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CONSTITUTIONAL RULES OF CRIMINAL PROCEDURE RELATED TO THE PRESENTATION OF EVIDENCE IN A CRIMINAL PROSECUTION

Although typically "evidentiary" issues in criminal cases implicate the rules of evidence, occasionally one or more provisions of the Constitution also are implicated. This paper discusses such constitutional rules of criminal procedure related to presentation (or exclusion) of evidence in a criminal prosecution.

A. *The Confrontation Clause*

The Confrontation Clause of the Sixth Amendment states that: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."[1] There are three main lines of Supreme Court decisions that have interpreted the Confrontation Clause: (1) cases addressing the issue of when the prior in-court testimony of a subsequently unavailable witness or a declarant's out-of-court hearsay statement may be admitted into evidence by the prosecution; (2) cases discussing what limits a trial court may place on a criminal defendant's right to "face-to-face" confrontation with a witness in the presence of the jury; and (3) cases addressing a defendant's right to impeach a prosecution witness.

1. Hearsay/Prior Testimony Cases

a. Prior Sworn Testimony

If a prosecution witness testified under oath at a prior adversarial hearing and the defendant was both represented by counsel at that prior hearing and had a meaningful opportunity to cross-

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[1] U.S. Const. amend. VI.

examine the witness, then as a general rule it does not violate the Confrontation Clause to introduce that prior testimony as substantive evidence if the witness has become "unavailable" by the time of trial.[2] Whether a witness is "unavailable" for Confrontation Clause purposes is generally the same as whether a witness is "unavailable" under the applicable rules of evidence.[3]

b. *Crawford, Roberts*, and "Testimonial" Hearsay

Before the United States Supreme Court's landmark decision in Crawford v. Washington,[4] the constitutional test for determining whether the admission of hearsay (for the truth of the matter asserted) violated the Confrontation Clause was governed by Ohio v. Roberts,[5] and its progeny.[6] Roberts set forth a two-pronged test for judging the admissibility of hearsay under the Confrontation Clause: (1) in cases involving prior *in-court* testimony of a subsequently unavailable witness, the prosecution had a burden to show that the witness was truly "unavailable" and that the defendant had a meaningful opportunity to cross-examine the witness in the prior adversarial proceeding; (2) in all other situations involving hearsay statements, the prosecution only needed to show that the

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[2] Ohio v. Roberts, 448 U.S. 56 (1980), overruled on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); California v. Green, 399 U.S. 149 (1970).

[3] See, e.g., Fed. R. Evid. 804(a)(1)-(5) (listing the grounds for deeming a witness to be "unavailable," including a witness' invocation of a recognized privilege; a witness' refusal to testify despite a court order; a witness' lack of memory; a witness' death or "then existing physical or mental illness or infirmity" that prevents the witness from testifying; and the witness' absence from court combined with the lack of the ability to compel the witness' attendance through a subpoena or other reasonable means). A witness will not be deemed "unavailable" if the proponent of the prior testimony was responsible for the witness' unavailability "for the purpose of preventing the witness from attending or testifying." Id.

[4] 541 U.S. 36, 124 S. Ct. 1354 (2004).

[5] 448 U.S. 56 (1980).

[6] See, e.g., Idaho v. Wright, 497 U.S. 805 (1990).

hearsay statement was sufficiently "reliable."[7] Under Roberts's second prong, reliability could be shown in one of two different ways: (a) that the hearsay fell within a "firmly-rooted" hearsay exception (such as business records); or (b) even if the hearsay did not fall within such a "firmly-rooted" exception to the hearsay rule, the hearsay statement in question had "particularized guarantees of trustworthiness" and "indicia of reliability" when the "totality of circumstances" were considered.[8]

In Crawford, after engaging in an "original intent" analysis of the Confrontation Clause (*i.e.*, what the law was in the late 1700s), Justice Scalia, writing for seven members of the Court, overruled (at least in part) Roberts's second prong concerning hearsay statements other than prior in-court testimony of a subsequently unavailable witness. The Court held that any such hearsay offered for the truth of the matter asserted that is "**testimonial**" in nature is *per se* inadmissible under the Confrontation Clause unless: (1) the declarant is unavailable at the time of the trial; and (2) the defendant had a prior opportunity to cross-examine the declarant under oath at an adversarial hearing.[9] In order to qualify as "testimonial," the hearsay need not be *in-court* statements or even sworn statements (such as testimony at a grand jury proceeding). Rather, without giving an exhaustive definition of "testimonial," the Court suggested that "testimonial" hearsay would include sworn or unsworn "statements that declarants would reasonably expect to be used prosecutorially" or "statements that were made under circumstances which would lead an objective [lay] witness

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[7] Id. at 820-24.

