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The Sixth Amendment provides that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This clause was held binding upon the states in Pointer v. Texas, 380 U.S. 400 (1965). In addition, the right of confrontation is recognized in virtually all state constitutions. *See* 5 J. Wigmore, Evidence § 1397 (Chadbourn rev. 1974) (listing authorities). For example, the Ohio Constitution provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person . . . [and] to meet the witnesses face to face . . .." The Ohio Supreme Court, however, has shown no inclination to interpret the Ohio provision so as to afford greater confrontation protection than that required by the Sixth Amendment. *See* State v. Spikes, 67 Ohio St.2d 405, 423 N.E.2d 1122 (1981); State v. Madison, 64 Ohio St.2d 322, 415 N.E.2d 272 (1980).

The U.S. Supreme Court has underscored the importance of the Confrontation Clause on numerous occasions. In an early case, Kirby v. U.S., 174 U.S. 47 (1899), the Court referred to the confrontation clause as "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the States composing the Union." *Id.* at 55-56. *See also* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."). Because the right of confrontation is considered such a fundamental right, it has often been applied as an element of due process in noncriminal proceedings. *See* In re Gault, 387 U.S. 1 (1967) (juvenile delinquency adjudicatory hearings); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare termination hearings); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation hearings; conditional right of confrontation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation hearings; conditional right); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (denial of admission to bar); Greene v. McElroy, 360 U.S. 474 (1959) (security clearance revocation).

Notwithstanding the recognized importance of the Confrontation Clause, its scope as well as the values it seeks to protect remain subject to debate. This result is probably attributable to two factors. First, as Justice Harlan has pointed out, "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause," California v. Green, 399 U.S. 149, 173-74 (1970) (concurring opinion). *See also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim. L. Bull. 99, 104 (1972) ("The historical approach is peculiarly difficult as applied to the Sixth Amendment because a satisfactory history of the right of confrontation has yet to be written."). Second, the Supreme Court has only recently ventured into this area. The Court "decided its first confrontation case a century after the Sixth Amendment was adopted." *Id.* Moreover, the Court had little need to develop a comprehensive view of the right of confrontation prior to 1965, when the right was first applied to state trials in Pointer v. Texas, 380 U.S. 400 (1965). Prior to that time, the Court could resolve most "confrontation" issues on federal evidentiary grounds.

This article will examine the current status of the Confrontation Clause. The first part of the article considers the "right to be present," the right of cross-examination, and *Bruton* issues. The second part discusses the relationship between the right of confrontation and the hearsay rule.

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PRESENCE AT TRIAL

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970); *accord,* In re Oliver, 333 U.S. 257 (1948); Lewis v. U.S., 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."). *See also* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567, 569-74 (1978). Thus, it is a violation of the right of confrontation for the defendant to be absent during challenges to the jury, Lewis v. U.S., 146 U.S. 370 (1892), during the introduction of evidence, In re Oliver, 333 U.S. 370 (1948), and when additional jury instructions are given, State v. Grisafulli, 135 Ohio St. 87, 19 N.E.2d 645 (1939); Jones v. State, 26 Ohio St. 208 (1875).

A recent case involving the right to be present is U.S. v. Benefield, 593 F.2d 815 (8th Cir. 1979). In *Benefield* a videotape deposition of the prosecution's principal witness, a kidnap victim, was taken prior to trial. The deposition was used because the witness' psychiatrist testified that her "psychiatric problems were directly related to her abduction. He recommended that she not be required to testify or that circumstances less stressful than a trial courtroom be arranged." *Id.* at 817. The defendant was excluded from the room in which the deposition was taken, although he did observe the proceedings on a monitor and could interrupt the proceedings by using a buzzer, at which time his counsel could consult with him. The Eighth Circuit found this procedure infringed the defendant's right of confrontation:

> Basically the confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel. *Id.* at 821.

See also State v. Wilkinson, 64 Ohio St.2d 308, 415 N.E.2d 261 (1980); *Criminal Defendant Has Sixth Amendment Right to Physically Confront Witness at Video-Taped Deposition,* 1979 Wash. U.L.Q. 1106.

Waiver

The right to be present at trial may be waived, either expressly or by conduct. In Illinois v. Allen, 397 U.S. 337 (1970), the Supreme Court held that a defendant who disrupts a trial, making it "difficult or wholly impossible to carry on the trial," may be excluded, after warning, from the courtroom. Similarly, in Taylor v. U.S., 414 U.S. 17 (1973), the Court held that a defendant who voluntarily absented himself from his trial during a recess had waived his right to be present. *See also* Diaz v. U.S., 223 U.S. 442 (1912).

In *Taylor* the defendant argued that a voluntary absence cannot be construed as an effective waiver because it was not "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 19, *quoting* Johnson v. Zerbst, 304 U.S. 458 (1938). The court rejected this argument, which would have required a defendant to have been advised in advance of the consequences of absenting himself from trial. According to the Court, "[i]t is wholly incredible to suggest that petitioner . . . entertained any doubts about his right to be present at every stage of his trial." *Id.* at 20.

Several courts have also found a "waiver" where the defendant absents himself prior to trial but after arraignment. *See* U.S. v. Peterson, 524 F.2d 167 (4th Cir. 1975). *cert. denied sub. nom.*, Smith v. U.S., 424 U.S. 925 (1976); U.S. v. Tortora, 464 F.2d 1202 (2d Cir. 1972), *cert. denied sub. nom.*, Santora v. U.S., 409 U.S. 1063 (1972).

The right to be present has been codified in Federal Criminal Rule 43 and Ohio Criminal Rule 43. *See generally* 8B Moore's Federal Practice ch. 43 (1981); 2 O. Schroeder & L. Katz, Ohio Criminal Law, Crim. R. 43 (1980). *See also* R.C. 2945.16 (right to be present at jury view); Crim. R. 15 (right to be present at deposition).

RIGHT OF CROSS-EXAMINATION

In addition to ensuring a defendant's right to be present, the Confrontation Clause guarantees the defendant the right to cross-examine the "witnesses against him." *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the [Confrontation] clause hold that a primary interest secured by it is the right of cross-examination."). Brookhart v. Janis, 384 U.S. 1, 3 (1966) ("a denial of cross-examination without a waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.").

Denial of Right to Cross-Examine

The Supreme Court has reviewed several cases in which it has found a complete denial of the right of cross-examination. For example, in Douglas v. Alabama, 380 U.S. 415 (1965), the prosecution called a previously-convicted accomplice as a witness. When the witness refused to testify, asserting the privilege against self-incrimination, the prosecutor read the witness' prior confession which implicated the defendant, under the guise of refreshing the witness' recollection. The Supreme Court reversed.

