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Sixth and Fourteenth Amendments--A Defendant's Right to Disclosure of a State's Confidential Child Abuse Records

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SIXTH AND FOURTEENTH AMENDMENTS—A DEFENDANT'S RIGHT TO DISCLOSURE OF A STATE'S CONFIDENTIAL CHILD ABUSE RECORDS

Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987).

I. INTRODUCTION

In *Pennsylvania v. Ritchie*,[1] the United States Supreme Court severely limited a defendant's sixth amendment right to confront the witnesses against him.[2] A plurality of the Court[3] explained that the confrontation clause provides a defendant the right to physically face and cross-examine those who testify against him.[4] In *Davis v. Alaska*,[5] the Supreme Court held that this right to cross-examination was violated by a trial court's order prohibiting reference to a witness' juvenile police record.[6] The Supreme Court in *Ritchie*, however, refused to extend *Davis* to provide a defendant pre-trial access to confidential child abuse records for the impeachment of a witness' testimony.[7] The right to confront one's accusers, the Court concluded, is a trial right that is satisfied whenever a defendant has an opportunity to cross-examine a witness free of statutory or court-imposed restrictions.[8]

A majority of the *Ritchie* Court,[9] however, held that the defendant was entitled to the disclosure of material information contained

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1 107 S. Ct. 989 (1987).

2 The confrontation clause of the sixth amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

3 *See infra* note 62 and accompanying text.

4 *Ritchie*, 107 S. Ct. at 998 (plurality opinion). *See* Delaware v. Fensterer, 474 U.S. 15 (1985)(per curiam).

5 415 U.S. 308 (1974).

6 *Id.* at 318-20. The trial court's order was granted pursuant to an Alaska state statute. *Id.* at 311.

7 *Ritchie*, 107 S. Ct. at 999 (plurality opinion). Justice Blackmun did not join the Court's discussion of the confrontation clause.

8 *Id.* at 999-1000 (plurality opinion).

9 *See infra* note 60 and accompanying text.

within such a confidential file under the due process clause of the fourteenth amendment.[10] The Court noted that although a defendant is entitled to discover exculpatory information from the government, the defendant may not make the sole determination of what evidence is to be disclosed.[11] The Court recognized the compelling state interest in retaining the confidentiality of child abuse investigative files.[12] Rather than breaching this interest in confidentiality, the majority remanded the case and instructed the trial court to review the confidential file in camera and to release any material evidence to the defendant.[13]

This Note examines the *Ritchie* opinions and concludes that the plurality's refusal to grant disclosure under the confrontation clause of the sixth amendment represents an unjustified restriction of that constitutional guarantee. This Note argues that the confrontation clause should encompass pre-trial events that have an adverse effect on a defendant's ability to cross-examine witnesses at trial. Furthermore, this Note contends that the confrontation clause contemplates inquiries into the potential effectiveness of the opportunity for cross-examination to assure the defendant has a meaningful opportunity to impeach a witness' testimony.[14] Finally, this Note suggests that the Court properly remanded the case for an in camera review but should have limited the scope of the procedure to a search for any inconsistent prior statements of the witness.

II. Facts and Procedural History

In June of 1979, George Ritchie was charged with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor.[15] Ritchie's alleged victim was his thirteen-year-old daughter, who claimed that the sexual attacks had occurred at a rate of two to three times a week over a four-year period.[16] The charges against Ritchie stemmed from an attack on June 11, 1979, when the daughter was taken to the police by an aunt.[17] The daughter's case was

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10 *Ritchie*, 107 S. Ct. at 1001-02. The fourteenth amendment due process clause states in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

11 *Ritchie*, 107 S. Ct. at 1003.

12 *Id.* at 1003-04.

13 *Id.* at 1003. The majority stated that "[w]e find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the . . . files be submitted only to the trial court for *in camera* review." *Id.*

14 *See id.* at 1004 (Blackmun, J., concurring).

15 *Id.* at 994.

16 *Id.*

17 Commonwealth v. Ritchie, 324 Pa. Super. 557, 560, 472 A.2d 220, 222 (1984), *aff'd*, 509 Pa. 357, 502 A.2d 148 (1985), *rev'd in part* 107 S. Ct. 989 (1987).

subsequently turned over to Children and Youth Services (CYS).[18]

In the course of preparing his defense, Ritchie served CYS with a subpoena requesting access to the agency's file on his daughter's case.[19] CYS denied Ritchie and his attorney access to the file on the basis of the file's confidentiality.[20] Records compiled by CYS in the investigation of child abuse cases are privileged under Pennsylvania law, subject to several statutory exceptions.[21] One such confidentiality exception permits CYS to disclose reports to "[a] court of competent jurisdiction pursuant to a court order."[22]

At a pre-trial hearing held in chambers, Ritchie moved to have CYS sanctioned for the agency's failure to provide access to the subpoenaed records.[23] Ritchie argued that the records were necessary to his defense because they might contain the names of witnesses, medical records, and other unspecified evidence that would enable him to impeach or discredit the complainant.[24] The trial judge, however, relied upon CYS' representation that there were no medi-

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[18] *Ritchie*, 107 S. Ct. at 994. Children Youth Services (hereinafter CYS) is a protective service agency established by the Commonwealth of Pennsylvania to investigate cases of suspected child abuse and neglect. *Id.* The Agency was formerly designated as Child Welfare Services (CWS). Commonwealth v. Ritchie, 509 Pa. at 360 n.4, 502 A.2d at 149 n.4.

[19] *Ritchie*, 107 S. Ct. at 994. Ritchie requested any contents of the file concerning the charges against him and records allegedly made in 1978 after CYS conducted an investigation of potential child abuse against his daughter. *Id.* Although the earlier investigation occurred during the time period in which the attacks allegedly took place, no criminal charges stemming from the earlier investigation were filed against Ritchie. *Id.* at n.1.

[20] *Id.* at 994.

[21] *Id.*

[22] At the time of trial, the Pennsylvania statute provided:

> (a) [R]eports made pursuant to this act including but not limited to report summaries of child abuse . . . and written reports . . . as well as any other information obtained, reports written or photographs or x-rays taken concerning alleged instances of child abuse in the possession of the department, a county public child welfare agency or a child protective service shall be confidential and shall only be made available to:
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> (1) A duly authorized official of a child protective service in the course of his official duties.
>
> (2) A physician examining or treating a child or the director or a person specifically designated in writing by such director of any hospital or other medical institution where a child is being treated . . . .
>
> (3) A guardian ad litem for the child.
>
> (4) A duly authorized official of the department . . . .
>
> (5) A court of competent jurisdiction pursuant to a court order.

PA. STAT. ANN. tit. 11, § 2215 (Purdon Supp. 1975).

The law has subsequently been amended to provide further disclosure to the Pennsylvania Attorney General, county commissioners, and various law enforcement officials. *See* PA. STAT. ANN. tit. 11, § 2215 (Purdon Supp. 1987).

[23] *Ritchie*, 107 S. Ct. at 995.

[24] *Id.* The medical records requested by Ritchie were allegedly compiled during the 1978 CYS investigation. *Id. See supra* note 19.

cal records contained in the record.[25] The trial judge denied the motion to sanction CYS and declined to order the Agency to provide access to its file.[26]

At trial, the commonwealth's main witness was Ritchie's daughter.[27] Defense counsel was given the opportunity to impeach her testimony during cross-examination.[28] The trial court placed few limitations on the scope of cross-examination, allowing defense counsel to question the daughter on all aspects of the alleged attacks and her motivation for not reporting the abuse earlier.[29] At the conclusion of the trial, the jury found Ritchie guilty on all counts and the court sentenced him to three to ten years imprisonment.[30]

Ritchie appealed his conviction to the Pennsylvania Superior Court, contending that CYS' failure to disclose the contents of the file violated his sixth amendment right to confront witnesses against him.[31] The superior court agreed that his right of confrontation had been violated[32] and, accordingly, vacated the judgment and remanded the case for further proceedings.[33] The court held, however, that the commonwealth's interest in confidentiality outweighed Ritchie's right to obtain specific material not relevant to the charges against him.[34] The superior court instructed the trial court on remand to review the record in camera[35] to determine if

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25 *Ritchie*, 107 S. Ct. at 995. The trial judge acknowledged that he had not reviewed the entire CYS file. In fact, he indicated that he had not read 50 pages or more of the CYS record. *Id.* at n.3.

26 *Id.* at 995. The trial court issued an order stating that "the [c]ourt finds that no medical records are being held by the Child Welfare Services that would be to the benefit of the defendant in this case." Commonwealth v. Ritchie, 509 Pa. at 360, 502 A.2d at 149.

27 *Ritchie*, 107 S. Ct. at 995.

28 *Id.*

29 *Id.* The only limitations imposed by the trial judge were routine evidentiary rulings. *Id.*

30 *Id.*

31 Commonwealth v.Ritchie, 324 Pa. Super. at 564-65, 472 A.2d at 224. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added).

The sixth amendment is applicable to the states through the due process clause of the fourteenth amendment. *See* Washington v. Texas, 388 U.S. 14, 17-19 (1967); Pointer v. Texas, 380 U.S. 400, 403-06 (1965).

32 Commonwealth v. Ritchie, 324 Pa. Super. at 565, 472 A.2d at 225.

33 *Id.* at 568, 472 A.2d at 226.

34 *Id.* at 565, 472 A.2d at 225.

35 In camera is defined as "in chambers." In an in camera inspection, a trial judge

they contained any statements made by the daughter regarding the abuse and to disclose any such statements.[36] If no such statements were contained in the files, the trial court was instructed to reinstate the original sentence.[37] Additionally, the superior court indicated that although the CYS record was confidential, counsel should be allowed access to the file in order to argue the relevance of any statements released by the reviewing judge.[38] If the trial court held that the statements were relevant or that the error in denying access was not harmless, the superior court contended that the defendant should be granted a new trial.[39]

On appeal by the commonwealth, the Supreme Court of Pennsylvania agreed that the denial of access to the CYS file violated Ritchie's sixth amendment rights.[40] The court concluded that the commonwealth's interest in the confidentiality of the records did not outweigh the defendant's right to effectively confront and cross-examine witnesses.[41] The in camera review favored by the superior court was rejected as insufficient because such a review "den[ies] the opportunity to have the files reviewed with the eyes and perspective of an advocate."[42] Accordingly, the case was remanded to the trial

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will "inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use." BLACK'S LAW DICTIONARY 684 (5th ed. 1979).

36 Commonwealth v. Ritchie, 324 Pa. Super. at 567-68, 472 A.2d at 226. These statements were to be made available to Ritchie's counsel who would then have the opportunity to argue that the statements could have been used to impeach the witness' testimony. The commonwealth would then be permitted to argue that the failure to provide counsel with these statements at trial was harmless error. *Id.*

37 *Id.*

38 *Id.* This right of inspection was limited, however. The court stated that counsel's access was strictly for the purpose of arguing relevance and that counsel was "otherwise bound by the confidential nature of the material in the record." *Id.*

39 *Id.*

40 Commonwealth v. Ritchie, 509 Pa. 357, 502 A.2d 148 (1985).

41 *Id.* at 367, 502 A.2d at 153. The court also stated that "[w]hen materials gathered become an arrow of inculpation, the person inculpated has a fundamental constitutional right to examine the provenance of the arrow and he who aims it." *Id.* The court analyzed Ritchie's sixth amendment rights generally without separately analyzing the confrontation and compulsory process clause components. In fact, the Pennsylvania Supreme Court did not fully develop a compulsory process clause analysis. In the majority opinion, Justice Powell chose to apply the doctrine of compulsory process under a fourteenth amendment due process analysis rather than under the sixth amendment. *See infra* text accompanying notes 87-97 for a discussion of Justice Powell's treatment of the compulsory process clause.