[8] Wright, 497 U.S. at 818-822.

[9] Crawford, 124 S. Ct. at 1363-74.

reasonably to believe that the statement would be available for use at a later trial."[10]

The Court in Crawford applied this definition and held that a tape-recorded out-of-court unsworn statement of the defendant's wife that implicated the defendant in a homicide was "testimonial" and, thus, inadmissible because the wife had never been subjected to cross-examination by the defendant and, furthermore, she was unavailable by the time of trial. Id. at 1374. In the wake of Crawford, the lower courts have grappled with the issue of what is "testimonial" and what is "non-testimonial" hearsay for Confrontation Clause purposes.[11] The Supreme Court recently granted certiorari in two cases – one concerning an excited 911 call and the other concerning an excited statement made to a police officer at the crime scene shortly after the offense – to further define the meaning of "testimonial."[12] The Court should issue decisions in those two cases at any time.

Crawford confirms that Bruton v. United States,[13] remains good law, and thus motions to sever codefendants' trials when there is a confession of one codefendant implicating another

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[10] Id. at 1364.

[11] See, e.g., United States v. Jordon, ___ F. Supp. 2d ___, 2005 WL 513501 (D. Colo. Mar. 3, 2005) (holding that a "dying declaration" was "testimonial" hearsay and, thus, inadmissible under Crawford); People v. Durio, ___ N.Y.S.2d ___, 2005 WL 545148 (N.Y. Sup. Ct. Mar. 2, 2005) (holding that a "dying declaration" was admissible even under Crawford); State v. Powers, 99 P.3d 1262, 1263-66 (Wash. App. 2004) (citing conflicting lower court decisions concerning whether an excited 911-call reporting a crime qualifies as "testimonial" under Crawford); State v. Forrest, 596 S.E.2d 22, 27, 29-30 (N.C. 2004) (majority and dissenting judges disagree about whether the victim's "excited utterance" which implicated the defendant was "testimonial"); People v. Geno, 683 N.W.2d 687, 692 (Mich. App. 2004) (holding that victim's out-of-court statement implicating the defendant made to a social worker at the Child Assessment Center was "testimonial"); Snowden v. State, 846 A.2d 36 (Md. App. 2004) (holding that victim's statement to social worker at Child Assessment Center was non-testimonial).

[12] See Hammon v. Indiana, 126 S. Ct. 552 (Oct. 31, 2005); Washington v. Davis, 126 S. Ct. 547 (Oct. 31, 2005).

[13] 391 U.S. 123 (1968).

codefendant -- and the confessing codefendant does not intend to testify -- are still viable. (Bruton is discussed *infra.*)

Although critical of the vague nature of the "reliability" concept, the Court in Crawford did not explicitly overrule Roberts's "reliability" test as applied to "non-testimonial" hearsay.[14] The Court intimated, however, that the question of Roberts's continued viability regarding that type of hearsay is an open one in the Court's Confrontation Clause jurisprudence.[15] Until the Supreme Court says otherwise, a clear majority of lower courts appear intent on continuing to apply Roberts's "reliability" test to "non-testimonial" hearsay.[16] This appears to be a valid approach since it would violate due process to use "unreliable"evidence against a criminal defendant.[17]

Assuming that Roberts's "reliability" test survives Crawford, certain types of hearsay, assuming that they are "non-testimonial" in nature and deemed reliable, continue to be admissible under the Confrontation Clause. They include, for example, coconspirator statements (at least when there is some degree of independent corroboration);[18] "spontaneous declarations" that were not intended to incriminate anyone when made;[19] and business and public records.[20]

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[14] Crawford, 124 S. Ct. at 1374.

[15] Id.

[16] See, e.g., United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004); State v. Rivera, 844 A.2d 191, 201 (Conn. 2004).

[17] Cf. Townsend v. Burke, 334 U.S. 736, 740-41 (1948).

[18] Bourjaily v. United States, 483 U.S. 171 (1987); see also id. at 184-85 (Stevens, J., concurring).