> In the circumstances of this case, [the defendant's] inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of [the witness'] alleged statement, and [the witness'] refusal to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that [the witness] in fact made the statement. . . *Id.* at 419.

See also State v. Liberatore, 69 Ohio St.2d 583 (1982).

A similar denial of cross-examination is found in joint trials in which one defendant's confession implicating a codefendant is admitted. Although

the codefendant would be entitled to an instruction cautioning the jury to use the confession only in establishing the guilt of the defendant who made the confession, the Supreme Court has held that such an instruction is ineffective, and consequently, the non-confessing defendant's right of confrontation is denied — at least, where the confessing defendant does not take the stand. Bruton v. U.S., 391 U.S. 123 (1968); Nelson v. O'Neil, 402 U.S. 622 (1971); *but see,* Parker v. Randolph, 442 U.S. 62 (1979) (plurality opinion) (interlocking confessions). *See infra.*

Parker v. Gladden, 385 U.S. 363 (1966), illustrates another way in which a defendant's right of cross-examination may be denied. In *Parker* a bailiff assigned to a sequestered jury told one juror "Oh that wicked fellow, he is guilty" and another juror "[i]f anything is wrong (in finding petitioner guilty) the Supreme Court will correct it." *Id.* at 363-64. The Supreme Court reversed, finding a violation of the right of confrontation.

These cases can also be viewed as "hearsay" cases because they involve extrajudicial statements that the jury probably used for the truth of the assertions. Indeed, the Supreme Court has often relied on these cases in deciding hearsay-confrontation issues. On the other hand, these cases can also be viewed as "nonevidence" cases, situations in which the jury may have decided the case on evidence that was not admitted at trial. *See* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim. L. Bull. 99 (1972).

Curtailment of Cross-Examination

Cases recognizing a trial court's discretion in controlling the scope of cross-examination are common. *E.g.,* O'Brien v. Angley, 63 Ohio St.2d 159, 163, 407 N.E.2d 490, 493 (1980) ("The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge."); State v. Walker, 55 Ohio St.2d 208, 214, 378 N.E.2d 1049, 1052 (1978), *cert. denied*, 441 U.S. 924 (1979) ("The trial judge is posited with broad discretion in controlling cross-examination . . . .")

Nevertheless, there are a number of cases in which the Supreme Court has ruled that a defense counsel's cross-examination of prosecution witnesses had been unconstitutionally curtailed. The leading case is Davis v. Alaska, 415 U.S. 308 (1974). Because of a state statute protecting the confidentiality of juvenile adjudications, the defense in *Davis* was not permitted to elicit information about a key government witness' juvenile probationary status during cross-examination. According to the defense, the witness' probationary status raised the possibility of bias; that is, the witness was "subject to undue pressure from the police and made his identifications [of the defendant] under fear of possible probation revocation." *Id.* at 311. In an opinion written by Chief Justice Burger, the Court held that this restriction on the scope of cross-examination violated the defendant's right of confrontation. Although the Court recognized the legitimacy of the state's protective policy concerning juveniles, the Court found that the "State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

The Court had addressed similar issues in two earlier cases. In Smith v. Illinois, 390 U.S. 129 (1968), the defense was precluded from eliciting the true name and address of the prosecution's "principal witness" during cross-examination. The Court held that this limitation on cross-examination deprived the defendant of the right of confrontation. "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. In reaching its decision, the Court relied heavily on Alford v. U.S., 282 U.S. 687 (1931), decided almost forty years earlier. As in *Smith,* the defense in *Alford* was not permitted to examine a government witness about the witness' current residence. The Court held that this curtailment of cross-examination, which would have apparently established that the witness was in federal custody, was an abuse of discretion and prejudicial error.

See also State v. Faulkner, 56 Ohio St.2d 42, 46, 381 N.E.2d 934, 936 (1978) ("a defendant must have the opportunity to cross-examine all witnesses against him as a matter of right . . ."); State v. Hannah, 54 Ohio St.2d 84, 88, 374 N.E.2d 1359, 1362 (1978) ("Any abrogation of the defendant's right to a full and complete cross-examination of such witnesses is a denial of a fundamental right essential to a fair trial and is prejudicial per se."); State v. Gavin, 51 Ohio App.2d 49, 365 N.E.2d 1263 (1977).

Fifth Amendment Limitations

Cross-examination may be limited or completely cut off if a prosecution witness asserts the Fifth Amendment privilege against self-incrimination. Under these curcumstances, the defendant's right of confrontation conflicts with the witness' Fifth Amendment right. If the assertion of the privilege "precludes inquiry into the details of [the witness'] direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be struck in whole or in part." U.S. v. Cardillo, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *accord*, U.S. v. Demchak, 545 F.2d 1029, 1031 (5th Cir. 1977); U.S. v. Newman, 490 F.2d 139, 145-46 (3d Cir. 1974). *See also* Douglas v. Alabama, 380 U.S. 415 (1965).

Striking the direct examination, however, is not automatic. The courts have recognized a distinction between "direct" and "collateral" matters.

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear

only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. U.S. v. Cardillo, 316 F.2d 606, 611 (2nd Cir.), *cert. denied,* 375 U.S. 822 (1963).

Accord, U.S. v. Williams, 626 F.2d 697, 701-02 (9th Cir.), *cert. denied,* 449 U.S. 1020 (1980); Turner v. Fair, 617 F.2d 7, 9-11 (1st Cir. 1980). *See also* 3 D. Louisell & C. Mueller, Federal Evidence § 338 (1979); Anno., 55 A.L.R. Fed. 742 (1981).

The direct-collateral dichotomy, however, is an "often tenuous distinction." 3 J. Weinstein & M. Berger, Weinstein's Evidence 611-54 (1981). As one court has noted:

> But the line between "direct" and "collateral" is not clear, and the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony. Fountain v. U.S., 384 F.2d 624, 628 (5th Cir.), *cert. denied sub. nom.* Marshall v. U.S. 390 U.S. 1005 (1968).

Davis v. Alaska would seem to preclude the possibility of equating "collateral" matters with matters of credibility because *Davis* involved impeachment by bias, a matter of credibility. *See* U.S. v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied sub. nom.* Antone v. U.S., 445 U.S. 946 (1980) (bias not a collateral matter).

