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[26] The Random House Unabridged Dictionary (1997) actually defines "graymail" as "a means of preventing prosecution . . . by threatening to disclose government secrets during trial."

[27] *See* Walsh Iran/Contra Report - Chapter 2, United States v. Oliver L. North (available at http://www.fas.org/irp/offdocs/walsh/chap_02.htm), cited in Morvillo and Anello, "White Collar Crime," New York Law Journal, April 4, 2005.

G. Adjournment in order to obtain and utilize discovery

Another difficulty in presenting the defnese arises when the court rushes to trial before the defense has an opportunity to assess, or even obtain, the needed discovery. Although such cases may often be categorized as infringing on the right to counsel, a they are equally cases involving the right to prepare to present a defense. *E.g. United States v. Verderame*, 51 F.3d 249 (11th Cir. 1995).[28] Perhaps the emphasis on the right to counsel arises from the fact that earlier seminal cases were decided before the watershed "Right to Present a Defense" cases, *e.g. Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed.2d 921 (1964) ("a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality"). However, implicit in the older cases was the understanding that the defense counsel plays a critical role in accessing other rights, like the right to present a defense. *Avery v. Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940)

> But the denial of opportunity for appointed counsel to confer, to consult with the accused *and to prepare his defense,* could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

(footnotes omitted) (*emphasis added*). In *United States v. Holmes*, 722 F.2d 37 (4th Cir.1983), the Fourth Circuit held that the trial court abused its discretion in denying the defendant the defendant an adjournment in order to fully review the *Jencks* (18 USC §3500) material, even though it had been delivered on the morning of the day before the witness testified, and that his was not cured by allowing an additional sixteen minutes to review the material after the witness testified.[29]

[28] "We find that the 34 days failed to provide defense counsel with sufficient time to defend against a case which the government spent years investigating, a case which grew during the 34-day interval to encompass further property subject to forfeiture, a case which abruptly shifted focus away from the cocaine conspiracy a mere four days before trial. We also find that the 34 days failed to provide the government with sufficient time to supply Verderame with copies of all the documents it had seized and to which he was entitled." 51 F.3d 249, at 252.

[29] The late William Moffett (NACDL Past President) and J. Flowers Mark represented the accused.

IV. The right to compel the attendance of witnesses and production of documents

> It is axiomatic that a defendant has a constitutional right to present a defense (*see, People v. Hudy,* 73 N.Y.2d 40, 538 N.Y.S.2d 197, 535 N.E.2d 250); the right to produce witnesses in support of that defense is fundamental and, absent a showing of bad faith, an application demonstrating that the testimony of a potential witness is relevant to such defense should be granted

People v. Prentice, 208 A.D.2d 1064, 617 N.Y.S.2d 570 (3rd Dept. 1994).

Antecedent to the right to put on witnesses, or to introduce documents or other physical objects, is the ability to get them to court in the first place. While the scope of the subpoena power of the accused is broad, there are a variety of procedural limitations on the manner of issuance of defense *subpoenae* and a host of practical obstacles that can be put in the path of the defense. When it comes to these restrictions and obstacles, despite the *subpoena* being at the nominal core of the "compulsory process" clause, the review of a defense *subpoena* by a court does not often erupt *sua sponte* into a discussion of constitutional rights. However, just as with other scenarios, any restrictions or obstacles affecting the defendant's ability to actually get witnesses or physical evidence into the courthouse door raises a fundamental constitutional question. While witness and documentary *subpoenae* (and the hybrid *subpoena duces tecum*) give rise to similar issues, they also giver rises to issues unique to that process. As always, the key is to anticipate the issues and prepare to address them with the court in a timely "pro-active" fashion.

A. The basic witness subpoena: witness out of custody, inside the state.

The basic provisions for subpoenas available in civil cases are also available in criminal cases, with some important differences, depending on the jurisdiction. In New York, the accused, unlike a party to a civil case or a federal defendant, *may* serve a subpoena,[30] and *is not required* to tender or pay witness fees although the court may direct the county treasurer to pay a witness a "reasonable sum for expenses" for a defense witness.[31]

In *People v. King*, 148 Misc.2d 859, 561 N.Y.S.2d 395 (N.Y.City Crim.Ct. 1990), defendants were charged with disorderly conduct and disruption or disturbance of a religious service at St. Patrick's Cathedral and they sought to subpoena Cardinal O'Connor as a witness. Although the subpoena was quashed, the criminal court stated "[n]evertheless, if the Cardinal's testimony were considered by this court to be material and relevant to the issues of the trial, the fundamental constitutional rights of the defendants to call witnesses in their behalf must prevail."

[30] Compare FRCrP 17(d) with NY CPL § 610.40

[31] CPL § 610.50(2). Compare FRCrP 17(d), and FRCrP 17(b) covering defendants unable to pay.

People v. King, supra, at 396.

B. Material witness orders

Many attorneys give up too easily in getting to court those helpful witnesses who "don't want to get involved". They leave it up to the client or his relatives to persuade someone to come to court. The provisions of Article 620 of the CPL can be used to insure that a needed witness appears in court. The procedures are simple to follow. All that is needed to establish that a witness is subject to the material witness provisions is that her testimony is material to the case and will not be "amenable or responsive" to a subpoena at the time attendance is sought. CPL § 620.20(1).

The witness will first be ordered to appear, or in some cases taken into custody and brought before the court. CPL § 620.30. Upon finding that the person is a material witness the court will either set bail or commit the witness to custody. CPL § 620.50

C. Securing the attendance of prisoners confined in the state

Presumably every state has a specific procedure for a "body order" to the corrections authorities in the state requiring the production of a prisoner as a witness. NY CPL Article 630 allows for the issuance of an order which would direct that a prisoner confined anywhere in the state be produced as a witness in a case so long as there is "reasonable cause to believe" that "such person possesses information material" to the case. The denial of such an order implicates the fundamental right to present a defense. *People v. Prentice*, 208 A.D.2d 1064, 617 N.Y.S.2d 570 (3rd Dept. 1994) (Refusal to order production of former State Trooper imprisoned for fabrication of evidence).

D. Witnesses outside the state

Although no court has held that one state must assist another state in effectuation of the compulsory process rights of the other state's citizens, practically every state has enacted the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases.[32]

[32] In *People v. Carter*, 37 N.Y.2d 234, 371 N.Y.S.2d 905, 333 N.E.2d 177 (1975) the Court stated:

> Defendant's assertion that his constitutional rights of due process and equal protection were infringed is rejected. While the Sixth Amendment to the United States Constitution, obligatory on the States through the due process clause of the Fourteenth Amendment, mandates that the accused has the right to present his own witnesses to establish a defense, including the right to compel their attendance if necessary (*Jenkins v McKeithen*, 395 US 411, 429; *Washington v Texas*, 388 US 14, 18-19), this right is subject to the limitation that no State, without being party to a compact (see *New York v O'Neill*, 359 US 1), has the power to compel the attendance of witnesses who are beyond the limits of the State (Minder v Georgia, 183 US 559, 562; see State v Smith, 87 NJ Super 98). It was to fill this gap, so that there would be extraterritorial impact in compelling attendance of witnesses, that the Legislature enacted CPL 640.10 (cf. *People v Cavanaugh*, 69 Cal 2d 262). Nor does the fact that an affluent defendant will be able to pay transportation and lodging expenses of proposed out-of-State witnesses, while an indigent

Here it is CPL Art. 640. Thus, although requests for judicial assistance in obtaining witnesses from outside the state are not properly grounded on the Sixth Amendment, *People v. Trice*, 101 A.D.2d 581, 476 N.Y.S.2d 402 (4th Dept. 1984) (finding a statutory abuse of discretion nonetheless), such relief ought to be argued as being compelled under the state constitution.

Likewise, a provision is made in CPL Article 650 for the securing as witnesses persons who are confined in another state in state or federal penitentiaries. There is a difference between the two, however, as persons confined in another state are more certainty available as a result of the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings" § 650.20 which all the states have signed. However this statute, and the Uniform Act do not by their terms apply to federal prisoners. For that we look to CPL § 650.30 "Securing Attendance of Prisoner in Federal Institution as Witness in Criminal Action in the State." This section describes a procedure wherein the trial judge issues a *writ of habeas corpus ad testificandum* addressed to appropriate federal Warden but delivered to the Attorney General of the United States, requesting the Attorney General to cause the attendance of the witness. Federal regulations provide for the manner in which this is handled: 28 CFR §527.30 - 527.31, and BOP Program Statement 5875.12 (2003).[33] It is treated as a "request" for a kind of temporary transfer of custody.

Articles 660 and 680, respectively, allow for the preservation of testimony for future use and the obtaining of testimony from outside the state for future use. The taking of evidence on commission, under Art. 680 may be less preferred as a method of obtaining evidence. In *People v. Carter*, 37 N.Y.2d 234, 371 N.Y.S.2d 905, 333 N.E.2d 177 (1975), the Court of Appeals refused to find error as a matter of law in the denial of Art. 680 relief where there was an insufficient factual basis for it and where there had been no resort to Art. 640. *Carter* described the process for taking evidence on commission:

> A "commission" is a process issued by a superior court (see CPL 10.10) designating one or more persons as commissioners and authorizing them to conduct a recorded examination of a witness or witnesses under oath, primarily on the basis of interrogatories annexed to the commission, and to remit to the issuing court the transcript of such examination (CPL 680.10, subd 2). The establishment of a commission is available initially only to the defendant (CPL 680.20, subd 2) but, once granted, the People may also seek such a procedure (CPL 680.30, subd 1; see People v Parkinson, 187 Misc 328, 331; Rothblatt, Criminal Law of New York, The Criminal Procedure Law, § 562; 1 Paperno and Goldstein, Criminal Procedure in New York [1971 ed], § 337). CPL

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defendant will not, present an equal protection violation. In either situation, the witness can decide to attend vel non or the defendant can attempt to utilize compulsory process under the "Uniform Act", under which a per diem and mileage allowance chargeable to the county in which the prosecution or Grand Jury investigation is pending is required to be paid, so that the discrimination would not be deemed invidious within the equal protection clause (see CPL 640.10; cf. *Douglas v California*, 372 US 353, 356-357; *People v Cavanaugh*, 69 Cal 2d 262, supra;).

[33] http://www.bop.gov/DataSource/execute/dsPolicyLoc. Thanks to Peter Goldberger for this information.

> 680.20 is entitled "Examination of witnesses on commission; when commission issuable; form and content of application". Subdivision 1 thereof provides: "Upon a pre-trial application of a defendant who has pleaded not guilty to an indictment *** the superior court in which such indictment is pending *** may issue a commission for examination of a designated person as a witness in the action, at a designated place outside the state, if it is satisfied that (a) such person possesses information material to the action which in the interest of justice should be disclosed at the trial, and (b) resides outside the state". (Emphasis supplied.) Subdivision 2 sets forth the contents which must be alleged in the moving papers, including: "(e) A statement that he [the prospective witness] possesses information material to the action which in the interest of justice should be disclosed at the trial, together with a brief summary of the facts supporting such statement." (Emphasis supplied.) In turn, subdivision 3 stipulates that, if the application is for the examination of more than one person, "[i]n such case, it must contain allegations specified in subdivision two with respect to each such person". Thus, even if the moving papers on their face contain all data as outlined, the statutory language of "may" and "if it is satisfied", indicates that the determination as to whether a commission shall issue is one resting in the sound discretion of the court in which the indictment or other accusatory instrument is pending (see 1 Paperno and Goldstein, Criminal Procedure in New York [1971 ed], § 339, pp 544-545).

Nevertheless, in this case

> defendant's supporting papers furnished little, if any, more than a very brief conclusional summary, without differentiation as to the persons named, of his contention regarding the 10 proposed witnesses, rather than a "brief summary of facts" supporting a statement that the witnesses possess "information material to the action which in the interest of justice should be disclosed at the trial". The statement of the reason for the inability of the proposed witnesses to appear in New York was sketchy, at best (see Matter of United States, 348 F2d 624, 625). Based on this appraisal of the papers and in view of the jurisdictional limits of our inquiry (NY Const, art VI, § 3; People v McClellan, 191 NY 341, 348; Cohen and Karger, Powers of the New York Court of Appeals, § 158, p 616; 7 Weinstein-Korn-Miller, NY Civ Prac, par 5501.17), it cannot be said, as a matter of law, that there was an abuse of discretion in the court's denial of a commission.

Moreover, as noted, the accused had not pursued relief under Art. 640:

> Additionally, defendant made no effort to secure the attendance of witnesses under CPL 640.10, cited as the "Uniform act to secure the attendance of witnesses from without the state in criminal cases" and adopted by New York and Pennsylvania, as well as the vast majority of the other States. It provides a statutory means whereby, upon a sufficient showing and the following of necessary procedures, a witness residing in another adopting State can be compelled to attend and testify at a

> criminal trial in the forum (see Barber v Page, 390 US 719, 723, n 4; 2 Wharton's Criminal Evidence [13th ed, 1972], § 510; Pitler, New York Criminal Practice Under the CPL, p 570).

All these statutory provisions are part of the fabric of New York's system for protecting the right to present a defense. They are merely elaborations upon the fundamental power of subpoena which has the most undisputed constitutional footing.

E. Government officers

As the inestimable film "Breaker Morant"(1980) teaches, in part, the most frustrating thing to justice is a government dependent on concealing the truth in its prosecution (and execution) of scapegoats for its own evildoing. There are federal regulations designed with no better purpose than frustrating the ability to obtain the testimony of federal officials and evidence in the hands of federal officials for use by defendants in criminal trials, whether to prove that the government has done wrong, or not.

The regulations are enacted upon the authority of 5 U.S.C.A § 301, the "Housekeeping" statute, which states,

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 C.F.R. §16.21, *et seq*.set forth rules to be complied with in seeking evidence from the Department of Justice or the testimony of an attorney employed by the Department of Justice. *See also* 6 CFR § 5.41 (Dept. of Homeland Security). The rules reflect a policy of non-disclosure, support for which the government usually tries to find in *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), 6 CFR §5.47; 28 CFR § 16.28. As Milton Hirsch demonstrates, *Touhy* did no more than recognize a statutory power of the heads of executive agencies designate the custodians of records for their departments.[34] Neither it, nor the precedent on which it relied, considered the rights of a criminal defendant to compulsory process. It is irrelevant to the power of a district court to compel production. *See, United States v. Schneiderman et al.*, 106 F.Supp. 731 (SDCal. 1951); *United States v. Liebert,* 383 F.Supp. 1060 (E.D. Penn. 1974); *F.A.C., Inc. v. Cooperativa de Seguros de Vida*, 188 F.R.D. 181 (D.P.R. 1999). *People v. Heller*, 126 Misc.2d 575, 483 N.Y.S.2d 590 (Sup.Ct. Kings Co.1984) (Subpoena to United States Attorney upheld, despite claim that government is without authority to comply with the subpoena based upon 28

[34] Milton Hirsch, "The Voice of Adjuration": the Sixth Amendment Right to Compulsory Process Fifty Years after United States ex Rel. Touhy V. Ragen, 30 FLORIDA STATE UNIVERSITY LAW REVIEW 81 (2002)

CFR 16.21); *United States v. Feeny*, 501 F. Supp 1324 (Dist.Ct. Colorado 1980);[35] *Streett v. United States*, No. 96-m-6-H, 1996 WL 765882 * 4 (W.D.Va., Dec. 18, 1996).

Where the U.S. is a party in the case, the Touhy Regulations empower the DOJ attorney in charge of the case to, in consultation with the "originating component," comply or refuse to comply with a "demand" for documents served upon the DOJ. See 16.23, 16. 24, 16.26. The only import of these types of regulations is that they seek to permit the designated record custodian to "respectfully decline to comply with . . . demand" served upon him for the production of information belonging to the Department. 28 C.F.R. § 16.28.

However, confronted practically with the issue, the discussion in *F.A.C., Inc. v. Cooperativa de Seguros de Vida* is helpful, though it is a civil case, and it clear from the other cases that it makes a huge difference where the government is a party. The problem is that few state court judges, and not a lot of federal judges, want to take on these agencies. They clearly have to be indoctrinated concerning the right to present a defense and their constitutional obligation to enforce subpoenas. The fact is that nothing in these regulations has anything to do with the power fo a judge to enforce a subpoena by every means available. Still, if the defense counsel complies with the regulations, which essentially requires an explanation fo the need for the documents or testimony, it removes one possible excuse for the judge to fail to enforce the subpoena.

As a practical matter, whenever a judge does call the government on this and demands compliance, the agency will generally comply working out some kind of face-saving compromise.

Another important point: *Touhy* and its antecedents had to do with the *production of documents*. They did not have anything to do with the requirement of *witnesses* to appear in response to a subpoena or the rights of federal agencies by whom they are employed to put any preconditions on their appearance or testimony. However it is common for government attorneys and judges to assume that the rules give the agency the ability to direct an employee to "respectfully" disregard a subpoena.

F. Adjournments to obtain witnesses or to allow them to appear

It can happen that a subpoenaed witness fails to appear, or that a witness expected to appear voluntarily does not do so. At times there have been judges disposed to curtain the defense effort by not allowing an adjournment for the purpose of delivery of subpoenas or the application for a material witness warrant, etc. Sometimes this judicial impulse is driven by pressure of time in cases which have lasted longer than expected, or doubts about the relevance of the proof sought.

[35] The district Court concluded that a subpoena to the Department of Justice could be enforced, despite that Department's self-serving regulations, observing that

> "A defendant has certain absolute rights under our system of justice, and he cannot be deprived of those rights because of claims by the prosecution that if he is given those rights, some allegedly more important case may be jeopardized." 501 F.Supp at 1333.

At least equal latitude must be given to the defense as to the prosecution in the granting of adjournments to procure witnesses. In *People v. Singleton*, 41 N.Y.2d 402, 393 N.Y.S.2d 353 (1977), the Court of Appeals upheld a trial court's refusal of an adjournment in a case where the defendant's material witness was improperly released from custody by the police on the wrongful advice of an assistant district attorney. Only one brief adjournment was allowed to the defense before the defendant was required to proceed further with the trial. Judge Fuchsberg wrote a vigorous dissent on compulsory process grounds. The United States Court of Appeals for the Second Circuit upheld a writ of habeas corpus, holding that error of a fundamental constitutional nature was committed when the adjournment was not granted until the witness could be produced in court. *Singleton v. Lefkowitz*, 583 F.2d 618 (2d Cir. 1978), *cert. denied sub. nom. Abrams v. Singleton*, U.S. 99 S.Ct. 1266, L.Ed.2d (1979). The right to produce a witness includes the right to an adjournment to obtain the witness, *People v. Foy*, 32 N.Y.2d 473, 346 N.Y.S.2d 245 (1973), and the assistance of the court in getting them to appear, *People v. Bernard*, 23 A.D.2d 697, 258 N.Y.S.2d 198 (1st Dept. 1965); *People v. West*, 171 A.D.2d 1026, 569 N.Y.S.2d 33 (4th Dept. 1991); See Muldoon, Handling A Criminal Case in New York, § 18:42 et seq. . In *Bernard*, citing *People v. Wells*, 272 N.Y. 215, 5 N.E.2d 206 (1936), the Appellate Division stated:

> Defendants were convicted of robbing a seaman who complained that when he asked a bartender to call a taxi the defendants offered to drive him to his destination and then robbed him when he got into their car. Defendants' counsel urged the court to have the bartender brought into court after he had ignored a subpoena served on him. In view of complainant's testimony that the bartender knew of defendants' offer and said "it's okay"; and in view of the defendants' claim that the bartender's testimony would establish that complainant (who by his own account had consumed nine drinks in a few hours) was never in his bar until he came in with the police and pointed out defendants, we are of the opinion that the court should have aided the defendants' counsel in compelling the appearance of this witness, even if the request was tardy (U. S. Const., 6th Amdt; Civil Rights Law, § 12; CPLR 2308, subd. [a]).

The constitutional implications of a motion for a continuance are well-recognized, if not perfectly honored. *E.g. United States v. Haldeman*, 559 F.2d 31, 83, 181 U.S.App.D.C. 254, 306 (D.C.Cir. 1977):

> Defendants sought a continuance here to enable them to produce an unavailable witness who, they alleged, could offer evidence favorable to the defense. Criminal defendants plainly have a substantial interest in being able to present the testimony of such witnesses to the jury. Indeed, this interest implicates constitutional values, since the Sixth Amendment right to compulsory process is "in plain terms the right to present a defense." [36] . . . . Because no firm rules can be articulated as to when

[36] [*Fn. 120 in original*] Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967); see Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975); Johnson v. Johnson, 375 F.Supp. 872 (W.D.Mich.1974). See generally Westen, The Compulsory Process Clause, 73 MICH.L.REV. 71, (1974), and

> a continuance is required,[37] the decision to *grant* a continuance is vested in the trial judge's discretion, and reviewable only when such discretion has been abused.

[*Emphasis added*] But, of course there are "firm rules" when it comes to the protection of fundamental rights. And so the judge's "discretion" (see discussion below on the limits of judges' discretion in te enforcement of constitutional rights, p. 160) ends where the rights of the accused, to effective assistance of counsel, compulsory process, and be free of prejudicial publicity, etc. begin. *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976).

G. Documents

Many of the cases above also involve a document subpoena or are directly relevant to *subpoenae* for documents. But there are nuances when it comes to document *subpoenae*. To repeat somewhat, is the *subpoena* an attempt to "circumvent" discovery, or a "fishing expedition"? Is the material sought "evidentiary?" Witnesses are subpoenaed for evidentiary proceedings but a document *subpoena* may be returnable well in advance of any evidentiary hearing or trial, and the real fight over the evidence may occur right there if the prosecution has a say. But *should* the prosecution have any say in whether the subpoena be issued, or does the accused have the right to an *ex parte* determination?

There is no more fundamental component of the Right to Present a Defense than the right to compel witnesses to appear and documents to be produced. That fundamental right is implemented, though hardly exhausted, by the terms of Federal Rule of Criminal Procedure 17(c), which unqualifiedly authorizes a defendant to subpoena "books, papers, document, or other objects," at least to the relevant evidentiary proceeding.

One oddity that seems pervasive is that both in terms of terminology and forms related to subpoenas, we have nothing referring exclusively to the production of documents. We have a *subpoena ad testificandum* (simply known as a "*subpoena*") and a *subpoena duces tecum*, literally commanding a person to appear to give testimony and bring documents with them. One cannot find a form simply for the production of documents, or a name for it.

1. The scope of document subpoena

The fundamental right to compulsory process is implemented, though hardly exhausted, by the terms of Federal Rule of Criminal Procedure 17(c), which unqualifiedly authorizes a defendant to subpoena "books, papers, document, or other objects." There is no restriction upon the materials that can be sought. They need not be "admissible" or "evidence" as long as the materials are sought for purpose relevant to the issues at the trial, and reasonable in scope and not unnecessarily burdensome. Each defense subpoena implicates "the right to present a defense" acknowledged by the Supreme Court in *Washington v. Texas*, 388 U.S. 14 (1967).

Some have argued that the literal terms of the compulsory process clause – referring to

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Compulsory Process II, 74 MICH.L.REV. 191 (1975).

[37] [*Fn. 122 in original*] See note 128 *infra*. But see Westen, Compulsory Process II, 74 Mich.L.Rev. 191, 244-250 (1975).

"witnesses" and nothing else – does not cover *documents* or other objects. This argument was dispelled at the very outset, in the *Burr* case, where Burr was allowed to subpoena the letters from President Jefferson and the Attorney General, despite this precise argument.

As to a simple *subpoena* for documents, though privileges can be asserted by the recipient or a proper party as an intervenor, the recipient cannot move to quash on grounds of relevance. They may only claim that "compliance would be unreasonable or oppressive." FRCrP 17(c)(2). Issues of probative value or admissibility are dealt with when, and if, the defense seeks to use/introduce the document. The accused does not have to meet the government on its terms, or even terms the government concedes are relevant. The accused has the right to challenge the credibility or reliability of the most honest witness as part of is defense,[38] the fairness or even competence of the investigation.[39] The Court cannot, consistent with the 6th Amendment, countenance the exclusion of evidence which might meet such a low threshold in the courtroom, by imposing a greater barrier outside the court house.

2. The "pretrial" subpoena: two flavors – "pre-trial" and "pretrial"

A document subpoena may be a "pretrial" subpoena because it seeks production of material for use in connection with a pretrial hearing or some other "preliminary matter," but not trial. See, Charles A. Wright, Federal Practice and Procedure, § 271, at 216-17 & n.10. (Criminal 3d Ed. 2000). Such subpoenas are usually issuable by the attorney alone, returnable on the date of the proceeding, with no notice to anyone except the witness or the holder of the records being sought.

A subpoena can also be used for the production of documents prior to a trial, "pre-trial," but this requires approval of a judge, at least in federal courts and most state courts. FRCrP 17(c).[40] Generally such a "judicial" subpoena is issued on the theory that delay at the proceeding can be avoided by allowing a party to inspect the material in advance in order to decide what should be used, thereby expediting the actual proceeding. Practically, this also allows a party to determine if the compliance with the subpoena is incomplete, and to have any motion to quash decided in deliberate, not hurried, fashion. In these situations the material is nominally subpoenaed to be produced to the court, where, contrary to a "regular" subpoena, the material is available to all parties to examine.

The enlightened view, held by the Federal courts for many years, is that properly

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[38] "In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth." *United States v. Wade*, 388 U.S. 218, 257-58, 87 S.Ct. 1926, 1948 (1967)(Opinion of Justices White, Harlan and Stewart , dissenting in part and concurring in part)

[39] *Kyles v. Whitley*, 514 U.S. 419, 441-46, 115 S.Ct. 1555 (1995) This includes examination based on the lack of evidence, or "inconclusiveness" of the evidence, and incompetence of the police. *Id*., 514 U.S. at 450-453.

[40] In New York, the statute permits the attorney to simply elect to make the subpoena returnable at any time. NY CPL § 610.25.

subpoenaed materials should be produced before trial at a specific time and place for inspection by the moving party. Such a procedure would expedite the trial by enabling the party to decide in advance whether to use the materials at trial, as reflected in *United States v. Nixon*, 418 U.S. 683, 698-699, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) and *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220, 71 S.Ct. 675, 95 L.Ed. 879 (1951); *United States v. Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952).

3. The standard for issuance of a pre-trial subpoena

Rule 17(c) empowers a Court to require that the subpoenaed books, papers, documents, or objects to be produced before the Court at a time *prior to the trial*. A subpoena to produce these items only at the commencement of trial would often be extremely injudicious. Part of the purpose of Rule 17(c) is to avoid delay at trial while the defense evaluates large productions pursuant to trial subpoenas. Where evidence relevant to guilt or punishment is in a third party's possession and is too massive for the defendant to adequately review unless obtained prior to trial, pre-trial production through Rule 17(c) is necessary to preserve the defendant's constitutional right to obtain and effectively use such evidence at trial. *See United States v. Murray*, 297 F.2d 812, 821 (2nd Cir. 1962)(Rule 17(c) permits pretrial production if it is necessary for the moving party to use the material as evidence at trial), *cert. denied*, 369 U.S. 828, 7 L. Ed. 2d 794, 82 S. Ct. 845 (1962). n14

Reconsideration of the *Burr* case is important here. In *United States v. Burr*, Justice Marshall wrote two opinions. *United States v. Burr*, 25 F. Cas. 30 (No. 14692D) (C.C.D.Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14, 694) (C.C.D. Va. 1807). Professor Peter Westen, in the first of his three definitive articles on the Right to Present a Defense,[41] has described the setting:

> It was not a propitious moment for reasoned adjudication. Aaron Burr, a former Senator and Vice-President of the United States, was accused of planning to precipitate war with Spain and set up a separate government in the western states by force. His archenemy, President Thomas Jefferson, was so successful in poisoning public opinion that the Senate approved a bill suspending habeas corpus to prevent the courts from releasing Burr and his alleged co-conspirators. Yet, despite the popular pressure, and despite the likelihood that Jefferson would exploit the trial to remove him from office, Marshall resolved all doubts in favor of Burr's right of compulsory process: "[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."

Peter Westen, The Compulsory Process Clause, 73 MICHIGAN L. REV. 71, 102 (1974) The case began with a message from Jefferson to Congress in 1807, accusing Burr of planning to secede the states west of the Alleghenies, invade Mexico, and set up a separate government. This

[41] The Compulsory Process Clause, 73 MICHIGAN L. REV. 71 (1974); Compulsory Process II, 74 MICHIGAN L. REV. 191 (1975); Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 HARVARD L. REV. 867 (1978)

was based on certain letters from General James Wilkinson. Jefferson asserted that Burr's guilt was established "beyond question." This resulted in Burr's arrest in Louisiana, and his return to Virginia where he was held for the grand jury.

With respect to the first motion to subpoena the letters from President Jefferson, the government argued in opposition (1) that a *subpoena duces tecum* was not covered by the Sixth Amendment, which related only to witnesses and not documents; (2) that the defendant's showing was insufficient, having only stated that the letter *may* be material to his defense; (3) the motion was premature because the defendant was not yet indicted; (4) the motion was invalid with respect to a United States President who is privileged from subpoena.

In his decision of June 13, 1807, Justice John Marshall ruled against all these objections and the subpoena issued to Jefferson. Jefferson complied by the delivery of a letter, dated October 21, 1806, averting an issue of contempt. Burr applied for another subpoena to produce a second letter to Jefferson, dated November 12, 1806, as to which the Attorney General claimed Executive Privilege. The subpoena issued, in a decision warning that the Executive Privilege does not trump that right of an accused to compulsory process, observing it would be

> a very serious thing, if such letter should contain any information material to the defense, to withhold from the accused the power of making use of it.

25 F. Cas. at 192. As put more recently by Judge Scheindlin:

> Criminal defendants have the right to "put before a jury evidence that might influence the determination of guilt."[42] To effect this right, a defendant must have the ability to obtain that evidence.

United States v. Tucker, 249 F.R.D. 58, 65 (SDNY 2008).

Generally, especially with subpoenas to governmental agencies, Rule 17(c) has been interpreted to require that (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable, with due diligence, in advance of trial; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial; and (4) the application was made in good faith and is not a fishing expedition, standards articulated in *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). While a number of courts have applied the *Nixon* standard to defense subpoenas without analysis, when the fundamental rights of the accused to present a defense are take into account, the standard is much more lenient when it comes to the issuance of defense subpoenas.

In *United States v. Nachamie*, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000) Judge Scheindlin, held that the *Nixon* standard does not apply to cases where Defendants were seeking the government's documents, and instead applied the standard set out in Federal Rule of Criminal Procedure 17(c) itself. The Court observed:

> [The] high [*Nixon*] standard, of course, made sense in the context of a Government subpoena, especially one seeking evidence from the President. It must be recalled that the Government's use of a subpoena occurs after the completion of a grand jury investigation. Indeed, the

[42] [*in original*] *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (citations omitted).

> Supreme Court has held that "the *Nixon* standard does not apply in the context of grand jury proceedings . . . ." *United States v. R. Enterprises*, 498 U.S. 292, 299-300, 112 L. Ed. 2d 795, 111 S. Ct. 722 (1991). A real question remains as to whether it makes sense to require a defendant's use of Rule 17(c) to obtain material from a non-party to meet this same [U.S. v. Nixon] standard. Unlike the Government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena. Because the Rule states only that a court may quash a subpoena "if compliance would be unreasonable or oppressive," the judicial gloss that the material sought must be evidentiary -- defined as relevant, admissible and specific -- may be inappropriate in the context of a defense subpoena of documents from third parties. As one court has noted,
>
> > 'The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.'
>
> [quoting *U.S. v. Tomison*, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997)]

Applying *Nachamie*, then, the only test for obtaining the documents would be whether the subpoena was: (1) reasonable, construed using the general discovery notion of "material to the defense;" and (2) not unduly oppressive for the producing party to respond.

Judge Scheindlin returned to this issue in *United States v. Tucker,* 249 F.R.D. 58 (S.D.N.Y. 2008). Judge Scheindlin undertook a thorough analysis of the role of Rule 17(c) in this constitutional context, refusing to grant a motion to quash a defense subpoena for recordings of telephone calls in prison made by government cooperating witnesses.

> It is therefore fair to ask whether it makes sense to require a defendant seeking to obtain material from a non-party by means of a Rule 17(c) subpoena to meet the *Nixon* standard. In fact, several commentators argue that the standard is inappropriate. Unlike the government, the defendant has not had an opportunity to obtain material from non-parties either through a grand jury subpoena or through Rule 16 discovery (which only applies to parties).

249 F.R.D. 58 at 63-64 (*Footnotes omitted*). "Criminal defendants have the right to 'put before a jury evidence that might influence the determination of guilt.'" (Citing *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987)). To effect this right, a defendant must have the ability to obtain that evidence. Therefore Judge Scheindlin determined that

> the standard annunciated in *Nixon* should not apply in the instant situation, the less-stringent standard I apply requires, as a threshold matter, the element of *materiality*. Under this standard, Rule 17(c) subpoenas are not to be used as broad discovery devices, but must be reasonably targeted to ensure the production of *material evidence*.

249 F.R.D. 58 at 66

Of course, Judge Scheindlin reminds us of the reason why *Nixon* is inappropriate to the

determination here – that was not a subpoena by the defense, but by the special prosecutor to the President of the United States – an "unindicted coconspirator." It raised huge constitutional and political questions in a tumultuous time. It cannot rationally be argued that the right of the accused to present a defense in a garden variety case should be limited to what the Special Prosecutor could compel a sitting President to turn over at the risk of creating a major national constitutional power struggle.

But, beyond this, *Burr*, an "original intent" case if there ever was one, begs us to reconsider restrictions imposed by discovery rules. Where the state or a third party has information material to the defense, and where discovery rules are not interpreted to reach that material, why do we not just issue a *subpoena* for the material as Aaron Burr did? What constitutional validity can there be in the oft-repeated, but never validated, proposition that one cannot obtain by *subpoena* what is denied through discovery?

However, getting back to the cases, even the rule in *Nixon* is not as rigid as the government often attempts to make out. The *Nixon* requirement of "admissibility" really is nothing different than Judge Weinfeld's formulation in *United States v. Iozia*, 13 F.R.D. 335, 338 (SDNY 1952), that the documents are "evidentiary." "Evidentiary," in the discussion of subpoenas connotes relevance to what a party might actually urge in confronting the prosecution's case or establishing one's own version of the events, or theory of the case. The information need not, on its own, be "admissible," and the accused has no burden to prove – in the abstract, and apart from the trial context – that the property being sought would in fact be "admissible." A prior inconsistent statement may be used as impeachment evidence, but not necessarily admissible on its own. A procedure manual can be used to challenge whether a witness went "by the book." A document may be able to refresh recollection, thereby having evidentiary value, without itself being admissible. A document may provide a foundation for the admissibility of evidence or an opinion. Of course, the document may bear on a pretrial hearing or a "preliminary matter" and relevant only to that and not at all to the trial.

Typically the government will attempt to argue, however, relying on the verbiage of *Nixon*, that the "evidentiary/admissibility" requirement calls for proof that the documents will be admitted at the trial, and then seek to shut off the subpoenas on the grounds that the defense has not laid bare every detail of the defense theory to prove that everything sought will be admitted at trial. This seeks, in effect, to condition the right to compulsory process on abandoning the defendant's right to keep its theory of defense secret (within the limits allowed) until the government has presented its case. This is what is classically described as an "unconstitutional condition." See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989).[43]

[43] "The manifest purpose of the ex parte proceedings provided for in the statute and the Rule is to insure that defendants will not have to make a premature disclosure of their case." *Marshall v. United States,* 423 F.2d at 1318; *see also* H.R.Rep. No. 864, 88th Cong., 2d Sess. (1963) (Criminal Justice Act's *ex parte* procedure "*prevents the possibility that an open hearing may cause a defendant to reveal his defense* "), *reprinted in* 2 U.S.Code Cong. & Ad.News 2990, 2990 (1964) (emphasis added); S.Rep. No. 346, 88th Cong., 1st Sess. 3 (1963) (*ex parte* requirement inserted into Criminal Justice Act "*in order to protect the accused from premature disclosure of his case* ") (emphasis added)." *United States v. Greschner*, 802 F.2d 373, 380 (10th Cir. 1986).

It is clear in *Nixon* that the issue is whether the documents are *of the type which might be admissible*, rather than actual admissibility. The *Nixon* Court described the material as having a "sufficient likelihood" or relevancy, that there was a "rational inference that at least part of the conversations relate to the offenses," a "sufficient preliminary showing," that there was no "automatic bar" to the evidence, that it may be admissible even for "limited purposes" (impeachment) and speculated that there "there are other *valid potential evidentiary uses* for the same material . . ." 418 U.S. 683, 701-02. The term "evidentiary uses" expresses the difference between what the government typically argues and what was of real concern in *Nixon*.

The government will argue that the defense "cannot use a Rule 17 (c) subpoena to obtain impeachment materials they are not entitled to under Jencks or 3500." But the cases typically cited for this relate to *pretrial* subpoenas rather than *trial* subpoenas, but the cases implicitly to acknowledge that impeachment material can be subpoenaed in a "regular" subpoena, once the witness testified, and entirely impractical alternative, unless the trial is adjourned for a few weeks after a witness testifies on direct. *E.g. United States v. Cuthbertson*, 630 F.2d 139, 145-46(3d Cir. 1980); *United States v. Messino*, 882 F. Supp. 115, 116 (N.D. Ill. 1995) (holding that the subpoena requesting impeachment material was premature because it was not certain whether the witness would testify and the witness had not yet testified). But rigid adherence to this makes no sense. As stated in *United States v. King,*194 F.R.D. 569, 574 (E.D. Va. 2000):

> It follows, therefore, that where it is known with certainty before trial that the witness will be called to testify, the admissibility determination, within the meaning of Nixon, can be made before trial, and the statements properly may be considered evidentiary. . . . In sum, witness statements useful for impeachment purposes are evidentiary within the meaning of Nixon. . . . The decisions which have analyzed the issue carefully have recognized as much by disposing of the "admissibility/evidentiary" inquiry as a question of timing.

What these cases essentially mean is that the defense has the right to subpoena impeachment material, and it may be that the judge can decide to keep it *in camera* until after the witness has testified. But if no subpoena is allowed pre trial to get the materials there, then something will have to be done to allow the materials to be sought and obtained prior to cross examination.

Accordingly, the Supreme Court, in *Nixon*, recognized that the fact that material is sought for impeachment is also no bar to its pretrial production:

> Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. *Generally,* the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. See, e.g., United States v. Carter, 15 F.R.D. 367, 371 (DC 1954). *Here, however, there are other valid potential evidentiary uses for the same material, and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot conclude that the District Court erred in authorizing the issuance of the subpoena*

duces tecum.

United States v. Nixon, 418 U.S. 683, 701-02. (*Emphasis added*).

Accordingly, *Tucker* upheld a subpoena to the Bureau of Prisons for material expressly sought for its impeachment value. The judge based this on the fact that the confrontation clause

> is meaningless if a defendant is denied the reasonable opportunity to obtain material evidence that could be crucial to that cross-examination.

249 F.R.D. 58 at 67. And *Tucker* made it clear that the intersts of efficiency which the defense can usually articulate trump the government's desires for tactical advantage:

> Given the significant quantity of recordings and the government's promise that these witnesses will testify, requiring Tucker to wait until their testimony is complete to begin reviewing the recordings would result in an unreasonable trial delay. See United States v. LaRouche Campaign, 841 F.2d 1176, 1180 (1st Cir.1988) ("[T]he admissibility prong of Rule 17(c) cannot be fully assessed until the corresponding witness testifies at trial. Observation of this general rule, however, is left to the sound discretion of the district court.") (citations omitted).

4. Ex Parte issuance of a "pretrial" subpoena

Even though the difference between a regular and a judicial subpoena may be just a question of timing, often the prosecution will, if it has the opportunity, attempt to block the issuance of a judicial subpoena. Whether they have that opportunity depends on how the accused elects, or is directed, to proceed. Courts seem divided on whether the pretrial judicial subpoena can, or must, be issued *ex parte.* In one case, *People v. Mallia*, later reported at 179 A.D.2d 1016, 580 N.Y.S.2d 598 (4th Dept.1992)—the subpoena was not at issue on the appeal—the defense issued a subpoena to the prosecutor which, owing to the failure of the prosecutor to properly move to quash, was enforced by the trial judge.

However it is accepted in federal court that apretria subpoena under Rule17(c) can be applied for and issued *ex parte.*

5. The prosecution's "standing" to challenge a defense subpoena is limited.

The simple answer is, not usually.

> As a threshold matter, the Court finds that the United States has only limited standing to bring its motion to quash in this case. In a criminal case, a party has standing to move to quash a third party subpoena "if the subpoena infringes upon the movant's legitimate interests." *United States v. Jenkins*, 895 F. Supp. 1389 , 1393 (D. Haw. 1995) (quoting *United States v. Raineri*, 670 F.2d 702 , 712 (7th Cir. 1982)). Because questions of standing implicate the Court's jurisdiction to hear the matter, the party moving to quash bears the burden of demonstrating that it has standing. *United States v. Tomison*, 969 F. Supp. 587 , 596 (E.D. Cal. 1997) (citing *KVOS v. Associated Press*, 299 U.S. 269 , 278 , 57 S. Ct. 197 , 81 L. Ed. 183 (1936)). "In many

> instances, the opposing party in a criminal case will lack standing to challenge a subpoena issued to a third party because of the absence of a claim of privilege, or the absence of a proprietary interest in the subpoenaed material or of some other interest in the subpoenaed documents." *Id*. (quotation marks omitted).
>
> The courts have recognized several legitimate interests that may confer upon a party standing to move to quash a third party subpoena, including avoiding undue lengthening of a trial, preventing undue harassment of a witness, and preventing prejudicial overemphasis on a particular witness's credibility. See *Raineri*, 670 F.2d at 712 ; see also *United States v. Nachamie*, 91 F.Supp.2d 552 , 560 (S.D.N.Y. 2000) (noting that, even if the government invokes these grounds for standing, they "cannot be applied uncritically"). Importantly, ensuring that a defendant properly complies with Federal Rule of Criminal Procedure 17(c) is "not a legitimate interest that would confer standing upon the government." *United States v. Ortiz*, No. 12-00119, 2013 U.S. Dist. LEXIS 181420 , 2013 WL 6842559 , at *2 (N.D. Cal. Dec. 27, 2013).

United States v. Johnson, No. 14-cr-00412-TEH, 2014 BL 320010 (N.D. Cal. Nov. 13, 2014):

> It is not immediately clear that the government has standing to object to Tucker's subpoena (which is directed toward the Bureau of Prisons). A party generally lacks standing to challenge a subpoena issued to a non-party absent a claim of privilege or a proprietary interest in the subpoenaed matter. See *United States v. Reyes*, 162 F.R.D. 468, 470 (S.D.N.Y.1995) (*citing Langford v. Chrysler Motors Corp*., 513 F.2d 1121 (2d Cir.1975)); *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990*, 741 F.Supp. 1059, 1060 n. 1 (S.D.N.Y.1990), aff'd,956 F.2d 1160 (2d Cir.1992).

United States v. Burger, 773 F.Supp. 1419 (D. Kansas 1991). However, a federal agency can designate the U.S. Attorney to move to quash on its behalf, typical in so-called "*Touhy* regulation" maters, for example.

In New York state courts, there is even more doubt about the standing of the District Attorney to move to quash a *subpoena* on a city agency. *E.g. People v. Grosunor,* 108 Misc.2d 932, 439 N.Y.S.2d 243 (Bronx Co. 1981)

V. The Right To Put Defense Witnesses On The Stand

Washington v. Texas did away with the narrow view that the compulsory process clause only guarantees the right to summon witnesses to court, and invalidated a state rule of evidence which precluded the defendant from putting on the stand material evidence favorable to himself. We should take a look at other state rules of competency or rules of practice which may tend to

violate the defendant's right to compulsory process by preventing the accused's witnesses from taking the stand.

A. Rules of Competence

Rules of competence are designed usually either to prevent the use of inherently untrustworthy testimony, or to further independent public interest by disqualifying witnesses from taking the stand. When any such rule is sought to be applied to prevent the use of material evidence by the defendant, a Sixth Amendment question is raised.

Untrustworthy testimony has in the past been attributed to witnesses with a bias, relationship to the parties, of a certain age, or with some moral deficiency, such as felons, accomplices and perjurers. However, few such rules of competency still operate to exclude broad categories of witnesses. The opinion in *Washington v. Texas* illustrates at least that such arbitrary rules which presume whole categories of persons unworthy of belief violate the compulsory process clause.

But, *Washington v. Texas* has implications for any determination of competency, since disqualification of individual witnesses by means of arbitrary standards must be equally impermissible as arbitrary exclusions of entire categories of witnesses.

In New York there are few statutory provisions relating to competency of witnesses. CPL §60.20 gives the trial court discretion to exclude witnesses by reason of "infancy or mental disease or defect." The same provisions also give the trial court discretion to allow the introduction of unsworn testimony. These determinations under §60.20 must be made in accordance with the standards implicit in *Washington*: unnecessary burdens should not be imposed upon the defendant's right to put on a defense. Exclusion of a witness is not necessary if the jury can adequately measure the credibility and weight to be given to the evidence, with the assistance of cautionary instructions, if necessary. Testimony of a witness may be excluded only if that witness is so untrustworthy, and where there is such an absence of corroborating factors, as to give the jury no rational basis for evaluating the truth of the testimony.

Although the question may be designated statutorily and in appellate decisions as a matter of "discretion" for the trial court, a trial judge has no "discretion" to deny the right to present a defense. See discussion at page 160.

New York, in *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S. 255 (1983), like other states, *see*, *Admissibility of Hypnotic Evidence at Criminal Trials*, 92 A.L.R.3rd 442, has restricted the use by prosecutors of hypnotically refreshed testimony. Such restrictions may not necessarily apply to hypnotically refreshed evidence offered by the accused without violating the right to present a defense. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), at least as long as there is no affirmative basis to find the evidence unreliable in fact. See, *People v. Hults*, 76 N.Y.2d 190, 557 N.Y.S.2d 270 (1990).[44]

[44] Defendant was convicted of first degree sodomy. The Court held that statements made by the complainant during hypnotic procedure could not be used by the defendant to impeach the complainant. Construing the scope of cross examination to be within the discretion of the trial judge, and determining that there were affirmative signs of unreliability, the Court said

. . . even assuming that the Constitution requires an exception to the general exclusion of hypnotic

Rules of competency which seek not to protect the jury from untrustworthy testimony, but rather to protect independent state interests may similarly be evaluated. Such rules may serve to disqualify a judge from testifying in trials over which he presides, or lawyers from testifying in a case in which they are counsel, or jurors from testifying about their deliberations. Should such rules threaten to prevent the defendant from adducing evidence in his favor, exclusion of the evidence may not obtain if the public interests involved might be adequately protected by means less drastic, for example the declaration of a mistrial, and the use of the judges or lawyers' testimony in the subsequent trial. Such rules abridge an accused's right to present a defense if they are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 1264, 140 L. Ed. 2d 413 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 107 S. Ct. 2704, 2711, 97 L. Ed. 2d 37 (1987).

B. Threats of preclusion, procedural default.

If the rallying cry of the Supreme Court echoes Cardozo's argument, "Should the criminal go free because the constable has blundered?," then these are the cases where the question becomes "Can the constable (the state) suppress favorable evidence because the defendant has blundered?" There are rules of possible preclusion of testimony designed to enforce certain procedural rights of the prosecution, such as reciprocal discovery and notice concerning *alibi* witnesses. *Cf.* CPL § 250.20(3). Although such rules are designed to enforce the discovery rights of the prosecution, any proposed determination of exclusion under such rules must be, finally, a Sixth Amendment question. *Michigan v. Lucas,* 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991); *Taylor v. Illinois*, 484 U.S.401, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Escalara v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988); *Dutton v. Brown*, 812 F.2d 593 (10th Cir. 1987) *cert. den.* 108 S.Ct. 116;[45] *United States v. McBride,* 786 F.2d 45 (2d Cir. 1986);[46] *United States v. Davis*, 639 F.2d 239 (5th Cir. 1981); *Ronson v. Commissioner*, 604 F.2d 176 (2d Cir.

> statements, it is clear that the State may constitutionally exclude hypnotic statements which have been demonstrated to be unreliable (Rock v. Arkansas, 483 U.S., at 61).

People v. Hults, supra, at 275. The defendant had also conceded the unreliability of the complainant's hypnotic statements.

[45] In *Dutton v. Brown,* a Writ of a Habeas Corpus was granted to a state prisoner whose mother was excluded at trial for violation of a witness sequestration order.

[46] *McBride* involved a defendant who asserted that she was mentally incapable of forming the intent to commit the bank fraud crimes she was charged with, and that she was unwittingly manipulated by her co-defendant into the commission of the crimes.

The Second Circuit panel reversed McBride's conviction.

> Her only apparent defense was her contention that she lacked the capable knowledge of the criminal activity and that her co-defendant manipulated her behavior in furtherance of the crime. . . . *the excluded evidence was critical to appellant's defense*.

786 F.2d at 49-50 (*emphasis added*).

1979);[47] *People v. Cuevas*, 67 A.D.2d 219, 414 N.Y.S.2d 520 (1st Dept. 1979).[48] And the court sometimes need to be reminded that the criminal process, by necessity and design, does not allow the defense to be treated the same as the prosecution, especially in the area of discovery.[49]

The defendant in *Taylor* had failed to comply with Illinois' witness discovery rule under circumstances which were described as "willful and blatant." Of course, as is too often noted, Under these facts, the right to present the witness was not absolute because the notice requirement itself was reasonable.[50] But in the course of it all the Court made it clear that "a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." Alternatives to preclusion are "adequate and appropriate," as in in most cases, and therefore preclusion is appropriate in only the most severe instances "where the inference that [the defendant] was deliberately seeking a tactical advantage is inescapable". *Taylor*, 484 U.S. at 414, 98 L.Ed.2d at 814.