[19] White v. Illinois, 502 U.S. 346 (1992); see also id. at 358-66 (Thomas, J., concurring in result, joined by Scalia, J.).

[20] Roberts, 448 U.S. at 66 n8.

Further clarification from the United States Supreme Court in this area is all but certain. In the meantime, defense counsel faced with hearsay evidence being offered by the prosecution should carefully analyze whether the hearsay in question is "testimonial" and, if it appears to be, raise a Crawford objection.

c. *Bruton* Motions

As a general rule, it is very difficult for a defendant to show that a joint trial with a codefendant would violate the defendant's constitutional rights. The main exception to the general rule of non-severance is when a codefendant has given an out-of-court statement implicating the defendant in the alleged offense (which the prosecution intends to offer against the codefendant) and the codefendant intends to invoke his right to silence by not testifying at the joint trial.[21] The Supreme Court has held that, in such a situation, the defendant's rights under the Confrontation Clause of the Sixth Amendment are violated when the non-testifying[22] codefendant's out-of-court statement implicating the defendant is admitted at a joint trial because the defendant cannot cross-examine the codefendant.[23] The Court further has held that a limiting instruction to jurors -- that they cannot consider the codefendant's confession against the defendant -- would be insufficient to overcome the potential "spillover" prejudice to the defendant.[24]

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[21] Bruton v. United States, 391 U.S. 123 (1968); see also Gray v. Maryland, 523 U.S. 185 (1998).

[22] The Bruton rule, which is rooted in the Confrontation Clause, does not apply if the co-defendant takes the stand and testifies at a joint trial; in such a situation, the defendant is able to cross-examine the co-defendant. See Nelson v. O'Neil, 402 U.S. 622 (1971).

[23] Gray, 523 U.S. at 189-90.

[24] Bruton, 391 U.S. 135-36.

The Supreme Court thus has given prosecutors a choice of whether to have a joint trial (and, if so, exclude the non-testifying codefendant's confession or redact it to exclude any reference to the defendant) or agree to a severance (in order to use the codefendant's confession at his separate trial). If a prosecutor chooses to redact the non-testifying codefendant's confession so as to make it available at a joint trial, the redaction must effectively eliminate any reference to the defendant. Thus, substituting a symbol or blank or the phrase "another person" for the defendant's name is sufficient only if it does not obviously refer to the defendant.[25] The Supreme Court's decision in Gray, while making it more difficult for prosecutors to effectively redact a confession to avoid a Bruton problem, did not fully resolve what type of redactions are proper.[26] It is thus likely the Supreme Court will further address redactions in a future case.

2. Face-to-Face Confrontation

For the time being at least, a majority of the Supreme Court believes that the hoary requirement that a criminal defendant be permitted to see every witness against him -- while, at the same time, the witnesses be permitted to see the defendant and the jury, with the jury permitted to see both the defendant and witnesses -- is not an absolute requirement. Rather, if a trial court finds special circumstances that outweigh the need for a "face-to-face" confrontation (*e.g.*, a frightened child complainant in a rape case), then the Confrontation Clause is not violated by the use of a device

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[25] Gray, 523 U.S. at 193-97; see also United States v. Gonzalez, 183 F.3d 1315, 1322-23 (11th Cir. 1999); United States v. Peterson, 140 F.3d 819, 822 (9th Cir. 1998).

[26] See Bryant M. Richardson, *Casting Light on the Gray Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under Bruton, Richardson, and Gray,* 55 U. MIAMI L. REV. 825 (2001).

such as a closed-circuit video monitor or a screen between the defendant and the sensitive witness.[27] A *per se* rule against face-to-face confrontation that does not require a case-by-case approach, however, violates the Confrontation Clause.[28] Arguably, Craig is subject to being reconsidered in light of Justice Scalia's majority opinion in Crawford, which eschewed the Court's former, less rigorous application of the Confrontation Clause (as evidenced by Roberts) in favor of a more categorical approach to interpreting the Clause.[29]

3. Cross-Examination/Impeachment

A defendant's right to cross-examine with the opportunity to impeach an adverse witness -- a prosecution witness as well as a hostile defense witness[30] -- "is the main and essential purpose" of the Confrontation Clause.[31] While the right to unlimited cross-examination concerning any topic is not constitutionally guaranteed, a criminal defendant does have a right within reasonable limits to cross-examine an adverse witness concerning matters that could reveal biases for the prosecution or against the defendant or a motivation to lie (*e.g.*, a witness' expectation that, in exchange for his testimony, the prosecution will dismiss pending charges against him) or matters that call into question the credibility of the witness (*e.g.*, prior inconsistent statements that the witness has

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[27] Maryland v. Craig, 497 U.S. 836 (1990).