Another solution to the conflict between the defendant's right of confrontation and the witness' privilege against compulsory self-incrimination is the immunization of the witness. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 Stan. L. Rev. 1211, 1228-30 (1978). There is some judicial support for requiring immunity in situations in which a witness' Fifth Amendment claim interferes with an accused's ability to defend. *See* Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); U.S. v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975); State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 891 (1974). *See generally* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266 (1978); Comment, *Defense Witness Immunity and the Right to a Fair Trial,* 129 U. Pa. L. Rev. 377 (1980).

Rape Shield Laws

In recent years, most jurisdictions have adopted rape shield laws. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544, 592-602 (1980) (listing 46 jurisdictions). The purpose of these provisions is to protect the privacy of rape victims. This goal is accomplished by altering the common law rule which permitted the accused to introduce evidence of the victim's character for chastity on the issue of consent. *See* McDermott v. State, 13 Ohio St. 332 (1862); McCombs v. State, 8 Ohio St. 643 (1858.) Instead of permitting the automatic admission of such evidence, shield laws place both substantive and procedural limitations on the admissibility of evidence of a victim's prior sexual history.

Because these provisions may curtail a defendant's right to cross-examine the alleged victim and limit the admissibility of exculpatory evidence, a number of commentators have questioned the constitutionality of shield provisions—at least as applied in some circumstances. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544 (1980); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 Colum. L. Rev. 1, 52-69 (1977); Westen, *Compulsory Process II,* 74 Mich. L. Rev. 191, 208-213 (1975). Indeed, the federal shield statute explicitly recognizes that the admissibility of evidence of a victim's prior sexual activity may be "constitutionally required," Fed. R. Evid. 412(b)(1).

Constitutional attacks on the rape shield statutes center on two Supreme Court cases. One is Davis v. Alaska, 415 U.S. 308 (1974). As discussed above, the Court in *Davis* held that a statute excluding evidence of a prosecution witness' juvenile adjudication (a type of shield law) violated the defendant's right of confrontation.

The second Supreme Court case is Chambers v. Mississippi, 410 U.S. 284 (1973), in which the defendant was charged with the murder of a policeman. Another person, named McDonald, signed a statement admitting that it was he, not Chambers, who fired the fatal shots. McDonald made the same admission to three other persons. At a preliminary examination McDonald recanted, testifying that he had been pressured into signing the statement. McDonald was called by the defense at Chambers' trial and his out-of-court confession was introduced on direct examination. On cross-examination, the prosecution elicited the fact that McDonald had recanted. On redirect examination, the defense wanted to cross-examine McDonald as an adverse witness. The trial court refused to declare him as adverse witness. The court also ruled that the defense could not introduce McDonald's incriminating statements made to the three other persons. The court's rulings were based upon two evidentiary rules: the voucher rule, which precludes a party from impeaching its own witnesses, and the hearsay rule, which did not recognize an exception for declarations against penal interests. As the Court put it: "In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's 'party witness' or 'voucher rule' and its hearsay rule, he was unable to either cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Id.* at 294. The Court reversed, finding a due process violation. Part of the Court's opinion rested on a confrontation analysis – that the state's voucher rule precluded Chambers from effectively cross-examining McDonald. Thus, like *Davis v. Alaska, Chambers* can be viewed as a case in which the Confrontation Clause prevailed over a conflicting state evidentiary rule.

Despite these constitutional arguments, shield laws generally have been upheld. *See* Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982); Pratt v. Parratt, 615 F.2d 486, 487 (8th Cir. 1980); Rozell v. Estelle, 554 F.2d 229 (5th Cir. 1977); 23 C. Wright & K.

Graham, Federal Practice and Procedure 571 n. 53 (1980) (listing cases). Nevertheless, most commentators believe that "exclusion may violate the defendant's constitutional rights as applied in particular circumstances." *Id.* at 572. For example, in State v. Gardner, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979), the Ohio Supreme Court upheld the constitutionality of the Ohio rape shield statute as applied to that case. In a footnote, however, the Court noted: "We hasten to stress that our holding is limited to the particular application of R.C. 2907.02(D) to the facts in this case. Whether the statute could conceivably be applied so as to exclude arguably relevant evidence, we cannot now determine." *Id.* at 19 n. 2.

A few courts have found a constitutional violation where evidence of the alleged victim's prior sexual history has been excluded. For example, in State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975), the defense's theory was that the alleged victim, a young teenager, fabricated her testimony about having intercourse with the defendant because she believed that she was pregnant and was afraid to inform her mother of this fact. The court, applying *Davis v. Alaska,* held that the defendant's right of confrontation had been denied when the trial court precluded the defense from introducing evidence of the alleged victim's past sexual history to support this theory. *See also* State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976); People v. Mandel, 61 App. Div.2d 563, 403 N.Y.S.2d 63 (1978).

Other Privileges

Whether the right of confrontation may override other state evidentiary privileges is a matter of debate. *See* Hill, *Testimonial Privilege and Fair Trial,* 80 Colum. L. Rev. 1173 (1980); Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 U. Mich. J. L. Reform 372 (1981). Again, *Davis v. Alaska,* in which the Court held that the defendant's right of confrontation prevailed over the privilege of confidentiality of juvenile court records, is the critical case. Moreover, United States v. Nixon, 418 U.S. 683 (1974), contains dictum indicating that the Sixth Amendment, under some circumstances, overrides executive privilege. *Id.* at 711.

In several cases courts have held that the right of confrontation prevails over conflicting statutory privileges. For example, in Salazar v. State, 559 P.2d 66 (Alas. 1976), the Alaska Supreme Court held that the right of confrontation overrode the privilege for confidential communications between husband and wife. Similarly, in State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975), the Minnesota Supreme Court held the right of confrontation prevailed over the physician-patient privilege. *See also* People v. Sumpter, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sup. Ct. 1973) (Sixth Amendment prevails over confidentiality of state agency's personnel files.); Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska,* 73 Mich. L. Rev. 1465 (1975); Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges,* 30 Stan. L. Rev. 935 (1978).

Waiver

In Brookhart v. Janis, 384 U.S. 1 (1966), the Supreme Court considered the standard for determining a waiver of the right of confrontation and cross-examination. In *Brookhart* the defendant's counsel agreed to a procedure that is described as a "prima facie trial;" that is, he "agreed that the state need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any State's witnesses." *Id.* at 7. The record indicated that the defendant did not fully comprehend what a "prima facie trial" entailed. In reversing, the Supreme Court wrote:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constiutional rights . . . and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 . . .. *Id.* at 4.

