Compulsory Process II

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COMPULSORY PROCESS II

Peter Westen*

The [sixth] amendment to the constitution gives to the accused, in all criminal prosecutions, a right to . . . compulsory process for obtaining witnesses in his favor. The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter.


A friend of mine who teaches constitutional law has the nasty habit of giving his students an objective exam to demonstrate how little they know about the actual text of the Constitution. One of his favorite and most successful questions lists various principles of criminal procedure (some of which are taken verbatim from the fourth, fifth, sixth, and eighth amendments, and some of which are pure inventions) with instructions to the students to designate those principles that are not explicitly found in the Constitution. Although their answers range widely, they invariably agree in one respect—that what John Marshall referred to as the defendant's "sacred" right of compulsory process is nowhere found in the Bill of Rights.

This article is dedicated to those unhappy students, and to the memory of their clients; for the compulsory process clause is indeed part of the Constitution. It is one of a half-dozen principles of criminal procedure that make up the sixth amendment. More precisely, the compulsory process clause is a companion and counterpart to the more famous confrontation clause. Together, these two clauses constitutionalize the law of witnesses in criminal cases:

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

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have been previously ascertained by law, and to be informed of the
nature and cause of the accusation; to be confronted with the wit-
tnesses against him; to have compulsory process for obtaining wit-
tnesses in his favor, and to have the Assistance of Counsel for his
defence.¹

It should not be surprising that students overlook the compulsory
process clause: In the 160 years that followed Marshall's landmark
opinions in the trial of Aaron Burr, the courts and the bar ignored
Marshall's warning and permitted the clause to become a "dead
letter." It is only during the past decade that the Supreme Court has
began to breathe life into the clause. In a series of opinions that
began in 1967 and culminated in the recent decision subjecting
President Nixon to compulsory process,² the Court has rejected the
notion that the clause guarantees the accused merely the means for
securing the attendance of witnesses at trial. It has come instead to
recognize, explicitly or implicitly, that the compulsory process clause
undergirds the entire presentation of a defendant's case, from the
right to discover witnesses in his favor to the right to compel them to
testify over claims of privilege.³

The significance of these decisions has been examined in an
earlier study concerning the extent to which a defendant's right to
produce witnesses extends beyond merely securing their presence at
trial and includes placing their testimony into evidence.⁴ This article
addresses a series of questions, specifically reserved in the earlier
study, concerning the process by which a defendant obtains the
attendance of witnesses in his favor. It re-examines the bases for
doctrinaire assertions that the compulsory process clause, having
nothing to say about standards of competence for defense witnesses,
has no bearing on the power of the state to impose numerical limits
on the number of defense subpoenas, to deny subpoenas for witnesses
whose testimony is deemed cumulative, to deny a defendant continu-
cances pending the appearance of his witnesses, and to require a
defendant to accept substitute evidence in the place of live testimony.
It further analyzes assertions that the clause, guaranteeing the defend-
ant nothing more than equality with the prosecution regarding the

¹. U.S. Const. amend. VI (emphasis added). See also Faretta v. California, 43
470 (1973); Chambers v. Mississippi, 410 U.S. 283 (1973) (per curiam); Cool v.
United States, 409 U.S. 100 (1972); Webb v. Texas, 409 U.S. 95 (1972) (per
curiam); United States v. Augenblick, 393 U.S. 348 (1969); Washington v. Texas,
388 U.S. 14 (1967).
issuance of subpoenas, has no additional bearing on the power of the state to withhold subpoenas from defendants who are unable to pay for them, to refuse to enforce subpoenas by attachment or arrest, and to refuse to produce out-of-state witnesses from beyond its territorial boundaries.\(^5\)

There are no easy answers to the questions raised by these assertions because the constitutional implications of the subpoena power remain largely unexplored. The conventional wisdom on the issuance, enforcement, timing, price, number, and territorial scope of defense subpoenas is largely nonconstitutional in origin. The scant constitutional authority that does exist is a mixed bag of state court decisions construing local versions of the compulsory process clause and obsolescent federal decisions, rendered without reference to recent developments in constitutional analysis.

This Article examines the validity of the conventional wisdom. It draws support for its analysis from the constitutional principles of compulsory process, and, in their absence, from related doctrine in the areas of a defendant's right to confront witnesses against him and his right to a fair trial. Part I of the article defines the constitutional standard that governs the simple case of a nonindigent defendant who makes a timely application to produce a witness from within the territory of the jurisdiction. Parts II through IV, in turn, examine that standard in the light of complicating factors such as the defendant's need for more time to secure a witness' presence, the indigency of the defendant, the defendant's failure to make an advance showing of need for the witness, the location of the witness beyond the territorial boundaries of the jurisdiction, and the availability of the defendant's evidence in a form other than live testimony.

I. THE CONSTITUTIONAL STANDARD FOR THE ISSUANCE OF COMPULSORY PROCESS

Our present understanding of the compulsory process clause can be traced to the 1967 Supreme Court decision in Washington v. Texas.\(^6\) In the 170 years preceding the decision, the Court had mentioned the clause only five times, twice in dictum\(^7\) and three times

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5. This "conventional" view was held by John Wigmore. See 8 J. Wigmore, Evidence § 2191, at 68-70 & n.3, § 2192, at 70 n.6, § 2195a, at 85 (J. McNaughton rev. 1961); 9 J. Wigmore, Evidence § 2595, at 605 & nn.8-9 (3d ed. 1940).


in the course of explaining its reluctance to construe the clause.\(^8\) Indeed, with the exception of John Marshall's seminal opinions in the trial of Aaron Burr,\(^9\) the clause remained dormant in the federal courts. Then, unexpectedly, the Court in Washington rejected Justice Harlan's invitation to limit its holding to certain due process objections\(^10\) and rendered a sweeping construction of the compulsory process clause. Essential to its construction was the formulation of a general standard of compulsory process that serves as the basis for our analysis here. It is important, however, first to set forth the facts of Washington.

The defendant, Jackie Washington, and a friend named Fuller were indicted for the murder of a young man. Fuller was tried first, convicted, and sentenced to fifty years in prison. The prosecution introduced evidence at Washington's trial to show the following facts: that Washington had become jealous of the victim; that on the night of the murder Washington gathered a group of friends, including Fuller, and proceeded to a house where the victim was having supper; that Fuller brought his shotgun along; that several boys threw bricks at the house to attract the victim's attention, then returned to the car; that Washington and Fuller were left standing alone in front of the house with Washington holding the shotgun; that when the victim appeared at the door he was fatally shot by either Washington or Fuller; and that, by the time Fuller and Washington returned to the car, Fuller was carrying the shotgun.\(^11\)

Washington took the witness stand in his own defense and testified that he took no part in the actual shooting and that Fuller acted alone in making the fatal decision. According to Washington, when he and Fuller approached the house, Fuller, who was drunk, suddenly grabbed the shotgun and declared that he was going to shoot somebody. Washington further claimed that after an unsuccessful effort to persuade Fuller to leave, Washington turned and ran and

\(^{467}\) (1918) (dictum that compulsory process clause codifies the common law as it existed in 1791).

\(^8\) Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966) (unnecessary to decide whether the trial court erred in failing to grant defendant a continuance to subpoena witnesses for whom he refused to make an offer of proof); Blackmer v. United States, 284 U.S. 421, 442 (1932) (unnecessary to decide the validity of a statute that granted extraterritorial subpoena power solely to the prosecution and denied it to the defense); Ex parte Harding, 120 U.S. 782 (1887) (unnecessary to decide an unspecified compulsory process issue).


\(^10\) 388 U.S. at 23-25 (Harlan, J., concurring).

\(^11\) 388 U.S. at 15-16,
was running toward the car when he heard the fatal shot.\textsuperscript{12} To corroborate his version of the facts (to which he and Fuller were the only surviving witnesses), Washington called Fuller as a witness for the defense. However, although Fuller evidently was ready to corroborate Washington's story,\textsuperscript{13} he was declared incompetent to testify for the defense because of a state statutory scheme disqualifying co-indictees from testifying for one another.\textsuperscript{14} Washington was then convicted and sentenced to fifty years in prison.

Washington argued on appeal that he had been denied his constitutional right to compulsory process for witnesses in his favor by the trial court's refusal to permit Fuller to testify for the defense. The Texas court, holding that the compulsory process clause had no effect on how a state defined the competency of witnesses, rejected the argument.\textsuperscript{15} The Supreme Court reversed in an opinion that, for analytical purposes, can be divided into three parts. First, it held that the compulsory process clause, like other provisions in the sixth amendment, is so essential to a fair trial that it must be deemed applicable to the states through the due process clause of the fourteenth amendment:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just 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. The right is a fundamental element of due process of law.\textsuperscript{16}

Second, the Court rejected the notion that the courts are completely free to regulate the testimonial competence of defense witnesses. The framers of the sixth amendment did not intend to commit the "futile act" of securing the attendance of witnesses whom the courts could "arbitrarily" prohibit from testifying;\textsuperscript{17} nor did the framers intend to make the production of witnesses depend on whether

\begin{itemize}
\item 12. 388 U.S. at 16.
\item 13. 388 U.S. at 16.
\item 14. The Texas scheme provided that "Persons charged as principals, accomplices or accessories . . . cannot be introduced as witnesses for one another . . .; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others." 388 U.S. at 16-17 n.4.
\item 16. 388 U.S. at 19. Justice Harlan would have preferred the Court to apply general due process considerations rather than apply the compulsory process clause to the states through the fourteenth amendment. See 388 U.S. at 23-24.
\item 17. 388 U.S. at 23.
\end{itemize}
the legislature or courts deemed them fit to testify. Rather, the framers intended to guarantee a defendant the right to place on the witness stand—and thus to produce by means of "compulsory process"—all persons whom they understood to be "witnesses in his favor." In providing the defendant these rights, they implicitly intended to abolish the common-law rule of competence that had disqualified witnesses from testifying for the accused and replace it with a constitutional standard of competence:

[T]he right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury. 18

In short, the framers granted the defendant the explicit right to produce witnesses in his favor on the assumption that, in doing so, they had implicitly granted him the right to place such witnesses on the stand. As the Court put it, "the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court..." 19

Finally, having established that the testimonial competence of defense witnesses is a federal question to be resolved by federal standards, the Court examined the Texas incompetency statutes. The Texas rule appears to have assumed that co-indictees charged with the same crime were untrustworthy witnesses because "each would try to swear the other out of the crime"; 20 as a remedy, Texas law declared co-indictees incompetent to testify for one another. Without challenging the underlying assumption about the general trustworthi-


19. 388 U.S. at 22. Justice Harlan objected to the extension of the compulsory process clause beyond the issuance of subpoenas to include matters of competence. 388 U.S. at 24. For similar criticism of Washington, see Casenote, 20 Baylor L. Rev. 467, 472 (1968); Casenote, 46 Tex. L. Rev. 795, 797-98 (1968). Justice Harlan and the majority basically differed about whether the framers intended the compulsory process clause to govern the competence of defense witnesses. See generally authorities cited in note 18 supra. If one concludes, as the majority did, that the framers were concerned with matters of competence, one can rationally conclude that the framers did not intend to allow the trial courts or the legislature to fashion rules of evidence limited only by their discretion.

20. 388 U.S. at 21, quoting Benson v. United States, 146 U.S. 325, 335 (1892).
ness of co-indictees, the Court concluded that the remedy was arbitrary because it imposed an unnecessary burden on the defendant's right to present witnesses. Even if co-indictees were potentially unreliable defense witnesses, Texas could have adequately protected the integrity of its fact-finding process by permitting them to testify and leaving the weight and credibility of their testimony to the fact-finder. The Court concluded by defining the standard for testing the Texas statutes:

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense.

This standard should not be viewed as a comprehensive test. On the contrary, the Court explicitly refused to decide, for example, whether a defendant had the right to compel a witness to testify over assertions of privilege. Nor is the standard entirely consistent in so far as it suggests that the defendant's right to present witnesses is confined to eye-witnesses (witnesses who are "capable of testifying to events that [they have] personally observed") and thus excludes expert witnesses and others whose testimony is based on opinion. Nevertheless, the standard contains the four essential elements of a defendant's right of compulsory process: a defendant has a right to subpoena witnesses who are (1) competent ("physically and mentally capable of testifying to events that [they have] personally observed") to give testimony that is (2) relevant, (3) material, and (4) favorable to the defendant (testimony that is relevant and material "to the defense").

A. Competent Witnesses

Because a defendant has no right to produce witnesses who are constitutionally incapable of testifying, his right to subpoena witnesses depends on their competence to testify. It has been com-

21. The Court quoted Rosen v. United States, 245 U.S. 467, 471 (1918): "[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ." 388 U.S. at 22. The Court then added that "[a]lthough Rosen v. United States rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment." 388 U.S. at 22.

22. 388 U.S. at 23 (footnote omitted).
23. 388 U.S. at 23 n.21.
monly assumed, moreover, that the compulsory process clause does no more than incorporate by reference whatever standards of competence otherwise exist in the jurisdiction. Wigmore best represents this view as follows:

This history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of the statutes [granting such a right] was merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases. The bills of rights in most of the constitutions have incorporated this statutory right . . . .

