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## Out-of-State Witnesses and Compulsory Process: The Indigent Defendant's Rights

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evidence touchstone without elaboration,<sup>61</sup> but others have recognized that the precise issue is whether the "evidence required to support a conviction on one indictment would have been sufficient to warrant a conviction on the other."<sup>62</sup> This approach recognizes the merit of the "same evidence" rule while adding the larger scope of the "necessarily adjudicated" test.

The contribution of the *Nash* decision as an aid to understanding what may be foreclosed from perjury prosecutions will have its greatest impact on the state courts which will be looking for guidance in applying the Supreme Court criteria now applicable to them.<sup>63</sup> The unfortunate aspect of the case is its rote dependability on the "necessarily adjudicated" formula.<sup>64</sup> This broad and uncertain approach creates difficulties in predicting the outcome of future perjury cases. A greater emphasis on the substantial identity of the evidence, however, would clearly state under what conditions a perjury trial would be proper. Furthermore, this latter approach acknowledges the soundness of the policy for not allowing perjurers to remain unpunished if new evidence has been produced. Instead of promulgating a new set of workable standards adopted from combining and distinguishing previous criteria, the *Nash* decision blindly accepts and refuses to clarify a semantic test which has, by itself, only dubious merit.

THOMAS ALEXANDER GOSSE

## OUT-OF-STATE WITNESSES AND COMPULSORY PROCESS: THE INDIGENT DEFENDANT'S RIGHTS

The right to have compulsory process for obtaining witnesses in a criminal prosecution is guaranteed to a defendant by the sixth amendment.<sup>1</sup> Yet at one time a defendant had no means by which to enforce this right in a state criminal proceeding where a material witness was

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<sup>61</sup>*See* *Wheatley v. United States*, 286 F.2d 519 (10th Cir. 1961); *Kuskulis v. United States*, 37 F.2d 241 (10th Cir. 1929); *Youngblood v. United States*, 266 F. 795 (8th Cir. 1920); *Chitwood v. United States*, 178 F. 442 (8th Cir. 1910). *See also* *Ehrlich v. United States*, 145 F.2d 693 (5th Cir. 1944).

<sup>62</sup>*United States v. Buonomo*, 441 F.2d 922, 925 (7th Cir. 1971); *see* *United States v. Kramer*, 289 F.2d 909 (2d Cir. 1961); *United States v. Butler*, 38 F. 498 (E.D. Mich. 1889).

<sup>63</sup>*Ashe v. Swenson*, 397 U.S. 436 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>64</sup>447 F.2d at 1387 (Winter, J., concurring).

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<sup>1</sup>In part, the sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining Witnesses in his favor . . ." U.S. CONST. amend. VI.

absent from the jurisdiction of the trial court.<sup>2</sup> Today an absent material witness can be obtained in those jurisdictions which have adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (hereinafter the Uniform Act).<sup>3</sup> While the Uniform Act provides a means by which the attendance of the out-of-state witness can be secured,<sup>4</sup> the party seeking to produce the witness

<sup>2</sup>*Minder v. Georgia*, 183 U.S. 559 (1902).