This preclusion of relevant evidence, evidence supporting the only real defense defendant had, was a deprivation of defendant's basic right to compulsory process. His case was gravely hampered by his inability to present the sort of evidence and testimony necessary to his defense.

> The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the frame work of the rules of evidence. To ensure that justice is done, *it is imperative to the function of courts that compulsory process be available for the production of evidence* needed either by the prosecution or by the defense.

Taylor v. Illinois, 484 U.S. 400, 409 (1988) quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974) (emphasis added). The Court even conceded that there will be cases where disclosure may not be proper. [At n.20, citing Note, The Preclusion Sanction – A Violation of the Right to Present a Defense, 81 Yale L.J. 1342,1350 (1972)].

Unfortunately, although it was clear from *Taylor* that preclusion is disfavored, and only reserved for a last resort remedy for deliberately seeking tactical advantage, many prosecutors

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[47] In *Ronson v. Commissioner,* 604 F.2d 176 (2d Cir.1979), the Second Circuit granted an application for a writ of habeas corpus after the New York state trial court had disallowed a § 250.10 Notice to present a defense of diminished mental capacity as having been filed too late. The Second Circuit observed that this was not a statute which was self-executing and under which the trial court had no discretion: "CPL § 250.10 allows a trial judge to permit an insanity defense `in the interests of justice' even if the notice requirements are not met prior to trial." 604 F.2d at 178.

[48] Trial court's refusal to allow defense on redirect to question police officer regarding his disavowal of victim's initial physical description of suspect during prosecution cross-examination warranted reversal.

[49] See the section below at p.171, "The "Parity" Notion: The accused may not be limited to parity with the state."

[50] The opinion states, predictably, "But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests." Frequently judges who are wary of the potential for the compulsory process clause to constitutionalize so man aspects of the criminal proceeding throw up this type of *caveat*, but it is beside the point, because this is not the defense argument being advanced. *See ante*, p. 11.

and judges still cite it for its result, disregarding its rationale. Still plenty of cases recognize the proper rule. *E.g. United States v. Finley*, 301 F.3d 1000, 1017 (9th Cir. 2002) reversed a conviction based on erroneous exclusion of an expert, where the notice "supplied the government with sufficient notice of the general nature of [the expert's] testimony," even though it "may not have been as full and complete as it could have been or the government would have liked." 301 F.3d at 1017. *See also*, *United States v. Sarracino*, 340 F.3d 1148, 1170 (10th Cir. 2003) (sanction of exclusion of a witness's expert testimony 'is almost never imposed' 'absent bad faith.')(citations omitted).

As always, the defense should look to the standards used when the statute is sought to be applied to the People, to establish a threshold base point. *See, People v. Davis*, 289 A.D.2d 977 (4th Dept 2001).[51]

1. Seek alternatives to preclusion

Alternatives to preclusion, noted in the dissenting opinion of Justices Brennan, Marshall and Blackmun, include allowing the prosecutor to comment on the failure of the accused to abide by the disclosure rules, a continuance to allow for investigation by the prosecutor and contempt against the culpable defense attorney. Such means, less harsh than the outright exclusion of the testimony, should serve to adequately protect the state's interests and preserve at the same time the defendant's right to use evidence in his favor, leaving the weight and credibility to be given such evidence for the jury to determine. *People v. White*, 57 N.Y.2d 129, 454 N.Y.S.2d 964 (1982) (instructions and comments, rather than preclusion: violation of *alibi* notice rule); *People v. Boone*, 78 A.D. 461, 435 N.Y.S.2d 268 (1st Dept. 1981) (Failure to provide notice and witness refused to be interviewed by the District Attorney before being called as a witness at trial. Preclusion of alibi witness error under *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001) (Failure to give alibi *notice* did not warrant preclusion, overturning *People v. Noble*, 209 A.D.2d 735 (3rd Dept. 1994).[45]

Certainly the Court cannot usually be trusted to think of compromises that will provide lesser sanctions than preclusion.[52] It is up to the defense counsel, once threatened with the serious threat of preclusion, to insist that lesser remedies be utilized. Such offers of compromise

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[51] "County Court properly permitted the People to present the testimony of an alibi rebuttal witness despite their failure to comply with the notice requirements set forth in CPL 250.20(2) where, as here, defendant did not request an adjournment (see, CPL 250.20[3], [4]) and failed to establish prejudice (see, People v. Wiener, 271 A.D.2d 319, 707 N.Y.S.2d 150, lv. denied 95 N.Y.2d 872, 715 N.Y.S.2d 228, 738 N.E.2d 376)"

[52] But if the court does offer a compromise, the defense should take it and can do so without abandoning the claim. For example in *State v. McKnight*, 321 S.C. 230, 467 S.E.2d 919 (S.C. 1996) the trial court, erroneously it seems, refused to allow the accused, in the second trial, to call as a hostile witness the same person he called as a hostile witness in the first trial, to accuse that witness of having done the actual shooting. The judge said that the witness' testimony would not be a "surprise," despite the fact that it was not a "surprise" in the first trial. But the judge offered to have the witness called as a "court witness" whom both sides could cross-examine – an apparently indistinguishable process. The defense turned this down for no apparent reason, which was used to find that it was the defendant, not the court which caused the witness not to appear, vitiating his claim basd on *Chambers v. Mississippi.* The defendant's additional failure to recognize other issues in the case as compulsory process issues, and to combine them into the strongest possible argument is discussed below at n. 227.

do not result in waiver of the claim that no sanctions were warranted at all and insure that the jury will get to consider the evidence, even if in a less favorable light. One compromise that was worked out by the trial court itself was in *People v. Qike,* 182 Misc.2d 737, 700 N.Y.S.2d 640 (Sup.Ct. Kings Co. 1999), where the defendant sought to use an audiotape found to have been obtained by the defendant through illegal wiretapping. While "suppressing" the evidence on the motion of the prosecutor, the court nevertheless held that "[t]he defendant may use the contents of the taped conversation for impeachment purposes should the trial court deem it relevant and otherwise admissible."

Suggesting alternatives to preclusion may be considered necessary to the preservation of the claims, given the eagerness of the courts to find waivers. *Cf. People v. Ayala*, 90 N.Y.2d 490, 662 N.Y.S.2d 739 (1997) (defendant has burden of suggesting alternatives to courtroom closure based upon safety concerns); *People v. Mojica*, 244 A.D.2d 138, 677 N.Y.S.2d 100 (1st Dept. 1998) (Same, alternatives to the "gag order" imposed on counsel to not tell client identity of prosecution witness); *People v. Ayala,* 275 A.D.2d 679, 713 N.Y.S.2d 529 (1st Dept. 2000) ("by failing to seek further relief after objections were sustained, defendant Ayala failed to preserve his present claims . . . .").

2. Preclusion as last resort

Although the Supreme Court rejected it as a matter of federal law, in *Taylor*, the very strong argument made by the accused in that case was that preclusion should never be allowed unless there is no other remedy available and the offered evidence was tainted somehow in relation to the rule violation. *See, e.g.*, *Holder v. United States*, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1983); *Braswell v. Wainwright*, 463 F.2d 1148 (5th Cir. 1972). This is probably more close to the standard in New York. *People v. Napierala*, 90 A.D.2d 689, 455 N.Y.S.2d 862 (4th Dept. 1982) (Failure of defense to turn over arson expert's report); *People v. White, supra*.

3. Disobedience of court orders

On compulsory process grounds courts have refused to use preclusion of defense evidence as a sanction in cases of violations of court orders. *People v. Brown*, 274 A.D.2d 609, 710 N.Y.S.2d 194 (3rd Dept. 2000) (disobedience of sequestration order by *alibi* witness):

> It is axiomatic that when a defense witness in a criminal prosecution is prospectively excluded from testifying, the defendant's 6th Amendment rights are implicated. It is equally well settled that a defendant's right to present evidence is not absolute but, rather, is subject to the rules of procedure that govern the orderly presentation of evidence at trial (*see, Taylor v. Illinois,* 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798). Indeed, preclusion of the testimony of a defense witness, even where the testimony is highly probative, has been found to be an acceptable sanction for failure to comply with a court order (*see, United States v. Nobles,* 422 U.S. 225, 241, 95 S.Ct. 2160, 45 L.Ed.2d 141; *cf., People v. Bembry,* 258 A.D.2d 921, 685 N.Y.S.2d 519, *lv. denied* 93 N.Y.2d 897, 689 N.Y.S.2d 709, 711 N.E.2d 985; *People v. Byrd,* 239 A.D.2d 277, 657 N.Y.S.2d 683, *lv. denied* 90 N.Y.2d 902, 663 N.Y.S.2d 514, 686 N.E.2d 226). That being the case, it seems clear that where a witness

> violates an order of exclusion, he or she is subject to court-imposed sanctions the severity of which are committed to the sound discretion of the trial court. And while the sanction may include precluding the witness from testifying, such sanction clearly is the most drastic available and would be appropriate only in the most egregious circumstances, such as upon a finding of collusion between defense counsel and the witness to gain some tactical advantage, e.g., tailoring the evidence to counter the prosecution's case (*see,* 6 Wigmore, Evidence § 1842, at 477-484 [Chadbourn rev. 1976]; 1 McCormick, Evidence § 50, at 210-211 [5th ed.]). In most situations, however, alternative sanctions, such as an adverse witness charge, most likely would suffice.

The concurring opinion by Judge Mugglin in this case highlights the point made throughout this paper, that the admission or exclusion of defense evidence that is favorable to the accused is a question of fundamental right, and should not be subject to harmless error analysis.[53] *See also*, *People v. Kelly* 288 A.D.2d 695, 732 N.Y.S.2d 484 N.Y.A.D. (3 Dept. 2001);[54] *People v Cervera (Frank)*, 40 Misc. 3d 89 (N.Y. App. Term 2013) (record not clear on sequestration order and testimony offered in good faith and important to the defense; *People v. Palmer*, 272 A.D.2d 891(4 Dept. 2000).

4. Particular notice requirements

There are several statutory "reciprocal discovery" statutes applicable in state and federal courts ranging from notices of defenses, notices of certain types of evidence, to basic reciprocal discovery of documents.. The same constitutional considerations apply whenever these rules are relied on as a basis to preclude evidence by the defense, but also the cardinal practical warning: here especially the judges are always interested in finding ways to blame the accused or the

[53] "In my view, the testimony of such a witness impinges directly on the issue of guilt or innocence; prohibiting such a witness from testifying because of a violation of a preclusion from the courtroom order so impacts defendant's right to a fair trial [*footnote omitted*]] that it is beyond the discretion of the trial court and is not a proper subject for harmless error analysis (see, *People v. Crimmins*, 36 N.Y.2d 230, 238, 367 N.Y.S.2d 213, 326 N.E.2d 787)."

[54] Finding that County Court's ruling precluding a defense expert from testifying at trial deprived him of a fair trial and his right to present his defense. While the court may preclude the proposed witness, "such sanction clearly is the most drastic available and would be appropriate only in the most egregious circumstances", such as when the omission is willful and motivated by a desire to obtain a tactical advantage (People v. Brown, supra, at 610, 710 N.Y.S.2d 194). Although, County Court based its preclusion ruling on defense counsel's late notice of his intention to call a DNA expert, its ruling was nonetheless an abuse of discretion.. Defense counsel indicated that he had been retained only two days prior and that he immediately made efforts to locate experts regarding DNA evidence. Defense counsel also argued, and the record reflects, that the People failed to disclose the pertinent DNA laboratory notes until one business day before trial.

defense lawyer for their adverse rulings. A lawyer who tries to keep the defense case too close to the vest tempts the judge seeking a way to keep the trial short and uncomplicated by throwing out the evidence. Rules of preclusion beg for literal application. And it is all the more difficult for the defense because the law in this area is flooded with cases ultimately lost because the attorney failed to recognize and assert the compulsory process issue raised by preclusion.

Psychiatric evidence

In *People v. Berk*, 88 N.Y.2d 257, 667 N.E.2d 308, 644 N.Y.S.2d 658 (1996), the Court of Appeals affirmed the preclusion of psychological evidence where the defense had not served a notice pursuant to CPL § CPL 250.10 until two weeks into the trial. The Court of Appeals acknowledged that the use of the preclusion sanction would raise a fundamental question of rights:

> Exclusion of relevant and probative testimony as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in his own defense (*see,* U.S. Const. 6th, 14th Amends; *see also, Ronson v. Commissioner of Correction,* 604 F.2d 176, 178, *supra*).

Although the People were not entitled to examine the accused, because the defense expert had not examined the accused, and therefore the prejudice to them was less, the court was heavily influenced by the fact that there was no good reason for the failure to provide the notice:

> Defendant, moreover, failed to offer any explanation other than indecision for waiting until near the end of trial to notify the court and prosecutor . . . .

Expert evidence

The general rule that we see in *Taylor* applies: the Right to Present a Defense trumps a literal application of the notice statutes applying to expert witnesses. A trial court may not preclude the calling of experts by the defense without evidence of a deliberate tactic to gain advantage, or irremediable prejudice to the People, notwithstanding a technically late notice. *United States v. Sarracino*, 340 F.3d 1148, 1170 (10th Cir. 2003) (sanction of exclusion of a witness's expert testimony 'is almost never imposed' 'absent bad faith.')(citations omitted); *United States v. Finley*, 301 F.3d 1000 (9th Cir. 2002). reversed a conviction based on erroneous exclusion of an expert, where the notice "supplied the government with sufficient notice of the general nature of [the expert's] testimony," even though it "may not have been as full and complete as it could have been or the government would have liked." *id.* at 1017. *See*, *People v. Kelly,* 288 A.D.2d 695, 732 N.Y.S.2d 484 (3rd Dept. 2001) (Preclusion of DNA expert, applying "harmless beyond reasonable doubt" standard on review for harmless error):

> While the court may preclude the proposed witness, "such sanction clearly is the most drastic available and would be appropriate only in the most egregious circumstances", such as when the omission is willful and motivated by a desire to obtain a tactical advantage (*People v. Brown, supra,*at 610, 710 N.Y.S.2d 194)

As correct as these decisions are, the attorney can never forget that this rule is not intuitive for most judges, and the burden is on defense counsel to not only comply to the degree

possible with the notice rules, but to expressly raise any compulsory process concerns. Numerous cases exemplify the use of Rule 16 as a pretext for exclusion of defense experts without a hint that counsel understood the compulsory process issue, with unhappy results.

In some of these cases the defense counsel seems to have misjudged the scope of the statute. In some cases the lawyer assumed that, because their evidence was *rebuttal* evidence they could delay the disclosure. Not so. *United States v. Iskander*, 407 F.3d 232 (4th Cir. 2005); *United States v. Hayez*, 260 Fed. Appx. 615 (4th Cir. 2008) ("The lack of notice under Rule 16(b)(1)(C) alone was sufficient to justify the district court's ruling," doubting that the defense could not anticipate the government's evidence on direct):

> "Iskander does not deny that he failed to fully comply with the rules concerning expert discovery. Instead he argues that within the context of the government's "late" superseding indictment, timeliness should not be an issue for the government and that the government did not need time to prepare for Mehler's testimony. The district court did not agree. Based on an abuse of discretion standard of review and the facts related above, we cannot find that the court's decision to exclude a portion of defendant's expert witness' testimony was arbitrary and irrational. See Fed. R. Crim. P. 16(d)(2)(C). ("Failure to Comply. If a party fails to comply with this rule, the court may: . . . prohibit that party from introducing the undisclosed evidence; or enter any other order that is just under the circumstances."

Often the defense has been careless, or presumptuous, in disregard of the purpose of the statute, though not seeking tactical advantage, and still had the evidence excluded. *United States v. Naegele*, 2007 U.S. Dist. LEXIS 283 (DCDC 2007) (Friedman, J.)(Proposed limiting defense experts to original Rule 16 disclosure, where later reports and notices varied); *United States v. Peel*, 2007 U.S. Dist. LEXIS 14310 (SD Ill 2007) (Court would not let defense provide details of potential defense expert *in camera* to satisfy Rule 16); *United States v Hoffecker*, 530 F.3d 137 (10th Cir. 2008)(Late Rule 16 disclosure, three business days before jury selection in the second trial, and 34 months after the indictment, results in preclusion); *United States v. Petrie*, 302 F.3d 1280, 1283, 1288 (11th Cir.2002)(similar).

In none of these cases did the defense attempt to argue and preserve the issue as a compulsory process issue. Who knows what the results might have been had the defense counsel taken care to inform the court that the question was a constitutional one? Uninstructed by counsel judges will find support for preclusion even in cases which rule it out – like *Taylor v. Illinois*. Without proper advocacy judges often overlook the critical facts that *Taylor* had failed to comply with Illinois' witness discovery rule under circumstances which were described as "willful and blatant," and that the Supreme Court made it clear that preclusion is appropriate in only the most severe instances "where the inference that [the defendant] was deliberately seeking a tactical advantage is inescapable." Unfortunately, *Taylor v. Illinois* is a case more frequently relied on by courts for its result than its rationale.

But the task is not simply to get the trial judge to recognize that the issue is not merely one of the application of the rules of evidence, or notice requirements, and that it makes a difference when seen as a constitutional question. Beyond this, the trial and appellate counsel must understand that a different standard of review is called for where the issue relates to the

denial of a fundamental right. See below, at p. 160.

This is an area where even the most experienced defense counsel seem to forget that there are constitutional issues at stake, and what difference that ought to make at trial and on appeal. A catastrophic, but instructive, case of a judge aggressively using the notice rule to exclude evidence is *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009). In *Nacchio*, an insider-trading prosecution, the district court faulted the defense's Rule 16 notice for failing to provide the detail required under the civil rules and failing to provide an explanation of the defense expert's methodology sufficient to obviate a *Daubert* challenge. The the trial court, "seemingly driven by some internal time schedule"[55] made an adverse *Daubert* ruling on the basis of a Rule 16 notice alone, with no motion by the government or hearing. The 10th Cir. panel had overturned this, saying what any reasonably experienced practitioner would say: "In a criminal trial the proponent of expert testimony is not under any obligation to provide a "a complete statement" of the reasons for the expert's opinion, compare Fed.R.Civ.P. 26(a)(2)(B)(i), or an explanation of the expert's methodology." *United States v. Nacchio*, 519 F.3d 1140, (10th Cir. 2008). Unfortunately, the 10th Circuit reviewed the case *en banc* and reversed the decision, 555 F.3d 1234, and the Supreme Court denied review, --- S.Ct. ----, No. 08-1172, Oct. 5, 2009.[56]

While the *Nacchio* case is instructive about the aggressiveness with which trial courts can seek to exclude defense evidence, it is most significant as an example of the failure to integrate the 6th Amendment Right to Present a Defense as an issue at trial and on appeal. Despite being represented by top tier "white collar" defense counsel, the issue was not expressly argued or preserved as a compulsory process claim. When that ground was urged on appeal it was urged only on an "abuse of discretion" standard – in other words, Nacchio's counsel conceded that it did not make any difference in how the case should be reviewed. Taking advantage of this, the *en banc* majority brushed side the belated compulsory process claim by trivializing it: "As there was no abuse of discretion in the exclusion, there was no impingement upon Mr. Nacchio's right to present his defense." As is demonstrated below, it is essential that, on appeal, counsel insist that, when it comes to rights as fundamental as the Right to Present a Defense, the trial judge does not have *discretion* – he must decide correctly, and review should be for error. *See below* at p. 160.

Noting the failure to correctly preserve the issue at trial, and to argue for *de novo* review of the exclusion of the evidence under the correct legal and constitutional standard, "in particular the Sixth Amendment, [which] protect[s] and support[s] the "truth seeking goal" of criminal

[55] 555 F.3d 1234 at 1279 (dissenting opinion of Judges Henry and Kelly)

[56] *Nacchio* involved the exclusion of of highly qualified defense expert on issue of materiality in an insider trading case. Four judges dissented. The question raised in *United States v. Nacchio*, is whether the accused had the burden to affirmatively demonstrate the methodological validity of its expert's proposed testimony, absent an actual *Daubert* challenge by the government. The government had opposed the defense expert on grounds that the Rule 16 notice had been inadequate, suggesting in passing that the evidence was suspect under *Daubert*, but had *not* brought a motion *in limine to exclude the evidence*. Based solely on the Rule 16 notice, with no motion to preclude the evidence, the judge summarily precluded the witness from giving expert opinions, mouthing non-conformity with *Daubert* standards. The unsoundness of this ruling, from the viewpoint of *Daubert* principles is discussed below, p. 119.

trials" the the dissenters argued that Nacchio had been deprived of effective assistance of counsel by his nationally known counsel. 555 F.3d at 1281.

Clearly Nacchio's case suffered by the focus of defense counsel on Rule 16, and failing to appreciate how the compulsory process clause required a difference in the approach of both the trial court and the Court of Appeals. But the case illustrates still how much a difference it made to even belatedly argue the compulsory process claim for the first time on appeal. The panel opinion in *Nacchio* makes it clear how the mere incantation of such a fundamental right as the right to present a defense alters the analysis on appeal, *United States v. Nacchio*, 519 F.3d 1140, 1156 (10th Cir. 2008), though the end result shows the problems created by the failure to truly integrate the issue into the trial and appellate defense.[57]

The *Nacchio* case is instructive in another way. Why do counsel and courts treat rebuttal expert or scientific testimony always as if it had to meet the same standard of admissibility as the government's expert hypothesis? By its own terms, *Dauber* should not apply to scientific or expert testimony which merely establishes expert facts or observations which call into question the correctness of the prosecution's hyptheseis of guilt. See the discussion below at p. 119.

Alibi notice

First, Preclusion of *alibi* evidence is not authorized merely because of a violation of the notice requirement. *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001) (Failure to give alibi *notice* did not warrant preclusion, overturning *People v. Noble*, 209 A.D.2d 735 (3rd Dept. 1994).[58] *People v. Boone*, 78 A.D. 461, 435 N.Y.S.2d 268 (1st Dept. 1981) (Despite failure to provide notice, and witness' refusal to be interviewed by the District Attorney before being called as a witness, preclusion of alibi witness was error under *Chambers v. Mississippi*); *People v. Collins*, 30 A.D.3d 1079, 816 N.Y.S.2d 801 (4th Dept. 2006) ("In any event, even assuming, arguendo, that a notice of alibi was required, we conclude that the court abused its discretion in failing to engage in the requisite analysis to balance "the fundamental character of the defendant's right to offer the testimony of witnesses in his favor); *People v. Duncan*, 187 Misc.2d 205, 721

[57] " The right of a defendant to call witnesses is crucial for testing the prosecution's case and defeating the charges against him. Indeed, the "right to present a defense ... is a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Even if the exclusion does not rise to the level of a constitutional violation, the burden is on the government to prove that the error did not have "a 'substantial influence' on the outcome." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir.1990) (*en banc*) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946))."

[58] The Appellate Division in New York attempted to avoid the constitutional issue by a finding of "harmless error" which was rejected by the district court and the Second Circuit. The district court found not only that the preclusion was error, but that the lawyer was ineffective for failing to file the notice. The Second Circuit agreed with the first conclusion, and therefore did not reach the second. This decision does modify the pre-Taylor case of *Escalara v. Coombe*, 852 F.2d 45 (2nd Cir. 1988), which only allowed for preclusion when there was "substantial prejudice to the prosecution's case,"by allowing for preclusion when, as under *Taylor*, the withholding of notice was "wilful and motivated by a desire to obtain tactical advantage." Such a finding was found to be precluded in *Noble* where there were questions about whether the witness was technically an *alibi* witness (although that was a question resolved against the defendant) and where the witness was on the witness list of the defense and had been mentioned several times prior to being called.

N.Y.S.2d 912 (Sup.Ct.Kings. Co 2001); *People v. Rosado,* 153 Misc.2d 477, 583 N.Y.S.2d 130 (Sup.Ct.Bronx Co. 1992) ("This Court holds it constitutionally impermissible to enforce generally New York's "Notice of Alibi" statute against a defendant by precluding or striking a defendant's own testimony.") In *People v. Peterson*, 96 A.D.2d 871, 465 N.Y.S.2d 743 (2nd Dept. 1983) the court found it to be an abuse of discretion for the trial court to have precluded the defense alibi evidence. The court noted that the statute itself is not absolute, since the trial court may extend the period for service of the notice, CPL § 250.20(1), and the people were not prejudiced.

Other cases evidence that the lack of effort to preserve a claim as a fundamental constitutional claim may be the real reason for the loss at trial and on appeal. *E.g.*. *People v. Mensche*, 276 A.D.2d 834, 714 N.Y.S.2d 377 (3rd Dept. 2000).

As always, the defense should look to the standards used when the statute is sought to be applied to the People, to establish a threshold base point. *See, People v. Davis*, 289 A.D.2d 977 (4th Dept 2001).[51] . Trial courts have, on both statutory and constitutional grounds blocked efforts by prosecutors to carry reciprocal discovery to an extreme, by seeking preclusion of the defendant as an "alibi" witness. *People v. Duncan*, 187 Misc.2d 205, 721 N.Y.S.2d 912 (Sup.Ct.Kings. Co 2001); *People v. Rosado,* 153 Misc.2d 477, 583 N.Y.S.2d 130 (Sup.Ct.Bronx Co. 1992) ("This Court holds it constitutionally impermissible to enforce generally New York's "Notice of Alibi" statute against a defendant by precluding or striking a

Because of the special protection for the right of the accused to testify, in most states the alibi notice statutes do not apply to the **testimony of the defendant**. *People v. Hampton*, 696 P.2d 765 (Colo.1985); *State v. Fechter*, 397 N.W.2d 711 (Iowa 1986); *People v. Merritt*, 396 Mich. 67, 238 N.W.2d 31 (1976)(opinion by Williams, J.); *People v. Rakiec*, 289 N.Y. 306, 45 N.E.2d 812 (1942); *People v. Collins,* 30 A.D.3d 1079, 816 N.Y.S.2d 801 (4 Dept.,2006);[59] *United States v. Smith*, 524 F.2d 1288 (D.C.Cir.1975); *Walker v. Hood*, 679 F.Supp. 372 (S.D.N.Y.1988); *People v. Pearson*, 2011 WL 2021931 (Michigan Supreme Court, 2011); *Alicea v. Gagnon*, 675 F.2d 913 (7th Cir.1982); *Campbell v. State*, 622 N.E.2d 495 (Ind.1993) (exclusion of defendant's own alibi testimony for violating notice provision violated defendant's state constitutional right to testify on his own behalf)(citing cases).

C. Discouragement of witnesses

Rules of practice or the behavior of judges or prosecutors may unconstitutionally discourage or preclude a witness for the defense. In *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the Supreme court reversed a conviction where a witness called by the defendant became unwilling to testify after receiving unnecessarily harsh warnings from the trial

[59] Trial court committed reversible error in accepting prosecutor's calim that to allow the accused testify that he was inside the bar when the shooting happened outside on the sidewalk constituted unnoticed *alibit* evidence. The proposed testimony was not an *alibi* because the defendant was in fact in the vicinity where the shooting occurred. In an event it violated the defendant's right to offer the testimony of witnesses in his favor, in this case himself.

judge about the consequences of perjury which "effectively drove that witness off the stand," *Webb*, 409 U.S. at 98, 93 S.Ct. at 353. The Supreme court ruled that if the defendant established that

> the unnecessarily strong terms by the judge could have exerted such stress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify, the burden fell on the prosecution to prove the contrary. *Ibid.*

Accord, *People v. Shapiro*, 50 N.Y.2d 747, 761 (1980); *People v. Lee*, 58 N.Y.2d, 459 N.Y.S.2d 19 (1982). *See*, *Grochulski v. Henderson*, 637 F.2d. 50 (2nd Cir. 1980) (Trial court conducted mid trial hearing on whether prosecution intimidated defense witnesses.)

"Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to 'substantial government interference with a defense witness' free and unhampered choice to testify." ' *United States v. Saunders*, 943 F.2d 388, 392 (4th Cir.1991). Some courts have also applied harmless error analysis to this situation if the witness in fact testifies. *United States v. Teague*, 737 F.2d 378 (4th Cir.1984); but compare *United States v. MacCloskey*, 682 F.2d 468 (4th Cir.1982) (finding *per se* error based on the prosecution conduct).

State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976), relying on *Webb* and *Washington v. Texas,* reversed an incest conviction where the defendant's wife was called by the state as a "hostile witness" and the defense cross examination was interrupted for the judge to caution her against perjury (out of the presence of the jury) and the defense counsel thereafter failed to ask further questions.[60] The third "hazard" defined by the North Carolina Supreme Court was that judicial cautions to the witness might as well serve to chill full examination of the witness by the defense.[61] Akin to this, in the astute analysis of the North Carolina court was the fourth "hazard"

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[60] "A second hazard [in cautioning a witness about perjury – even outside the presence of the jury] is that the judge's righteous indignation engendered by his 'finding of fact' that the witness has testified untruthfully may cause the judge, expressly or impliedly, to threaten the witness with prosecution for perjury, thereby causing him to change his testimony to fit the judge's interpretation of the facts or to refuse to testify at all. Either choice could be an infringement of the defendant's Sixth Amendment rights to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense. Both rights are fundamental elements of due process of law, and a violation of either could hamper the free presentation of legitimate testimony." The following statement from Annot., 127 A.L.R. 1385, 1390, is pertinent: 'Any statement by a trial court to a witness which is so severe as to put him or other witnesses present in fear of the consequences of testifying freely constitutes reversible error.' *Rhodes* is further discussed below at p. 65

[61] "This is particularly true when the judge anticipates a line of defense and indicates his opinion that the testimony necessary to establish it can only be supplied by perjury; *a fortiori*, if the judge's warnings and admonitions to the witness are extended to the attorney, coercion can occur. A law license does not necessarily insulate one from intimidation. In short, even a seasoned trial attorney may trim his sails to meet the prevailing judicial wind." To this the court added the interesting observation that the effect of rulings on defense counsel is often overlooked:

> The danger that a defendant's right to effective representation may be impaired by a trial judge's threat to or intimidation of the defendant's counsel has been treated in Annot., Conduct of Court-Rebuking Counsel, 62 A.L.R.2d 166 (1958). In it there appears the following:
>
> > '(I)n reviewing a case where the defendant's lawyer has run into stormy judicial

of perjury warnings for the impartiality of the tribunal.

> Thus a criminal defendant has the right to present his own version of the facts, to present his own witness without unwarranted judicial interference, and to have his guilt or innocence determined only after all admissible, relevant testimony which he has offered has been considered by the jury. See *United States ex rel. Darcy v. Handy*, 203 F.2d 407 (3d Cir. 1953) (per curiam). . . . [I]t is our opinion that the judge's remarks probably had the effect of stifling the free presentation of competent, available testimony. We therefore hold that they constituted reversible error.

290 N.C. 16 at 28.

Compare *People v. Bagby*, 65 N.Y.2d 410, 492 N.Y.2d 562 (1985), where this issue would have been appropriate but was not raised. Nor, after the defendant's ex-wife asserted her 5th Amendment privilege, in response to threats of a perjury prosecution, was the issue of immunity for her raised.[62]

In *United States v. Vavages*, 151 F.3d 1185 (9th Cir.1998), the prosecutor communicated

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> weather, courts usually confine their inquiry to the single question: Was the jury influenced, or likely to be influenced, against the defendant? Once satisfied on this point, most courts promptly decide whether or not to affirm.
> 'But the jury makes up but a part of the cast of characters in a trial. The lawyer also has his important role; and although the profession, especially that part of it that engages in criminal trials, is often thought to be tough-skinned, it is a fallacy to regard it as deficient in ordinary human sensitivity. If this premise is well taken, it follows that the judge can, by punishment, threat, abuse, and stricture, with or without design, cow or obstruct all but the most daring or determined lawyers to the point that their clients suffer from loss of effective representation. Once such a possibility is recognized, it no longer suffices merely to decide whether or not the jury was biased. Error may have been present although the jury's disposition towards the defendant was not at all warped; it could be that an intimidated or discouraged attorney left undeveloped a persuasive defense, and the trial became ex parte for practical purposes.
> 'So far as quantity goes, opinions giving direct recognition to the likeness of the judge's hurting the defendant by scaring or disorienting his lawyer are unimpressive; but the handful that have used it are logically attractive.'

Id. at 190.

[62] In these respects this case was similar to *People v. Farruggia*, 77 A.D.2d 447, 433 N.Y.S.2d (4th Dept. 1980). In the New York Court of Appeals case reaffirming the availability of defense witness immunity, *People v Shapiro*, it was a case where the Court condemned the efforts of the prosecutor to drive defense witnesses from the stand with a threat of perjury:

> "Accordingly, the District Attorney's refusal to extend immunity, not to speak of the menacing terms in which he did so, could have served no purpose other than to irretrievably bind the witnesses to their previous sworn versions, accurate or not. By doing so, it impermissibly affected their meaningful exercise of their Fifth Amendment rights and insured their unavailability as witnesses for the defendant. The prosecutor's conduct was, therefore, clearly erroneous."

People v. Shapiro, 50 N.Y.2d 747, 760-761 (1980).

Below, at page 146 is a discussion of the right to have immunity for defense witnesses.

several times to a potential witness's attorney that he did not believe the defendant's alibi defense. He also emphasized that if the witness testified falsely, she could be charged with perjury and the government could withdraw from its plea agreement with her (in an unrelated case). After determining that the prosecutor had acted improperly, the court concluded that the prosecutor's actions were a "but-for" cause of the witness's subsequent refusal to testify. The Second Circuit reiterated this test in *United States v. Williams*, 205 F.3d 23 (2d Cir.2000): "judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense."

Incorrect effort has been made to limit *Webb* to anticipatory efforts to drive defense witnesses from the stand. *People v. Siegel*, 87 N.Y.2d 536, 640 N.Y.S.2d 831 (1995). *Siegel* was a 4-3 decision by the Court of Appeals which upheld the giving of an instruction to the jury that the invocation of the 5th amendment privilege by a defense witness on cross examination could be considered in evaluating the credibility of the testimony. The Court pointed out that the trial judge did not, as was done in *Webb*, warn the defense witness before he gave his direct evidence for the defense. Rather, it was only after the cross examination revealed material differences between the testimony on direct with the testimony at the grand jury and on cross examination that the judge took the witness aside to warn of the dangers of perjury. If *Webb* does not apply, it is only because the instructions here were not as harsh as in *Webb*.

The fact remains that the trial judge would never have similarly warned police officer or complainant or other witness called by the prosecution and whose current testimony favored the People. The "bad law" of this case is attributable to the fact that options open to the judge were not explored by the Court of Appeals, nor, apparently by the parties on appeal or at trial.[63] For example, in *State v. Stanley*, 365 S.C. 24, 615 S.E.2d 455 (S.C. Ct. App. 2005) the defendant's brother was called by the state and, contrary to the written statement he apparently gave to the police at arrest, claimed that the drugs were his, not those of the accused. The trial judge had the witness arrested in the middle of his testimony, either on the idea that he had possessed the crack cocaine or that he had (at the station house) committed perjury. He denied the accuracy of the written statement. When the judge declared "Now, he's, obviously, either guilty of trafficking in cocaine or he's lying. You agree with that, [Defense Counsel]. He can't have it both ways?"

[63] The witness could have been given immunity from use of current truthful testimony to establish differential perjury at the earlier grand jury proceeding by merely directing the witness to answer; or the prosecution could have been directed to offer such immunity to the witness, which it could do informally, before any remedy would be given to the people for the refusal of the witness to answer on cross examination. See Below, at page 146 for a discussion of defense witness immunity. That is, the People should not be given the power to choose between having the witness' truthful answers on cross examination (retaining the ability to prosecute for perjury on *this occasion*) or having the witness' testimony discounted. If they wanted a remedy for limits on cross examination they must have first offered a cost-free choice to the witness to give truthful testimony.

Unfortunately, the discussion focused on what should happen after the witness refuses to testify, and not on what should have been done to keep the witness on the stand. The dissent, goes off on the sympathetic, but mistaken course of arguing that there can be no inferences from the refusal to testify, which is addressed at page 61.

defense counsel erroneously conceded: "That's correct, Your Honor."[64] On this was a based a finding that any error had not been preserved. After being jailed overnight, the witness, now appointed counsel, recanted his testimony. The South Carolina Supreme Court found – with transparent illogic – that the station house statement, if false, was covered by the state perjury statute for providing false information in a "document, record, report, or form *required by the laws of this State*," and thus supported the arrest in court for perjury based on the conflict between the trial testimony and the statement to the police. What is missed in the analysis by the court is that its theory accepts the current (favorable) testimony being *true*. So the actions taken which resulted in a recantation of the testimony is not an *anti-perjury* gesture, it is anti-acquittal gesture. Certainly the witness' admission of guilt supported the reliability of his testimony.

Of course the defendant is also a potential witness. Therefore this right also includes the right of the accused to testify, which is protected also by *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974), and later by *People v. Betts*, 70 N.Y.2d 289, 520 N.Y.S.2d 370 (1987).[65] A major purpose of these decisions is to avoid having the permitted scope of cross examination drive the accused from the stand. Another purpose, of course, is to give the accused at least a fair shot at having his or her testimony credited. See discussion below at page 65.

Consider, also, has the prosecution tried to make defense witnesses unavailable by threatening prosecution of them or naming them as "Unindicted Co-conspirators"? See, Abramowitz and Bohrer, "White Collar Crime," New York Law Journal, March 7, 2006. See, *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987) (reversible error where federal agent substantially interfered with witness by threatening defendant's accountant that he could be indicted for aiding defendant's tax fraud, after which accountant testified falsely); *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979) (reversing conviction where witness refused to testify further after FBI agent told him that "he would have nothing but trouble" in ongoing state case if he continued to testify, and second witness refused to testify at all); *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (prosecutor improperly conducted highly intimidating interview by repeatedly warning defense witness of right not to give self-incriminating evidence, after which she invoked Fifth Amendment regarding much of expected testimony); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (reversing conviction where witness initially willing to testify, but declined further testimony following recess during which Secret Service Agent threatened him with misprision if he testified).

[64] Obviously there is the issue of whether the statement to the police would have been perjury even if false. But the witness had denied he even made the statements that appeared above his signature. But the specific dichotomy was false. The witness was not trying to "have it both ways" in his testimony. He was exposing himself to conviction on his testimony for both the cocaine and, apparently, perjury in his police statement.

[65] Defendant may not be cross examined on a pending criminal charge. To allow this would force the accused to give up the right against self-incrimination in order to exercise the right to present a defense.

D. Impediments to the calling of witnesses

The right to compulsory process includes the right to actually put witnesses on the stand and ask questions without prior impediment. For example, the prosecution is not entitled to an offer of proof prior to the defense witness assuming the stand, *People v. Hepburn*, 52 A.D.2d 958, 383 N.Y.S.2d 626 (2d Dept. 1976), a device frequently used by the prosecution to hinder the presentation of the defense case. Although it has no basis in law, it is often allowed by judges either because (1) they did it as a prosecutor, for the obvious purpose of getting a preview of the defense witness, or (2) they do not know any better, or (3) they are looking for an excuse to bring the trial to a more rapid conclusion, or (4) the defense acquiesces without a fight.

1. Order of defense witnesses

Brooks v. Tennessee, 406 U.S. 605, 92 S.Ct.1891, 32 L.Ed.2d 358 (1972), well illustrates this principle. There the Tennessee statute only allowed defendants to testify at the outset of the defense case, ostensibly to serve the state's interest in preventing perjurious conformation of the defendant's testimony to any defense witnesses. The statute was expressly invalidated by the Supreme Court on self incrimination and counsel grounds,[66] but the Supreme Court seems to have accepted that the reversal was also based on the fact that the practice "impermissibly burdened the defendant's right to testify," *Portuondo v. Agard*, 529 U.S. 61, 70, 120 S.Ct. 1119 (2000), obviously a compulsory process concern. As Professor Westen pointed out, this case was very close to *Washington v. Texas*, except that the witness precluded was not an accomplice, but the accused. Westen, *The Compulsory Process Clause*, 73 Michigan L.Rev. 71, 117 (1974). The compulsory process clause provides the most coherent rationale for the result.

2. Sequestration rules

Geders v. United States, 425 U.S. 80, 87-91, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), held that the defendant must be treated differently from other witnesses insofar as sequestration orders are concerned, since sequestration for an extended period of time denies the Sixth Amendment right to counsel. The Court might as well have recognized that this also affected the right to present a defense.

The New York Court of Appeals expressly relied on the compulsory process rights of the accused in reversing the conviction in *People v. Santana*, 80 N.Y.2d 92, 587 N.Y.S.2d 570 (1992), where the trial court had barred the defense counsel from talking with the defense psychiatrist, who had already testified if he were to be called as a surrebuttal witness.

> This ruling effectively precluded defense counsel from offering any surrebuttal evidence if he chose to enlist the assistance of his own expert in developing and conducting the cross-examination of the People's expert. . . . We agree with defendant that the ruling interfered significantly with his right to make an effective presentation on the only issue before the jury-- his affirmative defense of insanity.

[66] The accused was penalized if he remained silent at the outset of his case, and the lawyer was interfered with in the exercise of legitimate strategic choices.

587 N.Y.S.2d at 574.[67]

E. Notwithstanding other interests

1. Public trial

In *People v. C.M.*, 161 Misc.2d 574, 614 N.Y.S.2d 491 (Sup. Ct. N. Y. Co. 1994), the judge granted the defendant's motion for closure of the courtroom so that he could testify without fear that his life would be in danger because of his history of cooperation with the police.[68]

F. Assertion of privileges: self-incrimination

The problem of the assertion of the privilege against self incrimination by a witness may be stated in two ways: first, the accused wishes to *use as a basis for inference* the fact that another person has refused to speak for fear of "self-incrimination" regarding the transaction which forms the basis for the charge; second, the accused wishes to have the *testimony* of a witness whose assertion of the privilege stands in the way. Obviously, although it may be stated in two different ways, the problem does not necessarily describe two distinct situations. There may be situations where the only thing available from the witness is the act of refusal to speak.[69] Our whole discussion here will simply beg the question of whether the accused is allowed to freely choose which approach to take.[70]

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[67] The Court of Appeals distinguished this case from the unfortunate case of *People v. Narayan*, 58 N.Y.2d 904, 460 N.Y.S.2d 503, 447 N.E.2d 51, in which the defense attorney was precluded from speaking with the accused during his testimony. The distinction is in the nature of expert testimony and the fact that the same reasons for sequestration do not apply here as might with the testimony of the accused:

> The same reasons for exclusion do not apply to expert witnesses. It has been pointed out that "the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury"

587 N.Y.S.2d at 574.

[68] " If, fearing exposure as an informant, he does not present his defense, he risks conviction and mandatory imprisonment. If his defense is successful, but his closure motion is not, he will be acquitted but may become the victim of those on whom he had informed, because he has been publicly exposed as an informant."

[69] Such as where the witness is not any longer available or, though available, will persist in refusing to speak even if held in contempt. The questions of admitting the former or compelling the witness to speak, by a grant of immunity, are addressed under the topic of the "Right to introduce evidence", *infra* at page 146. Insofar as the witness is a codefendant, other questions are raised as well, as described further herein.

[70] There are presented here cases which defend the right of the accused to use the silence of a witness as the basis for an inference that the witness was involved in the charged transaction, perhaps to the exclusion of the accused. These cases largely antedate those which recognized the right of the accused for immunity for such a witness called by the defendant. We can assert on the basis of these cases that at least *one* of these approaches must be available to the accused, but it is not clear that the accused can choose to rely on the inference alone if the court or

In this section we are concerned with getting the witness on the stand. There are many cases which stand for the proposition that the prosecutor may not call a witness who is expected to assert the privilege against self-incrimination. Not only would this prejudice the accused who would be deprived the opportunity to confront the witness, it would be unfair because the prosecutor has the power to confer immunity on the witness. It is different if the accused calls the witness.[71]

The defendant should be entitled to call to the witness stand, and ask questions of any person, notwithstanding the expectation that the person might assert a claim of privilege under the Fifth Amendment. As stated by the Second Department:

> In all criminal prosecutions, the accused has the right to have compulsory process for obtaining witness in his favor (U.S. Const. Sixth Amend.; Civil Rights Law, §12). As stated by the Court of Appeals: "Notwithstanding the strong evidence against defendant and the possibility or even a probability that Mrs. Jessmer would refuse to answer questions as sworn as a witness, we are of the opinion that the error in refusing to order her to be produced in court is not such a technical error as does not affect the defendant's substantial rights." *People v. Wells*, 272 N.Y. 215, 216-217, 5 N.E.2d 206 (1936).

People v. Caparelli, 21 A.D.2d 882, 251 N.Y.S.2d 803 (2d Dept. 1964). Accord, *People v. Hannon*, 50 Misc.2d 297, 270 N.Y.S.2d 327 (Sup.Ct. Erie Co. 1962, Gabrielli, J.); *People v. Krugman*, 44 Misc.2d 48, 51, 252 N.Y.S.2d 846, 850 (Sup.Ct.Kings Co. 1964, Sobel, J.). See, *Columbus v. Cooper*, 49 Ohio St.3d 42, 550 N.E.2d 937 (Ohio 1990) (Pursuant to the Compulsory Process Clause of the Ohio Constitution, a trial court may not exclude a person who has indicated his intention to assert his right against self-incrimination from appearing as a witness on behalf of a criminal defendant at trial.); *State v. Snyder*, 244 Iowa 1244, 1248, 59 N.W.2d 223 (Iowa 1953).[72] See also the cases discussed in the next section, regarding the issue of joinder, and the right of the accused to a severance so that he may call the codefendant, if only to have the codefendant assert the privilege. See *Murdoch v. Castro*, 365 F.3d 699, (9th Cir. 2004) (the more interesting of the two opinions; habeas granted), appeal after remand, 489 F.3d 1063 (9th Cir. 2007) (the court examined the issue of whether a defendant's Confrontation Clause right to cross-examine government witnesses trumped the witnesses' refusal to answer

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prosecutor are wiling to confer, one way or another, immunity on the defense witness. The state may well have a legitimate basis to prefer that the witness be forced to speak the truth rather than have the jury rely on inference alone as to the meaning of the assertion of the privilege. Thus counsel cannot attempt to be too clever in "having the cake and eating it too." Cf. *People v. Goetz*, 135 Misc.2d 888, 516 N.Y.S.2d 1007 (Sup.Ct.N.Y.Co.1987) (Where defense counsel rejected offer by prosecution for immunity for the witness, defendant could not later complain about denial of "missing witness" instruction.)

[71] This point is analyzed in greater detail by Professor Westen in the course of his discussion of the related issue of joinder, discussed in the next section, in Westen, The Compulsory Process Clause. 73 Michigan L.R 71 at

[72] "[T]he general rule is, as stated in 58 Am. Jur., Witnesses, Section 53, that although a witness cannot be compelled to give incriminating testimony, he must if properly summoned appear and be sworn. His privilege is available only as a witness and cannot be extended so as to prevent him from appearing."

based on the attorney-client privilege.)

It may be necessary for counsel to lay a proper foundation for the need for such procedure, and a true desire for the actual testimony of the person. *Cf. People v. Thomas*, 68 A.D.2d 450, 417 N.Y.S.2d 278 (2d Dept. 1979); *People v. Sapia*, 41 N.Y.2d 160, 391 N.Y.S.2d 245 (1973).

The reluctance of judges currently to allow such evidence stems from either general mistrust of defense evidence, confusion with the impermissibility of using the assertion of the privilege *against the witness*, or the assumption that the assertion of the privilege is not probative. The error of the latter assumption is established by the fact that the assertion of the privilege is something from which inferences of guilt maybe drawn in civil cases. *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1151, 47 L.Ed.2d 810 (1976); *Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Brinks, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).[73] Another question relating to the utilization of an assertion of the privilege arises when the person asserting the privilege is a codefendant whose case is joined with the accused, as seen below.

What do you do once the witness asserts the privilege? If the testimony of the witness is *really* desired, then one should attempt one of the three methods of obtaining immunity for defense witnesses, as discussed below beginning at page 146.

G. Rules of joinder

Joinder of offenses designed to serve legitimate state interests may nevertheless deprive the accused of substantial rights. For example, there might be no opportunity to cross examine the declarant-co-defendant whose statement is introduced at a joint trial, resulting in the need to sever co-defendants against whom statements will be introduced. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

Joinder determinations may also have the effect of preventing the defendant from testifying, or preventing the defendant from being able to challenge testimony or to obtain witnesses on his behalf.

Evidence favorable to the defendant may be inadmissible with respect to a co-defendant, 239-240, *People v. Carter*, 86 A.D.2d 451, 450 N.Y.S.2d 203 (2nd Dept. 1982); *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970). Co-defendants, unwilling to testify at a joint trial, may be willing to testify if called at a separate trial. *United States v. Shuford*, 454 F.2d 772 (4th Cir. 1971).

Once the defendant shows that the co-defendant has evidence favorable to him, and that joinder could reasonably tend to discourage the witness from testifying for the defense, the burden must be on the prosecution to establish that joinder is not the cause of the witness' silence. If it is more likely than not that the co-defendant would testify at a separate proceeding, severance must be granted. *United States v. Echeles*, 352 F.2d 892 (1st Cir. 1965); *United States v. Gleason*, 259 Supp. 282 (S.D.N.Y. 1966); Cf. *People v. Owens*, 22 N.Y.2d 96, 291 N.Y.S.2d

[73] The courts have had no problem allowing the drawing of an adverse inference against a party in civil cases, such as the debtor in bankruptcy proceedings. See, Collier on Bankruptcy, §344.05[3].