[28] Coy v. Iowa, 487 U.S. 1012 (1988); id. at 1022-23 (O'Connor, J., joined by White, J., concurring).

[29] See also Danner v. Kentucky, 525 U.S. 1010 (1998) (Scalia, J., joined by Thomas, dissenting from the denial of certiorari) (contending that Craig was wrongly decided).

[30] See, e.g., United States v. Stephenson, 887 F.2d 57, 60 (5th Cir. 1989).

[31] Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986).

given).[32]

Sometimes Confrontation Clause challenges are aimed at statutes that categorically limit the scope of cross-examination in some manner (*e.g.*, a "rape-shield" statute). In such cases, courts must balance the state's legitimate interest in enacting such laws against a particular defendant's right to confront a particular witness with relevant matters concerning the witness' credibility.[33] Depending on the circumstances of a particular case, courts have held that the application of such a law may violate the Confrontation Clause.[34]

The right to cross-examine a witness does not guarantee that a witness will remember or otherwise be mentally capable of addressing the matter about which he is being questioned.[35] Thus, for instance, the Confrontation Clause is not violated by a prosecution witness who previously picked the defendant out of a line-up shortly after the alleged offense but who, by the time of the trial, could not remember having done so because of a mental defect. Although the defense contended that it was unable to meaningfully cross-examine the witness because of his total memory loss, the Supreme Court held that the witness' presence under oath on the witness stand was

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[32] Id. at 678-79; see also Olden v. Kentucky, 488 U.S. 227 (1988); Davis v. Alaska, 415 U.S. 308 (1974)

[33] See Michigan v. Lucas, 500 U.S. 145, 149-151 (1991); see also Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709 (Spring 1995) (discussing constitutional challenges to rape shield laws).

[34] Compare, e.g., Davis v. State, 749 N.E.2d 552 (Ind. App. 2001) (finding a constitutional violation); State v. Atkinson, 80 P.3d 1143 (Ka. 2003) (same), with Quinn v. Haynes, 234 F.3d 837 (4th Cir. 2000) (finding no violation).

[35] Delaware v. Fensterer, 474 U.S. 15 (1985).

sufficient to satisfy the Confrontation Clause.[36]

B. The Compulsory Process Clause

The Compulsory Process Clause is most often associated with the subpoena power. However, compulsory process issues can arise during a trial as well. Both issues will be discussed below.

1. Defense Subpoenas

The Compulsory Process Clause in the Sixth Amendment requires trial courts to issue -- and, if necessary, enforce[37] -- subpoenas (including subpoenas *duces tecum*) for defense witnesses whose testimony will be "favorable" to the defense and "necessary" for a fair trial.[38] If a witness is in the custody of a state or federal jail or prison, the defendant may request the trial court issue a "writ of habeas corpus *ad testificandum,*" which is tantamount to a subpoena but directed to the warden of the institution to bring the inmate to court to testify.[39] In addition, where defendants are indigent and thus unable to afford witness fees and other costs associated with subpoenas (including a witness' travel expenses and photocopying expenses in the case of a subpoena *duces tecum*), the constitutional principle of equal protection requires courts to pay for such expenses when a subpoena

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[36] United States v. Owens, 484 U.S. 554 (1988).

[37] A subpoena may be enforced by a court through issuance of a bench warrant ordering the arrest of a witness who has been properly served with a subpoena but who refuses to comply with it. It also may be enforced through the trial court's contempt power. See, e.g., Commonwealth v. Ferguson, 552 A.2d 1075, 1089 (Pa. Super. 1988).

[38] Washington v. Texas, 388 U.S. 14, 16 (1967); see also Taylor v. Illinois, 484 U.S. 400 (1988).