42 *Id.* at 367, 502 A.2d at 153. The court was not entirely unsympathetic to the privacy concerns of CYS. It cautioned that the trial court should take "appropriate steps to insure against the improper dissemination of sensitive material gleaned from the files." *Id.* at 368 n.16, 502 A.2d at 153 n.16 (citing *In re* Pittsburgh Action Against Rape, 494 Pa. 15, 28-29, 428 A.2d 126, 132-33 (1981)). Suggested steps in protecting file confidentiality included "fashioning of appropriate protective orders, or conducting the pro-

court so that Ritchie's counsel could be granted access to the file.[43]

The United States Supreme Court granted certiorari[44] to determine if a state's interest in the confidentiality of its child abuse investigation files outweighed a criminal defendant's right under the sixth and fourteenth amendments to discover favorable evidence contained in those files.[45]

III. THE SIXTH AMENDMENT CONFRONTATION CLAUSE: AN OVERVIEW

The sixth amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[46] As the Supreme Court explained in *Mattox v. United States*:

> The primary object of the [confrontation clause] . . . was to prevent depositions or *ex parte* affidavits . . . 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 look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[47]

The Court has emphasized that the primary interest secured by this right of face-to-face confrontation is an "adequate opportunity for cross-examination."[48]

Generally, cases arising under the confrontation clause have fallen into two broad categories: "cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination."[49]

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ceedings *in camera*." *Id.* at 368 n.16, 502 A.2d at 153 n.16 (citing *In re* Pittsburgh Action Against Rape, 494 Pa. at 28-29, 428 A.2d at 132-33).

43 Commonwealth v. Ritchie, 509 Pa. at 367-68, 502 A.2d at 153. At this point, the parties would have the opportunity to argue the relevance of presenting evidence obtained from the file or the harmlessness of the trial court's error in preventing access. *Id.* at 368, 502 A.2d at 153-54.

44 Pennsylvania v. Ritchie, 106 S. Ct. 2244 (1986).

45 *Ritchie*, 107 S. Ct. at 994.

46 U.S. CONST. amend. VI. See *supra* note 31 for the text of the sixth amendment.

47 156 U.S. 237, 242-43 (1895).

48 Douglas v. Alabama, 380 U.S. 415, 418 (1965). Cross-examination in a criminal trial proceeding is crucial to the reliability of the outcome. Pointer v. Texas, 380 U.S. 400, 405 (1965). The Court recently stated in Kentucky v. Stincer, 107 S. Ct. 2658 (1987), that "[t]he right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Id.* at 2662.

49 Delaware v. Fensterer, 474 U.S. 15, 18 (1985)(per curiam). The Court in *Fensterer*

Cases involving the introduction of hearsay evidence exemplify the first category of confrontation clause cases. For instance, the defendant's confrontation right was violated in *Pointer v. Texas*[50] when the prosecution introduced a transcript of pre-trial testimony without affording the defendant an opportunity to cross-examine the witness.[51] These cases, however, do not ultimately conclude that all hearsay evidence violates the defendant's sixth amendment rights. The Court has recognized exceptions, such as in *Ohio v. Roberts*,[52] in which an out-of-court statement by an unavailable witness satisfied the demands of the confrontation clause because defense counsel fully cross-examined the witness at the time the statement was made.[53]

In the second category of cases, the defendant's right to confront his accusers is violated by restrictions placed on the scope of cross-examination either by operation of law or by a trial court's rulings. The Court's decision in *Davis v. Alaska*[54] is an excellent illustration of this second category. In *Davis*, a court order issued pursuant to a state statute prohibiting the admission of juvenile police records precluded the defendant from demonstrating the witness' bias during cross-examination.[55] The Court held that the inability to question the witness regarding his source of bias com-

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rejected the confrontation clause claim because "[t]his case falls in neither category." *Id.* at 19. The *Fensterer* defendant alleged that his rights under the confrontation clause were violated when his attempt to cross-examine an expert witness was impeded by the expert's failure to recall the underlying tests on which he had based his conclusion. *Id.* at 17-18. The Court held that in such cases the defendant's rights are unaffected because "the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused." *Id.* at 20. The Court determined that the defendant adequately demonstrated the witness' loss of memory to the jury and impeached the witness' conclusion through the testimony of his own expert witnesses. *Id.*

50 380 U.S. 400 (1965).

51 *Pointer*, 380 U.S. at 407. *See* Barber v. Page, 390 U.S. 719 (1967)(confrontation clause violated because admitted out-of-court testimony not subject to pre-trial cross-examination).

52 448 U.S. 56 (1980).

53 *Id.* at 70-73. Similarly, the Court concluded in California v. Green, 399 U.S. 149 (1970), that the defendant's confrontation clause rights were not violated by the admission of prior inconsistent statements made by the witness "as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *Id.* at 158. In fact, the Court in Mattox v. United States, 156 U.S. 237, 244 (1985), held that the admission of testimony of a deceased witness from a previous trial did not violate the confrontation clause if "[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination." *Id.*

54 415 U.S. 308 (1974).

55 *Id.* at 311-14.

promised the defendant's sixth amendment rights.[56] Similarly, in *Delaware v. Van Arsdall*,[57] the trial court prohibited the defendant from questioning a witness about the state's dismissal of pending charges against the latter in exchange for the witness' promise to discuss the case against the defendant with the prosecutor.[58] The Court concluded that "[b]y thus cutting off all questioning about an event . . . that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the trial court's ruling violated respondent's right secured by the Confrontation Clause."[59]

IV. JUSTICE POWELL'S MAJORITY AND PLURALITY OPINIONS

Justice Powell wrote the majority opinion in *Pennsylvania v. Ritchie*, in which the Court affirmed the Pennsylvania Supreme Court's ruling that Ritchie was entitled to know whether relevant information existed in the CYS file.[60] The Court, therefore, remanded the case for further proceedings.[61] A plurality of the Court, however, disagreed with the Pennsylvania Supreme Court, holding that Ritchie's rights under the sixth amendment confrontation clause did not guarantee him access to CYS' records.[62] Rather, using a due process analysis, the majority held that relevant information contained in the file should be given to the defendant only when the information is material to his defense.[63] In order to preserve the commonwealth's interest in protecting the confidentiality of the CYS file, this right of review was limited by the majority to an in camera inspection of the file by the trial court.[64]

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56 *Id.* at 318. The impeachment of the witness' testimony was critical to the defendant's case. The juvenile witness was on probation for burglary at the time of trial. The defense argued that the witness' testimony could be affected by the fear that he might be suspected of participating in the crime. The defense contended that the witness was under pressure from the police and identified the defendant out of fear of potential probation revocation. *Id.* at 311.

57 106 S. Ct. 1431 (1986).

58 *Id.* at 1434.

59 *Id.* at 1435.

60 *Ritchie*, 107 S. Ct. at 1004. The Court's opinion was joined in full by Chief Justice Rehnquist and Justices White and O'Connor and in part by Justice Blackmun. *Id.* at 994. Justice Blackmun joined in all but the plurality's discussion of the sixth amendment confrontation clause. *Id.* at 1004 (Blackmun, J., concurring). *See infra* notes 107-24 and accompanying text for a discussion of Justice Blackmun's concurring decision.

61 *Ritchie*, 107 S. Ct. at 1004.

62 *Id.* at 1000 (plurality opinion). Justice Powell was joined in his plurality opinion by Chief Justice Rehnquist and Justices White and O'Connor.

63 *Id.* at 1002.

64 *Id.* at 1004.

A. SUPREME COURT JURISDICTION

Initially, the majority addressed Ritchie's claim that the Court lacked proper jurisdiction.[65] Ritchie argued that the Pennsylvania Supreme Court's decision was not a "final judgment or decree."[66] Justice Powell observed that, ordinarily, judgments are not final if state courts must conduct further proceedings before the federal issues are resolved.[67] However, he also contended that the principles of finality have not been construed rigidly.[68] Justice Powell focused on the Court's decision in *Cox Broadcasting Corp. v. Cohn*,[69] which recognized that there are at least four scenarios in which jurisdiction would be proper despite the existence of further state proceedings.[70] He noted that the Court in *Cox Broadcasting* stated that one such exception exists " 'where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.' "[71]

Justice Powell concluded that *Ritchie* fell under this exception because the sixth amendment issue would not survive the proceedings on remand.[72] The constitutional issue, he determined, would

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[65] *Id.* at 996.

[66] *Id.* The finality doctrine is codified in 28 U.S.C. § 1257 (1982), which states in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> . . . .
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> (3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . . .

[67] *Ritchie*, 107 S. Ct. at 996. *See* Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 123-27 (1945)("[I]t has been a marked characteristic of the federal judicial system not to permit an appeal until all litigation has been concluded in the court of first instance."); Market St. Ry. v. Railroad Comm'n of Cal., 324 U.S. 548, 551 (1945)("Finality must be in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein."). Ritchie contended that the judgment in this case was not final because additional proceedings were to be conducted in the Pennsylvania courts. Ritchie noted that at a minimum the trial court must conduct an in camera review of the file and hear arguments by the parties as to whether the failure to disclose the contents of the files constituted prejudicial error. If the trial court found the error to be prejudicial, Ritchie would be granted a new trial. Ritchie further explained that because the sixth amendment issue might yet become moot, the Court should not review the claim until all proceedings in the Pennsylvania courts were completed. *Ritchie*, 107 S. Ct. at 996.

[68] *Ritchie*, 107 S. Ct. at 996.

[69] 420 U.S. 469 (1975).

[70] *Id.* at 477.

[71] *Ritchie*, 107 S. Ct. at 996 (quoting *Cox Broadcasting*, 420 U.S. at 481).

[72] *Id.* at 996-97. Justice Powell discussed three procedural situations and concluded that the sixth amendment issue would be resolved and that the commonwealth would be

be moot since the Pennsylvania Supreme Court had already decided the sixth amendment question in favor of Ritchie.[73] He concluded that without Supreme Court review, the Commonwealth's interest in the file's confidentiality would be irreparably lost.[74] The majority, therefore, rejected Ritchie's claim that the Court lacked proper jurisdiction.[75]

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unable to raise the issue on appeal. *Id.* In scenario one, if on remand the trial court found that the nondisclosure was harmless or that the file did not contain relevant information, the judgment would be reinstated and the commonwealth would have no basis on which to seek an appeal. Justice Powell maintained that even if Ritchie appealed his conviction under this scenario, the constitutional claim would be preserved only if the commonwealth filed a cross-petition. *Id.* at 997. He noted that in the past the Court has considered cases in this procedural posture to be sufficiently final. *Id. See e.g.*, New York v. Quarles, 467 U.S. 649, 651 n.1 (1984); South Dakota v. Neville, 459 U.S. 553, 558 n.6 (1983).