The Court went on to find that the defendant neither personally waived his constitutional right to confront and cross-examine the witnesses against him, nor acquiesced in his lawyer's attempted waiver. The waiver standard adopted in *Brookhart* is a more stringent standard than the one adopted by the Court in the "right to be present" cases. *See supra.*

BRUTON V. UNITED STATES

Because the Supreme Court has decided a number of cases involving "*Bruton*" issues, this subject is treated separately in this section. In Bruton v. U.S., 391 U.S. 123 (1968), the Court considered the admissibility in a joint trial of the confession of one defendant that inculpated another defendant. In such a situation, the non-confessing defendant is entitled to a limiting instruction, cautioning the jury to use the confession in determining only the guilt of the confessing party. Prior to *Bruton,* the Court had held that such an instruction was adequate to protect the non-confessing codefendant. Delli Paoli v. U.S., 352 U.S. 232 (1957). In *Bruton,* however, the Court held that the limiting instruction was not sufficient. According to the Court,

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. 391 U.S. at 135-36.

Once the Court concluded that there existed a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt," it held that the admission of the nontestify-

ing codefendant's "confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

In subsequent decisions, the Court held *Bruton* applicable to state trials, Roberts v. Russell, 392 U.S. 293 (1968), and subject to the harmless error doctrine, Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972); Brown v. U.S., 411 U.S. 223 (1973). *See also* State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980).

Applicability of Bruton

There are a number of situations in which *Bruton* does not apply. First, *Bruton* applies only when the codefendant's confession is *not* admissible against the non-confessing defendant. In a footnote in *Bruton* the Court pointed out this limitation: "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id.* at 128 n. 3. Thus, if the confession falls within a recognized hearsay exception, such as the coconspirator exception, *see* Fed. R. Evid. 801(d)(2)(E); Ohio R. Evid. 801(D)(2)(e), *Bruton* would not apply. In such a case the confrontation issue is analyzed under a different standard. *See infra* (hearsay).

Second, the *Bruton* rationale would not appear to apply to bench trials. *See* U.S. v. Pinkney, 611 F.2d 176, 178 (7th Cir. 1979); Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969). Nevertheless, if in a bench trial the court does, in fact, use the confession in determining the guilt of the non-confessing defendant, *Bruton* applies. *See* U.S. v. Longee, 603 F.2d 1342, 1345 (9th Cir. 1979).

Third, if the codefendant testifies at trial, *Bruton* does not apply. In *Bruton* the codefendant did not testify. *See* 391 U.S. 136 ("The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."). If the codefendant testifies, however, the defendant has the opportunity to cross-examine the codefendant, thereby obviating the confrontation issue. The Supreme Court took this position in Nelson v. O'Neil, 402 U.S. 622 (1971). *See also* State v. Doherty, 56 Ohio App.2d 112, 381 N.E. 2d 960 (1978). The *Nelson* rationale is inapplicable where both defendants are represented by the same attorney because in such a case cross-examination of the testifying codefendant would present a conflict of interests. *See* Courtney v. U.S., 486 F.2d 1108 (9th Cir. 1973); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972).

Fourth, there is authority for the proposition that *Bruton* is inapplicable when both defendants have confessed, implicating each other ("interlocking confessions."). The Court considered, but did not resolve, this issue in Parker v. Randolph, 442 U.S. 62 (1979). The plurality opinion in *Parker* took the position that *Bruton* was not applicable to cases involving interlocking confessions. Only four Justices, however, joined in that position. Justice Blackmun concurred on harmless error grounds and Justice Powell did not participate in the decision. The lower courts have split on the issue. *See id.* at 68 n. 4 (listing cases).

Bruton could apply, however, to statements made by a codefendant in a *pro se* argument to a jury. U.S. v. Sacco, 563 F.2d 552 (2d Cir. 1977).

Avoiding the Bruton Issue

There are several ways in which the *Bruton* issue may be obviated. Separate trials avoid the problem raised in *Bruton* because the codefendant's confession would be inadmissible hearsay in the trial of the non-confessing defendant. Frequently, a motion to sever is based on this ground. *See generally* State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980); 8 Moore's Federal Practice ch. 14 (1978); 2 O. Schroeder & L. Katz, Ohio Criminal Law, Crim. 14 (1980).

Another way to avoid the *Bruton* issue is to delete or redact all references in the confession that relate to the codefendant. The *Bruton* Court recognized this possibility. *See* 391 U.S. at 134 n.10. *See also* State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24, 26 (1949). This procedure is not effective in many cases "since other testimony in the case may lead any juror inevitably to the conclusion that omitted names in the statement can only be the names of other codefendants sitting at the defense table." 1 D. Louisell & C. Mueller, Federal Evidence 337 (1977). *See also* Parker v. Randolph, 422 U.S. 62, 67 n. 3 (1979); Hodges v. Rose, 570 F.2d 643 (6th Cir.), *cert. denied,* 436 U.S. 909 (1978). Thus, the California Supreme Court has remarked: "By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established." People v. Aranda, 63 Cal.2d 518, 530, 407 P.2d 265, 273, 47 Cal. Rptr. 353, 361 (1965). In addition, "the confessing defendant may *himself* object to redaction, invoking the 'rule of completeness' and urging that deletions from his statement as read or presented to the jury distort the meaning of the portion offered in evidence." 1 D. Louisell & C. Mueller, *supra,* at 337-38.

Another remedy for avoiding *Bruton* is the empaneling of two juries, with only the appropriate jury present at the time the codefendant's confession is received. *See* U.S. v. Rimar, 558 F.2d 1271, 1273 (6th Cir. 1977); U.S. v. Rowan, 518 F.2d 685, 690 (6th Cir.), *cert. denied, sub. nom.* Jackson v. U.S., 423 U.S. 949 (1975); U.S. v. Sidman, 470 F.2d 1158, 1167-70 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973).

See generally 21 C. Wright & K. Graham, Federal Practice and Procedure § 5064 (1977); 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶105[04] (1981); Marcus, *The Confrontation Clause and Codefendants Confessions: The Drift from Bruton to Parker v. Randolph,* 1979 U.Ill. L.F. 559.

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THE RIGHT OF CONFRONTATION
Part I

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The Sixth Amendment provides that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This clause was held binding upon the states in Pointer v. Texas, 380 U.S. 400 (1965). In addition, the right of confrontation is recognized in virtually all state constitutions. *See* 5 J. Wigmore, Evidence § 1397 (Chadbourn rev. 1974) (listing authorities). For example, the Ohio Constitution provides: "In any trial, in any court, the party accused shall be allowed to appear and defend in person . . . [and] to meet the witnesses face to face . . .." The Ohio Supreme Court, however, has shown no inclination to interpret the Ohio provision so as to afford greater confrontation protection than that required by the Sixth Amendment. *See* State v. Spikes, 67 Ohio St.2d 405, 423 N.E.2d 1122 (1981); State v. Madison, 64 Ohio St.2d 322, 415 N.E.2d 272 (1980).