It follows that this right [of compulsory process] does not over­ride and abolish such exemptions and privileges as may be otherwise recognized by common law or statute. The right guaranteed is merely the general right to the compulsory process which is required for making practical the testimonial duty, so far as that duty otherwise exists.26

The difficulty with the Wigmorean view is that it was implicitly rejected in Washington v. Texas as contrary to the framers' intent. In Washington, the Court held that by providing a defendant the right to subpoena witnesses in his favor, the framers intended to secure the right to place the testimony of such witnesses into evidence.27 Whether a witness is capable of testifying for the defendant, therefore, is not solely a matter of state law, but is ultimately a federal

(refusal to subpoena children to testify to defendant's state of mind at time of offense not a violation of compulsory process rights because children were not competent to testify); Commonwealth v. Jackson, 457 Pa. 237, —, 324 A.2d 350, 355 (1974) ("[W]here certain witnesses' testimony would not be admissible at trial, the Constitution does not require that a defendant be given the right to secure the attendance of witnesses which he has no right to use"). See also United States v. Sellers, 520 F.2d 1281, 1285-86 (4th Cir. 1975) (no violation of compulsory process rights to deny defendant subpoenas for witnesses not competent to testify to facts set forth in offer of proof); United States v. Deaton, 468 F.2d 541, 544 (5th Cir. 1972), cert. denied, 410 U.S. 934 (1973) (no violation of compulsory process rights to deny defendant a subpoena for witness whose testimony would be inadmissible as hearsay); United States v. Keefer, 464 F.2d 1385, 1387 (7th Cir.), cert. denied, 409 U.S. 983 (1972) (same). It should be noted, however, that whether hearsay evidence is competent evidence in the defendant's favor is itself a federal question—like the question of testimonial competence—to be resolved by constitutional standards. See Westen, supra note 4, at 149-59.

26. 8 J. WIGMORE, EVIDENCE ¶ 2191, at 68-69 (J. McNaughton rev. 1961) (footnotes omitted). For an elegant statement of this view of the Constitution, see In re Dillon, 7 F. Cas. 710, 712 (No. 3,914) (N.D. Cal. 1854). See also Commonwealth v. Jackson, 457 Pa. 237, —, 324 A.2d 350, 355 n.4 (1974) ("Although a defendant has the right to have compulsory process to obtain witnesses in his behalf and, therefore, to have subpoenas issued, the determination of whether or not to allow a witness to take the stand is a matter within the discretion of the trial judge").

27. See text at notes 17-19 supra.
question to be resolved by federal constitutional standards. Although the states may establish local standards of testimonial competence, they may not do so in a manner that arbitrarily excludes "witnesses in [the defendant's] favor" within the meaning of the compulsory process clause. 28

The crux of the Court's decision in Washington is the meaning of the term "arbitrary." Unfortunately, the Court did not define the term; it merely criticized the Texas incompetency rule and contrasted it with other rules of competence that it implied were more acceptable. Nevertheless, the Court said enough to permit us to infer what it meant by "arbitrary." To anticipate our conclusion, by use of the term "arbitrary" the Court was referring to the fact that the Texas rule imposed an unnecessary burden on the defendant's right to present witnesses because the rule wholly excluded evidence that might have been reliable instead of permitting it to be heard, weighed, and judged by the fact-finder.

Perhaps it is best to begin with a distinction the Court drew between the arbitrary Texas rule and nonarbitrary rules for infants and the insane. 20 The Court found the Texas rule arbitrary because it disqualified an entire class of persons from testifying simply because some of them might testify falsely:

[I]t could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of belief. 30

At the same time, however, the Court distinguished nonarbitrary rules that disqualify infants and insane persons from testifying:

Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them. 31

It might be argued that the Court was drawing a distinction between disqualification for mental or physical infirmity, which it found nonarbitrary, and disqualification based on interest and bias, which it found arbitrary. This seems unlikely, however, because rules that operate to disqualify the mentally and physically infirm can apply in the same a priori fashion as the Texas rule. It was once the rule, for example, that children below the age of seven, and persons deemed

28. 388 U.S. at 23.
29. See 388 U.S. at 23 n.21.
30. 388 U.S. at 22.
31. 388 U.S. at 23 n.21.
insane, were categorically presumed untrustworthy, regardless of their individual capacity to give reliable testimony. If the Texas rule was arbitrary because of its broad sweep, then these latter rules appear equally arbitrary.

It is unlikely, however, that in singling out rules for infants and the insane the Court was referring to categorical disqualifications of the kind described; for, by the time the Court decided Washington in 1967, those categorical rules had been universally replaced by the more modern view that infants and mentally infirm persons should be disqualified only if, after individual examination, they are determined incapable of giving meaningful testimony in the particular case. It is more likely, therefore, that in expressing apparent approval of rules for infants and the insane the Court was referring to rules reflecting the more modern view of competence.

The first basic theme of the opinion that begins to emerge, then, is a distinction between an a priori determination (based on a witness’ membership in a class) that a witness is incompetent, and an individual determination that a witness is incapable of giving testimony in a particular case. Yet even this distinction, by itself, is incomplete in so far as it implies that all categorical disqualifications are invalid. Assume, for example, that a state disqualified from testifying all persons under the age of six months, all persons with an I.Q. of less than twenty, or all persons incapable of recollecting for periods beyond eight hours. Would the Court declare such rules invalid? If not, how would the Court distinguish those categorical disqualifications from the incompetency rules in Washington? Similarly, the distinction is incomplete in so far as it implies that all individualized disqualifications are valid regardless of the standard used in determining the disqualification. Assume, for example, that a state disqualifies persons who, after individual determination, appear incapable of expressing themselves in perfect English. Would the Court uphold such individualized determinations? If not, how would it distinguish them from the procedures for infants and the insane, which it apparently approved?

While the Court did not expressly supply the missing element, we can construe its language in a way that both explains the distinction between “a priori categories” and individualized disqualification, and is consistent with what will appear as the second basic theme of the opinion. The defect in the Texas rule was not that it disqualified categories of witnesses, but that the particular category of co-indictees

32. See 2 J. Wigmore, Evidence § 492, and § 508, at 600 (3d ed. 1940).
33. See id. § 488 n.2, § 501, and § 509, at 600-01.
was overbroad. If Texas disqualified all witnesses with an I. Q. of less than twenty, the category would be valid because reasonable people could not differ about the inability of such witnesses to give meaningful testimony. The difficulty with the Texas rule was that it disqualified all co-indictees from testifying for one another, despite the fact that some co-indictees might be capable of giving trustworthy testimony. In the Court's words, the Texas rule "presume[d] them unworthy of belief"34 without any showing that everyone within the category was necessarily unreliable.

Having determined that the Texas rule was overbroad, the final question the Court faced was whether such overinclusion could be justified. The parties apparently agreed both that Texas had a legitimate interest in protecting its judicial processes from unreliable testimony and that co-indictees could be unreliable. They apparently disagreed, however, about whether disqualifying all co-indictees was a proper means of guarding against the unreliable testimony of some co-indictees. Texas contended that it was justified in excluding all co-indictees because it could not identify the unreliable individuals in advance and because some co-indictees were certainly unreliable. The defendant contended, however, that categorical exclusion was unnecessary because Texas could adequately satisfy its interests by permitting the co-indictees to testify subject to instructions concerning the weight and credibility of their testimony. The Court adopted the defendant's view and thus established the second basic theme of its opinion—that whenever a witness may seem to be competent, his competence must be left to the fact-finder:

"[The Sixth Amendment reflects] the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . ."35

Thus, the two separate themes of the opinion—that a priori categories are generally invalid and that matters of competence must usually be left to the fact-finder—together provide a general constitutional standard for determining the competence of defense witnesses in criminal cases. The Texas rule was arbitrary, not because it disqualified witnesses by categorizing them, but because the particular category used included witnesses whose competence was reasonably disputable. By the same token, the issue of competence had to go to the jury, not because statutory disqualification is never permissible,

34. 388 U.S. at 22.
but because the competence of co-indictees is something about which reasonable people can differ. This also explains the distinction between what the Court called "arbitrary" disqualifications based on a priori categories, and "nonarbitrary" disqualifications based on individualized examination. The latter procedure is valid, not simply because the trial court individualizes its determination, but because in doing so, it presumably applies the strict standard of disqualifying only those witnesses whose competence is not reasonably disputable.

To state the general standard, the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ. 36

Having thus defined the constitutional standard of competence implicit in Washington, we can apply it to one final, yet apparently inconsistent, statement in the opinion. In its conclusion, the Court emphasized that a defendant has the right to produce witnesses who are capable of testifying "to events [they] personally observed." 37

This statement raises the negative implication that the defendant has no right to produce witnesses whose testimony is based on opinion. If this implication was intended, it contradicts the basic standard of competence set forth above: there are many witnesses, including experts, whose testimony is based on opinion, yet who are capable of presenting evidence upon which reasonable people would rely. Indeed, it is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, bloodstains, sanity, and other matters that routinely arise in criminal litigation. 38 It is unlikely,
therefore, that the Court intended to limit the scope of its holding to the production of eye-witnesses. Since the particular witness for the defense in Washington based his testimony on personal observation, the Court had no occasion to consider the authority of the courts to exclude opinion evidence.

It is more likely that the Court stressed the importance of personal observation as one of several factors that might render it reasonable for the fact-finder to rely on a witness’ testimony. Although personal observation is by far the most common means of establishing a witness’ credibility, it is certainly not the exclusive method. Accordingly, it should be sufficient if the defendant can establish any foundation that would make it reasonable for a fact-finder to rely on the testimony of his witnesses. This standard may prove difficult to apply in individual cases, particularly with respect to expert witnesses.\(^{39}\) Yet, whether a witness possessing opinion evidence is a witness in the defendant's favor within the meaning of the sixth amendment, remains a federal question to be resolved by applying federal constitutional standards.

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39. Opinion testimony, by experts and lay witnesses alike, is admissible in federal court under certain conditions. See Fed. R. Evid. 405(a), 608(a), 701-02. Determining the competence of experts raises special problems, however, because of the difficulty in establishing their qualifications, the length and complexity of their testimony, and the danger that they may usurp the responsibility of the jury to formulate opinions on the ultimate issues in the case. The last problem may explain the reluctance of most courts to permit the defendant to call polygraph experts to render an opinion concerning the defendant's truthfulness when no constitutional right to do so is asserted. See, e.g., United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1973), revg. 350 F. Supp. 685 (D.D.C. 1972); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). But see United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (polygraph testimony admissible on the defendant's behalf on nonconstitutional grounds). Cf. State v. Dorsey, 532 P.2d 912 (N.M. Ct. App. 1975) (defendant has right under due process clause to offer polygraph testimony on his behalf).
B. Relevant Witnesses

A defendant has no constitutional right to produce witnesses whose testimony is wholly irrelevant to his defense. If a witness' testimony does not tend to prove the existence of facts asserted by the defense, then he can hardly be deemed a witness in the defendant's favor within the meaning of the sixth amendment. Thus, a defendant accused of committing a burglary on the night of March 15 is not entitled to subpoena an "alibi" witness to testify to his whereabouts on March 17 because the offered testimony does not tend to establish any facts concerning the defendant's actions on the night of the crime. Nor is a defendant, at the guilt-determining stage of his trial, constitutionally entitled to introduce evidence relevant only to the determination of punishment, on the "sporting theory" that the jury might secretly (and wrongfully) disregard its instructions and take the evidence into consideration in determining his guilt or innocence.

40. See Jenkins v. Moore, 395 F. Supp. 1336, 1338 (E.D. Tenn.), aff'd., 513 F.2d 631 (6th Cir. 1975) (no violation of defendant's compulsory process rights to deny him a subpoena for documentary evidence irrelevant to the issues in dispute); State v. Groppi, 41 Wis. 2d 312, 323, 164 N.W.2d 266, 271 (1969), revd. on other grounds, 400 U.S. 505 (1971) (no violation of defendant's compulsory process rights to deny him a subpoena for witness whose testimony was irrelevant to the issues in dispute). Cf. State v. Baldwin, 276 N.C. 690, 700, 174 S.E.2d 526 (1970) (no violation of defendant's compulsory process rights to deny him a continuance for absent witness whose testimony would not have tended to prove facts at issue in the case).

41. Chandler v. State, 272 S.2d 641, 643 (Miss. 1973) (relying on state and federal guarantees of compulsory process). See also People v. Stabler, 202 Cal. App. 2d 862, 865, 21 Cal. Rptr. 120, 122 (1962) (where intoxication is not a defense, refusal to subpoena witness to testify to defendant's intoxication at the time of the offense does not violate right of compulsory process).

42. Brady v. Maryland, 373 U.S. 83, 90 (1963). The defendant in Brady was convicted of felony-murder and sentenced to death by the jury. After sentencing, it was discovered that the prosecutor had withheld the confession of a co-defendant that tended to prove that, though Brady participated in the underlying felony, the co-defendant actually killed the victim. The Maryland court of appeals held that the suppression of the confession violated due process because, while the confession did nothing to exonerate the defendant of felony-murder, it might have persuaded the jury to refrain from sentencing him to death; accordingly, the court remanded for a new trial limited to the issue of punishment. Brady sought further relief in the United States Supreme Court, where he claimed that he was also entitled to a new trial on the issue of guilt. He argued that, even if the new evidence were relevant only to punishment, the jury might nevertheless disregard its instructions and consider the irrelevant evidence in determining guilt or innocence. The Court rejected the argument:

A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record. But we cannot raise that trial strategy to the dignity of a constitutional right . . . .

373 U.S. at 90.
Although it is clear that the defendant has no right to produce and present irrelevant evidence, defining the standard to determine whether his evidence is relevant presents a serious problem. One might contend that the compulsory process clause has no bearing on the determination of relevance and that it merely provides the accused the means for producing witnesses whose testimony is otherwise deemed relevant by the prevailing law. That contention, however, runs counter to the thrust of the Supreme Court's holding in Washington v. Texas. In Washington, the Court refuted the notion that courts can define the probative value of the testimony of defense witnesses in a manner that arbitrarily excludes witnesses in the defendant's favor. Although the issue in Washington was framed in terms of arbitrary standards of competence, the logic of the Court's opinion should apply with equal force in the area of relevance: The framers of the sixth amendment did not intend to commit the "futile act" of guaranteeing the defendant the presence of witnesses, while leaving it to the courts to prohibit them from testifying by employing arbitrary standards of relevance.  