Under scenario two, if the trial court found the nondisclosure to be prejudicial and if upon retrial the commonwealth prevailed on the merits, the same conditions as scenario one would result. Similarly, if Ritchie prevailed, the commonwealth would be precluded from appeal by the double jeopardy clause. *Ritchie*, 107 S. Ct. at 997. *See* California v. Stewart, 384 U.S. 436, 498 n.71 (1966)(decided with Miranda v. Arizona).

Justice Powell recognized a third scenario, suggested by Justice Stevens in his dissent in *Ritchie*. *Ritchie*, 107 S. Ct. at 997 n.7. See *infra* note 154 for an analysis of Justice Stevens' position. In this scenario, if the trial court found prejudicial error, the commonwealth could take an immediate appeal of the order. *See* 42 PA. CONS. STAT. ANN., PA. R.A.P., Rule 311(a)(5)(Purdon Supp. 1987). Justice Powell noted the dissent's argument that the claim is not final because the commonwealth could raise the sixth amendment issue once again on appeal. *Ritchie*, 107 S. Ct. at 997 n.7. However, Justice Powell was unpersuaded that the constitutional issues would necessarily survive for the Court's review. *Id.* For instance, the superior court could reverse and find the nondisclosure harmless, thus preventing further review. In the alternative, if the superior court agreed that the error was prejudicial, the court would allow the commonwealth to again raise the sixth amendment issue. Justice Powell argued that in order to reach the Supreme Court, the commonwealth would have to raise an appeal at each level of the Pennsylvania court system. Such an approach, in his estimation, would be wastful because the issue had been definitively decided by the Pennsylvania Supreme Court. *Id.* He concluded that in this situation "the justifications for the finality doctrine—efficiency, judicial restraint, and federalism—would be ill served by another round of litigation on an issue that has been authoratatively decided by the highest state court." *Id.* (citation omitted).

[73] *Ritchie*, 107 S. Ct. at 997 n.7.

[74] *Id.* at 997. Justice Powell observed that although this concern is not dispositive of the jurisdiction issue, the Court has concluded that " 'statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.' " *Id.* at 997-98 (quoting Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)).

[75] *Id.* at 998. Justice Powell distinguished *Ritchie* from the Court's decision in United States v. Ryan, 402 U.S. 530 (1971). *Ritchie*, 107 S. Ct. at 998 n.8. He noted that the *Ryan* Court refused to review a district court's denial of the respondent's motion to quash a subpoena of business records. *Id.* Justice Powell explained that the *Ryan* Court had rejected the respondent's assertion that an immediate review was necessary to avoid disclosing protected materials because the respondent had the option of finalizing the issue by ignoring the subpoena. *Id.*

The *Ritchie* majority observed that the *Ryan* Court's concern with the " 'necessity for

B. THE CONFRONTATION CLAUSE

Justice Powell, representing a plurality of the Court, rejected the Pennsylvania Supreme Court's broad interpretation of the confrontation clause.[76] He initially observed that the confrontation clause provides two types of protections for defendants: the right to confront witnesses and the right to conduct cross-examination.[77] Justice Powell distinguished Ritchie's claim from these two basic protections because Ritchie did not allege that he was denied the opportunity to confront or cross-examine his daughter.[78] The plurality stressed that the confrontation clause does not apply to allegations that the defendant was denied the opportunity to *effectively* cross-examine the witness.[79]

The plurality observed that in accepting Ritchie's argument, the Pennsylvania Supreme Court relied in part on the United States Supreme Court's decision in *Davis v. Alaska*.[80] In *Davis*, the Supreme Court held that a trial judge's restriction of the questioning of a witness regarding his juvenile criminal record represented a violation of the confrontation clause.[81] Justice Powell refused to ex-

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expedition in the administration of the criminal law' . . . would be undermined if all pretrial orders were immediately appealable." *Id.* (quoting *Ryan*, 402 U.S. at 533). The Court's implicit assumption in *Ryan*, Justice Powell contended, was that unless the party opposing discovery was willing to be held in contempt, the issue was not important enough to justify interrupting the proceeding for an appeal. *Ritchie* was different, Justice Powell explained, because the trial had concluded, and, therefore, the interest in expediting criminal proceedings would not be undermined. The majority maintained that judicial economy would be enhanced by hearing the present appeal rather than by requiring Ritchie to raise fruitless appeals in the Pennsylvania courts. *Id.*

76 *Ritchie*, 107 S. Ct. at 998 (plurality opinion). Justice Blackmun did not join in this portion of the opinion and filed a separate concurring opinion. *See infra* text accompanying notes 107-124.

77 *Id.* at 998 (plurality opinion)(citing Delaware v. Fensterer, 474 U.S. 15 (1985)(per curiam)).

78 *Id.* at 998 (plurality opinion).

79 *Id.* at 998-99 (plurality opinion). Ritchie argued that he did have the opportunity to cross-examine his daughter but that his sixth amendment right to confront witnesses was nonetheless undermined. He contended that without access to the CYS file he could not effectively question her during cross-examination. *Id.* at 998 (plurality opinion). Ritchie asserted that access to the file would have enabled him to establish weaknesses in her testimony and to discredit her. *Id.* at 998-99 (plurality opinion). *See* Davis v. Alaska, 415 U.S. 308, 316-18 (1974)(reference to restricted juvenile police records during cross-examination is necessary to impeach witness' reliability). Because impeachment of key witnesses will often determine the outcome of a case, Ritchie concluded that by denying him the opportunity to effectively cross-examine and impeach the witness, his sixth amendment rights had been violated. *Ritchie*, 107 S. Ct. at 999 (plurality opinion). *See* Napue v. Illinois, 360 U.S. 264, 269 (1959)("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . .").

80 415 U.S. 308 (1974).

81 *Id.* at 318-20. The Court found this restriction to be a sixth amendment violation

tend *Davis* to compel discovery of privileged information whenever a defendant asserts a need before trial to review such information for the purpose of impeaching a witness' testimony at trial.[82] Such an extension, in Justice Powell's estimation, would effectively transform the confrontation clause into a rule of pre-trial discovery despite the Court's earlier rulings to the contrary.[83] He stated, instead, that " 'the Confrontation Clause only guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' "[84] The plurality contended that the constitutional violation in *Davis* stemmed not from the confidentiality of the records but rather from the restriction of defense counsel's ability " 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' "[85] In *Ritchie*, Justice Powell concluded, the right to confrontation would have been violated if the trial judge had restricted defense counsel's cross-examination of the daughter, but it was not violated because CYS refused to disclose its file.[86]

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despite the state's legitimate interest in the confidentiality of its juvenile criminal records. *Id.*

82 *Ritchie*, 107 S. Ct. at 999 (plurality opinion).

83 *Id.* Justice Powell indicated that the confrontation clause provides merely a *trial* right designed to prevent restrictions improperly limiting the scope of questions posed during cross-examination. *Id.* (plurality opinion). *See* California v. Green, 399 U.S. 149, 157 (1970)("It is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."); Barber v. Page, 390 U.S. 719, 725 (1968)("The right to confrontation is basically a trial right."). For a discussion of *Green* and *Barber* see *infra* text accompanying notes 185-94.

84 *Ritchie*, 107 S. Ct. at 999 (plurality opinion)(quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(per curiam)(emphasis in original)). *See also* Ohio v. Roberts, 448 U.S. 56, 73 n.12 (1980)(should not inquire into effectiveness of cross-examination except in the most extraordinary of circumstances). In *Fensterer*, the Court found that the accused's right to confrontation was not implicated because the "trial court did not limit the scope or nature of defense counsel's cross-examination in any way." *Fensterer*, 474 U.S. at 19. For a discussion of *Fensterer*, see *supra* note 49. Justice Powell further contended that *Fensterer* was in complete accord with the Court's earlier decisions in which it found a confrontation clause violation only if there was a statutory or court-imposed infringement on the scope of questioning. *Ritchie*, 107 S. Ct. at 1000 (plurality opinion). *See, e.g.*, Delaware v. Van Arsdall, 106 S. Ct. 1431 (1986)(restriction of questioning about a potential source for witness' bias violates confrontation clause); *Davis v. Alaska*, 415 U.S. 308, 318 (1974)(restriction on reference to juvenile police record of witness interferes with defendant's ability to effectively cross-examine); Chambers v. Mississippi, 410 U.S. 284 (1973)(inability to impeach own witness who recanted earlier admissions deprives defendant of a fair trial); Smith v. Illinois, 390 U.S. 129 (1968)(restriction of questions regarding a witness' true identity violates the defendant's sixth amendment rights); Douglas v. Alabama, 380 U.S. 415 (1965)(inability to cross-examine co-defendant violates confrontation clause).

85 *Ritchie*, 107 S. Ct. at 1000 (plurality opinion)(quoting *Davis*, 415 U.S. at 318).

86 *Id.* (plurality opinion).

C. THE COMPULSORY PROCESS AND DUE PROCESS CLAUSES

Justice Powell, writing for a majority of the Court, confirmed the Pennsylvania Supreme Court's ruling that nondisclosure of CYS files violated the sixth amendment's guarantee of compulsory process.[87] After reviewing the sparse history of the compulsory process clause, the majority concluded that "[o]ur cases establish, at a minimum, that criminal defendants have the right to the Government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."[88] Justice Powell observed, however, that the Supreme Court has never explicitly held that the clause "guarantees the right to discover the *identity* of witnesses, or to require the Government to produce exculpatory evidence."[89] He noted that the Court has traditionally reviewed such claims under the due process clause of the fourteenth amendment.[90] As such, Justice Powell refrained from examining Ritchie's claim under the less certain compulsory process clause framework, but instead evaluated the claim under a more traditional due process analysis.[91]

Justice Powell indicated that it is well settled that the due process clause obligates the government to turn over evidence that is either favorable to the defendant or material to a determination of his or her guilt.[92] The majority noted that the Court has determined that evidence is material if " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of

87 *Id.* Ritchie argued that the failure to disclose the files prohibited him from discovering the names of potentially favorable witnesses and other evidence contained in the file. Justice Powell noted that although the Pennsylvania Supreme Court's ruling on compulsory process was unclear, the Pennsylvania court implicitly concluded that the compulsory process right requires the state's assistance in discovering useful evidence despite the statutorily created prohibition. *Id.*

88 *Id.* at 1001. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973); Cool v. Unites States, 409 U.S. 100 (1972)(per curiam); Washington v. Texas, 388 U.S. 14 (1967); United States v. Burr, 25 F. Cas. 30, 35 (C.C. D. Va. 1807)(No. 14,692).

89 *Ritchie*, 107 S. Ct. at 1001 (emphasis in original).

90 *Id. See* United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963).