313 (1968); *People v. LaBelle*, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966); *People v. Baum*, 64 A.D.2d 655, 407 N.Y.S.2d 58 (2d Dept. 1978).

In a sort of obverse situation, joinder of defendants for trial may be improper for one defendant becaus another defendant is entitled to seek favorable inferences that might be drawn from the co-defendant's silence or refusal to testify. *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962);[74] *People v. Hannon*, 50 Misc.2d 297, 270, N.Y.S.2d 327 (Sup.Ct. Erie Co. 1962, Gabrielli, J.); *People v. Caparelli*, 21 A.D.2d 882, 251 N.Y.S.2d 803 (2d Dept. 1954); *People v. Krugman*, 44 Misc.2d 48, 252 N.Y.S.2d 846 (Sup. Ct. Kings Co. 1965). In *Krugman*, Judge Nathan R. Sobel stated the matter:

> A related problem occurs when a defendant desire to call his co-defendant as a witness in his behalf. He may have a constitutional right to do so (*People v. Caparelli*, 21 A.D.2d 882, 251 N.Y.S.2d 803, *supra*) but the co-defendant has a constitutional right to remain silent even to the extent of not being compelled to claim his privilege *in the presence of the jury* trying him (citations omitted). In such a case separate trial seems essential. *Id*., 252 N.Y.S.2d at 850.

The order in which separate trials are scheduled may deprive the defendant of testimony of those who, if tried first, would then be available to testify in his favor. Since the order of trial is usually only a question of prosecutorial strategy and judicial discretion, the commands of compulsory process clause must control, where pertinent, on even the most minimal showing by the defense. Cf. *United States v. Echeles, supra; Byrd v. Wainwright, supra*. Such consideration should also apply to require the hearing on parole or probation violations to be scheduled after

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[74] In *DeLuna*, the appellant had been tried with a co-defendant on a narcotics charge. The co-defendant testified at trial, putting all the blame on DeLuna, and the co-defendant's attorney was allowed to comment at trial upon DeLuna's failure to testify. The co-defendant was acquitted.

Judge John Minor Wisdom, writing for the majority, concluded that this was a case where:

> an attorney's duty to his client should require him to draw a jury's attention to the possible inference of guilt from a co-defendant's silence....

Although the co-defendant was entitled to argue the inferences which could be drawn favorable to himself from failure to testify, DeLuna could not have that fact considered against him, and cautionary instructions are not sufficient to protect the rights of both defendants. Therefore, DeLuna's pre-trial motion for severance should have been granted and the conviction was reversed and remanded for a new trial. See, *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971):

> Judge Bell concluded that a defendant has no right to comment upon a co-defendant's failure to take the stand. We hesitate to go so far. Rather, we believe the better rule was stated by Chief Judge Hastings in *United States v. Kahn*, 381 F.2d 824, 840 (7th Cir. 1967):
>
> > The question as we see it is *how essential is it to a fair and complete defense, an attribute of a fair trial, that defendants be permitted to comment upon a co-defendant's exercise of his right against self-incrimination.*

But see *United States v. McClure*, 734 F.2d 484, 490-91 (10th Cir.1984) concluding that counsel is *not obligated* to comment on the silence of a co-defendant.

the criminal trial, because it may affect the right of the accused to choose to testify in the criminal case. *Flint v. Mullen*, 499 F.2d 100, 105-106 (1st Cir. 1974) (Coffin, J. dissenting). Cf. *United States v. Kordel*, 397 U.S. 1, 8-9, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970).

H. Right to Recall witnesses

It stands to reason that an accused ought to have the same right to call a witness, notwithstanding that the witness may have been called by the state on the direct case. Of course this is especially true where the subject matters of the state's presentation will be different from that of the accused, but the impression of cross-examination, as opposed to affirmatively eliciting evidence on direct can yield defferent cognitive response from jurors. Where such claims are raised merely as evidentiary concerns, however, the "discretion" of the trial judge is likely to be upheld as not having been "abused." *See*, *People v. Wegman*, 2 A.D.3d 1333, 769 N.Y.S.2d 682 (4th Dept. 2003); *People v. Taylor*, 231 A.D.2d 945, 647 N.Y.S.2d 902 (4th Dept 1996).

VI. The Right To Have Defense Witnesses Believed

Neither the conduct of a judge or prosecutor, nor the application of the law should put a shadow upon the defense witnesses. The right to present a defense includes the right to have the defense witnesses believed at least on a par with those called by the prosecution.

A. Conduct of Judge

As rules of competence disappear, judicial comments and instructions on credibility of witnesses have had more significance in jury determinations. Instructions on credibility or weight given to defendant's witnesses--accomplices alibi, experts, etc.--which arbitrarily discriminate against the defense witnesses either by imposing higher thresholds of credibility, or giving less weight to the same evidence when used by the defense than when used by the prosecution, constitute violations of the defendant's right to compulsory process. *Cool v. United States*, 409 U.S. 100, 935 S.Ct. 334, 34 L.Ed.2d 335 (1972) (decided the same day as *Webb, supra*); *People v. McDowell*, 59 A.D.2d 948, 399 N.Y.S.2d 475 (2d Dept. 1977).

Many of the cases regarding the conduct of the prosecutor and judge reflect this principle. *People v. Rogers*, 59 A.D.2d 916, 399 N.Y.S.2d 151 (2d Dept. 1977); *People v. Lopez*, 67 A.D.2d 624, 411 N.Y.S.2d 627 (1st Dept. 1979); *People v. Webb*, 68 A.D.2d 331, 417 N.Y.S.2d 92 (2d Dept. 1979); *People v. Keller*, 67 A.D.2d 153, 416 N.Y.S.2d 529 (4th Dept. 1979); *People v. Perez*, 69 A.D.2d 891, 415 N.Y.S.2d 706 (2d Dept. 1979).

Examples of this are cases where the trial judge, by the manner in which he cautions a witness against perjury, suggests disbelief in the witness, or restricts the ability of the accused to elicit information from the witness or drives the wintess from the stand. A good example of this is in the case of *State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976). The North Carolina Supreme Court there recognized that a trial judge, out of the presence of the jury, and in a "judicious manner," could "caution the witness to testify truthfully, pointing out to him generally the consequences of perjury." Expressly relying on the right of the accused to "right to a full and

free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury (or court in a proper case)," the Court declared that Any intimation by the judge in the presence of the jury, however, that a witness had committed perjury would, of course, . . . constitute reversible error."[75] The Court described the "hazards" of judicial warnings against perjury, including invading the jury's province of determining credibility:

> Therefore, if, while acting upon an assumption which only the jury can establish as a fact, he makes declarations which alter the course of the trial, he risks committing prejudicial error. For this reason, Inter alia, the judge has no duty to caution a witness to testify truthfully. 'Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.'It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.' *United States v. Winter*, 348 F.2d 204, 210 (2d Cir.1965).

A second "hazard" identified in *Rhodes* is the risk of chilling the defense examination of the witness or driving the witness from the stand, as discussed above, at p. 56, in relation to *Webb v. Texas.*

> Though defendant is not entitled to a perfect trial, he is entitled to a fair trial, and a trial in which the Trial Judge interjects through questions and comments serious doubt concerning the veracity of a witness does not constitute a fair trial.

People v. White, 57 N.Y.2d 129, 440 N.E.2d 1310, 454 N.Y.S.2d 964 (1982) (Judge's questioning the ethics of the former defense attorney, called to confirm when alibi witness came forward, regarding his failure to immediately notify the DA of an *alibi* witness, derogating from the jury's likelihood of believing the attorney, required a new trial.)

These rules apply even in the case of a non-jury trial. In *People v. Dale*, 65 A.D.2d 625, 409 N.Y.S.2d 525 (2d Dept. 1978), the trial judge indicated that he detracted from the credibility of a defense witness because he failed to give his story to the police previously. Since this line of reasoning on the part of the trial judge was contrary to the cases which disapprove of such reasoning on the part of the prosecution, or cross-examination of defense witnesses on such a theory [cf. *People v. Hamlin*, 58 A.D.2d 631, 395 N.Y.S.2d 679 (2d Dept. 1977)], the First Department reversed the conviction.

B. Scope, content of cross examination

Because the evidence of other crimes on the part of the defendant's witnesses may result in either the decision not to call such favorable witnesses or else permit wholly arbitrary inferences against the witnesses and the defendant, against which cautionary instruction could not protect, it would appear that, under the same reasoning, the rules which apply to limit the

[75] In *Rhodes*, the North Carolina Supreme Court stated that a judge may caution a witness regarding perjury outside of the jury's presence. However, the court cautioned that any intimation that a witness had committed perjury in the jury's presence is reversible error.

cross-examination of the defendant, *e.g. People v. Sandoval*, 34 N.Y.2d 371 (1974), should as well be applied to limit the cross-examination of the defendant's witnesses to crimes strictly bearing on their credibility, in certain cases. The Court of Appeals has indeed specifically declared that it is within the discretion of the court to restrict the cross examination of defense witnesses in order to protect the fundamental rights of the accused. *People v. Ocasio*, 47 N.Y.2d 55, 416 N.Y.S.2d 581, 389 N.E.2d 1101 (1979).[76] While in *Sandoval* the right was the right of the accused to get on the stand and testify in his own defense, in the case of the defense witness it is the right of the accused to have that witness believed.

Defense witnesses should not be discredited because they affirm rather than swear to the truth of their testimony. *People v. Wood*, 66 N.Y.2d 374, 497 N.Y.S.2d 340 (1985).[77]

Unfortunately, the Petitioner in *Portuondo v. Agard*,529 U.S. 61, 120 S.Ct. 1119(2000), did not raise this specific Sixth Amendment argument, in the face of the prosecution's comments suggesting that he was less believable because he had the opportunity to listen to the evidence and tailor is testimony accordingly.[78]

VII. The Right To Introduce Evidence

> A defendant has the right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether.[79]

State rules which exclude evidence favorable to the defendant that is considered either not probative (e.g., irrelevant) or unreliable (e.g. hearsay), or unacceptable for some policy reason (complainant sexual history), raise, ultimately, the constitutional question of the scope of the right to present a defense. While it might be easy to say that "[t]he right to present a defense does not give criminal defendants *carte blanche* to circumvent the rules of evidence," *People v. Cepeda*, 208 A.D.2d 364 (1st Dept. 1994), it can no longer be pretended that the question of

[76] "That is not to say, with respect to a witness who is not a defendant, that a trial court is precluded, in its sound discretion, from either entertaining an application for a ruling in limine on the permissible scope of cross-examination concerning a nonparty's prior misdeeds . . . ."

[77] This case was actually decided with reference to Art. I §3 of the New York constitution, which protects religious freedom. This approach only makes superficial sense, since it is not the witness who is injured by examination on refusal to swear, but the proponent of the witness, who has the right to have that witness believed at least on a par with those of the prosecution.

[78] According to the decision, *Portuondo* claimed "that the prosecutor's comments violated his Fifth and Sixth Amendment rights to be present at trial and confront his accusers" and his "right to due process."

[79] Westen, The Compulsory Process Clause, 73 MICH. L. R. 71, 159 (1974)

admission or exclusion of defense evidence is simply a matter of evidentiary "balancing" committed to the discretion of the judge. "A court's discretion in evidentiary rulings is circumscribed by the rules of evidence *and* the defendant's constitutional right to present a defense." *People v. Carroll*, 95 N.Y.2d 375 (2000)(citing *People v. Hudy*, and *Chambers v. Mississippi*); *People v. Ocampo*, 28 A.D.3d 684 (2nd Dept. 2006) (same):

> The jurors were 'entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the complainant's] testimony' (*People v. Ashner*, supra at 248 [internal quotation marks omitted]; *see Davis v. Alaska*, 415 US 308, 317 [1974]).

Id. at 686.

As Justice Potter Stewart wrote, "any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81, 79 S.Ct. 136, 140, 3 L.Ed.2d 125 (1958) (concurring).

Let's be clear about one thing. If it is true that there is a fundamental right to present a defense, and therefore evidence favorable to the defense, that right must afford the accused something more than the rights she would already have under the rules of evidence. A judge is already required to apply the rules of evidence in a fair and non-arbitrary manner. Therefore the right to present a defense can be violated even though the rules of evidence are not being violated or arbitrarily applied. **The mass of cases recited below stand for the proposition that the accused in entitled to the admission of evidence which might properly be excluded under the rules of evidence**, evidence of a type or character that the state would not be entitled to introduce. And the standard is this:

> The accused in a criminal proceeding has a constitutional right to introduce any favorable evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth.[80]

This right also applies to the penalty phase at capital trials. *Green v. Georgia*, 442 U.S. 95 (1979). A similar standard applies to that suggested here for the guilt phase, whether the evidence is such that a "sentencer could reasonably find that it warrants a sentence less than death." *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 110 S.Ct. 1227 (1990). This is

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[80] The Compulsory Process Clause, 73 Mich. L.R. 71 at 151-52, 155 and 159. See, *e.g. Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988), in which the court reversed a conviction after the defense's offer of the results of an alcohol screening device test had been refused by the trial court. Not only are the results of such tests "inadmissible" under the state statute, the state had a legitimate challenged to whether the test was reliably administered in this case:

> We are convinced that the evidence is not so inherently unreliable that a jury cannot rationally evaluate it. See P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-7 (1986). See also Westen, The Compulsory Process Clause,73 Mich.L.Rev. 73 (1974-75)

described as a "low threshold."[81]

1. Don't overlook common evidentiary principles

Nothing threatens constitutional rights as much as resorting to them when it is not necessary. This could not be more true than in the case of efforts to introduce apparent hearsay by using the Right to Present a Defense as an evidentiary rules wildcard. Attorneys should always pursue the limits of traditional evidentiary rules first, even the "catch-all" provisions of Rule 807, and like common-law principles. There is usually no excuse for not always primarily arguing any rule of evidence in your favor.

Thus, police reports may be business records, or admissions by a "party-opponent" under Rule 801(d)(2)(B), *United States v. Morgan*, 581 F.2d 933 (DCCir.1978); *United States v. McKeon*, 738 F.2d 26, 33 (2nd Cir. 1984); *United States v. Warren*, 42 F.3d 647, 655 (D.C.Cir.1995); *Unite States v. Kattar*, 840 F.2d 18, 131 (1st Cir. 1988); *United States v. Salerno*, 937 F.2d 797, 811-812 (2nd Cir, 1991)(Jury argument by AUSA in related case); Weinstein's Federal Evidence § 810.3[3]. The "party-opponent" analysis should also apply to extrajudicial admissions by the complainant in a criminal case who would be the party in a civil case, though it is the state that is nominally the party-opponent in a criminal case. *Cf. State v. Brown*, 29 S.W.3d 427, 435 (Tenn. 2000)[82]

Bear in mind that making the constitutional argument may be the thing that pushes the court to rule in our favor on the plain evidentiary grounds *Somers v. State,* 368 S.W.3d 528

[81] *Renteria v. State*, 206 S.W.3d 689, 698 (Ct. Crim App. 2006). While the standard for admission of mitigating evidence is usually argued as an Eighth Amendment issue, it seems that it also falls under the right to present a defense in mitigation, as established in *Green v. Georgia*. *McKoy* illustrates the necessary intersection between the two when it discusses "relevance" as being the same concept for both the guilt and punishment phases of the case. The Supreme Court rejected the effort by the Fifth Circuit (antTexas) to articulate as separate standard of "constitutional relevance" as a threshold for the admission of mitigating evidence in *Tennard v. State*, 542 U.S. 274, 124 S.Ct. 2562 (2004): "The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment." Yet Texas persists in using the term "constitutional relevance" *Smith v. State*, 2010 WL 3787576, T.A.N. 98 (Tex.Crim.App. 2010) to describe the standard.

[82] "While the State is technically the "party" in a criminal case, the complainant in a criminal case is analogous to a party. Since the hearsay evidence proffered by Brown in this case was the out-of-court statement of the complainant, such testimony is quite similar to hearsay evidence which is currently admissible under Rule 803(1.2)(A)." The court does not actually adopt this as a rule, but in support of its compulsory process ruling, states: "Therefore, the reliability of the proffered testimony is evidenced, in part, by its similarity to an existing firmly rooted hearsay exception."

(Tex.Crim.App. 2012);[83] *cf., Leza v. State*, 351 S.W.3d 344 (Tex.Crim.App. 2011).[84]

B. Hearsay and "unreliable" evidence

While it might well be said that the mere incantation of the right to present a defense does not trump all the rules of evidence, it certainly remains the case that every decision to exclude defense evidence is a fundamental constitutional question and that the rules of evidence are not dispositive where their enforcement would deprive the accused of favorable evidence.

Under this analysis, evidence which might be excluded if offered by the prosecution, or which might ordinarily be allowed for a limited purpose, such as "impeachment," may, and sometimes *must* be admitted *for its substance* when offered by the defense.

1. Chambers v. Mississippi, Green v. Georgia

The leading case demonstrating the subordination of local rules of evidence to the defendant's right of compulsory process is *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Chambers was tried for a murder to which one McDonald had extrajudicially confessed. McDonald was called by the defense, but retracted his prior confessions and asserted an alibi. Chambers, under the state "voucher" rule, was not allowed to impeach McDonald with respect to his alibi or confession. Furthermore, Chambers was not allowed to introduce into evidence McDonald's extrajudicial confessions, because they were only against the declarant's *penal* (as opposed to pecuniary) interest, and therefore inadmissible under Mississippi hearsay rules.

Although, for procedural and jurisdictional reasons, *Chambers* was decided on due process grounds, its analysis and language were based upon the Sixth Amendment. Both rulings by the trial court in *Chambers* operated to deprive the defendant of his compulsory process rights, by preventing him from attempting to elicit facts from this witness through examination, and by preventing him from introducing independent evidence of those facts. Since the "impeachment" of McDonald was directed at putting the extrajudicial statement before the jury, that too was a compulsory process issue, even though it arose in the course of cross examination.[85]

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[83] David Botsford, of Austin, TX, got review on the question whether an "EMIT test is sufficiently reliable to require its admission on a defendant's behalf based on his right to present a defense, but succeeded on the evidentiary issue: "Given our disposition [that it was evidentiary error to exclude he EMIT test], we need not address whether appellant's constitutional right to present a defense has been impaired."

[84] While Leza's counsel had argued that an out-of-court statement by his accomplice exclupating him was admissible as a statement against penal interest under Rule 803(24) he failed raise the constitutional argument which was therefore not preserved. The court noted that the standard of review would be more stringent for constitutional error, had it been preserved. Ironically, Leza did not argue the statutory evidentiary issue on appeal, this the entire issue was left unreviewed.

[85] For the analytic foundation for the statement that the impeachment of McDonald involves the right of compulsory process, see, Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 HARVARD L. REV. 567, 605 (1978). Westen, of course, was counsel for Chambers, having been appointed as such shortly after leaving the Supreme Court as a clerk. Westen cheekily takes the blame, for that

The Supreme Court reversed the conviction. With respect to the application of the state "voucher" rule to prevent the examination of McDonald on the basis of his written and oral confessions, the Court held that the defendant's Sixth Amendment right

> has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by the technicality or by narrow and unrealistic definition of the word "against." The "voucher" rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

Chambers v. Mississippi, 410 U.S. at 298, 93 S.Ct. at 1047.

With respect to the exclusion of McDonald's extrajudicial confessions, the Court stated as follows:

> Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay.... The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declaration against interest. The testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. at 302, 93 S.Ct. at 1049.

The Supreme Court's 1979 opinion in *Green v. Georgia*, 442 U.S. 95 (1979), was similar *Chambers*, involving the "mechanistic" application of the same hearsay rule, but occurring during the penalty phase of a capital case. Quoting its decision in *Chambers*, the Court concluded that "the hearsay rule may not be applied mechanistically to defeat the ends of justice." 442 U.S. at 97. The opinion explicitly referenced neither *Washington v. Texas* nor the Compulsory process clause in finding a violation of Chambers' right to present a defense because Chambers trial counsel had not preserved any constitutional claim at trial. The Court assumed that the only constitutional question properly before it rested on due process grounds, rather than on Chambers' compulsory process argument made on appeal.[86] The Court, however, would eventually bring *Chambers, Green* and *Washington* under the same right to present a defense rubric fifteen years later, in *Crane v. Kentucky*, 476 U.S. 683 (1986).

Crane had given a confession, but his motion to suppress, on grounds that it was involuntary and had been given under duress was rejected by the trial judge. Crane was prohibited from arguing or trying to prove the involuntariness and duress at the trial itself, since, under Kentucky procedure, a trial court's voluntariness determination is conclusive and may not be relitigated at trial. Because this prevented Crane from advancing his claim of innocence –

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reason, for the Court's incorrect characterization as a confrontation issue what should better be understood as a compulsory process issue.

[86] Peter Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 HARV. L. REV. 567, 607 n.108 (1978).

which required explanation of how he had come to "confess" – this deprived him of his right to present a defense. Here the Court merged together the principles in *Washington v. Texas* and *Chambers v. Mississippi* into a seamless "right to present a defense:"

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v, Mississippi*, … in the Compulsory Process Clause or Confrontation clauses of the Sixth Amendment, [or in] *Washington v. Texas*, …the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."

476 U.S. at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984).

2. The true lesson of Chambers v. Mississippi

This is what defense counsel have to communicate to the trial judge: there is an articulable standard for determining when defense evidence must be admitted notwithstanding a state rule of evidence or procedure that might otherwise require its exclusion. The standard is this: is the evidence something on which a rational juror, together with all the other evidence, might reasonably conclude that there is a reasonable doubt? In other words, is the jury (properly instructed) able to rationally evaluate the credibility and the weight which should be accorded to the evidence?

Thus, the reversal of Chambers' conviction, establishes that the defendant has a constitutional right to introduce any evidence favorable to himself, notwithstanding the correct application of the rules of evidence or procedure, unless it is plainly too unreliable for anyone to consider. As put by Professor Peter Westen, *Chambers* and its progeny establish the following general rule:

> Broadly construed, it appears to recognize that the accused in a criminal proceeding has a constitutional right to introduce any exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth.
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> * * *
>
> At the very least, therefore, Chambers stands for the proposition that evidence that is sufficiently reliable by constitutional standards to be introduced "against" the accused is sufficiently reliable to be introduced "in his favor."
>
> * * *
>
> A defendant has a right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence

altogether.[8787]

And this must also be highlighted: the admissibility of the extrajudicial "confession" of someone like McDonald is independent of any confrontation of the declarant. The extrajudicial statement is not merely a vehicle of impeachment, but is ***itself admissible for its truth***.

This dual function of the hearsay evidence – as both impeachment and as affirmative evidence – in the cross-examination setting is often overlooked, even by courts which are steadfast in upholding the right to admit the hearsay evidence for its truth independent of cross-examination.[88]

Most critical at this point is to recall what we stated above, p. 68, that the Right to Present a Defense must, if it is any kind of fundamental right at all, provide broader protection than is provided merely by the even-handed application of the rules of evidence.

Given that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense" (*Chambers v. Mississippi*, 410 U.S. at 302), the exclusion of evidence on the grounds of state evidentiary rules such as the rule against hearsay must be necessary to satisfy a compelling state interest. See, *Patrick v. State* , supra n. 80; *People v. Young*, 59 A.D.2d 920, 399 N.Y.S.2d 156 (2d Dept. 1977); *People v. Torre*, 42 N.Y.2d 1036, 399 N.Y.S.2d 203 (1977).

3. The Supreme Court reaffirms the principles of Chambers v. Mississippi

The United States Supreme Court reaffirmed the principles stated in *Chambers* in *Green v. State of Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979). The Petitioner, Green, and his co-defendant, Moore, were tried separately on charges of rape and murder. Moore was convicted of both crimes and sentenced to death. At the punishment stage of Green's prosecution, he sought to prove that he was not present when the victim was killed and had not participated in her death. He attempted to introduce the testimony of a witness who had been told by Moore that Moore alone had killed the victim after ordering the petitioner to run an errand.

This same testimony had been given by the witness, testifying for the state against Moore.

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[87] The Compulsory Process Clause, 73 Mich. L.R. 71 at 151-52, 155 and 159. It is to be understood that when Prof. Westen refers to "exculpatory" evidence, he is referring to the same merely "favorable" evidence that was the subject of *Brady v. Maryland.* Of course, as everyone knows, the term "exculpatory" was never used by the Supreme Court in that case to describe what it was that the state must turn over to the accused. That is what the term "favorable" was used for.

[88] *E.g. State v. Brown*, 29 S.W.3d 427 (Tenn. 2000), discussed below. In that case the dissent argued that the fact that he defendant had foregone confronting the complainant with he extrajudicial admissions worked against the right to introduce the admissions on their own. The majority, while upholding the right to introduce the hearsay evidence to rebut the complainant, argued in part that the use of the statement to impeach was not the equivalent of the use affirmatively. "Therefore, even assuming defense counsel had examined the complainant about the alleged prior statement and offered extrinsic evidence of the statement following a denial by the complainant, the jury would have considered the evidence only when assessing the credibility of the complainant." *Id.* At n. 11. This is simply not so, under *Chambers*.

However, this offer of evidence on behalf of Green, was refused by the trial court on the strength of the Georgia hearsay statute, which did not recognize declarations against penal interest as an exception to the hearsay rule *unless* that statement is admitted against a declarant. Thus the state felt the witness' testimony reliable against Moore, but not in favor of the defendant.

The Supreme Court reversed the death penalty sentence imposed, holding that the hearsay rule of the State of Georgia may not be applied mechanistically in a fashion which deprives the defendant of his fundamental rights, referring to the decision in *Chambers*, and the third of Professor Westen's articles.[89]

Some have tried to read Justice Scalia's opinion in *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), as imposing a limit on *Chamber*s. Justice Scalia's opinion in that case did not garner a majority and was joined by only three other justices, Chief Justice Rehnquist and Justices Kennedy and Thomas. While Justice Ginsburg filed a separate opinion concurring in the judgment reached by Justice Scalia's plurality, she expressed absolutely no opinion on *Chambers* and its progeny. However, Justice O'Connor filed a dissenting opinion strongly disagreeing with Justice Scalia's characterization of *Chambers*. Justices Stevens, Souter, and Breyer joined Justice O'Connor in dissent. Two years later a clear majority of the Court rejected Justice Scalia's characterization of *Chambers* by recognizing that a defendant's constitutional right to present a defense cannot be impinged by evidentiary rules which are "arbitrary" or "disproportionate to the purposes they are designed to serve" in light of the right to present a defense. *United States v. Scheffer, 523 U.S. at 303, 118 S. Ct. at 1264* (quoting *Rock*, 483 U.S. at 56, 107 S. Ct. at 2711).

The *Chambers* principle was again affirmed by the Supreme Court in *Holmes v. South Carolina,* 547 U.S. 319 (2006), in the first opinion issued by Justice Alito. Bobby Lee Holmes had been convicted of capital murder, after cross examination and evidence implicating another person were precluded. There was strong circumstantial evidence connecting Holmes to the crime, including fingerprints, trace fiber and DNA evidence. However the defendant alleged that he was being framed, also using scientific evidence to support that claim, and offered evidence that Jimmy McCaw White had been in the neighborhood at the time and had admitted to the crime and stated that Holmes was "innocent." However White denied these inculpatory statements in a pretrial hearing. The trial court excluded the evidence of White's guilt, and cross examination regarding the police suspicions of White,[90] relying on *State v. Gregory,* 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941). That case had stated that third-party guilt evidence

> must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

In applying this rule the trial court also found that White's multiple confessions must be excluded as hearsay, and that without the confessions the rest of the third-party guilt evidence did not

[89] Westen, *Confrontation and Compulsory Process*, 91 HARVARD L. REV. 567 (1978)

[90] *See* Petitioner's *certiorari* petition, at n. 7.

clearly point to White as the perpetrator. [Petitioner's Brief at 2]. Trial counsel objected that this ruling would be a "compulsory process violation" and negate the "right to present a defense."[91]

The South Carolina Supreme Court affirmed, but on different grounds. It observed that in its more recent decision of *State v. Gay*, 343 S.C. 543, 541 S.E.2d 541 (2001),

> we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

State v. Holmes, 361 S.C. 333, 343, 605 S.E.2d 19 (2005). The Court stated that "Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt."

The Supreme Court reversed, stating that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense'" quoting *Crane v.Kentucky* quoting *California v. Trombetta*, 467 U. S. 479, 485 (1984).[92] Unfortunately, most probably because of the manner in which the case was briefed on behalf of Holmes, the Supreme Court only addressed the faults with the standard, in *State v. Gay*, relied on by the South Carolina Supreme Court, and not broader problematic standard of *State v. Gregory* on which the trial court had relied. This, of course, left Holmes exposed to the same ruling in a second trial that resulted in his conviction in the first trial.[93]

The Court faulted the South Carolina ruling for the illogic of the rule in *State v. Gay* :

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[91] *See* Petitioner's *certiorari* petition, at 29a. Holmes' defense attorney was Bill Nettles, of Columbia, S.C., who had in his hands, at the very moment he made this argument, an earlier version of this article.

[92] Unfortunately, the opinion perpetuates the Court's vacillation between the Due Process and Compulsory Process, and even the Confrontation clause, as the basis for this right. The full quote from *Crane* and *Trombetta* is:

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

However the Petitioner's *Certiorari* petition similarly wavered on this question in text that was virtually lifted into Justice Alito's opinion:

> This Court has long recognized that, whether rooted in the Fourteenth Amendment's Due Process Clause or in the Sixth Amendment's Compulsory Process or Confrontation Clauses, the U.S. Constitution guarantees every criminal defendant "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The major point made by Professor Westen decades ago, and the lesson learned since, is that the compulsory process clause is clearly the proper basis for such claims and that reliance on Due Process invites diluted review of a violation of such claims. See, *infra* p. 157 Had the *certiorari* petition been more definite on this, it may have edified Justice Alito. Unfortunately neither the Petitioner's brief nor many of the *amicus* briefs even referred to the large secondary literature on the compulsory process clause, particularly Professor Westen's seminal articles. It is thus not very surprising that he opinion is written with such a narrow perspective.

[93] I further discuss the imponderable Supreme Court briefing in *Holmes* in the notes which follow and below at note 131.

> The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak.

That logic is wrong because "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." Therefore the rule was arbitrary with respect to the "end that the *Gregory* rule and other similar third-party guilt rules were designed to further" and therefore violated the right to present a defense.[94]

This language about the arbitrariness of the rule in *Gay*, with no recitation of the linear history of the linear history of the Right to Present a Defense has led many later courts to simply assume that that right only related to arbitrary rules of evidence, or th earbiutrary application of the rules. But this clearly sell short the broad right that was articulated in *Chambers* and many cases which followed. For this reason,

While the ruling is certainly a victory in the sense that it reaffirms compulsory process principles in general, it could be taken as approval of the more common rule applied by the trial court, based on *Gregory*, excluding evidence which, though creating suspicion of a third party, does not tend to otherwise prove the innocence of the accused. And the South Carolina courts, almost defiantly, continue to suggest that the Right to Present a Defense provides the accused with no more protection than the fair application of the rules of evidence. *South Carolina v. Lyles*, 379 S.C. 328, 665 S.E.2d 201 (S.C.Ct Ap. 2008).[95]

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[94] Following the argument contained in several of the briefs, but only added as a third argument in the *Certiorari* petition, the Court suggested another defect in the South Carolina analysis that rings of the rulings in *United States v. Booker*, 125 S. Ct. 738 (2005) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000):

> And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

Indeed, the Petitioner's brief, apparently enthralled with the recent decisions affirming the jury's role in the determination of facts regarding the elements of the offense (*e.g. Apprendi v. New Jersey)*, attempted to change the issue to one of the *right to a jury trial*, actually making it the first point in the Petitioner's Brief. The brief even reworded the right to present a defense as "the right to present a complete defense *to the jury*." p. 22. The notion that the exclusion of defense evidence might be more successful if raised as subsumed under the right to have a jury determine facts is bizarre and indefensible as constitutional theory or appellate strategy. But to attempt to argue that there is a different right to present a defense before a jury than in a non-jury trial is fundamentally noxious. Had Holmes elected to go without a jury, in other words, do his attorneys before the Supreme Court concede that the evidence was properly excluded?

I further discuss the imponderable Supreme Court briefing in *Holmes* below at note 131.

[95] Despite paying lip service to the fundamental nature of the right to present a defense, and after citing the restrictive portions of the decisions in *Montana v. Egelhoff* and *Taylor v. Illinois* that we have discussed, the Court, now citing only itself, states:

> Defendants are entitled to a fair opportunity to present a full and complete defense, but this right does not supplant the rules of evidence and all proffered evidence or testimony must comply with

4. Cases applying Chambers v. Mississippi

There are now many cases which refer to *Chambers v. Mississippi.* Many are cases simply reciting that this issue was not preserved at trial. Many attempt to limit *Chambers* to its facts. Many, however, often inspired by careful and deliberate advocacy, take to heart the notion that the jury must be trusted to sort out the facts where there is a rational basis for the jury to evaluate the weight to be given to the evidence the defense offers.

New York

There are numerous decisions in New York that have similarly implemented the right to introduce evidence which might otherwise have been excluded, or allowed for only a limited purpose. See, *People v. Robinson*, 89 N.Y.2d 648 *(*1997)[96]; *People v. Lyons*, 112 A.D.3d 849, 978 N.Y.S.2d 47 (2 Dept. 2013)[97]; *People v. Oddone,* 22 N.Y.3d 369 (2013)[98]; *People v.*

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any applicable evidentiary rules prior to admission. *Hamilton*, 344 S.C. at 359, 543 S.E.2d at 594. One could fairly demand of such a court to explain – if this is true – what does the 6th amendment gives the accused, with respect to introducing evidence to prove doubt about his or her guilt that is not provided by the rules of evidence? The South Carolina court's later declaration that "this right does not supersede any pertinent evidentiary rules" simply cannot be squared with the seminal cases in this area of law which repeatedly have reversed convictions where correct rulings on state evidentiary rules were found nevertheless to have violated the Right to Present a Defense. The decision in *State v. Hamilton*, 344 S.C. 344, 543 S.E.2d 586 (S.C. Ct. App. 2001) to which the decision in *Lyles* clings, advances a "broadly deferential standard of review" regarding the admission or exclusion of evidence, which is completely inconsistent with the fundamental nature of the right to present a defense. In *Hamilton* the defense offered psychiatric evidence of his mental disease or defect – antisocial personality disorder – as relevant to the jury's choice between "assault and battery of a high and aggravated nature" (ABHAN) or the more serious " assault and battery with intent to kill (ABIK)." The evidence was excluded on grounds of relevance and "confusion."

[96] Relying on *Chambers v. Mississippi*, violation of compulsory process to exclude grand jury transcript as direct proof.

[97] Defendant charged with endangering welfare of a child (his daughter). Striking the defendant's son's testimony as to his observations of the incident, partly on foundational grounds as to a prior inconsistent statement, and in part because the judge believed the son's testimony was fabricated vilated the right to present a defense. The decision cites , citing *People v. Gilliam*, 37 N.Y.2d 722 (1975); *Taylor v. Illinois*, 484 U.S. 400 (1988); *People v. Siegel*, 87 N.Y.2d 536, 544, 640 N.Y.S.2d 831 (1995), *People v. Arena*, 106 A.D.3d 1445, 1446–1447, 964 N.Y.S.2d 383 (4th Dept. 2013); *People v. Murray*, 79 A.D.2d 993, 994, 434 N.Y.S.2d 720 (N.Y. App. Div. 1981).

[98] Defendant charged with causing death of a by holding a man in a headlock. When a defense witness, testified that the duration of the part of the incident she observed "could have been a minute or so," defense counsel was not allowed to refresh her recollection with a prior statement that put the same interval at "maybe 6 to 10 seconds," because she had "given no indication she needs her memory refreshed." Noting that "technical limitations on the impeachment of witnesses must sometimes give way," in the presentation of the defense, citing *Chambers v. Mississippi*, new trial ordered. The Court of Appeals did not do so well dealing wit the exclusion of the defense psychological expert, Steven Penrod in the same case. See infra at n. 156

Bradley, 99 A.D.3d 934, 952 N.Y.S.2d 260 (2nd Dept. 2012)[99]; *People v. Dismel*, 16 Misc. 3d 1120(A), 847 N.Y.S.2d 898 (N.Y. Sup. Ct. 2007);[100] *People v. Rosa*, 153 A.D.2d 257, 550 N.Y.S.2d 886 (1st Dept. 1990)("the right to present the defendant's version of the facts");[101] *People v. Phan*, 150 Misc.2d 435, 568 N.Y.S.2d 498 (Sup.Ct.Kings.Co. 1990);[102] *People v. Young*, 59 A.D.2d 920, 399 N.Y.S.2d 156 (2d Dept. 1977)[103]; *People v. Torre*, 42 N.Y.2d 1036, 399 N.Y.S.2d 203 (1977)[104]; *People v. Goodman*, 59 A.D.2d 896, 399 N.Y.S.2d 56 (2d Dept. 1977)[105]; *People v. Yopp*, 67 A.D.2d 774, 412 N.Y.S.2d 698, 699 (3rd Dept. 1979);[106] *People v.*

[99] Testimony that the complainant, shortly after the incident, stated that she thought that the door had been shut on her hand accidentally, had been excluded as hearsay that was "too remote or speculative." Rather, the testimony should actually be admitted for the truth of the prior statements, not just to impeach. Under such circumstances, the right to present a defense "encompasses the right to place before the [trier of fact] secondary forms of evidence, such as hearsay."

[100] Relying on *Chambers v. Mississippi,* finding the failure of the complaining witness to mention many of the alleged sex offenses during her Grand Jury testimony constitutes a prior inconsistent statement which may be used to impeach her trial testimony and denying defendant from impeaching on this fact constituted a violation of his right to compulsory process.

[101] The trial court precluded the defendant from testifying to the fact that he had never been convicted of a crime, in response to the complainant's testimony that her assailant had told her he had just been released from prison, citing *Washington v. Texas*, and *People v. Gilmore*, 863, discussed below at p. 86 and *People v. Carter*, 37 N.Y.2d 234, discussed below at 86. The Appellate Division stated that the defendant's right to present a defense includes "the right to present the defendant's version of the facts . . . ."

> To forbid the jury from hearing evidence that defendant had not been previously convicted of a crime, served to curtail defendant's right to offer a meaningful defense.

550 N.Y.S.2d at 888.

[102] This was a prosecution for murder in which the defendant sought to present the grand jury testimony of an unavailable witness. The court agreed with the defendant's contention that he has a constitutional right to introduce the grand jury testimony of unavailable witnesses even though it was hearsay. The court relied heavily on the reasoning in *Chambers v. Mississippi* and his determination that the evidence was material to the defense, *United States v. Agurs*, 427 U.S. 97, 122, 113, 96 S.Ct. 2392, 2401, 2402, 49 L.Ed.2d 342 (1976), and bears sufficient indicia of reliability *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), and the defendant establishes that the testifying witness is unavailable *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988); *United States ex rel. Bracey v. Fairman*, 712 F.2d 315, 318 (7th Cir. 1983)

[103] Defendant's "habit or routine" alibi defense to nighttime robbery should have been admitted where for years the accused had not gone out at night because of exhausting chronic illness.

[104] Defense of justification, concerning defense of brother and self. Brother was impeached with portions of grand jury testimony which failed to mention certain facts and trial judge excluded redirect testimony, as "bolstering," which sought to bring out portions where these facts were raised. "The redirect examination related directly to the subject matter of the cross-examination, bore upon the question of justification, and was, therefore, proper."

[105] The defendant had presented justification defense to first degree manslaughter. The conviction was reversed because the trial court had excluded the testimony of a witness that she had heard defendant being told that someone had been hired to burn his car: "[t]he fact that the defendant had heard such a statement could

Harding, 37 N.Y.2d 130, 371 N.Y.S.2d 493 (1975);[107] *People v. Ortiz*, 119 Misc.2d 572, 463 N.Y.S.2d 713 (Sup.Ct.Bronx 1983);[108] *People v. Darrishaw,* 206 AD2d 661, 614 S2d 622 (3rd Dept.1994),[109] *People v. Gonzales*, 54 NY2d 729 (1982); *People v. Esteves*, 152 AD2d 406 (2d Dep't. 1989).

In the case of *People v. Yopp*, 67 A.D.2d 774, 412 N.Y.S.2d 698, 699 (3rd Dept. 1979), the conviction for assaulting a correction officer was reversed where the trial court

> improperly limited the defendant's proof by failing to permit testimony from the correctional counselor who admittedly was not present on the date of the incident but who had conducted an investigation of it.

Id., 412 N.Y.S.2d at 699. Obviously the offered evidence was pure hearsay, but the evidence was nonetheless the type that a jury was capable of evaluating. Lab notes would be independently admissible at trial as statements by government witnesses pertaining to factual issues; they are admissible for the truth of the matters asserted as a "public record" police report under FRE 803(8)(B).[110] Similarly, under Rule 803(8)(C) investigative reports would be admissible against the government in a criminal case.[111]

CPL § 670.10, if read alone, would seem to limit the type of former testimony which can be introduced in the absence of the witness. However, using a compulsory process analysis, the Court of Appeals has held that former testimony not covered by § 670.10 still must be admitted *People v. Robinson*, 89 N.Y.2d 648, 679 N.E.2d 1055, 657 N.Y.S.2d 575 (1997) ("Under the circumstances of this case, where the hearsay testimony is material, exculpatory and has sufficient indicia of reliability, we hold that the trial court's failure to admit such evidence was

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circumstantially indicate his state of mind" and thus should have been admitted as original evidence.

[106] The conviction for assaulting a correction officer was reversed where the trial court improperly limited the defendant's proof by failing to permit testimony from the correctional counselor who admittedly was not present on the date of the incident but who had conducted an investigation of it. 412 N.Y.S.2d at 699.

[107] Prior grand jury testimony of a witness now unavailable should be admissible for the defense, even though not admissible under CPL § 670.10. *Cf.*, *People v. Gonzalez*, 54 N.Y.2d 729, 442 N.Y.S. 980, 426 N.E.2d 474 (1981) where the defendant raised only an evidentiary rule argument and failed to assert a compulsory process claim until appeal.

[108] Defense allowed to elicit information that a witness to the crime, now unavailable, had failed to identify defendant as one of the perpetrators of the robbery, the court relying on *Chambers v. Mississippi.*

[109] Error to exclude favorable statement, accepting responsibility for the drugs that were found, in affidavit by another participant, who was taking the 5th when called as a witness, citing *Chambers v. Mississippi*

[110] See, e.g., *United States v. Versaint*, 849 F.2d 827 (3d Cir. 1988)(police report containing statement of nonparty admissible for truth of matter asserted); *United States v. Oates*, 560 F.2d 45, 78 (2d Cir. 1977) (Customs drug analysis report and worksheet admissible if offered by defendant).

[111] See, e.g., *United States v. MacDonald,* 688 F.2d at 229 (Army Article 32 hearing report admissible against government as report of findings in official investigation).

reversible error" "As the only other person with any firsthand knowledge of the alleged events of that night, it is clear that defendant's then fiancee was in a position to offer testimony that would have been not only "relevant and material" but also "vital to the defense" (*Washington v. Texas,* 388 U.S. 14, 16, 87 S.Ct. 1920, 1921-22, 18 L.Ed.2d 1019, supra."); *People v. Harding,* 37 N.Y.2d 130, 371 N.Y.S.2d 493 (1975); *People v. Settles,* 46 N.Y.2d 154, 170, 412 N.Y.S.2d 874, 385 N.E.2d 612 ["If the proponent of the statement is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt"]; *People v. Tinh Phan*, 150 Misc.2d 435, 568 N.Y.S.2d 498 (Sup.Ct.Kings Co. 1990).[112]

Prior inconsistent statements are not hearsay if offered only to "impeach" the witness. However, where the prior inconsistent statement is favorable to the accused it ought to be admitted for its truth, notwithstanding the fact that it would be hearsay. *Welcome v. Vincent*, 549 F.2d 853 (2d Cir. 1977); *United States v. Lee*, 540 F.2d 1205 (4th Cir. 1976); *People v. Gregg*, 90 A.D.2d 812, 455 N.Y.S.2d 816 (2d Dept. 1982); *People v. Jordan*, 59 A.D. 246, 398 N.Y.S.2d 556 (2d Dept. 1977).

Even when the Court of Appeals interprets the state hearsay rule as requiring exclusion, it has declared its intention of doing it consistent with the *Chambers* standards. *People v. Shortridge*, 65 N.Y.2d 309, 491 N.Y.S.298 (1985).

Rules of procedure, such as that in *Chambers*, limiting direct testimony of an unfriendly witness to non-leading questions, and the like, have been analyzed in New York, from a compulsory process viewpoint, as unnecessarily inhibiting the defense ability to adduce evidence. When this is so, latitude in examination should be required. *People v. Cuevas*, 67 A.D.2d 219, 414 N.Y.S.2d 520 (1st Dept. 1979); *People v. Simone*, 59 A.D.2d 918, 399 N.Y.S.2d 154 (2d Dept. 1977). In *Simone* the accused, deprived of prosecution production of the informant, called the suspected informant to the stand. Citing *Chambers v. Mississippi,* the Appellate Division stated:

> In the instant case, even if the court was not required by *Goggins* to disclose the informant's identity, it was obligated to make some provision so that defendant could present his defense. In the context of this trial, this required that Holliman be declared a hostile witness.

New York has recognized that differing standards may apply to the introduction by the defendant of declarations against penal interest of unavailable third persons which are favorable to the defendant and the prosecution's offer of such declarations to incriminate a defendant. *People v. Maerling*, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1978)[113] This is due to the defendant's

[112] The trial court considered the question as having been reserved in *People v. Gonzalez*, 54 N.Y.2d 729, 442 N.Y.S. 980 (1981), where the defendant raised only an evidentiary rule argument and failed to assert a compulsory process claim until appeal. However the trial court in *Tinh Phan* also finds that the witness was not shown to be unavailable.

[113] The law of New York State has finally been resolved to allow the defendant to prove at trial, where justification is a defense, the victim's specific prior acts of violence of which the defendant had knowledge, in addition to the victim's reputation for being a "quarrelsome, vindictive or violent periods." *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976).

right of confrontation which is jeopardized by the introduction of hearsay by the prosecution.

The early cases which establish the admissibility of declaration against penal interest (as opposed to pecuniary interest) were for the assistance of defendants seeking to introduce favorable evidence. *People v. Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1978); *People v. Spriggs*, 60 Cal.2d 868, Cal.Rptr. 8401, 389 P.2d 377 (Cal. 1964). And it continues to be recognized that the threshold for admission of such evidence to exculpate the accused is far lower than the threshold for inculpating the accused. [114] *See*, *People v. Deacon,* 96 A.D.3d 965, 968, 946 N.Y.S.2d 613 (2012), quoting *People v. Settles*, 46 N.Y.2d 154, 169–170, 412 N.Y.S.2d 874, 385 N.E.2d 612 (1978); *People v. Soto*, 113 A.D.3d 153, 976 N.Y.S.2d 87 (1 Dept.2013)[115]; *People v. McFarland*, 108 A.D.3d 1121, 969 N.Y.S.2d 295 N.Y.A.D. (4 Dept. 2013);[116] *People v. Gibian*, 76 A.D.3d 583, 585 (2010).[117]

Likewise, out of court statements which might be hearsay on their own, may be relevant and probative to respond to claims conflicting with the prior statement, even if self-serving by the defendant. *People v. Carroll*, 95 N.Y.2d 375 (2000).[118]

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[114] "When the declaration is offered by the People to inculpate the defendant in a criminal trial--as distinguished from declarations offered by defendant to exculpate himself--it is subjected to even more exacting standards in recognition of the due process protections afforded defendants charged with crime including, of course, the requirement that guilt be established beyond a reasonable doubt." *People v. Brensic*, 70 N.Y.2d 9, 16, 517 N.Y.S.2d 120, 123 (1987)

[115] Relying on *People v. Deacon*. DWI case in which accused called a 19–year–old woman who had admitted to his investigator that she was operating the vehicle at the time, but who asserted the 5th at trial. Trial court accepted prosecution argument that the statement was not really against her penal interests, because she was not afraid of prosecution , but of her parents finding out. Of course this is going behind the rule to try to get around it. The Appellate Division disallowed that reasoning, focusing not only on the evidentiary confusion of the judge, but the right to present a defense.

[116] Declarations, which exculpate the defendant, "are subject to a more lenient standard, and will be found 'sufficient if [the supportive evidence] establish[es] **a reasonable possibility that the statement might be true**' " (Relying also on *People v. Deacon*, 96 A.D.3d at 968, and People v. Settles, 46 N.Y.2d 154, 169–170. "Depriving a defendant of the opportunity to offer into evidence [at trial] another person's admission to the crime with which he or she has been charged, even though that admission may . . . be offered [only] as a hearsay statement, may deny a defendant his or her fundamental right to present a defense."

[117] Right to present a defense was violated by precluding the defendant from testifying that his mother admitted killing the decedent, as hearsay. The defendant wanted to testify that he removed evidence and confessed, all to protect his mother.