[39] United States v. Cruz-Jiminez, 977 F.2d 95, 100 (3d Cir. 1992).

is otherwise required to be issued and enforced.[40]

Although the Supreme Court has stated that a defendant must show that a witness or evidence will be "material" as well as "favorable" in order for the Compulsory Process Clause to require a subpoena to issue,[41] the Court has not addressed the issue of whether the Brady doctrine's somewhat demanding "materiality" standard applies in the subpoena context -- as it does in the special situation involving the deportation of potential defense witnesses before the defense has a chance to subpoena them.[42] The lower courts are divided on the type of "materiality" required in the subpoena context.[43] Most appear to apply a "materiality" standard for subpoenas that is more akin to a traditional "relevancy" test -- namely, that a defendant's subpoena application make a plausible showing that the requested evidence or testimony is "relevant to any issue" and that the allegations in the subpoena

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[40] See, e.g., United States v. Hegwood, 562 F.2d 946, 952 (5th Cir. 1977). When an indigent defendant applies for issuance of a subpoena and payment of witness fees by the court, the defendant ordinarily may file his application in an *ex parte* manner and the trial court ordinarily should order the clerk of the court to seal the subpoena application and corresponding order issuing the subpoena. This is because requiring an indigent defendant to file an unsealed application and serve it on the prosecution would place him at a disadvantage (based on his poverty) because it would provide the prosecution with pretrial discovery of the defendant's trial strategy (which must be explained in the application). See, e.g., United States v. Hang, 75 F.3d 1275, 1281 (8th Cir. 1996). Equal protection of the laws is served by such an *ex parte* procedure because non-indigent defendants need not apply for issuance of a subpoena (without costs) from the court.

[41] Washington, 388 U.S. at 16-18.

[42] See Valenzuela-Bernal, 458 U.S. at 873 & n.9.

[43] Compare, e.g., Richmond v. Embry, 122 F.3d 866, 873 & n.5 (10th Cir. 1997) (applying the Brady-type "materiality" standard), with id. at 876-77 (Henry, J., concurring) (applying a more "traditional relevancy" standard of materiality); Arizona v. Carlos, 17 P.3d 118, 123 (Ariz. 2001) (same).

application are not "incredible on their face."[44]

A related issue arises when a defendant seeks to subpoena records in the possession of an agency (*e.g.,* Child Protective Services) which is obliged under a statute to keep the record confidential, and the agency seeks to quash the subpoena. In Pennsylvania v. Ritchie,[45] the Supreme Court held that, at least in situations when the defendant has only shown that the records in question "might" be favorable and material at trial, due process requires the trial court to examine the confidential records in chambers and make a determination whether any of the records are "material" within the meaning of the Brady doctrine.[46] The Court in Ritchie held that its decision was rooted in the Due Process Clause -- rather than in the Compulsory Process Clause -- because the defendant's subpoena was not aimed at specified evidence but was more exploratory in nature.[47] If the defendant in Ritchie had sought specified records known to exist (but nonetheless confidential under applicable law), presumably the Compulsory Process Clause's lesser standard of "materiality" would have applied instead.

2. Compulsory Process Issues During Trial

The Supreme Court has stated that the Compulsory Process Clause affords a criminal defendant two protections: (1) the right to compel favorable witnesses at trial, *i.e.*, the subpoena power; and (2) the right to actually "have the witness' testimony heard by the trier of fact," *i.e.*, to

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[44] See, e.g., United States v. Sims, 637 F.2d 625, 627-28 (9th Cir. 1980) (citing cases).

[45] 480 U.S. 39 (1987).

[46] Id. at 58.

[47] Id. at 56-57.

"put before a jury evidence that might influence the determination of guilt."[48] The latter is not absolute and will not be infringed during a trial if a trial court justifiably refuses to allow a defense witness to testify on the ground that the defense willfully violated a discovery rule or procedural rule (such as a rule requiring timely disclosure of all defense witnesses before trial).[49] In Taylor, the Court concluded that there was not a violation of the Compulsory Process Clause when a trial court refused to allow the defense to call a subpoenaed witness after finding that the defense intentionally violated such a state discovery rule by withholding the witness's name until the middle of the trial.[50] The Court has held, however, that not every violation of a state discovery or procedural rule will forfeit a defendant's right to call a subpoenaed witness; if a trial court's refusal to permit a favorable defense witness is "disproportionate" to the seriousness of the rule violation, then the Compulsory Process Clause will be violated.[51]

The Compulsory Process Clause also can be violated by a trial judge or prosecutor who unjustifiably intimidates a favorable defense witness from testifying.[52] In Webb, the trial court first advised a defense witness of his right against self-incrimination and then, without any basis to believe that the witness was about to commit perjury, warned the defense witness that if he lied the judge would personally refer his case to the grand jury. In response, the witness invoked his right

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[48] Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (citation and internal quotation marks omitted).