91 *Ritchie*, 107 S. Ct. at 1001. Justice Powell stated that "[b]ecause the applicability of the Sixth Amendment to this type of case is unsettled, and because our Fourteenth Amendment precedents addressing the fundamental fairness of trials establish a clear framework for review, we adopt a due process analysis for the purposes of this case." *Id.*

92 *Id. See* United States v. Agurs, 427 U.S. 97, 106 (1976)("[I]f the subject matter . . . is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge."); Brady v. Maryland, 373 U.S. 83, 87 (1963)("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment.").

the proceeding would have been different.' "[93] Justice Powell, however, recognized that the Court could not presently determine whether the CYS file contained material evidence because the parties had been denied access to the file and the trial judge had only partially reviewed its contents.[94] He rejected the Commonwealth's contention that the statutory privilege placed an absolute prohibition on any search for material evidence because the legislature contemplated some use of CYS records in judicial proceedings.[95] The majority, therefore, affirmed the Pennsylvania Supreme Court's decision to remand the case.[96] The due process clause, according to the Court, entitled Ritchie to further review by a trial court to determine if there existed evidence material to his conviction.[97]

D. IN CAMERA REVIEW VERSUS COMPLETE DISCLOSURE

The Court in *Pennsylvania v. Ritchie* agreed that the defendant was entitled to material evidence contained in the CYS file.[98] Justice Powell, however, indicated that this right did "not include the un-

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93 *Ritchie*, 107 S. Ct. at 1001 (quoting United States v. Bagley, 473 U.S. at 682 (opinion of Blackmun, J., joined by one other justice)). A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* at 682 (opinion of Blackmun, J., joined by one other justice).

94 *Ritchie*, 107 S. Ct. at 1002. The commonwealth argued that the Court should not inquire into materiality because the legislature had deemed the file confidential. To allow disclosure, the commonwealth asserted, would destroy the state's interest in file confidentiality on mere speculation that the file might contain useful evidence. *Id.* The commonwealth pointed out that Ritchie must specifically show what evidence he wishes disclosed and its materiality. *Id.* at n.15. *See* United States v. Agurs, 427 U.S. at 109-110 ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense.").

Justice Powell recognized the strong state interest in confidentiality and acknowledged that Ritchie could not require the trial court to search the CYS file without establishing that the file contained material information. *Ritchie*, 107 S. Ct. at 1002 n.15. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)("He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense."). Justice Powell contended that although the commonwealth's obligation to disclose exculpatory information contained in the file existed in the absence of a specific request, "the degree of specificity of Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure." *Ritchie*, 107 S. Ct. at 1002 n.15.

95 *Ritchie*, 107 S. Ct. at 1002. *See* PA. STAT. ANN. tit. 11, § 2215(a)(5)(Purdon Supp. 1987). Because disclosure would be proper when a trial court determined that the file contained material information, Justice Powell explained, the statute did not provide for total confidentiality as the commonwealth asserted. *Ritchie*, 107 S. Ct. at 1002.

96 *Ritchie*, 107 S. Ct. at 1002.

97 *Id.* Justice Powell noted that upon remand, if the trial court found material information, Ritchie should be granted a new trial. Conversely, if the files did not contain material information or if the nondisclosure was harmless, then Ritchie's conviction should be reinstated. *Id.*

98 *Id.*

supervised authority to search through the Commonwealth's files."[99] Although the Court has recognized that "the eye of an advocate may be helpful" to discovery,[100] the majority claimed the Court "has never held—even in the absence of a statute restricting disclosure—that a defendant alone may make the determination as to the materiality of information."[101] Justice Powell concluded that the defendant had no constitutional right to search the commonwealth's files to determine the relevance of the evidence.[102]

The majority determined that Ritchie's interest in receiving a fair trial could be adequately protected by submitting the records to the trial court for an in camera review.[103] Justice Powell explained that although Ritchie would lose the benefit of an "advocate's eye" in an in camera review, "the trial court's discretion is not unbounded."[104] He contended that allowing defense counsel unlimited access to the CYS file would unnecessarily destroy the commonwealth's compelling interest in the confidentiality of its child abuse files.[105] Justice Powell concluded that the risk of the trial court's failing to recognize some exculpatory evidence did not warrant interference with the commonwealth's efforts to uncover and prevent child abuse.[106]

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99 *Id.* at 1003. The Pennsylvania Supreme Court concluded that if the defendant alleged that the confidential file might contain material evidence, the defendant should be granted full access to the file in spite of the commonwealth's interest in confidentiality. Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985).

100 *Ritchie*, 107 S. Ct. at 1003. *See* Dennis v. United States, 384 U.S. 855, 875 (1966)("The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

101 *Ritchie*, 107 S. Ct. at 1003. Justice Powell explained that in situations in which the defendant's request is general in nature, the state decides what information should be disclosed. He noted that unless the defense became aware of specific material evidence left undisclosed, the decision to disclose rests exclusively in the prosecution's discretion. *Id.* (citing Brady v. Maryland, 373 U.S. 83 (1963)).

102 *Id. See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977)("There is no general constitutional right to discovery in a criminal case . . . .").

103 *Ritchie*, 107 S. Ct. at 1003.

104 *Id.* Justice Powell noted that if a defendant had knowledge of specific information contained in the file, such as a medical report, he could request its disclosure and argue its materiality. Additionally, he indicated that an in camera review should be ongoing, so that a court could reevaluate the file as the trial developed and release any evidence as it became material. *Id.*

105 *Id.* The majority stressed that file confidentiality would encourage abused children and other witnesses to come forward and report the crime. The Court noted the possible adverse effects disclosure would have on Pennsylvania's efforts to combat such abuse. *Id.*

106 *Id.* at 1004.

V. JUSTICE BLACKMUN'S CONCURRING OPINION

Justice Blackmun concurred in its judgment but rejected the plurality's conclusion that the confrontation clause applies only to events occurring at trial.[107] Justice Blackmun contended that the mere opportunity to cross-examine a witness would be insufficient if the defendant were denied the opportunity to effectively cross-examine the witness.[108] He explained that "[i]f I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality."[109]

Justice Blackmun distinguished those cases in which the simple questioning of a witness would satisfy the purposes of cross-examination from those situations in which questioning alone would be insufficient and potentially detrimental.[110] Justice Blackmun indicated that the Supreme Court rejected the confrontation clause claim in *Delaware v. Fensterer* because that case illustrated an instance in which simple questioning proved adequate.[111] He explained that in *Fensterer* the defendant asserted that his right to confront was violated when the prosecution's expert witness could not recall the method he had used to arrive at his conclusion.[112] The facts of *Fensterer*, Justice Blackmun contended, demonstrated an instance in which defense counsel could effectively undermine the witness' credibility through basic questioning and through the testimony of other defense experts.[113] Justice Blackmun criticized the plurality's

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107 *Id.* (Blackmun, J., concurring). Justice Blackmun stated that "[i]n my view, there might well be a confrontation violation if, as here, a defendant is denied pre-trial access to information that would make possible effective cross-examination of a crucial prosecution witness." *Id.* (Blackmun, J., concurring). Justice Blackmun also indicated that he was "in substantial agreement" with Justice Brennan's dissent on the confrontation clause issue. *Id.* (Blackmun, J., concurring). For a discussion of Justice Brennan's dissent, see *infra* text accompanying notes 125-46.

108 *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

109 *Id.* (Blackmun, J., concurring). Justice Blackmun contended that even the plurality would agree that an important aspect of cross-examination is to cast doubt on a witness' testimony. In his estimation, the mere opportunity to question "makes little sense set apart from the goals of cross-examination." *Id.* (Blackmun, J., concurring).

110 *See id.* at 1004-05 (Blackmun, J., concurring).

111 *Id.* at 1004 (Blackmun, J., concurring)(citing Delaware v. Fensterer, 474 U.S. 15, 18 (1985)(per curiam)). See *supra* note 49 for a description of *Fensterer*.

112 *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring)(citing *Fensterer*, 474 U.S. at 17-18 (per curiam)).

113 *Id.* at 1004-05 (Blackmun, J., concurring). Justice Blackmun asserted that the *Fensterer* Court did not imply that the confrontation clause was unconcerned with the effectiveness of cross-examination but rather that "when . . . simple questioning serves the purpose of cross-examination, a defendant cannot claim a confrontation violation

application of *Fensterer* for the proposition that the confrontation clause merely referred to the opportunity for cross-examination rather than the opportunity for effective cross-examination.[114] Justice Blackmun recognized that the *Fensterer* Court stated that " 'the confrontation clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' "[115]

Justice Blackmun contended that *Davis v. Alaska*[116] represented an instance in which simple questioning was insufficient.[117] Although the defendant in *Davis* had access to the witness' juvenile police record, he could not refer to it while attempting to demonstrate the witness' potential bias during cross-examination.[118] The *Davis* Court held that questioning, without reference to the witness' juvenile record, would be useless and potentially harmful to the defendant's case because the jury might view the questioning as a baseless attack on the credibility of an innocent witness.[119] Justice Blackmun found that *Davis* and *Ritchie* were compellingly similar as both defendants were limited to simple questioning and prohibited from referring to specific facts which might have established witness bias.[120] Justice Blackmun concluded that a state violates a defendant's right to witness confrontation when the state's effort to protect confidentiality hinders the defendant's ability to effectively cross-examine.[121]

Despite his disagreement with the plurality's narrow reading of the confrontation clause, Justice Blackmun concurred in the judgment because the Court's solution to the confrontation dilemma was satisfactory.[122] Justice Blackmun maintained that in camera review would adequately identify and disclose any material statements made by Ritchie's daughter that could be used to impeach her credi-

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because there might have been a more effective means of cross-examination." *Id.* at 1005 n.1 (Blackmun, J., concurring).

114 *Id.* at 1005 n.1 (Blackmun, J., concurring).

115 *Id.* (Blackmun, J., concurring)(quoting *Fensterer*, 474 U.S. at 20 (per curiam)(emphasis in original)).

116 415 U.S. 308 (1974). *See supra* notes 54-56 and accompanying text.

117 *Ritchie*, 107 S. Ct. at 1005 (Blackmun, J., concurring).

118 *Id.* (Blackmun, J., concurring). The witness in *Davis* was on probation for the same crime that Davis was accused of committing. The Court recognized that the witness might alter his testimony in an attempt to divert attention from his own criminal history. *Davis*, 415 U.S. at 313-14.

119 *Davis*, 415 U.S. at 318. The *Davis* Court concluded that because the defendant was not permitted to refer to the witness' juvenile record, the "[p]etitioner was thus denied the right of effective cross-examination." *Id.*

120 *Ritchie*, 107 S. Ct. at 1005 (Blackmun, J., concurring).

121 *Id.* at 1006 (Blackmun, J., concurring).

