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COMPULSORY PROCESS, RIGHT TO

The first state to adopt a constitution following the Declaration of Independence (New Jersey, 1776) guaranteed all criminal defendants the same "privileges of witnesses" as their prosecutors. Fifteen years later, in enumerating the constitutional rights of accused persons, the framers of the federal BILL OF RIGHTS bifurcated what New Jersey called the "privileges of witnesses" into two distinct but related rights: the Sixth Amendment right of the accused "to be confronted with the witnesses against him," and his companion Sixth Amendment right to "compulsory process for obtaining witnesses in his favor." The distinction between witnesses "against" the accused and witnesses "in his favor" turns on which of the parties—the prosecution or the defense—offers the witness's statements in evidence as a formal part of its case. The CONFRONTATION clause establishes the government's obligations regarding the production and examination of witnesses whose statements the prosecution puts into evidence either in its case in chief or in rebuttal. The compulsory process clause establishes the government's obligations regarding the production and examination of witnesses whose statements the defendant seeks to put into evidence in his respective case.

The constitutional questions of compulsory process are twofold: What is "compulsory process?" Who are the "witnesses in his favor" for whom a defendant is entitled to compulsory process? The first is the easier of the two questions to answer. "Compulsory process" is a term of art used to denominate the state's coercive devices for locating, producing, and compelling evidence from witnesses. A common example is the SUBPOENA *ad testificandum*, a judicial order to a person to appear and testify as a witness, or suffer penalty of CONTEMPT for failing to do so. The right of compulsory process, in turn, is the right of a defendant to invoke such coercive devices at the state's disposal to obtain evidence in his defense. The right of compulsory process is therefore no guarantee that defendants will succeed in locating, producing, or compelling witnesses to testify in their favor; it does not entitle defendants to the testimony of witnesses who have died or otherwise become unavailable to testify through no fault of the state. Rather, it assures defendants that the state will make reasonable, good-faith efforts to produce such requested witnesses as are available to testify at trial. It gives a defendant access to the same range of official devices for producing available evidence on his behalf as the prosecution enjoys for producing available evidence on its behalf.

The more significant question for a defendant is: Who are the witnesses for whom a defendant is entitled to compulsory process? What law defines "witnesses in his favor"? Early commentators argued that a defendant might claim compulsory process only with respect to witnesses whose testimony had already been determined to be admissible, according to the governing rules of evidence in the respective jurisdiction. The Supreme Court in its seminal 1967 decision in *Washington v. Texas* rejected that narrow interpretation of "witnesses in his favor." The defendant had been tried in state court for a homicide that he asserted his accomplice alone had committed. The accomplice, who had already been convicted of committing the murder, had appeared at the defendant's trial and offered to testify that he, the accomplice, had acted alone in committing the homicide. The trial court, invoking a state rule of evidence disqualifying accomplices from testifying for one another in criminal cases, refused to allow the accomplice to testify in Washington's favor, and Washington was convicted. The Supreme Court held, first, that the compulsory process clause of the Sixth Amendment, like other clauses of the Sixth Amendment, had become applicable to the states through the DUE PROCESS clause of the FOURTEENTH AMENDMENT. Second, and more significantly, the Court held that the meaning of "witnesses in

[a defendant's] favor" was to be determined not by state or federal evidentiary standards of admissibility but by independent constitutional standards of admissibility. The compulsory process clause, it said, directly defines the "witnesses" the defendant is entitled to call to the witness stand. The state in *Washington* violated the defendant's right of compulsory process by "arbitrarily" preventing him from eliciting evidence from a person "who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."

Having determined that the compulsory process clause operates to render exculpatory evidence independently admissible on a defendant's behalf, the Court found *Washington* to be an easy case; the accomplice's proffered testimony was highly probative of the defendant's innocence, and the state's reasons for excluding it were highly attenuated. The Court has since invoked the authority of *Washington* to prohibit a trial judge from silencing a defense witness by threatening him with prosecution for perjury; to prohibit a state from invoking state HEARSAY RULES to exclude highly probative hearsay evidence in a defendant's favor; and to prohibit a trial judge from instructing a jury that defense witnesses are less worthy of belief than prosecution witnesses. Lower courts have invoked the compulsory process clause to compel the government to disclose the identity of informers; to compel defense witnesses to testify over claims of EVIDENTIARY PRIVILEGES; and to compel the prosecution to grant use IMMUNITY to defense witnesses asserting the RIGHT AGAINST SELF-INCRIMINATION. Although the Supreme Court in *Washington* did not define the outer limits of the compulsory process clause, it subsequently emphasized in *Chambers v. Mississippi* (1973) that "few rights are more fundamental than the right of an accused to present witnesses in his defense."