The standard of relevance applied to the testimony of defense witnesses, therefore, ultimately presents a federal question to be resolved by federal constitutional standards. On a nonconstitutional level, evidence is said to be relevant if it tends to establish the existence of a fact at issue in a case. The wording of the standard may differ from one jurisdiction to another, but applications of the various formulations do not appear to differ in substance. Thus, most commentators would agree that evidence is relevant if it has "any tendency to make the existence of [a] fact . . . more probable or less probable than it would be without the evidence." Because the relevance of evidence depends upon first identifying the issues to be proved, state legislatures (and Congress) can set the basic framework for relevance by defining the elements constituting crimes and defenses. However, beyond this initial delineation of the substantive issues, the legislature has limited control. It can establish local standards of relevance, but only to the extent that such standards do not define the relevance of the defendant's evidence so narrowly that they

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43. Cf. text at notes 18-23 supra.

44. Although an examination of relevance may sometimes involve only a consideration whether the evidence tends to establish a proposition, the test contemplated here involves an additional consideration whether that proposition is at issue in the case. See McCormick's Handbook of the Law of Evidence, § 185, at 434-35 (2d ed. E. Cleary 1972) [hereinafter McCormick]. See also Fed. R. Evid. 401.

45. McCormick, supra note 44, § 185, at 436-37.

exclude witnesses in his favor within the meaning of the compulsory process clause.

By applying the test of arbitrariness developed by the Court in *Washington*, we can establish a constitutional standard of relevance and then use it to measure the prevailing nonconstitutional standard. While courts have a legitimate interest in being able to detect and screen irrelevant evidence, they may not do so by arbitrary means. Resorting to the outright exclusion of potentially relevant evidence is arbitrary if less drastic alternatives exist for screening irrelevant evidence; accordingly, if the relevance of evidence is something about which reasonable people may differ, instructing the fact-finder to screen the evidence is a less drastic alternative than outright exclusion. *In sum, the defendant has a constitutional right to present any evidence that may reasonably be deemed to establish the existence of facts in his favor.* The prevailing standard of relevance, which defines relevant evidence as evidence that has any tendency to make the existence of a fact at issue more probable or less probable, would thus appear to satisfy constitutional requirements.

While the prevailing standard of relevance seems broad enough to satisfy the constitutional test, it is invariably accompanied by exceptions and by grants of discretion that raise more serious problems. Thus, in most jurisdictions the trial judge may exclude relevant evidence if he concludes that its probative value is out-weighed by its prejudicial effect or by its tendency to cause confusion or undue delay. The judgment of the court in weighing such factors is entitled to considerable deference and is reviewable only for manifest abuse of discretion. In addition, most jurisdictions have made the policy decision that certain kinds of relevant evidence should always be excluded, such as evidence of the defendant's bad character for the purpose of showing that he acted in conformity therewith, or evidence that the defendant offered to plead guilty for the purpose of showing that he is guilty. The categorical exclusion of such evidence is based upon the legal determination that its probative value is always

47. *See, e.g.*, FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay [or waste of time . . .").


outweighed by the danger of prejudice or by other independent policies.

A good illustration of the constitutional problems presented by such exceptions is found in the rules governing the relevance of a victim's prior sexual conduct to prosecutions for rape. The approach taken by the Michigan sexual assault law is representative of the rule used in a majority of states. Its adoption was due in part to efforts by women to make the criminal process more congenial to reporting and prosecuting rape by removing some of the evidentiary rules that previously deterred victims from reporting assaults. The Michigan law excludes what may be relevant evidence in two ways. First, the law prohibits the defendant from introducing any evidence of the victim's sexual conduct except for the limited purpose of showing either the victim's prior sexual conduct with the defendant himself, or the origin of semen, pregnancy, or disease found in the victim. Second, the law grants the trial judge discretion to exclude such evidence, even for the latter enumerated purposes, if he finds that its "inflammatory or prejudicial" nature outweighs its probative value.

The statute presents two separate problems—one stemming from its across-the-board exclusion of possibly relevant evidence and one stemming from its grant of discretion to the trial court. First, by declaring most sexual-conduct evidence to be legally irrelevant, the statute categorically excludes evidence that might reasonably be deemed to favor the defendant's case. A defendant customarily offers such evidence for at least two purposes: to impeach the victim's credibility by proving her "bad" character and to raise the inference that she consented to the sexual act in question by proving that she consented to similar acts in the past. Although sexual-conduct evidence tends to prove little, if anything, about a witness' capacity to tell the truth, it may tend to establish the probability of the victim's consent. For example, the defendant may try to show that the victim is an experienced prostitute whose real grievance is that the defendant refused to pay for her services, or that the victim has made previous

51. In most jurisdictions, as in Michigan, evidence of specific instances of the victim's prior sexual conduct with persons other than his or her spouse is inadmissible either to establish the affirmative defense of consent or to impeach the victim's credibility. See Casenote, 8 Ga. L. Rev. 973, 974-75 & n.24 (1974).
54. See McCormick, supra note 44, § 42, at 82-83. Cf. Fed. R. Evid. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence").
false claims about conduct that was actually consensual, or that the
victim's conduct with the defendant was part of an existing and
distinctive pattern of seduction. Furthermore, if it is rational to
assume that a person who has consented to sexual intercourse in the
past is more likely to consent to sexual intercourse than a virgin, then
the defendant may wish to offer sexual-conduct evidence because it
tends to make the existence of consent more probable than it would
be without such evidence.55 In each case, if reasonable people could
differ about the probative value of such evidence, then, as a matter of
law, it is constitutionally relevant to the defendant's case.56

The Michigan legislature, in response, would probably not deny
that sexual-conduct evidence can be relevant; rather, it would assert
that the probative value of such evidence is generally slight and is
usually outweighed by its deterrent effect on the victim's willingness
to prosecute. There are several problems with that position. First,
even though sexual-conduct evidence may have slight probative value
in some cases, the statute categorically excludes it in almost all cases,
including those in which it has substantial value. Second, in a
proceeding in which the prosecution must prove all essential elements
of the crime beyond a reasonable doubt (including lack of con-

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55. Although some commentators believe that a person's past sexual conduct bears
no reasonable relationship to his willingness to engage in future sexual activity, see S.
BROWNMILLER, AGAINST OUR WILL 371 (1975), the courts remain unanimous in
finding that persons who have refrained from sexual activity in the past are less likely
to consent in any given instance than persons who have often engaged in such activity
in the past. See Washburn, Rape Law: The Need for Reform, 5 N.M. L. Rev. 279,
of Evidence apparently recognize the relevance of such evidence. See FED. R. EVID.
404(a)(2) ("Evidence of a person's character or a trait of his character is not
admissible for the purpose of proving that he acted in conformity therewith on a
particular occasion, except: Evidence of a pertinent trait of character of the victim of
the crime offered by an accused . . . ").

56. To be sure, evidence of prior sexual conduct carries the least amount of
weight when offered solely to support the inference that a person who has consented
to sexual intercourse in the past is more likely to consent again than a person who
was a virgin. For this reason, some jurisdictions wholly preclude the defendant from
offering such evidence for that purpose. See CAL. PEN. CODE § 1103(2)(a) (West
Supp. 1975). See also note 64 infra. The difficulty with such outright exclusion,
however, is that it may preclude the defendant from offering evidence that, in the
recent judgment of courts and commentators alike, has some relevance to the issue of
(1975); Wynne v. Commonwealth, — Va. —, 218 S.E.2d 445 (1975); Note,
Limitations on the Right To Introduce Evidence Pertaining To the Prior Sexual
History of the Complaining Witness in Cases of Forceible Rape: Reflections of
Reality or Denial of Due Process?, 3 Hofstra L. Rev. 403, 408-19 (1975). Nor can
the evidence be constitutionally excluded by simply asserting that its probative value
is outweighed by its inflammatory effect. It is up to the jury to decide how much
weight, if any, the evidence carries, unless the court concludes that the evidence is so
inherently inflammatory that even a properly instructed jury cannot be expected to
evaluate it rationally. See text at notes 63-70 infra.
sent), even evidence with only slight probative value may prove sufficient to introduce doubt into a juror's mind. The real question, then, is whether the state has the constitutional authority to exclude evidence that may make the difference between guilt and innocence in order to make the criminal process more congenial to those who seek to use it.

The answer to this question can be found in two separate lines of cases—those concerning a defendant's right to produce government informers and those concerning his right to examine prosecution witnesses over claims of privilege. The state's interest in preserving the anonymity of its informers is very similar to its interest in excluding sexual-conduct evidence. In each case, the state encourages individuals to come forward with evidence of criminal violations by guaranteeing them a modicum of confidentiality; in each case, the state fears that open disclosure of certain facts at trial will dry up its sources of information. Nevertheless, the state's authority to suppress information about informers is limited by "the fundamental requirements of fairness." In a decision that can be understood to be implicitly based on the compulsory process clause, the Supreme Court held that the state's efforts to preserve the confidence of its sources must "give way" whenever disclosure "may be relevant and helpful to the accused's defense."

In a case dealing with the defendant's right of confrontation, the Court reached a similar result. The prosecution in Davis v. Alaska relied on the identification testimony of a seventeen-year-old witness who was on probation for a prior juvenile offense. When the defendant tried to impeach the witness for bias by questioning him about his self-interest in pleasing the prosecution, the trial judge barred the questions on the basis of a statute designed to protect the juvenile

58. The focus here is on the simple relevance, and not on the probative weight, of the exculpatory evidence. Thus, although sexual-conduct evidence may not be sufficient by itself to prove consent, it may be sufficient, when linked with additional evidence of consent, to introduce doubt into the minds of enough jurors to avoid a conviction. Cf. United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969) (defendant has constitutional right to produce evidence if there is "a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction"). See also text at notes 71-144 infra.
59. See generally MCCORMICK, supra note 44, § 111.
from the embarrassment of exposing his record. The Supreme Court reversed, holding that the state's interest in permitting the juvenile to testify "free from embarrassment and with his reputation unblem­ished" was outweighed by "the right of the petitioner to seek out the truth in the process of defending himself." 63 This statement of the paramount importance of the defendant's right to present exculpatory evidence should apply with equal force to the case of the rape victim. 64 Indeed, if the state's desire to spare a witness embarrassment is subordinate to the defendant's right of confrontation, it is also subordinate to his right of compulsory process, for the two clauses are simply different ways of defining the government's obligation to produce witnesses for the benefit of the defendant. 65

63. 415 U.S. at 320.
64. Indeed, at the time Davis was decided the California legislature was considering the adoption of legislation to prohibit evidence of the victim's prior sexual conduct from being introduced for any purpose whatsoever. In response to Davis, however, the legislature amended the bill to permit the defendant to introduce such evidence for the purpose of attacking the victim's credibility on the assumption that to do otherwise would violate the defendant's right of confrontation. See Note, California Rape Evidence Reform: An Analysis of Senate Bill 1678, 26 HAST. L.J. 1551, 1570-71. The Davis exception to the California legislation may be so broad that it completely undercuts the effect of the remaining sections of the legislation, which purport to prohibit the use of sexual conduct evidence. See id. at 1567-68.
65. The confrontation and compulsory process clauses of the sixth amendment impose a constitutional obligation on the states to produce witnesses in criminal proceedings to enable the defendant to defend himself effectively. See California v. Green, 399 U.S. 149, 176 (1970) (Harlan, J., concurring). The language of the clauses distinguishes between those witnesses whose testimony the prosecution relies upon to prove its case and those witnesses whose testimony the defendant relies upon to defeat the state's case. This distinction has no bearing on the scope or importance of the underlying duty to produce witnesses, which remains the same whichever party calls the witness at trial. Rather, the purpose of the distinction is to allocate the burden of invoking the state's underlying duty to produce. While the state has no duty to produce the defendant's witnesses unless he identifies and requests their production, once he makes a proper request, the state has the same duty to produce them as to produce the witnesses upon whose testimony the prosecution relies.

Thus, the sixth amendment enables the defendant to establish facts both by cross-examining the prosecution's witnesses and by examining his own witnesses. In a rape case, evidence of the victim's prior sexual conduct can be produced either as the result of the defendant's right of confrontation or as the result of his right of compulsory process. If, in response to his direct questions, the witness admits the facts the defendant wishes to establish, then the defendant has produced the evidence in the course of cross-examination through the exercise of his confrontation rights. On the other hand, if on cross-examination the witness denies the truth of the facts the defendant wishes to establish, then the defendant must introduce the evidence by calling independent witnesses as part of his affirmative case through the exercise of his compulsory process rights. For an example of the impeachment of a prosecution witness arising not on cross-examination (as in Davis), but in the context of the defendant's affirmative case, see State v. Cox, 42 Ohio St. 2d 200, 327 N.E.2d 639 (1975). Regardless whether the issue arises as a matter of confrontation or compulsory process, however, the constitutional analysis—the weighing of the defendant's right to produce evidence against the interests protected by the testimonial privilege—is the same.
The second defect in the Michigan statute (which is also shared by most rules of relevance) is that, after recognizing the probative value of particular kinds of sexual-conduct evidence, it allows the trial judge the discretion to exclude such evidence. The statute recognizes two limited exceptions to the ban on sexual-conduct evidence: evidence of the victim's prior sexual conduct with the defendant and evidence of the victim's sexual conduct with others that reveals the origin of semen, pregnancy, or disease. Although, as noted above, the exceptions do not cover all instances in which sexual-conduct evidence may be constitutionally relevant, they are rational in themselves. They permit the defendant to prove that he had a prior personal relationship with the victim (which may tend to establish consent), and, where identity is at issue, to disprove that he was the source of semen, disease, or pregnancy. Nevertheless, having recognized the relevance of such evidence, the statute authorizes the trial court to exclude it whenever it concludes that its probative value is outweighed by its "inflammatory or prejudicial nature."