[118]

> Defendant also claims that the trial court erred in precluding the police- recorded audiotape of defendant's conversation with his stepdaughter. Under the circumstances presented here, we agree and hold that in light of the testimony that defendant "never denied" the allegations, the trial court abused its discretion in failing to allow the tape or testimony related to that conversation.
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> * * *
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> *A court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense* (see, People v. Hudy, 73 N.Y.2d 40, 57, 538

Tennessee

In a case also ruling that the Tennessee "Rape Shield" statute was improperly applied, the court ruled that the defendant's evidence, the complainant's admission of sex with others, was also improperly excluded as hearsay, even though the court believed that the defendant had foregone the opportunity to cross-examine the complainant concerning the prior conduct or her admissions. *State v. Brown*, 29 S.W.3d 427 (Tenn. 2000)[119]

C. Relevance, "probative value" of evidence

The standards of relevance applied to the admissibility of the defendant's evidence may not be arbitrary. The defendant has a right under the compulsory process clause to present any evidence that may reasonably be deemed to establish the existence of facts in his favor. Cf. F.R. Evid. 401. If the relevance of the evidence is something about which reasonable persons might differ, using the analysis of *Washington v. Texas*, instructing the jury concerning any particular reasons to be cautious about the evidence is far preferable to its exclusion.

In evaluating problems of "probative value" of offered defense evidence, it is important to remember two separate principles: first, the defense is not necessarily held to the same standard as the prosecution in determining whether the evidence is sufficiently "probative" to be admitted. This derives, of course, from the principle established in *Washington*, that giving the defense parity with the prosecution is not sufficient if the rule, though equally applied to the accused and the state, still results in the exclusion of favorable evidence. It also derives partly from the fact that the defendant is supposed to prevail in a criminal trial merely by establishing a *reasonable doubt* about guilt; the threshold of admissibility should not be any higher than suggested by the question "Could this evidence create a reasonable doubt in the mind of a qualified juror?"

So long as there is a

> significant chance of this added item, developed by skilled counsel . . . could [induce] a reasonable doubt in the minds of enough jurors to avoid a conviction the constitutional standard of materiality has been met.

United States v. Miller, 411 F.2d 825, 832 (2d Cir., 1969). *See*, *Welcome v. Vincent*, 549 F.2d 853 (2nd Cir.1977) ("some semblance of reliability", at 859). If the evidence "could . . . in any reasonable likelihood have affected the judgment of the jury" a sufficient showing of materiality has been made under our constitution. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763,

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N.Y.S.2d 197, 535 N.E.2d 250, abrogated on other grounds by Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577; see also, Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 ["The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"]).

[119] The assumption by the majority, and assertion by the dissenters in *Brown* that the defendant actually forewent cross examination of the complainant is doubtful, however. The Appellant's brief to the Tennessee Supreme Court indicated that the state had successfully moved to preclude proposed cross-examination of the witness. Nevertheless, the ruling is even stronger in light of this mistaken belief.

31 L.Ed.2d 104 (1972) (Burger, L.J., for a unanimous court); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

As the Supreme Court said in *United States v. Agurs*:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, *constitutional error has been committed.*

United States v. Agurs, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (emphasis added).

In *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), affirming the compulsory process rights of the accused to favorable information in confidential child sex abuse reports for use at trial, the Supreme Court said

> our cases establish, at a minimum, that criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt

In Canada it is expressly recognized that the rules and policies designed to protect the "innocent" from being convicted have to be interpreted in light of the fact that "innocence" exists when there is a "reasonable doubt." *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 93: "In our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount."[120]

Consider the case of *People v. Mountain*, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985) which first allowed evidence of "ABO" blood type in New York to suggest a connection between the accused and the offense. In *Mountain* the Court of Appeals observed:

> The basic problem with the rule is the premise on which it is founded. Although blood grouping may only serve to show that the defendant and the assailant are part of a large group having that particular characteristic, *it does not follow that such proof completely lacks probative value*. When identity is in issue, proof that the defendant and the perpetrator share similar physical characteristics is not rendered inadmissible simply because those characteristics are also shared by large segments of the population.

[120] See also, *R v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, discussing the "innocence at stake" test for breaching the attorney-client privilege in order to allow the defense to discover and introduce otherwise privileged materials:

> Before the *innocence* at stake test is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and that he is unable to *raise a reasonable doubt* as to his guilt in any other way.

Although *Mountain* was certainly bad news in respect to the latitude allowed prosecutors[121] it sets the highest standard for admissibility of defense evidence as well. Therefore, efforts to exclude defense evidence because it fails to *prove the innocence* of the accused must fail. Just as in *Mountain*, the favorable defense evidence must be admitted unless it does not "completely lack probative value."

Thus, though conflicting with rules of evidence, such as hearsay, evidence favorable to the accused which the jury has a rational basis to evaluate ought to be admitted. This can occur in a number of various ways.

1. Putting the police or victim or anyone else on trial

Judges often have it in their head s that the defense cannot "put the police on trial" or "put the "victim" or a particular witness "on trial." However in our adversary system it is recognized that the motives or bias or even carelessness of the accusers or the investigators can be placed before the jury. But, in fact it is the right and responsibility of the defense counsel to suggest, and imply, improper motive, bad faith, mistake, coaching, perjury, incompetence on the part of witnesses, and the plausibility of other hypothesis of how the crime might have occurred, or suspicion of other persons, even if he does not have the evidence to prove it is so, or has been deprived of the evidence. *Kyles v. Whitley*, 514 U.S. 419, 441-46, 115 S.Ct. 1555 (1995). *Kyles*, refers to the right of the defense "to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." *Id.* at 445. This includes examination based on the lack of evidence, or "inconclusiveness" of the evidence, and attenuated issues like the incompetence of the police investigation. *Id.*, 514 U.S. at 450-453; *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (same); *Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) ("The defendant could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation"); *United States v. Sager*, 227 F.3d 1138 (9th Cir. 2000) ("To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information . . . . "[d]etails of the investigatory process potentially affected [the investigator's] credibility and, perhaps more importantly, the weight to be given to evidence

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[121] The case is not quite as bad as it might have been, because the Court did still recognize that such evidence might be in need of limitation or qualification. Acknowledging that

> the jury may accord it undue weight, beyond its probative value, because of its scientific basis (cf. Richardson, Evidence § 147 [10th ed])

the court went on to say:

> That, however, can generally be avoided by instructions, where requested, emphasizing the fact that it is only circumstantial evidence and noting, perhaps, the percentage of the population involved. In cases where the defendant can show that the potential prejudice outweighs the probative value the court may in its discretion exclude the evidence.

produced by his investigation."); *United States v. Aguilar*, 831 F.Supp.2d 1180 (C.D. Ca. 2011) (The court observed that the testimony of the agent was "central to the late-developed defense that the Government's evidence was suspect because of a biased investigation."); *Orena v. United States*, 956 F.Supp. 1071, 1100 (E.D.N.Y. 1997) ("destroying the bona fides of the police is a tactic that has never lost its place in the criminal defense reasonable doubt armamentarium.) It is the obligation of defense counsel to suggest plausible theories of innocence simply on the basis that they have not been precluded by the proof. *United States v. Glenn*, 312 F.3d 58, 70 (2nd Cir. 2002); *People v. Szwec*, 271 A.D.2d 322 (1st Dept. 2000) (Error to limit defendant's testimony as to the specific facts regarding the culpable acts of the two of the arresting officers as proven in his earlier successful civil suit against the police to suggest their motivation to fabricate the current charges, even though neither of the two officers testified at trial.); *People v. Badia*, 94 A.D.3d 622, 942 N.Y.S.2d 114(1 Dept. 2012)[122]; *People v. Sampel*, 16 A.D.3d 1023, 791 N.Y.S.2d 745 (4 Dept.,2005)[123]

This may include the discovery and introduction of evidence concerning prior bad acts on the part of the witness or victim. See below at p. 98.

D. Evidence of *Mens Rea*

Perhaps because there are so many reasons why a person might have held one view of the facts or circumstances surrounding an offense, despite a general willingness to allow defendants to testify as to their state of mind, prosecutors jump up and judges get impatient when the defense offers third party or other evidence to corroborate or substantiate such testimony, or, worse, *in place of* such testimony. Still, the right of the accused to present his defense extends to his defense on the *mens rea* elements.

In federal cases this has come up in cases where **willfulness** was an element of the offense. That element, relating to a "purpose to do what the law forbids," calls into question the defendant's beliefs as to the legality of his or her conduct. Prosecutors attempt to counter such evidence with the claim that "ignorance is no excuse." There is, however a difference between *ignorance* of the law and an affirmative belief in the lawfulness of one's behavior. Where state of mind is an element of the offense, "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment . . . ." *Cheek v. United*

[122] Finding that the defense was entitled to present a theory that defendant had unwittingly agreed to aid in the drug enterprise at the other participant's behest, and that the defense should have been given the opportunity to explore what the police investigation of the other participant had revealed.

[123] Finding that the court erred in refusing to permit a defense witness to testify that defendant's former girlfriend told that defense witness that she had defendant arrested in order to obtain defendant's vehicle. Defendant's former girlfriend denied on cross-examination that she had made such a statement, and defendant was denied the opportunity to show that his former girlfriend had an interest in his arrest and incarceration by providing extrinsic evidence that contradicted her testimony on cross-examination.

States, 498 U.S. 192, 203-04(1991).[124] See also *United States v. Lankford*, 955 F.2d 1545, 1550—51 (11th Cir. 1992) (reversing conviction where district court excluded defendant's expert testimony that the defendant's belief in the legality of his acts was reasonable)

So also with respect to **intent**. a defendant "is entitled to wide latitude" to introduce evidence "which tends to show lack of specific intent. "[E]vidence on the question of intent ... may take a wider range than is allowed in support of other issues ..

E. Cumulative evidence

The defense case comes last. Perhaps the judge has another case scheduled to start, or a planned vacation to begin. One of the most common tactics to shortcut the defense, once the defense begins, is to label defense testimony as "cumulative" where several witnesses corroborate the version of events favorable to the accused. The judge's "discretion" to limit the evidence, if she has it at all,[125] is not enhanced at the end of a trial.[126] Unless the prosecution has stipulated to the truth of this information, or foregone the right to challenge whether the jury should believe it or accord it full weight, the fact that evidence is "cumulative" is a reason for admission of the defense evidence, not its exclusion. *People v. Torre*, 42 N.Y. 2d 1036, 399 N.Y.S. 2d 203 (1977); *People v. Carter*, 37 N.Y.2d 234, 240, 371 N.Y.S.2d 905 (1975) (*alibi* evidence claimed to be cumulative[127]); *State v. Hart*, 412 S.E.2d 380 (S.C. 1991) (when the victim has provided differing descriptions of defendant, an exhibition of a defendant's physical

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[124] *Cheek* was argued, and decided, on the Sixth Amendment *right to a jury trial*, because the judge sought to take away from the jury the question of the subjective state of mind of the accused:

> We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one, and would prevent the jury from considering it. . . . It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or to pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

4908 U.S. at 203-04. But there can be no doubt that this decision approves of the admission of the evidence to begin with.

[125] See below at page 160.

[126] *See Bower v. O'Hara*, 759 F.2d 1117 (3rd Cir. 1985) (exclusion of evidence prompted chiefly if not solely by the court's impatience about the length of the trial cannot be defended as a valid exercise of discretion under Fed.R.Evid. 403).

[127] "We cannot agree with the position taken that the testimony of the nonresident witnesses would have but bolstered that given by the grandparents. These relatives were subjected to vigorous cross-examination by the prosecutor, who emphasized their apparent interest in the outcome and noted, in his summation, his impression that they had "been used." Obviously, proof uttered by an unbiased witness might have been persuasive in supporting the alibi defense, rather than being merely cumulative." Although the Court failed to reverse the decision below, it affirmed the compulsory process principles discussed here. See the discussion at page 31.

characteristics is not "cumulative evidence," even if there was already testimony defendant's appearance).

The Eighth Circuit Court of Appeals recognized that the exclusion of evidence under Federal Rule 403 is "subject to the caveat that such an exclusion of testimony sought to be presented by a criminal defendant must not be used in a way that violates the defendant's sixth amendment rights." *United States v. Turning Bear, III*, 357 F.3d 730, 734-735 (8th Cir. 2004). In *Turning Bear*, the defendant appealed his conviction on five counts of aggravated sexual abuse of his son and daughter. *Id*. at 730 The Circuit Court held that it was error for the district court to exclude defendant's proffered character evidence as cumulative, finding instead that the testimony went to the central issue in the case of the veracity of defendant's son's testimony, and violated the defendant's right to put on witnesses in his defense. *Id*. at 735.

F. Explanations of conduct alleged to give rise to inferences

Often the accused is saddled with inferences which arise consciously or unconsciously from their conduct. The accused should always be allowed to offer explanations for conduct which, in one manner or another, reflects adversely on them, or their credibility, or character. *People v. Gilmore*, 66 N.Y.2d 863, 498 N.Y.S.2d 752 (1985) (accused was prevented from testifying that his flight was motivated by conversation during which he had learned of threatening police conduct); *Gilmore v. Henderson*, 825 F.2d 663 (2nd Cir. 1987) (Same case, overturning New York determination that error was harmless); *People v. Yopp*, 67 A.D.2d 774, 412 N.Y.S.2d 698 (3rd Dept. 1979).

G. "Speculative" evidence

Since all the defense must do to be entitled to an acquittal, it is only necessary that the evidence be capable of raising a reasonable doubt for it to be admissible. It need not prove the guilt of the third person. Thus, evidence can be admitted even though it is considered "speculative." *People v. Barnes*, 109 A.D.2d 179, 491 N.Y.S.2d 864 (4th Dept. 1985) (witness must be allowed to testify of observations of another person fitting assailant's description in the vicinity at the time of the crime); *People v. Johnson*, 89 A.D.2d 506, 452 N.Y.S.2d 53 (1st Dept. 1982) (exclusion of photo of deceased friend of co-defendant who had confessed to involvement in the charged robbery); *People v. Young*, 59 A.D. 2d 920 (2d Dept.1977)(medical condition of accused which corroborated alibi); *People v. Shields*, 81 A.D.2d 870 (2nd Dept. 1981); *United States v. Bay*, 762 F.2d 1314 (9th Cir. 1984)(Admissibility of relevant physical characteristics of accused).

> But the district court is not free to dismiss logically relevant evidence as speculative: "[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt." *United States v. Vallejo*, 237 F.3d 1008, 1023 (9th Cir.2001) (quoting John Henry Wigmore, Evidence in Trials at Common Law § 139 (1983)) (alterations in original).

United States v. Stever, 603 F.3d 747, 754 (9th Cir. 2009).

H. "Self serving" evidence

Although it is trivial to describe defense evidence as "self-serving," it seems to be a darling claim by prosecutors and given some credit by judges. In fact there might be legitimate suspicion of evidence created after the fact by the accused or one associated with the accused. This does not render the evidence inadmissible. *Gilmore*, *supra*; *People v. Ellison,* 128 A.D.2d 720, 513 N.Y.S.2d 213 (2d Dept. 1987); *People v. McCann*, 90 A.D.2d 554, 455 N.Y.S.2d 134 (2d Dept.1982) (preclusion of reports by accused prepared on day of alleged offense); *People v. Daly*, 98 A.D.2d 803, 470 N.Y.S.2d 165 (2d Dept. 1983) (Error to exclude defense investigator's testimony about unsuccessful efforts to locate some witnesses); *People v. Arroyo*, 162 A.D.2d 337, 557 N.Y.S.2d 898 (1st Dept. 1990) (defense witnesses' testimony should not be excluded unless it is offered in *palpably bad faith*);[128] *People v. Arena*, 106 A.D.3d 1445, 964 N.Y.S.2d 383 N.Y.A.D. (4th Dept. 2013);[129] *People v. Gibian*, 76 A.D.3d 583, 585 (2010).[130]

I. Third party guilt: "SODDI"

Naturally, proof that another person may have committed the crime may exonerate the accused. While the evidence might not be so compelling, it might be sufficient to raise doubt about the guilt of the accused, and that should be enough. This, after all, was the issue in *Chambers v. Mississippi* itself. The Supreme Court recently reaffirmed that point in *Holmes v. South Carolina,* 547 U.S. 319 (2006). But *Holmes* was decided on narrower grounds than it might have, specifically rejecting a rule that evidence of third-party guilt might be excluded in

[128] The trial court refused to allow the defendant's mother to testify that he was at home asleep when the co-defendant woke him to ask for help in taking the co-defendant's mother to the hospital. That would have corroborated the defendant's claim that he was surprised when his co-defendant robbed a taxicab driver. The Appellate Division held that a defendant has a constitutional right to call witnesses, (*Chambers v. Mississippi, supra*) and the defense witnesses' testimony should not be excluded unless it is offered in *palpably bad faith*. *People v. Gilliam*, 37 N.Y.2d 722, 374 N.Y.S.2d 616, 337 N.E.2d 129 (1975), rev'g on the dissenting opinion of Justice Hopkins 45 A.D.2d 744, 356 N.Y.S.2d 663. However the error was viewed to be harmless.

[129] Defendant was charged with beating the victim and forcibly stealing property from him. According to the People, defendant's motive was to retaliate against the victim for informing the police, in an anonymous 911 call on April 18, 2010, that defendant was growing marihuana in his house. Defense counsel sought to call a witness who was on the witness list submitted to the court by defendant prior to voir dire. The proposed witness intended to testify that on April 18, 2010—the same day on which defendant was arrested on the marihuana charge—defendant accused the proposed witness of being the informant but did not assault or threaten him. The court precluded the proposed witness from taking the stand, ruling that his proposed testimony was "not relevant to the issues presented to this jury.
The Appellate Court ruled the testimony of a defense witness should not be prospectively excluded unless the offer of such proof is palpably in bad faith. It is well settled that "a defendant's 'right to present his own witnesses to establish a defense ... is a fundamental element of due process of law'

[130] Right to present a defense was violated by precluding the defendant from testifying that his mother admitted killing the decedent, as hearsay. The defendant wanted to testify that he removed evidence and confessed, all to protect his mother.

cases where the prosecution evidence is considered to be "strong." Unfortunately, as it was finally briefed, neither the Petitioner nor its *amici* sought a more expansive ruling than was given.[131] As demonstrated above, p. 74, *Holmes* does squarely reject, on compulsory process grounds, the South Carolina rule that evidence of third party guilt can be excluded merely on the basis that the state had a strong case against the accused. Nevertheless, because of its narrowness, it **is not recommended that *Holmes* be relied on for the primary authority for any compulsory process claim.**

But courts are hostile to evidence merely pointing to the possible guilt of others, especially where the guilt of the other party is not logically inconsistent with the guilt of the accused. Still, the fundamental question has to be whether the evidence raises a reasonable doubt:

> [I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir.2001) *See above*, at p. 87.

Eyewitness identification cases are notoriously difficult when the defense tries to prove that the offense was committed by another person. Excluding such defense evidence can "cut the

[131] The petition for a writ of *certiorari* in *Holmes* led with a straight compulsory process argument. It argued that a defendant is entitled to put before the jury the testimony of competent witnesses with first-hand knowledge directly relevant to the question of guilt or innocence. It argued that, while a defendant may have to show that the evidence in question is genuinely probative of third-party guilt (as opposed to conjectural), the defendant should not have to do more than show that the third-party guilt evidence, if credited, is sufficient when considered together with other defense evidence to raise a reasonable doubt regarding innocence. Similarly, I have pointed out here that, since all the defense has to do to command a verdict of acquittal is prove reasonable doubt about any element of the offense, the threshold of admissibility of defense evidence can be no greater than whether it is evidence on which a reasonable juror might rely in deciding that there was a reasonable doubt. See, infra, at p. 82. Accordingly, the *cert.* Petition argued " South Carolina thus puts a defendant—even a capital defendant like Petitioner—to a greater burden in seeking to admit exculpatory evidence than the defendant bears in trying to win acquittal before the jury." Unfortunately, this perfect, broader argument was relocated in the Petitioner's brief to an argument that the standard impinged on the right to a jury trial and a jury verdict beyond a reasonable doubt, and it was detached from the compulsory process claim, which was also subordinated to the "jury trial" argument.

No doubt this was designed to appeal to the currency of "jury trial" issue in *United States v. Booker*, but in my view it tragically undercut the strength and breadth of the compulsory process claim that was better presented in the petition. A similar tack was taken by the *amicus* brief submitted by "Forty Professors of Evidence Law," which, though the group nominally included Peter Westen, did not reflect or even refer to his writings. *Holmes* was such a perfect case for *amici* to press for a categorical discussion of the parameters of the compulsory process right, the narrowness and contrived nature of the briefs on behalf of the Petitioner is disappointing. Indeed, none of the *amici* referred to Prof. Westen's writings or any of the other scholarly writings on the breadth of the compulsory process right. The NACDL *amicus* brief was broadest in its approach, but it too vacillated on the nature of the right and also diverted into parroting the "jury trial" arguments made by the Petitioner and other *amici.* There is nothing to be gained by attempting to use the right to a jury trial right as a proxy for the right to present a defense (or any other trial-related right). And, what would be the implications of such an argument in a non-jury trial?

Indeed, seen in this light, we are most fortunate that the Court ignored the briefs and focused on the excellent oral argument by John Blume.

heart out of the defense case." *People v. Washington*, 99 A.D.2d 848, 488 N.Y.S.2d 615 (2d Dept. 1984)(Titone, J., dissenting). However, as *People v. Washington* itself shows, the mere assertion of the "right to present a defense" does not obviate the need to thoroughly think through a plan for presenting the defense. If it appears that the offer is disingenuous, or a tactical bluff, exclusion of the evidence will probably be tolerated. Judge Titone painted a most favorable picture of the defense offer of evidence dissenting at the Appellate Division to a no-opinion affirmance. But the Court of Appeals painted an entirely different picture of the tactical posture of the case:

> No error of law is preserved for our review on this appeal (CPL 470.05 [2]) Following the recess taken to permit defense counsel to interview the proposed witness Grier, who allegedly had confessed to being one of the perpetrators of the robbery with which defendant was charged, no request was made by defense counsel either to call Grier to testify or to seek admission of his so-called confession as an admission against penal interest (*People v. Settles,* 46 N.Y.2d 154, 412 N.Y.S.2d 874, 385 N.E.2d 612), through the testimony of the officer who had arrested Grier for an unrelated robbery and to whom the confession was made. No attempt was made by defense counsel to advise the court, through an offer of proof, of what he had learned in his interview of Grier and the arresting officer or to renew his request to call the witnesses.

People v. Washington, 64 N.Y. 2d 961, 477 N.E.2d 1098, 1098-99, 488 N.Y.S.2d 644, 644-45 (1985). In other words, the Court of Appeals felt that something smelled funny about the defense offer. Nevertheless, Judge Titone's dissent at the Appellate Division. contains a valuable explication of the theory of admission of evidence.

In *Smithart v. State*, 988 P. 2d 583 (Alaska1999) a new trial was granted because of the exclusion of evidence suggesting that another person had committed the offense.[132] Massachusetts also has favorable cases:

> [I]t is well established that a defendant should have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast doubt upon the identification of the defendant as the person who committed the crime.

Commonwealth v. Keizer, 377 Mass. 264, 267, 385 N.E.2d 1001 (Mass. 1979); *State v. Bock*, 229 Minn. 449, 458, 39 N.W.2d 887 (Minn. 1949); *Commonwealth v. Murphy*, 282 Mass. 593, 597-98, 185 N.E. 486 (Mass. 1933); *Commonwealth v. Graziano*, 368 Mass. 325, 329-330, 331 N.E.2d 808 (Mass. 1975); *Commonwealth v. Jewett*, 458 N.E.2d 769, 17 Mass.App.Ct. 354 (Mass.App.Ct. 1984); *Ex parte Griffin*, 790 So.2d 351 (2000) (Death penalty case reversed

[132] "Charles Smithart appeals his convictions for kidnaping, first-degree sexual assault, and first-degree murder. He argues that the trial court erred by refusing to allow his attorney to present evidence and argument that the crimes were committed by another man. Because the right to present one's defense is a fundamental right in our criminal justice system, the trial court's failure to allow Smithart to introduce relevant evidence and to argue freely that another man committed the crimes was not harmless beyond a reasonable doubt. We thus reverse and remand for a new trial."

because trial court refused to allow defendant to introduce evidence that another person pled guilty to the offense.); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965) (Op. by Griffin Bell, J.). Also, *Laureano v. Harris*, 500 F.Supp. 668 (S.D.N.Y. 1980).[133]

In *Commonwealth v. Murphy*, 282 Mass. 593, 185 N.E. 486 (Mass. 1933), the Supreme Judicial Court of Massachusetts held it was reversible error for the trial court to exclude evidence that, while defendant was in custody, a man who resembled the defendant had committed crimes similar to those for which the defendant was on trial and that the defendant had been mistakenly identified as being involved in those crimes. The court noted that mistaken identity as to these other crimes did not prove mistaken identity as to the case on appeal but held that the defendant was entitled to have the jury "consider the evidence, pass upon its credibility and weigh it with the evidence of identification upon the issue of his guilt." 185 N.E .at 487.

In *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965), the court reversed a conviction because the trial court did not allow the defendant to show he had been mistakenly identified as the man guilty of prior similar crimes, holding that this fact was relevant to his "mistaken identity" defense.

Similarly in *Commonwealth v. Keizer*, 385 N.E.2d 1001 (Mass. 1979), a conviction was reversed because the defendant in a robbery case was not allowed to present evidence of a robbery committed by similar means while he was in custody. The Appellate Court noted that some of the similarities were common to many robberies committed in the area and that there was some discrepancy in the reported physical description of the subjects involved in the two offenses, but held that notwithstanding that the offered evidence was capable of an interpretation consistent with the defendant's guilt, the defendant was entitled to have the jury decide the significance of the evidence.

In *Commonwealth v. Jewett*, 458 N.E.2d 769, the conviction was overturned because the defendant was not allowed to show that a man who resembled the defendant, and who had been identified as the defendant but could not possibly have been him, had committed a similar sexual assault five days before the crime with which defendant was charged. Again the court held that the proffered testimony, though not determinative as to innocence, should have been presented to the jury.

See also, *People v. Barnes*, 109 A.D.2d 179, 491 N.Y.S.2d 864 (4th Dept.1985) and the effort there to distinguish *People v. Johnson*, 62 A.D.2d 555, 405 N.Y.S.2d 538 (4th Dept.1978);[134] *United States v. Armstrong*, 621 F.2d 951 (9th Cir. 1980) (third party found with

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[133] Petitioner's defense that he was innocent would have been buttressed by evidence that the "pattern rapist" was guilty of these similar crimes.

[134] In *Barnes* Judge Hancock attempted to distinguish the case of *People v. Johnson*, 62 A.D.2d 555, 405 N.Y.S.2d 538 (4th Dept.1978) in which evidence that another person was responsible for the series of rapes was excluded. Judge Hancock had dissented in *Johnson*, one of those classic, and tragic, cases where the facts were altered by the court to accommodate the result desired. In fact the two cases are not consistent, nor is the standard of "relevance" stated in *Johnson* consistent with that in *People v. Mountain*, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985), discussed *infra*. Other cases elsewhere establish conclusively that evidence, though somewhat speculative, that the offense was likely to have been committed by the same person as other similar offenses, and that the accused did not commit one or more of the other offenses, must be admitted for the jury to evaluate.

bank's "bait" money); *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976) (Suspect in other robberies resembled photo of robber in this case); *United States v. Morgan*, 581 F.2d 933 (D.C. Cir. 1978) (Evidence that another person was the seller of drugs); *United States v. Crenshaw*, 698 F.2d 1060 (9th Cir. 1983) (Evidence that third party planned robbery); *United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983) (Third party's history of sexually abusive behavior).

1. A special standard for SODDI evidence?

Is there a special standard such evidence must meet before it is admissible on behalf of the accused? In his dissent in *People v. Washington*, Judge Titone stated:

> The People's claim that a high barrier must be overcome before the "supporting circumstances" requirement can be satisfied is unpersuasive. While the motivation for that requirement appears to be a fear of perjured testimony, such a danger is present with all testimony and, as Professor Wigmore cogently observed, "any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent" (5 Wigmore, Evidence [Chadbourn rev], § 1477, p 359; see, also, McCormick, Evidence [2d ed], § 278, p 674; dissenting opn of Holmes, J., in *Donnelly v United States*, 228 U.S. 243, 277-278; *People v Edwards*, 396 Mich 551). Moreover, in criminal prosecutions, there are constitutional limitations on exclusion of evidence favorable to an accused (US Const, 6th, 14th Amdts; NY Const, art I, §6; *Chambers v Mississippi*, 410 U.S. 284; *Pettijohn v Hall*, 599 F2d 476, 480, cert den 444 U.S. 946; *People v Simone*, 59 AD2d 918, 919-920).

However, ever suspicious of defense evidence, and of efforts to divert attention to other possible suspects, ("misleading" or "confusing" the jury) a series of Appellate Division cases began to adopt a "standard" of "more than mere suspicion" of the third person, which other cases have applied as requiring a "clear link" to the crime. See, *e.g.*. *People v. Aulet*, 111 A.D.2d 822, 825, 490 N.Y.S.2d 567 (2nd Dept. 1985); *People v. Brown*, 187 A.D.2d 662, 590 N.Y.S.2d 896 (2d Dept 1992).

The great difficulty with the "clear link" cases was the convenience with which such language could be utilized to brush aside defense offers of evidence as insufficient. The "clear link" "test" can be subjective and an excuse to exclude evidence where the defense cannot prove that the other person did the crime—far too rigorous where all the accused needs to "establish" is reasonable doubt. See, Muldoon, Handling A Criminal Case in New York, § 18:158. For the most part the "clear link" cases were predictably short on factual analysis, but clearly worked to put the burden of proof on the accused to show more than a reasonable doubt about guilt.

The "clear link" line of cases was put gently to rest with the decision of the Court of Appeals in *People v. Primo*, 96 N.Y.2d 351, 753 N.E.2d 164, 728 N.Y.S.2d 735 (2001).

See the discussion below of *People v. Johnson* and the "Reverse M.O." problem, at p. 95.

Apparently embarrassed that it had not stepped in sooner to correct the situation, the Court did not expressly declare that these cases were erroneous, it simply overruled them by trivializing the phraseology:

> This appeal presents us with the opportunity to determine whether the "clear link" phraseology best articulates the standard that should govern the admissibility of evidence of third-party culpability. For reasons that follow, we hold that the test is better described in terms of conventional evidentiary principles.

The decision is less than gratifying, however, for it does not directly address the compulsory process arguments raised by the defendant, and retreats to the more comfortable territory of "balancing" that might be used for any evidentiary question:

> To the extent that the "clear link" standard implies no more than an abbreviation for the conventional balancing test, it presents no problem. A review of clear link cases reveals that the courts would very likely have made the same ruling regardless of the nomenclature. "Clear link" and similar coinages, however, may be easily misread as suggesting that evidence of third- party culpability occupies a special or exotic category of proof.
>
> The better approach, we hold, is to review the admissibility of third-party culpability evidence under the general balancing analysis that governs the admissibility of all evidence. In this setting, we note that the countervailing risks of delay, prejudice and confusion are particularly acute. If those concerns were not weighed against the probative value of evidence, the fact-finding process would break down under a mass of speculation and conjecture. Courts thus have been careful to exclude evidence of third-party culpability that has slight probative value and strong potential for undue prejudice, delay and confusion.

People v. Primo, 96 N.Y.2d 351at 356-57. The problem with using "balancing" where fundamental rights are involved, discussed below at 166, is overlooked by the Court. What the court meant by "in this setting" "the countervailing risks . . . are particularly acute" is hard to tell. Why would the risk of delay, prejudice and confusion" be more "acute" when the defendant is proving the possibility that someone else committed the crime, than when the prosecution is proving guilt, such as by blood type evidence, as in *People v. Mountain*, discussed above at note 3? Additionally, the "slight probative value" analysis is meaningless unless it is understood that all the defense has to prove in order to succeed is only a reasonable doubt. The test can be nothing other than whether the evidence was such as would reasonably create in the mind or a reasonable juror a reasonable doubt about guilt.

Of course other cases recognize this. *People v. Hall*, 718 P.2d 99 (Cal. 1986) ("To be admissible, the third-party evidence need . . . only be capable of raising a reasonable doubt about the defendant's guilt."); *Winfield v. United States*, 676 A.2d 1, 3-4 (D.C. 1996) ("the phrase 'clearly linked' is unhelpful and should be discarded from our lexicon of terms governing the admissibility of third-party perpetrator evidence." The evidence "need only *tend* to create a reasonable doubt that the defendant committed the offense"); *Sparman v. Edwards*, 26 F.Supp.2d 450, 472-73 (E.D.N.Y. 1997), *aff'd* 154 F.3d 51 (2nd Cir. 1998) ("Indeed, a general rule of

evidence that bars the introduction of relevant, exculpatory evidence and imposes a burden on defendants to produce another piece of evidence supporting defendant's defense strikes this Court as constitutionally questionable"); *State v. Robinson*, 628 A.2d 664, 666-67 (Me. 1993)("Requiring that alternative perpetrator evidence 'clearly link' the alternative perpetrator to the crimes placed too high a burden on a criminal defendant who is without the vast investigatory resources of the State.") *Bisaillon v. Keable*, [Canada 1983] 2 S.C.R. 60, 93: "In our system the right of an individual accused to establish his or her innocence by raising a reasonable doubt as to guilt has always remained paramount." It is obvious that the standards of probative value for the defense evidence cannot be set at a higher threshhold than what the defense has to prove in order to succeed in the case. See above at p 82.

Behind *Primo*'s directions as to how to proceed in these cases, one can clearly see the concern about desperate and speculative and remote efforts to suggest the involvement of others. This results in the suggestion that the defense make an "offer of proof" in these cases.

> The admission of evidence of third-party culpability may not rest on mere suspicion or surmise. In practice, the balancing is best performed by requiring the defense, at the earliest reasonable opportunity, to make an offer of proof outside the presence of the jury to explain how it would introduce evidence of third-party culpability. The court will then hear any counter-arguments from the prosecutor, weigh the considerations, and make its determination followed by clear directives as to what it will and will not allow.

The problem with forcing the defense to make an "offer of proof" is discussed above at p. 59. The Court's practical suggestion arises out of the experience that so many of the cases in which third party culpability is raised present disorganized and half-baked efforts by the defense. Too often the defense wants to make the suggestion that someone else committed the crime, without doing the investigation or preparation or research necessary to demonstrate the plausibility of the idea, the fairness of admitting the evidence and the constitutional footing of the offer. The fact is that courts will not tolerate the defense keeping evidence of a third-party's culpability close to the vest, as illustrated in the Court of Appeals' decision in *People v. Washington*, 64 N.Y. 2d 961, discussed above.

Indeed, the conviction in *Primo* was probably reversed on the basis of the subtle factors present, such as the fact that the accused turned himself in, agreed to speak to the police after waiving his rights, and because of the independent evidence corroborating the defense hypothesis. The case is illustrative as well of the typical response of the prosecutor where the defense actually seeks to prove his innocence: make the defense pay a price for the admission of the favorable evidence.[135]

[135] In this case the prosecutor argued that if the defendant was allowed to show that Booker was at the deli, then this would "open the door" to evidence that the detective "received a phone call linking up [defendant] and Moe[Booker] as being involved in another shooting robbery in Staten Island." Unfortunately, the Court of Appeals failed to comment on this tactic. So often courts give in to prosecutors' motions to preclude such evidence because they don't want to deal with all the "opened doors" the prosecutors will find in the evidence. That is, the prejudice and confusion does not come from the defense offer, but the hydraulic pressure from the People to make the defendant pay a price for daring to prove innocence.

The New York Court of Appeals was given a chance, in *People v Gamble*, 18 N.Y.3d 386, 964 N.E.2d 372 (2012), to consider the issue expressly on compulsory process grounds, and review for legal error. Rather it still looked not at whether the accused had established a "nexus" between the events suggesting a motive of others and he actual shooting charged. However, the Appellate Division in *People v. Oxley*, 64 A.D.3d 1078, 883 N.Y.S.2d 385 (3rd Dept. 2009) did rest a similar determination on compulsory process grounds, citing *Holmes v. South Carolina.*[136]

2. "Reverse M.O." cases

This is a subset of the "SODDI" case. *People v. Johnson,* 62 A.D.2d 555, 405 N.Y.S.2d 538 (4th Dept.1978) was a case where the defendant, a black activist, after three trials, was convicted of one of a series of rapes of white women. Evidence of the serial nature of a number of rapes, and his affirmative non-identification by one of the victims was excluded in the first trial. He was acquitted on one rape (in the face of an undoubtable *alibi*), but the jury hung on a second rape allegation. At the next trial, again the evidence of a serial rapist, and the positive testimony by one victim that Johnson was not the rapist, were exclused, in assition to his complete alibi and acquittal of the other rape in the first trial.[137] He also did not fit the description of the rapist. The argument attempted by the defense in these cases was that the other crimes and the charged crime were committed by the same person, not the defendant, so the defendant had the right to put evidence of the other crimes before the jury. This was rejected, on the idea that the serial rapist theory was "speculative." The engine of the rule in *Johnson* is simply mistrust of juries, and the disproportionate fear of letting a possibly guilty (black) person be freed, compared to dimiished fear of convicting an innocent person.

There can be tragic consequences for the innocent when the defense is prevented from proving evidence suggesting that the real criminal has not ben caught. Few cases better

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[136] Trial court excluded testimony of a witness that she saw a man called Chase at the scene of the crime and threatening the victim only a few hours before the murder, and had threatened to kill the victim less than 48 hours prior to that, and that Chase . Six months after the murder, she heard Chase admit that he committed the murder. A jail inmate was prepared to testify that Chase told him that he, and not defendant, committed the murder. There was more similar eidence available but exclused as hearsay and speculative. Chase testified outside the jury's presence and, predictably, denied committing the murder or making the statements.

The Appellate Division found that the exclusion deprived the accused of the right to present his evidence, and that the evidence was not merely speculative, "but specific and adequately connected Chase to the victim and scene so that it " 'tend[ed] clearly to point out someone besides [defendant] as the guilty party,'" *People v. Schulz*, 4 N.Y.3d 521, 529 (2005), and citing *People v. Primo*, 96 N.Y.2d 351, 356–357 (2001) and *Holmes v. South Carolina*, 547 U.S. 319, 330–331 (2006)

[137] Kenneth Johnson was innocent. But in each of his three trials evidence of his innocence was excluded. In the last two trials he refused a "time served" plea. When paroled his parole officer violated Johnson on the claim that he had engaged in a new series of three rapes, despite myriad discrepancies in the description of the perpetrator and Johnson's solid alibi, and an actual confession to one of the rapes by the real perpetrator, Victor Kevin Thomas. There was not enough to criminally charge Johnson, who was "no billed" by a grand jury, and the Appellate Division later threw out the parol revocation. 580 N.Y.S.2d 957 (3rd Dept. 1992) In 2008 DNA evidence exonerated Johnson from one of the rapes with proof that Victor Thomas had raped this victim also. Unfortunately, no DNA evidence was preserved from Johnson's original conviction for him to be exonerated of that rape.

demonstrate this than the case of *People v. Capozzi*, 152 A.D.2d 985, 544 N.Y.S.2d 95 (4th Dept. 1989).[138] Capozzi was charged with three similar rapes and went to trial in 1987. The rape victims told police their attacker was about 160 pounds – Capozzi weighed 200 to 220 pounds. None of the victims mentioned a prominent three-inch scar on Capozzi's face. Capozzi sought to have admitted evidence that there were in fact a series of rapes which all were – before his arrest - thought to have been perpetrated by the same person, and that Capozzi could not be that person. Indeed, he had "airtight *alibi*s" for one of the rapes he was charged with, as well as those he was not charged with. All three victims identified Capozzi in court as the attacker. Nevertheless, the evidence was excluded on the basis of the decision in *People v. Johnson*.[139] As a result, Capozzi was convicted by a jury of two rapes and acquitted of the third. He was sentenced to 35 years, in 1987.

DNA tests in March 2007 on biological evidence stored for two decades in a hospital drawer showed that another man, Altemio Sanchez, actually committed the attacks for which Capozzi was convicted. Unfortunately, during the 20 years of Capozzi's wrongful imprisonment, Sanchez committed numerous other rapes and three brutal rape-murders. These rapes and murders were the price society – and more innocent victims – paid on account of the stinginess of judges in allowing the jury to hear evidence demonstrating the plausibility that another person was responsible for the crime Capozzi was charged with.

While the exoneration of Capozzi generated a great deal of publicity, scarcely acknowledged was the role that the misguided exclusion of defense evidence played in enabling Sanchez' deadly crime spree to continue.[140] Had the defense been allowed to introduce the evidence of Capozzi's innocence, based on the probability of another perpetrator, and had Capozzi then been acquitted, there were leads to Sanchez in existence that could have led to his prosecution and conviction, sparing the lives of these additional victims. As it turns out, the judges' notion of what evidence was "relevant" to Capozzi's guilt was more ideological than it was empirical.

In addition to *Capozzi* and *Johnson,* see also *People v. Lawson*, 71 N.Y.2d 950 (1988); *People v. Robinson*, 114 A.D.2d 120 (3rd Dept.), *rev'd* 68 N.Y.2d 541 (1986); *People v. Greenwood*, 166 A.D.2d 353 (1st Dept. 1990).

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[138] Capozzi was released 21 years later after being exonerated by DNA evidence which proved that another person – Altemio Sanchez – had committed the rape/murder. Sanchez had and committed multiple additional rapes and three murders while Capozzi was in prison. http://en.wikipedia.org/wiki/Altemio_Sanchez

[139] "The trial court properly precluded defendant from introducing evidence of three other uncharged sex crimes committed in the Delaware Park area on dates when defendant could not have committed them. These uncharged crimes were neither unique nor sufficiently similar to *986 the crimes charged in the indictment to support an inference that the same individual was responsible for all the crimes. "[E]vidence tending to establish that a defendant did not commit uncharged crimes is, because of its irrelevancy, similarly inadmissible as evidence-in-chief to establish that the defendant did not commit the charged crime" (*People v. Johnson*, 47 N.Y.2d 785, 786, 417 N.Y.S.2d 925, 391 N.E.2d 1006, cert. denied, 444 U.S. 857, 100 S.Ct. 116, 62 L.Ed.2d 75; . . ."

[140] See, http://www.innocenceproject.org/Content/Anthony_Capozzi.php. There were two books written about the conviction and exoneration of Anthony Capozzi. Becker and Beebe, The Bike Path Killer (Pinnacle Books, 2009); Schober and Delano, Bike Path Rapist (The Lyons Press, 2009)

One *habeas corpus* decision draws a bead on these cases. In *Laureano v. Harris*, 500 F.Supp. 668 (S.D.N.Y. 1980). Although the judge ruled that all the claims raised in the habeas petition were not exhausted in the state courts, the court commented upon the merits of the alternative perpetrator evidence:

> Ordinarily, no discussion of the merits of petitioner's claims would be necessary. In this case, however, petitioner is not represented by counsel, and the several clearly unmeritorious arguments he has raised may obscure the relative merit of his claim (B), involving the trial court's refusal to permit petitioner to call Caraballo and members of the Bronx Sex Crimes Unit as witnesses. This testimony, given petitioner's defense and offer of proof, would have been highly relevant. Caraballo subsequently confessed to the crimes for which petitioner was convicted. Even if Caraballo would have refused to testify, the court could have arranged for the jury to compare his appearance with petitioner's, which the record shows is strikingly similar. Such an appearance by Caraballo would not have constituted testimony and therefore could not have been itself barred by Caraballo's invocation of the Fifth Amendment, which could have been placed on the record outside the jury's presence. Moreover, the police officers allegedly would have testified that they believed that Caraballo, not Laureano, had committed these particular crimes. Petitioner's defense that he was innocent would have been buttressed by evidence that the "pattern rapist" was guilty of these similar crimes.
>
> The trial judge's refusal to permit petitioner to call any of these witnesses, because "the anticipated evidence ... would be highly suggestive, unduly suggestive, unduly inflammatory and because it would lead to speculation on the trial jurors," seems erroneous on its face. The evidence would have been "highly suggestive" of the possibility that Caraballo had committed the rapes and would have led "to speculation" as to Laureano's guilt. These are precisely the issues that were before the jury, and the trial judge's ruling essentially denied petitioner an opportunity to establish that a reasonable doubt existed as to his guilt. After this claim is properly presented to the state courts, it will be appropriate to consider it here if relief is not obtained.

[emphasis added] *Id.* at 672-73. This case supports an argument that the rule espoused in *Johnson* and its progeny is unconstitutional. Hopefully the tragic results of the rule in *Johnson* – which we see laid out in the case of Anthony Capozzi – will lead to judicial recognition that, in fact, “reverse m.o.” evidence is extremely relevant to claims of innocence.

J. Prior Bad Acts of Third Parties: "Reverse 404(b)"

In New York we have relatively high standards for the admission of "prior bad act" evidence against the accused. The prosecution must show not only the probative value of the evidence, and that prejudice is outweighed, but also that the prior misconduct *actually happened* by "clear and convincing evidence." *People v. Robinson*, 68 N.Y.2d 541 (1986). Of course this standard is less in federal court. *Huddleston v. United States*, 485 U.S. 681, 99 L.Ed.2d 771 (1988). What about when the accused wishes to affirmatively use prior bad act evidence? This is sometimes called the "reverse 404(b)" situation.

Courts have acknowledged that compulsory process concerns dictate that a lower standard be applied when the defendant is offering the evidence. *United States v. Stevens*, 935 F.2d 1380 (3rd Cir. 1991); *State v. Garfole*, 76 N.J. 445, 452-53, 388 A.2d 587, 591 (1978) ("when the defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made."); *State v. Welker*, 357 S.E.2d 240 (W.Va. 1987) (quoting from Wigmore); *Garner v. State*, 711 P.2d 1191 (Alaska Ct. App. 1986); *United States v. Aboumoussallem*, 726 F.2d 906 (2nd Cir. 1984) ("we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword"); *United States v. Cohen*, 888 F.2d 770 (11th Cir. 1989). *United States v. Cruz-Garcia*, 344 F.3d 951 (9th Cir. 2003) (evidence of witness' prior convictions and drug dealing, hoping to show that the witness indeed was capable of dealing drugs on his own.)[141]

K. Prior acts of the complainant in self-defense cases

It has been generally accepted in New York that (1) prior violent acts by a victim are not admissible to prove that the victim was the aggressor when the defense is self-defense but (2) prior violent acts of the victim of which the defendant was aware at the time of the alleged crime are admissible as relevant to the defendant's state of mind. *See People v. Reynoso*, 73 N.Y.2d 816, 819 (1988); *Matter of Robert S.*, 52 N.Y.2d 1046 (1981); *People v. Miller*, 39 N.Y.2d 543

[141] "That Meza-Castro was a witness, rather than the defendant, further militates in favor of inclusion. Though 404(b) does apply to witnesses and third parties, United States v. McCourt, 925 F.2d 1229, 1235 (9th Cir. 1991), we have suggested that "courts should indulge the accused when the defendant seeks to offer prior crimes evidence of a third person for an issue pertinent to the defense other than propensity." Id. at 1236. This is because 404(b) is often thought to protect a defendant from being tried "for who he is," not for "what he did." *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993) (quoting *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985)) (internal quotation marks omitted). The "guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing." Id. (quoting *Hodges*, 770 F.2d at 1479) (internal quotation marks omitted). Where evidence of prior crimes pertains to a witness, this is not an issue. At most, a jury might discredit his testimony--a consideration Rule 609 already takes into account.

(1976). [142]

This latter rule has been under attack on compulsory process grounds. In *Williams v. Lord*, 996 F.2d 1481 (2nd Cir. 1993), the Second Circuit rejected the challenge, at least as the rule was applied to the Petitioner, but did note that

> Such restrictions, however, may not be "arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987). Thus, "a State must evaluate whether the interests served by a rule justify the limitations imposed on the defendant's constitutional right to testify.

Id. In his concurrence in *Williams*, Judge Cardamone stated he was "troubled" by "the application in this case of New York's evidentiary rule.":

> A state in a criminal case may place restrictions on a defendant's introduction of evidence without violating the constitutional right to present a defense so long as those restrictions are neither arbitrary, *see Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 297, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973), nor "disproportionate to the purposes they are designed to serve," *Rock v. Arkansas*, 483 U.S. 44, 55-56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987). Accordingly, when a state adopts an evidentiary rule limiting the admission of relevant proof, the test applied to that rule is whether the legitimate interests advanced by the state outweigh the defendant's right to introduce exculpatory evidence.

What is disturbing about both opinions is the fact that each would permit a "balancing" of rights, which is not permitted when we are dealing with a fundamental trial right of the accused. Nevertheless, Judge Cardamone states: "Yet, a stated rule may be generally constitutional and still be unjust when applied to a given case. Such is the fact here." He notes insightfully that

> The question posed "is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief." 1 John H. Wigmore, Wigmore on Evidence § 63 (3d ed. 1940).
>
> Most states and the Federal Rules of Evidence have recognized this distinction and, as a consequence, would have considered admitting Doe's testimony, subject to the general rules of exclusion and trial court discretion. *See In re Robert S.*, 52 N.Y.2d 1046, 1049, 438 N.Y.S.2d 509, 420 N.E.2d 390 (1981) (Fuchsberg, J. dissenting); *see also United States v. Burks*, 470 F.2d 432, 435 & n. 4 (D.C.Cir.1972) (Skelly Wright, J.).

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[142] However, threats by a victim against the defendant are admissible to prove that the victim was the initial aggressor and are therefore admissible regardless of whether the defendant was aware of the threats. *People v. Miller*, 39 N.Y.2d 543, 549 (1976) ("Even if the defendant was not aware of the threat, the threat still is probative of the deceased's state of mind and bears, thus, on whether the deceased was the aggressor."); *People v. Frazier*, 184 A.D.2d 284, 584 N.Y.S.2d 821; *People v. Owens*, 158 A.D.2d 478 (2nd Dept. 1990); *People v. Henderson*, 162 A.D.2d 1038 (4th Dept. 1990).

The rest of his opinion, however, fails to disclose why, if he feels that the rule was unconstitutionally applied to this defendant, he is still concurring in the judgment.