<sup>3</sup>ALASKA STAT. §§ 12.50.010 *et seq.* (1962); ARIZ. REV. STAT. ANN. §§ 13-1861 *et seq.* (1956); ARK. STAT. ANN. §§ 43-2005 *et seq.* (Repl. Vol. 1964); CAL. PEN. CODE §§ 1334 *et seq.* (West 1970); COLO. REV. STAT. ANN. §§ 39-6-1 *et seq.* (1963); CONN. GEN. STAT. ANN. §§ 54-22 *et seq.* (1958); DEL. CODE ANN. tit. 11, §§ 3521 *et seq.* (1953); FLA. STAT. ANN. §§ 942.01 *et seq.* (1944); IDAHO CODE ANN. § 19-3005 (1947); ILL. ANN. STAT. ch. 38, §§ 156-1 *et seq.* (Smith-Hurd Supp. 1972); IND. ANN. STAT. §§ 9-1626 *et seq.* (Repl. Vol. 1956); KAN. GEN. STAT. ANN. §§ 22-4201 *et seq.* (Supp. 1971); KY. REV. STAT. ANN. §§ 421.230 *et seq.* (1969); LA. CODE CRIM. L. & PROC. ANN. art. 741 *et seq.* (West 1967); ME. REV. STAT. ANN. tit. 15, §§ 1411 *et seq.* (1964); MD. ANN. CODE art. 27, §§ 617 *et seq.* (Repl. Vol. 1971); MASS. ANN. LAWS ch. 233, §§ 13A *et seq.* (1956); MINN. STAT. ANN. §§ 634.06 *et seq.* (Supp. 1971); MISS. CODE ANN. §§ 1892 *et seq.* (1956); MO. ANN. STAT. §§ 491.400 *et seq.* (Supp. 1971); MONT. REV. CODES ANN. §§ 94-9001 *et seq.* (Repl. Vol. 1969); NEB. REV. STAT. §§ 29-1906 *et seq.* (1964); NEV. REV. STAT. §§ 174.395 *et seq.* (1967); N.H. REV. STAT. ANN. §§ 613.1 *et seq.* (1955); N.J. STAT. ANN. §§ 2A:81-18 *et seq.* (1952); N.M. STAT. ANN. §§ 41-12-13 *et seq.* (Repl. Vol. 1964); N.Y. CODE CRIM. PROC. § 640:10 (McKinney 1971); N.C. GEN. STAT. §§ 8-65 *et seq.* (Repl. Vol. 1969); N.D. CENT. CODE §§ 31-03-25 *et seq.* (1960); OHIO REV. CODE ANN. §§ 2939.25 *et seq.* (Baldwin 1971); OKLA. STAT. ANN. tit. 22, §§ 721 *et seq.* (1969); ORE. REV. STAT. §§ 139.210 *et seq.* (1969); PA. STAT. ANN. tit. 19, §§ 622.1 *et seq.* (1964); R.I. GEN. LAWS ANN. §§ 12-16-1 *et seq.* (Supp. 1970); S.C. CODE ANN. §§ 26-301 *et seq.* (1962); S.D. COMP. LAWS § 23-40-14 (1967); TENN. CODE ANN. §§ 40-2429 *et seq.* (1955); TEX. CODE CRIM. PROC. ANN. art. 24.28 (1966); UTAH CODE ANN. §§ 77-45-11 *et seq.* (1953); VT. STAT. ANN. tit. 13, §§ 6641 *et seq.* (1958); VA. CODE ANN. §§ 19.1-269 *et seq.* (Repl. Vol. 1960); WASH. REV. CODE ANN. §§ 10.55.010 *et seq.* (1956); W. VA. CODE ANN. §§ 62-6A-1 *et seq.* (1966); WIS. STAT. ANN. § 325.33 (1958); WYO. STAT. ANN. §§ 7-250 *et seq.* (Repl. Vol. 1952); D.C. CODE ANN. §§ 23-801 *et seq.* (Supp. V. 1971). Alabama, Georgia, Hawaii, Iowa and Michigan have not adopted the Uniform Act. The constitutionality of the Uniform Act has been upheld in *New York v. O'Neill*, 359 U.S. 1 (1959).