[49] Id.

[50] Id. at 410-18.

[51] Michigan v. Lucas, 500 U.S. 145, 151 (1991).

[52] Webb v. Texas, 409 U.S. 95 (1972) (per curiam).

to silence and refused to testify for the defense. The Supreme Court held that the "threatening" remarks of the trial judge violated the Confrontation Clause.[53] Since Webb, lower courts have held that trial judges and prosecutors are not strictly prohibited from advising potential defense witnesses about their right to silence nor about the possibility that they could be prosecuted for perjury if they lie under oath. Rather, if a judge or prosecutor has a "particular basis" to believe that the witness is about to lie, then such a admonition is permitted,[54] so long as it does not unduly interfere with the witness' free will.[55]

A related Compulsory Process issue that occasionally arises during a trial is whether the trial court or prosecution must grant a favorable defense witness some type of immunity if the witness invokes his right to silence under the Fifth Amendment, thereby refusing to testify for the defense. The United States Supreme Court has never addressed this issue,[56] but the majority of lower courts have held that no such forced immunity is constitutionally required where there is no prosecutorial misconduct related to the witness' decision to invoke his right to silence.[57] Some courts have left

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[53] Id. at 97-98.

[54] See, e.g., United States v. Smith, 997 F.2d 674, 679-80 (10th Cir. 1993) (permitting such an admonition where the court had a "particular basis" to do so).

[55] See, e.g., United States v. Arthur, 949 F.2d 211, 215-16 (6th Cir. 1991) (holding that Webb was violated where the trial judge not only advised a defendant of his right to silence but also stated that it would be "against [the witness'] interest" to testify).

[56] See Autry v. McKaskle, 465 U.S. 1085, 1087-88 & n.3 (1984) (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari).

[57] See, e.g., Curtis v. Duval, 124 F.3d 1, 9 (1st Cir. 1997); United States v. Whittington, 783 F.2d 1210, 1220 (5th Cir. 1986); State v. Axley, 646 P.2d 268, 273-74 (Ariz. 1982); but see Gov't of the Virgin Islands v. Smith, 615 F.2d 964, 974 (3d Cir. 1980) (requiring forced immunity where a defense witness is clearly "exculpatory" and "essential to the defense").

open the possibility, however, that in an exceptional situation -- when, for instance, the prosecution immunizes key prosecution witnesses, and a potential defense witness has strongly exculpatory testimony to offer that contradicts the prosecution witnesses but will not do so without immunity -- the Constitution would require immunity for the defense witness.[58]

The Supreme Court has not yet addressed the type of "materiality" that a defendant needs to show in order to prove a violation of the Compulsory Process Clause in the trial setting. Although the Court has stated that a defendant must show that a witness or evidence will be "material" as well as "favorable" in order for the Compulsory Process Clause to require a subpoena to issue,[59] the Court has not addressed the issue of whether the Brady doctrine's somewhat demanding "materiality" standard applies in the trial context -- as it does in the special *pretrial* situation involving the deportation of potential defense witnesses before the defense has a chance to interview them or subpoena them.[60] The lower courts are divided on the type of "materiality" required in the trial context.[61]

C. *Other Constitutional Evidentiary Issues*

1. Destroyed Evidence/Deported Witnesses

A possible due process claim arises when the prosecution (including law enforcement

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[58] See, e.g., United States v, Praetorius, 622 F.2d 1054, 1064 (2d Cir. 1979).

[59] Washington, 388 U.S. at 16-18.

[60] See Valenzuela-Bernal, 458 U.S. at 873 & n.9.