The U.S. Supreme Court has underscored the importance of the Confrontation Clause on numerous occasions. In an early case, Kirby v. U.S., 174 U.S. 47 (1899), the Court referred to the confrontation clause as "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the States composing the Union." *Id.* at 55-56. *See also* Pointer v. Texas, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."). Because the right of confrontation is considered such a fundamental right, it has often been applied as an element of due process in noncriminal proceedings. *See* In re Gault, 387 U.S. 1 (1967) (juvenile delinquency adjudicatory hearings); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare termination hearings); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation hearings; conditional right of confrontation); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation hearings; conditional right); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) (denial of admission to bar); Greene v. McElroy, 360 U.S. 474 (1959) (security clearance revocation).

Notwithstanding the recognized importance of the Confrontation Clause, its scope as well as the values it seeks to protect remain subject to debate. This result is probably attributable to two factors. First, as Justice Harlan has pointed out, "the Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause," California v. Green, 399 U.S. 149, 173-74 (1970) (concurring opinion). *See also* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim. L. Bull. 99, 104 (1972) ("The historical approach is peculiarly difficult as applied to the Sixth Amendment because a satisfactory history of the right of confrontation has yet to be written."). Second, the Supreme Court has only recently ventured into this area. The Court "decided its first confrontation case a century after the Sixth Amendment was adopted." *Id.* Moreover, the Court had little need to develop a comprehensive view of the right of confrontation prior to 1965, when the right was first applied to state trials in Pointer v. Texas, 380 U.S. 400 (1965). Prior to that time, the Court could resolve most "confrontation" issues on federal evidentiary grounds.

This article will examine the current status of the Confrontation Clause. The first part of the article considers the "right to be present," the right of cross-examination, and *Bruton* issues. The second part discusses the relationship between the right of confrontation and the hearsay rule.

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PRESENCE AT TRIAL

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. 337, 338 (1970); *accord,* In re Oliver, 333 U.S. 257 (1948); Lewis v. U.S., 146 U.S. 370, 372 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."). *See also* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L. Rev. 567, 569-74 (1978). Thus, it is a violation of the right of confrontation for the defendant to be absent during challenges to the jury, Lewis v. U.S., 146 U.S. 370 (1892), during the introduction of evidence, In re Oliver, 333 U.S. 370 (1948), and when additional jury instructions are given, State v. Grisafulli, 135 Ohio St. 87, 19 N.E.2d 645 (1939); Jones v. State, 26 Ohio St. 208 (1875).

A recent case involving the right to be present is U.S. v. Benefield, 593 F.2d 815 (8th Cir. 1979). In *Benefield* a videotape deposition of the prosecution's principal witness, a kidnap victim, was taken prior to trial. The deposition was used because the witness' psychiatrist testified that her "psychiatric problems were directly related to her abduction. He recommended that she not be required to testify or that circumstances less stressful than a trial courtroom be arranged." *Id.* at 817. The defendant was excluded from the room in which the deposition was taken, although he did observe the proceedings on a monitor and could interrupt the proceedings by using a buzzer, at which time his counsel could consult with him. The Eighth Circuit found this procedure infringed the defendant's right of confrontation:

> Basically the confrontation clause contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition allowing the accused to face the witness, assist his counsel, and participate in the questioning through his counsel. *Id.* at 821.

See also State v. Wilkinson, 64 Ohio St.2d 308, 415 N.E.2d 261 (1980); *Criminal Defendant Has Sixth Amendment Right to Physically Confront Witness at Video-Taped Deposition,* 1979 Wash. U.L.Q. 1106.

Waiver

The right to be present at trial may be waived, either expressly or by conduct. In Illinois v. Allen, 397 U.S. 337 (1970), the Supreme Court held that a defendant who disrupts a trial, making it "difficult or wholly impossible to carry on the trial," may be excluded, after warning, from the courtroom. Similarly, in Taylor v. U.S., 414 U.S. 17 (1973), the Court held that a defendant who voluntarily absented himself from his trial during a recess had waived his right to be present. *See also* Diaz v. U.S., 223 U.S. 442 (1912).

In *Taylor* the defendant argued that a voluntary absence cannot be construed as an effective waiver because it was not "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 19, *quoting* Johnson v. Zerbst, 304 U.S. 458 (1938). The court rejected this argument, which would have required a defendant to have been advised in advance of the consequences of absenting himself from trial. According to the Court, "[i]t is wholly incredible to suggest that petitioner . . . entertained any doubts about his right to be present at every stage of his trial." *Id.* at 20.

Several courts have also found a "waiver" where the defendant absents himself prior to trial but after arraignment. *See* U.S. v. Peterson, 524 F.2d 167 (4th Cir. 1975). *cert. denied sub. nom.*, Smith v. U.S., 424 U.S. 925 (1976); U.S. v. Tortora, 464 F.2d 1202 (2d Cir. 1972), *cert. denied sub. nom.*, Santora v. U.S., 409 U.S. 1063 (1972).

The right to be present has been codified in Federal Criminal Rule 43 and Ohio Criminal Rule 43. *See generally* 8B Moore's Federal Practice ch. 43 (1981); 2 O. Schroeder & L. Katz, Ohio Criminal Law, Crim. R. 43 (1980). *See also* R.C. 2945.16 (right to be present at jury view); Crim. R. 15 (right to be present at deposition).

RIGHT OF CROSS-EXAMINATION

In addition to ensuring a defendant's right to be present, the Confrontation Clause guarantees the defendant the right to cross-examine the "witnesses against him." *See* Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the [Confrontation] clause hold that a primary interest secured by it is the right of cross-examination."). Brookhart v. Janis, 384 U.S. 1, 3 (1966) ("a denial of cross-examination without a waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.").

Denial of Right to Cross-Examine

The Supreme Court has reviewed several cases in which it has found a complete denial of the right of cross-examination. For example, in Douglas v. Alabama, 380 U.S. 415 (1965), the prosecution called a previously-convicted accomplice as a witness. When the witness refused to testify, asserting the privilege against self-incrimination, the prosecutor read the witness' prior confession which implicated the defendant, under the guise of refreshing the witness' recollection. The Supreme Court reversed.