<sup>4</sup>To obtain a witness under the Uniform Act both the state seeking to obtain the witness and the state in which the witness is located must have adopted the Act. An application is made to the judge of the court in which the prosecution is pending. If the judge finds that the requested witness is material, he may issue a certificate bearing the seal of the court, stating the facts, and specifying the number of days for which the witness will be required. This certificate is then presented to a judge of a court of record in the county in which the witness is found. That judge then summons the witness to appear and holds a hearing to determine if the witness is material and necessary. If he so finds, he issues an order directing the witness to attend and testify in the court where the prosecution is pending. The witness, then, must attend after being tendered the specified statutory fee or else be subject to punishment as if he had failed to comply with a summons to appear before a court of record in his own state. See generally *N.C. GEN. STAT. §§ 8-65 et seq.* (Repl. Vol. 1969).

must first tender him a specified fee.<sup>5</sup> Therefore, when an indigent defendant seeks to obtain a witness under the Uniform Act, the indigent cannot obtain compulsory process unless the state pays the required witness fee. The recent case of *Preston v. Blackledge*<sup>6</sup> examines the question of whether an indigent defendant is denied his rights to compulsory process and to equal protection when a judge refuses to issue process under the Uniform Act at public expense.

*Preston* was a federal habeas corpus proceeding in which petitioners, who had been convicted in the courts of North Carolina of armed robbery, alleged that the state had denied them their sixth amendment right to compulsory process, as applied to the states through the due process clause of the fourteenth amendment,<sup>7</sup> and their fourteenth amendment right to equal protection when it failed to secure the attendance of petitioners' alibi witnesses from Pennsylvania at public expense.<sup>8</sup> Although process had been issued and the witnesses obtained under the Uniform Act at public expense at four previous trials, each of which ended in a mistrial with a hung jury,<sup>9</sup> the trial judge refused to issue process at public expense at the fifth trial.<sup>10</sup> Consequently, the witnesses were not present at the fifth trial and the petitioners were convicted.<sup>11</sup>

The North Carolina Court of Appeals upheld the order of the trial judge,<sup>12</sup> stating that appellants had cited no authority by which the trial

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<sup>5</sup>The Uniform Act provides that witnesses shall be paid ten cents a mile for each mile by the ordinary route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness. *See, e.g.,* N.C. GEN. STAT. § 8-66 (Repl. Vol. 1969).

<sup>6</sup>332 F. Supp. 681 (E.D.N.C. 1971).

<sup>7</sup>*Washington v. Texas*, 388 U.S. 14 (1967).

<sup>8</sup>332 F. Supp. at 682.

<sup>9</sup>*Id.* Also at issue in *Preston* was whether the fifth trial violated the petitioners' constitutional protection against double jeopardy. The district court held that this right had been violated and in addition to granting the writ, prohibited the state from holding a new trial. *Id.* at 685-86.

<sup>10</sup>*Id.* at 683. *See also* *State v. Preston*, 9 N.C. App. 71, 175 S.E.2d 705, 708-09 (1970). The Uniform Act was adopted in North Carolina in 1937. *See* N.C. GEN. STAT. §§ 8-65 *et seq.* (Repl. Vol. 1969).

<sup>11</sup>332 F. Supp. at 682.

<sup>12</sup>*State v. Preston*, 9 N.C. App. 71, 175 S.E.2d 705, 709 (1970).

[t]he presiding superior court judge entered an order finding as a fact that the testimony of these witnesses (who were a sister and brother-in-law of defendant Mitchell) as given by them under oath at a previous trial was available to defendants, that there was no provision of law under which Wake County or the State of North Carolina could be required to pay the expenses of the witnesses as requested, and that the interests of the defendants could be protected by the use of the testimony of these witnesses as theretofore given by them under oath and recorded by the court reporter at a previous trial of this case.

*Id.*

judge could compel the state or county to appropriate funds for the witness fees required by the Uniform Act.<sup>13</sup> While it was recognized that appellants' right to due process might require that the state pay the fee in some cases, the court felt that due process was adequately afforded to appellants by the admission into evidence of the sworn testimony of the alibi witnesses which was taken at the previous trial.<sup>14</sup>