[61] Compare, e.g., Richmond v. Embry, 122 F.3d 866, 873 & n.5 (10th Cir. 1997) (applying the Brady-type "materiality" standard), with id. at 876-77 (Henry, J., concurring) (applying a more "traditional relevancy" standard of materiality); State v. Carlos, 17 P.3d 118, 123 (Ariz. 2001) (same).

officers) destroyed or failed to preserve potentially exculpatory evidence (*e.g.*, fingerprint evidence or DNA evidence). In such a situation -- where no one will ever know whether the destroyed evidence would have proven to be exculpatory -- the defendant is not entitled any remedy under the Constitution[61] unless he can show that the *potentially* exculpatory evidence was destroyed in "bad faith."[62] "Bad faith" is shown when "the police themselves by their conduct indicate that the evidence could [have] form[ed] a basis for exonerating the defendant."[63] Merely being negligent in allowing potentially exculpatory evidence to be destroyed is not tantamount to "bad faith."[64] Nor is the fact that the defense had filed a discovery motion requesting access to the evidence at the time of its destruction automatically a basis for finding bad faith.[65] Not surprisingly, the requirement that actual "bad faith" be shown erects a high hurdle for defendants and few defendants actually have prevailed in making this type of claim.[66]

If a defendant can show "bad faith," a court must decide on the appropriate remedy. In some situations, an outright dismissal of the charges may be the only equitable remedy where the bad-faith

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[61] While not constitutionally mandated, some courts have required the submission of "spoliation instructions" to juries when the prosecution or police have *negligently* destroyed potentially exculpatory evidence. See, e.g., State v. Fulminante, 975 P.2d 75, 93 (Ariz. 1999). Such instructions permit jurors to draw adverse inferences against the prosecution that the destroyed evidence would have been favorable to the defendant's case. Id.

[62] Arizona v. Youngblood, 488 U.S. 51 (1988); California v. Trombetta, 467 U.S. 479 (1984).

[63] Youngblood, 488 U.S. at 58.

[64] Id. at 57-58.

[65] Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam).

[66] See, e.g., United States v. Bohl, 25 F.3d 904 (10th Cir. 1994).

destruction of potentially exculpatory evidence entirely undermined the defendant's ability to mount a defense; in other cases, rather than dismiss the charges, courts will simply suppress evidence that the prosecution wishes to offer but that cannot be fairly rebutted by the defense because of the destruction of other evidence in the prosecution's possession.[67]

A related issue arises when the prosecution deports foreign witnesses before the defense has had the opportunity to interview them. This issue usually arises in the context of federal immigration prosecutions for alien-smuggling.[68] If the witnesses were deported before being interviewed by agents of the government -- and, thus, what the witnesses had to say is unknown -- then the Youngblood/Trombetta standard applies and "bad faith" must be shown.[69] However, if the witnesses were interviewed before being deported (usually by immigration officials) and a record of their statements exists, a court should dismiss the indictment if there is a "reasonable probability" (within the meaning of the Brady doctrine) that the deported witnesses' testimony would have exculpated the defendant at trial.[70] The lower courts are divided on whether "bad faith" must be shown in addition to a "reasonable probability" that the deported aliens' testimony would have exculpated the defendant at trial.[71] In view of the Supreme Court's repeated statement that "bad faith" need not be

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[67] See Trombetta, 467 U.S. at 487; see also United States v. Elliott, 83 F. Supp.2d 637, 649 (E.D. Va. 1999).

[68] United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

[69] United States v. Ramirez-Lopez, 315 F.3d 1143, 1165 & n.6 (9th Cir.) (Kozinski, J., dissenting), vacated, opinion withdrawn, and appeal dismissed, 327 F.3d 829 (9th Cir. 2003).

[70] Valenzuela-Bernal, 458 U.S. at 866.

[71] Compare United States v. Barajas-Chavez, 358 F.3d 1263, 1267-68 (10th Cir. 2004) ("bad faith" must be shown), with United States v. Dring, 930 F.2d 687, 694 n.7 (9th Cir. 1991) (bad faith irrelevant when deported aliens' testimony would have been favorable and material).

shown in the Brady context, it would appear that bad faith need not be shown when there is such a reasonable probability.[72] In other words, in such a situation, the constitutional issue is more akin to a classic Brady issue than a Trombetta/Youngblood issue; "bad faith" appears to be relevant only in the latter context.