Allowing the judge discretion to balance the probative value of evidence against the danger that it will improperly influence the jury raises several problems. To begin with, it implies that, in counteracting the dangers of prejudice, the judge is free to exclude probative evidence rather than admit it under cautionary instructions. Yet Washington teaches that it is unconstitutional for a court to resort to exclusion when the less drastic alternative of sending the evidence to the jury under cautionary instructions is available. Furthermore, the jury is constitutionally presumed to be able to follow its instructions in all but the most extraordinary cases. Ordinary, therefore, the compulsory process clause denies the judge any discretion to exclude relevant evidence. In some cases, of course, the judge may conclude

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68. Only twice has the Supreme Court held that the assumption that the jury can follow its instructions may violate constitutional rights. In Jackson v. Denno, 378 U.S. 368, 388-89 (1964), the jury was found incapable of disregarding a defendant's involuntary confession, and in Bruton v. United States, 391 U.S. 123, 128-37 (1968), it was found similarly incapable of disregarding statements in a co-defendant's confession that powerfully incriminated the defendant.

As the Court pointed out in Bruton, 391 U.S. at 135, the jury is ordinarily presumed capable of following its instructions. See, e.g., Frazier v. Culp, 394 U.S. 731, 733 (1969) (instructions to disregard prosecutor's opening statement concerning statements by a co-defendant incriminating defendant); Spencer v. Texas, 385 U.S. 554, 562-63 (1967) (instructions to consider evidence of defendant's prior crimes only to determine sentence). Furthermore, to the extent that the Court in Bruton and Jackson doubted the jury's ability because of the Court's concern for the rights of the defendant, it should trust the jury here where it is the defendant who asserts a right to bring the evidence before the jury.
that the evidence is so inflammatory or prejudicial as to induce the fact-finder to disregard its instructions and decide the case on irrational grounds. In these rare cases, which may include cases involving the victim's prior sexual conduct, the judge may exclude the evidence on the ground that, because of its inflammatory effect, he can no longer say that it rationally tends to favor the defendant's case. In the absence of such circumstances, however, the defendant has a constitutional right to demand that the fact-finder, rather than the judge, determine the probative value and weight of his evidence.

Another problem with a relevance rule that grants discretion to the trial courts is that it implies that appellate courts should defer to the trial court's determination of relevance and should reverse only for the most apparent abuse. Yet, whatever the standard of review for nonconstitutional issues, the federal courts should not defer to determinations of relevance that raise "grave constitutional overtones." Indeed, it is particularly appropriate that an appellate court scrutinize the exclusion of prejudicial or inflammatory evidence because of the limited nature of the inquiry: The appellate court does not have to balance the probativeness of the evidence against the dangers of improper influence, nor does it have to re-weigh factors that may be better understood by the trial court. Rather, it must only decide whether the case presents the rare kind of evidence that is too inflammatory or too prejudicial for a properly instructed fact-finder to consider rationally. Absent such a finding, the appellate court must reverse the trial court for imposing an arbitrary burden on the defendant's right to produce witnesses in his favor.

C. Material Witnesses

The defendant has no constitutional right to subpoena witnesses whose testimony is immaterial to his defense. Although commentators differ on the proper use of the term "material," the Supreme

69. See note 48 supra.


72. Some courts use "relevance" to refer to the tendency of evidence to prove a fact, regardless whether the fact is at issue in the case, and use "materiality" to refer to the relationship between the fact that the evidence tends to prove and the issues in the case. Thus, if a fact is at issue, but evidence does not tend to prove that fact, the
Court has used the term in reference to the prejudicial effect of denying the defendant the benefit of relevant and favorable evidence. Accordingly, though evidence may be favorable and relevant to a defendant’s case, he has no right to produce it if the impact of its exclusion will be too insignificant in the context of the other evidence presented at trial to have any material bearing on the outcome.

The issue of materiality, the conventional wisdom notwithstanding, ultimately presents a question to be resolved by federal constitutional standards. First, the constitutional implications of materiality are implicit in the logic of Washington: The framers of the sixth amendment did not intend to commit the futile act of guaranteeing the defendant the presence of witnesses, while leaving it to the courts to prohibit them from testifying by imposing arbitrary standards of materiality. And, second, the federal nature of materiality is implicit in the Supreme Court’s treatment of the concept of prejudicial error. If, as the Supreme Court has held, the prejudicial effect of commenting on the defendant’s silence is a federal question, then the material effect of denying the defendant the right to produce witnesses in his favor must also present a federal question. For to say that evidence is material to the defendant’s case is simply another way of saying that its exclusion would be prejudicial by federal standards; conversely, to

evidence would be excluded as “irrelevant”; conversely, if evidence tends to prove a fact, but the fact itself is not at issue, the evidence would be excluded as “immaterial.”

For a discussion of the above distinction, see McCormick, supra note 44, § 185, at 434-35. Here, in contrast, both of the usages referred to above are treated as questions of relevance. See note 44 supra. Materiality, on the other hand, is used to refer to the probative weight of evidence that is assumed to be relevant.

73. In Moore v. Illinois, 408 U.S. 786, 798 (1972), the Supreme Court concluded that the suppressed evidence, which tended to impeach one of the prosecution’s five identification witnesses by showing that his identification was confused, was not material, 408 U.S. at 797, because the evidence, even if produced, would not have left the witness’ identification “significantly, if at all, impeached,” 408 U.S. at 796. Justice Marshall, dissenting, did not agree: “It is evident from the foregoing that the statements were not merely material to the defense, they were absolutely critical.” 408 U.S. at 806.

74. Wigmore believed that the compulsory process clause did nothing more than guarantee the defendant the same rights with respect to the issuance of subpoenas as are enjoyed by the prosecution. Therefore, he felt that local law alone governs the number of witnesses who are permitted to testify in criminal cases. 8 J. Wigmore, Evidence § 2191, at 69 n.3 (J. McNaughton rev. 1961).

75. See Chapman v. California, 386 U.S. 18, 21 (1967) (the prejudicial effect of commenting on the defendant’s decision to assert his privilege against self-incrimination is a federal question reviewable by the Supreme Court). Cf. Harrington v. California, 395 U.S. 250, 252 (1969) (the prejudicial effect of admitting hearsay evidence against the defendant is a federal question reviewable by the Supreme Court).
say that evidence is immaterial is another way of saying that its exclusion would be harmless by federal standards.\textsuperscript{76}

The more difficult task—after recognizing the federal nature of the issue—is to define the term “material” with sufficient precision to determine whether courts are applying the proper standard. Most jurisdictions have fashioned nonconstitutional rules of practice that have a direct effect on whether the defendant is afforded all material witnesses in his favor. For example, in some jurisdictions, rules have been adopted that limit the number of witnesses a defendant may subpoena in a single case\textsuperscript{77} or the number of witnesses who may testify to any single issue.\textsuperscript{78} Limits have also been placed on the number of character witnesses,\textsuperscript{79} expert witnesses,\textsuperscript{80} and witnesses who may testify to collateral issues.\textsuperscript{81} Those jurisdictions that do not

\textsuperscript{76} Since “prejudicial effect” and “materiality,” when used in this fashion, are synonymous, it is superfluous to speak of “prejudicial error” (or its converse, “harmless error”) with respect to a constitutional right like compulsory process that has already been formulated to require a showing of materiality. If the defendant’s right of compulsory process were formulated without reference to materiality—as it certainly could be and as his right of confrontation is usually formulated—then courts would find it useful to apply a prejudicial error test to decide whether violations justified reversal, just as they now apply the test of materiality.


\textsuperscript{78} See, e.g., Chapa v. United States, 261 F. 775 (5th Cir. 1919), cert. denied, 252 U.S. 583 (1920) (defendant limited to 13 out of 150 possible witnesses to testify that he “cured” them of illness); O’Hara v. United States, 129 F. 551, 555-56 (6th Cir. 1904) (no violation of the compulsory process clause to limit an indigent defendant to 4 witnesses on each contested issue); McMillan v. State, 229 Ark. 249, 255-57, 314 S.W.2d 483, 487-88 (1958) (defendant limited to 5 witnesses on question of his physical condition); People v. Cavanaugh, 69 Cal. 2d 262, 270-72, 444 P.2d 110, 115-16, 70 Cal. Rptr. 438, 443-44 (1968), cert. denied, 395 U.S. 981 (1969) (defendant limited in advance to 2 alibi witnesses from out-of-state); State v. Mucci, 25 N.J. 423, 433-34, 136 A.2d 761, 766 (1957) (defendant can be limited to a certain number of witnesses on any issue in the case, regardless whether a "collateral" or "main" issue is in dispute).

\textsuperscript{79} See, e.g., cases cited in note 151 infra.

\textsuperscript{80} See United States v. West Coast News Co., 357 F.2d 855, 859 (6th Cir. 1966), rev’d on other grounds sub nom. Aday v. United States, 388 U.S. 447 (1967) (defendant limited in advance to three expert witnesses); Burgman v. United States, 188 F.2d 637, 641 (D. C. Cir.), cert. denied, 342 U.S. 838 (1951) (defendant limited to two expert witnesses without cost). See also 6 J. WIGMORE, EVIDENCE § 1908, at 380 (3d ed. 1940) (“This result may be said to be universally accepted; the trial court in its discretion may limit the number of expert witnesses”).

\textsuperscript{81} See, e.g., People v. Arnold, 248 Ill. 169, 178, 93 N.E. 786, 789 (1910) (“While a court has no power to limit the number of witnesses to be heard as to a
impose numerical limits in advance invariably leave it to the trial judge to deny subpoenas for witnesses whose testimony is cumulative—a determination that will not be reviewed unless arbitrary.83

There is no constitutional difference between a rule that permits the judge to impose a numerical limit on the defendant's witnesses and a rule that permits the judge to exclude cumulative witnesses for the defense. Both rules may be applied to deny the defendant material witnesses within the meaning of the compulsory process clause. Thus, the constitutionality of a rule that limits the defendant to a certain number of witnesses for a particular issue depends upon whether it has the effect in that case of excluding material witnesses for the defense.84 Similarly, the constitutionality of a judge's ruling that denies the defendant subpoenas for cumulative witnesses depends upon whether the local definition of "cumulative" is coextensive with the constitutional meaning of "immaterial."85 In each case, the

controlling fact . . . it is not error to fix a reasonable limit concerning collateral matters . . .

82. See, e.g., United States v. Plemons, 455 F.2d 243, 246 (10th Cir. 1972) (no error to deny the defendant subpoenas for witnesses whose testimony would have been cumulative); United States v. Chapman, 455 F.2d 746, 748 (5th Cir. 1972) (same). Cf. Hamling v. United States, 418 U.S. 87, 127 (1974) ("The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative . . . ").


84. Compare Leverett v. State, 18 Ala. App. 578, 582, 93 S. 347, 350-51 (1922) (violation of the state compulsory process clause to limit the defendant to six character witnesses where character was "main" issue in case), with Malinauskas v. United States, 505 F.2d 649, 655-56 (5th Cir. 1974) (no error to limit defendant to one of five witnesses to testify that he was drugged at time he plead guilty, where the one witness who testified was totally incredible, and where the fact-finder had independent knowledge of the facts because he presided over the entry of plea). See also State v. Thompson, 65 N.J. Super. 189, 194, 167 A.2d 410, 413 (App. Div. 1961) (denial of a fair trial to limit defendant to two witnesses on a crucial issue, where further witnesses may have been more credible). Cf. United States v. Escamilla, 467 F.2d 341, 349 (4th Cir. 1972) (error to limit defendant to one character witness); Commonwealth v. Streuber, 185 Pa. Super. 369, 373, 137 A.2d 825, 827 (1958) (error to limit defendant to one character witness where "character testimony is substantial and positive evidence which may, of itself, create a reasonable doubt to produce an acquittal"); Cope v. State, 23 Okla. Crim. 161, 213 P. 753, 755 (1923) (error to limit defendant in advance to four character witnesses, "where, as in this case, the conviction rests wholly upon the testimony of the witness sought to be impeached [by the character evidence], and no conviction could be sustained without his testimony"). But see Owens v. State, 169 Miss. 141, 152 S. 651 (1934) (no error to limit the defendant to 100 of 500 potential witnesses in support of his motion for change of venue).

85. See Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (no violation of compulsory process clause to exclude as cumulative a second impeaching witness);
validity of the rule depends initially upon defining the federal standard of materiality.

The Supreme Court, unfortunately, has not formulated a federal standard of materiality. The Court was able to avoid the issue of materiality in Washington because the parties agreed that Fuller was an important eye-witness to the crime. In the absence of guidance from the Court, the lower courts have divided with respect to the governing standard. The Eighth Circuit has held that it is within the discretion of the trial court to exclude evidence as immaterial and that appellate courts will not reverse except for abuse of discretion. The Fifth Circuit, on the other hand, has required the government to show beyond a reasonable doubt that there was already sufficient evidence in the record to prove the point for which the excluded evidence was offered. Neither of these standards is very useful in identifying the specific elements that bear on materiality or in providing a meaningful measure of their effect in individual cases. It is possible, however, to derive a more meaningful standard of materiality by examining the Supreme Court's analysis in two related lines of cases—those cases defining the "prejudicial effect" of denying the defendant the benefit of other constitutional rights, and those cases defining the "material effect" of denying the defendant the right to discover exculpatory evidence in the government's possession.

As previously noted in the context of compulsory process rights, a finding of prejudicial error is equivalent to a finding of materiality.

United States v. McGrady, 508 F.2d 13, 18-19 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975) (no violation of compulsory process clause to deny subpoena for cumulative evidence that would not have affected the outcome). For a discussion of the extent to which the definition of "cumulative evidence" in Missouri fails to conform to the constitutional standard, see Note, The Cumulative Evidence Rule and Harmless Error, 40 Mo. L. Rev. 79 (1975).