L. "Irrelevant" evidence

Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979), *cert. denied*, 444 U.S. 946, 62 L.Ed.2d 315 (1979), is an illustration of how state courts may not impinge upon a defendant's fundamental constitutional rights by relying on state rules of "relevancy." The petitioner in this habeas corpus case had won a suppression motion excluding a pretrial identification which was the product of impermissible suggestive police practices. However, having learned that the same witness also previously identified someone other than the petitioner as the culprit, petitioner sought to call that witness. This evidence was excluded by the trial court and the state appellate courts as irrelevant.

In granting the writ of habeas corpus, the First Circuit stated that:

> [O]nce a sixth amendment right is implicated, the state must offer a sufficiently compelling purpose to justify the practice. Various state evidentiary rules which advanced legitimate state interests have bowed to the defendant's right to let the jury hear relevant evidence. *Id*., 599 F.2d at 481.

The Supreme Court of Canada, in *R. v. Seaboyer,* has recognized that a standard of *relevancy* is the highest that can be imposed on defense evidence:

> It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: *See R. v. Morris*, [1983] 2 S.C.R. 190, 36 C.R. (3d) 1, [1984] 2 W.W.R. 1, 48 N.R. 341, 7 C.C.C. (3d) 97, 1 D.L.R. (4th) 385, and *R. v. Corbett*, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1, [1988] 4 W.W.R. 481, 85 N.R. 81, 41 C.C.C. (3d) 385, 28 B.C.L.R. (2d) 145, 34 C.R.R. 54. In general, nothing is to be received which is not logically probative of some matter requiring to be proved, and everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

Even where the defense evidence may simply be related to the reliability or credibility of one of the prosecution witnesses, state rules of evidence which tend to limit such proof must be subordinated.

In *People v. Hudy,* 73 N.Y.2d 40, 538 N.Y.S.2d 197 (1988) the New York Court of Appeals noted that

> extrinsic proof tending to establish reason to fabricate is never collateral

> and may not be excluded on that ground. . . . Further, the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers (citing *Davis v.Alaska*, *Chambers v. Mississippi* and *People v. Gissendanner)*

In *Hudy,* the trial court foreclosed examination of the investigating officers concerning the manner in which the child witness was first interviewed, improperly denying the accused "the right to present his case."

In *People v. Agosto*, 67 A.D.2d 624, 411 N.Y.S.2d 626 (1st Dept. 1979), the Appellate Division held that the defendant should have been allowed to call witnesses concerning efforts by his sister and girlfriend to determine whether he had a lawyer present at the time he was interrogated since such testimony would have been relevant on the issue of the police officer's credibility. See also *People v. Nelu*, 157 A.D.2d 864, 550 N.Y.S.2d 905 (2d Dept. 1990);[143] *People v. Gaskin*, 170 A.D.2d 458, 565 N.Y.S.2d 547 (2d Dept. 1991);[144] *People v. Klem*, 80 A.D.3d 777, 915 N.Y.S.2d 607 (2d Dept. 2011);[145] *People v. Eastment*,106 A.D.3d 1019, 965 N.Y.S.2d 360 (2d Dept. 2013)(co-defendant in *Klem*); *People v. Grant*, 60 A.D.3d 865, 875

[143] Defendant appealed from a judgment convicting him of second degree burglary and third degree criminal possession of stolen property. The Appelate Division, relying on the reasoning of *People v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197, N.E.2d 250 (1988), stated that the trial court had committed an error by excluding evidence concerning the defendant's alleged past relationship with the complaining witness. It held that the trial court's ruling had resulted in denying the defendant's right to present proof of the complaining witness' motivation to fabricate the charges against him.

[144] The defense was that the police had framed the accused by planting a weapon in his apartment. The police claimed that they had never seen the defendant before. The defense attorney proved that the police had been to defendant's apartment building earlier that day, but he was precluded from crossing the officers about the reason for the earlier visit or what occurred during that visit. The defendant was also precluded from presenting a witness, who would have testified that, "three hours before they arrested the defendant, the police pushed their way into his apartment . . . , that they searched it without result, and that one of the officers implied he would plant a gun on the defendant." The Appellate Division, relying on the reasoning of *People v. Hudy*, 73 N.Y.2d 40, 56, 538 N.Y.S. 197 (1988) ordered a new trial, stating "[p]roof tending to establish a witness' hostility or reason to fabricate is never a collateral issue."

[145] The defendant was charged with with burglary in the third degree, for allegedly entering without permission into the abandoned building thereon, with the intent to steal a hot water heater. The defendant sought to call a witness who allegedly would have testified that, on the day of the incident, a hot water heater was taken from her property, and that her property abutted property owned by the employer of one of the codefendants. This testimony was relevant to the theory of defense, which was that the hot water heater that was seen in the defendants' possession by the People's witnesses had not been taken from the building on the complainant's property, and also would have served to impeach the credibility of the People's principal witnesses. Accordingly, the Supreme Court's determination to quash the subpoena served upon this witness on the ground that the witness's testimony was irrelevant was error which deprived the defendant of his constitutional right to present a defense to the charge of burglary in the third degree (see People v. Perez, 40 A.D.3d 1131, 1132, 837 N.Y.S.2d 275; People v. Ocampo, 28 A.D.3d 684, 685–686, 813 N.Y.S.2d 217; People v. Legrande, 176 A.D.2d 351, 352, 574 N.Y.S.2d 780).

N.Y.S.2d 532 (2 Dept, 2009).[146]

In one First Department case the defendant had been charged with raping his brother's girlfriend. The defendant tried to show that he had accused the complainant, in his brother's presence, of going out with other men, to suggest that the rape charge was in retaliation for this. The People argued that the evidence should be excluded unless they were allowed to adduce evidence about the defendant having threatened the complainant with an ice pick. This should be recognized as the persistent "sporting theory" that there should be some penalty for the accused if he or she is allowed to fully exercise the right to present a defense. The Appellate Division reversed and ordered a new trial relying on *People v. Hudy*. *People v. Miranda*, 176 A.D.2d 494, 574 N.Y.S.2d 563 (1st. Dept. 1991).

Under rules of practice which allow relevant evidence, such as expert testimony and evidence of character, to be excluded for fear that improper influence on the jury might outweigh the probative value of the evidence, the jury must again be presumed to be able to follow cautionary instruction in considering the evidence.[147] In such cases, the defendant has a constitutional right to have the jury determine the weight and probative value to be given to the testimony.

In 1977, a divided Appellate Division affirmed the conviction of Charles Culhane, later pardoned by Governor Cuomo. *People v. Culhane*, 57 A.D.2d 418, 395 N.Y.S.2d 513 (3rd Dept. 1977). Although the Court of Appeals affirmed, *People v. Culhane*, 45 N.Y.2d 757, 408 N.Y.S.2d 489, 308 (1978), *cert. denied*, 439 U.S. 1047 (1978), Judge Fuchsberg's dissenting opinion foreshadowed many decisions of the Court of Appeals to come. He asserted that there was no valid evidentiary basis to exclude the evidence (various records corroborating claim that a third individual was the actor), but that even if there was, the evidence ought still to have been received

> on the even more fundamental ground that its exclusion violated the constitutional right of the Appellants to present exculpatory evidence on the issue on which, in the end, their guilt or innocence turned (See generally, Clinton, Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. Law Review 713).

Id., 45 N.Y.2d at 764.

M. Illegally obtained evidence

Sometimes the real evidence of innocence is not legally obtained, but it must be admissible nonetheless. The accused is in a different position than the state which must be restricted from exploiting illegality in order to convict. In *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (S.C. 1989) the conviction was overturned where the trial court had excluded a tape recording of the complainant, even though it was obtained illegally without her consent. even

[146] Finding that proof aimed at establishing a motive to fabricate is never collateral and may not be excluded on that ground.

[147] Only twice has this presumption been held not to survive: *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

illegally obtained evidence is generally admissible for impeachment purposes. *State v. Mercado*, 263 S.C. 304, 210 S.E.2d 459 (1974)

N. Extrinsic evidence

The frequently stated rule is that a party may not introduce evidence only to impeach the credibility of a witness. Thus, ordinarily, the witness who claims to be a college graduate, but is not, is immune from being later attacked by introduction of evidence that the witness flunked out. However, in criminal cases, and with respect to prosecution witnesses the discretion that is ordinarily accorded to the judge to exclude extrinsic evidence on "collateral" matters, such as credibility of a witness, is circumscribed by the right to present a defense.

In *People v. Hudy*, 73 N.Y.2d 40, 57-58, 538 N.Y.S.2d 197 (1988), the Court of Appeals stated:

> We also conclude that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned. It is well established that the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters (see, e.g., People v Sorge, 301 NY 198). However, extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground (see, Richardson, Evidence § 503 [Prince 10th ed]; cf., People v Thomas, 46 NY2d 100 [proof offered to establish motive to fabricate too remote]). Further, the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers (see, Davis v Alaska, 415 US 308; Chambers v Mississippi, 410 US 284; Washington v Texas, 388 US 14; Pointer v Texas, 380 US 400; People v Gissendanner, 48 NY2d 543, 546).

O. Restrictions on examinations of witnesses

1. confrontation or compulsory process?

It is a point that is often missed by defense attorneys and judges that the right to affirmatively present a defense encompasses the right to elicit favorable information on cross-examination. Even the Supreme Court missed this, as Prof. Westen points out. *See* n. 85, *ante*. Thus the accused may be entitled to offer for its "truth" a prior inconsistent statement of a witness, though it is hearsay. See, *ante*, at page 79. In *People v. Hults*, 76 N.Y.2d 190, 557 N.Y.S.2d 270 (1990), the trial court, finding that the witness' post hypnotic testimony was not to be admitted by the prosecution, also refused to allow the accused to examine the eyewitness concerning statements during hypnosis that were inconsistent with the appearance and dress of the accused. The Court of Appeals distinguished *Rock v. Arkansas* (which allowed the defendant's hypnotically-refreshed testimony notwithstanding a general proscription on the

admission of post-hypnotic evidence) on the ground that this was a *confrontation* case (which is how the case was presented) and said that "On the other hand, unlike the relevant testimony to be proffered by a criminal defendant, the scope of cross-examination is within the sound discretion of the Trial Judge. . . ." 76 N.Y.2d at 199.[148]

Cases such as this point out the need for clarity in analysis by the trial attorney about the exact right being asserted and the relative advantage of the compulsory process right. Some courts have picked up on this. In *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992), the Circuit Court observed that the argument in cases where the restriction of cross-examination actually excluded evidence which would further the theory of the defense was "better directed at demonstrating a denial of [the defendant's] constitutional guarantee of a 'meaningful opportunity to present a complete defense'." 970 F.2d at 587-88. See, *People v. Rufrano*, 220 A.D.2d 701, 632 N.Y.S.2d 648 (2nd Dept. 1995) ("The defendant contends that the trial court improperly curtailed his cross-examination of the complainant and that this error violated his right to present a defense. We agree."); *People v. Rios*, 223 A.D.2d 390, 636 N.Y.S.2d 753) (1st Dept 1996) (Restrictions on cross examination curtailed right to present defense).

In *People v. Sepulveda*, 105 A.D.2d 854, 481 N.Y.S.2d 870 (2nd Dept. 1984), the accused had been prevented from cross examining a key witness about inconsistent statements made to a third person, and then refused to allow an adjournment for the defense to procure the presence of the third person. Relying on *Chambers v. Mississippi* the court reversed the conviction.

The problem often arises in the offer of documents or testimony that contradicts the claims of the state's witnesses. Prosecutors argue that the evidence is not admissible as it is merely goes to the credibility of the witness, and therefore "extrinsic" evidence is not

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[148] Even the dissenters overlooked the fact that the accused has the right in certain cases to affirmatively use prior inconsistent statements, a point from which they made the argument that the exclusion was unnecessary because the statements were not offered for their truth. 76 N.Y.2d at 202. However, the dissenters did recognize the applicability of *Chambers* and correctly observed that "At the least, something more than an evidentiary rule of general application is necessary to limit the exercise of a basic trial right." Later the assumption that such matters an be disposed of simply by reference to the trial judge's discretion is dealt with. *Infra* p. 160.

The same limitations we apply on the invocation of the trial judge's "discretion" to rule adverse to the defendant, however, also apply to confrontation issues clearly identified as such. While the trial judge is often described as having discretion to regulate the scope of cross examination, it is equally clear that the judge has no discretion to curtail it entirely, nor to deprive the accused of the fundamental right of confrontation.

> The constitutional right of confrontation is, in essence, a right to cross-examine. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); Bruton v. United States, supra. The scope of the cross-examination is, of course, largely within the court's discretion. *Alford v. United States*, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931); see *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). But appellate review of an absolute denial of cross- examination stands in different case. In the words of Wigmore, "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." 5 Wigmore, Evidence s 1395 at 123 (Chadbourn ed. 1975).

United States v. Rosenwasser, 550 F.2d 806, 813 (2nd Cir. 1977). The right of confrontation is denied where the jury is deprived of the ability "to make a discriminating appraisal of the particular witness's credibility," *United States v. Roldan-Zapata,* 916 F.2d 795, 806 (2d Cir.1990).

admissible.[149] Evidence of innocence often *contradicts* the prosecution witnesses, and may ultimately call into doubt the credibility of witnesses. Usually the best answer to such an argument is to point out that the evidence would have been admissible whether or not a prosecution witness happened to testify in the opposite fashion. This same distinction is important also in efforts to subpoena "privileged" material.[150]

In other cases, courts have held that evidence which is deemed inadmissible on its own may be "admissible" for impeachment purposes, here cases relating to possible third party guilt. *State v. Beckham*, 513 S.E.2d 606, 614 (S.C. 1999) (concluding that the trial judge erred in excluding third party guilt evidence for impeachment purposes, but noting that, under the circumstances of that case, the error was harmless); *State v. Jenkins*, 474 S.E.2d 812, 815-16 (S.C. Ct. App. 1996) (holding that the trial judge committed reversible error by barring cross-examination of police officers regarding their confidential informant, who could have planted incriminating evidence on defendant) Of course these cases are helpful, but more helpful would be the recognition that the third party guilt evidence was admissible on its own under the compulsory process clause. (For more on the S.Carolina "third party guilt" situation see the discussion of *Holmes v. S. Carolina, supra,* p. 88.

2. Restrictions on "refreshing recollection"

In *People v Oddone*, 22 N.Y.3d 369 (2013) the refusal to allow the defense to refresh the recollection of its own witness was found to be a too technical application of the rule and inconsistent with the right to present a defense. (Discussed above at n. 98

P. Scientific tests, expert evidence

The admission or exclusion and the challenging of "expert" evidence in the criminal courtroom presents special challenges to the criminal defense lawyer. Of course basic rules of evidence apply, but the determination on these questions often turns on some "gatekeeping" function by a trial judge who is generally scientifically illiterate, and more inclined to exclude defense evidence than evidence offered by the prosecution. However the issue of the exclusion of defense expert evidence – which happens far more often than the exclusion of prosecution expert evidence – actually raises a fundamental constitutional issue of the Right to Present a Defense, an issue that is rarely preserved as such by the defense counsel or understood by the court. Defense attorneys also are generally scientifically illiterate and face daunting challenges in effectively

[149] The same argument is often made in connection with "newly discovered evidence" claims, in motions pursuant to §330.10(3) and §440.10(1)(g)

[150] *See People v. Gissendanner*, 48 N.Y.2d 543 (1979); *People v. Freeland*, 36 N.Y.2d 518 (1975). There Chief Judge Breitel, writing for a unanimous Court, held that hospital records of a witness' heroin addiction would not be inadmissible under the collateral evidence rule if they had some bearing on the witness' testimonial capacity: Generally, evidence of narcotic addiction is admissible to impeach a witness' credibility if tending to show that she was under the influence of drugs while testifying, or at the time of the events to which she testified, or that her powers of perception or recollection, were actually impaired by the habit [citations omitted]. In such instances the collateral evidence rule is not applicable. (36 N.Y.2d at 525, 369 N.Y.S.2d 649, 330 N.E.2d 611).

confronting expert evidence and exposing the extent to which it may not actually be valid for the purpose it is offered.

It is not the purpose of this paper to answer all these questions. However, I will point to some answers, and suggest ways to comprehend these issues that may actually make a difference in the outcome of cases.

1. What's Science Got to Do With It?

> "The inertia of the human mind and its resistance to innovation are most clearly demonstrated not, as one might expect, by the ignorant mass- which is easily swayed once its imagination is caught- but by professionals with a vested interest in tradition and in the monopoly of learning. Innovation is a twofold threat to academic mediocrities: it endangers their oracular authority, and it evokes the deeper fear that their whole, laboriously constructed intellectual edifice might collapse. The academic backwoodsmen have been the curse of genius from Aristarchus to Darwin and Freud; they stretch, a solid and hostile phalanx of pedantic mediocrities, across the centuries."
>
> Arthur Koestler– "The Nightwalkers"

About 400 years ago Galileo built a telescope through which he made more discoveries that changed the world than anyone previously, or since. He published his observations in March, 1610, in a book called "The Starry Messenger" (*Siderius Nuncius*) with integrated text and 78 images and drawings of nearly photographic quality. This book shattered the prevailing religious and philosophical holdings on the nature of the universe. His observations and images were so meticulous that they provided irrefutable proof of his conclusions. From then on, theories about the universe had to be tested against the visual evidence of empirical observation. This empiricism eclipsed religion and philosophy as the means for understanding Nature.

As Edward Tufte writes in his brilliant book, Beautiful Evidence (Graphics Press 2006) at 101:

> Galileo makes the key link between empirical observation and credibility with the phrase "visible certainty," *oculata certitudine*. And that is the grand, forever consequence of *Sidereus Nuncius*: from then on, all science to be credible had to be based on publicly displayed evidence of seeing and reasoning, and not merely on wordy arguments. Galileo wrote:
>
> > What was observed by us in the third place is the nature or matter of the Milky Way itself, which, with the aid of the spyglass, may be observed so well that all the disputes that for so many generations have vexed philosophers are destroyed by visible certainty and we are liberated from wordy arguments. For the Galaxy is nothing else than a congeries of innumerable stars distributed in clusters. To whatever region you direct your spyglass. an immense number of stars immediately offer themselves to view, of which very many appear rather large and very conspicuous but the multitude of

small ones is truly unfathomable.

Thus, approaching the question of "expert" testimony in the courtroom, Galileo is important not only as the progenitor of empiricism, but as a teacher of the role of the graphical element in persuasion – he made no distinction between words and images in this timelessly beautiful work. The detail and number of images of his observations were overwhelming, persuasive, and open for all to see and challenge.

But there is another poignant fact: a number of years later, after publishing that his observations supported the Copernican heliocentric system, Galileo was condemned as a heretic by the Ecclesiastical Court.

Four hundred years later, what happens in the American criminal court in many ways, including scientific inquiry, still has more in common with the world-view of the Ecclesiastical Courts, from which it is directly descended, than Galileo's beautiful and empirical search for the truth.

2. What's the constitution got to do with it?

The right to present a defense also means the right to have introduced expert testimony helpful to understand or make out the theory of the defense. *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In *Crane* the exclusion of psychiatric testimony offered by the defense to show the "physical and psychological environment" of the interrogation of the accused was found to deprive the accused of his "fundamental constitutional right to a fair opportunity to present a defense." See also *Boykin v. Wainwright*, 737 F.2d 1539 (11th Cir. 1984) (Psychiatrist's testimony about defendant's sanity); *United States v. Roarke*, 753 F.2d 991 (11th Cir. 1985); *People v. Minnis*, 34 Cr.L. 2168, 455 N.E.2d 209 (Ill.4th Dist.1983).

It also must be the case that the defendant must be allowed to introduce scientific evidence which the prosecution could not. *People v. Seeley*, 186 Misc.2d 715, 720 N.Y.S.2d 315 (Sup.Ct.Kings Co. 2000) ("The rules are different when the People offer expert testimony about BWS than when the defendant offers such evidence (*Commonwealth v Kacsmar,* 421 Pa Super 64, 75, 78, 617 A2d 725, 730, 732; *see also,* Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer,* 76 Iowa L Rev 553)"); *People v. Seeley*, 179 Misc.2d 42, 683 N.Y.S.2d 795 (Sup.Ct.Kings Co, 1998)(Battered Spouse Syndrome).

An excellent example of this type of evidence, and of a case where the court fails to see it as an issue of the right to present a defense, is *People v. Aphaylath*, 68 N.Y.2d 945, 510 N.Y.2d 83 (1986), where it was error to exclude expert evidence about Laotian culture helpful in presenting an extreme emotional disturbance defense. See, Alison Dundes Renteln, The Cultural Defense (2005), McCord, Syndromes, Profiles and Other Mental Exotica: A New Approach to the admissibility of non-traditional Psychological evidence in criminal cases, 66 Ore.L.Rev. 19 (1987); Wanderer & Connors, "Culture and Crime: *Karger* and the Existing Framework for a Cultural Defense," 47 Buffalo L.R. 829 (1999). See also, *People v. Diaz*, 181 A.D.2d 595, 581 Misc.2d 329 (1st Dept.1992). See also *United States v. Lankford*, 955 F.2d 1545, 1550—51 (11th Cir. 1992) (reversing conviction where district court excluded defendant's expert testimony that the defendant's belief in the legality of his acts was reasonable)

This also extends to the pretrial phase where the accused is entitled to adduce evidence on the issue of competency. *People v. Christopher*, 65 N.Y.2d 417, 492 N.Y.S.2d 566 (1985).

However, we are all too familiar with the eagerness with which prosecutors will oppose defense evidence, including expert evidence, and judges have been all too willing to comply. Unfortunately, many of the prosecution successes in this regard derive as much from the defense failure to carefully analyze what the evidence really is, what the rules of evidence actually hold, and the failure to envelope the evidence in the constitutional protection it deserves. We reviewed this earlier when discussing the troubling rate at which defense experts are excluded because of technical violations of reciprocal discovery rules. *Above*, p. 51. Here we look at substantive principles affecting the admission of expert evidence.

3. Scientific opinion vs. scientific fact

One has to consider more closely the question of what is being offered in the way of scientific evidence. In New York, and probably elsewhere, there is an important, but almost universally overlooked, distinction to be drawn between testimony concerning "expert facts," facts not within the knowledge of jurors which will aid in their analysis, and expert's *opinions* drawing conclusions from the facts, whatever their nature. *Dougherty v. Milliken*, 163 N.Y. 527, 57 N.E. 757 (1900). In the former case, as long as the facts are relevant, the trial judge has no more basis to exclude this evidence than evidence of any other relevant facts. *People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976). See also *Kulak v. Nationwide Insurance Co.*, 40 N.Y.2d 140, 386 N.Y.S.2d 87 (1976).

This distinction is very important in areas such as the offer of scientific evidence relating to identification cases. The experts sought to be admitted in these cases have so often been described as offering opinions, opinions about eyewitness identification, or particular procedures for collecting eyewitness evidence, or the capabilities of human perception, memory and recollection. Most trial courts which have excluded such evidence did so on the premise that it was opinion testimony, resulting in many decisions excluding the evidence, using one or more rubric pertaining to opinion testimony. . *People v. Valentine*, 53 A.D.2d 832, 385 N.Y.S.2d 545 (1st Dept. 1976); *People v. Brown*, 124 Misc.2d 938, 479 N.Y.S.2d 110 (N.Y.Co.Ct. 1984); *People v. Brown*, 117 Misc.2d 587, 459 N.Y.S.2d 227 (N.Y.Co.Ct. 1983). Often these cases turned on the fact that the expert was construed as offering testimony on the "ultimate issue," a concern that has been substantially diluted by the Court of Appeals decision in *People v. Cronin*, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983).

Actually, much of this testimony is not "opinion" testimony at all, but testimony about *facts* which have been empirically proven. Thus, the better emphasis in offering such evidence is on this *factual content*, and how such facts will enlighten the jury in its determination. This would include facts known to experimental psychologists about the factors involved in human perception, memory and recollection. About this type of evidence there really should be no question as to its admissibility. *People v. Brooks*, 128 Misc.2d 608, 490 N.Y.S.2d 692 (Westchester Co.1985) (Referring to *Chambers v. Mississippi); State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (Arizona 1983); *People v. McDonald*, 37 Cal.3d 351, 208 Cal.Rptr 236, 690 P.2d 709 (Cal. 1984); *United States v. Downing*; 753 F.2d 1224 (3rd Cir. 1985). See also *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984), cert denied 469 U.S. 868, 105 S Ct 213.

This is especially important in eyewitness identification cases where the jury's "common sense" about the process of identification is often wrong. As the trial court said in *People v.*

Brooks, supra,

> This is especially true where the scientific evidence is not in accord with common perceptions. According to the offer of proof, Dr. Buckhout will testify, among other things, that there is not necessarily a correlation between the reliability of identification testimony and the confidence of the witness in that identification; that it is a myth that recall is enhanced by the violence of a situation; that recall is affected by the selectivity of the initial perception and a phenomenon which involves filling in the details through after-acquired experience. These and other items of Dr. Buckhout's testimony will bring to the attention of the jury certain relevant factors of which they might not otherwise have been aware.

The Court of Appeals has stated that: "It cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror." *People v. Lee*, 96 N.Y.2d 157, 162 (2001).[151] Also see *People v. Beckford*, 141 Misc.2d 71, 532 N.Y.S.2d 462 (Kings Co. 1988) (permitting an expert to testify concerning the psychological factors influencing the reliability of an identification made by a witness of a different race than the defendant).

I do not pretend that this facts/opinion distinction completely avoids *Daubert* or *Frye* scrutiny. For example many "facts" in the area of physical and social sciences, while undisputed, are nevertheless the product of measurement, and deduction, and one has to be prepared to defend them as having been deduced, observed, or established in a reliable fashion. Nevertheless, expert facts are rarely the product of "novel" science, and are not, by definition, a hypothesis which needs to be established by empirical testing. This is discussed more below. Therefore, the attorney is well advised to think beforehand on exactly what type of expert evidence is being offered.

4. "Novel" science and judicial "gatekeeping": Frye and Daubert

Another barrier for the accused is often the standard that is applied in determining whether evidence is "scientific" enough to be admitted in evidence. Is this "science" on which one can reliably rely, or is it speculation or, worse, deception dressed up as "science"? New York has officially clings to the *Frye* analysis, *e.g. People v. Wesley*, 83 N.Y.2d 417, 611

[151] Unfortunately, rather than putting the evidence on the same footing as other expert evidence, the Court said "We now hold that, while such expert testimony is not inadmissible *per se*, the decision whether to admit it rests in the sound discretion of the trial court." Much could be said still about the stinginess of this language. The Court of Appeals also fails to appreciate the "fact" vs. "opinion" difference, and it still unqualifiedly considers the matter as one purely of "discretion" of the trial court.

Additionally, this case appears to be another one where the defense failed to gather empirical evidence concerning the suggestiveness of the photographic array. It is too easy for the court to look at a photo array and say, as does the court of Appeals here, that "although there were slight differences among the six photographs that comprised the array, all of the persons depicted were similar in appearance." The methodology for empirically testing photo arrays and lineups is so simple and obvious that there is no excuse, where counsel really feels that the lineup is suggestive, for not using empirical methods.

N.Y.S.2d 97 (1994) (admission of RFLP DNA analysis). That case exhibits such shallow consideration of the question, in a 3-2 decision, that the matter must be considered open to further review and in all likelihood the Court of Appeals will be drawn to the more useful analysis exhibited by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). *Daubert* abandoned the *Frye* analysis in favor of the potentially more exacting standard expressed in FRE 702.

The Supreme Court in *Daubert* identified five criteria that bear on the question of admissibility, including whether the theoretical framework or technique underlying the witness's testimony (1) is subject to verification through testing, (2) whether it has been subjected to peer review and publication, (3) what its known or potential rate of error is, (4) whether there are standards controlling its application, and (5) whether it is generally accepted within the relevant expert community. *Daubert*, 509 U.S. at 593-94). "[T]his list is neither definitive nor exhaustive, but rather flexible to account for the various types of potentially appropriate expert testimony." *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 505 (7th Cir.2003), (citing *Kumho Tire Co.*, 526 U.S. at 141).

When applied in the context of the Rules of Evidence, the *Daubert* inquiry would generally look like this, from *United States v. Frazier*, 387 F.3d 1244, 1260 (11th. Cir. 2004):

> [I]n determining the admissibility of expert testimony under Rule 702, we engage in a rigorous three-part inquiry. Trial courts must consider whether:
>
> > (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Accordingly, the Seventh Circuit has held, "[u]nder *Daubert* and Federal Rule of Evidence 702, '[a]n expert must offer good reason to think that this approach produces an accurate estimate using professional methods, and this *estimate must be testable*.'" *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410, 421 (7th Cir. 2005) (quoting *Zenith Elecs. Corp. v. WH-TV Broad. Corp*, 395 F.3d 416, 419 (7th Cir. 2005)).

The principles adopted in *Daubert* for "hard science" were later applied to "soft" expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), expert testimony based on "training and experience" rather than strictly empirical sciences like physics, chemistry and engineering. For federal courts, and now many state courts, these standards replace the pervious *Frye* analysis for the admissibility of "expert" or scientific testimony.

Daubert was thought to be of great positive significance to the defense not only because it opens up the courts to the use of unfamiliar or "novel" novel scientific applications, but it also opens previously unexamined pseudo-science that was routinely admitted, e.g. handwriting analysis, the probability theory usually served up with firearms examination, to the possibility of

exclusion. While the admissibility of scientific *facts* would seem be insulated from such analysis, in fact the determination of what is a "fact" may well implicate the same methodological concerns as raised in *Daubert.*

But, despite its promise, how does the increased scrutiny of expert testimony under *Daubert* actually affect the defense? In practice, there are more cases using "gatekeeping" rules like in *Daubert* to justify *excluding* defense expert evidence, than there are using the same rules to exclude such evidence offered by the state.[152] The experience *post-Daubert* is that defense challenges to government experts generally fail, if they are taken seriously at all, while government challenges to defense expert testimony succeed at a significantly higher rate. Part of this seems to be that judges are averse to conducting actual hearings on scientific methodology. They seem to often brush aside defense *Daubert* motions, or trivialize them by treating the government's *voir dire* of its witness as the "*Daubert* hearing." Judges seem to hold defense expert evidence to a higher standard than prosecution expert evidence. And, in order to avoid engaging in that analysis, many courts resort to technical defects in the content of the notices under Rule 16 and equivalent state notice requirements. An egregious example of this was described above, in the *Nacchio* case. See above, p. 52. Obviously all these matters implicate the right to compulsory process. At every juncture the defense needs to point out that relevant defense evidence cannot be excluded on the basis of mechanical application of the rules of evidence, including the "rules" relating to expert evidence.

When it comes to the substance of the determination, Rule 702 and *Daubert* provide a framework which make it rather easy for a judge to exclude expert testimony, especially typical "connoisseur" testimony – testimony based on "training and experience" if a judge really wants to. *See*, David E. Bernstein, Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 IOWA L. REV. 451(2008). The problem is that when the judge "really wants to" keep out the evidence it usually happens to the defense expert, not that of the prosecution.

To avoid methodological inquiries and findings, the exclusion of *defense expert testimony* is increasingly accomplished by deference to government complaints about the timing or adequacy of Rule 16 disclosure by the defense and a far stricter approach to Rule 702 and 703 than is applied to government testimony – as perfectly demonstrated in *Nacchio.*

5. The impact of Frye on criminal cases

In states like New York that have not yet adopted a *Daubert* approach to the admissibility of expert evidence, the analysis is even more remote from the empirical model. This is a matter of logic, because of the focus on "general acceptance" gives no deference to the risk of fallaciousness in "generally accepted" – but false – scientific assumptions and procedures. The

[152] A resource for checking out decisions on the admission or exclusion of scientific evidence is called "Daubert Tracker" - www.dauberttracker.com DT attempts to keeps track of all cases which either directly cite a large number of "Gatekeeping" cases regarding expert and scientific evidence, but also has worked to find cases which decide such issues without actually citing to the leading cases, perhaps relying on the text of 702 or 703. The database includes many unreported decisions, and makes every effort to identify the experts whose testimony is at issue, where not disclosed in the judicial decision itself.

criminal courts assume the impartiality of experts called by the state, despite all evidence to the contrary. This is anathema to true science, but fits squarely within Koestler's negative assessment. "If we should count on scientist's impartiality, science, even naturalistic science, would be at all impossible." Karl Popper, "The Poverty of Historicism"

Meanwhile, correct science is ignored or censored in the courtroom (at least if offered by the defense) because it is not "generally accepted." Of course there is no progress in science without deviating from what is "generally accepted." "Every scientific conception starts as heresy," as Aldous Huxley pointed out. There are many examples of this, but a favorite one is that of Dr. Ignaz Semmelweis. This Hungarian-born physician discovered that the simple washing of hands by doctors and nurses could dramatically reduce maternal deaths from childbirth (caused by puerperal infections), from 29% to 3%,in the maternity hospital in Vienna. (Roy Porter, The Greatest Benefit to Mankind: A Medical History of Humanity, New York, Norton & Co. 1997, p 369.) But there was no germ theory, or proof of it, in 1847, and Dr. Semmelweis' findings were rejected and ridiculed, despite his conclusive proof of the hidden connection between cleanliness and the disease. Year after year Semmelweis replicated his results, which he finally published in 1861, but the "weight of authority" was against him, so countless women continued to needlessly die in maternity wards, until long after Semmelweis's death, from a mental breakdown, resulting in his hospitalization in 1865 and his own ironic contraction of a puerperal infection there.[153] This history of unnecessary suffering and death as a result of clinging to tradition and what was "generally accepted," despite clear empirical evidence, is perfectly consistent with the *Frye* analysis which provides no vehicle to challenge accepted, but false, science, or to accept true, but not *yet* generally accepted contrary science.

As a result, the rulings in this area are not edifying at all concerning actual science, and are generally contrived to allow the defense to offer scientific evidence only where it looks like there was an unjust result without it. They appear much more "from the hip," and seem to be dependent more on peripheral rather than empirical considerations. In New York, which remains a *Frye* jurisdiction, the effect of this is rather stark. In the handful of criminal decisions by the New York Court of Appeals in the past decade in which the admissibility of expert opinion was an issue, it was not about the legitimacy of forensic science offered by the state, but about rulings excluding defense experts, and primarily concerning the fallibility of eyewitness identification. Even in these cases the determinant of the result is not concerns of science and the truth-finding function of the jury, as much as of the relative strength of the state's case, *i.e.*, the Court's own sense of the probability of guilt.

Illustrative of this is the trudging, grudging crawl of the Court of Appeals toward permitting the defense to prove the factors affecting the fallibility of eyewitness identification of strangers.

In *People v Mooney*, 76 NY2d 827 (1990) the Court of Appeals affirmed the exclusion of Robert Buckhout as a witness. Buckhout, of Brooklyn College, was the pioneer in empirical research on the fallibility of eyewitness identification in the U.S. The attitude of the Court is

[153] Alan Gold gives an excellent overview of Semmelweis' tragic story, in the context of discussing how innately unscientific humans are. Alan D. Gold, "Expert Evidence in the Criminal Law: A Scientific Approach," Irwin Law, Toronto 2003, p- 80-81.

clear in this statement:

> The object of the proposed testimony was to discredit the testimony of the four robbery victims who had identified defendant as the perpetrator.

Why could the Court not see that the object of the testimony to provide facts useful to the jury to evaluate the weight to be accorded to the eyewitness evidence? Rarely does the evidence go to *credibility.* However, since the accused did not attempt to raise a constitutional issue in the exclusion of this testimony, the majority brushed the issue aside, resting on its deferential standard of review in mere evidentiary rulings:

> On this appeal, we need not decide whether the expert testimony sought to be presented was of the type that could, as a matter of law, properly be admitted. Here, the trial court based its decision to exclude the testimony in the exercise of its sound discretion to which the admission of such evidence would, if legally admissible at all, be entrusted.

Judge Kaye's dissent, 76 NY2d 827, 829-830 (1990) challenges the use of the *Frye* standard at all and also seeks to frame the question as a matter of law for the Court to review. She pointed to the "broad acceptance of the cognitive principles about which Dr. Buckhout proposed to testify."

The court was oblivious to the obvious – the usual methods of the police to gather identification testimony, 6 person lineups and photo arrays, are crude and biased implementations of a flawed theory about human perception, memory, and recollection which has resulted in mistaken identifications and wrongful convictions of innocent persons (and the non-apprehension of guilty persons). Even Judge Kaye gives credit to the notion that the defendant's ability to introduce evidence may be tied to whether the case for guilt – obviously untested by the defense evidence – appears strong:

> Appellate courts that have found such testimony admissible in theory have nonetheless preserved ample room for trial court exercise of discretion through weighing of such factors as . . . the existence of other evidence corroborating the identifications . . . .

This theme, of giving nearly conclusive effect to a "weight of the evidence" test, as a precondition to the introduction of expert testimony by the defense obviously has no empirical concerns behind it. It has to do with a basic mistrust of juries, and the condescending concern that the jury will be unduly influenced by the evidence and might possibly acquit a person as to whom the court believes the evidence is strong.[154] Of course it is axiomatic that credibility and weight determinations should be made by the jury and not the courts deciding whether to admit evidence. E.g., *United States v. Bailey*, 444 U.S. 394, 414-15 (1980); *Pierce v. United States*, 252 U.S. 239, 251-52 (1920); *Hoke v. United States*, 227 U.S. 308, 324 (1913). Nevertheless, this theme pervades and persists until the present in these *Frye* cases.

After *Mooney*, came *People v. Lee,* 96 N.Y.2d 157, 750 N.E.2d 63 (2001). This was

[154] In reality, in single eyewitness cases where there is no corroboration or special circumstances pointing to the reliability of the eyewitness, the case shouldn't even be allowed to go to trial. *R. v. Turnbull*, [1977] QB 224 (CA). *See* Devlin, Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases (1976)

another case where the exclusion of defense evidence was not preserved as a compulsory process issue. The Court ruled only that "expert testimony proffered on the issue of the reliability of eyewitness identification . . . is not inadmissible *per se*" but refused to find an abuse of discretion in its exclusion. In *People v Young*, 7 NY3d 40 (2006), another case in which the question of the exclusion of the testimony was not constitutionalized under the compulsory process clause, the Court again refused to find an abuse of discretion, in part relying on the claimed "strong" corroborative evidence that, a month after the offense the accused had some of he stolen property.

In *People v. LeGrand*, 8 N.Y.3d 449, 867 N.E.2d 374 (2007) the identification occurred seven years after the offense. Of the five available witnesses, only one identified the defendant as the assailant in a photo array and lineup. Two witnesses viewed the photo array but neither made a "positive identification."[155] Two witnesses found a similarity in appearance, while the other two witnesses were unable to make any identification. There was no corroborating physical evidence. The first trial resulted in a hung jury, the second in a murder conviction. After a *Frye* hearing the trial judge "precluded the expert testimony on the ground that the expert's conclusions were not generally accepted in the relevant scientific community." The Appellate Division affirmed. Reversing, the Court of Appeals held that

> where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.

Most important, the Court ignored the argument of *amicus* Innocence Project that "expert testimony is necessary to inform jurors of the causes of misidentification and its admission should not be hinged on a pretrial determination of the strength of the prosecution case."

Finally, in *People v. Abney, People v. Allen*, 13 N.Y.3d 251, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009) the Court reached different conclusions in the two cases. In *Abney*, "there was no evidence other than [the victim's] identification to connect defendant to the crime," and the 13 year old gave a vague description. Again, it is the kind of case which should never go to the jury at all, the risk of erroneous identification being so great. *See above* at n. 113. Thus

> the trial judge abused his discretion when he did not allow [the expert witness] to testify on the subject of witness confidence. As for the remaining relevant proposed areas of expert testimony–the effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification–the trial judge should have conducted a Frye hearing before making a decision on admissibility.

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[155] Of course this is the classic ruse by police, as the phrase "positive identification" really only means "positive" as "+" and as opposed to "negative." Yet it is always reconstructed in the retelling at trial as if "positive" meant "certain."

Even this "favorable" ruling can't resist leaving hurdles for the defense. In *Allen* even though the robber wore a mask covering all but his eyes and nose, the evidence was considered strong enough to obliterate the defendant's ability to call an expert where the two witnesses claimed to have recognized the defendant, someone they knew.

Thus, rather than any truly empirical concerns about the reliability of the evidence, we see in New York a dominance of focus simply on the strength of the state's case. If it is not so weak that he case should be dismissed outright, it might not be an abuse of discretion to exclude the expert testimony. But if it is so weak, the court becomes more sanguine about the possibility of an acquittal, and requires that the evidence be admitted, apparently to give the accused a sporting chance of success. This is the type of analysis of the strength of the state's case as a determinant of admissibility of favorable evidence for the accused is precisely what the Supreme Court found unconstitutionally arbitrary in *Holmes v. South Carolina*, 547 U.S. 319 (2006):

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.
>
> * * *
>
> The rule applied in this case appears to be based on the following logic: Where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak. But this logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.
>
> The rule applied in this case is no more logical than its converse would be, *i.e.,* a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. . . .
>
> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.

The New York Court of Appeals still attempts to validate its consideration of the

"strength of the case" in reviewing the exclusion of defense expert witnesses after *LeGrand.*

> "Courts do not normally exclude relevant evidence merely because the case against the defendant is strong. But the overall strength of the case is important to issues arising under *LeGrand*, because where the eyewitness testimony is not crucial, expert testimony about the collateral issue of eyewitness reliability can be a harmful distraction."

People v Oddone, 22 N.Y.3d 369 (2013). [156]

Apart from the obdurate arbitrariness and hypocrisy of the way the defense expert evidence is treated in these cases, there is another disturbing pattern. As several of these cases illustrate, Defendants have been cowed into putting their evidentiary necks on the chopping block by making pretrial "proffers" in *in limine* motions. When is the last time a prosecutor offered the trial court a pretrial opportunity to exclude its evidence? As I demonstrate above, p. 59, the prosecution cannot insist on an "offer of proof" of what the defense intends to prove through a witness. Why volunteer for it?

The other point is that these case on eyewitness identification experts practically exhaust the *oeuvre* of the New York Court of Appeals in the area of the admissibility of expert evidence in criminal cases – all focusing on the exclusion of defense evidence, and none scrutinizing prosecution evidence.[157]

Is it not clear that it is time for a change in the standard by which trial courts admit, and the appellate courts review the admission and exclusion of expert evidence? Is there not a federal constitutional issue in permitting the admission of unreliable expert evidence merely because it has heretofore been "generally accepted," or the exclusion of reliable and relevant evidence merely because it contradicts what is "generally accepted" (and therefore not itself "generally accepted," or because the evidence of guilt is "strong"? Indeed, why not preclude the entire defense case if he prosecution case seems airtight?

At the very least, defense counsel need to constitutionalize every case of the exclusion of defense expert evidence, which is simply not being done frequently in criminal cases.[158] This

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[156] *Oddone* involved the exclusion, *inter alia*, of the testimony by the eyewitness identification expert Steven Pernod of testimony about 'Vierordt's Law' - that witnesses estimates of the time elapse of short intervals tend to be overestimated and longer ones under-estimated. Because the conviction was being reversed on other grounds, whether this was an "abuse of discretion" was not decided. Here is another example of where the Court has been slow to recognize that a judge's discretion to exclude must be circumscribed in the area of defense expert testimony also.

[157] *People v. Wernicke*, 89 N.Y.2d 111, 674 N.E.2d 322, 651 N.Y.S.2d 392 (1996) also involved the exclusion of defense expert evidence, but related to the "neonaticide syndrome"*; People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996) involved the exclusion of oblique reference to a polygraph in a psychiatrist's testimony

[158] The failure of appellate counsel in these cases to raise the compulsory process issue is no doubt mostly due to the failures of trial counsel. *E.g. People v. Angelo*, 88 N.Y.2d 217, 666 N.E.2d 1333, 644 N.Y.S.2d 460 (1996):

> Defendant argues that County Court erred in prohibiting Dr. Schwartz from testifying that his conclusions were based in part on the results of defendant's polygraph examination and that the

does not, however, minimize the importance of careful and accurate argument on the rules of evidence. In the area of experts, just as in other areas, counsel needs to make the best case possible under the rules of evidence and procedure, being careful not to make the constitutional argument seem like an afterthought. *E.g. Somers v. State*, 368 S.W.3d 528 (Tex.Crim.App. 2012).[159]

On a lower note, the prospect of the possibility of actually excluding "novel" scientific evidence offered by the state under the *Frye* analysis is exceedingly dim. An example of a recent *Frye* challenge, in a case of "low count DNA," shows the eagerness of the trial court to blow by the science and the risks and questions to seize on any kind of "acceptance" of the technique – even in areas unrelated to the identification of persons. *People v. Megnath*, 27 Misc.3d 405, 898 N.Y.S.2d 408 (Sup. Ct. Queens Co. 2010).

6. Rules 703, 703

Of course trial courts will also attempt to rely on Rules 702 and 703 as a basis for excluding the defense testimony. See *United States v. Tucker*, 345 F.3d 320 (5th Cir. 2003) (Finding some errors in exclusion of testimony on legal securities expert). And counsel has to be careful to qualify their evidence under both rules. "Defendants seem wrongly to believe that expert testimony can be admitted under Rule 703 alone, even if it violates Rule 702. Rule 702 is the gatekeeping rule." *United States v. Sparks*, 8 Fed. Appx. 906 (10th Cir. 2001).

Prosecutors will inevitably tell the court that it has "discretion" to exclude evidence, and remind the court that the review of a decision excluding evidence will only be for an "abuse of discretion." The government should be challenged on such assertions as an insult to the trial court, who has an obligation to rule correctly, without regard to the standard of review. But it is important to note that this type of discretion is not the true "discretion" – even when seen just as an evidentiary matter. True "discretion" is when the judge is "not bound to decide the question one way rather than another." Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 636-37 (1971)(Cited in Friendly, Indiscretion about Discretion, 31 Emory L.J. 747, 754 (1982). An "abuse of discretion" does just not mean "arbitrary"– it can mean erroneous on the law. "A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990).

But such determinations, at least when it comes to the exclusion of defense evidence, are not, properly considered under such a deferential standard, as discussed below.

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court's ruling violated his constitutional rights to due process and to present witnesses in his own defense. Because defendant failed to present these constitutional claims to County Court, however, they are unpreserved for this Court's review.

[159] Discussed *supra*, at n. 83, 84.

7. Defense expert evidence undercutting the prosecution's scientific – or quasi-scientific theories – is not subject to Frye or Daubert standards

But there is another view of this issue that has been entirely ignored by the defense bar, and therefore the Courts. Often what the defense offers in the way of scientific evidence should not properly be measured against the *Frye* or *Daubert* standards at all.

In order to explain this, it is necessary to look more closely at the foundations for the *Daubert* decision.

In *Daubert* the Supreme Court finally tiptoed into the world of true science, the empirical world where there is structure and method in determining what hypotheses about physical world are entitled to consideration. The Court introduced Karl Popper's methodological conceptualization of "science" as an empirical endeavor :

> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green, at 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability").

The role of scientific method, as espoused by Popper, and here, by the Court is to allow us to distinguish between the scientific hypotheses which are merely consistent with observed phenomena, and therefore plausible, and a hypothesis that can be *proven* to be true. That "proof" comes by way of the ability to predict future observations based on the hypothesis, and most important, the ability to postulate what kind of future observations could refute the hypothesis if it were not true. While an expert might be able to cite examples that "support" their hypothesis, that is not the same as acknowledging that there is at least hypothetically a result which would disprove their hypothesis. An hypothesis which can be meaningfully tested is one which is "falsifiable" and which therefor has "content" ("Gehalt" in Popper's language). On the other hand, a theory which cannot be tested is therefore trivial, and not entitled to any weight.

The concept of "science" has evolved greatly since Galileo virtually invented empiricism, primarily tracking advances in our powers of observation. The world has experienced several scientific revolutions, each refining understanding of the physical world.[160] When Einstein published his paper on the general theory of relativity just over a hundred years ago, he not only advanced his famous formulation of $E=mc^2$ but he also described three experiments which would

[160] See, generally, The Structure of Scientific Revolutions, by Thomas S. Kuhn (U. Of Chicago, 3rd Ed. 1996).

either verify his theory or prove it false. The last of these experiments was accomplished in 1923, when the "red shift" was confirmed at the Mount Wilson observatory. Einstein's rigor in this regard impressed the young Viennese philosopher Karl Popper, who became famous for articulating this principle of scientific methodology: that for a scientific principle to have any real content ("Gehalt") the principle must have the ability to be proven false ("Falzifizierbarkeit") – the very concept at the heart of *Daubert*.

The problem is, this principle of scientific method has in mind two very different types of scientific assertions – the general hypothesis, and the test of that hypothesis. A critical point, which seems to have been generally overlooked by all of the cases, is that a fact or event that has the effect of *disproving* a hypothesis does not need to pass all the criteria which a scientific hypothesis must pass in order to earn general acceptance. A scientific hypothesis, to be valid, must explain all relevant events. But the *test* of that hypothesis is merely a demonstration of a fact or event that is not explained by the hypothesis.

If the general hypothesis is, in principle, "falsifiable," we can attach weight to it as an explanations for the phenomenon we study. The proposition that "all metals expand when warmed" is useful, because it can be proven false by the discovery of a metal which does not expand upon being warmed. A theory which denies the relevance of unpredicted outcomes is not scientific. By definition the hypothesis is only potentially "falsifiable" – it need not be one which has withstood every imaginable "test" of its validity, as long as it has passed the tests that were conceived, and were appropriate.