122 *Id.* (Blackmun, J., concurring).

bility.[123] Furthermore, he observed that the in camera review would be an ongoing process to identify material evidence that was originally thought to be insignificant.[124]

VI. Justice Brennan's Dissenting Opinion

Justice Brennan dissented from the plurality's conclusion that the confrontation clause applies only to events occurring at trial.[125] Justice Brennan's criticism of the plurality was based on his belief that events outside of trial could equally infringe upon the right of cross-examination.[126] The trial court's denial of access to prior statements made by the daughter, according to the dissent, deprived Ritchie of information crucial to witness impeachment and therefore violated his rights under the confrontation clause.[127]

Justice Brennan initially identified the Court's historic understanding that the confrontation clause guarantees the right to cross-examination.[128] Although restricting a line of inquiry at trial may be one way of impairing the right to cross-examine, Justice Brennan suggested that the confrontation clause does not exclusively address such restrictions.[129] The dissent emphasized that a denial of access to important information would hamper defense counsel's ability to pursue lines of interrogation at trial.[130] Foreclosing lines of inquiry through nondisclosure, Justice Brennan explained, interferes with counsel's ability to cross-examine as much as restrictions imposed by the trial court.[131] He argued that, in fact, the Court had already held that the right of cross-examination may be infringed by events

123 *Id.* (Blackmun, J., concurring). Justice Blackmun warned lower courts reviewing confidential records to be particularly sensitive to the existence of impeachment evidence because the failure to identify such evidence "would undermine confidence in the outcome of the trial." *Id.* (Blackmun, J., concurring).

124 *Id.* (Blackmun, J., concurring).

125 *Id.* (Brennan, J., dissenting). Justice Marshall joined Justice Brennan's dissenting opinion.

126 *Id.* (Brennan, J., dissenting).

127 *Id.* (Brennan, J., dissenting). Justice Brennan conceded, however, that the trial court properly rejected Ritchie's general assertion that the file as a whole might contain useful evidence and that it rightfully denied complete access to the file. *Id.* (Brennan, J., dissenting).

128 *Id.* (Brennan, J., dissenting)(citing Douglas v. Alabama, 380 U.S. 415 (1965)). *See* Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985)(per curiam).

129 *Ritchie*, 107 S. Ct. at 1007. (Brennan, J., dissenting). Justice Brennan attacked the plurality's use of statements from California v. Green, 399 U.S. 149, 157 (1970), and Barber v. Page, 390 U.S. 719, 725 (1968), to support its restricted view of the confrontation clause. Neither case, in Justice Brennan's estimation, addressed the possibility of applying the clause to events outside of the trial. *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting).

130 *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting).

131 *Id.* (Brennan, J., dissenting).

occurring outside the scope of trial.[132] In *Jencks v. United States*,[133] the Court ruled that the defendant should be given access to previous statements made by prosecution witnesses to government agents.[134] Justice Brennan observed that in accordance with *Jencks*, defendants are entitled to inspect materials that relate to the witness' testimony.[135] He criticized the plurality's insistence that counsel be restricted at trial from pursuing a specific line of inquiry to establish a confrontation violation, because without prior access to the file, counsel could not identify the subjects of inquiry foreclosed from examination at trial.[136] The Court's holding, Justice Brennan concluded, would recognize confrontation clause violations only in situations in which there was a partial denial of access but not when defense counsel was absolutely denied access.[137]

The dissent argued that *Davis v. Alaska*,[138] although focusing primarily on the restriction at trial, did not indicate "that an infringement on the right to cross-examination could occur *only* in that context."[139] Justice Brennan examined *Davis* and noted that although the immediate barrier to cross-examination was the trial judge's restriction of defense counsel inquiries into the juvenile police record, the underlying impediment was the statutory prohibition on disclosure of such records.[140] He explained that "[t]he

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132 *Id.* (Brennan, J., dissenting).

133 353 U.S. 657 (1957).

134 *Id.* at 668-69. The Court contended that such access was critical because the defendant's ability to impeach witnesses against him was "singularly important," and the reports were crucial to the impeachment effort. *Id.* at 667.

135 *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting). Justice Brennan indicated that although *Jencks* was decided on non-constitutional grounds, " 'it would be idle to say that the commands of the Constitution were not close to the surface of the decision.' " *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting)(quoting Palermo v. United States, 360 U.S. 343, 362-63 (1959)(Brennan, J., concurring)).

136 *Id.* at 1007-08 (Brennan, J., dissenting). Justice Brennan additionally argued that the Court's decision in United States v. Wade, 388 U.S. 218 (1967), demonstrates that pre-trial events may disturb the right of cross-examination. *Id.* at 1008 (Brennan, J., dissenting). In *Wade*, the Court held that the defendant was entitled to the presence of counsel at a pre-trial lineup "to preserve the defendant's right to a fair trial as affected by his right to meaningfully cross-examine the witnesses against him." *Wade*, 388 U.S. at 227. If counsel were not present to observe any unfairness at the lineup, Justice Brennan explained, the defendant may lose his only significant opportunity to attack the credibility of the witness' identification. *Ritchie*, 107 S. Ct. at 1008 (Brennan, J., dissenting)(citing *Wade*, 388 U.S. at 232). Because counsel would be precluded from developing a line of inquiry at trial based upon the denial of pre-trial access, Justice Brennan concluded that *Wade* dictates a different conclusion than the plurality advocated. *Id.* (Brennan, J., dissenting).

137 *Ritchie*, 107 S. Ct. at 1008 (Brennan, J., dissenting).

138 415 U.S. 308 (1974).

139 *Ritchie*, 107 S. Ct. at 1008 (Brennan, J., dissenting)(emphasis in original).

140 *Id.* at 1008-09 (Brennan, J., dissenting). Thus, Justice Brennan agreed with the

creation of [such] a significant impediment to the conduct of cross-examination thus undercuts the protections of the Confrontation Clause, even if that impediment is not erected at the trial itself."[141] Accordingly, the dissent concluded that the denial of access to prior statements imposed a significant handicap on the defendant's ability to confront the witness by depriving him of information crucial to his ability to conduct cross-examinination.[142]

Finally, Justice Brennan argued that the due process clause, rather than the confrontation clause, would not provide a better mechanism for providing the defendant access to material information because "due process analysis requires that information be evaluated by the trial judge, not defense counsel."[143] A neutral trial judge, Justice Brennan argued, may be unable to recognize the materiality of prior statements if the trial judge does not recognize their subtle potential for impeaching a witness.[144] Justice Brennan pointed out that the *Jencks* Court held that defense counsel should examine the statements " '[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense.' "[145] In conclusion, Justice Brennan maintained that "while Confrontation Clause and due process analysis may in some cases be congruent, the Confrontation Clause has independent significance in protecting against infringements on the right to cross-examination."[146]

VII. Justice Stevens' Dissenting Opinion

In a separate dissenting opinion, Justice Stevens contended that the Court lacked proper jurisdiction.[147] Justice Stevens observed

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Pennsylvania Supreme Court that the true problem for the defendant in *Davis* "was the prohibition on disclosure of juvenile records." *Id.* at 1009 (Brennan, J., dissenting).

141 *Id.* at 1009 (Brennan, J., dissenting).

142 *Id.* (Brennan, J., dissenting). Justice Brennan noted that a witness' prior statements are critical to any impeachment effort. *See* Jencks v. United States, 353 U.S. 657, 667 (1957). He also contended that "[t]he right of a defendant to confront an accuser is intended fundamentally to provide an opportunity to subject *accusations* to critical scrutiny" and that in order to test such accusations, it is essential to compare witness' testimony with earlier statements. *Ritchie*, 107 S. Ct at 1009 (Brennan, J., dissenting)(emphasis in original). *See* Ohio v. Roberts, 448 U.S. 56, 65 (1980)(confrontation clause's "underlying purpose [is] to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence").

143 *Ritchie*, 107 S. Ct. at 1009 (Brennan, J., dissenting).

144 *Id.* (Brennan, J., dissenting).

145 *Id.* (Brennan, J., dissenting)(quoting *Jencks*, 353 U.S. at 668-69).

146 *Id.* (Brennan, J., dissenting).

147 *Id.* at 1009-10 (Stevens, J., dissenting). Justices Brennan, Marshall, and Scalia joined Justice Stevens in dissent.

that the Supreme Court is a court of limited jurisdiction that "may only review '[f]inal judgments or decrees rendered by the highest court of a State.' "[148] He noted that this limitation serves "notions of efficiency, judicial restraint and federalism."[149] The Court's adherence to this policy of strict finality, Justice Stevens explained, has resulted in the Court's refusal to review countless cases that have otherwise ended in settlement or termination of litigation.[150] Justice Stevens acknowledged, however, that the Court has recognized certain exceptions to the finality principle.[151] In *Cox Broadcasting Corp. v. Cohn*,[152] the Court maintained that one such exception exists "where the federal claim has been finally decided with further proceedings in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."[153]

Justice Stevens, after examining the various procedural scenarios that might occur if the Court declined further review, determined that *Ritchie* did not properly fit within the *Cox Broadcasting* exception.[154] The dissent maintained that the commonwealth could

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148 *Id.* (Stevens, J., dissenting)(quoting 28 U.S.C. § 1257 (1982)).

149 *Id.* at 1010 (Stevens, J., dissenting). *See also* Construction Laborers v. Curry, 371 U.S. 542, 550 (1963)(policy against fragmented and prolonged litigation not implicated when national labor policy would be furthered); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945)(Finality "avoids the mischief of economic waste and of delayed justice.").

150 *Ritchie*, 107 S. Ct. at 1010 (Stevens, J., dissenting).

151 *Id.* at 1010 (Stevens, J., dissenting)(citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1975)).

152 420 U.S. 469 (1975).

153 *Id.* at 481. Justice Stevens stated that "[t]he concern, of course, is that the petitioning party not be put in a position where he might eventually lose on the merits, but would have never had an opportunity to present his federal claims for review." *Ritchie*, 107 S. Ct. at 1010 (Stevens, J., dissenting)(citing *Cox Broadcasting*, 420 U.S. at 481). The most frequent example of this scenario arises, Justice Stevens explained, when a state appeals an appellate court's order to suppress evidence. In such a case, if the state was forced to proceed to trial before subsequent review, it might lose on the merits and be barred from further appeals by the double jeopardy clause. *Id.* (Stevens, J., dissenting). *See* New York v. Quarles, 467 U.S. 649, 651 n.1 (1984)(procdeural posture in which federal issue cannot be reviewed regardless of outcome in state court falls under *Cox Broadcasting* exception).

154 *Ritchie*, 107 S. Ct. at 1010-11 (Stevens, J., dissenting). Justice Stevens explained that in the first scenario, CYS "might refuse to produce the documents under penalty of contempt, in which case appeals could be taken, and this Court could obtain proper jurisdiction." *Id.* at 1010 (Stevens, J., dissenting). In the second scenario, if CYS disclosed the records, the trial court might find the error to be harmless and uphold Ritchie's conviction. *Id.* (Stevens, J., dissenting). In that event, Justice Stevens commented, "the Commonwealth would not have been harmed by our having declined to review the case at this stage." *Id.* (Stevens, J., dissenting). Finally, in the last scenario, if the trial court determined that the nondisclosure was prejudicial and ordered a new trial, under Pennsylvania law the commonwealth could obtain an immediate interlocu-

not lose the case on federal constitutional grounds without an opportunity to appeal the issue to the Supreme Court.[155] Furthermore, Justice Stevens rejected the majority's preference for Supreme Court review before disclosure of the file rendered its confidentiality moot because this preference contradicted the Court's long-standing tradition of avoiding constitutional issues if the case can be disposed of on nonconstitutional grounds.[156] The Court's policy against hearing unnecessary constitutional claims, he concluded, "demands strict application of the finality requirement."[157]

Justice Stevens criticized the majority's contention that immediate Supreme Court review was needed to prevent the sacrifice of the commonwealth's interest in confidentiality.[158] Instead, he cited the Court's well-established rule of granting the party objecting to disclosure the option to refuse production of the requested documents if that party believes the disclosure will be harmful and to appeal immediately any resulting contempt orders.[159] Justice Stevens concluded that the requisite conditions for appellate review did not exist because CYS had not yet been given the opportunity to choose between complying with the court order or being held in contempt of court.[160]

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tory appeal of the new trial order. *Id.* (Stevens, J., dissenting). *See* 42 PA. CONS. STAT. ANN., PA. R.A.P., Rule 311(a)(5)(Purdon Supp. 1987).