> In the circumstances of this case, [the defendant's] inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of [the witness'] alleged statement, and [the witness'] refusal to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that [the witness] in fact made the statement. . . *Id.* at 419.

See also State v. Liberatore, 69 Ohio St.2d 583 (1982).

A similar denial of cross-examination is found in joint trials in which one defendant's confession implicating a codefendant is admitted. Although

the codefendant would be entitled to an instruction cautioning the jury to use the confession only in establishing the guilt of the defendant who made the confession, the Supreme Court has held that such an instruction is ineffective, and consequently, the non-confessing defendant's right of confrontation is denied — at least, where the confessing defendant does not take the stand. Bruton v. U.S., 391 U.S. 123 (1968); Nelson v. O'Neil, 402 U.S. 622 (1971); *but see,* Parker v. Randolph, 442 U.S. 62 (1979) (plurality opinion) (interlocking confessions). *See infra.*

Parker v. Gladden, 385 U.S. 363 (1966), illustrates another way in which a defendant's right of cross-examination may be denied. In *Parker* a bailiff assigned to a sequestered jury told one juror "Oh that wicked fellow, he is guilty" and another juror "[i]f anything is wrong (in finding petitioner guilty) the Supreme Court will correct it." *Id.* at 363-64. The Supreme Court reversed, finding a violation of the right of confrontation.

These cases can also be viewed as "hearsay" cases because they involve extrajudicial statements that the jury probably used for the truth of the assertions. Indeed, the Supreme Court has often relied on these cases in deciding hearsay-confrontation issues. On the other hand, these cases can also be viewed as "nonevidence" cases, situations in which the jury may have decided the case on evidence that was not admitted at trial. *See* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One,* 8 Crim. L. Bull. 99 (1972).

Curtailment of Cross-Examination

Cases recognizing a trial court's discretion in controlling the scope of cross-examination are common. *E.g.,* O'Brien v. Angley, 63 Ohio St.2d 159, 163, 407 N.E.2d 490, 493 (1980) ("The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge."); State v. Walker, 55 Ohio St.2d 208, 214, 378 N.E.2d 1049, 1052 (1978), *cert. denied*, 441 U.S. 924 (1979) ("The trial judge is posited with broad discretion in controlling cross-examination . . . .")

Nevertheless, there are a number of cases in which the Supreme Court has ruled that a defense counsel's cross-examination of prosecution witnesses had been unconstitutionally curtailed. The leading case is Davis v. Alaska, 415 U.S. 308 (1974). Because of a state statute protecting the confidentiality of juvenile adjudications, the defense in *Davis* was not permitted to elicit information about a key government witness' juvenile probationary status during cross-examination. According to the defense, the witness' probationary status raised the possibility of bias; that is, the witness was "subject to undue pressure from the police and made his identifications [of the defendant] under fear of possible probation revocation." *Id.* at 311. In an opinion written by Chief Justice Burger, the Court held that this restriction on the scope of cross-examination violated the defendant's right of confrontation. Although the Court recognized the legitimacy of the state's protective policy concerning juveniles, the Court found that the "State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

The Court had addressed similar issues in two earlier cases. In Smith v. Illinois, 390 U.S. 129 (1968), the defense was precluded from eliciting the true name and address of the prosecution's "principal witness" during cross-examination. The Court held that this limitation on cross-examination deprived the defendant of the right of confrontation. "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. In reaching its decision, the Court relied heavily on Alford v. U.S., 282 U.S. 687 (1931), decided almost forty years earlier. As in *Smith,* the defense in *Alford* was not permitted to examine a government witness about the witness' current residence. The Court held that this curtailment of cross-examination, which would have apparently established that the witness was in federal custody, was an abuse of discretion and prejudicial error.

See also State v. Faulkner, 56 Ohio St.2d 42, 46, 381 N.E.2d 934, 936 (1978) ("a defendant must have the opportunity to cross-examine all witnesses against him as a matter of right . . ."); State v. Hannah, 54 Ohio St.2d 84, 88, 374 N.E.2d 1359, 1362 (1978) ("Any abrogation of the defendant's right to a full and complete cross-examination of such witnesses is a denial of a fundamental right essential to a fair trial and is prejudicial per se."); State v. Gavin, 51 Ohio App.2d 49, 365 N.E.2d 1263 (1977).

Fifth Amendment Limitations

Cross-examination may be limited or completely cut off if a prosecution witness asserts the Fifth Amendment privilege against self-incrimination. Under these curcumstances, the defendant's right of confrontation conflicts with the witness' Fifth Amendment right. If the assertion of the privilege "precludes inquiry into the details of [the witness'] direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be struck in whole or in part." U.S. v. Cardillo, 316 F.2d 606, 611 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *accord*, U.S. v. Demchak, 545 F.2d 1029, 1031 (5th Cir. 1977); U.S. v. Newman, 490 F.2d 139, 145-46 (3d Cir. 1974). *See also* Douglas v. Alabama, 380 U.S. 415 (1965).

Striking the direct examination, however, is not automatic. The courts have recognized a distinction between "direct" and "collateral" matters.

> In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear

only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. U.S. v. Cardillo, 316 F.2d 606, 611 (2nd Cir.), *cert. denied,* 375 U.S. 822 (1963).

Accord, U.S. v. Williams, 626 F.2d 697, 701-02 (9th Cir.), *cert. denied,* 449 U.S. 1020 (1980); Turner v. Fair, 617 F.2d 7, 9-11 (1st Cir. 1980). *See also* 3 D. Louisell & C. Mueller, Federal Evidence § 338 (1979); Anno., 55 A.L.R. Fed. 742 (1981).

The direct-collateral dichotomy, however, is an "often tenuous distinction." 3 J. Weinstein & M. Berger, Weinstein's Evidence 611-54 (1981). As one court has noted:

> But the line between "direct" and "collateral" is not clear, and the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness' direct testimony. Fountain v. U.S., 384 F.2d 624, 628 (5th Cir.), *cert. denied sub. nom.* Marshall v. U.S. 390 U.S. 1005 (1968).

Davis v. Alaska would seem to preclude the possibility of equating "collateral" matters with matters of credibility because *Davis* involved impeachment by bias, a matter of credibility. *See* U.S. v. Diecidue, 603 F.2d 535 (5th Cir. 1979), *cert. denied sub. nom.* Antone v. U.S., 445 U.S. 946 (1980) (bias not a collateral matter).