Hypothesis v. "test"

The critical thing to understand about the notion of "fasifiability" is the difference in character from the *hypothesis* that is being tested, and the facts or phenomena or observations which provide that *test*. Had the observations at the Mount Wilson observatory failed to confirm Einstein's prediction of a "red shift," the scientists involved would not have had to establish some alternative theory of the universe to that of Einstein's in order to have disproven his theory. All they would have to prove is that they performed their measurements in the correct manner. In other words, under Popper's "falsifiability" concept, adopted by the Supreme Court, not every scientific proposition advanced in seeking the truth in a criminal case is a "hypothesis" – sometimes the scientific evidence is merely the "test."[161]

The point generally overlooked by the defense and the courts in many of these cases, and *United States v. Nacchio* is a good example,[162] is that the character of the defense evidence is often to challenge the hypothesis of guilt by posing alternative reasonable explanations of the conduct, or facts or events, which are inconsistent with hypothesis of guilt. In other words, Reasonable Doubt. A principle point in arguing compulsory process issue is that the threshold of admissibility for defense evidence cannot be raised to a higher level than what the defense must do in order to prevail – establish reasonable doubt about any element of the offense. So it is with respect to rebuttal scientific evidence. The rules for scientific methodology also treat

[161] Of course this recalls our earlier distinction between expert facts and expert opinions.

[162] *Nacchio* was previously discussed as illustrating the need to constitutionalize the question of preclusion of defense expert evidence, *above* p. 52 .

differently the requirements for establishing a scientific hypothesis and what is needed to posit facts or results which are the hypothesis fails to explain or take into account.

Courts have recognized that *Daubert* does not bar expert evidence, whether factual or in the form of opinions, that seeks to raise questions as to the opponent's a scientific testimony. *Daubert* itself emphasized that the defense has the right to attack the prosecution's expert with "presentation contrary evidence." 509 U.S. 579, 596.[163] What is the "contrary evidence" that the Supreme Court assured us would be admitted in challenging questionable expert evidence? Would that not be evidence of facts which tend to "falsify" the expert evidence, facts, even *scientific facts or observations*, which would have to be otherwise if the hypothesis were true? Other cases make the same point.

> Plaintiff's arguments lack merit. Buser is Defendants' rebuttal witness, and, as such, he need not suggest alternative theories of damages, but, instead, is entitled to merely criticize CDA's damages calculations. *See 1st Source Bank v. First Resource Fed. Credit Union,* 167 F.R.D. 61 (N.D.Ind.1996) FN5 (in a similar case, the court allowed defendant's expert to testify as to the weaknesses in plaintiff's theory of damages without offering his own theory); *KW Plastics v. United States Can Co.,* 199 F.R.D. 687, 692 (M.D.Ala.2000) (noting that a 'well-accepted way to criticize damages estimates' is for a defendant's rebuttal expert to point out the assumptions and flaws in a plaintiff's damages calculations).

CDA of America Inc v Midland Life Ins Co, No 01-CV-837, 2006 WL 5349266, at *6 (SD Ohio Mar 27, 2006). *See, e.g., Slicex, Inc. v. Aeroflex Colo. Springs, Inc.*, No. 2:04-cv-615, 2006 WL 1932344, at *3 (D.Utah July 11, 2006); *Wiand v Waxenberg*, 611 F Supp 2d 1299, 1315–6 (MD Fla 2009) ("In this case, Morgenstern may properly challenge Oscher's methodology and assumptions, notwithstanding the fact that he does not offer a competing opinion as to whether a Ponzi scheme existed."); *State v Tester*, 968 A2d 895 (Vt 2009) (Evidence of possibility of lab cross contamination does not raise a *Daubert* concern.)

Thus, counsel in cases where defense expert testimony is challenged need to first emphasize that part of their proposed proof which *merely undercuts the validity of the methodology or conclusions* advanced by the government. If the defense can demonstrate the inability of the government's scientific hypothesis to explain or predict the occurrence of relevant facts or events, then this demonstration is not "novel science" even if no one else has offered such proof in the past. It is not challengeable as "not generally accepted." Such evidence is merely an attack on the soundness of the scientific principles offered by the state and does not involve an effort to prove the "truth" of any alternative hypothesis. Put in terms articulated by the Supreme Court, based on the fundamentals of scientific methodology and Popper's writings, such evidence is the "test" of the prosecution's theory, and not some alternative effort to fully

[163] "Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. *See Rock v. Arkansas*, 483 U.S. 44, 61 (1987)."

explain al the relevant facts or events under examination. It is like the difference between proving a reasonable doubt, as opposed to proving innocence. *See*, Imwinkelreid & Garland, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence, § 6-6. "The Application of the Accused's Constitutional Right to Introduce Scientific Evidence: Rebutting Prosecution Scientific Evidence."

Such evidence therefore may not be excluded on the grounds that it fails either the *Frye* or *Daubert* criteria because offers a different type of scientific evidence than contemplated by those cases or Rule 702. While the expert witness must still be qualified, and may need to employ reliable techniques of observation, it makes no sense to expect an "error rate" in such testimony or "standards" for applying such observations or that such observations are "generally accepted" or whether there has been "peer review." Those are requirements for the admission of a scientific hypothesis. But evidence of facts or events which defeat a scientific hypothesis need only demonstrate that the hypothesis fails to explain what it is required, for its validity, to explain, and need not themselves explain or predict other events, as is required of a scientific hypothesis. This is a critical distinction that is almost universally overlooked.

Rebutting the prosecution's quasi-scientific hypotheses

An important task in cases where "expert" testimony is offered by the defense is to identify precisely what the fundamental scientific proposition is that is implicated in the case. This may sound terribly silly, because one might assume that the "fundamental scientific proposition" is simply that to which the proposed expert will testify. And one may wonder why this is so important. Trust me, it is not silly, and it is very important.

The "null hypothesis"

Lets's start with the idea of the "null hypothesis." Pure science involves formulating and testing hypotheses, as a way to deduce the properties and laws of nature. Valid scientific hypotheses, we are told are those which are capable of being tested to determine their validity. The **null hypothesis** is a term used to designate a general or default hypothesis that needs to be tested. The concept of the "null hypothesis" can actually get very complicated, in part because there is something of an art in actually stating what the "null hypothesis" is, or study should be, and what might seem like the similar, but perhaps obverse statements of the hypothesis can yield completely different results. So I will consider the matter very simply.

Quiz

Let's start with a quiz.

Question 1: In a single eyewitness identification case, where the perpetrator was a stranger, and was the only person in the lineup wearing blue jeans and was taller than the fill-ins, the defense offers the testimony of an experimental psychologist who tested the lineup by showing the photo of it to test subjects who did not witness the crime, who picked out the police suspect at a rate of 9:1 concluding that the lineup was unfair. What is the "null hypothesis" involved in this case related to eyewitness identification of strangers.

Question 2: in a case of a confession obtained as a result of custodial interrogation the defense offers the testimony of a psychologist to the effect that the "Reid technique" used in the interrogation tends to make a confession a rational choice even for an innocent person. What is the "null hypothesis" involved in this case of a possibly false confession?

The answers to these questions are important because the party perceived to be advancing a scientific hypothesis may be impeded by a requirement to prove that the theory is "generally accepted," as in *Frye v. United States*, or that the theory meets the standards of *Daubert or Kumho Tire*.

Stripping away all preconceptions, and looking at the matter with a fresh view of it, we see that the lineup itself is a crude quasi-scientific experiment, offered as a demonstration of the ability of the witness to reliably recognize a stranger from a previous occasion. Similarly, it is the interrogation process itself – with all the psychological tricks used in the "Reid Technique"– that is being offered as a vehicle for reliably determining the nature of past events. Thus, the "null hypotheses" in these examples are:

- In determining the ability of an eyewitness to perceive, remember and recall the face of a stranger, a lineup containing persons shorter than the police suspect, who is the only person wearing blue jeans, is a fair test.
- In determining the nature of a person's participation in some past event, it is a reliable method of ascertaining the truth to refuse to accept any version of the person's narration of the events inconsistent with the police theory of guilt, to make the person feel that they will not be allowed to leave the interrogation until they say what the interrogators want to hear, and to suggest that the crime to which the person should confess is not as morally or legally serious as the person might also be suspected of under the circumstances.

Seen in this light, evidence, even of a scientific nature, such as tests on the fairness of the lineup, or evidence of how the Reid Technique produces false confessions are merely the "tests" of the null hypothesis advanced by the state, **they are the "contrary evidence"** which must be admitted as the "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. 579, 596 As such, this evidence, like potential evidence of the failure of a "red shift" to appear as predicted by Einstein's theory, is not properly subject to the same type of requirements for *establishment* of a theory, such as "general acceptance," or the specific criteria set forth in *Daubert*, or at least not to the same degree. For example, certainly the methodology used to ascertain this contrary evidence will have to be defended.

Using the supposed validity of a lineup, or an interrogation, as examples of a "null hypothesis" is a helpful exercise in taking a fresh look at what exactly is going on in the criminal court. For some judges it might actually be a revelation. But "the inertia of the human mind and its resistance to innovation" of which Koestler wrote will make it tough to persuade most judges that these tools for generating evidence, no matter how unreliable, need to pass any *Daubert* test before being admissible. But the point is to establish the character of the *defense evidence*, as something distinct from, and "contrary evidence" to, the "hypotheses" that are of concern to *Daubert* and *Frye.* In this light, this reality may have some effect on how judges view it.

8. Even if Daubert and Frye logically apply, the right to present a defense may trump those rules

However, if the defense does seek to offer an alternative hypothesis, any scientific theory which explains facts or events relevant to the case, then *Daubert* and *Frye* and Rule 702 do

logically apply to that evidence. However, in light of the general discussion here, do these criteria apply with the same effect as they might be applied to the state's evidence? In theory, the defense should still have the easier go of it. However the standard is articulated, "where the testimony was offered *by the defendant*, its admission could not prejudice him and, therefore, his right to a fair trial, which it had previously considered to be 'a strong countervailing restraint on the admission of expert testimony'" is not implicated. *United States v. Smith*, 736 F2d 1103, 1107. This is a distinction often missed by trial courts.[164] Cf. *People v. Burton*, 153 Misc.2d 681, 590 N.Y.S.2d 972 (Bronx Co. 1992).[165]

The admissibility of scientific evidence is an important arena for the accused, and scientific evidence that may not have "general acceptance" may nevertheless be sufficiently reliable that a jury can rationally evaluate the weight to attach to it, and therefore must be admitted notwithstanding the *Daubert*, *Frye* and 702 criteria.

9. Claims of statutory inadmissibility or unreliability

In *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988), the Arkansas Supreme Court reversed a conviction after the defense's offer of the results of an alcohol screening device test had been refused by the trial court. Not only are the results of such tests "inadmissible" under the state statute, the state had a legitimate challenged to whether the test was reliably administered in this case:

> We are convinced that the evidence is not so inherently unreliable that a jury cannot rationally evaluate it. See P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-7 (1986). See also Westen, The Compulsory Process Clause,73 Mich.L.Rev. 73 (1974-75)[166]

And as to the possible unreliability of the evidence, the Court stated:

> The question of whether Patrick followed the officers' instructions as to the correct procedure would go to the weight of the evidence, not the admissibility of it. *See* P. Giannelli & E. Imwinkelried, Scientific Evidence § 1-8(B) (1986).

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[164] See page 171, below, for the discussion of the fact that the accused cannot be held to the standards applied to the prosecution in terms of the admission of evidence, among other things.

[165] The trial court refused to admit defense evidence of "acute grief syndrome" as an explanation for the accused's false confession. The trial judge later published an *aplogia* for his decision, but again failed to draw the distinction between the standards for admission of defense and prosecution evidence. The article is worth reading, however. Massaro, Dominic R., *Novelty in the Courts: Groping for Consensus in Science and the Law*, N.Y.S. Bar J. May/June 1993, p.46.

[166] In *Patrick v. State*, the Arkansas Supreme Court also rejected arguments based on "parity" (the state could not use the evidence for any purpose). See the discussion of the "parity" issue below, at p. 171. It also rejected the argument that cases like *Chambers* are "limited to their facts," citing the First Circuit's decision in *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir.1979):

> If the Supreme Court cases of *Washington v. Texas, supra* and *Chambers v. Mississippi, supra* mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.

Thus the evidence which is not considered reliable enough to be used to convict, may be sufficiently reliable to be used to acquit. *See also, Fischer v. Van Hollen*, 741 F. Supp. 2d 944 (E.D. Wisc 2010), a case handled by the Shellow Group, I which the exclusion of an expert's testimony based in part on a roadside screening test resulted in the granting of a §2254 writ ordering a new trial, on compulsory process grounds. [167]

10. Specific areas of expert testimony

Polygraph

As an example of the question of the admissibility of "novel" science, although the defendant may not be compelled to submit a polygraph examination, the defendant may be allowed to introduce a polygraph examination on his own behalf, here in a motion to dismiss in the interest of justice [("*Clayton* hearing", *People v. Clayton*, 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dept. 1973)]. *People v. Vernon*, 89 Misc.2d 472, 391 N.Y.S.2d 959 (Sup.Ct.N.Y.Co. 1977). In her opinion, Justice Shirley Levitan stated:

> It has not been an invariable principle of our criminal jurisprudence that every evidentiary right of or restriction upon one party must be matched by a symmetrical right of or restriction upon the other party.

People v. Vernon, 391 N.Y.S.2d at 962. *See also*, *People v. Battle*, NYLJ April 18, 1989, p.26; *People v. Preston*, 176 N.Y.S.2d 542, 557 (Kings Co. 1958, Nathan R. Sobel, J.); *Matter of Jennifer Meyer*, 132 Misc.2d 415, 504 N.Y.S.2d 358 (N.Y.Fam.Ct. 1986); *People v. Daniels*, 102 Misc.2d 540, 422 N.Y.S.2d 832 (Sup.Ct.Westch. 1979) (emphasizing that admission was being allowed in a single witness eyewitness identification case); (But compare *People v. Stuewe*, 103 A.D.2d 1042, 478 N.Y.S.2d 434 (4th Dept. 1984); *People v. Shedrick*, 104 A.D.2d 263, 482 N.Y.S.2d 939 (4th Dept. 1984); *Matter of Michelle B.*, 133 Misc.2d 89, 506 N.Y.S.2d 634 (Lewis Co. 1986).

Although for years polygraph evidence has been considered of insufficient reliability for admission in criminal cases, even if only to prove innocence, *People v. Leone*, 25 N.Y.2d 511, 307 N.Y.S.2d 430 (1969), substantial advances have been made in the reliability and objectivity of the technique in the hands of the most qualified examiners. *See*, Matte, James Allan, and Reuss, Ronald M., *Validation Study on the Polygraph Quadri-zone Comparison Technique*, Polygraph, Vol.18 (Fall 1989)(Journal of the American Polygraph Association) and Research Abstracts, LD01452, Vol.1502 (University Microfilms Int'l.1989).[168]

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[167] No doubt if the tables were turned, the prosecution would be allowed to use such evidence for a different purpose than as affirmative evidence of intoxication. *See City of Westland v Okopski*, 208 Mich App 66; 527 NW2d 780 (1994) (State allowed to introduce "PBT" screening test to rebut defendant's claim that he was not drunk, in a charge of disturbing the peace.

[168] Available from James A. Matte, PhD., Matte Polygraph Service, 43 Brookside Drive, Williamsville, NY 14221-6915 (716) 634-6645.

This report, based on "one hundred twenty-two confirmed real-life cases" concludes, *inter alia*,

> [T]he Quadri-Zone Comparison Technique . . . enjoys a 100 percent accuracy. In this study, the

The Supreme Court has, while reaffirming the basic principles of the compulsory process clause,[169] upheld Military Rule of Evidence 707, which has a *per* se preclusion of polygraph evidence.[170] *United States v. Scheffer,* 523 U.S. 303, 118 S.Ct. 1261 (1998). This ruling is criticized by Prof. Edward Imwinkelried in his article "A Defense of the Right to Present Defense Expert Testimony: The Flaws in the Plurality Opinion in *United States v. Scheffer*," 69 Tenn.L.Rev. 539, 560 (Spring 2002). On the other hand there are rare cases where the polygraph has been admitted, or its exclusion considered error. In *McMorris v. Israel*, 643 F. 2d 458 (7th Cir. 1981) where the Court granted a writ of *habeas corpus* when the state prosecutor refused to stipulate to polygraph without giving a reason - a permitted basis under Wisconsin state procedure, holding that due process was violated for failure to admit an exculpatory polygraph under those circumstances. In *United States v. Newell*, 741 F. 2d 570 (3d Cir. 1984), after trial where the exculpatory polygraph was admitted, the Third Circuit entered a judgment of acquittal as to all counts, without ever mentioning the admission of the polygraph in the published opinion. See also *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989)[171] (Allowing polygraph upon certain stipulations and for purposes of impeachment). In *Lee v. Martinez*, 96 P.3d 291 (NM 2004) the New Mexico Supreme Court held, on statutory, not constitutional, grounds:

> Quadri-Zone Comparison Technique correctly identified 91 percent of the Innocent as Truthful and 9 percent as Inconclusive, with no errors. It further correctly identified 97 percent of the Guilty as Deceptive and 3 percent as Inconclusive, with no errors.

(at p. 63) A different view is expressed in the book "The Lie Detectors," by Ken Alder. See book review in April 2007 Washington Monthly, "The Big Lie: How America became obsessed with the polygraph—even though it has never really worked" by David Wallace-Wells.

[169] The power of the compulsory process right is so clear to the Court now that, instead of articulating that it overcomes other interests, the Court focuses on the fact that it is not "unlimited": "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions" and that the exclusion of defense evidence is "unconstitutionally arbitrary or disproportionate . . . where it has infringed upon a weighty interest of the accused." Of course, one has to qualify this also, as Justice Scalia has criticized any "balancing" when it comes to the fundamental rights of the accused, see *infra* p. 166.

[170] That Rule reads, in relevant part:
"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence."

[171] As noted by Charlie Daniels in his monograph "Using Polygraph Evidence after Schaeffer: The law of polygraph admissibility in American jurisdictions, and suggestions for dealing with the recurring legal obstacles,"*The Champion*, May 2003 (Part1) and June 2003 (Part 2):

> "That court therefore articulated standards for admissibility in the 11th circuit, in a decision that theoretically is in force today. *United States v. Padilla*, 908 F. Supp. 923 (S.D. Fla. 1995); *Elortegui v. United States*, 743 F. Supp. 828 (S.D. Fla. 1990). No other jurisdiction has followed the *Piccinonna* precedent, however, and it has not greatly affected proceedings even within the 11th Circuit. See, e.g., *United States v. Gilliard*, 133 F.3d 809 (11th Cir. 1998)."

> that polygraph examination results are sufficiently reliable to be admitted under Rule 11-702, provided the expert is qualified and the examination was conducted in accordance with Rule 11-707. Therefore, we exercise our power of superintending control to order the district courts in the pending cases to comply with Rule 11-707 in determining whether to admit polygraph examination results. The proponents of such polygraph evidence are not required to independently establish the reliability of the examiner's testimony in a *Daubert/Alberico* hearing.

In the area of polygraph, it does not seem that the compulsory process argument has been useful in overcoming policy and reliability concerns over the polygraph.

DNA

Generally, see *Teemer v. State*, 615 So. 2d 234, 236 (Fla. Dist. Ct. App. 1993) (holding that the defendant's right to present a defense was violated when the trial court excluded DNA evidence to rebut the state's case and establish the defense of misidentification)

Q. Statutory restrictions: Rape Shield statute

The right to compulsory process should also supersede what appear to be statutory limitations on the admissibility of evidence. For example NY CPL §60.42 excludes certain evidence about the prior sexual history of a complainant in a rape prosecution.[172] Notwithstanding this provision, because of the favorable inferences which could arise from such evidence in this case, it was held error to exclude evidence of the complainant's prior history of sexual activity, psychiatric records, and false rape complaints. *People v. Mandel*, 61 A.D.2d 563, 403 N.Y.S.2d 63 (2d Dept. 1978). Accord, *People v. Ruiz*, 71 A.D.2d 569, 418 N.Y.S.2d 402 (1st Dept. 1979); *State v. Zaetringer*, 280 N.W.2d 416 (Iowa 1979).

The New York Court of Appeals rejected a challenge to the application of CPL § 60.42 in *People v. Williams (Richardson and Fearon*), 81 N.Y.2d 303, 598 N.Y.S.2d 167 (1993)[173] The record in the case was very weak on the compulsory process point, however, and the Court upheld the trial judge's exclusion. Since the New York statute has an "interest of justice" exception to exclusion, all of the arguments generally related to the compulsory process interests at stake are continually relevant.

Prior to the enactment of rape shield laws, evidence of the victim's sexual history was generally admissible, in the United States and the British Commonwealth, without a showing of relevance to any issue at trial. Simple evidence of unchastity, without regard to the facts of the case or the details of the history, was accepted as giving rise to inferences that the complainant had consented to the alleged assault and that she was also less worthy of belief. The defense was also allowed to introduce evidence regarding the general reputation of the complainant for immorality or unchastity. Any specific acts of sexual intercourse with the defendant was

[172] See, Graham, Relevancy and the Exclusion of Relevant Evidence -- The Federal Rape Shield Statute, 18 Cr.L.Bull. 513(Nov/Dec 1982).

[173] The New York State Association of Criminal Defense Lawyers *amicus* brief submitted in this case was authored by Mark J. Mahoney.

admissible for the purpose of showing the probability of consent by the complainant. However, the defendant was not allowed to cross examine the victim about prior acts of sexual intercourse between herself and men other than the defendant.[174]

Underlying these practices were two premises. First, the rationale was that the more sexually experienced a woman was, the more likely it was that the woman consented to the sexual act at issue. Second, the premise was that a woman who had sexual experiences outside of marriage was generally assumed to be an untruthful person. Female chastity was considered to be synonymous with honesty and truthfulness, although, typically, the same was not true of *males* and their veracity.[175] Though perhaps less pervasive now as stereotypes, these myths are still seen as powerful influences on the various stages of the criminal justice process.

These common law evidentiary laws were severely and properly criticized for placing a rape victim on trial by allowing the defense to freely cross examine the victim about her entire sexual history without regard to the relevance of that history to a particular issue at trial. This practice has often been referred to in feminist literature as the victim's second rape.[176]

This humiliation of the victim created a deterrent against the reporting of rape and sexual assault. Especially at a time when jurors were more likely to be male, this evidence may have provided the vehicle for unjustified acquittals, or dismissals of charges altogether. No doubt, the defense often used the victims prior sexual history to assassinate her character,[177] although it is commonly said that the same thing happens still today, which is clearly not the case generally in the criminal courts of this state.

Because the attitudes in society, and the composition of juries, have so much changed, we sincerely doubt that, even if it were permitted as a matter of evidence, any qualified defense counsel would set about to simply prove the unchastity of a rape complainant before New York jurors of the 1990's as a means to prove her unworthy of belief. Yet the practices that were allowed in the past resulted in legislative action attempting to regulate the admission of complainant sexual history, often running into fatal conflict with the rights of the accused.

Congress and all but two states have enacted rape shield statutes. These statutes are generally uniform in eliminating the traditional assumption that a complainant's sexual history is automatically admissible on the issue of consent. However, these laws do vary in respect to other specific provisions, as well as procedures for determining admissibility.[178]

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[174] *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 ALR 4th 283 1(b)

[175] Sakhi Murthy, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent, 79 CALIF. L. REV. 2, 550-551 (1991).

[176] Frank Tuerkheimer, A Reassessment and Redefinition of Rape Shield Laws, 50 OHIO ST. L.J. 5, 1246-1247 (1989).

[177] 1 ALR 4th 283, 285 §1[b]; Sakhi Murthy, *supra* at note 175.

[178] 1 ALR 4th 283 §1[b].

1. The Purposes Served by Rape Shield Laws

Rape shield laws have been rationalized as serving five ends. The first purpose of theses laws is to protect the rape victim's privacy. Before these laws were enacted it was not uncommon for the victim's private life to be discussed in excruciating detail in the courtroom.[179] The second purpose, which is related to the first, was to encourage rape victims to come forward and prosecute their attackers. The rape shield laws attempt to achieve this goal by prohibiting humiliating and intrusive questions about the victim's sex life.[180]

The third purpose of these laws is to "increase the accuracy of the verdicts" in rape trials by excluding irrelevant and prejudicial evidence. One of the underlying assumptions of rape shield laws is that a woman's sexual history has little or no probative value in a rape trial.[181]

Deterrence is the fourth purpose of rape shield laws. It is believed that these laws deter potential rapists by putting them on notice that sexually active women are not fair game and that they will be punished for rape, regardless of whether or not the victim is sexually experienced. Protecting the autonomy of women, is said to be the fifth purpose of the rape shield laws. By "sending the message" to would-be rapists that sexually experienced women are not fair game, these laws make it clear that a woman's choice of lifestyle will not effect the amount of rape law protection she receives.[182]

Experience since the passage of these statutes casts doubts on the practical and constitutional merit of the concept of "balancing" a defendant's right to present a defense, in cases of a certain type, against the complainant's interest in privacy. Nor is there any empirical support for the notion that rapists are influenced in their behavior by evidentiary rules, or that they get the "messages" this legislation or its authors intended to broadcast. Some critics consider these laws to be a complete failure.[183] As far as the integrity of the factfinding process, the means implemented, the blanket exclusion of a category of evidence offered only by the defense, suggests that the only "accurate" verdict, for the proponents of such legislation, must be one of guilt.

These laws were enacted for legitimate reasons, but the means utilized — the restriction of the trial judge's relevancy determining power — has the unavoidable potential to violate the Right to Present a Defense, resulting in the conviction of legally innocent persons. In the legislative zeal to correct the sins of the past, or accomodate strong "victims rights" and feminist agendas, legislators have gone too far when they tamper with the truth finding process *for certain offenses*.

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[179] Murthy, *supra* at note 175, at p 551; J. Alexander Tanford and Anthony J. Bocchino, Rape Shield Laws and the Sixth Amendment, 128 U. PAS. L. REV. 544, 566-567 (1980)

[180] *Id.*

[181] Murthy, *supra* at note 175, at 552.

[182] Murthy, *supra* at note 175, at 552; Tanford and Bocchino, 566-567.

[183] Tuerkheimer, 1247.

2. *Four Types of "Rape Shield" Statute*

Professor Harriet Galvin, in her extensive study of the nation's "rape shield" laws, has divided these laws into four categories: the Michigan, Arkansas, California, and federal approaches.[184] The majority of the nation's "rape shield" laws are modeled on the Michigan prototype.[185] Statutes modelled on the Michigan prototype create a general prohibition on the introduction of any evidence of prior sexual conduct of the complainant subject to designated exceptions which usually number at least two. Prior consensual sexual intercourse with the defendant is usually excepted, as are sexual relations with third parties to explain physical evidence of sexual activity such as pregnancy, semen, or venereal disease. A defendant who wants to introduce evidence under one of these two exceptions, usually has to follow procedural requirements compelling advance notice of such intent and in camera hearings to resolve questions raised under these procedures.[186]

In the states following the Michigan model, the legislatures have left the courts with little flexibility and discretion. The balance between interests limiting inquiry into a victims sexual past and the defendant's interest in presenting evidence helpful to the defense is struck legislatively and definitely.[187]

The Arkansas model and the nine other states that follow it, take the opposite approach.[188] In states following the Arkansas model, the law creates no substantive exclusions, it instead insures an in camera determination of the question in a setting where the court is specifically instructed to consider whether the prejudicial effects of the evidence outweighs its probative value. [189]

Federal Rule of Evidence 412 is the federal "rape shield" law. Rule 412 is a partial combination of the Michigan and Arkansas-type statutes. This rule is followed in six states. Under Rule 412, there is a general rule excluding a complainant's past sexual conduct subject to a number of exceptions which vary from jurisdiction to jurisdiction. Usually, prior sexual relations between the complainant and the defendant are admitted on the defense of consent and sexual intercourse with third parties are admitted to prove that the physical evidence of the rape is not attributable to the defendant. Rule 412 also provides for a constitutional catchall clause: essentially when a court determines that the evidence at issue must be admitted to insure the accused's right to a fair trial, the evidence is admissible. As is generally the case with other

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[184] Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1985-1986); Tuerkheimer, 1247.

[185] Galvin, *supra* note 184, at 908-911.

[186] Tuerkheimer, 1248.

[187] *Id.*

[188] Galvin, *supra* note 184, at 907.

[189] Tuerkheimer, 1249.

"rape shield" laws, there are procedures requiring the defendant to make a motion under the catchall clause before trial for an in camera determination of the issue.[190]

Apart from the motion requirement, New York CPL § 60.42, is modelled on Rule 412.

Under the California approach, evidence of the complainant's prior sexual conduct is divided into two categories: evidence relating to consent which is inadmissible, and evidence relating to credibility which is admissible.[191]

3. NY CPL § 60.42

NY CPL § 60.42 is similar to many state provisions. It is a blanket exclusion of a class of defense evidence. It represents a legislative determination that evidence of the complainant's prior sexual activity is so presumptively irrelevant that, unless it falls into one of four pidgeon-holes, it may only be admitted if the accused not only proves its relevance to the case but also *that it is "admissible in the interests of justice."*[192]

4. There is no conflict between the Right to Present a Defense and the policies behind CPL § 60.42

Though the purpose of the statute to prevent harassment of complainants and juror confusion is meritorious,[193] other statutes, which do not proceed on a blanket exclusion and impose an extra burden on the accused, can just as well serve the same purpose while leaving the rights of the accused and the relevency determination function of the trial judge intact.

The right to compulsory process is rooted in the belief that we must preserve the means for innocent persons to be acquitted. If we accept it that this right requires the admission of evidence which might give rise to a reasonable doubt, then every effort to raise the threshold of

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[190] Tuerkheimer, 1249-1250.

[191] *Id., 1250*

[192] **§ 60.42. Rules of evidence; admissibility of evidence of victims sexual conduct in sex offense cases.**
Evidence of a victims sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the penal law unless such evidence:
1. proves or tends to prove specific instances of the victims prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the penal law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the people of the victims failure to engage in sexual intercourse, deviate sexual intercourse or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

[193] The memorandum of Assemblyman Stanley Fink, N.Y.Legis.Ann., 1975, pp. 47-48 is representative of the various arguments in support of the legislation. For example, that the chastity of the complainant is generally immaterial and focus on it tends to demean the witness, discourages the prosecution of meritorious cases, and leads to acquittals of guilty defendants.

admissibility above that of relevance, or close the door of admissibility entirely, with respect to a class of defense evidence, is an asault on that fundamental belief. The policy behind the so called "rape shield" statute is primarily that irrelevant evidence should be excluded. Since the right of the accused to introduce evidence stops where irrelevancy begins, there is no conflict between the rights of the accused, on the one hand, and the statutory policy on the other hand.

5. Judicial restrictions on "rape shield " statutes

Our problem is only with the statute, which seeks to categorically exclude a type of defense evidence, or put additional conditions on admission beyond simple relevancy. As drawn the statute instead reflects the choice that the interest in preventing the conviction of some innocent persons is not as strong where certain political or social interests arise because of the nature of the charges.

Indeed, the history since the adoption of the statute demonstrates that courts have for the most part ignored the literal language in the statute and relied upon the "interests of justice" provision to make a determination of relevancy, more or less constrained by what is perceived to be the policy of the statute as a whole. *People v. Gagnon*, 75 N.Y.2d 736, 551 N.Y.S.2d 195 (1989);[194] *People v. Swain*, 171 A.D.2d 765, 567 N.Y.S.2d 318 (2d Dept. 1991). *People v. Castell*, 171 A.D.2d 561, 567 N.Y.S.2d 443 (1st Dept. 1991).[195]

In *People v. Labenski,* 134 A.D.2d 907, 521 N.Y.S.2d 608, 609 (4th Dept. 1987), the Appellate Division held that the trial court erroneously excluded evidence of the complainant's closely proximate sexual contact with her boyfriend, where evidence of semen found in her underwear was admitted. The exception listed in § 60.42(4) was inapplicable because no semen was found "in the victim," only on her underpants. The Appellate Division invoked the § 60.42(5) "relevance" provision as requiring the admission of the prior sexual conduct evidence.

In *People v. Ruiz*, 71 A.D.2d 569, 418 N.Y.S.2d 402 (1st Dept. 1979), the complainant was the 12 year old daughter of the defendant's common-law wife. The accused sought to question the complainant about prior sexual relations with a third person. The defense argued that this evidence would establish that the complainant's description of sexual intercourse was not that of a young girl who only had this one sexual experience. Also, the defense claimed that

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[194] Defendant was convicted of first degree rape, first degree sodomy, and first degree sexual abuse, and he appealed. The Court of Appeals stated that:

> [t]he proposed evidence of prior sexual contact between the complaining witness and her (minor) uncle was offered by the defense solely on the theory that it might be admissible to explain testimony of an examining physician that the 11 year old complainant showed physical signs of sexual abuse. The prosecutor agreed that should the People present such medical testimony, the door might be opened for the proposed evidence in rebuttal. However, defendant could not himself elicit the medical testimony and then argue that he was entitled to present evidence of the victim's prior sexual conduct to refute the very evidence he had just put before the jury.

People v. Gagnon, supra, at 196.

[195] The trial court redacted the complainant's prior sexual history from her medical records. The redaction was permissible because a victim's prior sexual history can not be used merely to discredit her by inferences of immorality. (Citing *People v. Mandel,* 48 N.Y.2d 952, 425 N.Y.S.2d 63, 401 N.E.2d 185, *cert.den. 466 U.S.949,100, S.Ct. 2913, 64 L.Ed.2d 805*)

the complainant's mother had a sexual relationship with this same third person which explained the three day delay in reporting this incident to the police. The defendant claimed that this evidence would demonstrate that the complainant and her mother fabricated the rape allegation against him, in retaliation for defendant's arguing with complainant's mother about her sexual activities with the third party.

The Appellate Division held that the "sparseness" of the complainant's testimony coupled with the trial court's barring of proof offered by of the complainant's sexual activities with a third party, warranted the reversal and remand for a new trial in the interest of justice, notwithstanding the restrictions of CPL § 60.42.

In other cases, though the evidence is excluded, it is clearly because the standard of "relevance" has not been met in the eyes of the court. *People v. Mandel*, 48 N.Y.2d 952, 425 N.Y.S.2d 63, 401 N.E.2d 185 (1979) *cert. den.*, 446 U.S. 949, 100 S.Ct. 2913, 64 L.Ed.2d 805); *People v. Halbert*, 175 A.D.2d 88, 572 N.Y.S.2d 331 (1st Dept. 1991);[196] *People v. Kellar*, 174 A.D.2d 848, 571 N.Y.S.2d 144 (3d Dept. 1991);[197] *People v. Clark*, 118 A.D.2d 718, 500 N.Y.S.2d 50 (2d Dept. 1986); *People v. Carroll*, 117 A.D.2d 815, 499 N.Y.S.2d 135 (2d Dept. 1986); *People v. Westfall*, 95 A.D.2d 581, 469 N.Y.S.2d 162 (3d Dept. 1983).

In some cases we see the danger that trial and appellate judges have gone beyond even the literal terms of exclusion in the statute. The Appellate Division, in *People v. Harris*, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dept. 1987), ruled that the trial court had erroneously concluded that CPL § 60.42 prohibited evidence concerning prior rape claims made by the victim, and therefore erred when it refused to allow the defendant to examine the complainant about the falseness of two previous rape claims. Evidence of the prior rape claims were admissible for impeachment purposes. See also, *People v. Lippert*, 138 A.D.2d 770, 525 N.Y.S.2d 390-391 (3d Dept. 1988) (agreeing that the statute did not apply to prior rape claims); *People v. Gomez*, 112 A.D.2d 445, 492 N.Y.S.2d 415 (2d Dept. 1985).[198]

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[196] The defendant lived with the complainant's mother and sister. The defendant wanted to use evidence that the complainant was sexually active with her boyfriend "to show that the reason the complainant left her home was to continue a sexual relationship with her boyfriend rather than to escape further sexual encounters by the defendant." *People v. Halbert, supra*, at 332. However, the trial court did not prevent the defense from exploring the non-sexual aspects of the complainant's relationship with her boyfriend. *Id.*

[197] The court stated that "[c]ontrary to the defendant's assertion, the victim did not testify that she was a virgin; rather, she testified that she told defendant during the attack that she was a virgin. As such, CPL § 60.42(3) does not apply," and the evidence offered by the defendant had no other probative value.

[198] In Wisconsin, prior false A great number of courts from other jurisdictions have also reached this conclusion. See Miller v. State (1989), 105 Nev. 497, 500-501, 779 P.2d 87, 89; Smith v. State (1989), 259 Ga. 135, 137, 377 S.E.2d 158, 160; Clinebell v. Commonwealth (1988), 235 Va. 319, 322, 368 S.E.2d 263, 264; Commonwealth v. Bohannon (1978), 376 Mass. 90, 95, 378 N.E.2d 987, 991-992; State v. Barber (1989), 13 Kan. App.2d 224, 226, 766 P.2d 1288, 1289-1290; Covington v. State (Alaska App.1985), 703 P.2d 436, 442; State v. LeClair (1986), 83 Ore.App. 121, 126-127, 730 P.2d 609, 613; Little v. State (Ind.App.1980), 413 N.E.2d 639, 643; State v. Boggs, 63 Ohio St.3d 418, 423, 588 N.E.2d 813, 818 (1992).

In *People v. Perryman*, 178 A.D.2d 916, 578 N.Y.S.2d 785 (4th Dept. 1991), the Appellate Division construed evidence offered by the defendant about the prior abortions of his daughter, the complainant, as evidence of "sexual conduct" in order to make the statute appear applicable.[199]

6. Unconstitutionality of "Rape Shield" provisions in other states

It is obvious that a statute which attempts to preordain circumstances where evidence of prior sexual conduct should be admitted are doomed to constitutional failure because of the wide variety of human sexual conduct and circumstances in which rape and similar complaints may arise.

It is therefore no surprise that other jurisdictions have similarly felt constitutionally compelled to make these evidentiary determinations on the bases of simple relevance to an issue at trial, and have found that the statutes, if literally applied, would unconstitutionally encroach on the right to present a defense. *State v. Zaetringer*, 280 N.W.2d 416, 25 Cr.L. 2421 (Iowa, 1979).

In the Illinois case of *People v. Mason*, 219 Ill.App.3d 76, 578 N.E.2d 1351 (Ill.App.Ct.1991) the trial court had excluded evidence that an alleged child abuse victim had viewed sexually explicit videotapes. The evidence suggested that the victim's hymenal irregularities were caused by her acting out, with crayons, what she had seen on the tapes. Although ruling that the constitution precluded the application of a "rape shield" statute to exclude such relevant evidence, the viewing of such videotapes by a curious seven year old was, in any event, neither prior sexual activity nor reputation evidence within the literal meaning of the statute. The court stated:

> The rape shield statute should be construed and applied so as to uphold the constitutional rights of the defendant, while creating the least possible interference with the legislative purpose reflected in the statutes (*Summit v. Nevada*, 101 Nev. 159, 162, 697, P.2d 1374 [1985]).

People v. Mason, supra, at 1354.

In *Saylor v. State*, 559 N.E.2d 332 (Ind. 1990) the Indiana Court of Appeals held that the trial court had violated the defendant's 6th Amendment confrontation and compulsory process rights, when it invoked its "rape shield" law to bar evidence that the complainant, defendant's mildly mentally handicapped stepdaughter, had been the victim of a sexual assault two years before either the complainant or her mother had met him. The exclusion of this evidence precluded the defendant from casting doubt upon both the complainant's testimony and the testimony of her therapist and pediatrician. The prior sexual assault evidence would have suggested that the victim had in fact experienced the acts of intercourse described but had substituted the defendant as the perpetrator of the acts of sexual intercourse that had occurred earlier in her life.

Another Indiana case shows how a distortion of the truth can occur when the accused is

[199] The defendant argued that this evidence was relevant to support his defense, which was that his daughter fabricated these sexual allegations against him after he refused for pay for an abortion.

not even allowed to testify to his version of the events because the *res gestae* happened to include the reference to the complainant's past sexual history which the accused said made her so angry that the charge of rape ensued as retaliation. *Stephens v. State*, 544 N.E.2d 137 (Ind. 1989)[200]

Since 1988 Wisconsin has had two cases in which the courts have found that the "rape shield" law as applied violated the defendants compulsory process rights. In *State v. Herndon*, 145 Wis.2d 91, 426 N.W.2d 347 (Wisconsin 1988), the trial court refused to allow the accused to elicit from the complainant evidence, and prove independently, her prior arrests for prostitution. This evidence bore on the complainant's credibility and her motive to fabricate the charge. The Court of Appeals found that the possible impact of the excluded proof on the motive of the complainant to falsify was too strong to warrant exclusion and that the principles of *Davis v. Alaska* and *Chambers v. Mississippi* compelled the admission of this evidence. Thus, the court held that the states "rape shield" law, as applied, was unconstitutional.

In *State v. Pulizzano*, 148 Wis.2d 190, 434 N.W.2d 807 (Wis.Ct.App. 1988), aff'd 155 Wis.2d 633, 456 N.W.2d 325 (Wisconsin 1990) the defendant was accused of sexually assaulting her two children and two of her nephews. One of the nephews testified about the alleged assault on him and two other boys by employing terminology not usually known or used by children of his age. In an attempt to prove that the complainant (nephew) had acquired knowledge and familiarity with such sexually explicit terms elsewhere, defendant inquired on cross examination about a prior sexual assault on complainant by third parties, the trial court, applying the "rape shield" law, precluded this inquiry.

At least one of the complainants prior abusers was an adult woman. Thus, the Court of Appeals concluded that sufficient similarity between the acts had been shown to allow the inference that complainant's explicit sexual knowledge was not necessarily acquired as a result of the alleged assault by defendant. The Court of Appeals concluded that the application of the "rape shield" law to the facts of this case was unconstitutional under *Davis v. Alaska*, referring also to the Nevada case of *Summit v. Nevada*, 101 Nev. 159, 697 P.2d 1374 (1985). The court concluded that

> the state's interest in protecting the complainant cannot require yielding of so vital a constitutional right as effective cross-examination . . . of an adverse witness. *Davis v. Alaska*, 415 U.S. at 320, 94 S.Ct. at 1112.

State v. Pulizzano, supra, at 812.

In *State v. Williams*, 16 Ohio App.3d 484, 477 N.E.2d 221 (Ohio.App. 1984), affd 21 Ohio St.3d 33, 487 N.E.2d 560 (Ohio 1986) the Court of Appeals held that the "rape shield" law was unconstitutional as applied, since the trial court had interpreted it as precluding the defendant from introducing testimony concerning alleged sexual activities of the complainant with other men, even after complainant had testified that she would not have consented to intercourse with the defendant because she was a lesbian. *State v. Williams, supra*, at 227.

In *People v. Hackett*, 421 Mich. 338, 365 N.W.2d 120 (Mich. 1984) the Michigan

[200] The defendant asserted a consent defense, claiming that he and the complainant had engaged in consensual intercourse on the night of the alleged incident. He stated that they had used the doggy style position. He stated that while they were in this position, he told complainant that he had heard she enjoyed having doggy style and that this had made her so angry that she pursued the attempted rape charge against him.

Supreme Court, while upholding a sexual assault conviction, observed that the exceptions to the state's "rape shield" statute were constitutionally compelled by the confrontation and compulsory process rights of the accused:

> The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant sexual conduct may also be probative of a complainant ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.

People v. Hackett, supra, at 124-125.

In *People v. Varona*, 143 Cal.App.3d 566, 192 Cal.Rptr. 44 (Cal.App.2.Dist. 1983) the complainant testified that she was waiting for the bus when the defendants attacked her and forced her into a nearby house where they forced her to perform vaginal and oral intercourse with them. The defendants stated that the complainant had voluntarily gone to the house and engaged in sexual contact with them, but became enraged when she discovered that the defendants had no money to pay her. The trial court excluded their evidence that the complainant was a prostitute who had walked the streets of the area and that she not only engaged in normal intercourse for money, but that she was known for specializing in oral sex, and that she was currently on probation for prostitution.

The California Court of Appeals reversed the trial court's ruling because the evidence was relevant to the issue of consent and therefore should have been admitted. *People v. Varona, supra*, at 46.

People v. Mason, 219 Ill. App. 3d 76, 578 N.E.2d 1351, 1353-54, 161 Ill. Dec. 705 (Ill. App. Ct. 1991)(holding that the defendant's right to present a defense was violated when he was not allowed to introduce evidence that would have provided another explanation for the injury to the seven-year-old complainant's hymenal ring); *Douglas v. State*, 797 S.W.2d 532, 534 (Mo. Ct. App. 1990)(error when the prosecution presented expert medical proof of the complainant's hymenal condition and the trial court precluded the defendant from presenting proof to establish that the complainant had engaged in sexual intercourse with another person before the defendant allegedly assaulted her); *State v. Jalo**, 27 Ore. App. 845, 557 P.2d 1359, 1362 (Or. Ct. App. 1976) (error when the rape shield law prevented defendant from proving the complainant's motive to lie about her sexual activity with the defendant); *Commonwealth v. Black**, 337 Pa. Super. 548, 487 A.2d 396, 400 (Pa. Super. Ct. 1985)* (defendant's rights were violated when he was prevented from showing that the complainant accused him of rape to get out of the house so that she could resume sexual activity with another person); *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325, 335 (Wis. 1990)(holding that right to present a defense was violated by

exclusion of defense evidence that the child complainant's sexual knowledge resulted from a previous sexual assault); *Tague v. Richardson*, 3 F.3d 1133, 1139 (7th Cir. 1993) (finding constitutional error when the prosecution presented evidence of hymenal injury and the trial court precluded the defendant from showing that the complainant's father had molested her several times prior to the alleged assault involving the defendant); *United States v. Begay**, 937 F.2d 515, 523 (10th Cir. 1991) (error to prevent defendant from eliciting complainant's testimony on cross-examination about past sexual activity with a third person and of the physician's testimony about the complainant's condition being consistent with proof that a third person had sexual intercourse with the complainant); *State v. Finley*, 300 S.C. 196, 387 S.E.2d 88 (S.C. 1989) (error to exclude testimony about defendant's observation of complainant having sex with another person on the night in question); see generally Annotation, Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences, *1 A.L.R. 4th 283* (1980 & Supp. 1998); Annotation, Admissibility of Evidence that Juvenile Prosecuting Witness in Sex Offense Case had Prior Sexual Experience for Purposes of Showing Alternative Source of Child's Ability to Describe Sex Acts, *83 A.L.R. 4th 685* (1991 & Supp. 1998).[201]

Where proof of hymenal injury is offered in a sexual assault or abuse case involving a child complainant, rebuttal proof of prior sexual experience is particularly critical to the defense since it offers the jury an alternative explanation for the hymenal injury. In the absence of such rebuttal proof, most jurors will presume that the child is sexually innocent and attribute the hymenal damage to the alleged criminal act. *Tague, supra*, 3 F.3d at 1138; *Oswald v.* State, 715 P.2d. 276 (Alaska App. 1986); *State v. McDaniel*, 204 N.W.2d 627 (Iowa 1973); People *v. Mikula*, 269 N.W.2d 195, 198 (Mich. 1978); *People v. Haley*, 153 Mich. App. 400, 395 N.W.2d 60, 62 (Mich. Ct. App. 1986); *State v. Howard*, 121 N.H. 53, 426 A.2d 457, 462 (N.H. 1981);*State v. Reinhart*, 440 N.W.2d 503, 505 (N.D. 1989); *State v.* Shockley, 585 S.W.2d 645 (Tenn. Crim. App.1978); State *v. Brown*, 29 S.W.3d 427 (Tenn. 2000).

7. Canadian Supreme Court: R. v. Seaboyer

The Supreme Court of Canada had the occasion to review the Canadian "rape shield" statute in 1991. That statute, Criminal Code § 276, is based on a the "Michigan Model".[202] The

[201] The cases in this paragraph with an asterisk (*) are cases where the issue was mistakenly framed originally as one *confrontation* merely because the event involved cross-examination. As has been demonstrated above, the right to compulsory process is involved in any effort to affirmatively present evidence, even if through cross examination. See above at n. 85 and accompanying text.

[202] Criminal Code, § 276:
"276.(1) In proceedings in respect of an offense under section 271, 272 or 273, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
(a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
(b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
(c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the

case is highly relevant for its thorough discussion of the constitutional concerns under the Charter of Rights and Freedoms which guarantees the right to make a "full answer and defense". The evolution of rights under the Canadian Charter, enacted in 1982, closely parallels the evolution in New York, and elsewhere, separate from *federal law*, of principles of state constitutional law. Not only do the right to compulsory process and confrontation arise out of the same English-speaking common law traditions, but the "rape shield" legislation in each country arise out of indistinguishable circumstances and were adopted for exactly the same reasons.

The decision in *R. v. Seaboyer*, 7 C.R.(4th) 117 (1991), was written by Madam Justice McLachlin. It evidences an historical background for the admission of prior sexual conduct evidence identical to what existed in New York prior to enactment CPL § 60.42:

> The main purpose of the legislation is to abolish the old common law rules, which permitted evidence of the complainant's sexual conduct which was of little probative value and calculated to mislead the jury. The common law permitted questioning on the prior sexual conduct of the complainant without proof of relevance to a specific issue in the trial.