Justice Stevens also contended that the commonwealth had the opportunity to reassert its constitutional claim in the Pennsylvania courts. *Ritchie*, 107 S. Ct. at 1011 (Stevens J., dissenting). He acknowledged that although the Pennsylvania courts would reject the claim in accordance with the Pennsylvania Supreme Court decision in Commonwealth v. Ritchie, 509 Pa. 357, 502 A.2d 148 (1985), the United States Supreme Court would still be able to review the issue. *Ritchie*, 107 S. Ct. at 1011 (Stevens, J., dissenting). *See* Barclay v. Florida, 463 U.S. 939, 946 (1983)(claim properly before Court when highest state court refused to reconsider its previous decision on earlier appeal); Hathorn v. Lovorn, 457 U.S. 255, 261-62 (1982)(The state supreme court's "subseqent reliance on the law of the case cannot prevent us from reviewing federal questions determined in the first appeal.").

155 *Ritchie*, 107 S. Ct. at 1011 (Stevens, J., dissenting).

156 *Id.* (Stevens, J., dissenting). *See* Rescue Army v. Municipal Ct., 331 U.S. 549, 571 (1947); Ashwander v. TVA, 297 U.S. 288, 346-47 (1936)(Brandeis, J., concurring).

157 *Ritchie*, 107 S. Ct. at 1011 (Stevens, J., dissenting)(citing Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 70-71 (1948)).

158 *Id.* (Stevens, J., dissenting).

159 *Id.* (Stevens, J., dissenting). Justice Stevens noted that this rule was used in United States v. Ryan, 402 U.S. 530 (1971), a case in which the district court denied a motion to quash a subpoena duces tecum for the production of documents located in Kenya. The Court ultimately ruled that the order was non-appealable and argued that if the subpoena was as unduly burdensome as claimed, the party may refuse to comply and risk being held in contempt of court. *Ryan*, 402 U.S. at 532-33. *See* Cobbledick v. United States, 309 U.S. 323, 328 (1940)("Whatever right [the witness] may have requires no further protection . . . than that afforded by the district court until the witness chooses to disobey and is committed for contempt.").

160 *Ritchie*, 107 S. Ct. at 1012 (Stevens, J., dissenting). Justice Stevens emphasized

Finally, the dissent rejected the majority's assertion that because the case had been tried and appealed, an immediate review would expedite the conclusion of the case.[161] Justice Stevens contended that had the Court not granted certiorari, the trial court might have already disposed of the case.[162] Because litigants would interrupt lower court proceedings with time-consuming interlocutory appeals, Justice Stevens concluded that a case-by-case assessment of finality would ultimately lead to greater inefficiencies.[163]

VIII. ANALYSIS

A. THE CONFRONTATION CLAUSE

In *Ritchie*, the plurality misinterpreted the scope of the confrontation clause in holding that the defendant's rights were not violated by CYS' refusal to comply with the subpoena. Justice Powell, writing for the plurality, maintained that the confrontation clause should be narrowly construed.[164] He contended that the clause merely affords the defendant a "trial" right to cross-examination.[165] Moreover, Justice Powell found that this right encompasses only the opportunity for cross-examination rather than the effectiveness of the opportunity.[166] Justice Powell's analysis, unfortunately, reflects a rather short-sighted view of the confrontation clause. To ignore the effects of pre-trial events on the scope of cross-examination or to limit the defendant's right strictly to an opportunity to confront witnesses against him, would indeed render the confrontation clause an "empty formality."[167]

Justice Powell narrowly interpreted the Court's decision in *Davis v. Alaska*[168] in his conclusion "that the right of confrontation is a

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that a relaxation of the finality requirement in this case would be especially inappropriate as CYS was not a party to the case. *Id.* at n.2 (Stevens, J., dissenting). He acknowledged that the Court has recognized a limited exception to the rule if the documents are held by a third party without an independent interest in the documents' confidentiality. *Id.* at n.3 (Stevens, J., dissenting). *See* Perlman v. United States, 247 U.S. 7 (1918). However, he distinguished *Ritchie* because a third party, namely CYS, asserted the interest in the documents' confidentiality. *Ritchie*, 107 S. Ct. at 1012 n.3 (Stevens, J., dissenting).

161 *Ritchie*, 107 S. Ct. at 1013 (Stevens, J., dissenting).

162 *Id.* (Stevens, J., dissenting).

163 *Id.* (Stevens, J., dissenting).

164 *Id.* at 998-1000 (plurality opinion).

165 *Id.* at 999 (plurality opinion).

166 *Id.* (plurality opinion).

167 *See Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

168 415 U.S. 308 (1974). *See supra* text accompanying notes 54-56 for a description of the Court's holding in *Davis*.

trial right."[169] In *Davis*, the trial court, pursuant to a state statute, issued a pre-trial protective order prohibiting any reference to a key witness' juvenile police record.[170] The *Davis* Court concluded that this prohibition prevented defense counsel from adequately demonstrating to the jury the witness' source of bias.[171] The Court stated:

> On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination . . . .[172]

Justice Powell rejected the Pennsylvania Supreme Court's view that under *Davis* a statutory privilege was less important than the defendant's need for pre-trial access to information which might be used to impeach the witness.[173] The effect of such a broad interpretation, he maintained, "would be to transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery."[174] Justice Powell, therefore, concluded that Ritchie's sixth amendment rights would have been violated by a court-imposed restriction of cross-examination at trial rather than by the denial of access to CYS files before trial.[175]

However, Justice Powell mistakenly believed that the restriction of cross-examination in *Davis* occurred exclusively at trial. Although the effect of the restriction rendered defense counsel unable to question the witness directly on his source of bias, the restriction emanated from the pre-trial order.[176] This pre-trial order prevented defense counsel from providing the jurors with evidence that

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169 *Ritchie*, 107 S. Ct. at 999 (plurality opinion)(emphasis in original).

170 *Davis*, 415 U.S. at 311. Despite the court-imposed restriction, defense counsel attempted to expose the witness' potential bias without specific reference to the police record. *Id.* at 312.

171 *Id.* at 318.

172 *Id.* Justice Powell contended that the error in *Davis* was not that the records were confidential but that the defendant was denied the opportunity to expose to the jury circumstances from which they might infer that the witness was unreliable. *Id.* at 1000 (plurality opinion)(citing *Davis*, 415 U.S. at 318).

173 *Ritchie*, 107 S. Ct. at 999 (plurality opinion). The Pennsylvania Supreme Court concluded that the confidentiality of the files was less important than "a defendant's right to effectively confront and cross-examine the witnesses against him." Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985). Furthermore, the court declared "that it would be absurd to read the statute as providing that the records be made available to a court of competent jurisdiction, while denying any use of them to the litigants in a criminal case before such courts." *Id.*, 502 A.2d at 153.

174 *Ritchie*, 107 S. Ct. at 999 (plurality opinion).

175 *Id.* at 1000 (plurality opinion).

176 *See Davis*, 415 U.S. at 311. The prosecution ultimately objected to defense counsel's line of inquiry not on the grounds that the defense violated the pre-trial order, but

might have allowed them to infer the witness' bias just as effectively as if the trial court had restricted defense counsel's inquiries at the time of cross-examination.[177] *Davis* demonstrates that the distinction between pre-trial and trial events is meaningless because pre-trial events can be as restrictive on the ability to cross-examine as is a restriction imposed at trial.[178] As Justice Brennan argued, "[w]hile *Davis* focused most explicitly on the restriction at trial of cross-examination, nothing in the opinion indicated that an infringement on the right to cross-examination could occur *only* in that context."[179] In short, the pre-trial/trial distinction announced by Justice Powell does not logically follow from the Court's decision in *Davis*.

Justice Blackmun, in his concurring opinion, contended that the similarities between *Davis* and *Ritchie* outweigh any differences.[180] In both cases defense counsel was prevented from referring to specific facts that might have suggested the bias of a critical witness.[181] Whether the restriction occurred at or before trial, the defense was effectively prohibited from pursuing lines of inquiry during cross-examination. Therefore, the *Ritchie* plurality should have recognized a sixth amendment violation on the same grounds as the violation was found in *Davis*. Justice Blackmun acknowledged, however, that the cases were technically different because the defense in *Davis* had access to the prohibited records.[182] He noted that Davis was restricted at trial from pursuing an available line of inquiry while Ritchie's pre-trial preparation was hindered by the nondisclosure of potentially useful information.[183] Rejecting this distinction, Justice

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rather because defense counsel's repeated questions merely rehashed prior cross-examination. *Id.* at 312-13. The trial court sustained the prosecution's objections. *Id.* at 313.

177 *Ritchie*, 107 S. Ct. at 1008-09 (Brennan, J., dissenting).

178 *Cf.* United States v. Ash, 413 U.S. 300, 310 (1973)("This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pre-trial events that might appropriately be considered to be parts of the trial itself."); United States v. Wade, 388 U.S. 218, 227 (1967)(presence of counsel at pre-trial identification lineup necessary "to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him").

179 *Ritchie*, 107 S. Ct. at 1008 (Brennan, J., dissenting)(emphasis in original). Justice Brennan noted in his dissent that this distinction "ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside of trial itself." *Id.* at 1006 (Brennan, J., dissenting).

180 *Id.* at 1005 (Blackmun, J., concurring).

181 *Id.* (Blackmun, J., concurring). Justice Brennan suggested that although the immediate barrier in *Davis* was the trial judge's order, the underlying reason for the restriction was the state statute prohibiting its use in trial. *Id.* at 1008-09 (Brennan, J., dissenting).

182 *Id.* at 1005 (Blackmun, J., concurring).

183 *Id.* 1005-06 (Blackmun, J., concurring).

Blackmun stated:

> I do not believe, however, that a State can avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination, on the basis of a desire to protect the confidentiality interests of a particular class of individuals, at the pretrial, rather than at the trial, stage.[184]

Justice Powell also erroneously concluded that the case law establishes that the right to confrontation is a trial right. To support his proposition, he cited dicta from earlier Court decisions.[185] For instance, he quoted from *California v. Green*,[186] in which the Court stated that "it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."[187] The *Green* Court held that the introduction of a witness' out-of-court statements was permissible at trial because the witness was subject to cross-examination both at the time the statements were made and at trial.[188] *Green* did not indicate, as Justice Powell alleged, that the right to cross-examination was implicated solely at trial.[189] Similarly, Justice Powell misconstrued the Court's decision in *Barber v. Page*,[190] which declared that "[t]he right to confrontation is basically a trial right."[191] The *Barber* Court held that the admission of out-of-court testimony of an allegedly unavailable witness violated the confrontation clause absent "a good faith effort to obtain his presence at trial."[192] In dicta, the Court indicated that even when defense counsel cross-examines a witness at a preliminary hearing, the scope of such a hearing is too limited to satisfy the demands of the confrontation clause.[193] This dicta does not author-

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184 *Id.* at 1006 (Blackmun, J., concurring).