Another solution to the conflict between the defendant's right of confrontation and the witness' privilege against compulsory self-incrimination is the immunization of the witness. *See* Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity,* 30 Stan. L. Rev. 1211, 1228-30 (1978). There is some judicial support for requiring immunity in situations in which a witness' Fifth Amendment claim interferes with an accused's ability to defend. *See* Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); U.S. v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975); State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 891 (1974). *See generally* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266 (1978); Comment, *Defense Witness Immunity and the Right to a Fair Trial,* 129 U. Pa. L. Rev. 377 (1980).

Rape Shield Laws

In recent years, most jurisdictions have adopted rape shield laws. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544, 592-602 (1980) (listing 46 jurisdictions). The purpose of these provisions is to protect the privacy of rape victims. This goal is accomplished by altering the common law rule which permitted the accused to introduce evidence of the victim's character for chastity on the issue of consent. *See* McDermott v. State, 13 Ohio St. 332 (1862); McCombs v. State, 8 Ohio St. 643 (1858.) Instead of permitting the automatic admission of such evidence, shield laws place both substantive and procedural limitations on the admissibility of evidence of a victim's prior sexual history.

Because these provisions may curtail a defendant's right to cross-examine the alleged victim and limit the admissibility of exculpatory evidence, a number of commentators have questioned the constitutionality of shield provisions—at least as applied in some circumstances. *See* Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. Pa. L. Rev. 544 (1980); Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 Colum. L. Rev. 1, 52-69 (1977); Westen, *Compulsory Process II,* 74 Mich. L. Rev. 191, 208-213 (1975). Indeed, the federal shield statute explicitly recognizes that the admissibility of evidence of a victim's prior sexual activity may be "constitutionally required," Fed. R. Evid. 412(b)(1).

Constitutional attacks on the rape shield statutes center on two Supreme Court cases. One is Davis v. Alaska, 415 U.S. 308 (1974). As discussed above, the Court in *Davis* held that a statute excluding evidence of a prosecution witness' juvenile adjudication (a type of shield law) violated the defendant's right of confrontation.

The second Supreme Court case is Chambers v. Mississippi, 410 U.S. 284 (1973), in which the defendant was charged with the murder of a policeman. Another person, named McDonald, signed a statement admitting that it was he, not Chambers, who fired the fatal shots. McDonald made the same admission to three other persons. At a preliminary examination McDonald recanted, testifying that he had been pressured into signing the statement. McDonald was called by the defense at Chambers' trial and his out-of-court confession was introduced on direct examination. On cross-examination, the prosecution elicited the fact that McDonald had recanted. On redirect examination, the defense wanted to cross-examine McDonald as an adverse witness. The trial court refused to declare him as adverse witness. The court also ruled that the defense could not introduce McDonald's incriminating statements made to the three other persons. The court's rulings were based upon two evidentiary rules: the voucher rule, which precludes a party from impeaching its own witnesses, and the hearsay rule, which did not recognize an exception for declarations against penal interests. As the Court put it: "In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's 'party witness' or 'voucher rule' and its hearsay rule, he was unable to either cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity." *Id.* at 294. The Court reversed, finding a due process violation. Part of the Court's opinion rested on a confrontation analysis – that the state's voucher rule precluded Chambers from effectively cross-examining McDonald. Thus, like *Davis v. Alaska, Chambers* can be viewed as a case in which the Confrontation Clause prevailed over a conflicting state evidentiary rule.

Despite these constitutional arguments, shield laws generally have been upheld. *See* Bell v. Harrison, 670 F.2d 656 (6th Cir. 1982); Pratt v. Parratt, 615 F.2d 486, 487 (8th Cir. 1980); Rozell v. Estelle, 554 F.2d 229 (5th Cir. 1977); 23 C. Wright & K.

Graham, Federal Practice and Procedure 571 n. 53 (1980) (listing cases). Nevertheless, most commentators believe that "exclusion may violate the defendant's constitutional rights as applied in particular circumstances." *Id.* at 572. For example, in State v. Gardner, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979), the Ohio Supreme Court upheld the constitutionality of the Ohio rape shield statute as applied to that case. In a footnote, however, the Court noted: "We hasten to stress that our holding is limited to the particular application of R.C. 2907.02(D) to the facts in this case. Whether the statute could conceivably be applied so as to exclude arguably relevant evidence, we cannot now determine." *Id.* at 19 n. 2.

A few courts have found a constitutional violation where evidence of the alleged victim's prior sexual history has been excluded. For example, in State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975), the defense's theory was that the alleged victim, a young teenager, fabricated her testimony about having intercourse with the defendant because she believed that she was pregnant and was afraid to inform her mother of this fact. The court, applying *Davis v. Alaska,* held that the defendant's right of confrontation had been denied when the trial court precluded the defense from introducing evidence of the alleged victim's past sexual history to support this theory. *See also* State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976); People v. Mandel, 61 App. Div.2d 563, 403 N.Y.S.2d 63 (1978).

Other Privileges

Whether the right of confrontation may override other state evidentiary privileges is a matter of debate. *See* Hill, *Testimonial Privilege and Fair Trial,* 80 Colum. L. Rev. 1173 (1980); Westen, *Reflections on Alfred Hill's "Testimonial Privilege and Fair Trial,"* 14 U. Mich. J. L. Reform 372 (1981). Again, *Davis v. Alaska,* in which the Court held that the defendant's right of confrontation prevailed over the privilege of confidentiality of juvenile court records, is the critical case. Moreover, United States v. Nixon, 418 U.S. 683 (1974), contains dictum indicating that the Sixth Amendment, under some circumstances, overrides executive privilege. *Id.* at 711.

In several cases courts have held that the right of confrontation prevails over conflicting statutory privileges. For example, in Salazar v. State, 559 P.2d 66 (Alas. 1976), the Alaska Supreme Court held that the right of confrontation overrode the privilege for confidential communications between husband and wife. Similarly, in State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975), the Minnesota Supreme Court held the right of confrontation prevailed over the physician-patient privilege. *See also* People v. Sumpter, 75 Misc.2d 55, 347 N.Y.S.2d 670 (Sup. Ct. 1973) (Sixth Amendment prevails over confidentiality of state agency's personnel files.); Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska,* 73 Mich. L. Rev. 1465 (1975); Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges,* 30 Stan. L. Rev. 935 (1978).

Waiver

In Brookhart v. Janis, 384 U.S. 1 (1966), the Supreme Court considered the standard for determining a waiver of the right of confrontation and cross-examination. In *Brookhart* the defendant's counsel agreed to a procedure that is described as a "prima facie trial;" that is, he "agreed that the state need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any State's witnesses." *Id.* at 7. The record indicated that the defendant did not fully comprehend what a "prima facie trial" entailed. In reversing, the Supreme Court wrote:

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constiutional rights . . . and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 . . .. *Id.* at 4.