R. v. Seaboyer, 7 C.R.(4th) at 134.

Echoing the doctrine which emanates from our compulsory process cases, that the right of the accused to make his or her defense is not limited to parity with the Crown,

The argument of the Crown in *Seaboyer* was made carefully to avoid the suggestion that the goal of the legislation was *to exclude relevant evidence.*

> The Attorney General for Ontario, for the respondent, does not assert that the *Charter* permits exclusion of evidence of real value to an accused's defense. Rather, he contends that any evidence which might be excluded by ss. 276 and 277 of the Code would be of such trifling value in relation to the prejudice that might flow from its reception that its exclusion would enhance rather than detract from the fairness of the trial. Others who defend the legislation, do so on the ground that it does not exclude evidence relevant to the defense, that the exceptions contained in the provisions "encompass *all* potential situations where evidence of a complainant's sexual history with men other than the accused would be *relevant* to support a legitimate defense": *see Grant* at p. 601 [3 C.J.W.L.]. It is to this issue, which I see as the crux of the case, which I now turn.

R. v. Seaboyer, 7 C.R. (4th) at 140. With that the Court concluded that the exceptions put into the statute were incapable of comprehending all the evidence which could be relevant to such

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complainant.

(2) No evidence is admissible under paragraph (1)(c) unless

(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and

(b) a copy of the notice has been filed with the clerk of the court.

(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met."

charges.

> [C]an it be said *a priori*, as the Attorney General for Ontario contends, that any and all evidence excluded by s. 276 will necessarily be of such trifling weight in relation to the prejudicial effect of the evidence that it may fairly be excluded?
>
> In my view, the answer to this question must be negative. The Canadian and American jurisprudence affords numerous examples of evidence of sexual conduct which would be excluded by s. 276 but which clearly should be received in the interests of a fair trial, notwithstanding the possibility that it may divert a jury by tempting it to improperly infer consent or lack of credibility in the complainant.

R. v. Seaboyer. 7 C.R. (4th) at 141. Justice McLachlin gave numerous examples.[203] After giving examples of *patterns of sexual behavior* which would also be relevant[204] she concluded

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[203] [*in original*] "Other examples abound. Evidence of sexual activity excluded by s. 276 may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease - evidence which may go to the consent: *see* Galvin at pp. 818-823 [70 Minn.L.Rev.]; J.A. Tanford and A.J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U. Pa. L. Rev. 544, at pp. 584-585; D.W. Elliott, "Rape Complainants' Sexual Experience with Third Parties" [1984] Crim. L.R. 4, at p. 7; *State v. Carpenter*, 447 N.W.2d 436 (Minn. App., 1989), at pp. 440-442; *Commonwealth v. Majorana*, 503 Pa. 602, 470 A.2d 80 (1983), at pp. 84-85; *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978), at pp. 198-199; *State ex rel. Pope v. Superior Court, In and For Mohave County*, 113 Ariz. 22, 545 P.2d 946, 94 A.L.R. 3d 246 (1976), at p. 953. In the case of young complainants, where there may be a tendency to believe their story on the ground that the detail of their account must have come from the alleged encounter, it may be relevant to show other activity which provides an explanation for the knowledge: *see R. v. LeGallant* (1985), 47 C.R. (3d) 170, 18 C.R.R. 362 (B.C. S.C.), at pp. 175-176 [C.R.]; *R. v. Greene* (1990), 76 C.R. (3d) 119 (Ont. Dist. Ct.), at p. 122; *State v. Pulizzano*, 155 Wis.3d 633, 456 N.W.2d 325 (1990), at pp. 333-335; *Commonwealth v. Black*, 337 Pa. Super. 548, 487 A.2d 396 (1985), at p. 400 [A.2d], fn. 10; *State v. Oliveira*, 576 A.2d 111 (R.I., 1990), at pp. 113-114; *State v. Carver*, 37 Wash. App. 122, 678 P.2d 842 (1984); *State v. Howard*, 121 N.H. 53, 426 A.2d 456 (1981); *State v. Reinart*, 440 N.W.2d 503 (N.D., 1989); *Summit v. Nevada*, 101 Nev. 159, 697 P.2d 1374 (1985)." *R. v. Seaboyer*, 7 C.R. (4th) at 142.

[204] [*in original*] Even evidence as to pattern of conduct may on occasion be relevant. Since this use of evidence of prior sexual conduct draws upon the inference that prior conduct infers similar subsequent conduct, it closely resembles the prohibited use of the evidence and must be carefully scrutinized: *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.), at pp. 339-240; *R. v. Seaboyer* (1987), 58 C.R. (3d) 289, 61 O.R. (2d) 290, 37 C.C.C. (3d) 53, 35 C.R.R. 300, 20 O.A.C. 345 (C.A.), at p. 63 [C.C.C.]; Tanford and Bocchino at pp. 586-589 [128 U.Pa.L.Rev.]; Galvin at pp. 831-848 [70 Minn.L.Rev.]; Elliott at pp. 7-8 [[1984] Crim. L.R.]; A.P. Ordover, "Admissibility of "Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity" (1977) 63 Cornell L. Rev. 90, at pp. 112-119; *Winfield v. Commonwealth*, 255 Va. 211, 31 S.E.2d 15 (1983), at pp. 19-21; *State v. Shoffner*, 62 N.C. App. 245, 302 S.E.2d 830 (1983), at pp. 832-833 [S.E.2d]; *State v. Gonzalez*, 110 Wash.2d 738, 757 P.2d 925 (1988), at p. 929-931 [P.2d]; *State v. Hudlow*, 99 Wash.2d 1, 659 P.2d 514 (1983), at p. 520 [P.2d]. Yet such evidence might be admissible in non-sexual cases under the similar fact rule. Is it fair, then, to deny it to an accused, merely because the trial relates to a sexual offense? Consider the example offered by Tanford and Bocchino at p. 588 [128 U.Pa.L.Rev.], commenting on the situation in the United States:

> "A woman alleges that she was raped. The man she has accused of the act claims that she is a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse him of rape, she demanded an additional one hundred dollars. The man refused to pay the extra amount. She had him arrested for rape, and he had her arrested for extortion. In the

> These examples leave little doubt that s. 276 has the potential to exclude evidence of critical relevance to the defense. Can it honestly be said, as the Attorney General for Ontario contends, that the value of such evidence will always be trifling when compared with its potential to mislead the jury? I think not. The examples show that the evidence may well be of great importance to getting at the truth and determining whether the accused is guilty or innocent under the law - the ultimate aim of the trial process. They demonstrate that s. 276, enacted for the purpose of helping judges and juries arrive at the proper and just verdict in the particular case, overshoots the mark, with the result that it may have the opposite effect of impeding them in discovering the truth.

Responding to some of the same arguments made here in support of the application of CPL § 60.42, the Madam Justice concluded:

> The argument based on the reporting of sexual offenses similarly fails to justify the wide reach of s. 276. As Doherty points out at p.65, it is counterproductive to encourage reporting by a rule which impairs the ability of the trier of fact to arrive at a just result and determine the truth of the report.
>
> * * *
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> To accept that persuasive evidence for the defense can be categorically excluded on the ground that it may encourage reporting the convictions is, Elliott points out, to say either (1) that we assume the defendant's guilt; or (b) that the defendant must be hampered in his defense so that genuine rapists can be put down. Neither alternative conforms to our notions of fundamental justice.
>
> Finally, the justification of maintaining the privacy of the witness fails to support the rigid exclusionary rule embodied in s. 276 of the Code. First, it can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in case of conflict. As Doherty puts it (at p.66):
>
> > "Every possible procedural step should be taken to minimize the encroachment on the witness's privacy, but in the end if evidence has sufficient cogency the witness

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extortion trial, the state wold be permitted to introduce evidence of the woman's previous sexual conduct - the testimony of other men that, using the same method, she had extorted money from them. When the woman is the complaining witness in the rape prosecution, however, evidence of this *modus operandi* would be excluded in most states. The facts are the same in both cases, as is the essential issue whether the woman is a rape victim or a would-be extortionist. Surely the relevance of the testimony should also be identical. If the woman's sexual history is relevant enough to be admitted against her when she is a defendant, entitled to the protections of the Constitution, then certainly it is relevant enough to be admitted in a trial at which she is merely a witness, entitled to no constitutional protection. Relevance depends on the issues that must be resolved at trial, not on the particular crime charged." [Footnotes omitted.]

R. v. Seaboyer, 7 C.R. (4th) at 142-43.

> must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted."

R. v. Seaboyer, 7 C.R. (4th) at 144. Madam Justice McLachlin's conclusion regarding the constitutionality of the statute is clear:

> I conclude that the operation of s.276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11(d) of the *Charter*. In achieving its purpose - the abolition of the outmoded, sexist-based use of sexual conduct evidence - it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defenses and, hence, to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inference from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price it too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent.

Of course, this cannot be all. The Supreme Court of Canada was confronted with the issue: given the propensity of the statute for unconstitutional application, What should be done?

The Canada Supreme Court chose not to attempt to reconstruct the statute to render it constitutional, but struck it down entirely.[205] It rejected the idea of judicially engrafting an additional "exception" such as CPL § 60.42(5). Although § 276 did not have the "relevance"-plus-"interest of justice" provision of § 60.42, our CPL provision has the same effect as an "interpretation" of § 276 that would have allowed for the trial judge to use discretion to admit evidence. The reason why the Canada Supreme Court disallowed that route is simply put:

> As Professor David M. Paciocco points out in "The *Charter* and the Rape Shield Provisions of the Criminal Code: More About Relevance and the Constitutional Exemptions Doctrine" (1989) 21 Ottawa L. Rev. 119, at p.146:
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> > "It would contribute nothing to the resolution of issues of admissibility. The constitutional limit would require that evidence excluded by the provision be admitted where it is relevant and potentially probative enough to cause a reasonable trier of fact to have a reasonable doubt in all of the circumstances of the case. Thus, the only evidence that section 276 would be allowed to exclude would be either irrelevant or non-probative information. According to the ordinary rules of

[205] In so doing it also declared that the prior "common law" rules of evidence were not reinstated, and presented guidelines, largely taken from the Galvin article, for trial judges. These guidelines were then ore or less incorporated into new legislation [S.C. 1992, c.38, effective August 15, 1992)]. Still, these of the guidelines, and the corresponding new § 276, has also earned valid criticism for inexplicable language that was added, but which was inconsistent with the rationale and authorities upon which *Seaboyer* had been decided. See, Delisle, Potential Charter Challenges to the New Rape Shield Law, 13 C.R.(4th) 390.

> evidence, information that is not relevant is already inadmissible."
>
> * * *
>
> This result has the effect of placing on the accused the burden of showing that the decision to exclude evidence, for example, is unconstitutional, a burden the accused would not bear if the section were struck out.

R. v. Seaboyer, 7 C.R. (4th) at 153.

There is no constitutional room in a system which is anchored upon the ability of an accused to present a defense for placing burdens on the accused beyond a showing of relevance, either in general, or because of the sex of the complainant, or the nature of the charges.

R. v. Seaboyer exemplifies the fact that a simple rule of relevance must be adhered to if the innocent accused are to be protected, and that no legitimate interest in the protection of the privacy of complainants or the truthfinding process or the reporting of crimes dictates otherwise.

Conclusion

The foregoing cases demonstrate that courts confronted with the exclusion of defense evidence under a "rape shield" statute, appealing where possible to the language of the statute, revert to a plain determination of relevance in order to enforce compliance with the compulsory process right. Legislators' efforts to circumscribe the discretion of trial judges by predefining "pigeonhole" exceptions to blanket preclusion of evidence invariably prove too narrow to accommodate the wide range of human sexual behavior and circumstances under which rape charges might arise.

When such statutes have the effect of excluding relevant evidence they are unconstitutional.

R. Character Evidence

Doubts about the admissibility of character evidence, especially where directly relevant to the defense case, must be resolved in favor of admissibility. The exclusion of character evidence was fount to have been error, under the compulsory process clause, in *Brazelton v. State*, 947 S.W.2d 644 (Texas App – Ft. Worth 1997) (Evidence that appellant did not use or sell drugs is a pertinent trait and essential element to her defense that the only reason she possessed the marihuana was because she reasonably believed that possession was immediately necessary to avoid imminent harm). Also *Wade v. State*, 803 S.W.2d 806, 808 (Tex.App.-Fort Worth 1991)(evidence of defendant's non-use of drugs to support defense that drugs were planted).

As noted above, p. 86, character evidence should not be excluded on the theory that it is "cumulative."

VII. Right to introduce evidence notwithstanding privileges

Generally, no interest protected by a privilege should outweigh the defendant's right to present evidence favorable to himself.

A. Statutory, evidentiary and governmental privileges

There is a tendency on the part of courts to want to "balance" the interests of the accused to present a defense (compulsory process) or confront the witnesses for the state, with the conflicting interests of the witness who raises a privilege. *Cf.*, *People v. Ortiz*, 127 A.D. 2d 305, 515 N.Y.S. 2d 317 (3rd Dept.1987); *People v. Tissois*, 516 N.Y.S. 2d 314 (2d Dept. 1987). This tendency derives from a kind of constitutional relativism which passes in law schools for legal reasoning. The compulsory process cases demonstrate, however, that the right to present a defense and to confrontation ordinarily have primacy over other interests. Thus, the Court of Appeals, in *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, observed, at 548:

> . . . the constitutional roots of the guarantees of compulsory process and confrontation may entitle these to a categorical primacy over the State's interest in safeguarding the confidentiality of police personnel records.

Although it is gone into in greater depth later at page 166, every suggestion of such "balancing" must be opposed vigorously. First, upon analysis it may develop that there is no real conflict, such as in the case where "use immunity" can be given to completely protect the privilege against self-incrimination. Second, as with a material informer whose identity the state wishes to be kept concealed, the charges must be dropped. Privileges are awarded to preserve certain interests of the state. If the state wishes to say that the confidentiality of CPS records is so important that they can not be made available to an accused, should not the state be put to the choice of protecting **either** the right of the accused **or** the right of the witness? If the state chooses to protect the interest of the witness, it should be deemed to be saying that it values that interest greater than the opportunity to obtain a valid conviction of the accused.[206]

> When the Government choose to prosecute an individual for crime it is not free to deny him the right to meet the charge against him by introducing relevant documents which the Government might otherwise claim to be privileged from public disclosure. And whenever the

[206] Such a reevaluation is appropriate in other contexts as well, for example in the cases involving a "public safety" exception to the warrant requirement. There the state argues that the public interest, say in forcing an accused to divulge the location of a weapon or victim of a kidnaping, outweighs the Fifth and Sixth Amendment rights of the accused. This puts the issue incorrectly. If it is the state which values the information to be obtained illegally, then it should be the state which "pays the price". That is, if the state so values the information needed to protect the safety of the public, it should not be concerned if the information is not also available for use against the accused at trial. This is especially so in those cases where the state would not have had the evidence had it acted lawfully. There the state wants the suspect to pay *twice*: first when the information is illegally extracted, and then when it is used at trial. Public safety may have required the first, but not the second violation.

> Government's claim of privilege conflicts with the right of the accused 'to have compulsory process for obtaining witnesses (and other evidence) in his favor,' U.S. Const. Amend. VI, the Attorney General must decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of 'secrets of State' and other confidential information in the Government's possession, which might be relevant to the defense. Cf. United States v. Burr

United States v. Schneiderman et al., 106 F.Supp. 731, 738 (S.D.Cal. 1951)

1. Privacy-based privileges

In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Supreme Court held the defendant's interests under the Sixth Amendment superior to those of the prosecution's witness who claimed a privilege to preserve the confidentiality of his juvenile record. The Supreme Court held that the only way that the state could preserve the juvenile's privilege was "by refraining from using him to make out its case." 415 U.S. at 320.[207] *United States v. Chacon*, 564 F.2d 1373 (9th Cir. 1977) (transcripts from trial of juvenile who was acquitted in the same conduct). Accord, *People v. Price*, 419 N.Y.S.2d 415 (Sup. Ct. Bronx Co. 1979) ("the rights to effectively cross-examine prosecution witnesses and prepare a defense are certainly entitled to equal, if not greater, protection than investigations of criminal activity"); *State v. Nice*, 240 Or. 343, 401 P.2d 296 (Or. 1965); *People v. Price*, 100 Misc.2d 372, 419 N.Y.S. 2d 415 (Bronx Co.1979) (Juvenile probation intake records); *Chandler v. State*, 230 Or. 452, 370 P.2d 626 (1962) (welfare department records); *United States v. Weintraub*, 429 F.2d 658 (2d Cir. 1970) (review of draft records of other draft registrants); *Texas Bd. of Pardons & Paroles v. Miller*, 590 S.W.2d 142 (Tex.Crim.App.1979) (confidential letter by witness to parole board)

In *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40 (1987), the Supreme Court affirmed the compulsory process rights of the accused to favorable information in confidential child sex abuse reports for use at trial.

New York courts have also disregarded "Rape Shield" provisions where the complainant's prior sexual history, psychiatric records, or false rape complaints were actually relevant to the issues. E.g. *People v. Mandel*, 61 A.D.2d 563, 403 N.Y.S.2d 63 (2d Dept.1978); *People v. Labenski*, 134 A.D.2d 907, 521 N.Y.S. 2d 608 (4th Dept. 1987); *People v. Harris*, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dept.1987). Other states have similarly restricted the reach of such statutes. *People v. Patterson*, 79 Mich.App. 393, 262 N.W.2d 835 (Mich.App. 1977); *State v. Jalo*, 27 Or.App. 845, 557 P.2d 1359 (Or.App. 1976). The "Rape Shield" problem is discussed thoroughly below.

Police personnel records, ordinarily confidential, must be disclosed where they contain information that is favorable to the accused, by exposing some bias or interest or ulterior motives of the police. Unless the effort by the accused is a trivial attempt to find information that merely

[207] Although *Davis* may be considered a "confrontation" case, had the issue arose as well from the denial of a judicial subpoena for the production of the juvenile records, on the basis of the same statutes, one cannot imagine a different result.

goes to the general credibility of the police, the constitutional roots of the guarantees of compulsory process and confrontation are entitled to a "categorical primacy" over the State's interest in safeguarding the confidentiality of police personnel records. *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893 (1979); *People v. Sumpter*, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sup.Ct.N.Y.Co. 1977); *State v. Fleischman*, 10 Or.App. 22, 495 P.2d 277 (Or.App. 1972). The issue would be whether the information in the records "if believed by a trier of fact, would be seriously considered by that trier of fact in determining guilt or innocence." *Fleischman*, *supra.*

2. Executive privileges

Some privileges pertain mainly to the government, relating to decision making, security, national defense, law enforcement, informants, etc. Though many of these interests may be considered compelling by the prosecution, the prosecution has the choice of not using the testimony of witnesses impeachable by the privileged information, or waiving the prosecution if the privileged information forms an essential element of the prosecution's case; *United States v. Burr*, 25 F.Cas. 187 (No. 14,694) *supra*. *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (presidential communications privilege.); *United States v. Schneiderman et al.*, 106 F.Supp. 731 (S.D.Cal. 1951) (FBI reports by confidential informant)[208]

3. Informer privilege

Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 625, 1 L.Ed.2d 639 (1957); *People v. Jones*, 76 Misc.2d 547, 350 N.Y.S.2d 539 (Sup. Ct. N.Y. Co. 1973). The Court in *Jones* authorized an *in camera* examination of the government informant by the attorney for the defense to determine the relevancy of the witness' testimony. If the testimony were relevant and the defendant intended to call the witness, the prosecution was put to the election of waiving the informant privilege, or dismissing the prosecution. See *Roviaro v. United States*, *supra*; *People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571 (1974); *People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582 (1974); *People v. Singleton*, 52 N.Y.2d 466, 398 N.Y.S.2d 871 (1977); *People v. Simone*, 59 A.D.2d 918, 399 N.Y.S.2d 154 (2d Dept. 1977); *People v. Rogers*, 59 A.D.2d 916, 399 N.Y.S.2d 151 (2d Dept. 1977); *People v. Castro*, 63 A.D.2d 891, 405 N.Y.S.2d 729 (1st Dept. 1978). See also, *R. v. McClure,* [2001] 1 S.C.R. 445

4. Doctors, therapists

There are various other privileges, held by persons not party to the prosecution, designed to use secrecy in the courtroom to promote a relationship outside the courtroom. Such a privilege which denies the defendant favorable evidence material to his case is unconstitutional as applied. Many privileges which serve a useful purpose in civil cases could be constitutionally narrowed to bar their use in a criminal case, e.g. the doctor-patient privilege. *People v. Mandel*, 61 A.D. 563, 403 N.Y.S.2d 63 (2d Dept. 1978); *United States v. Andolschek*, 142 F.2d 503 (2nd Cir. 1944); *People v. Parks*, 41 N.Y.2d 36 (records of mental treatment of witness); *People v. Knowell*, 127

[208] "Whenever the court is called upon to determine in the course of trial whether competent evidence, which appears relevant and material to the proof of some ultimate or evidentiary fact, will be 'essential to the defense' in a criminal case, justice requires that doubt be weighed in favor of the defense' in a criminal case . . . ."

A.D. 2d 794, 512 N.Y.S. 2d 190 (2d Dept. 1987) (same); *People v. Baier*, 73 A.D.2d 649, 422 N.Y.S.2d 734 (2d Dept. 1979) (same); *People v. Lowe*, 96 Misc.2d 33, 408 N.Y.S.2d 873 (Crim Ct. N.Y.City 1978) (granted discovery of the complainant's psychiatric records, recognized possibility of order directing him to submit to a psychiatric examination); *State v. Hembd*, 232 N.W.2d 872 (Minn. 1975); *State v. Roma*, 357 A.2d 45 (N.J.Super.L. 1976); *United States v. Ammar*, 714 F.2d 238 (3rd Cir. 1983) (marriage counselor privilege).

5. Attorney-client privilege

The attorney client privilege, while perhaps more sacrosanct than any, is not absolute. It must give way to the right to present a defense. *People v. Calandra*, 120 Misc.2d 1059, 467 N.Y.S.2d 141 (Sup.Ct.N.Y.Co. 1983); *Salem v. State of North Carolina*, 374 F.Supp. 1281 (W.D.N.C. 1974); *State v. Pearson*,62 Ohio St.2d 291, 405 N.E.2d 296 (Ohio 1979). In *Calandra*, the Judge stated:

> Finally, defendants have demonstrated that the disputed documents may contain information useful to the defense to show bias and interest of the People's witnesses. The State's concern in protecting attorney-client communications and attorneys work-product may not go so far as to inhibit the vital constitutional right of cross-examination and, concomitantly, the impeachment of witnesses to demonstrate bias or interest. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

See, *R v. McClure*, [Canada 2001] 1 S.C.R. 445, 2001 SCC 14 ("Solicitor-client privilege and the right to make full answer and defence are integral to our system of justice. Solicitor-client privilege is not absolute so, in rare circumstances, it will be subordinated to an individual's right to make full answer and defence."). See also, *R. v. Seaboyer*, 7 C.R.(4th) 117 (Canada 1991), the Canadian Supreme Court also gave examples of the right to make an "answer and defense" notwithstanding privileges, similar to our compulsory process cases.[209]

While decided on the 6th Amendment confrontation grounds raised by the Petitioner, the Ninth Circuit ruled that the defendant can have a constitutional right to access to a letter written by the accomplice-cooperator to his attorney which, contrary to his testimony, exculpated the defendant. *Murdoch v. Castro*, 365 F3d 699 (9th Cir 2004).[210]

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[209] "For the same reason, our Courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge: *Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)*, [1981] 2 S.C.R. 494, 23 C.R. (3d) 338, 23 C.P.C. 99, 128 D.L.R. (3d) 193, 38 N.R. 588, 62 C.C.C. (2d) 193; *R. v. Dunbar* (1982), 28 C.R. (3d) 324, 138 D.L.R. (3d) 221, 68 C.C.C. (2d) 13 (Ont. C.A.)."

[210] *Murdock* is another example of a case where the court and the party thought of confrontation, exclusively, and not of compulsory process. Here the letter was not only something to impeach, it is something that one would want to offer for its truth, and only the compulsory process right would allow that.

6. Spousal privilege

Claims of spousal privilege will be overcome by compulsory process claims. *Salazar v. State*, 559 P.2d 66 (Alaska 1976).

7. Newsperson, Journalist privilege

The newsman's privilege to keep confidential the sources of information for news gathering, a protected First Amendment activity, has given way to the right to compulsory process. *In Re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *cert. den. sub. nom.*, *New York Times Co. v. New Jersey*, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978); *People v. LeGrand*, 67 A.D.2d 446, 415 N.Y.S.2d 252 (2nd Dept. 1979) ("If the holding in *Branzburg* [*v. Hayes*, 408 US 665] subordinated the need for confidentiality to the prosecution's need to present its case, should the result be any different when a defendant's Sixth Amendment rights are at stake? The answer is obviously that it should not"); *People v. Zagarino*, 97 Misc.2d 181, 411 N.Y.S.2d 494 (Sup.Ct. Kings Co. 1978)(defendant's subpoena for production of newspaper reporter's notes about defendant from an undercover police officer in order to impeach the credibility of the officer).

8. Juror's privilege

What has been labeled the juror privilege, or the really the inadmissibility of juror's testimony to impeach a verdict, may not suffice to keep the juror from being called and compelled to testify about jury improprieties, especially when it comes to extrinsic influence on the jury or juror misconduct involving bringing extrinsic information to the deliberations. *Durr v. Cook*, 589 F.2d 891 (5th Cir. 1979)(State statute prohibiting jurors from impeaching verdict "cannot overcome Durr's constitutional rights. *Chambers v. Mississippi*, . . ; *Stimack v. Texas*, 548 F.2d 588 (5 Cir. 1977)."); *Simon v. Kuhlman*, 488 F.Supp. 59 (SDNY 1979) (jurors may be questioned about the the occurrence of an experiment among jurors and the nature and content of the jurors' communications respecting the experiment, notwithstanding Rule 609(b)); *c.f. Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (statements to the jurors by a bailiff, violated defendant's Sixth Amendment right to be confronted with the witnesses against him).

9. Legislative privilege

A legislative body's claim of privilege in documents or testimony must give way to the compulsory process rights of the accused. *Christoffel v. United States*, 200 F.2d 734, 738-39 (D.C.Cir. 1952)[211]; *see*, Westen, The Compulsory Process Clause, at n. 462.

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[211] *Christoffel v. United States*, 200 F.2d 734, 739 (DC Cir. 1952)stated:
The right of an accused by appropriate means to obtain evidence material to his defense is essential to the administration of the criminal law. A subpoena duces tecum to one who has custody of the evidence is an appropriate means. If such evidence is under the control of a department of government charged with the administration of those laws for whose violation the accused has been indicted, and its production is refused, or it is excluded, the courts having responsibility under

B. Privilege against self incrimination: defense witness immunity

Commonly the Fifth Amendment privilege obstructs the presentation of the defense case. Above we discussed the role of privileges when the accused wished to rely on an inference to be drawn from the assertion of a privilege by a potential witness, and how the order of trial or joinder of co-defendant's might affect this. Here we deal with the need for immunity to be provided so that the assertion of the privilege against self incrimination will not stand as a bar to the admission of evidence favorable to the accused.[212]

While there are few reported cases of judges implementing defense witness immunity, there are many cases indicating that judicial action to effectuate defense witness immunity may be required under certain circumstances, and there is little reason to believe that instances where courts have taken any of the various actions discussed here might have resulted in reported decisions.

1. Is there a valid privilege at all?

When first confronted with a claim of any privilege, the primary avenue of attack is to have some scrutiny of whether there is a basis for its assertion. This is no different in the case of a claim of a 5th Amendment privilege. However trial judges—especially in the case of efforts by the *accused* to elicit evidence (from prosecution witnesses or defense witnesses)—are prone to erroneously accept the mere assertion of the privilege as conclusive. There is a duty on the part of the court to inquire into the legitimate basis for the privilege. *United States v. Turkish*, 623 F.2d 769, 780 (2d Cir. 1980)(Lumbard, J., concurring and dissenting).

Whether a 5th Amenment privilege claim is valid is for the court, not the witness, to determine. *Hoffman v. United States*, 341 US 479, 486 (1951); *Mason v. United States*, 244 US 362, 365 (1917) ; *In re US Hoffman Can Co*, 373 F2d 622, 628 (3d Cir. 1967). The danger allegedly faced by the witness is insufficient if of "imaginary and unsubstantial character." *Ohio v. Reiner*, 532 US 17, 21 (2001), quoting *Mason*, 244 US at 366.[213]

> the Constitution for the trial of criminal cases, have held a conviction will not be permitted without the evidence. United States v. Grayson, 2d *739 Cir., 1948, 166 F.2d 863, 870; United States v. Andolschek, 2 Cir., 1944, 142 F.2d 503, 506, opinions by Judge Learned Hand. See, also, Edwards v. United States, 1941, 312 U.S. 473, 482, 61 S.Ct. 669, 85 L.Ed. 957. Like principles should apply with regard to evidence in the custody of the House of Representatives. While the privilege of the House must be respected it might give rise to occasions when it would be necessary to forego conviction of crime because evidence is withheld.

[212] See, in addition to the other sources cited, Gershman, The Prosecutor's Obligation to Grant Defense Witness Immunity, 24 CR.L.BULL. 14 (1988); Koblitz, "The Public Has A Claim to Every Man's Evidence": The Defendant's Constitutional Right To Witness Immunity, 1 CR.L.REV 385 (1979); Natali, "Does a Criminal Defendant Have a Constitutional Right to Compel the Production of Privileged Testimony Through Use of Immunity?" 30 VILLANOVA L.R. 1465 (1985). See Bibliography.

[213] However, contrary to the customary taunting by prosecutors, an innocent person is fully entitled to asert the privilege. "But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's "basic functions ... is

The incorrect sustaining of a privilege constitutes a violation of the compulsory process right, *cf. Royal v. State of Maryland*, 529 F.2d 1280 (4th Cir. 1976)(Winter, J., dissenting); *United States v. Bowe*, 698 F.2d 560 (2d Cir. 1983).

2. The prosecution witness on cross-examination

The next approach, if the witness is a prosecution witness, would be to move to strike any evidence offered before the witness invoked the privilege. *Cf. People v. Farruggia*, 77 A.D.2d 447, 433 N.Y.S.2d 950 (4th Dept. 1980) (Defendant apparently sought no remedy at the time of trial. No discussion of other possible remedies, such as immunity).

3. The defense witness' assertion of the privilege

In reviewing the cases which have discussed—and too often rejected—claims for defense witness immunity, it is clear that the courts have taken a shallow approach which unfortunately reflects an often simplistic approach by the defense. The phrase "defense witness immunity" seems so self-explanatory that the defense counsel and judges have each approached it with their own intuitive understanding (and biases) and failed to give the problem the depth of analysis required. There is no point to trying to raise the possibility of immunity for defense witnesses without thorough familiarity of the origin and foundation for the argument. Raising the argument without thorough preparation and without being prepared to fully defend it will only insure defeat and another bad precedent in the way of those who follow.

The trilemma of self-accusation, perjury, or contempt

The Fifth Amendment requires that a witness whose truthful testimony may tend to incriminate that witness, must be protected from "the cruel trilemma of self-accusation, perjury, or contempt." *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678 (1964). The goal of the privilege to protect persons from being compelled to incriminate themselves might be satisfied by three responses:

1. Remain silent, and assert the privilege against self-incrimination as the defense to the prosecution for contempt.
2. Lie, and in defense of a perjury charge, argue that the government had no authority to compel an incriminating answer, though truthful.
3. Testify truthfully, and then subsequently challenge the admission against the witness of any statements considered to be incriminating.

See, Westen and Mandell, To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response", 19 Am. Crim. L. Rev., 521, 524 (1982) (herein referred to as "Preferred Response"). As described by Prof. Westen, the Constitution is indifferent as to which method the witness uses in order to protect himself from compulsory self-incrimination, and is, therefore, amenable to the state and federal government establishing a "preferred response" for the witness.

Perjury is universally not a preferred response, and even in the absence of an explicit

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to protect innocent men ...'who otherwise might be ensnared by ambiguous circumstances.' " *Grunewald v. United States*, 353 U.S. 391, 421, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957)" *Ohio v. Reiner*, 532 US 17, 21 (2001)

statute, a witness may be expected to know that perjury is worse than silence, "Preferred Response" at 530; *Knox v. United States*, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969).[214] The remaining alternate responses of silence, and giving truthful testimony, challenging the admissibility of the evidence in a subsequent proceeding, are generally acceptable, and may, in different situations, be statutorily preferred responses.[215]

The legal position of the holder of the privilege is theoretically the same whether they choose to remain silent or acquiesce in giving testimony. Whether prosecuted thereafter for contempt or perjury, they can argue the 5th Amendment as a bar to contempt or the use of what they testified to as evidence against them.

The constitutional foundations of "immunity"

The 5th Amendment right is not exactly a right to remain silent. A witness may be forced to testify so long as the evidence he gives, or the fruits of that evidence, are not used against him in a subsequent criminal prosecution. *Kastigar v. United States*, 406 U.S. 441, 89 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Even though forced to testify, there is no violation of the self-incrimination privilege so long as the witness has this assurance. This we call "immunity." The grant of immunity can come from the operation of a statute, or an express judicial grant, and simply as a result of being compelled to testify.

For New York, of course, the "immunity" which is generally discussed, for all proceedings, is "transactional immunity." CPL § 50.10(a). This is broader than the immunity mandated before a witness can be compelled to testify over a Fifth Amendment claim of privilege under federal law. And it has never been held that the New York Constitution requires transactional immunity for the purpose of compelling a witness to testify over a claim of 5th Amendment privilege. This is a point which the Court of Appeals has poorly analyzed in the past, *see*, *People v. Chin*, 67 N.Y.2d 22, 499 N.Y.S.2d 638 (1985), but on which it has recently spoken correctly. *Matt v. LaRocca*, 71 N.Y.2d 154, 524 N.Y.S.2d 180 (1987).

It is therefore a self-destructive argument that it is transactional immunity to which defense witnesses should be entitled. Defense counsel should never make the mistake of giving in to the temptation to argue that the witness is entitled to anything more than the assurance that the compelled testimony would not be used against the witness.

Statutory Immunity

There is no need to dwell on the federal and state statutes which provide a framework for the prosecutor to confer immunity. I include in this category the executive power to simply withhold prosecution and withhold damaging evidence, and therefore all manner of informal methods by which a prosecutor can bind herself to forgo prosecution or the use of certain items

[214] See New Jersey v. Potash (cited by Monroe Freedman)

[215] For example in New York State, before the Grand Jury, silence is not the preferred response, and a witness is not permitted to refuse to answer questions on the basis of a Fifth Amendment privilege which is enforced, rather, by barring subsequent prosecution for transactions to which the testimony related. New York CPL § 50.20(1).

of evidence—all with nearly the same practical effect as a statutory grant of immunity.[216]

The statutes are important in the compulsory process cases because one method that has been approved by most courts for "conferring" immunity on a prospective defense witness is by putting it to the prosecutor that she either grant immunity to defense witnesses or suffer dismissal of the charges.

In these cases there is often excessive reliance on whether there is an "imbalance" between the prosecutor and the defense set up by the use of immunity grants by th prosecutors to obtain their evidence, while "distorting the truth finding process by depriving the defense of immunity for its witnesses." See the section entitled "*Reciprocal Imunity"* at p. 153.

While this can be a useful argument in many cases, it misses the point: the defense need for the introduction of helpful evidence, evidence which might give rise to a reasonable doubt in the mind of a juror does not magically track the prosecution's evidence. While in some cases there may be coincidental use of grants of immunity by the prosecutor in order to make a case, there is no logical or practical connection between that and the need by the accused for immunity for a defense witness.

Judicial grant of immunity

A judge has the inherent power to grant immunity to a witness in order to render cost-free the choice to provide truthful evidence in any proceeding. This latter avenue rests upon the reasoning in *Chambers v. Mississippi, supra,* and is exemplified in *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 247 (1968). Under these cases there exists inherent power in the trial court to grant witnesses immunity in order to vindicate constitutional rights, or to assure a witness or party that one right has to be traded for another right. This has also been called the "Doctrine of Unconstitutional Conditions."[217] *Simmons* is an example of this because the Court held there that the testimony of a defendant at a suppression hearing had to be use-immunized so as not to deter the defendant from raising his claim of constitutional right by the threat of utilizing his testimony directly at a subsequent trial.[218]

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[216] Of course the informal immunity granted by one prosecutor may not be binding on another or on another jurisdiction.

[217] "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Sullivan, Unconstitutional Conditions, 102 Harv. L.Rev. 1413, 1415 (1989).

[218] Some courts refuse to acknowledge the inherent power of courts to create "use immunity" to protect the rights of the accused. In *United States v. Turkish*, 623 F.2d 769, 774 (2nd Cir.1980), the Second Circuit acknowledged that use immunity was "implicit" in *Simmons*, but suggested that it applied only to testimony on the issue of "standing." However, the holding in *Simmons* is not so limited, and one must assume that all the defendant's testimony at a suppression hearing, including testimony directed to police misconduct in the taking of a confession or in effecting an arrest would be inadmissible at a subsequent trial.

The Second Circuit argued:

> nothing comparable is presented when the defendant finds that evidence he hoped to present is unavailable because other persons prefer to assert their own privilege.

Similarly, a witness' testimony given in order to assert a defense under the speech and debate clause or under the double jeopardy clause may be use immunized. *In Re Grand Jury Investigation*, 587 F.2d 589 (3rd Cir. 1978); *United States v. Immon*, 568 F.2d 326 (3d Cir. 1977). It may be assumed that defendant's testimony on a hearing on his competency to stand trial would similarly be inadmissible at trial. Amsterdam, Trial Manual for the Defense of Criminal Cases, § 180 (ALI 1978); cf. *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981).

The first conclusion to be drawn from these cases is that use immunity for any witness does not involve "replacing the protection of the self-incrimination privilege," *United States v. Turkish*, 623 F.2d at 774, but is merely one way of protecting the privilege. Assuming, as we must in federal matters, *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), and ought to under state constitutions, that use immunity is coextensive with the Fifth Amendment privilege, the witness has no constitutional complaint if compelled to speak the truth so long as what they say, and evidence derived from what they say, is not later utilized in a prosecution of the witness.

These cases exemplify situations where the courts have declared as a matter of policy, executed by decree in individual cases, that the exercise of rights in one proceeding should not hinge on loss of rights in another. One cannot be forced, in other words, to trade one right for another.

Immunity from use of compelled testimony

The most fundamental rule of immunity is that if a witness is compelled to give evidence over an objection on Fifth Amendment grounds, the answers and evidence derived therefrom may not be used in a subsequent proceeding against them. *Murphy v. Waterfront Commission*, 84 S.Ct. 1596,1598, n.6. *Matt v. LaRocca*, 71 N.Y.2d 154, 524 N.Y.S.2d 180 (1987).[219] That is, there exists apart from any statute, a "constitutionally imposed use immunity," *Maness v. Meyers*, 419 U.S. 449, 474, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) (White, J., concurring) which allows a witness who was ordered to testify despite a claim of privilege to testify truthfully and later successfully challenge any future use of the statements.

> [A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.

Adams v. Maryland, 347 U.S. 179, 181, 74 S.Ct. 442, 445, 98 L.Ed.608 (1954); *Murphy v.*

Turkish, at n.4.

However, it must be clear that evidence is not unavailable because a witness has a Fifth Amendment privilege and chooses to assert it, but because the witness is only allowed to assert the privilege by remaining silent rather than giving compelled testimony with either express or constitutional assurance that it may not be used later against the witness.

[219] It ought to be pointed out that the Supreme Court has attempted, unpersuasively in my opinion, to argue that the trial court does not have these inherent powers. *Pillsbury v. Conboy*, 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983). If a judge has the ability to determine that the witness does not have a sufficient basis to raise a 5th Amendment claim, why cannot the judge also determine, if there is a valid claim, to protect the witness's rights and the rights of the accused by directing the witness to answer?

Waterfront Commission, 378 U.S. at 75, 84 S.Ct. at 1608.

It is this simple fact which is most often overlooked by defense lawyers. It is assiduously avoided by judges seeking to avoid the issue. The judge does not have to order the prosecutor to grant immunity. The judge does not have to affirmatively declare that the evidence is use-immunized. All the judge has to do is, upon the assertion of a 5th Amendment privilege by a defense witness, order the witness to testify notwithstanding the privilege. With that simple directive the witness has all the pretection required by the 5th Amendment, for the evidence which they then give, if truthful, may not be used against them.

Seen in this elemental light, a request for "defense witness immunity" is in reality a request for a court order to enforce a subpoena by compelling a witness to testify even though the witness raises a Fifth Amendment claim: the witness will have "use immunity" as a matter of course, without regard to any statute. Although by statute the court might not have an affirmative power to make a "grant of use immunity" the court does have an affirmative obligation to enforce the right of the accused to present a defense and may compel witnesses called by the defense to testify.

However, while there are several cases discussing whether the Court can grant immunity affirmatively, or compel the prosecutor to grant immunity, the avenue of simply directing the defense witness to testify despite the claim of privilege is left virtually undiscussed in the cases. This is almost entirely due to the failure of defense counsel to recognize and advocate for this approach.

Compelling the prosecutor to grant immunity

The grant of immunity under a statute is a "process" routinely used by the prosecutor to gather and produce evidence. Should, therefore, the defendant also be entitled to that "process" for obtaining witnesses in his favor? Should not the trial court be authorized to grant immunity in order to assist the defendant in obtaining evidence in his favor?

The New York Court of Appeals has accepted in principle the proposition of defendant's right to immunity for a witness whose testimony is sought by the defendant, or dismissal of the prosecution *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422 (1980). *People v. Sapia*, 41 N.Y.2d 160, 166, 391 N.Y.S.2d 93, 97 (1976). Cf. *People v. Tyler*, 40 N.Y.2d 1065, 392 N.Y.S.2d 250 (1976). Compare *People v. Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250 (1984) (considered issue as whether there was abuse of discretion for prosecutor not to obtain immunity for witness; reliance on lack of probative value of evidence).

Judicial grants of immunity

The power to grant use immunity has been exercised by trial courts. *People v. Qike,* 182 Misc.2d 737, 700 N.Y.S.2d 640 (Sup.Ct. Kings Co. 1999) (Giving use immunity to defendant testifying in a pretrial hearing about having engaged in illegal wiretapping).

For federal courts, the Court of Appeals for the Third Circuit has determined, that, under certain circumstances, the criminal defendant has a right to obtain immunity from prosecution for potential defense witnesses, where the prosecution has refused to apply for immunity. *Virgin Islands v. Smith*, 615 F.2d 964, (3d Cir. 1980). *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978).

The real question is not whether immunity should be available to witnesses called by the

defense, for it is plainly available to them if forced to testify. Rather the question is, to what extent in any particular case is there a compelling governmental interest in silence as the "preferred response" by a witness called by the defense whose truthful testimony may exculpate the accused though it also may tend to incriminate the witness? That is, when is the government's administrative interest in silence as the preferred response greater than the Sixth Amendment interest in avoiding conviction of innocent persons which would be inevitable when evidence defined as relevant, exculpatory, and unique is excluded?

The interest on the part of the government in having a witness remain silent as the method of protecting their right to avoid self-incrimination, as a general rule, may be substantial. Westen, "Preferred Response" at 531, (citing *United States v. Turkish,* 623 F.2d at 775). The obligation to prove an independent source for proof used in a subsequent prosecution of the witness may be burdensome in the general case where the witness might provide some previously undisclosed information on examination by defense counsel or the state. Surely this presents a substantial basis for not granting blanket use immunity to defense witnesses on a par with the prosecutor.

But, quite obviously, the issue is not an absolute right on the part of the defense to immunity for all defense witnesses, but the right to compel the testimony of witnesses with relevant favorable evidence which is obtainable from no other source.

Unfortunately, the Third Circuit is practically alone among federal circuits in authorizing judicially-compelled use immunity for defense testimony. *See, United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *United States v. Todaro*, 744 F.2d 5 (2d Cir. 1984). The Second Circuit, while acknowledging the potential need for defense witness immunity, has never applied it. [220]

Prosecutorial offers of immunity

There are cases where prosecutors actually offered use immunity to defense witnesses, and where it was refused. Apparently the defense lawyers in these cases insisted on transactional immunity, already discussed above as an unfounded and self-destructive tactic. The inference is that the witness probably afraid of being caught lying, and exposed to a perjury prosecution, and the the notion of "defense witness immunity" was merely raised as a tactical bluff to trap the judge into an appealable error. Reading the cases, one has a hard time understanding the defense tactics.

Immunity was offered to the defense witness in *People v. Goetz*, 135 Misc.2d 888, 516 N.Y.S.2d 1007 (Sup.Ct.N.Y.Co.1987) (Where defense counsel rejected offer by prosecution for immunity for the witness, defendant could not later complain about denial of "missing witness" instruction.)

[220] In the course of deciding the issue, however, the Second Circuit has twice misinterpreted the rule in New York: *Grochulsky v. Henderson*, 637 F.2d 50, 52 (2nd Cir. 1980); *United States v. Gleason*, 616 F.2d 2, 28 (2nd Cir. 1979).

C. Arguments against defense witness immunity

Counsel seeking to have immunity granted in one way or another to a prospective defense witness must be aware of the arguments typically raised in opposition.

1. Immunity as creature of statute only

Mistaken are the arguments made that "immunity" ought not be available to witnesses called by the defense because the existing statute refers only to the prosecution. The existence of "use immunity" is not dependent upon the statute, which merely expresses a "preferred response" in specified situations. The plainer truth is that the effectuation of Sixth Amendment rights consistent with the Fifth Amendment claims of the witness should not and does not await the enactment of a statute.

2. Reciprocal immunity

It is suggested by some of the cases that the interests of the accused in having immunity for defense witnesses is heightened when the *prosecution* has utilized immunity to obtain *its* witnesses. *Earl v. United States*, 361 F.2d 531 (D.C.Cir.1966) *cert.den.* 449 U.S. 921; *United States v. DePalma*, 476 F.Supp.775 (S.D.N.Y. 1979); *People v. Shapiro*, 50 N.Y.2d 747, 431 N.Y.S.2d 422 (1980).

Although the imbalance of power suggested by this scenario may emphasize the unfairness of excluding favorable evidence that could be obtained if immunity were available to the defense, there is no logical connection between the prosecutor's use of immunity and the *need* on the part of the accused for immunity for defense witnesses. What was noted before needs to be emphasized here: the rights of the accused are not satisfied by having *parity* with the prosecution, either in the rules or standards to be applied, or in the procedural remedies available.

However, in developing this this argument other aspects of prosecutorial conduct need to be looked at. Has the prosecution tried to make defense witnesses unavailable by threatening prosecution of them or naming them as "Unindicted Co-conspirators"? See, Abramowitz and Bohrer, "White Collar Crime," New York Law Journal, March 7, 2006.

3. Loss of opportunity to prosecute the witness

This argument would be far more substantial if the immunity which a witness were due before being compelled to testify was *transactional* immunity. As noted, there is no reason to say that the New York constitution requires greater protection against self-incrimination than the federal. The New York transactional immunity statute fits into the entire scheme for indictment by a grand jury, and represents a choice made by the legislature as to how to best insure timely and thorough grand jury investigations. That legislative choice hardly suggests a finding that more than "use" immunity is necessary before a witness may be compelled to speak in other contexts.

As to the actual impediment to future prosecution of the witness, in every instance where the defense makes such a showing to compel a witness to testify despite a Fifth Amendment claim, the prosecution will have a source in the defense attorney's offer of proof for approximately all of the information sought to be compelled! Certainly the defense attorney has

little incentive to withhold information on such a showing. This would lessen if not remove any difficulty for the prosecution in establishing that later information or leads had a source independent of the compelled testimony.

It is also the case that "the witness cannot prevent prosecution and secure an immunity `bath' by broadening the scope of his answers," *United States v. Turkish*, 623 F.2d at 775, for his nonresponsive answers are not "compelled".

The plain truth is that every time an offer of proof is made to persuade a trial judge to compel a witness to testify notwithstanding a claim of privilege, even if the witness is compelled to testify, the government's position with respect to its ability to prosecute that witness is improved not hampered. Given the nature of the offer of proof which may be required of the defense in such a situation, the claims of administrative burden to establish a source of subsequent proof independent of the witness' testimony is a genuine "red herring."

This conclusion is strengthened by observations of the dissenters in *Kastigar* who feared that the "independent source" rule was unenforceable in any event, since in the final analysis "the good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights" and even good faith would not be a sufficient safeguard. 406 U.S. at 469, 92 S.Ct. at 1669 (Marshall, dissenting).

In any event, the Unites States Supreme Court has ruled that

> Immunity from use and derivative use 'leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity. (Footnote excluded).

Kastigar v. United States, 406 U.S. at 458-59, 92 S.Ct. at 1664. However in the context of "immunity" for defense witnesses, the position of the government with respect to its ability to later prosecute the witness is significantly enhanced by always being given an "independent source" before the "use-immunized" testimony is heard.

What remaining governmental interests are there in favor of enforcing silence as the "preferred response" for witnesses called by the defense who raise a Fifth Amendment claim? Might the government

> curtail its cross examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution[?]

United States v. Turkish, 623 F.2d at 775.

Federal Rule 611 (b) and state practice maintain that cross examination "should be limited to the subject matter of the direct examination and matters effecting the credibility of the witness." If the government limits its cross examination to the scope of the direct examination, there is little danger of discovery of new information.

The hallmark of cross examination is the use of leading questions by which one attacks the testimony or the witness with questions which incorporate the present knowledge of the examiner. Thus, the witness may be examined regarding matters within the knowledge of the prosecutor without it appearing that the information actually derived from the witness.

Normally a witness is examined with respect to his or her credibility on the basis of

things within the knowledge of the prosecutor, and this is amply demonstrated by the form of the question.

The control of the prosecutor over the scope of his or her own cross examination provides far greater protection than in the usual case where the defense cross examines and seeks information for which the government would have a difficult time establishing an independent source in a subsequent criminal prosecution of a witness.