185 *See id.* at 999 (plurality opinion).

186 399 U.S. 149 (1970).

187 *Id.* at 151.

188 *Id.* at 158.

189 The Court's decisions have established that pre-trial cross-examination can satisfy the confrontation clause. *See* Ohio v. Roberts, 448 U.S. 56, 72-73 (1980)(admission of out-of-court testimony of unavailable witness did not violate the confrontation clause in situation in which defense counsel had adequate opportunity to cross-examine the witness at pre-trial hearing); Pointer v. Texas, 380 U.S. 400, 407 (1965)(confrontation clause was violated when the defendant was denied "a complete and adequate opportunity to cross-examine an unavailable witness" at a pre-trial hearing). For a discussion of the quality of cross-examination necessary to satisfy the confrontation clause, see *infra* text accompanying notes 204-11.

190 390 U.S. 719 (1968).

191 *Id.* at 725.

192 *Id.* at 724-26. The Court rejected the state's assertion that the defendant waived his right to confront when he declined to cross-examine the witness at a preliminary hearing. *Id.* at 725.

193 *Id.* at 725. However, the *Barber* Court acknowledged that "there may be some justification for holding that the opportunity for cross-examination of a witness at a pre-

itatively conclude, however, that the effects of pre-trial events have no bearing on a defendant's confrontation clause rights. Justice Brennan, after examining *Green* and *Barber*, concurred that neither "address[ed] the question of whether Confrontation Clause rights may be implicated by events outside of trial."[194]

After concluding that the right to confront was basically a trial right, Justice Powell indicated that the scope of this right is satisfied whenever "defense counsel receives wide latitude at trial to question witnesses."[195] In his view, accordingly, the confrontation clause should provide the defendant an opportunity for cross-examination rather than serve as a basis for scrutinizing the effectiveness of cross-examination.[196] In support of this proposition, Justice Powell cited the Court's decision in *Delaware v. Fensterer*,[197] in which the Court declared that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[198]

In his concurrence, however, Justice Blackmun argued that such a conclusion is questionable. He stated that by "divorc[ing] confrontation analysis from any examination into the effectiveness of cross-examination . . . in some situations the confrontation right would become an empty formality."[199] Justice Blackmun recognized that the plurality's reliance on the above-quoted remark from

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liminary hearing satisfies the demands of the confrontation clause where the witness is shown to be actually unavailable." *Id.* at 725-26. The Court has recognized instances in which pre-trial cross-examination satisfies the confrontation clause. *See supra* note 189.

194 *Ritchie*, 107 S. Ct. at 1007 (Brennan, J., dissenting). Additionally, Justice Powell contended that the Court's decision in Delaware v. Fensterer, 474 U.S. 15 (1985)(per curiam), reaffirmed his view of the confrontation clause when it rejected the defendant's claim in the absence of a court-imposed restriction at trial. *Ritchie*, 107 S. Ct. at 1000 (plurality opinion). Nothing in *Fensterer*, however, would suggest that the Court intended to exclude pre-trial events from coverage under the confrontation clause. See *supra* note 49 for a discussion of the Court's decision in *Fensterer*.

195 *Ritchie*, 107 S. Ct. at 999 (plurality opinion).

196 *See id.*

197 474 U.S. 15 (1985)(per curiam).

198 *Id.* at 20 (per curiam)(emphasis in original). The plurality, concluded that *Fensterer* "was in full accord with our earlier decisions, that have upheld a Confrontation Clause infringement claim on this issue only when there was a specific statutory or court-imposed restriction at trial on the scope of questioning." *Ritchie*, 107 S. Ct. at 1000 (plurality opinion). Justice Powell cited numerous cases for the proposition that the clause merely protects the defendant's right to confrontation from statutory or court-imposed restrictions at trial. *Id.* at n.10 (plurality opinion). None of these cases, however, expressly hold that the confrontation clause guarantee is strictly limited to these circumstances. *But see* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 125 (1974)("[T]he right of confrontation is exclusively a 'trial right' ")(quoting Barber v. Page, 390 U.S. 719, 725 (1968)).

199 *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

Fensterer was misguided.[200] The remark can be read to imply that the confrontation clause provides an opportunity for *effective* cross-examination rather than, as Justice Powell asserted, the mere opportunity to confront a witness without regard for the potential effectiveness of that confrontation.[201] Justice Blackmun chose the former interpretation and explained that "it means . . . when, as in *Fensterer*, simple questioning serves the purpose of cross-examination, a defendant cannot claim a confrontation violation because there might have been a more effective means of cross-examination."[202] The necessity for inquiries into the potential effectiveness of confrontation opportunities is demonstrated by cases such as *Davis*, in which the physical opportunity to question a witness existed but was insufficient.[203]

Although the Court has never expressly held that there must be an opportunity for effective cross-examination, this position has been strongly implied.[204] The Court in *Davis*, for instance, after analyzing the defendant's limited ability to cross-examine the juvenile witness, concluded that the "[p]etitioner was thus denied the right of effective cross-examination."[205] Justice Blackmun explained that in *Davis* simple questioning without reference to the privileged material would be tantamount to no cross-examination at all.[206] Similarly, in *Smith v. Illinois*,[207] the Court held that the defendant had a right under the confrontation clause to ask a witness for his true identity for the purpose of impeaching the latter's testimony.[208]

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200 *Id.* at 1005 n.1 (Blackmun, J., concurring).

201 *See id.* at 999 (plurality opinion).

202 *Id.* (Blackmun, J., concurring). Justice Blackmun contended that in *Fensterer*, the defendant, through simple questioning, had an opportunity for effective cross-examination. *Id.* at 1004-05 (Blackmun, J., concurring). This is not to say, however, that Justice Blackmun intended that there be a confrontation clause issue whenever a defendant, who had an opportunity for effective confrontation, failed to take advantage of that opportunity. *See id.* (Blackmun, J., concurring).

203 *See id.* at 1005 (Blackmun, J., concurring). In *Davis*, the defendant could question the witness regarding his possible bias, but, without reference to the protected record, the defendant could not effectively undermine the witness' credibility. *Davis*, 415 U.S. 308, 318 (1974). See *supra* text accompanying notes 54-56 for an analysis of *Davis*.

204 *See Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

205 *Davis*, 415 U.S. at 318.

206 *Ritchie*, 107 S. Ct. at 1005 (Blackmun, J., concurring). *Cf.* United States v. Wade, 388 U.S. 218, 227 (1967)("[W]e scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him.")(emphasis in original).

207 390 U.S. 129 (1968).

208 *Id.* at 131. As in *Davis*, the credibility of the witness in *Smith* was of primary importance. *Id.* at 130. The Court found that although the defendant could still cross-examine, disclosure of the witness' true identity in *Smith* was the critical starting point for

The *Smith* Court argued that "[t]o forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."[209] Finally, the Court in *Fensterer* stated that "the Confrontation Clause is generally satisfied when the defense is given a *full* and *fair* opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."[210] As the facts of *Davis*, *Smith* and *Ritchie* demonstrate, the mere opportunity to cross-examine a witness does not necessarily provide the jury with the requisite information with which to question a witness' credibility. Dismissal of any considerations of the potential effectiveness of cross-examination would surely render the right of confrontation a hollow promise.[211]

B. IN CAMERA REVIEW

The majority in *Ritchie* accurately concluded that the defendant was entitled to have the CYS files reviewed for "material" evidence.[212] Justice Powell, after weighing the competing interests, ju-

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discovering falsehoods in the testimony through "in-court examination and out-of-court investigation." *Id.* at 131. *See* Alford v. United States, 282 U.S. 687, 692-93 (1931)(defendant entitled to request a witness' place of residence because such information was essential "to place the witness in his proper setting and put the weight of his testimony and his credibility to a test").

209 *Smith*, 390 U.S. at 131.

210 Delaware v. Fensterer, 474 U.S. 15, 22 (1985)(per curiam)(emphasis added).

211 *But see* Ohio v. Roberts, 448 U.S. 56 (1980). In *Roberts*, the Court held that the admission of out-of-court testimony did not violate the confrontation clause in a situation in which the evidence was sufficiently reliable. *Id.* at 73. Justice Blackmun, writing for the *Roberts* Court stated in dicta that "in all but such extraordinary cases, no inquiry into 'effectiveness' is required." *Id.* at n.12. This language, however, should not be construed to mean that the confrontation right is unconnected to inquiries into effectiveness. See Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court examined the effectiveness of an unavailable witness' testimony at an earlier trial to determine if the transcript provided reliable testimony. Significantly, Justice Blackmun has since taken a firm stand in his concurring opinion in *Ritchie*, supporting the opposite conclusion. *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring). See *supra* notes 107-24 and accompanying text for a discussion of Justice Blackmun's concurring opinion. Furthermore, *Roberts* is a hearsay case and can be distinguished from *Ritchie* because the confrontation concern in the former stems from the defendant's inability to confront his accusers. *See Roberts*, 448 U.S. at 63-64. *But see* California v. Green, 399 U.S. 149, 158 (1970)("There is no good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination."). Finally, the concern in non-hearsay cases focuses not on the actual ability to confront the witness, but upon whether restrictions placed on the defense preclude "expos[ing] to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. at 318. For a discussion of the categories of confrontation clause cases, see *supra* text accompanying notes 49-59.

212 *Ritchie*, 107 S. Ct. at 1003-04. *See* United States v. Agurs, 427 U.S. 97 (1976)("[I]f

diciously determined that only an in camera review by the trial court would protect Ritchie's right to a fair trial while preserving the state's interest in the confidentiality of its child abuse files. The Court's decision, however, provides a trial court with great discretion in conducting its in camera review, as the search will be performed exclusively by the trial court without the benefit of an advocate's perspective.[213] Although future defendants are denied the advantages of their attorney's expertise in ferreting out information, *Ritchie* will provide defendants with a needed mechanism for compelling a court review of privileged or confidential information for useful evidence.[214]

The in camera compromise is well supported by the decisions of numerous courts.[215] In *United States v. Nixon*,[216] the Court concluded that the President's generalized interest in the confidentiality of his records could not supersede "the fundamental demands of due process of law in the fair administration of criminal justice."[217] The district court was entrusted to review the material in camera to determine if there existed evidence that met "the test of admissibility and relevance."[218] Although *Nixon* did not provide the framework for Justice Powell's analysis in *Ritchie*, the Court in both cases

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the subject matter . . . is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge."); Brady v. Maryland, 373 U.S. 83 (1963)("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment . . . .").

213 *Ritchie*, 107 S. Ct. at 1003. *See* State v. Storlazzi, 191 Conn. 453, 459, 464 A.2d 829, 833 (1983)(quoting State v. Pikorski, 177 Conn. 736, 677, 419 A.2d 866, 895-96, *cert. denied*, 444 U.S. 935 (1979) ("[I]n the case of admissibility of such records, however, access to such [records] must be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it.' ").