86. 488 U.S. at 16.

The most direct reference to a "materiality" standard for the compulsory process clause is found in a later dissenting opinion that discussed the implications of the decision in Cool v. United States, 409 U.S. 100 (1972) (per curiam). In Cool, the Supreme Court reversed a conviction on the ground that the trial court's instruction on the credibility of a defense witness violated both the defendant's right of compulsory process and his right to demand that the prosecution prove its case beyond a reasonable doubt. In a later dissenting opinion, three members of the Court derived from Cool the proposition that the defendant is entitled to a new trial whenever a possibility exists that exculpatory evidence, wrongfully excluded, "would have created a reasonable doubt in the minds of the jurors." Cupp v. Naughten, 414 U.S. 141, 152-53 (1974) (Brennan, J., dissenting). This standard is entirely consistent with the standard the Court has adopted in related areas, and with the standard proposed here. See text at notes 90-106 infra.


88. Flores v. Estelle, 492 F.2d 711, 713 (5th Cir. 1974).

89. See notes 75-76 supra and accompanying text.
In either case, the court must determine whether the constitutional error was sufficient to justify a new trial. Realistically, of course, a court can never be certain whether the original trial would have reached the same result if the error had not been committed; the only way to be absolutely safe is to reverse the conviction outright or reverse and remand for an error-free trial. Yet, rather than requiring absolute certainty, the Supreme Court has tended to place the prejudicial error cases into three separate categories: (1) cases in which the consequences of the error are so difficult to isolate and measure that the Court will automatically reverse on the presumption that there was prejudice; 90 (2) cases in which the error is the product of such deliberate misconduct by the prosecution that the Court will automatically reverse, without requiring prejudice, in order to punish the state for its wrongdoing; 91 and (3) cases in which the error concerns the admission, in violation of constitutional rights, of specific items of evidence, where the Court will reverse only if persuaded that the error could have reasonably influenced the result. 92


91. See Nash v. Illinois, 389 U.S. 906, 907 (1967) (Fortas, J., dissenting), denying cert. to 36 Ill. 2d 275, 222 N.E.2d 473 (1966) (“It is by no means clear that petitioner must show that the prosecutor’s knowing acquiescence in a material falsehood prejudiced him. There is no place in our system of criminal justice for prosecutorial misconduct”). In cases of deliberate prosecutorial misconduct, the courts are concerned with more than protecting a particular defendant from prejudice; they are also concerned with maintaining the integrity of the system for future defendants. Thus, if the defendant can show that the prosecutor deliberately suppressed exculpatory evidence, he need not show that he was prejudiced by the suppression. See United States v. McCord, 509 F.2d 334, 349-50 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975); Levin v. Clark, 408 F.2d 1209, 1211 (D.C. Cir. 1967); Levin v. Katzenbach, 363 F.2d 265, 294 (D.C. Cir. 1966) (Burger, J., dissenting). As Judge Friendly put it, in cases of deliberate misconduct the court is willing to depart from its usual rule and reverse without a showing of prejudice because the scales contain weights and counterweights other than the interest in a perfect trial. Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that “The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach...” and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse. Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961), cert. denied, 377 U.S. 909 (1964). See also United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

We are not greatly concerned here with the first two categories. The consequences of denying the defendant witnesses in his favor can usually be evaluated with a fair degree of accuracy because the appellate court can adequately reconstruct what the evidence in an error-free trial would have looked like. Similarly, while rare cases may arise in which the defendant's witnesses are excluded in bad faith, most exclusions result from the good faith application of subpoena rules and rules of evidence. The important cases for our purposes, therefore, fall into the third category where the Court will reverse only if persuaded that the error could have reasonably influenced the result. Those cases have invariably involved the illegal admission of tainted evidence against the accused. In deciding whether such errors are harmless, the Court has applied the following standard: The error of introducing tainted evidence is harmless if, putting it aside, one can conclude beyond a reasonable doubt that the remaining evidence of guilt is so overwhelming that a reasonable jury

cot-defendant's confession implicating the defendant in violation of his right of confrontation); Chapman v. California, 386 U.S. 18 (1967) (comment on the defendant's refusal to testify in violation of his right against self-incrimination). See also note 95 infra.

One commentator has argued that in order to preserve the defendant's constitutional right not to be found guilty unless proven guilty beyond a reasonable doubt, the same constitutional standard should be applied to every evidentiary error at trial, regardless whether the error independently violates the Constitution. See Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988 (1973). Yet the argument appears to be fundamentally misconceived. It is true that in reviewing all criminal proceedings, state and federal, the courts must ensure (presumably beyond a reasonable doubt) that the evidence in the record is sufficient to permit a rational jury to find the defendant guilty beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). However, as far as Winship is concerned, it makes no difference how the evidence gets into the record. The fact that some or all of the evidence may have been admitted in violation of state or federal rules of evidence does not itself present a constitutional question under Winship. The only question under Winship is whether there was sufficient evidence before the jury to survive a directed verdict for the defendant. Thus, unless the admission or exclusion of evidence independently violates the Constitution and, hence, is itself a constitutional error, the court need not concern itself with the specific effect of the error.

93. Most violations of compulsory process are deliberate in the sense that they involve conscious decisions in response to a defendant's request for evidence. A reviewing court, however, will not require a showing of prejudice only when it is persuaded that the violation was not simply deliberate, but deliberately abusive. For instance, in Webb v. Texas, 409 U.S. 95 (1972) (per curiam), the Court reversed the defendant's conviction because of the trial judge's abusive and threatening remarks to his witness, although, as Justice Blackmun's dissent points out, only bare allegations of prejudice were made, 409 U.S. at 99. For other examples of deliberate misconduct that violated the defendant's right of compulsory process, see Bray v. Peyton, 429 F.2d 500 (4th Cir. 1970) (prosecutor arrested and incarcerated a defense witness to deter him and other witnesses from testifying for the defendant); People v. Pena, 383 Mich. 402, 175 N.W.2d 767 (1970) (prosecutor threatened defense witnesses); State v. Kearney, 11 Wash. App. 394, 523 P.2d 443 (1974) (prosecutor tampered with the defendant's witnesses).

94. See cases cited in note 92 supra.
would have had to reach the same result on the basis of the untainted evidence alone. 95

A court might be tempted to apply the tainted-evidence standard in cases raising compulsory process challenges to exclusions of exculpatory evidence. Thus, if the testimony of a relevant and competent defense witness is excluded on the ground that it is cumulative, the appellate court might put aside the exculpatory testimony and try to decide beyond a reasonable doubt whether the remaining evidence of guilt is so overwhelming that a reasonable jury would have had to reach the same result without regard to the exculpatory evidence. If the remaining evidence of guilt is overwhelming, then the excluded testimony would be immaterial and its exclusion would be harmless error; however, if the remaining evidence did not meet this test then the excluded testimony would be material and its exclusion prejudicial error. The obvious problem with applying the tainted-evidence test in this fashion, however, is that it causes the appellate court to retrace the same erroneous path as the fact-finder. Because the test forces the court to disregard the exculpatory evidence, the defendant is once again deprived of the benefit of having the favorable testimony affirmatively considered.

Although the tainted-evidence standard cannot be mechanically applied to problems of exculpatory evidence, it can be used in a modified form. The purpose of the test is to reconstruct the evidence as if the error had not occurred in order to decide, beyond a reasonable doubt, whether an error-free trial would have had to reach the same result. Because the error in tainted-evidence cases consists of admitting evidence that should have been excluded, the court reconstructs an error-free trial by disregarding the tainted evidence and evaluating the weight of the valid evidence that remains. 96 In com-

95. Brown v. United States, 411 U.S. 223, 231 (1973); Milton v. Wainwright, 407 U.S. 371, 377 (1972); Harrington v. California, 395 U.S. 250, 254 (1969). It is important to understand that the Court's test of harmless error does not represent an attempt to determine the actual effect of an error on the jury below, for it could only do that by opening up jury deliberations for inspection. Indeed, if the Court were to reverse for every error that might have actually influenced the jury, then it would have to reverse automatically in every case. See Note, supra note 90, at 819. Rather the Court's test represents an effort to determine the effect of the error on a reasonable (and thus hypothetical) jury by reconstructing the evidence on an error-free basis. Thus, instead of trying to determine whether erroneously admitted evidence may have actually influenced the jury, the Court puts aside the evidence, and proceeds to determine (beyond a reasonable doubt) whether a reasonable person, considering the evidence on an error-free basis, would have had to reach the same result. See note 96 infra.

96. Justice Brennan (together with Chief Justice Warren and Justice Marshall) criticized the Supreme Court for adopting a harmless-error test that consciously puts the tainted evidence aside and focuses on the amount of untainted evidence remaining.
pulsory process cases, on the other hand, the error consists of precisely the opposite behavior—the exclusion of evidence that should have been admitted. Accordingly, to reconstruct an error-free trial, the court should consciously study the exculpatory evidence and then reverse, unless it determines beyond a reasonable doubt that the exculpatory evidence, if admitted, could not have reasonably affected the jury. To restate the same test in affirmative terms, the court should reverse if there is any “reasonable likelihood” that the exculpatory evidence could have reasonably affected the jury.

Significantly, the Supreme Court has adopted this very test in the second line of cases to be considered—those, beginning with Brady v. Maryland, involving the defendant’s constitutional right to discover material evidence in his favor. The defendant’s right to discover evidence under the due process clause contains substantially the same elements as his right to produce witnesses under the compulsory process clause. In either case, he must show that (a) he has made a formal request to the government (b) to exercise its powers to produce evidence (c) that is favorable and (d) material to his defense. Whether or not the two formulations should be viewed as stating precisely the same principle, the standard of materiality can be presumed to be identical in each case.

Although the Court found it unnecessary to define the term “material” in Brady (and for several years thereafter), it addressed

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97. To say that an error is harmless “beyond a reasonable doubt” is simply the converse of saying that there is no “reasonable possibility” that the error was prejudicial. See Saltzburg, supra note 92, at 1014 n.88.


100. For the view that the defendant’s right of discovery under Brady and his right of compulsory process are identical, see note 145 infra. See also Westen, supra note 4, at 123-24.

101. In Giles v. Maryland, 386 U.S. 66, 73-74 (1967), the Court specifically refrained from defining the standard of materiality by which to evaluate the suppression of exculpatory evidence. As a result, the lower courts felt obliged to apply the materiality standard without knowing what the Supreme Court meant by it. The District of Columbia circuit required a new trial whenever the exculpatory evidence “might have led the jury to entertain a reasonable doubt about appellant’s guilt.” United States v. Lemonakis, 485 F.2d 941, 964 (1973), cert. denied, 415 U.S. 989 (1974); Levin v. Katzenbach, 363 F.2d 287, 291 (1966), aff’d, 408 F.2d 1209 (1967). The Second Circuit required a new trial whenever there was a “significant chance that this added item [of exculpatory evidence, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.” United States v. Miller, 411 F.2d 825, 832 (1969). The Fourth Circuit required a new trial only where there was a “substantial likelihood” that the
the problem directly in Giglio v. United States. The defendant in Giglio was convicted of forgery, largely on the testimony of a single co-conspirator named Taliento. At trial, both Taliento and the prosecutor denied that Taliento had been promised immunity from prosecution in return for his testimony. Later, when evidence was discovered that made it appear that Taliento had, in fact, been promised immunity, the lower court, finding the suppressed evidence immaterial, refused to order a new trial. The Supreme Court reversed on the issue of materiality. Although agreeing that a defendant cannot demand a new trial whenever he is denied evidence that may be "possibly useful to the defense but not likely to have changed the verdict," the Court held that he makes a sufficient showing of materiality if the suppressed evidence "could . . . in any reasonable likelihood have affected the judgment of the jury." The Court then found that the suppressed evidence in Giglio was material because the evidence could have reasonably persuaded the jury to suspect the credibility of the prosecution's principal witness.

The Giglio standard for the materiality of defense witnesses is entirely consistent with the constitutional logic of Washington. If it is "arbitrary" to prohibit the defendant from calling a witness whom the jury might reasonably find to be competent, it is equally "arbi-

exculpatory evidence would have changed the result. Ingram v. Peyton, 367 F.2d 933, 936 (4th Cir. 1966). The Tenth Circuit did not require a new trial unless the original trial was found to be "unacceptably unfair." United States v. Harris, 462 F.2d 1033, 1035 (1972). The Fifth Circuit required that the defendant show that the new evidence was "crucial, critical, [and] highly significant." Luna v. Beto, 395 F.2d 35, 41 (1968) (en bane), cert. denied, 394 U.S. 966 (1969).

102. 405 U.S. 150 (1972). Chief Justice Burger wrote the opinion for a unanimous Court.

103. 405 U.S. at 151-52.


106. 405 U.S. at 154-55. Again it is important to understand that the test of materiality represents an attempt to determine, not what effect the exculpatory evidence would actually have had on the original jury, but rather what effect it could have reasonably had. See note 95 supra.

Where the defendant seeks to introduce evidence to impeach the credibility of a prosecution witness, the issue of materiality involves two steps: the court must first decide whether there is any reasonable likelihood that the excluded evidence could have reasonably affected the jury's judgment of the witness' credibility; if so, then the court must put aside the impeachable (and, therefore, tainted) testimony and determine beyond a reasonable doubt whether a reasonable jury would have had to reach the same result on the basis of the remaining "untainted" evidence. For the development of this standard in the context of the defendant's constitutional right, under the confrontation clause, to elicit impeaching evidence by means of cross-examination, see Note, supra note 62, at 1471-75.
"trary" to prohibit him from calling a witness whom the jury might reasonably find to be material. In each case, the evidentiary ruling imposes an unnecessary burden on the defendant's right to produce witnesses by excluding testimony that the jury might reasonably find to be exculpatory. Indeed, if a court were required to fashion a sixth amendment standard of materiality without the guidance of *Giglio*, it could conclude, solely by reasoning from *Washington*, that the defendant has a right to produce any witness whose testimony could have reasonably affected the judgment of the jury.