The companion clause to compulsory process, the confrontation clause, is the more widely known and the more often litigated of the Sixth Amendment witness clauses. The issues of confrontation can be grouped into two questions: What does the right "to be confronted" with witnesses mean? Who are the "witnesses against him" whom a defendant is entitled to confront? The answer to the first question has become relatively clear in recent years. Some commentators, including JOHN HENRY WIGMORE, once argued that the right to be "confronted" with witnesses meant no more than the right of a defendant to be brought face to face with the state's witnesses and to cross-examine them in accord with the ordinary (nonconstitutional) rules of evidence. The Supreme Court in 1974 rejected that position in *Davis v. Alaska.* Davis was convicted in a state court on the basis of testimony for the prosecution by a juvenile delinquent. On cross-examination, the witness refused to answer impeaching questions relating to his current delinquency status, invoking a state-law privilege for the confidentiality of juvenile court records. The Supreme Court held that the right to be confronted with prosecution witnesses creates an independent right in defendants, overriding state rules of evidence to the contrary, to elicit probative evidence from the state's witnesses by cross-examining them for exculpatory evidence they may possess. The Court has yet to decide how far the right to examine prosecution witnesses extends in circumstances other than those presented in *Davis.* The parallel right of compulsory process suggests, however, that the confrontation clause entitles a defendant to elicit by cross-examination from prosecution witnesses the same range of probative evidence that the compulsory process clause entitles him to elicit by direct examination from defense witnesses. Both witness clauses serve the same purpose—to enable an accused to defend himself by examining witnesses for probative evidence in his defense.

The more difficult, and still uncertain, question of confrontation is the meaning of "witnesses against him." A defendant certainly has a right to face and cross-examine whichever witnesses the prosecution actually produces in court. The question is whether the confrontation clause also defines the "witnesses" whom the prosecution must call to the witness stand. Does the confrontation clause specify which witnesses the prosecution must produce in person? Or does it merely entitle a defendant to confront whichever witnesses the prosecution in its discretion chooses to produce? These questions arise most frequently in connection with hearsay, that is, evidence whose probative value rests on the perception, memory, narration, or sincerity of a "hearsay declarant," someone not present in court—and thus not subject to cross-examination. Most jurisdictions address the hearsay problem by treating hearsay as presumptively inadmissible, subject to numerous exceptions for particular kinds of hearsay that are admissible either because of their reliability or for other reasons. The Sixth Amendment potentially comes into play whenever the prosecution invokes such an exception to introduce hearsay evidence against the accused. The confrontation question is whether the hearsay declarant is a "witness against" the defendant, within the meaning of the Sixth Amendment, who must be produced for cross-examination under oath and in the presence of the jury.

The Supreme Court held in *Bruton v. United States* (1968) that a prosecutor must produce in person a declarant whose out-of-court statements are being offered against an accused, not to prove him guilty but to spare the state the administrative burden of conducting separate

trials. The more difficult question is what other declarants are "witnesses" against an accused for constitutional purposes.

Some authorities have argued that hearsay declarants are always witnesses against the accused for Sixth Amendment purposes and, hence, must always be produced in person as a predicate for using their out-of-court statements against an accused, even if they are no longer available to appear or testify in person. Other authorities argue that hearsay declarants are never witnesses against the accused for Sixth Amendment purposes. The Supreme Court appears to have adopted a middle position. *Ohio v. Roberts* (1980) arguably held that although the state has a Sixth Amendment obligation to produce in person available hearsay declarants whom it can reasonably assume the defendant would wish to examine in person at the time their out-of-court statements are introduced into evidence, the state has no Sixth Amendment obligation to produce hearsay declarants who have become unavailable through no fault of the state. The state remains constitutionally free to use the hearsay statements of these declarants, provided that the statements possess sufficient "indicia of reliability" to afford the trier of fact "a satisfactory basis" for evaluating their truth—such as statements that fall within "firmly rooted hearsay exceptions." Significantly, the state's burden of production under the confrontation clause thus parallels its burdens under the compulsory process clause. Both clauses require the state to make reasonable, good-faith efforts to produce in person witnesses the defendant wishes to examine for evidence in his defense. Yet neither clause requires the state to produce witnesses whom a defendant is not reasonably expected to wish to examine for evidence in his defense, or witnesses who have died, disappeared, or otherwise become unavailable through no fault of the state.

Although the confrontation clause does not require the state to produce declarants who are unavailable to testify in person or whom a defendant is not reasonably expected to wish to examine in person, other constitutional provisions do regulate the state's use of their hearsay statements. *Manson v. Brathwaite* (1977) held that the due process clauses of the Fifth and Fourteenth Amendments require the state to ensure that every item of evidence it uses against an accused, presumably including hearsay evidence, possesses sufficient "features of reliability" to be rationally evaluated by the jury for its truth. The compulsory process clause, in turn, requires states to assist the defendant in producing every available witness, including available hearsay declarants, whose presence the defendant requests and who appears to possess probative evidence in his favor. It follows, therefore, that although the state has no obligation under the confrontation clause to produce hearsay declarants who are unavailable to testify in person, it has a residual due process obligation to ensure that their hearsay statements possess sufficient "indicia of reliability" to support a conviction of the accused. Although the state has no obligation under the confrontation clause to produce as prosecution witnesses available declarants whom it does not reasonably believe the defendant would wish to examine in person at the time their out-of-court statements are introduced into evidence, it has a residual obligation under the compulsory process clause to assist him in producing such declarants whenever the defendant indicates that he wishes to call and examine them as witnesses in his defense.

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