CONSTITUTIONAL LAW—SIXTH AMENDMENT—RIGHT TO CONFRONTATION PARAMOUNT TO ANONYMITY OF JUVENILE OFFENDERS

In *Davis v. Alaska*[1] the Supreme Court held that the sixth amendment right to confrontation is paramount to the state's interest in protecting the anonymity of juvenile offenders.

While on an errand near his home, Green, a 16 year old convicted juvenile offender, saw the defendant and another man disposing of what later proved to be contraband. Green subsequently became a crucial witness for the state. At trial the prosecution was granted a protective order which enjoined the defense from making any reference to Green's juvenile record. During the course of cross-examination, defense counsel attempted to attack Green's credibility by employing questions which contained veiled references to Green's previous "contacts" with the police.[2] Many of these questions were ruled out of order on the basis of the protective injunction. Several of the questions were allowed, however, and Green replied that he had had no previous experience with the police. The defendant was convicted, largely on the basis of Green's testimony.

In affirming the conviction, the Supreme Court of Alaska[3] concluded that the defense had been able to question the witness in sufficient detail to bring the possibility of bias to the jury's attention. In reversing, the United States Supreme Court[4] held that there had not been adequate cross-examination, that the defense was entitled to show that Green was biased because of his vulnerable status as a probationer, and that the petitioner's right to confrontation was preeminent to the state's policy of protecting juvenile offenders.

It has long been recognized that the right of an accused to confront the witnesses against him in a criminal trial involves two separate processes: (1) the right to physically confront witnesses, and (2) the right to cross-examination.[5] And, while it has been conceded that physical confrontation is of considerable value in furthering the truth-determination process, it has been the policy of the courts for the last 200 years to regard the sixth amendment right of confrontation as having been satisfied only when there has been an opportunity for cross-examination.[6] More simply, it can be said that the courts have uniformly held that the primary and essential

1. 415 U.S. 308 (1974).
2. *Id.* at 312-13.
3. Davis v. State, 499 P.2d 1025, 1036 (Alas. Sup. Ct. 1972).
4. 415 U.S. 308 (1974).
5. 5 J. WIGMORE, EVIDENCE §1395 (3d ed. 1940) [hereinafter cited as WIGMORE].
6. 5 WIGMORE §§1367, 1395.

purpose of confrontation is to secure the opportunity for cross-examination.[7]

The clearest statement of the Supreme Court's basic position on the importance of cross-examination appears in the early case of *Mattox v. United States*.[8] There the Court said that the primary object of confrontation is

> to prevent depositions or ex parte affidavits [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may . . . judge by his demeanor . . . whether he is worthy of belief.[9]

Courts since *Mattox* have stressed that cross-examination is essential because it is the primary vehicle for testing the accuracy, truthfulness, and value of testimonial evidence.[10] The most recent pronouncements of the present Court suggest it is even more firmly committed to this basic position.[11]

As fundamental as the concept of confrontation/cross-examination has become,[12] however, courts have long recognized a variety of restrictions on its use. In *Chambers v. Mississippi*, the Court said "the right of confrontation is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[13] *Chambers* dealt specifically with the problem of the admission of prior testimony given by witnesses who were under oath and subject to cross-examination. The Court allowed such testimony to be heard even though there had been no confrontation, finding that there were sufficient "indicia of reliability" for the jury to evaluate adequately the truth of the prior statements.[14] The Court has also permitted the use of a dying declaration against an accused.[15] At the state level, a majority of jurisdictions have recognized another legitimate interest before which the right of confrontation must bow—the state's interest in preserving the confidentiality of juvenile court records.[16]

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7. Douglas v. Alabama, 380 U.S. 415, 418 (1964).

8. 156 U.S. 237, 242-43 (1894).

9. *Id.* at 242.

10. State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934).

11. "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determination process." Chambers v. Mississippi, 410 U.S. 285, 294 (1973).

12. Pointer v. Texas, 380 U.S. 400 (1964).

13. 410 U.S. at 295.

14. *Id.* at 298. *See also* Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970).

15. 156 U.S. at 242-43.

16. Love v. State, 36 Ala. App. 693, 63 So.2d 285 (1953); Martinez v. Avila, 76 N.M. 372, 415 P.2d 59 (1966).

In *Davis v. State*[17] an Alaska trial court, citing the confidentiality provisions of the state's juvenile code, refused to permit the cross-examination of a juvenile about his prior record. The Alaska Juvenile Code is representative of the juvenile codes in force in every state.[18] The fundamental philosophy of juvenile law, as embodied in these formal codes, is that the delinquent, even one guilty of a serious violation of the law, is not to be considered or treated as a criminal. Juvenile behaviorial theory teaches that the best interests of both the young offender and the state are most effectively served by providing care, protection, and education.[19] Confidentiality provisons were included in the various codes as legislators realized that rehabilitation could be speeded if the young offender, following release, was given an opportunity to re-enter society free from the stigma of a conviction.[20] Confidentiality provisions assumed two forms: (1) a stipulation that juvenile adjudications were not to be considered convictions, and (2) a provision that the record of juvenile adjudications was not to be used against the juvenile in any proceeding except a delinquency proceeding.[21] Further confidentiality was assured by provisions for the sealing of juvenile records under certain circumstances.[22]