The *Giglio* standard has important constitutional implications for local rules regarding materiality. It casts doubt, for example, on the validity of rules that set limits on the number of witnesses a defendant may produce, or that give the trial court discretion to deny subpoenas for cumulative witnesses. Although such rules may be constitutional on their face, under the standard they cannot be applied to deny the defendant the presence of witnesses whose testimony could in any reasonable likelihood have affected the judgment of the jury; if they are so applied, the appellate courts must reverse. In such cases, the appellate court owes no deference to the trial court; rather, it must determine to its own satisfaction that the trial court has applied the proper standard.

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107. The rules are constitutional on their face because they are capable of being validly applied according to their terms in at least some cases. Thus, a rule that limits a defendant to a maximum of two expert witnesses can be validly applied in any case in which the defendant does not wish to produce more than two experts. *Cf.* *Calley v. Callaway*, 519 F.2d 184, 219 (5th Cir. 1975). On the other hand, while constitutional on their face, the rules are also capable of being unconstitutionally applied to exclude testimony that is material. *See* *Riser v. Teets*, 253 F.2d 844, 847 (9th Cir.), *cert. denied*, 357 U.S. 944 (1958) (Pope, J., dissenting).

108. Ironically, a good example of the proper standard of judicial review can be found in appellate opinions adopting the language of "harmless error" to review questions of compulsory process. As previously noted, it is redundant to ask whether the wrongful exclusion of a material witness is prejudicial. *See* note 76 *supra*. To say that a witness is "material" is simply another way of saying that his wrongful exclusion is prejudicial. We have analyzed the problems of compulsory process here in terms of materiality not because it is any better than an analysis in terms of prejudice, but because the Supreme Court has chosen to frame the issue in those terms. Once it has done so, the most one can say about the harmless-error analysis is, not that it is wrong, but that it is superfluous.

Nevertheless, by proceeding to engage in the superfluous, some courts have conveniently illustrated the strict level of appellate review required in compulsory process cases. It should be enough in such cases that the appellate court decide for itself whether there is any *reasonable likelihood* that the alleged error below could have reasonably affected the judgment of the jury—a question that requires the painstaking analysis. *See*, e.g., *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975). Some courts, instead, ask the same question in other terms, namely whether the alleged error was harmless beyond a reasonable doubt. *See*, e.g., *United States v. McGrady*, 508 F.2d 13, 18 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975); *Wisconsin ex rel. Monsoor v. Gagnon*, 497 F.2d 1126, 1130 (7th Cir. 1974); *Flores v. Estelle*, 492 F.2d 711, 713 (5th Cir. 1974). In doing so, they merely illustrate
The *Giglio* standard of materiality also casts doubt on the validity of rules that determine the weight of evidence by its form, such as rules that attribute less than full weight to credibility evidence, corroborative evidence, or character evidence. It should be clear that testimony can be material whether offered to support an affirmative defense, to rebut the prosecution's case, to corroborate the defendant's testimony, or to impeach a witness for the prosecution, or to support the defendant's good character. Whether the testimony should be self-evident—that is, that the very same standard of appellate review applicable in the “harmless error” cases, see Chapman v. California, 386 U.S. 18, 24 (1967), also applies in cases of compulsory process. See note 97 supra.

109. See, e.g., State v. Cotton, 103 Ariz. 408, 409, 443 P.2d 404, 405 (1968) ("We have ruled that it is not an abuse of discretion to deny [the defendant] a continuance where the testimony sought is to be used for impeachment"); Machin v. State, 213 S.2d 499, 500 (Fla. Dist. App.), cert. denied, 221 S. 2d 747 (Fla. 1968) ("Generally, a continuance is properly refused when the testimony which would be later produced would only tend to impeach a witness"); State v. McKeever, 339 Mo. 1066, 1076, 101 S.W.2d 22, 26 (1936) (same).

110. See, e.g., United States v. Moriarty, 497 F.2d 486, 489-90 (5th Cir. 1974) (defendant denied a continuance to obtain an absent witness on ground that the witness could do nothing more than corroborate the defendant's own testimony); Galloway v. Burke, 297 F. Supp. 624, 628 (E.D. Wis. 1969) (same); Keller v. State, 128 Ga. App. 129, 195 S.E.2d 767 (1973) (same); State v. Durden, 212 S.E.2d 587, 590 (S.C. 1975) (no error to deny defendant a short recess to produce a witness whose testimony would have merely "fortified[ed] the appellant's own evidence, and was at most corroborative").

111. See cases cited in note 151 infra.

112. See, e.g., Welsh v. United States, 404 F.2d 414 (5th Cir. 1968) (violation of compulsory process rights to deny the defendant a subpoena for psychiatrist who would have testified on the issue of insanity).

113. See, e.g., Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (violation of due process to deny defendant critical evidence that tended to show he was innocent and the crime was committed by another person).


115. See, e.g., *Giglio* v. United States, 405 U.S. 150 (1972) (violation of due process to fail to reveal evidence that tended to show key witness' motive for testifying for prosecution); Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975) (extrinsic evidence that impeaches key prosecution witness is material in constitutional sense even though deemed collateral under state rules of evidence); Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974) (evidence that complaining witness signed an affidavit originally charging another person with the crime was material to her identification of defendant); United States v. Tashman, 478 F.2d 129 (5th Cir. 1973) (evidence that defendant-turned-witness engaged in plea bargaining with prosecutor was material evidence of bias); In re Ouiimet, — R.I. —, 342 A.2d 250, 255 n.4 (1975) ("The duty to disclose not only embraces evidence that is directly related to the innocence of the accused such as mistaken identity by an eye-witness ... but it may also embrace indirect evidence such as impeachment testimony ... which can affect the weight or credibility of the evidence that is being used against the accused"). See also United States v. Miller, 411 F.2d 825 (2d Cir. 1969) (evidence that a principal witness for prosecution had been subjected to hypnosis by prosecutor before trial was material).

116. See cases cited in note 84 supra,
mony is material depends upon its particular relationship to other evidence at trial rather than upon its general form. Accordingly, the controlling factors in determining materiality are the relative importance of the issue in the context of the trial, the extent to which the issue is in dispute, the number of other witnesses who have testified to the issue, and the credibility of the witness in relation to the other witnesses. Thus, a person remains a material witness, even

117. Although every issue in a criminal case is potentially controlling in that it could lead to an acquittal, most cases are litigated under a theory that emphasizes one or more central issues upon which most of the testimony centers. See, e.g., Teague v. United States, 499 F.2d 1381, 1385 (7th Cir. 1974) (error to exclude evidence that would have impeached one of five identification witnesses where impeachable witness was "key" witness for the prosecution); United States v. Badalamente, 507 F.2d 12, 18 (2d Cir. 1974) (impeachable witness' credibility was "crucial"); United States v. Moudy, 462 F.2d 694, 698 (5th Cir. 1972) (error to deny defendant a witness on the issue of his sanity where sanity was "the only factual question really in issue"); United States v. Julian, 469 F.2d 371, 374-75 (10th Cir. 1972) (abuse of discretion, in view of compulsory process clause, to deny defendant a psychiatrist to rebut the state's psychiatrist); State v. Scott, 117 Kan. 303, 322, 235 P. 380, 390 (1925) (error to limit defendant to five impeaching witnesses where impeachable witness was "the key to all the evidence of any consequence on the question of the defendant's motive"); State v. Thompson, 65 N.J. Super. 189, 193, 167 A.2d 410, 413 (App. Div. 1961) (error to deny defendant witnesses to testify to involuntary nature of his confession where "the defendant's signed admission of guilt was more or less the keystone of the State's case and any evidence in derogation of it occupied an equally important status").

118. This kind of distinction has been made under the conventional approach. Compare People v. Dersa, 42 Mich. App. 522, 202 N.W.2d 334 (1972) (no error to deny defendant a continuance for witness who would have testified that defendant had a beard at the time of the offense where six other witnesses had already testified to that readily observable fact), with State v. Randall, 143 Minn. 203, 206-07, 173 N.W. 425, 428 (1919) (error to limit defendant in a seditious libel case to twelve out of twenty-seven possible witnesses on question of what words he had spoken at public meeting where difficulties of accurate observation and recollection were considerable). See also State v. Demaree, 362 S.W.2d 500, 505-06 (Mo. 1962) (no error to limit defendant to three character witnesses where defendant's good character was not disputed); Bowlin v. State, 93 Tex. Crim. App. 452, 248 S.W. 396 (1922) (no error to exclude defendant's character witnesses where prosecution conceded that his character was good).

119. The number of witnesses to testify on a certain issue may have a bearing on the weight of their evidence even for constitutional purposes. In Washington v. Texas, 388 U.S. 14 (1967), for example, the defendant was found to have a constitutional right to call his co-indictee to testify to the same facts to which the defendant had already testified, presumably because the additional testimony, even by a witness of doubtful credibility, might add to the weight of the defendant's evidence. See also Cool v. United States, 409 U.S. 100 (1972). On the other hand, "[a] party does not have 'an absolute right to force upon any unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim.' " State v. Mucci, 25 N.J. 423, 433, 136 A.2d 761, 766 (1957). See also People v. Arnold, 248 Ill. 169, 93 N.E. 786 (1910) (no error to limit defendant to 25 out of 400 named character witnesses); United States v. Zuidveld, 316 F.2d 873, 881 (7th Cir. 1963) (no error to deny defendant's request that 420 witnesses located throughout the states and in Mexico, Costa Rica, South Africa, and Ethiopia be presented at government expense).

120. Again, this distinction has been made adequately in cases in which no constitutional challenge was made. Compare United States v. Coppola, 479 F.2d
when other witnesses have testified to the same facts, if the jury could reasonably conclude either that his testimony is more credible, or that the mere accumulation of testimony adds to its weight. Indeed, a witness should not be deemed cumulative in a constitutional sense unless the number or credibility of the witnesses who have preceded him is such that his testimony cannot reasonably be deemed to add either substance or weight to the existing evidence.

The Giglio standard of materiality also bears on the several other exceptions to the general rule that the defendant may subpoena witnesses in his favor. It is common practice to permit a witness both to quash a subpoena ad testificandum on grounds of personal hardship and to quash a subpoena duces tecum on the ground that it is unreasonable or oppressive. Both exceptions assume that the witness possesses material evidence, yet excuse him from appearing. The question, then, is whether these exceptions are valid when applied to excuse material witnesses from testifying for the accused.

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121. Such a consideration was sometimes made in the conventional reviews of discretion. See, e.g., State v. Sharp, 175 Ark. 1083, 1086, 3 S.W.2d 23, 25 (1928) (error to exclude fifth witness on certain issue as cumulative if, because of his standing in the community, he was more credible than the other four); People v. Smith, 151 Cal. 619, 628-29, 91 P. 511, 515 (1907) (error to exclude physician as witness to testify to defendant's physical condition where physician was more credible than defendant).

122. As recognized in pre-Ohio cases, the very fact that the defendant can accumulate corroborating testimony by multiple witnesses sometimes adds to the weight of his evidence. See State v. Mucci, 25 N.J. 423, 433, 136 A.2d 761, 766 (1957); State v. Lyle, 125 S.C. 406, 439, 118 S.E. 803, 815 (1923); Burns v. State, 110 Tex. Crim. App. 84, 86, 8 S.W.2d 157, 158 (1928).

123. Some post-Ohio cases reached this conclusion. See, e.g., United States v. Spoonhunter, 476 F.2d 1050, 1055 (10th Cir. 1973) (no error to deny defendant a continuance for three additional witnesses without some showing that their testimony "would have lent any greater weight to the credibility of the alibi defendant testified to at length by seven or eight other defense witnesses"); Loux v. United States, 389 F.2d 911, 917 (9th Cir.), cert. denied, 393 U.S. 867 (1968) ("We are not convinced that the testimony of ten prisoners would have been significantly more persuasive than the testimony of five").

124. See, e.g., United States v. Nixon, 418 U.S. 683, 698 (1974) ("A subpoena for documents may be quashed if their production would be 'unreasonable or oppressive,' but not otherwise"); United States v. Mitchell, 385 F. Supp. 1190 (D.D.C. 1974) (quashing a subpoena ad testificandum to ex-President Nixon because of the witness' illness); Fed. R. Crim. P. 17(a) ("The court on motion made promptly may quash or modify the subpoena [duces tecum] if compliance would be unreasonable or oppressive"). Section 2 of the Uniform Act To Secure the Attendance of Witnesses from Without the State in Criminal Proceedings (Uniform Act To Secure Witnesses) also authorizes a court to compel a witness to appear in a sister state if it determines "that it will not cause undue hardship to the witness to be compelled to attend and testify ... in the other state."
The validity of the hardship exemption depends on how broadly it is defined. If an individual is physically incapable of testifying, or if testifying might critically endanger his life, then he is "simply unavailable" as a witness within the meaning of the sixth amendment. 125 In such circumstances the government cannot be faulted for failing to produce the witness. The compulsory process clause does not guarantee that the government will succeed in producing the defendant's witnesses, it merely guarantees that a good-faith effort will be made to produce them. 126 The government has no obligation to produce a witness who has become unavailable due to death, disappearance, or illness, 127 as long as the government itself is not responsible for the witness' absence. 128 Thus, while in extreme cases

125. See United States v. Mitchell, 385 F. Supp. 1190, 1191 (D.D.C. 1974) ("The members of the medical panel appointed by the Court to appraise the state of Mr. Nixon's health reported as their unanimous opinion that he could not appear and testify before February 1975, and that he would not be well enough to give a deposition until at least January 6, 1975. This fact in and of itself should answer the defendants' motions. The witness is simply unavailable to be deposed" (emphasis added)).