The Court went on to find that the defendant neither personally waived his constitutional right to confront and cross-examine the witnesses against him, nor acquiesced in his lawyer's attempted waiver. The waiver standard adopted in *Brookhart* is a more stringent standard than the one adopted by the Court in the "right to be present" cases. *See supra.*

BRUTON V. UNITED STATES

Because the Supreme Court has decided a number of cases involving "*Bruton*" issues, this subject is treated separately in this section. In Bruton v. U.S., 391 U.S. 123 (1968), the Court considered the admissibility in a joint trial of the confession of one defendant that inculpated another defendant. In such a situation, the non-confessing defendant is entitled to a limiting instruction, cautioning the jury to use the confession in determining only the guilt of the confessing party. Prior to *Bruton,* the Court had held that such an instruction was adequate to protect the non-confessing codefendant. Delli Paoli v. U.S., 352 U.S. 232 (1957). In *Bruton,* however, the Court held that the limiting instruction was not sufficient. According to the Court,

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. 391 U.S. at 135-36.

Once the Court concluded that there existed a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt," it held that the admission of the nontestify-

ing codefendant's "confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Id.* at 126.

In subsequent decisions, the Court held *Bruton* applicable to state trials, Roberts v. Russell, 392 U.S. 293 (1968), and subject to the harmless error doctrine, Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972); Brown v. U.S., 411 U.S. 223 (1973). *See also* State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980).

Applicability of Bruton

There are a number of situations in which *Bruton* does not apply. First, *Bruton* applies only when the codefendant's confession is *not* admissible against the non-confessing defendant. In a footnote in *Bruton* the Court pointed out this limitation: "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id.* at 128 n. 3. Thus, if the confession falls within a recognized hearsay exception, such as the coconspirator exception, *see* Fed. R. Evid. 801(d)(2)(E); Ohio R. Evid. 801(D)(2)(e), *Bruton* would not apply. In such a case the confrontation issue is analyzed under a different standard. *See infra* (hearsay).

Second, the *Bruton* rationale would not appear to apply to bench trials. *See* U.S. v. Pinkney, 611 F.2d 176, 178 (7th Cir. 1979); Cockrell v. Oberhauser, 413 F.2d 256 (9th Cir. 1969). Nevertheless, if in a bench trial the court does, in fact, use the confession in determining the guilt of the non-confessing defendant, *Bruton* applies. *See* U.S. v. Longee, 603 F.2d 1342, 1345 (9th Cir. 1979).

Third, if the codefendant testifies at trial, *Bruton* does not apply. In *Bruton* the codefendant did not testify. *See* 391 U.S. 136 ("The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."). If the codefendant testifies, however, the defendant has the opportunity to cross-examine the codefendant, thereby obviating the confrontation issue. The Supreme Court took this position in Nelson v. O'Neil, 402 U.S. 622 (1971). *See also* State v. Doherty, 56 Ohio App.2d 112, 381 N.E. 2d 960 (1978). The *Nelson* rationale is inapplicable where both defendants are represented by the same attorney because in such a case cross-examination of the testifying codefendant would present a conflict of interests. *See* Courtney v. U.S., 486 F.2d 1108 (9th Cir. 1973); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972).

Fourth, there is authority for the proposition that *Bruton* is inapplicable when both defendants have confessed, implicating each other ("interlocking confessions."). The Court considered, but did not resolve, this issue in Parker v. Randolph, 442 U.S. 62 (1979). The plurality opinion in *Parker* took the position that *Bruton* was not applicable to cases involving interlocking confessions. Only four Justices, however, joined in that position. Justice Blackmun concurred on harmless error grounds and Justice Powell did not participate in the decision. The lower courts have split on the issue. *See id.* at 68 n. 4 (listing cases).

Bruton could apply, however, to statements made by a codefendant in a *pro se* argument to a jury. U.S. v. Sacco, 563 F.2d 552 (2d Cir. 1977).

Avoiding the Bruton Issue

There are several ways in which the *Bruton* issue may be obviated. Separate trials avoid the problem raised in *Bruton* because the codefendant's confession would be inadmissible hearsay in the trial of the non-confessing defendant. Frequently, a motion to sever is based on this ground. *See generally* State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980); 8 Moore's Federal Practice ch. 14 (1978); 2 O. Schroeder & L. Katz, Ohio Criminal Law, Crim. 14 (1980).

Another way to avoid the *Bruton* issue is to delete or redact all references in the confession that relate to the codefendant. The *Bruton* Court recognized this possibility. *See* 391 U.S. at 134 n.10. *See also* State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24, 26 (1949). This procedure is not effective in many cases "since other testimony in the case may lead any juror inevitably to the conclusion that omitted names in the statement can only be the names of other codefendants sitting at the defense table." 1 D. Louisell & C. Mueller, Federal Evidence 337 (1977). *See also* Parker v. Randolph, 422 U.S. 62, 67 n. 3 (1979); Hodges v. Rose, 570 F.2d 643 (6th Cir.), *cert. denied,* 436 U.S. 909 (1978). Thus, the California Supreme Court has remarked: "By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established." People v. Aranda, 63 Cal.2d 518, 530, 407 P.2d 265, 273, 47 Cal. Rptr. 353, 361 (1965). In addition, "the confessing defendant may *himself* object to redaction, invoking the 'rule of completeness' and urging that deletions from his statement as read or presented to the jury distort the meaning of the portion offered in evidence." 1 D. Louisell & C. Mueller, *supra,* at 337-38.

Another remedy for avoiding *Bruton* is the empaneling of two juries, with only the appropriate jury present at the time the codefendant's confession is received. *See* U.S. v. Rimar, 558 F.2d 1271, 1273 (6th Cir. 1977); U.S. v. Rowan, 518 F.2d 685, 690 (6th Cir.), *cert. denied, sub. nom.* Jackson v. U.S., 423 U.S. 949 (1975); U.S. v. Sidman, 470 F.2d 1158, 1167-70 (9th Cir. 1972), *cert. denied,* 409 U.S. 1127 (1973).

See generally 21 C. Wright & K. Graham, Federal Practice and Procedure § 5064 (1977); 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶105[04] (1981); Marcus, *The Confrontation Clause and Codefendants Confessions: The Drift from Bruton to Parker v. Randolph,* 1979 U.Ill. L.F. 559.