214 The Supreme Court of Minnesota adopted the *Ritchie* rationale in State v. Paradee, 403 N.W.2d 640 (Minn. 1987). The court stated that "[t]he in camera approach strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense. *Id.* at 642. The court added "that it is not our intent to complicate or change the discovery process in criminal cases" and that the decision was consistent with the state's policy for broad discovery. *Id.*

215 The use of an in camera procedure in the context of rape and sexual assault cases has been advocated by several of the highest state courts. *See, e.g.*, *In Re* Robert H., 199 Conn. 693, 509 A.2d 475 (1976); People v. Coates, 109 Ill. 2d 431, 488 N.E.2d 247 (1985), *cert. denied*, 106 S. Ct. 1474 (1986); Commonwealth v. Two Juveniles, 397 Mass. 261, 491 N.E.2d 234 (1986); State v. Daniels, 1 Ohio St. 3d 69, 437 N.E.2d 1186 (1982).

216 418 U.S. 683 (1974).

217 *Id.* at 713.

218 *Id.* at 714. *See* Palermo v. United States, 360 U.S. 343, 354 (1959)("[W]e approve the practice of having the Government submit the [written out-of-court] statement [of a witness] to the trial judge for an *in camera* determination.").

chose to permit the disclosure of some information without compromising the confidentiality of the entire body of information.[219] Additionally, the Court in both *Nixon* and *Ritchie* concluded that the trial court could adequately determine the materiality of information in voluminous files without the assistance of an "eye of an advocate."[220]

The strongest argument favoring full disclosure of CYS records to the defendant was the denial of the opportunity "to have the files reviewed with the eyes and the perspective of an advocate."[221] The Supreme Court had previously stated in *Dennis v. United States*[222] that "[t]he determination of what may be useful to the defense can properly and effectively be made only by an advocate."[223] However, as Justice Brennan acknowledged in his dissent, a generalized request to search the files for information that might be useful provides "an insufficient basis for permitting general access to the file."[224] The Court has looked unfavorably upon requests for disclosure in order

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219 *Ritchie*, 107 S. Ct. at 1003; *Nixon*, 418 U.S. at 714-16. *Compare* Rovario v. United States, 353 U.S. 53 (1957)(prejudicial error to permit the government to withhold the identity of its informant if the informant's possible testimony would be relevant and useful to the defense) *with* McCray v. Illinois, 386 U.S. 300 (1967)(no need to reveal an informant's name at a pre-trial hearing if the lack of disclosure did not deny the defendant his sixth amendment rights).

Rovario implicitly advocates the disclosure of the complete file directly to the defendant. Cases such as *Nixon* and *Ritchie*, however, can be distinguished from *Rovario*. Unlike *Rovario*, the administration of justice in these two cases could still be adequately achieved without disclosure of confidential information that had no bearing on the outcome of the proceedings. In *Rovario*, the right to a fair trial depended on the disclosure of the complete body of confidential information which was the witness' name. *Rovario*, 343 U.S. at 56-58.

220 *Ritchie*, 107 S. Ct. at 1003; *Nixon*, 418 U.S. at 714-16. The Court in *Ritchie* rejected the need for defense counsel's participation in the in camera review but noted that the defendant could make specific requests for known information and argue its materiality. Furthermore, the majority stressed that the trial court's duty to review was ongoing so that information originally thought to be immaterial might eventually be properly disclosed. *Ritchie*, 107 S. Ct. at 1003.

221 Commonwealth v. Ritchie, 509 Pa. 357, 367, 502 A.2d 148, 153 (1985).

222 384 U.S. 855 (1966).

223 *Id.* at 875. The Court held that the defendant was entitled to examine the grand jury testimony of four government witnesses where the interest of confidentiality of grand jury proceedings was minimal. *Id.* at 874-75. *See also* Alderman v. United States, 394 U.S. 165, 182 (1969)("[a]n apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event . . . may have special significance to one who knows the more intimate facts" and "may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances"); Jencks v. United States, 353 U.S. 657, 668-69 (1957)(defendant is entitled to inspect reports submitted by government witnesses "[b]ecause only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness").

224 *Ritchie*, 107 S. Ct. at 1006 (Brennan, J., dissenting).

to allow a party to conduct "fishing expeditions."[225] In *Palermo v. United States*,[226] the Court approved the use of in camera review, contending that the "[f]inal decision as to production must rest . . . within the good sense and experience of the district judge."[227] Because the ultimate decision of admissibility lies with the trial court, that court should be able to competently determine the probative value of the evidence and the subsequent need for disclosure to the defendant.[228] Furthermore, as Justice Powell recognized, the duty to review the files is ongoing so that information originally thought to be immaterial might eventually be disclosed.[229]

Justice Powell might have reduced the pressures placed on the trial court when conducting its in camera review had he adopted the Pennsylvania Superior Court's approach of focusing exclusively on the disclosure of prior inconsistent statements.[230] The Pennsylvania Superior Court instructed the trial court to limit its in camera review to the daughter's out-of-court statements to determine if there existed any material inconstistencies which Ritchie could utilize to impeach her testimony.[231] Justice Powell, however, shifted the scope of the in camera review to all "material" information, placing an

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225 *See Nixon*, 418 U.S. at 699-700. *See also* Camitsch v. Risley, 705 F.2d 351, 353 (9th Cir. 1983)(defendant convicted of sexual assault of minors not constitutionally entitled to "rummage through the otherwise confidential case files of every juvenile witness").

226 360 U.S. 343 (1959).

227 *Id.* at 363.

228 *See* State v. Paradee, 403 N.W.2d 640, 642 (Minn. 1987)("We believe that trial courts, who by training and experience are qualified for the task of determining matters of relevancy, are capable of determining what if any of the information in the records might help in the defense."); State v. Storlazzi, 191 Conn. 453, 459, 469 A.2d 829, 833 (1983)(review of records should be left to the trial court which is in the best position to measure the probative value of the evidence).

229 *Ritchie*, 107 S. Ct. at 1003. The Court in Dennis v. United States, 384 U.S. 855 (1966), criticized the use of an in camera review of grand jury testimony and concluded that " 'it would be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' " *Id.* at 874 (quoting Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 410 (1959)(Brennan, J., dissenting)). In *Ritchie*, the trial court admitted that over 50 pages of a voluminous record were not reviewed at the time of the trial. *Ritchie*, 107 S. Ct. at 995 n.3. There is at least some justifiable criticism, therefore, that a trial court could not adequately perform the ongoing review advocated by Justice Powell. See *infra* note 234 and accompanying text for contrary analysis.

230 *See* Commonwealth v. Ritchie, 324 Pa. Super. 557, 567-68, 472 A.2d 220, 226 (1984). Justice Blackmun focused on impeachment evidence but concurred in judgment because the majority's proscribed review for material information "would certainly include such evidence as statements of the witness that might have been used to impeach her testimony by demonstrating any bias towards respondent or by revealing inconsistencies in her prior statements." *Ritchie*, 107 S. Ct. at 1006 (Blackmun, J., concurring).

231 Commonwealth v. Ritchie, 324 Pa. Super. at 567-68, 472 A.2d at 226. Unfortunately, the Pennsylvania Superior Court went beyond what was necessary in holding that the defendant should be given full access to the files in order to argue the relevancy of

increased burden on trial judges, who will now have to evaluate every piece of information in the file.[232] By limiting the search to prior inconsistent statements, the concern that the files need be reviewed with the "eyes of an advocate" could have been reduced.[233] Furthermore, allegations that the trial court would be unable to perform an ongoing review would be minimized because the trial court would only need to focus on comparing the trial transcript to verbatim statements contained in the CYS files.[234] In short, had the majority limited the in camera review to an inspection of the witness' out-of-court statements, *Ritchie* might have better avoided any concerns that trial courts cannot adequately protect a defendant's right to a fair trial.

IX. CONCLUSION

In *Ritchie*, the plurality's narrow view of the scope of the confrontation clause would in many instances render it an "empty formality."[235] The defendant's ability under the confrontation clause to cross-examine witnesses against him cannot be inhibited if society is to remain steadfast in its "belief that the right of confrontation

any released material. *Id.* at 568, 472 A.2d at 226. This step would tend to undermine any benefit achieved from conducting the in camera review in the first place.

232 The Court's expansion to a full review for exculpatory evidence was unnecessary in this case. Ritchie's counsel basically asked for access to specific medical records and the names of any potential witnesses that might be contained in the file. *Ritchie*, 107 S. Ct. at 994-95. Ritchie's request could easily have been satisfied by an in camera review for these specific items in addition to the generalized search for inconsistent statements. *See id.*, 107 S. Ct. at 1006 (Blackmun, J., concurring)("When reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial.").

233 Justice Brennan stated in his dissent that "[t]he prospect that these statements will not be regarded as material is enhanced by the fact that due process analysis requires that information be evaluated by the trial judge, not defense counsel." *Ritchie*, 107 S. Ct. at 1009 (Brennan, J., dissenting). Although it will always be possible that a trial judge might fail to recognize a subtle inconsistency, the Court dismissed this risk in holding that the state's compelling interest in confidentiality outweighed the defendant's absolute right to disclosure. *Id.* at 1003. Justice Powell explained that the trial court would not have unlimited discretion because "[i]f a defendant is aware of specific information contained in the file (*e.g.*, the medical report), he is free to request it directly from the court." *Id.*

234 *Compare* Alderman v. United States, 394 U.S. 165, 182 (1969)(in camera review of surveillance records from illegal wiretap rejected in situation in which "the task is too complex, and the margin for error too great, to rely wholly on the . . . judgment of the trial court to identify those records which might have contributed to the Government's case") *with* Taglianetti v. United States, 394 U.S. 316, 317-18 (1969)(per curiam)(in camera review of illegal wiretaps was proper in situation in which the task was not overly complex).

235 *Ritchie*, 107 S. Ct. at 1004 (Blackmun, J., concurring).

and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[236] It is important that courts recognize that a defendant's ability to cross-examine a witness can be affected equally by events occurring both in and out of the courtroom. Limiting the application of the confrontation clause to infringements occurring only at trial makes little sense if the end result denies a defendant the opportunity to effectively impeach a witness' testimony during cross-examination. Therefore, to retain the clause's vitality, courts should examine whether a defendant's opportunity for cross-examination is a potentially useful opportunity to expose weaknesses in a witness' testimony. The plurality in *Ritchie*, however, divorced the confrontation clause analysis from these practical considerations. Thus, the Court essentially laid the groundwork for an unequal and inconsistent application of the confrontation clause to future defendants.

Fortunately, in *Ritchie*, the Court arrived at a solution that will assure the defendant an opportunity for a fair judgment. An in camera review of the confidential files by the trial court will adequately protect the interests of both the state and the defendant. Although trial judges are perfectly capable of conducting such reviews, the burden of conducting a broad search for any relevant material, rather than a search only for inconsistent out-of-court statements, could become substantial. Given the commonwealth's strong interest in maintaining the confidentiality of such sensitive files, however, the burden of an in camera review is the best way to secure the defendant's right to a fair trial.

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236 Pointer v. Texas, 380 U.S. 400, 405 (1965).