The juvenile court system survived constitutional challenge until 1967, when the Supreme Court, noting certain intolerable deficiencies in the operation of the juvenile courts, ordered large scale changes in juvenile court procedure.[23] In the process of condemning certain features of the juvenile system, however, the Supreme Court specifically commended several other aspects, including the confidentiality provisions:

> In any event, there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve a provision for the confidentiality of records of police contacts and court action relating to juveniles.[24]

As noted above, the Alaska trial court in *Davis v. State* relied heavily on state juvenile confidentiality provisions in refusing to permit a witness to be cross-examined about his prior juvenile record. The Alaska court's

17. 499 P.2d 1025 (Alas. Sup. Ct. 1972).

18. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 794-95 (1966).

19. *In re* Gault, 387 U.S. 1 (1967).

20. 1 WIGMORE §196(c). *See also* Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

21. *See, e.g.*, GA. CODE ANN. §24A-2401(a)(b) (Rev. 1971); United States v. King, 482 F.2d 454 (6th Cir. 1973); Hampton v. Stevenson, 210 Ga. 87, 78 S.E.2d 32 (1953).

22. GA. CODE ANN. §24A-3501 *et seq.* (Rev. 1971).

23. 387 U.S. 1 (1967). The Court has subsequently added: (a) the right to a hearing on the question of whether the juvenile has waived his right to be processed by juvenile authorties. Kent v. United States, 383 U.S. 541 (1966); and (b) the necessity of proof beyond a reasonable doubt. *In re* Winship, 397 U.S. 358 (1970).

24. 387 U.S. at 25.

decision was in accord with decisions in most other jurisdictions.[25] As interpreted by the majority of state courts, the confidentiality provisions[26] mean that prior juvenile adjudications are inadmissable as impeaching evidence in later prosecutions.[27] Many state courts, in rendering this interpretation, have pointed to the fact that under the rules of evidence, only a conviction can be used to impeach a witness, and since a juvenile adjudication is not a "conviction" by definition, it cannot be used to impeach.[28] Whatever the justification, the paramountcy of juvenile confidentiality provisions appeared to be well established in both federal and state courts until the Supreme Court decision in *Davis*.

In defending that decision, the Court, citing *Douglas v. Alabama*, pointed out that a defendant's right to confront the witnesses against him has been consistently construed as meaning primarily the right to cross-examine.[29] Alluding to "traditional" trial procedures, the Court stressed that cross-examination is particularly vital to the cause of truth because it is the principal means for testing the veracity of testimonial evidence.[30] The Court then pointed out that cross-examination typically involves the attempted impeachment of witnesses by the introduction of evidence of prior convictions, or of evidence of motive, bias, or prejudice.

A major part of the Court's argument was based on *Alford v. United States*.[31] In *Alford*, defense counsel attempted to impeach a witness by showing that the witness was serving time in a federal penitentiary at the time of trial and therefore could have been biased by expectations of immunity.[32] In reversing the lower court decision, the Supreme Court stated that the defendant had a right to impeach by showing bias and that the court had no obligation to protect a witness from being discredited on cross-examination.

Having sketched this background, the Court in *Davis* proceeded to analyze the trial record in detail, coming to the following conclusions: (1) Green's testimony was of crucial importance to the state's case; (2) Green,

25. 499 P.2d 1025 (Alas. Sup. Ct. 1972).

26. Pee v. United States, 274 F.2d 556 (D.C. Cir. 1959).

27. The specific language of the confidentiality provisions as it appears in the majority of codes is: "[T]he record of juvenile adjudications is not to be used against the juvenile in any other proceeding . . . ." *See, e.g.*, GA. CODE ANN. §24A-2401(b) (Rev. 1971).

28. Cotton v. United States, 355 F.2d 480 (10th Cir. 1966); People v. Peele, 12 N.Y.2d 890, 237 N.Y.S.2d 999, 188 N.E.2d 265 (1963); State v. Wilson, 1 Wash. App. 1001, 465 P.2d 413 (1970). *But see* People v. Davies, 34 Mich. App. 19, 190 N.W.2d 694 (1971), which holds that the statute which prohibits the use of the record of disposition of a charge of committing a juvenile offense against a child does not prohibit the use of the juvenile record to impeach credibility when he testifies against someone else.