The district court granted the writ of habeas corpus,<sup>15</sup> holding that it was error not to issue process at public expense under the Uniform Act.<sup>16</sup> Since all considerations properly within the discretion of the trial judge had been resolved in favor of the defendants at four previous trials,<sup>17</sup> failure to secure the witnesses solely because the state would have to pay their expenses violated the defendants' right to equal protection of the law.<sup>18</sup> Furthermore, in the absence of circumstances which necessitated the substitution of recorded testimony for the actual presence of the witnesses,<sup>19</sup> the failure of the trial judge to take steps necessary to secure the witnesses violated the defendants' sixth amendment right to compulsory process.<sup>20</sup> The district court concluded that the trial judge abused his discretion under the Uniform Act when the effect of his action was to violate the defendants' constitutional rights.<sup>21</sup>

The sixth amendment right to compulsory process was applied to the states in *Washington v. Texas*,<sup>22</sup> where the Supreme Court stated that this

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<sup>13</sup>*Id.* At the time of the *Preston* trial, North Carolina statute provided that a witness in a criminal action would be paid from state funds and the amount disbursed would be assessed in the bill of costs. N.C. GEN. STAT. § 7A-316 (Repl. Vol. 1969). The state is liable for this bill of costs unless the defendant is found guilty, in which case he is liable. N.C. GEN. STAT. §§ 6-45, -49 (Repl. Vol. 1969) (§ 6-45 repealed 1971). However, the Uniform Act requires that the witness be tendered the fee in advance. N.C. GEN. STAT. §§ 8-66, -67 (Repl. Vol. 1969). North Carolina statute prohibits the payment of witness fees by the state in advance of the attendance of the witness. N.C. GEN. STAT. § 6-51 (Repl. Vol. 1969).

<sup>14</sup>9 N.C. App. 71, 175 S.E.2d 705, 709 (1970).

<sup>15</sup>Petitioners had exhausted their state remedies since they had appealed the decision of the North Carolina Court of Appeals by seeking a writ of certiorari to the Supreme Court of North Carolina, which denied the writ. *See* 332 F. Supp. at 682.

<sup>16</sup>*Id.* at 684.

<sup>17</sup>*Id.* at 683.

<sup>18</sup>*Id.* at 684.

<sup>19</sup>The death of a witness, inability to locate him, or his presence in a jurisdiction which has not adopted the Uniform Act may necessitate the substitution of recorded testimony. *See generally* 5 J. WIGMORE, EVIDENCE §§ 1403-08 (3d ed. 1940).

<sup>20</sup>332 F. Supp. at 684.

<sup>21</sup>*Id.*

<sup>22</sup>388 U.S. 14 (1967). At issue in *Washington* were two Texas statutes which prevented a participant accused of a crime from testifying for, but not against, his coparticipant. The Court held that the sixth amendment right to compulsory process applies to the states through incorporation by the due process clause of the fourteenth amendment and that these state statutes violated this sixth amendment right.

right "is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment."<sup>23</sup> Without this right the accused is seriously impaired in his efforts to present a defense. The Court concluded that compulsory process and the right to confront the prosecution's witnesses are complementary rights which allow the defendant to present his version of the facts.<sup>24</sup> The ability of a court to compel the attendance of a witness, however, is generally thought to be limited by the territorial jurisdiction of the court.<sup>25</sup>

This traditional view of compulsory process is illustrated by the case of *Minder v. Georgia*.<sup>26</sup> In *Minder*, which predated the Uniform Act,<sup>27</sup> a defendant in a state criminal proceeding asserted that the state had failed to afford him process by which to compel the attendance of witnesses who resided in another state.<sup>28</sup> This, he contended, violated his right to due process under the fourteenth amendment since these witnesses were essential to his defense.<sup>29</sup> The Supreme Court held that when a state was unable to procure a witness for a criminal prosecution because the witness was beyond the jurisdiction of the court, the defendant was not deprived of due process where the state had no means by which to compel the attendance.<sup>30</sup> An initial question in *Preston*, then, was whether or not the state had a means by which to compel the attendance of the out-of-state witnesses.