2. Constitutional Right to Testify & Present Reliable Exculpatory Evidence

A criminal defendant has a constitutional right to testify in his own behalf at trial -- a right nowhere explicitly found in the Constitution but one that emanates from various provisions of the Bill of Rights.[73] That right is not absolute and may be outweighed by a countervailing governmental interest. For instance, with a sufficient showing that a defendant's post-hypnosis memory is unreliable, the prosecution can limit a defendant to testimony about his pre-hypnosis memory of the relevant events.[74] However, a state may not adopt a *per se* rule that prohibits all testimony by a defendant about post-hypnosis memory and, instead, must limit its prohibition to *unreliable* memory.[75]

The right to testify is a "personal" right which cannot be waived by defense counsel without the defendant's consent.[76] The lower courts are divided over whether a defendant must expressly consent on the record in order to validly waive his right to testify or whether, instead, a defendant's silent acquiescence in his attorney's statement that "the defense rests" (without having called the

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[72] See Ramirez-Lopez, 315 F.3d at 1165 & n.6 (Kozinski, J., dissenting).

[73] Rock v. Arkansas, 483 U.S. 44 (1987).

[74] Id. at 60-62.

[75] Id. at 62.

[76] Ward v. Sternes, 334 F.3d 696, 704-05 (7th Cir. 2003)

defendant to testify) is generally sufficient to waive the right (so long as the attorney had informed the defendant that it was his choice whether to testify and the defendant had stated that he did not wish to testify).[77]

Regardless of whether he testifies in his own behalf, a criminal defendant has a similar constitutional right to "present a defense" through other evidence.[78] However, like a defendant's right to testify in his own behalf, the right to present a defense is "subject to reasonable restrictions" if there is a sufficient countervailing governmental interest.[79] Thus, for example, in Scheffer, the Supreme Court held that a criminal defendant's right to present the favorable results of a polygraph examination did not violate the right to present a defense because polygraph tests have not yet been shown to be sufficiently reliable.[80] Conversely, application of a state's evidentiary rules that unreasonably excludes reliable exculpatory evidence would violate a defendant's right to present a

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[77] Brown v. Artuz, 124 F.3d 73, 78-79 (2d Cir. 1997) (discussing the conflicting lower court decisions).

[78] United States v. Scheffer, 523 U.S. 303, 308 (1998); Chambers v. Mississippi, 410 U.S. 284 (1973).

[79] Scheffer, 523 U.S. at 308. An issue that has not yet resulted in a majority of the Supreme Court reaching an agreement is whether a state categorically may prohibit a defendant from offering a particular type of evidence that is not unreliable but is, in the legislature's judgment, inadmissible based on public policy grounds -- such as voluntary intoxication -- to defeat an essential element of the prosecution's case. In Montana v, Egelhoff, 518 U.S. 37 (1996), the Justices split four to four on whether such a categorical restriction violated a defendant's constitutional right to present a defense. Compare id. at 39-56 (plurality op. of Scalia, J.), with id. at 61 (O'Connor, J., dissenting, joined by Stevens, Souter, & Breyer, JJ.). Justice Ginsburg concurred in the judgment on the ground that Montana's prohibition on a defendant's ability to offer evidence of voluntary intoxication to defeat a *mens rea* element was constitutionally permissible because it merely defined an essential *mens rea* element in a manner that made voluntary intoxication irrelevant under state law. Id. at 57 (Ginsburg, J., concurring in the judgment).

[80] Id. at 309-17.

defense.[81] The lower courts have grappled with applying the constitutional rule first announced in Chambers to a variety of state evidentiary rules.[82] The United States Supreme Court recently reaffirmed Chambers' holding in a case in which South Carolina courts refused to allow a defendant to offer reliable exculpatory evidence that established a third party's guilt.[83] The Court broadly held that a particular rule of evidence may not be applied "arbitrarily" so as to exclude reliable exculpatory evidence.[84] The Court also held that a rule of evidence may not be applied in a "disproportionate" manner with respect to a defendant's theory of the defense (i.e., the state's interest in excluding the defense's evidence must be "legitimate" and also must not be "disproportionate" to the defendant's legitimate need to introduce such evidence).[85]

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[81] Chambers, 410 U.S. at 302-03; see also Holmes v. South Carolina, 126 S. Ct. 1727 (2006).

[82] See, e.g., Rice v. McCann, 339 F.3d 546 (7th Cir. 2003) (holding that the state evidentiary rule at issue in that case did not violate Chambers); id. at 550-53 (Posner, J., dissenting) (contending that the state evidentiary rule violated Chambers).

[83] Holmes, 126 S. Ct. at 1732-33.

[84] Id.

[85] Id.