29. Hudson v. United States, 387 F.2d 331 (5th Cir. 1967); Metropolitan Life Ins. Co. v. Saul, 189 Ga. 1, 5 S.E.2d 214 (1939).

30. 380 U.S. 415 (1964).

31. 415 U.S. at 316.

32. 282 U.S. 687 (1931).

under the shield of immunity afforded by the trial court's injunction against any reference to his prior record, had not been absolutely candid; (3) defense counsel's attempts to show that Green was biased had been frustrated by the injunction; and (4) petitioner Davis had been denied the right to confrontation.[33]

The Court dismissed the state's argument that publication of the juvenile record was contrary to state policy and the juvenile code; the Court felt the embarrassment to Green from publication of his juvenile records was merely temporary.[34] The Court summarized its argument by saying that while it was clear from the record that Davis' counsel had been permitted some latitude in asking Green whether he, Green, was prejudiced, it was also clear that counsel had been unable to establish a record as to why Green might have been expected to be prejudiced, and that it was this error which constituted denial of the right of confrontation.[35]

The United States Supreme Court's decision in *Davis* overturns a well-settled rule of juvenile law. The majority of courts, both state and federal, have construed the juvenile code confidentiality provisions to mean that prior juvenile adjudications are inadmissable as impeaching evidence.[37] The Supreme Court, per *Davis*, has now ruled that under certain circumstances, these lower court interpretations constitute a denial of a fundamental constitutional right.

Confidentiality provisions were included in the juvenile system in recognition of the devastating effects of a conviction on the juvenile offender's chances for community acceptance and in the hope that restricted access to juvenile records, by avoiding stigmatization, would encourage reassimilation and promote rehabilitation. In view of this basic national commitment,[37] it was distressing to see the Supreme Court in *Davis* dismiss the publication of witness Green's juvenile court record as a "temporary" embarrassment.[38] The opinion suggests either a failure on the part of the Court to understand and appreciate the realities of offender rehabilitation, or a disinclination to empathize with the basic aims of the juvenile system.

To be sure, the Court does not suggest that either the juvenile system or the confidentiality provisions should be abolished. On the contrary, the Court stated: "We do not challenge the state's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender."[39] Further, and possibly in anticipation

33. *Id.* at 688-89.
34. 415 U.S. at 314, 319.
35. *Id.* at 319.
36. *Id.* at 318.
37. See notes 16 and 28, *supra*. *See also In re* Smith, 637 Misc.2d 198, 310 N.Y.S.2d 617 (1970); Note, *Juvenile Delinquents: The Police, State Courts and Individual Justice*, 79 HARV. L. REV. 775, 799-800 (1966).
38. The Supreme Court has itself documented the effect. *See* 387 U.S. at 24.
39. 415 U.S. at 319.

of some disruption of trial procedures, the Court limits its holding to those instances in which the witness is crucial to the state's case.[40]

As well meaning as these efforts at attenuating the possibly disruptive effects of the holding may have been, however, the efforts must fall short because the guidelines for limiting the application of the holding give no clear indication as to when the wider latitude in cross-examination is to be permitted.[41] The guideline offered in *Davis* is contained in the words: "When serious damage to the strength of the State's case would have been a real possibility."[42] The problem with this test is in the interpretation of the words "serious damage." How serious is "serious" damage? Will the courts be able to interpret this phrase as the Supreme Court intends and still give maximum protection to those witnesses who are entitled to confidentiality?

A further disconcerting note is that the entire decision might easily have been avoided. One of the settled rules of appellate procedure is that the scope of cross-examination is to be left to the discretion of the trial judge.[43] In *Davis* the Court has taken the unusual step of reversing the discretionary ruling of the trial court that the witness Green had been cross-examined sufficiently concerning bias.[44] The immediate effect of this course of action, as the dissent in *Davis* points out, would appear to be to invite federal review of state trial judges' rulings on the limits of cross-examination.[45] Certainly litigants now have a basis for arguing that the previous limits on cross-examination should be expanded.

Finally, it is to be anticipated that in cases featuring witnesses with juvenile records, prosecutors may now find it necessary to decline prosecution in deference to the witnesses' chances for continued acceptance and viability in the community at large. To the extent that a greater number of guilty defendants will perhaps be allowed to remain at large as a result of this circumstance, it might be argued that *Davis*, rather than furthering the cause of justice, has actually somewhat retarded it.

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40. *Id.*

41. *Id.*

42. *Id.* The entire quote reads:

> Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry [questions as to prior police contact]. In this setting we conclude that the right to confrontation is paramount to the State's policy of protecting a juvenile offender.

43. United States v. Williams, 445 F.2d 421 (10th Cir. 1971); Hudson v. United States, 387 F.2d 331 (5th Cir. 1967).

44. 499 P.2d at 1036.

45. 415 U.S. at 321.