Prior to *Preston* the predominant view among the states was that the Uniform Act was not a means for providing compulsory process<sup>31</sup> because

[t]he Uniform Act does not extend the jurisdiction of the courts

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<sup>23</sup>*Id.* at 17-18.

<sup>24</sup>*Id.* at 19. The Court stated that

[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

*Id.*

<sup>25</sup>*See, e.g.,* *United States v. Wolfson*, 322 F. Supp. 798 (D. Del. 1971). The fact that an American court lacks power to subpoena witnesses, other than American citizens, from foreign countries does not make a conviction unconstitutional as violating the sixth amendment right to compulsory process. *United States v. Greco*, 298 F.2d 247, 251 (2d Cir.), *cert. denied*, 369 U.S. 820 (1962).

<sup>26</sup>183 U.S. 559 (1902).

<sup>27</sup>The Uniform Act was adopted by the National Conference of Commissioners of Uniform State Laws in September, 1931. 9 UNIFORM LAWS ANNOTATED 87 (1957).

<sup>28</sup>183 U.S. 559, 559-60 (1902).

<sup>29</sup>*Id.* at 560.

<sup>30</sup>*Id.* at 561-62.

<sup>31</sup>*E.g.,* *People v. Cavanaugh*, 69 Cal. 2d 262, 444 P.2d 110, 70 Cal. Rptr. 438 (1968); *Vore v. State*, 158 Neb. 222, 63 N.W.2d 141 (1954); *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953), *cert. denied*, 347 U.S. 962 (1954).

of this state beyond its territorial limits, for this is not within the power of the legislature. The operation of the Uniform Act depends upon the principles of comity, and it has no efficacy except through the adoption of the same act by another state.<sup>32</sup>

State courts seemed to place more emphasis on being able to *compel* the attendance of an out-of-state witness than on securing the presence of the witness for the trial. The rationale of *Minder* was used as a justification for this position,<sup>33</sup> and the fact that the Uniform Act provided a means by which to secure out-of-state witnesses was not deemed sufficient to make it a means to guarantee compulsory process.

The theory that it is impossible to compel the attendance of an out-of-state witness "because the process of the trial court is of no force without the jurisdiction" was rejected by the Supreme Court in *Barber v. Page*,<sup>34</sup> which stated that this theory was no longer valid where the Uniform Act had been adopted by both the jurisdiction of the prosecution and the jurisdiction in which the witness was located.<sup>35</sup> The Court recognized that the Uniform Act provides a means by which out-of-state witnesses can be obtained to testify at a state criminal proceeding.<sup>36</sup> While *Barber* dealt with the ability of a court to compel the attendance of an out-of-state prosecution witness in order to protect the defendant's sixth amendment right to confrontation of witnesses, the reasoning would seem equally applicable to the defendant's right to compulsory process for obtaining witnesses in his favor.<sup>37</sup> The Court held that to protect the right to confrontation, a good faith effort was required to obtain the absent witness through whatever means were available.<sup>38</sup> Since *Washington* equated the right to confrontation of witnesses with the right to compulsory process,<sup>39</sup> it may be concluded that the Uniform Act is a means by which to guarantee a defendant his right to compulsory process.<sup>40</sup>

However, the issuance of process under the Uniform Act is not automatic. The trial judge in the jurisdiction of the pending prosecution is

<sup>32</sup>State v. Blount, 200 Ore. 35, 264 P.2d 419, 426 (1953).

<sup>33</sup>Text accompanying note 30 *supra*.

<sup>34</sup>390 U.S. 719, 723 (1968).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 723-24.

<sup>37</sup>Note 24 and accompanying text *supra*.

<sup>38</sup>390 U.S. 719, 724-25 (1968).

<sup>39</sup>388 U.S. 14, 19 (1967).