Would "defense witness immunity" "create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators"? *United States v. Turkish*, 623 F.2d at 775.

This argument is nearly identical to the argument in support of the Texas accomplice rule struck down in *Washington v. Texas*. But how, really, could this come about? This Court suggests the following scenario:

> Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-defendant at a separate trial by falsely accepting sole responsibility for the crime. . . .

United States v. Turkish, 623 F.2d at 775.

Are our U.S. Attorneys and our state prosecutors so stuporous that they would not be aware of contemporaneous applications by co-defendants to give conflicting testimony in each other's trials? If only one defendant made such an application, what would prevent a mildly suspicious prosecutor from scheduling the prospective witness's trial first; that would obviate the need to even demonstrate a source independent of immunized testimony for the proof of that trial.[221]

But what if the first defendant is some how able to "secure use immunity" for his co-defendant who testifies as suggested. When that co-defendant goes to trial, what judge knowing this pattern would allow the acquitted defendant to now take the stand and claim sole responsibility for the offense?

What prosecutor would fail in his or her obligation to inform the court of what had occurred?

None of these imagined events could ever be effectuated without knowing subornation by the defense attorneys. Were our courts and prosecutors so weak or our defense attorneys so vicious as to make possible such a shockingly monstrous assault on the administration of justice, ample evidence of it should be demonstrable at present.

Another suggestion by Judge Lumbard in his dissent in *Turkish*, 623 F.2d at 779, that the opportunity for use immunity, and the correlative opportunity for the prosecutor to demonstrate compelling reasons why the witness should not be required to testify, might "invite wrongdoers to come forward as potential witnesses to ascertain if they have been discovered". This is satisfactorily answered by another portion of the same opinion which notes that

[221] The prosecutor could also suggest that, were the prospective witness/co-defendant acquitted at this superordinated trial, he would no longer have a Fifth Amendment claim to raise at the trial of the defendant who issued the subpoena. On the other hand, if proof adduced at that superordinated trial bore out the offer of proof, that the subpoenaed co-defendant was solely responsible for the offense, the government might, in the interest of justice, forego a later trial of the first defendant.

> a witness, who suggests by his claim of immunity that he might well be a suitable target for investigation would properly arouse the suspicion of the prosecutor.

Thus the public assertion of a Fifth Amendment privilege is not well suited to gaining assurance that one is not suspected by the authorities.

Imagined opportunities for an accused person to abuse a constitutional right, assuming that all of the judges and prosecutors and defense attorneys are ignorant, incompetent, or corrupt, is not a satisfactory standard against which to assess whether such constitutional rights should be enforced. Unfortunately, the mythological reasoning in *Turkish* is contagious, and parroted in other cases which also disregard the same fundamental principles, even if they recognize that there must, in many cases, be a remedy for the accused whose case rests on witnesses who fear, or are made to fear, prosecution. *E.g Carter v. United States*, 684 A.2d 331(DC 1996) (*En banc* decision rejecting "judicial grant" of use immunity, but allowing for dismissal of action if prosecutor fails to grant immunity in a case requiring it.[222])

D. Other restrictions

It is important to remember that the right to introduce evidence does not mean that the defendant is only entitled to parity with the prosecution. The defendant may offer evidence of the type which the prosecutor may not. Cf. *People v. Santarelli*, 49 N.Y.2d 241, 425 N.Y.S.2d 77, 83 n.3 (1980); *People v. Maerling*, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1978); *People v. Vernon*, 89 Misc.2d 472, 391 N.Y.S. 2d 959 (Sup.Ct.N.Y.Co 1997)(Levitan, J.); *People v. Brensic*, 70 N.Y.2d 9, 16, 517 N.Y.S.2d 120, 123 (1987) (statements against penal interest).[223]

[222] "If after a debriefing procedure and investigation the government were to decline to grant "use" immunity to the proposed defense witness, [*footnote omitted*] who by definition must possess material, exculpatory, non-cumulative evidence, unobtainable from any other source, [*footnote omitted*] it would be for the trial court to explore the basis of the government's refusal and decide whether there will be a distortion of the fact-finding process and the indictment should therefore be dismissed for a denial of due process and Sixth Amendment rights to the defendant, or some other commensurate remedy, unless the government agrees to grant "use" immunity to the crucial witness." 684 A.2d 33, 345.

[223] "When the declaration is offered by the People to inculpate the defendant in a criminal trial--as distinguished from declarations offered by defendant to exculpate himself--it is subjected to even more exacting standards in recognition of the due process protections afforded defendants charged with crime including, of course, the requirement that guilt be established beyond a reasonable doubt."

IX. Methodology for Articulation of the Right to Present a Defense

In his concurring opinion in *California v. Green*, 399 U.S. 149, 176, 90 S.Ct. 1930, 1944, 26 L.Ed.2d 489 (1970), Justice Harlan indicated that the compulsory process and confrontation clauses of the Sixth Amendment "constitutionalize the right to a defense as we know it." Of the two provisions, the compulsory process clause is the more important. The right to confrontation reduces the burden upon the defendant to call witnesses, but the right to compulsory process is what gives the defendant the power to call witnesses at all, and to have them testify, even over claims of privilege and over objections based upon state evidentiary rules, where the testimony is favorable and material to the defense. By these provisions we understand that every denial of the defendant's efforts to discover material favorable evidence and to produce that evidence before the jury ultimately raises a federal question. But this right cannot be preserved by vague incantations and afterthoughts. They must be carefully anticipated and articulated.

A. Reliance on Most Particular Right: compulsory process

It may well have previously been recognized that denial of defense efforts to obtain and produce before the jury favorable evidence raises a federal question, but previously it has been thought that this was a question of "due process" under the Fifth or Fourteenth Amendments. There are, however, important reasons to rely upon the Sixth Amendment compulsory process clause, or "the Right to Present a Defense, or the correlative state constitutional provision, rather than "due process" or "fair trial" provision.

1. More favorable standard of review

The use of a specific constitutional provision may genuinely affect the outcome of the case. It has long been clear that the courts will apply less rigorous standards in considering and reviewing "fair trial" claims of right than in considering a claim of violation of a specific provision of the Bill of Rights. *Compare, Betts v. Brady*, 316 U.S. 455, 462 (1942) (Due Process Clause of the Fourteenth Amendment, was "less rigid and more fluid" than the specific provisions of the Bill of Rights) with *Gideon v. Wainwright*, 372 US. 335 (1963) (Reaching opposite result by applying 6th Amendment to the states); See, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969); *People v. Daly*, 98 A.D.2d 803, 470 N.Y.S.2d 165 (2nd Dept.1983) (Where appellant raised it as an issue of "due process," the erroneous exclusion of the defense investigator's testimony about unsuccessful efforts to locate some witnesses was subjected to "harmless error" analysis. See dissenting opinion of Justice Lazer arguing that the case was really a compulsory process issue which was so fundamental that "harmless error" analysis was inapplicable.)

Some courts have tried to educate the bar on the relationship between "due process" and the specific guarantees of the Sixth Amendment. In *Bess v. State*, 2013 WL 827479 (Tex.Crim.App. 2013) Bess complained Bess claimed that his mitigation expert was only able to get prison guards to talk about his lack of dangerousness by promising that they would not be called as witnesses, and that the need to make such promises denied him "due process," an "equal opportunity and access to investigate and discover evidence to use on the issue of future

dangerousness," when the court refused to allow his expert testify as to what the guards said. The Court of Ctrimnal Appeals rejected this analysis of the issue, and noted that the claim was really a compulsory process claim.

> But we broadly construe Appellant's claim that he was denied equal access to allege that his right to present a defense was violated. *Cf. Strickland v. Washington,* 466 U.S. 668, 684–85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines *the basic elements* of a fair trial largely through the *several provisions of the Sixth Amendment*.")

2. The evolution of doctrine

Specific reliance on the compulsory process clause, and the "right to present a defense" may allow more consistent, logical and enlightened development of the defendant's right to put on a defense than reliance on the often vague notion of a "fair trial." Additionally, a trial decision or an appellate decision which is based on a specific fundamental right will hold more precedential value than a decision which is based upon the due process clause. Due process determinations rest, often, on the totality of circumstances, and review of such determinations is often on the basis of "clear abuse of discretion," to the extent that the appellate courts indulge in great deference to the lower courts. "Due process" claims are especially susceptible to "balancing" which is merely a metaphor for circumvention. In fact, the use of the due process clause is the preferred method of analysis for those appellate judges inclined toward the summary affirmance of convictions.[224]

B. Make a record of entitlement and desire for relief

Trial and appeals judges are quick to blame defendants and defense counsel for any failing in enforcing rights. One approach is to suggest that the defense had not been diligent in obtaining evidence, or laying the groundwork for its admission. Another is that the defense really does not need the evidence, but only seeks to "trap" the trial judge into an apparently erroneous ruling, creating an issue on appeal. *E.g. Bess v. State*, 2013 WL 827479

[224] A clear demonstration of resort to a "due process" rationale in order to apply a weaker standard than the specific relevant constitutional guarantee is found in the majority opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40 (1987):

> [T]he Court traditionally has evaluated claims such as those raised by Ritchie under the broader protections of the Due Proces Clause . . . Because the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for purposes of this case. . . . It is enough to conclude that on these facts, Ritchie's claims more properly are considered by reference to due process.

The effort to contrive Ritchie's claims as falling under due process should serve as a clue to how important to the result it was not to "settle" his rights under the Sixth Amendment if the desired result, in this child sex abuse case, were to be achieved.

(Tex.Crim.App. 2013);[225] *People v Becoats and Wright*, 17 N.Y.3d 643, 958 N.E.2d 865 (2011).[226] These are strong cues that the defense has to make a good record that the evidence is important and favorable, and that every effort had been made to present it.

C. Reliance on the full breadth of the Right

Professor Westen points out, in his discussion of *Washington v. Texas*, the Court rejected another suggestion by Justice Harlan that the case be reversed on its "peculiar" facts, and on the amorphous grounds that there was not a "fair trial." By focusing on the specific words of the compulsory process clause, the Court rejected such an *ad hoc* approach. Westen, Compulsory Process, 73 MICH. L. REV at 116-117. However, on more than a few occasions more conservative judges have signaled an intention, where possible, to evade the full exercise of the compulsory process clause by limiting seminal cases, primarily *Chambers v. Mississippi,* to their facts. *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996), (1996); *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. at 1268 (1998). Unfortunately it is all too common for defense counsel to attempt to advance a compulsory process issue by citing one or two of the closest cases.

The problem with this is partly pedagogic: most trial courts have very little exposure to the compulsory process principles discussed herein as part of a broad comprehensive right. Like lawyers in general, they were not taught these principles in law school. It is incumbent for the advocate to educate judges about the full scope of the Right to Present a Defense, placing the particular aspect of that right at issue in the case in its proper perspective as part of a larger fabric of protection designed to insure that innocent persons are not convicted.

The other problem is tactical: it is easier for a judge or prosecutor or appellate court to get around one case than it is to get around an entire doctrine. And one cannot but help notice that in all the better decisions upholding individual rights to present the defense we see reference to the broader principles, not just the results in one or two individual cases. For example In *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988), the Arkansas Supreme Court noted, but rejected the argument that cases like *Chambers* are "limited to their facts," citing the First Circuit's decision in *Pettijohn v. Hall*, 599 F.2d 476 (1st Cir.1979):

> If the Supreme Court cases of *Washington v. Texas, supra* and *Chambers v. Mississippi, supra* mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.

In each case where a compulsory process issue arises, provide a memo to the judge or

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[225] "Appellant did not subpoena witnesses who refused to appear in court voluntarily, he never exercised that right." . . . "Although Appellant complains that officers subpoenaed by the defense would have retaliated by saying bad things about Appellant, that does not explain why the defense chose not to cross-examine a witness called by the State, who had previously made statements that would have helped the defense."

[226] "If defense counsel had acted with *reasonable diligence* . . . it might well have been an abuse of discretion for the court to deny an adjournment (see People v Foy, 32 NY2d 473 [1973])." . . . "It is unclear from the record *whether counsel really wanted Bishop's testimony*, or simply wanted delay, or was hoping to create an issue for appeal.". . . "[O]ur dissenting colleagues would order a new trial for Becoats, apparently because the possibility that Becoats was deprived of critical, exculpatory testimony seems unacceptable. But that is *no more than a possibility* on this record."

appellate court that traces the broad contours of this right, and reveals the particular aspect of that right at issue in the case as a necessary component of the whole. And it is important to look at all the compulsory process issues in the case in a cumulative fashion, rather than allowing the judge or the appellate court to piece off each issue one at a time in isolation. What was the *overall effect* of the rulings? In many cases the trial lawyer recognized one issue as a compulsory process issue, but failed to recognize, or argue, the compulsory process violations in other rulings that colleectively killed the defense.[227]

D. Enforcement of Constitutional Rights is *not* a "matter of discretion"

The greater danger, from the viewpoint of the accused, is not that the Court of Appeals, or intermediate appellate courts, will derogate from the constitutional principle that relevant evidence, favorable to the accused, must be admitted. The greater danger is that the appellate court will fail to fully review the exclusion of such evidence, treating the matter as one of "discretion" for the trial court, immutable except upon a finding of "abuse of discretion."[228]

This danger is the greater for two reasons. First, the use of an "abuse of discretion" standard can not be justified in matters where the determination below actually involves the enforcement of fundamental rights, such as the Right to Present a Defense. Second, the communication to trial courts that such determinations are insulated from meaningful appellate scrutiny invites disparate and unconstitutional action by trial judges. It is not the rules themselves which ultimately protect the accused, but the existence of meaningful review of decisions applying the rules.

1. The nature of trial court discretion

The characterization of a trial court determination as a "matter of discretion" has the most obvious effect upon the nature of review that will be available. We also find that there is a range of determinations considered to be "discretionary," resulting in a range of intensity of appellate scrutiny. Although seemingly abstract, and rarely discussed openly in decisions, the designation of a trial court's determination as a "matter of discretion can be a powerful, and disingenuous, device to avoid appellate scrutiny and the enforcement of rights."

Judge Friendly wrote:

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[227] For example, in *State v. McKnight*, 321 S.C. 230, 467 S.E.2d 919 (S.C. 1996) the defendant argued that *Chambers v. Mississippi* required that he be allowed to to call as a hostile witness one "Willie" who he claimed did the actual shooting. As discussed above, n. 52, the defense fatally failed to accept the judge's offer to have the witness called as a "court witness" whom both sides could cross-examine. But when it came to the question of calling another witness to say that Willie had admitted the shooting, and another witness who would have testified to Willies attempt to sell a gun that could have been the murder weapon shortly after the murder, the accused failed to raise the issue as a constitutional question or bundle it with the exclusion of Willie himself as a witness.

[228] See, e.g. *People v. Mandel*, 48 N.Y.2d 952, 425 N.Y.S.2d 63, 401 N.E.2d 185, cert. den. 466 U.S. 949, 100 S.Ct. 2913, 64 L.Ed.2d 805; *People v. Lippert*, 138 A.D.2d 770, 525 N.Y.S.2d 390 (3d Dept.1988); *People v. Hauver*, 129 A.D.2d 889, 514 N.Y.S.2d 814 (3d Dept.1987); *People v. Harris*, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dept.1987)

> What do we mean when we speak of the discretion of the trial judge? Most definitions of discretion are not very helpful as applied to the problem of the power of a reviewing court.

Friendly, Henry J., Indiscretion about Discretion, 31 Emory L.J. 747, 754 (1982).[229] Judge Friendly draws the connection between the type of review engaged in and the nature of the trial court determination:

> When we look at the spectrum of trial court decisions, we find a wide variance in the deference accorded to them by appellate courts. In some instances the trial court is accorded broad, virtually unreviewable discretion . . . . In others, the trial judge's decision is accorded no deference beyond its persuasive power, as in the case of determinations of the proper rule of law or the application of the law to the facts. Our concern is with determinations where the scope of review falls somewhere between these extremes.

Id., at 755-56.

Judge Friendly observes that the determination of what degree of appellate scrutiny that is appropriate for those determinations "between the extremes" hinges upon an assessment of the comparative benefits of appellate review, on the one hand, and deference to the trial judge, on the other.

> Our judicial system takes as a given the desirability of appellate review. As stated by Professor Maurice Rosenberg in the pioneering article on the discretion of the trial judge:
>
> > A right to appeal has been traditional in this country's judicial process, even though the Constitution does not spell out an obligation to grant appeals. Even if constitutional, unreviewable discretion offends a deep sense of fitness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial-court level. [230]

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[229] Judge Friendly's article was first presented as the Randolph W. Thrower, Lecture in Law and Public Policy, April 14, 1982.

[230] [*in original*] Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635, 641-42 (1971) (footnote omitted) hereinafter cited as Judicial Discretion. I have borrowed outrageously from this splendid article. Unhappily, so far as I have been able to determine, the article has had no successors except for a condensed version by Professor Rosenberg, Appellate Review of Trial Court Discretion, 79 F.R.D. 173 (1975), and the collection of materials and comments in Judge Aldisert's THE JUDICIAL PROCESS 142-76 (1976), which I have found useful. See also an earlier article by Professor Rosenberg, Judicial Discretion, 38 OHIO B. 819 (1965). The paucity of judicial and academic writings on this topic is the more surprising in light of the increasing attention that has been given to a cognate subject, review of administrative discretion, particularly in the wake of Professor Kenneth Culp Davis', "Discretionary Justice: A Preliminary Inquiry," a subject to which he has returned in volume two of the second edition of his Administrative Law Treatise. See 2 K. Davis, Administrative Law Treatise §§ 8:1-8:12 (1979).

Friendly, *supra*, at 756.

Judge Friendly's entire discussion is based on the unquestionable doctrine that "determinations of the proper rule of law or the application of the law to the facts" are *not* "discretionary" matters for the trial judge, nor are they to be reviewed as such by appellate courts. As put by the Supreme Court of Canada in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at 93, in such cases the decision "does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound." See also the discussion above, at p. 49, of the concurring opinion in *People v. Brown*, 274 A.D.2d 609, 710 N.Y.S.2d 194 (3rd Dept. 2000)

2. Trial court "discretion" corresponds to appellate abdication and non-enforcement of rights

Although Judge Friendly acknowledges the advantages of giving deference to the trial court determinations which resemble findings of fact, he makes it clear that often such deference is "appellate abdication . . . in the name of the discretion rule."

An obvious detriment of allowing the trial court discretion as to matters affecting substantial rights, takes away meaningful review of deprivation of rights.

> To say that a court has discretion in a given area of the law is to say that it is not bound to decide the question one way rather than another. In this sense, the term suggests that there is no wrong answer to the questions posed -- at least there is no officially wrong answer.

Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 636-37 (1971), cited in Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of Scope of Review, the Judge/Jury Question, and Procedural Discretion,* 64 N.C.L. Rev. 993 at n.335 (1986). Professor Louis states: "Discretion is the power to make choices among legally permissible, sometimes even conflicting, answers" including "even though there are also legally wrong answers."*Id.*

Judge Friendly acknowledges the value of judicial discretion:

> Although appellate review of trial court decisions protects many values we see as important, a sound judicial system also requires a good deal of deference to trial court decisions. The most notable exception to full appellate review is deference to the trial court's determination of the facts. . . . One test for determining the amount of deference that should be accorded to rulings of trial courts which are neither of law[231] nor of fact, is how closely the trial court's superior opportunities to reach a correct result approximate those existing in its determinations of fact.

Friendly, *supra*, at 759. Obviously, resort to the "discretion rule" insulates erroneous trial court determination from reversal because findings of "abuse of discretion" are rare.[232] To avoid

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[231] [*in original*] References to rulings of "law" include application of law to the facts.

[232] [*in original*] Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of Scope of Review, the Judge/Jury Question, and Procedural Discretion,* 64 N.C.L. REV. 993, 1038 (1986)

injustice even where the trial determination involves a simple determination of "facts," broad appellate review may still be appropriate.[233]

The critical role that "discretion" plays is well evidenced by the position taken so often by the state. First the state argues in favor of support of the legislative restriction upon the discretion of the trial court involved in making whatever determinations are needed as to the admissibility of evidence.[234] On the other hand the state then urges appellate courts to simply treat the matter as one of "discretion" in order to avoid meaningful review.[235] The error in this argument lies in the assumption that the enforcement of constitutional rights by the trial court can be masked as a matter of discretion. This view appeared to have been conclusively rejected by the New York Court of Appeals when it decided *People v. Hudy*, *supra* p. 100.[236]

3. The refusal of a trial court to allow subpoenas, or admit favorable defense evidence, or allow a showing of relevance of the evidence, may not be reviewed as a mere matter of discretion

If there is one thing that is clear from the compulsory process cases it is this: trial level determinations which exclude favorable defense evidence, even on a determination of relevance, are not merely rulings on a question of evidence—they are determinations of the scope of the fundamental right to present a defense. When it comes to favorable defense evidence, the question of "relevance" is a fundamental question of constitutional law under our state, and even federal constitution. *Pettijohn v. Hall*, *supra* ; *People v. Hudy*, *supra*. The trial court's discretion does not extend to exclusion of crucial relevant evidence. *United States v. Cohen*, 888 F.2d 770, 29 Fed. R. Evid. Serv. 182 (11th Cir. 1989); *United States v. McClure*, 546 F.2d 670 (5th Cir.

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[233] [*in original*] Judge Jerome Frank espoused the view that full appellate review of fact finding by the trial judge was appropriate when the evidence was solely documentary or in the form of depositions since the appellate court was thought to be in as good a position to find the facts as the trial court. *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir.), cert. denied, 340 U.S. 810 (1950). Judge Frank's view has become so well established in the Second Circuit. See, e.g., *Coca-Cola Co. v. Tropicana Prods*., 690 F.2d 312, 318 (2d Cir. 1982)

[234] [*in original*] David Guy Hanson, *Note: Judicial Discretion in Sexual Assault Cases after State v. Pulizzano: The Wisconsin Supreme Court Giveth, Can the Wisconsin Legislature Taketh Away?* 1992 WIS. L. REV. 785, 806:

> Those who would limit judicial discretion by adhering to the Michigan approach fear granting judges the power to make relevance decisions in sexual assault cases.

[235] In *People v. Williams*, *Amici* NOW. *et al.* argued that the trial court's determination of admissibility is "clearly discretionary." *Amici* Queens County District Attorney and New York State District Attorney's Association urged that

> "the decision of a trial court to refuse to admit such evidence is given great deference, as it cannot be reversed on appeal unless it constitutes an abuse of discretion as a matter of law"

(p.6).

[236] Dissenting in *Hudy*, Judge Wachtler argued that an "abuse of discretion" standard was all that was called for.

1977); *United States v. Anderson*, 872 F.2d 1508, 28 Fed. R. Evid. Serv. 162 (11th Cir. 1989); *United States v. Riley*, 550 F.2d 233, 237 (5th Cir. 1977); *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981); see also *United States v. Terebecki*, 692 F.2d 1345, 1351 (11th Cir. 1982) (Hill, J., dissenting).

The narrow type of review ordinarily urged by the state would allow for reversal only where there was an "abuse of discretion," as it is called. Granted, there are a variety of meanings attributed to this method of review,[237] the type often dependent on the nature of the lower court decision.[238]

> Professor Rosenberg does not like the phrase "abuse of discretion." He says it is used to convey the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. The phrase "abuse of discretion" does not communicate meaning. It is a form of ill-tempered appellate grunting and should be dispensed with.[239] . . . I also dislike it since it suggests limitations upon review that often should not exist and that in fact are not respected when a court wishes to escape them. But, as Judge Duniway concedes, "it has become the customary word."[240] It is so embedded in hundreds of decisions, as well as in statutes,[241] that we cannot just wish it away. Rather we should recognize that "abuse of discretion," like "jurisdiction," is "a verbal coat of . . . many colors."[242]

At bottom, the "abuse of discretion" method of review serves only as a means to avoid full scrutiny of the trial court decision, something unjustified when the trial court has decided a

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> There are a half dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.

Friendly, *supra*, at 763.

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> The justifications for committing decisions to the discretion of the trial court are not uniform, and may vary with the specific types of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

Friendly. *supra*, at 764.

[239] [*in original]* Judicial Discretion, supra note 29, at 659.

[240] [*in original*] *Pearson v. Dennison*, 353 F.2d at 28 n.6.

[241] [*in original*] See, e.g., the judicial review provisions of the Federal Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

[242] [*in original] United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 39, 73 S.Ct. 67, 97 L.Ed. 54 (1952) (Frankfurter, J., dissenting).

question of fundamental right. For, it can hardly be said that such determinations involve a choice "between two or more courses of action, each of which is thought of as permissible" or a case where "no strict rule of law is applicable." This is not a question upon which the trial judge has "a limited right to be wrong."[243]

Thus, Judge Friendly states:

> A presumptively strong case for a broad reading of "abuse of discretion" -- more accurately, for complete appellate abdication -- is the situation where "there is no law to apply."[244] Very few cases, however, fall into this category.

Friendly, *supra*, at 765. Certainly the present issue does not fall into that category. Consider this additional observation by Judge Friendly, *supra*, at 782-83, about review of simple evidentiary questions:

> Justice Murphy's extraordinary statement that "rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act,"[245] is surely not the law under the Federal Rules of Evidence -- if, indeed, it ever was.

Judge Friendly's conclusion, at 784, is a direct answer to the state, and the *amici* in support of the state's effort to have this court abjure its constitutional responsibility by adopting an "abuse of discretion" standard in this type of case.

> In short, the "abuse of discretion" standard does not give nearly so complete an immunity bath to the trial court's rulings as counsel for appellees would have reviewing courts believe. An appellate court must carefully scrutinize the nature of the trial court's determination and decide whether that court's superior opportunities of observation or other reasons of policy require greater deference than would be accorded to its formulations of law or its application of law to the facts. In cases within the former categories, "abuse of discretion" should be given a broad reading,[246] in others a reading which scarcely differs from the definition of error.

An example of this principle in action appears in *United States v. Thor*, 574 F.2d 215, 218,220

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[243] [*in original*] 1 J. Weinstein & M. Berger, supra note 128, ¶40101, at 401-7 (citing Rosenberg, Judicial Discretion, 38 Ohio B. 819, 823 (1965)).

[244] [*in original*] The phrase comes from S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945), on the Administrative Procedure Act. Its current vogue stems from its use in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

[245] [*in original*] *Lavender v. Kurn*, 327 U.S. 645, 654 (1946).

[246] Here Judge Friendly refers to an earlier footnote in his article, note 62, which stated:
By a "broad" interpretation of the phrase "abuse of discretion," I mean affording expansive protection to the decision of the district court and limiting the scope of appellate review. By "narrow" I mean narrowly protecting the decision of the district court and sustaining a wide scope of appellate review.

(5th Cir. 1970) which observed that in the past "Appellate courts took the view that under the rule (17b, Fed.R.Cr.P.) the grant or denial of a subpoena was committed to the sound discretion of the trial court" but that the rule's mandatory language "rests ultimately upon the Sixth Amendment guarantee of compulsory process." Hence,

> '. . . if the accused avers facts which, if true, would be relevant to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the Government shows, either by introducing evidence or from matters already of record, that the . . . request is otherwise frivolous.' . . . That test places the burden of showing frivolity or abuse of process on the Government, where it properly belongs. *Welsh v. United States, supra*, 404 F.2d at 417-418.

574 F.2d 215, at 220 (quoting *United States v. Moudy*, 462 F.2d 694, 697-698 (5th Cir. 1972) in turn quoting *Greenwell v. United States*, 317 F.2d 108, 110 (D.C.Cir. 1963).) This transformation, from an "abuse of discretion" standard to a standard which gives the accused the benefit of any doubt, should apply across the spectrum when it comes to enforcing the right to present a defense rather than simply enforcing the rules of procedure and rules of evidence.

4. It is not proper for a prosecutor to suggest that compulsory process relief be denied because the court has "discretion" to do so

Prosecutors frequently argue to the trial court that the its decisions on the admission or exclusion of evidence, or the enforcement of a pre-trial *subpoena duces tecum* is "committed to the sound discretion of the trial court." This is seriously wrong from a jurisprudential perspective and a constitutional perspective.

First of all, most statements like this in the cases refer to an appellate court discussing its *own review, on appeal*, of the district court's decision. It simply should have no place in the trial-level determination of any issue that the standard of review might be more or less deferential. While the "abuse of discretion" standard is so often used indiscretely by appellate courts to sustain trial level determinations, it is not an invitation to the lower court to disregard the rules.

It should therefore have no part in trial advocacy that the court should rule one way because it can get away with it under an "abuse of discretion" standard. Regardless of the standard of review, the trial court is obligated to make the *right decision*, period. More importantly, no trial court has discretion to deny fundamental rights, such as the right to compulsory process. And this entire monograph demonstrates that the exclusion of defense evidence, the denial of defense access to evidence, is not simply a question of the rules of evidence, or rules of procedure, but a question of fundamental constitutional rights. It is the obligation of a trial judge to decide the matter correctly, not merely on the basis of what the prosecutor suggests the court could "get away with" in restricting the defense. Any arguments in the trial court that a decision is "discretionary" should be vociferously opposed by the defense.

E. Avoid "Balancing" of Rights

What we have come to see as a great danger in the logical evolution of individual rights in criminal case in the United States merely mirrors the pedestrian view that the rights of the accused should not be given greater stature than the rights of society. Thus, trial judges will take it upon themselves, or even be encouraged by appellate decisions or statutes, to "balance" the interests seen to bear in the particular question. This ranges from questions having to do with search and seizure to rulings on the admissibility of evidence, to fundamental determinations on liberty pending trial.

Unfortunately it has taken the conservatives on the Supreme Court to curb this relativistic approach to the protection of fundamental rights.

> The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court.
>
> * * *
>
> We are not free to conduct cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.

Maryland v. Craig, 497 U.S. 836, 860, 870, 111 L.Ed.2d 694, 688, 110 S.Ct. 3157 (1990) (Scalia, J., dissenting, joined by Brennan, Marshall, and Stevens) (by one-way closed circuit television, the testimony of an alleged child abuse victim) Justice Scalia's opinion lends powerful and persuasive argument against the use of a so-called "balancing" process to avoid enforcement of fundamental rights.

> I agree with the plurality that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. But I do not agree with the plurality's balancing approach. Rather, my reasoning rests strictly on the Sixth Amendment's text and common-law backdrop.
>
> * * *
>
> , , , ,The Sixth Amendment guarantees the right to counsel of choice. As discussed, a pretrial freeze of untainted asset sinfringes that right. This conclusion leaves no room for balancing. Moreover, I have no idea whether, "compared to the right to counsel of choice," the Government's interests in securing forfeiture and restitution lie "further from the heart of a fair, effective criminal justice system." *Ante*, at 12. Judges are not well suited to strike the right "balance" between those incommensurable interests. Nor do I think it is our role to do so. The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail. See *Heller*, 554 U. S., at 634–635. Those tradeoffs are thus not for us to reevaluate. "The very enumeration of the right" to counsel of choice denies us "the power to decide . . . whether the right is really worth insisting upon." Id., at 634. Such judicial balancing "do[es] violence" to the constitutional design. *Crawford v.*

> *Washington*, 541 U. S. 36, 67–68 (2004). And it is out of step with our interpretive tradition. See Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L. J. 943, 949–952 (1987) (noting that balancing did not appear inthe Court's constitutional analysis until the mid-20th century).

Luis v. United States, 578 U. S. ____ (2016) (Thomas, J. Concurring Op.)

However, like the notion "abuse of discretion," the exercise characterized as "balancing" interests has become "the customary word . . . so embedded in hundreds of decisions . . . that we cannot wish it away." See, *Friendly, supra*, at p. 164. "Balancing" is often used to achieve a result, but offers nothing in the way of reasons or guidance for the future. It is particularly problematic when it comes to the enforcement of the rights of the accused, for those rights were originally established to protect the accused from the at times weighty interests of the public which often sees the enforcement of rights of the accused as an obstacle to justice.

1. The accused is constitutionally entitled to an imbalance of advantage.

As we demonstrate below, the Right to Present a Defense is not dependent on, or limited to, parity with the state.[247]

The very idea of "balancing" generalized interests of society or victims against the enforcement of individual rights of the accused in a particular case is anathema to the constitutional *imbalance* that is necessary to make the proceeding fair! "Balancing" seems designed, rather, to simply take away with one hand the rights which the state was obligated to enforce with the other.

"The asymmetrical nature of the Constitution's criminal trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent. The State is at no risk of that." *Giles v. California*, 554 U.S. 353, 128 S.Ct. 2678 (2008), at 2692, fn 7. This statement by U.S. Supreme Court Justice Scalia is clear. There are rules that run in favor of the defendant only and the Constitution intends it to be that way. As Peter Goldberger has said:

> The "government" has *no* "rights." "Rights" are what "the people" (and "persons") have to place limits on government power and authority. That's the essence of the political philosophy that lies behind the American Constitutional system. Specifically, under the 14th Amendment to the Constitution, the state may not deprive any person of life, liberty or property without due process. Likewise, the federal government under the Fifth Amendment may not deprive a "person" of life, liberty or property without due process of law. The government is entitled to the benefit of many procedural fairness rules in the conduct of trials and pretrial proceedings, but this is not "due process" in the constitutional sense, and these procedural rules should *never* be referred to as "rights." There is absolutely no equivalency.

A judicial example of this appears in *Commonwealth v. Gonsalves*, 432 Mass 613, 618-

[247] See text accompanying note 248 above.

19 (2000) in which the Massachusetts Supreme Judicial Court rejected both a "prosecutor's rights" argument and a "government's rights" argument:

> We turn now to the merits of the appeal. The district attorney claims that an order entered under rule 15 (d) is unconstitutional because the order violates both the prosecutor's right of equal access to the courts and the separation of powers between the judiciary and the other branches of government.
>
> There is no merit to the claim that a rule 15 (d) payment order violates a prosecutor's constitutional right of equal access to the courts by "singling out prosecutors and effectively penalizing them for exercising their right to pursue an appeal." Article 11 of the Declaration of Rights of the Massachusetts Constitution, set forth below, [*footnote omitted*] affords no constitutional protection to prosecutors. As a representative of a district attorney's office, a prosecutor is an officer of the State, and cannot be characterized as a "subject" of the Commonwealth.[*footnote omitted*] The district attorney's alternative claim, that Art. 11 applies because a prosecutor represents members of the public, who are subjects of the Commonwealth, also lacks merit. The right to prosecute a criminal case resides solely in the office of the district attorney, as a representative of the Commonwealth, and not in individual members of the public. *See Taylor v. Newton Div. of the Dist. Court Dep't*, 416 Mass. 1006, 1006, 622 N.E.2d 261 (1993); *Manning v. Municipal Court of the Roxbury Dist*., 372 Mass. 315, 317, 361 N.E.2d 1274 (1977).[*footnote omitted*]

Also from Massachusetts:

> A criminal defendant has a right to due process that will, in some circumstances, require production of otherwise privileged materials, and the procedures of Bishop were designed to identify those specific circumstances. The Commonwealth, however, has no comparable due process right that would potentially trump the restrictions imposed by its own laws.

Commonwealth v. Callahan, 440 Mass. 436, 438 (Mass. 2003)

In *United States v. Cardinal Mine Supply, Inc*., 916 F. 2d 1087 (6th Cir. 1990), the Sixth Circuit noted that the United States government conceded it had no right to due process. See 916 F. 2d at 1089. For this proposition, the court cited *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S.Ct. 803, 815-16, 15 L.Ed.2d 769 (1966). In *Katzenbach*, the Supreme Court considered the objections of the state of South Carolina to being subjected to the Voting Rights Act of 1965. One of its objections was that Congress had deprived the state of Due Process by employing an invalid presumption of important facts and not providing for judicial review of some administrative determination or other. The Supreme Court, in a unanimous opinion by the Chief Justice, treated these arguments as frivolous: "Some of these contentions may be dismissed at the outset. The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any Court." *See also*, Cathleen C. Herasimchuk, "Criminal Justice and the State's Right to Due Process," 30

S.Tex.L.Rev. 97 (1990)

2. One cannot fairly "balance" incomparable interests

Moreover, often courts appear to deliberately "balance" wholly incomparable interests. For example, in cases where the defendant seeks disclosure of the identity of an informer, the Supreme Court recognized that it was not a question of whether the right of the accused to a fair trial outweighs the interests of the government, or even society in general, to the confidentiality of informers. (Indeed, how can one objectively do that?)

Instead, the real interests in need of balancing are the state's interest in obtaining a valid conviction, on the one hand, and the state's interest in preserving the confidentiality of the informer's identity. Therefore the government can decide which interest is to prevail: it can disclose the informer, or dismiss the case. Cf. *People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571 (1974); *Roviaro v. United States*, 353 U.S. 53, 61-65(1957). This was exemplified in the case of *United States v. Feeny*, 501 F Supp 1324 (Dist.Ct. Colorado 1980). There the district Court concluded that a subpoena to the Department of Justice could be enforced, despite the argument that this disclosure could have an adverse impact on other investigation.

> A defendant has certain absolute rights under our system of justice, and he cannot be deprived of those rights because of claims by the prosecution that if he is given those rights, some allegedly more important case may be jeopardized.

501 F.Supp at 1333.

Similarly in the case of prior sexual conduct, the fairer "balancing test" would be between the state's interest in obtaining a valid conviction, on the one hand, and the state's general interest in encouraging rape complaints, etc. That process would force the state into a more realistic assessment of the interests it espouses.

By way of comparison, the only meaningful "balancing" that could be undertaken with respect to the right of the accused to present favorable evidence, would be whatever interests the complainant could raise about how such inquiry would result in embarrassment or humiliation, etc. Obviously there was nothing particular placed on the record by the state about reluctance on the part of the complainant to address her prior sexual history, or to raise concern that she would necessarily regard such inquiries as invasive of her privacy.

We raise the point less to suggest that it would be of no concern to a complainant, than to suggest that, for the most part courts which claim to engage in "balancing" on such issues are often not "balancing" anything, but merely saying that they choose not to enforce a particular right. Of course, however sympathetic one might be to the complainant, his or her interests are not going to enjoy the same fundamental protection as the rights of the accused.

3. Cautionary instructions as a way to protect competing interests

The only valid "balancing" that can occur with respect to the fundamental rights of the accused at trial are those types of determinations that our courts have made to uphold the defendant's right while using other measures, such as cautionary instructions, to effectuate the interests of the state, such as they are, in a "fair trial." For example, using cautionary instructions

instead of preclusion in the case where the defense has not provided reciprocal discovery concerning "experts," or cautioning the jury to be careful in evaluating evidence that is admitted for the defense despite its speculative nature.

4. "Balancing" of general interests against fundamental rights is neither objectively possible nor constitutionally permissible.

Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974) shows how when the right of the accused to examine the witness is compared to "the State's desire that [the witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished," "the right of confrontation is paramount to the State's policy" which "must fall before the right of petitioner to seek out the truth in the process of defending himself." 415 U.S. at 320-21. The concept of "paramount" rights is not consistent with "balancing" rights against "interests" and "policies."

Certainly the concept of a "balancing" approach has a ring of "fairness." Fairness is only assured in the criminal context, however, by an *imbalance* which gives "paramount" status to the rights of the accused, and insulates the process of enforcement of the rights of the accused from strong social and political forces, be they racism, cynicism, feminism, and so on.

The danger, in "balancing," is that the opportunity for the innocent accused to be acquitted may hinge not on the truth, but on whether her right to discover and prove the truth will be taken away because the nature of the charge or the appearance of the complainant compels the judge to conclude that the right of the accused is "outweighed" by the desire to comfort the "victim."

Of course, allowing such a "balancing," to begin with, and then abdicating full appellate review by treating the matter as one of discretion, is a double-barreled attack on the protection of the innocent from conviction.[248]

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[248] This is why the decision in *People v. Chipp*, 75 N.Y.2d 327, 553 N.Y.S.2d 72 (1990), is so regrettable. No doubt the youth of the complainant in that case provides some explanation for the result. However, if left untouched, the legacy of *Chipp's* suggestion that, at both trials and Wade hearings, a defendant's compulsory process rights "may be outweighed by countervailing policy concerns, properly within the discretion and control of the . . . Judge" *People v. Chipp, supra*, at 78, will be innocent persons sent to jail without hope for meaningful appellate review. The notion that the right to compel evidence is any less so in pretrial hearings than at trial is one flatly rejected by the Canadian courts. *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14)(at ¶¶26-27):

> Where the accused seeks to establish that a search warrant was not supported by reasonable grounds, the accused may be entitled to information which may reveal the identity of an informer notwithstanding informer privilege . . . whether on a hearing into the reasonableness of the search or on the trial proper.

But especially has no place in situations where the pretrial hearing goes to the fairness, the structural integrity of the fact finding process, which is exactly what identification hearings do.

F. The "Parity" Notion: The accused may not be limited to parity with the state

Nothing bothers prosecutors more, indeed nothing seems to grate on judges more than the realization that the accused has rights that the state does not. The constitutions of every state and of the United States, for example, provide the right to the accused to a fair trial. The state has no such "right." Much effort has gone into constructing "rights" for others than the accused, like the "public's right to a speedy trial" or the rights of complaining witnesses, at trial, in sentencing, or the rights of jurors. Nevertheless, the fact remains that, however unstated the principle might be, the accused is not only entitled to protections that other players take for granted, but also to advantages in the process of criminal adjudication those others would be denied.

The beginning point for much of this was in the recognition, in *Washington v. Texas* that it would not be enough to simply rule that accomplices were not competent to testify for *any* party, and that even under such a rule the accused would still have the right to call an accomplice to testify. Of course *Chambers v. Mississippi* is to the same effect, for it held that the rule against hearsay may not apply to the accused even where it would clearly have applied to the prosecution. This is the beginning of the realization that the accused is entitled to more than parity with the state in the presenting of the defense.

In *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391 (1988), the Arkansas Supreme Court rejected arguments based on "parity:"

> The state's argument is that because the results of such a test are not admissible against a defendant in Arkansas they likewise cannot be used by a defendant to prove his innocence. This argument overlooks the decision of the United States Supreme Court in *Chambers v. Mississippi* . . . .

As another example of this proposition, the New York Court of Appeals has held that, although the defendant may introduce the "whole previous career of a man" in an effort to demonstrate insanity [*People v. Carlin*, 194 N.Y. 448, 452, 87 N.E. 805 (1909)] the Court of Appeals clarified that this statement

> was intended only as indication of the considerable latitude which should be afforded to a defendant who is seeking to prove his own insanity as a defense to a criminal charge. This statement certainly was not intended to suggest that the People may bring in "the whole previous career of a man" whenever the insanity defense is interposed.

People v. Santarelli, 49 N.Y.2d 241, 425 N.Y.S.2d 77, 83 N.3 (1980). See also, *People v. Brensic*, 70 N.Y.2d 9, 16, 517 N.Y.S.2d 120, 123 (1987).[249]

The accused is given trial rights which the state is not. The government has greater discovery obligations to the accused, and a higher burden of proof. The "tactical advantage to the defendant is inherent in the type of [criminal] trial required by our Bill of Rights." *Williams v. Florida*, 399 U.S. 78, 111, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970)(Black, J. concurring in part and dissenting in part).

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[249] See text from *Brensic*, *supra* at n. 166.

> A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant . . . [I]n the context of criminal investigations and criminal trials, where the accuser and the accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle. . . .

United States v. Turkish, 623 F.2d 769, 774-75 (2nd Cir. 1980) cert. den. 449 U.S. 1077 (1981); see also, *Dunham v. Franks Nursery & Crafts, Inc.*, 919 F.2d 1281, 1292 (7th Cir. 1990) (Ripple, J. dissenting, discussing difference between civil and criminal trials). See also, Katherine Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in A Criminal Trial*, 102 Harv. L.Rev. 808, 821-26; Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S.Cal.L.Rev. 1019 (1987); Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960)

"Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Wardius v. Oregon*, 412 U.S. 470 (1973); Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv.L.Rev. 994, 1018--1019 (1972). As Justice White stated in *United States v. Wade*:

> To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case.

United States v. Wade, 388 U.S. 218, at 256-58 (1967) (White, J., dissenting in part, concurring in part).

In a case involving the right of the accused to introduce evidence damaging to a prosecution witness the Eleventh Circuit Court of Appeals stated:

> Unlike the usual circumstance in which the prosecution seeks to introduce evidence of the accused's conduct on another occasion, the evidence in question was offered by the defense and involves behavior of a witness other than a defendant. . . . [T]he standard for admission is relaxed when the evidence is offered by a defendant . . . When the defendant offers similar acts evidence of a witness to prove a fact pertinent to the defense, the normal risk of prejudice is absent. See *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984)

United States v. Cohen, 888 F.2d 770 (11th Cir. 1989).

In *People v. Vernon*, 89 Misc.2d 472, 391 N.Y.S.2d 959 (Sup.Ct.N.Y.Co 1977), Justice Shirley Levitan stated:

> It has not been an invariable principle of our criminal jurisprudence that every evidentiary right of or restriction upon one party must be matched by a symmetrical right of or restriction upon the other party. .

People v. Vernon, 391 N.Y.S.2d at 962.

> In a criminal case where the proponent is the defense, the court should hesitate even more than in other instances in excluding testimony on Rule 602 grounds.

Weinstein and Berger, Weinstein's Evidence ¶602[02] at 602-10(1992). See, *People v. Seeley*, 186 Misc.2d 715, 720 N.Y.S.2d 315 (Sup.Ct.Kings Co. 2000).[250]

In *United States v. Reyes*, 362 F.3d 536, 544 n.7 (8th Cir. 2004) the Eight Circuit noted that, "it is the defendant, and not the government, who has rights to confrontation and compulsory process."

Echoing the doctrine which emanates from our compulsory process cases, that the right of the accused to make his or her defense is not limited to parity with the Crown, the Supreme Court of Canada also articulates a constitutionally compelled skepticism about any "balancing" argument which pits the specific rights of an individual accused against generalized policies and interests:

> This Court has affirmed the trial judges' power to exclude Crown evidence the prejudicial effect of which outweighs its probative value in a criminal case, but a narrower formula than that articulated by McCormick[251] has emerged.
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> * * *
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> More recently, in *R. v. Sweitzer*, [1982] 1 S.C.R. 949, [1982] 5 W.W.R. 555, 42 N.R. 550, 37 A.R. 294, at p. 953 [S.C.R.], an appeal involving a particularly difficult brand of circumstantial evidence

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[250] "Because of the principle that a court must weigh the probative value of relevant evidence against the prejudice to the defendant, and the defendant's constitutional right to confront witnesses and to present exculpatory evidence, the rules of evidence are applied somewhat differently when the People offer relevant evidence than when the defendant offers relevant evidence. Thus, a defendant may have a constitutional right to have reliable hearsay evidence admitted (*People v Robinson,* 89 NY2d 648), while the People would be precluded from introducing hearsay evidence because of a defendant's right to confront a witness against him/her (*Ohio v Roberts,* 448 US 56, *supra*). Similarly, a court should preclude cross-examination of a defendant about a prior conviction where its probative value is outweighed by the prejudice (*People v Sandoval,* 34 NY2d 371). The court's right to preclude a defendant's cross-examination of a victim/complainant, however, is limited by the constitutional right to confront witnesses (*People v Allen,* 67 AD2d 558, *affd on opn below* 50 NY2d 898; *see also, People v Carroll, supra*). Also, the courts have stated that where the defendant seeks to introduce a declaration that is alleged to be against the declarant's penal interest the standard for admissibility is "more lenient" than when the People seek to introduce a declaration against penal interest (*People v Fonfrias,* 204 AD2d 736, 738; *People v Campney,* 252 AD2d 734, 735).

The rules are different when the People offer expert testimony about BWS than when the defendant offers such evidence (*Commonwealth v Kacsmar,* 421 Pa Super 64, 75, 78, 617 A2d 725, 730, 732; *see also,* Schroeder, *Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer,* 76 Iowa L Rev 553).

[251] The reference is to McCormick, Handbook on the Law of Evidence, 238-249 (2nd. Ed., West 1972)

> offered by the Crown, the Court said that "admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission."
>
> * * *
>
> The Canadian cases cited above all pertain to the evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defense evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defense, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defense allowed by law.
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> * * *
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> These principles and procedures are familiar to all who practice in our criminal courts. They are common sense rules based on basic notions of fairness, and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*. They may be circumscribed in some cases by other rules of evidence, but as will be discussed in more detail below, the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defense. In most cases, the exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value.

R. v. Seaboyer, 7 C.R.(4th) 117, 139-40 (1991).

Another example of this, the determination by the Oregon Supreme Court in *State v. Johanesen*, 319 Or 128, 130, 873 P2d 1065 (1994) where, to challenge the reliability of the eyewitness to a robbery, the defense sought to introducing evidence that, in response to a photographic display of pictures of other possible suspects in the robbery, the victim had stated that one of the men in the display "could be the robber." The state had argued that the evidence did not pass the standard for admissibility for identification evidence offered by the state. The court rejected this:

> The due process concerns that underlie the evidentiary rule that this court announced in *State v. Classen, supra*, are not present when a criminal defendant proffers identification evidence to impeach an eyewitness' identification. We agree with the Court of Appeals that the evidentiary rule that this court announced in Classen does not control the admissibility of photographic identification evidence offered by a defendant in a criminal case.

Thus, the accused is not merely assured of, nor can the accused be held to, parity with the prosecution.

X. Conclusion

It is necessary for the trial practitioner to be mindful of the significance of the compulsory process clause, assert claims of right based upon that clause when appropriate, and educate trial and appellate judges to the contours of its meaning. The primary responsibility is on the defense bar to clarify and develop this fundamental constitutional right upon which the fate of citizens wrongfully accused of crimes is so dependent.

MJM

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