Under the conventional wisdom, some courts have also held that the government has no obligation to produce witnesses who are beyond the territorial reach of the court's subpoena power, see United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1961), cert. denied, 369 U.S. 820 (1962), or witnesses who assert lawful privileges, see Myers v. Frye, 401 F.2d 18 (7th Cir. 1968); United States v. Erlichman, 389 F. Supp. 929 (S.D.N.Y. 1975). But, for the assertion that no privilege can validly be applied to deny a defendant his right to produce witnesses, see Weston, supra note 4, at 159-77. And, for a discussion of the extent to which the state has a constitutional obligation to make a "good faith effort" to produce witnesses from without its territorial boundaries, see the text at notes 345-406 infra.

128. If the government is responsible for the witness' absence, a defendant's right of compulsory process is violated when he is precluded from producing the witness in court. See United States v. Augenblick, 393 U.S. 348, 356 (1969) (dictum) (destruction of prior statements of prosecution witnesses could, in some cases, amount to a violation of compulsory process rights); United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) (violation of compulsory process rights for government to deport potential defense witness to frustrate defendant's later request that he be produced); White v. State, 517 S.W.2d 543, 548 (Tex. Crim. App. 1974) (same); Application of Newbern, 175 Cal. App. 2d 862, 864-65, 1 Cal. Rptr. 80, 82 (1959), affd., 55 Cal. 2d 508, 360 P.2d 47, 11 Cal. Rptr. 551 (1961) (violation of compulsory process rights to
the defendant may be able to argue that the unavailability of a witness denies him a fair trial under the due process clause, he cannot complain of being denied the benefits of compulsory process.

The exemption raises more serious problems, however, if broadly defined to include witnesses for whom testifying would be a physical hardship, but who are, nevertheless, physically capable of testifying for the defense. A witness who is pregnant, for example, may fall into this category. The first problem with the creation of a testimonial exemption (or "privilege") for physical hardship is that it flies in the face of the common-law tradition. The law assumes that "the public . . . has a right to every man's evidence" in criminal refuse to permit defendant charged with intoxication to consult with physician for purpose of taking blood test before any alcohol in his system dissipates).

129. See United States v. Walton, 411 F.2d 283, 288 (9th Cir. 1969) ("And since the ultimate inquiry is whether defendant had a fair trial, the controlling consideration is whether there is a reasonable possibility that, if the unavailable witness had been available to testify, defendant would not have been convicted"). Cf. Carlson, False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?, 1969 DUKE L.J. 1171, 1183-87 (suggesting that it may deny a defendant a fair trial under the due process clause to try him without the benefit of certain kinds of exculpatory evidence, even if the government has done its very best to produce the evidence and is not responsible for its absence).

The due process and compulsory process clauses are both designed to afford a defendant a fair trial. Nevertheless, they differ in their focus. The compulsory process clause is a specific guarantee designed to protect a defendant against the particular unfairness of being tried without the means for compelling the presence of witnesses in his favor; the due process clause is a general guarantee designed to protect a defendant against the residual kinds of unfairness not otherwise enumerated in the more specific provisions of the Bill of Rights. See Westen, supra note 4, at 126-33. Thus, while it may be unfair in a general sense to try a defendant at a time when his exculpatory witnesses have become unavailable and can no longer be produced by judicial process, that is not the particular kind of unfairness the compulsory process clause is designed to prevent.

130. It is important to distinguish the case of simple hardship for the pregnant witness from the case in which the burden of testifying would actually jeopardize her life. See, e.g., Commonwealth v. Kent, 355 Pa. 146, 152, 49 A.2d 388, 391 (1946) (defendant denied a subpoena for pregnant witness who was expected to give birth a week following the trial, and for whom two physicians stated that "it would be dangerous to her life and well being to compel her attendance at the trial under the circumstances"). If the woman is not reasonably expected to survive court appearance, then, like any critically ill witness, she must be deemed unavailable. Given the nature of pregnancy, however, it is unnecessary to face the harshness of that result, because the needs of the defendant can be accommodated with the interests of the mother and unborn child by continuing the case until a certain date in the reasonably near future (which could never exceed the period of gestation) when the woman can reasonably be expected to appear. See Peterson v. United States, 344 F.2d 419, 425 (5th Cir. 1965). See generally text at notes 162-201 infra. Similarly, if a witness' life is in danger not because of illness, but because of external threats by third persons, then the solution is not to excuse the witness, but to protect him against the external threat. See Commonwealth v. Johnson, -- Mass. --, 313 N.E.2d 571, 577-79 (1974) (dictum).

cases, even if this means depriving the witness of his dignity and personal freedom.\textsuperscript{132} In recent years, the Supreme Court has affirmed that tradition by refusing to create testimonial privileges for newsmen\textsuperscript{133} and for presidential advisers.\textsuperscript{134} More importantly, however, the creation of a broad hardship exemption for witnesses other than those who are critically ill would abridge the defendant’s constitutional right to produce witnesses in his favor. Although this is not the place to analyze the validity of testimonial privileges,\textsuperscript{135} it suffices to say that the Supreme Court has never permitted a privilege to be asserted in such a manner as to deny the defendant material evidence in his favor. The Court has either avoided the constitutional question by narrowly construing the privilege in question,\textsuperscript{136} or, where a conflict was unavoidable, has declared the privilege invalid.\textsuperscript{137} In direct conflicts between the privileges of witnesses and the rights of the accused, the rights of the accused are “paramount.”\textsuperscript{138} If the state upholds the use of testimonial privileges in such circumstances, it must accept the constitutional consequences that inevitably result from deliberately suppressing evidence in the defendant’s favor.\textsuperscript{139}

\textsuperscript{132} Witnesses can be arrested and detained for long periods of time, simply for the purpose of guaranteeing that they will be available to testify at trial. \textit{See Fed. R. Crim. P. 46(b)} (a material witness may be required to post an appearance bond and, if unable to post it, may be detained until the trial). \textit{Cf. Hurtado v. United States, 410 U.S. 578 (1973)}; \textit{see generally Ash, On Witnesses: A Radical Critique of Criminal Court Procedures, 48 Notre Dame Law. 386 (1972)}; \textit{Carlson, Jailing the Innocent: The Plight of the Material Witness, 55 Iowa L. Rev. 1 (1969)}. Witnesses can also be expected to bear the economic burden of testifying in criminal cases. \textit{See Florida v. Axelson, 80 Misc. 2d 419, 420, 363 N.Y.S.2d 200, 202 (1974)}.\textsuperscript{133}

\textsuperscript{134} \textit{See Branzburg v. Hayes, 408 U.S. 665, 707-08 (1972)} (newsmen have no privilege to maintain the confidentiality of their sources, unless they can show themselves to be the object of “official harassment . . . undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources”).\textsuperscript{133}

\textsuperscript{135} \textit{See United States v. Nixon, 418 U.S. 683, 705-13 (1974)} (the constitutional privilege to maintain the confidentiality of communications between the President and his advisers does not apply in criminal proceedings).\textsuperscript{134}

\textsuperscript{136} \textit{See United States v. Nixon, 418 U.S. 683, 709, 711 (1974)} (privilege for presidential communications does not apply where it would conflict with principle that “compulsory process be available for the production of evidence needed . . . by the defense”); \textit{Jencks v. United States, 353 U.S. 657, 666-72 (1957)} (privilege to maintain confidentiality of prior statements of government witnesses does not apply where it would conflict with defendant’s need to impeach witnesses with “evidence relevant and material to his defense”).\textsuperscript{136}

\textsuperscript{137} \textit{See Davis v. Alaska, 415 U.S. 308 (1974)} (privilege to maintain confidentiality of juvenile court records is unconstitutional in so far as it conflicts with sixth amendment right to examine witnesses against defendant).\textsuperscript{137}

\textsuperscript{138} Davis v. Alaska, 415 U.S. 308, 319 (1974).\textsuperscript{138}

\textsuperscript{139} The consequences vary, depending on the nature of the suppressed evidence. If the evidence is material to the impeachment of a government witness, the government is precluded from calling the witness; and if the witness has already testified, the court must either strike his testimony from the record or, if the
The validity of the exception for unreasonable or oppressive subpoenas also depends upon how broadly it is construed. The fourth amendment ban on "unreasonable searches and seizures" was once thought to cover "seizures" by subpoena and to prohibit a court from issuing burdensome subpoenas duces tecum, regardless of the need for the evidence.\(^{140}\) It is now understood that a subpoena is not a "seizure" within the meaning of the fourth amendment and that, in so far as the fourth amendment applies at all to subpoenas, it does not protect a witness from the burden of responding to appropriate requests for documents. At most, the fourth amendment prohibits a court from issuing subpoenas that are excessively broad in relation to the underlying inquiry.\(^{141}\) Thus, as long as the subpoena is narrowly drafted with respect to the relevant evidence, the witness must respond even if compliance is "exceedingly burdensome."\(^{142}\)

To the extent that the unreasonable-or-oppressive exception is narrowly construed in accord with the fourth amendment, it does not preclude the defendant from producing material evidence in his case; instead, it merely requires that he formulate his requests as precisely as possible under the circumstances. On the other hand, if the exception is construed more broadly than is constitutionally required to protect a witness from the burdens of responding to appropriate requests for evidence, it abridges the defendant's right of compulsory process.\(^{143}\) The state cannot vindicate its concern for the witness at

\(^{140}\) See Hale v. Henkel, 201 U.S. 43, 76 (1906). For the contrary suggestion that the fourth amendment gives witnesses no protection from subpoenas duces tecum, see In re Horowitz, 482 F.2d 72, 75-80 (2d Cir. 1973), cert. denied, 414 U.S. 867 (1973).


\(^{142}\) In re Horowitz, 482 F.2d 72, 78 (2d Cir. 1973).

the expense of the defendant's constitutional rights. In so far as the state chooses to protect a witness from the burden of complying with appropriate requests for evidence, it thereby suppresses evidence and must accept the consequences of its choice.144

D. Favorable Witnesses

The final element of a defendant's right of compulsory process—that the testimony of the defendant's witnesses tend to "favor" his case—while nowhere explicitly identified in Washington, is nevertheless implicit in its reasoning. By its very terms the compulsory process clause limits the defendant to the production of favorable witnesses ("the right . . . to compulsory process for obtaining witnesses in his favor"). Moreover, by its juxtaposition to the confrontation clause, the defendant's right to produce favorable witnesses is distinguished from his companion right to demand that the government separately produce witnesses "against him." Thus, if a witness' testimony is adverse to or of no value to the defendant's case, the witness cannot be said to "favor" the defendant (and thus the defendant has no compulsory process right to have the witness produced), even though the witness' testimony is competent, relevant, and material.

The requirement that the defendant's witnesses tend to favor his case rarely has been examined in terms of the compulsory process claims. However, this requirement has been examined in cases dealing with the defendant's analogous right, under the due process clause, to produce favorable evidence in the government's possession:

The heart of the holding in [Brady v. Maryland] is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.145

appearance would be burdensome if there are other readily available witnesses whose appearance would not be burdensome and whose testimony would not materially differ from former witness' testimony).

144. See note 127 supra. The government cannot expect the defendant to pay the consequences of its decision to create a testimonial privilege for the witness' benefit. See Davis v. Alaska, 415 U.S. 308, 320 (1974) ("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected the witness from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records" (emphasis added)).

145. Moore v. Illinois, 408 U.S. 786, 794-95 (1972) (emphasis added). See also
Although the other elements of the Supreme Court's test may present difficult proof problems, "[t]he burden of demonstrating that the evidence was of a favorable nature is . . . a very slight one."\textsuperscript{148} It is sufficient for the defendant to show that the evidence he seeks is "potentially useful"\textsuperscript{147} to his case. The requirement that the defendant's witnesses favor his case has rarely been tested—few defendants ever deliberately set about to produce witnesses whose testimony is not even potentially useful. If that should happen, however, or if a defendant should seek to produce a witness whom he expects to be favorable but whose testimony would be of no value, a denial of a subpoena will not deny the defendant's constitutional right to produce witnesses in his favor.\textsuperscript{148}

Although a defendant has no constitutional right to procure testimony that will in no way help his case, it is within his constitutional prerogative to subpoena a witness who is hostile by disposition. By its very terms, the compulsory process clause assumes that a defendant may wish to call witnesses who will appear on his behalf only if compelled by the court. Accordingly, a defendant has a right to produce any witness, whether friendly or not, who may respond favorably to proper questions.\textsuperscript{149} Similarly, the defendant's right of

\textsuperscript{146} Evans v. Janing, 489 F.2d 470, 476 (8th Cir. 1973).

\textsuperscript{147} Evans v. Janing, 489 F.2d 470, 476 (8th Cir. 1973).


\textsuperscript{149} The Supreme Court, in Chambers v. Mississippi, 410 U.S. 283, 291-92, 295-98 (1973), held that the defendant had a constitutional right to examine a hostile and uncooperative witness of his own by means of leading questions. Although the Court based its decision on the defendant's due process right to a fair trial and, by implication, on his right to confront witnesses "against him," the decision is better viewed as a reflection of his right to present and examine witnesses "in his favor," since the witness was called, not by the government as part of its case, but by the
compulsory process is not limited by the fact that a witness' testimony is not entirely favorable. A defendant is entitled to seek favorable evidence where he can find it, even if it means separating the good from the bad and urging that a portion of the testimony be believed and a portion disbelieved.\textsuperscript{150}

In determining whether a defendant's witnesses are favorable, some courts appear to be influenced by the character of the testimony that a witness will offer. Thus, some courts impose numerical limits on the number of character witnesses a defendant may call, apparently on the assumption that their testimony is less exculpatory than other evidence.\textsuperscript{151} Similarly, at least one court has gone further and has held that the defendant's constitutional right to the disclosure of favorable evidence held by the prosecution included the production of rebuttal evidence and evidence to support affirmative defenses but did not include impeachment evidence that went solely to the credibility of the witnesses against him.\textsuperscript{152}

\textsuperscript{150} In Chambers v. Mississippi, 410 U.S. 283 (1973), the Court held that, after calling a hostile witness and eliciting adverse testimony, the defendant had a constitutional right both to urge the witness, by means of impeaching questions; to change his testimony, 410 U.S. at 295-98, and to introduce the witness' prior contradictory statements in order to show that he was lying in court and that his out-of-court statements were true, 410 U.S. at 298-302. In other words, the defendant had a constitutional right to try to persuade the jury (both by putting direct questions to the witness and by calling independent witnesses) to reject the witness' in-court testimony and instead accept his out-of-court statements. As the court put it, "in modern criminal trials, defendants are rarely able to select their own witnesses: they must take them where they find them."