<sup>40</sup>In those jurisdictions which have not adopted the Uniform Act, *Minder* would still seem to control. Following the *Minder* rationale, the inability of a court to obtain an out-of-state witness because either the state of the prosecution or the state in which the witness is located had not adopted the Uniform Act would not violate a defendant's right to compulsory process. *Cf.* United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971).

vested with discretion under the Uniform Act<sup>41</sup> to decide whether or not process should be issued to obtain an out-of-state witness. The Uniform Act provides that

[i]f a person . . . is a material witness in a prosecution pending in a court of record of this State, . . . a judge of such court may issue a certificate under the seal of the court . . . .<sup>42</sup>

The judge must first decide, then, that the requested witness is material. The burden of establishing materiality is on the party seeking to obtain the witness.<sup>43</sup>

Once a finding of materiality is made, the issuance of process under the Uniform Act is still subject to the discretion of the judge, inasmuch as the Act provides that a judge "may" issue process to obtain a material witness.<sup>44</sup> Cases interpreting the discretion allowed the judge under the Act have held that he may scrutinize the good faith of the party requesting the presence of the out-of-state witness.<sup>45</sup> If the judge feels that the request is made only for purposes of delay,<sup>46</sup> or if he deems the testimony of the requested witness to be cumulative and of little value,<sup>47</sup> process may be denied at his discretion.

The district court in *Preston* apparently felt that since petitioners sought to obtain alibi witnesses who were presumably instrumental in producing four hung juries, it was an abuse of discretion for the trial judge to refuse to issue process at the fifth trial. At the four previous trials all of the issues within the discretion of the judge had been resolved in favor of defendants and process was issued.<sup>48</sup> Thus, based upon the premise that

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<sup>41</sup>The judge in the foreign jurisdiction in which the witness is located is also vested with the discretion to ascertain that the witness will not be caused any undue hardship and that the laws of the state in which the prosecution is pending and of any states through which the witness must pass will provide protection to him from arrest and service of civil and criminal process. N.C. GEN. STAT. § 8-66 (Repl. Vol. 1969).

<sup>42</sup>N.C. GEN. STAT. § 8-67 (Repl. Vol. 1969).

<sup>43</sup>*E.g.*, *State v. Mance*, 7 Ariz. App. 269, 438 P.2d 338 (1968); *State v. Smith*, 87 N.J. Super. 98, 208 A.2d 171 (1965); *State v. Etheridge*, 74 Wash. 2d 102, 443 P.2d 536 (1968).

<sup>44</sup>Note 42 and accompanying text *supra*.

<sup>45</sup>*See, e.g.*, *Commonwealth v. Diring*, 354 Mass. 523, 238 N.E.2d 508, 512 (1968); *State v. Smith*, 87 N.J. Super. 98, 208 A.2d 171, 175 (1965); *State v. Smith*, 458 P.2d 687, 690 (Ore. App. 1969).

<sup>46</sup>*Id.*

<sup>47</sup>*People v. Cavanaugh*, 69 Cal. 2d 262, 444 P.2d 110, 114-16, 70 Cal. Rptr. 438 (1968). A trial judge may generally stop further introduction of cumulative testimony when the point in dispute has been thoroughly presented and further testimony will be of no assistance in arriving at a conclusion as to the truth of the issue. *See Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962); *Henson & Sons Coal Co. v. Strickland*, 152 Ark. 203, 238 S.W. 5 (1922).

<sup>48</sup>332 F. Supp. at 683.



the Uniform Act was a means to protect the sixth amendment right to compulsory process,<sup>49</sup> the district court concluded that the refusal to issue process at the fifth trial violated this right.<sup>50</sup> It would also seem, based upon Supreme Court decisions regarding the rights of indigents,<sup>51</sup> that the issue of whether or not the witnesses could be obtained at public expense was not within the discretion of the trial judge.

In *Griffin v. Illinois*<sup>52</sup> the Supreme Court recognized that "[t]here can be no equal justice where the kind of trial a man gets depends upon the amount of money he has."<sup>53</sup> The Court held that by failing to provide a free trial transcript to indigent defendants in a felony case, the state had effectively denied them an adequate appellate review of alleged non-constitutional errors committed at their trial.<sup>54</sup> This action constituted invidious discrimination which violated the defendants' right to equal protection of the law, as only indigent defendants were barred from the appellate process.<sup>55</sup> In subsequent decisions the Supreme Court has expanded the application of the *Griffin* rationale to include, for example, the right to free transcripts in non-felony cases in order to effect appellate review<sup>56</sup> and the right to counsel for appellate proceedings.<sup>57</sup>

The decision of the district court in *Preston* is fully supported by the principles enunciated in *Griffin*. As the *Preston* court noted, "the fact that petitioners were indigent should create no bar to securing the attendance of these witnesses under the Uniform Act."<sup>58</sup> Since the witnesses had previously been obtained four times at public expense under the Uniform Act, the court seemed unpersuaded by the excuse that the trial judge was neither required nor authorized by state statute to obtain the witnesses

<sup>49</sup>Text accompanying notes 34-40 *supra*.

<sup>50</sup>332 F. Supp. at 684.

<sup>51</sup>*E.g.*, *Tate v. Short*, 401 U.S. 395 (1971) (denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but to convert the fine to imprisonment for those who are unable to pay it); *Williams v. Illinois*, 399 U.S. 235 (1970) (violation of equal protection to add to prison sentence of indigent for inability to pay fine); *Anders v. California*, 386 U.S. 738 (1967) (affirming indigent's right to counsel on appeal); *Douglas v. California*, 372 U.S. 353 (1963) (providing counsel for indigent's appeal); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (guaranteeing indigent the right to counsel at trial); *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring free trial transcript for indigents if necessary for appellate review).

<sup>52</sup>351 U.S. 12 (1956).

<sup>53</sup>*Id.* at 19.

<sup>54</sup>*Id.* at 18-19. The State of Illinois did provide a free transcript to indigents for appellate review of constitutional questions. *Id.* at 15.

<sup>55</sup>*Id.* at 18.

<sup>56</sup>*E.g.*, *Mayer v. Chicago*, 92 S. Ct. 410 (1971) (non-felony case; only a fine, as opposed to imprisonment, involved).

<sup>57</sup>*E.g.*, *Douglas v. California*, 372 U.S. 353 (1963).

<sup>58</sup>332 F. Supp. at 685.

at public expense.<sup>59</sup> It seems clear that but for the defendants' indigency, the trial judge would have issued process and the out-of-state witnesses would have been obtained for the fifth trial. This type of judicial expediency, then, seems to be the kind of invidious economic discrimination which is prohibited by the equal protection clause of the fourteenth amendment.<sup>60</sup>

In *Griffin* the Court also recognized that by denying convicted indigents access to appellate review the state had denied them fourteenth amendment due process.<sup>61</sup> However, the state was not required to furnish a free transcript in every case but was given the latitude to provide alternative means by which to perfect appellate review.<sup>62</sup> That alternatives may be adequate to protect the indigent's right to due process is suggested in the recent case of *Britt v. North Carolina*,<sup>63</sup> where an indigent defendant requested a free transcript of his first trial, which ended with a hung jury, for purposes of preparing for his second trial.<sup>64</sup> The Court held that where the trial court reporter would have read back notes of the first trial to defendant's counsel at his request, the defendant had available an informal alternative substantially equivalent to a transcript,<sup>65</sup> and that the *Griffin* mandate thus had not been violated.<sup>66</sup>

The latitude which *Griffin* allows would seem to raise a question in the *Preston* case as to whether or not the trial court had provided an acceptable alternative at the fifth trial by reading the sworn testimony of the witnesses from a previous trial.<sup>67</sup> The district court effectively answered this question:

While the recorded testimony of the previous trials gave the jury an adequate version of the substance of their [the witnesses'] testimony, it could in no way give the jury any idea of the witnesses' demeanor or credibility by which they could weigh the substantive nature of the testimony. The presence of these witnesses under the circumstances of this case was vital to petitioners' right to receive a fair trial.<sup>68</sup>

The fact that petitioners were convicted only at their fifth trial when their alibi witnesses were not present raises a serious doubt as to the adequacy

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<sup>59</sup>*Id.* at 683-85.

<sup>60</sup>*Id.* at 684-85.

<sup>61</sup>351 U.S. 12, 18 (1956).

<sup>62</sup>*Id.* at 20.

<sup>63</sup>92 S. Ct. 431 (1971).

<sup>64</sup>*Id.* at 433.

<sup>65</sup>*Id.* at 435.

<sup>66</sup>*Id.* at 433.

<sup>67</sup>332 F. Supp. at 683.

<sup>68</sup>*Id.* at 684.

of the alternative provided by the trial court. The reason given by the district court for rejecting the substitute of recorded testimony, namely that the jury was deprived of the opportunity to observe the witnesses' demeanor and then weigh their substantive testimony,<sup>69</sup> essentially supports the rationale behind the right to compulsory process.<sup>70</sup>

Although consistent with the rationale of Supreme Court cases such as *Griffin* and *Barber*, *Preston* runs contrary to the weight of state case law on both the issue of the right to compulsory process under the Uniform Act and the issue of the indigent's right to witness fees under the Act.<sup>71</sup> The Oregon case of *State v. Blount*<sup>72</sup> is illustrative of the position taken by state courts prior to *Preston*.

In *Blount* an indigent defendant sought to obtain two witnesses from California through the provisions of the Uniform Act. The trial judge issued the requisite certificates but then denied a motion to obtain the witnesses at the public expense.<sup>73</sup> The indigent defendant contended that he had been denied his constitutional rights to compulsory process and to equal protection.<sup>74</sup> The Supreme Court of Oregon held that the Uniform Act did not provide a means for guaranteeing compulsory process<sup>75</sup> and that the indigent defendant could not be heard to complain of a denial of equal protection since the prosecution had not invoked the Uniform Act at public expense.<sup>76</sup> It is questionable, however, in light of *Griffin* and *Barber*, whether *Blount* and the other cases reaching a similar conclusion are still good law.

Assuming that *Preston* has been properly decided, it establishes precedent in two important areas of criminal justice administration. The case has expanded the right to compulsory process to include the obtaining of out-of-state witnesses in those jurisdictions which have adopted the Uni-

<sup>69</sup>*Id.*

<sup>70</sup>*Cf. Barber v. Page*, 390 U.S. 719, 725 (1968).

<sup>71</sup>*See, e.g., State ex rel. Butler v. Swenson*, 243 Minn. 24, 66 N.W.2d 1 (1954); *Vore v. State*, 158 Neb. 222, 63 N.W.2d 141 (1954); *State v. Fouquette*, 67 Nev. 505, 221 P.2d 404 (1950), *cert. denied*, 341 U.S. 932 (1951); *State v. Blount*, 200 Ore. 35, 264 P.2d 419 (1953), *cert. denied*, 347 U.S. 962 (1954); *State v. Hemmenway*, 80 S.D. 153, 120 N.W.2d 561 (1963).

<sup>72</sup>200 Ore. 35, 264 P.2d 419 (1953), *cert. denied*, 347 U.S. 962 (1954).

<sup>73</sup>*Id.* at 421-22.

<sup>74</sup>*Id.* at 423-24.

<sup>75</sup>*Id.* at 426.

<sup>76</sup>*Id.* at 427. On the issue of equal protection the Oregon court stated that the defendant has not in fact been the victim of any discrimination . . . because the state has brought no witnesses from California, and has received no advantage from the Uniform Act denied to the defendant.

*Id.* Whether or not there was discrimination between rich and poor defendants was not considered, but it must be noted that this case was decided prior to *Griffin v. Illinois*, 351 U.S. 12 (1956). See text accompanying notes 52-70 *supra*.