The requirement that a witness "favor" the defendant should not be made to turn upon the character of the witness' testimony. Although courts are entitled to consider the nature of the defendant's evidence in determining whether it is material (for the form evidence takes may have a bearing on its impact in a particular case¹⁵³), a witness favors the defendant if his testimony tends to defeat an element of the state's case, whether this is accomplished by testifying directly to the underlying events at issue or by testifying indirectly to the reliability of the state's witnesses.¹⁵⁴ Thus, from the trial of Aaron Burr to the most recent pronouncements on compulsory process, it has been assumed that to the extent that a witness impeaches the prosecution he favors the accused.¹⁵⁵ The Supreme Court has reached the same conclusion in construing the defendant's associated right to discover favorable evidence from the government.¹⁵⁶

II. TIME, PRICE, AND MANNER OF COMPULSORY PROCESS

We have now defined the constitutional standard that governs the timely request of a nonindigent defendant to subpoena available witnesses from within the jurisdiction. It is the right to produce, and thus implicitly to present, any witness who is capable of giving testimony that could reasonably tend to persuade a jury to return a

297 F. Supp. 624, 628 (E.D. Wis. 1969) ("This court is not prepared to say that, as a matter of constitutional law, a defendant is entitled to a continuance at any time prior to trial to procure the attendance of witnesses who may affect his credibility. The question would be different if it were claimed that a missing witness would establish a defense to the crime charged. . . ." (emphasis added)).

¹⁵³. Although character evidence may be vital in some cases, see cases cited in note 84 supra, in many cases it is peripheral to the main issues in dispute, see 6 J. WIGMORE, EVIDENCE § 1908, at 580 (3d ed. 1940). Hence, if the defendant's good character is not controverted by the prosecution and he has already called six witnesses to testify to his character, the remaining fourteen witnesses, though favorable, may not have a material bearing on the verdict. Fugler v. State, 192 Miss. 775, 779, 7 S.2d 873, 874 (1942). See also Shaw v. United States, 41 F.2d 26, 27 (5th Cir. 1939); Hamil v. United States, 298 F. 369, 372 (5th Cir. 1924); Carr v. State, 208 S.2d 886, 888-89 (Miss. 1968).


¹⁵⁵. See United States v. Augenblick, 393 U.S. 348, 356 (1969) (defendants may have a right, under the compulsory process clause, to produce prior statements of government witnesses for use as impeachment evidence); United States v. Burr, 25 F. Cas. 30, 36 (No. 14,692d) (C.C.D. Va. 1807) (defendant had a right, under the compulsory process clause, to subpoena prior statements of government witness for possible use as impeachment evidence).

¹⁵⁶. See Giglio v. United States, 405 U.S. 150 (1972) (denial of due process to withhold from defendant evidence that tended to impeach prosecution witness for motive).
verdict in the defendant's favor. The standard is strict. The right to produce witnesses is as absolute as any principle known in the law and cannot be overcome by any demonstrable interest, including the state's interest in preserving its utmost secrets.¹⁵⁷

We now turn to the factors that tend to complicate the analysis and weaken the standard. Thus, while the defendant has an absolute right to subpoena witnesses, the trial court is said to have discretion both to deny him a continuance if his witnesses fail to appear, and to deny him subpoenas if he is unable to pay the accompanying costs. Similarly, the defendant is deemed to waive his right to produce witnesses if he fails to make a precise showing of the nature of their testimony. The question here is whether such supplemental rules are constitutionally valid and, if so, whether they can be reconciled with the absolute nature of the general standard.

A. The Timing of Subpoenas

The two most common questions involving the timing of subpoenas are whether a defendant has a right to issue subpoenas returnable before trial and whether he has a right to postpone the trial when witnesses fail to make timely appearances.

The first question can be viewed essentially as a problem of discovery, namely, whether a defendant has the right to produce evidence in advance of trial in order to prepare his defense. Although a few courts have dealt with the compulsory process aspects of this problem,¹⁵⁸ it has more commonly been discussed as a question

¹⁵⁷. See United States v. Reynolds, 345 U.S. 1, 12 (1953) (dictum). Cf. text at notes 135-44 supra. More precisely, the defendant's interest in disclosure is great enough to force the government to choose between preserving its interest in secrecy or its interest in prosecution. If the government proceeds with the prosecution, the defendant has an absolute right to present any evidence that he can show to be available and exculpatory. The Supreme Court has only once allowed the defendant's sixth amendment right to present witnesses to be outweighed by a competing governmental interest, and there only as a judicial sanction for the defendant's failure to disclose the witness' prior statements for possible use in impeachment. In United States v. Nobles, 43 U.S.L.W. 4815, 4820 (U.S. June 23, 1975), the Court implicitly held that the state's interest in using preclusion as a sanction for enforcing valid rules of disclosure outweighed the defendant's interest in presenting witnesses. It is significant, however, that the defendant in Nobles at all times retained the option of presenting his witness simply by disclosing the witness' prior notes. By refusing to disclose the notes, the defendant made a voluntary decision that his case was better served by keeping the witness off the stand than by presenting the witness and permitting him to be impeached with the prior statements. Nobles, therefore, has no bearing on cases in which the government, rather than the defendant, controls the exculpatory witness. For an analysis of the extent to which testimonial privileges are also outweighed by the defendant's constitutional right, under the confrontation clause, to develop evidence by means of cross-examination, see Note, supra note 62, at 1478-85.

¹⁵⁸. See Westen, supra note 4, at 129 & n.281.
of the defendant's due process right to obtain exculpatory evidence held by the government. Thus, at least one court has denied pretrial discovery on the ground that the right to produce exculpatory evidence is part of the right to a fair trial and cannot be ascertained in advance of trial.\textsuperscript{159} Other courts have granted pretrial discovery on the ground that the right to have exculpatory evidence produced impliedly includes the right to have the evidence produced in time to use it.\textsuperscript{160}

We need not pause, however, to compare the defendant's right of discovery under the due process clause with his right to have witnesses produced under the compulsory process clause, for whether the defendant has a right to subpoena witnesses in advance of trial ultimately depends upon the same considerations that determine whether he has a right to postpone his trial because of the absence of such witnesses. The two issues are different aspects of the same essential question.\textsuperscript{161}

Suppose, for example, that a defendant seeks documentary evidence that is too voluminous to review in the heat of trial, or seeks information from an uncooperative witness that may lead to the discovery of other witnesses in his favor. It makes little difference to the defendant whether he receives pretrial subpoenas returnable in advance of the trial or trial subpoenas plus a postponement of the trial: under both procedures he receives the time necessary to marshal the evidence in his favor. Whether he is entitled to either procedure, however, depends on whether the right to produce "witnesses in his favor" includes the right to demand sufficient time to benefit from their testimony. We shall first discuss the question in the context of requests to postpone the trial, where it arises most frequently, and then apply our conclusions to the issue of pretrial subpoenas.

The Supreme Court has not yet commented upon the compulsory process implications of requests for continuances; indeed, in one case that presented the issue directly, the Court specifically refused to decide it.\textsuperscript{162} In the absence of guidance from the Court, the lower

\textsuperscript{161. See United States ex rel. Lucas v. Regan, 503 F.2d 1, 3 n.1 (2d Cir. 1974). Cf. Williams v. Florida, 399 U.S. 78, 85-86 (1970) (no constitutional difference between pretrial discovery and discovery at trial with a continuance). I have argued elsewhere that the defendant's constitutional right to request the government to use its coercive authority to discover evidence in his favor is better viewed as a principle of compulsory process than of due process. See Westen, supra not 4, at 121-31.}
\textsuperscript{162. Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966), affg. 345 F.2d 691 (7th Cir. 1965). The Court has held (when no constitutional challenge was made) that}
courts have divided on the issue. Some courts—beginning with John Marshall's decision in the trial of Aaron Burr—have held that the right to produce witnesses implicitly entails the right to postpone, or, if necessary, adjourn the trial. Other courts have taken the view, best expressed by Wigmore, that the compulsory process clause guarantees the defendant nothing more than equality with the prosecution in the issuance of subpoenas, and leaves to local law the determination of the propriety of granting continuances:

The constitutional provision for compulsory process, as the history of that right shows, was designed merely to give equally to the accused (beyond the power of legislative change) the aid of the State's subpoena . . . . But the constitutional provision does not have anything to say about the time of holding trial; which is the only question here involved.

The difficulty with Wigmore's reading of history is that the Supreme Court, in Washington v. Texas, rejected the view that the compulsory process clause concerns only the defendant's right to subpoena witnesses and says nothing about his right to place them on the witness stand. The framers did not intend to commit the futile act of granting a defendant the right to subpoena witnesses, while leaving it to the courts to deny him the benefit of their testimony by arbitrarily denying him sufficient time to render the subpoenas effective. To the contrary, they guaranteed a defendant the explicit right to subpoena witnesses in order to safeguard his implicit right to produce and present such witnesses to the trier of fact.

the granting of a continuance is within the discretion of the trial court. See Isakas v. United States, 159 U.S. 487 (1895).

163. During his trial for the misdemeanor of plotting to attack Spain in Mexico, Burr subpoenaed the United States attorney to produce a letter written by General Wilkinson to President Thomas Jefferson. When the United States attorney refused to produce the letter on grounds of privilege, Burr moved for an indefinite continuance until the letter was produced. Marshall agreed that Burr was entitled to the letter under the compulsory process clause and granted the continuance. United States v. Burr, 25 F. Cas. 187, 191-92 (No. 14,694) (C.C.D. Va. 1807). For a fuller account of the Burr case, see Westen, supra note 4, at 106-08.


166. See text at notes 10-14 supra. Cf. Calley v. Callaway, 519 F.2d 184, 230 (5th Cir. 1975) (Bell, J., dissenting) (defendant's constitutional right under due process clause to discover exculpatory evidence presently under government control not limited to evidence under the prosecutor's control).
quently, whether a defendant has received sufficient time to produce witnesses in his favor is itself a federal question.167

The defendant's sixth amendment right to produce witnesses can be compared in this respect with his sixth amendment right to counsel. Although the right-to-counsel clause does not contain an explicit provision for continuances, the Supreme Court has held that to deny a defendant a continuance to enable his attorney to render effective assistance is to deny a defendant his right to counsel: "[T]he denial of opportunity for appointed counsel to confer, to consult with the accused, and to prepare his defense, could convert the appointment of counsel into a sham."168 By analogy, to deny a defendant the time to request subpoenas, to serve them on his witnesses, and to allow his witnesses to respond, is effectively to deny him compulsory process.169

After recognizing that a constitutional issue is involved, the more difficult problem is to define the standard that governs the granting of continuances. A defendant is certainly not entitled to a continuance whenever, and however often, he expresses a desire for one; nor, on the other hand, can a defendant be arbitrarily denied a continuance at the whim of the court. Absent an explicit standard under the compulsory process clause, the courts have tended to adopt the standard that governs in the area of the right to counsel. In that area, the Supreme Court has expressly held that whether a continuance should be granted for the purpose of securing the assistance of counsel is a decision that should be left to the discretion of the trial judge and should be reviewed only when arbitrarily made:

The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel . . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.170

167. The debates preceding the adopting of the sixth amendment also support the conclusion that the framers of the compulsory process clause were specifically concerned with matters of timing. The clause was discussed only once during the debates, when a member of the House of Representatives moved that it be amended to guarantee the accused the explicit right to a continuance if his subpoenas were not served in a timely fashion. The motion was defeated on the ground that it was superfluous because the courts could be trusted to construe the clause generously to fulfill its purposes. 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1114 (1971).
169. See Paoni v. United States, 281 F. 801, 802-03 (3d Cir. 1922).
170. Ungar v. Sarafite, 376 U.S. 575, 589 (1964). The Court has since refused
The lower courts have applied this standard to continuances for the purpose of securing the presence of witnesses and thus have left the matter to the discretion of the trial judge, and have exercised review only upon a “clear showing of abuse resulting in manifest injustice.”

“Discretion” is always a problematic standard. It neither provides the trial court with guidance as to what factors should be considered in reaching a judgment, nor furnishes a scale by which to evaluate such factors once they have been identified. Furthermore, while a grant of discretion to the trial courts does not permit the appellate courts to abdicate their responsibilities altogether, it gives them no guidance for reviewing “abuses” of the standard.

More importantly, however, a grant of discretion is particularly troublesome when applied to constitutional rights. Constitutional rights are not ordinarily made to depend upon the exercise of discretion; nor, indeed, have we applied this standard to the right of compulsory process in other contexts. Thus, under the constitutional standard for compulsory process that this article has developed, a trial judge is not given the “discretion” to decide whether a witness is competent, or relevant, or material, in issuing subpoenas to the defendant. Rather, we have required that the judge issue subpoenas unless he can make a decision beyond a reasonable doubt that the witness could not reasonably be considered a witness in the defendant’s favor. The question we must now examine, then, is whether we can justify the broad and relatively unreviewable authority given the trial judge to pass on requests for continuances.

We can begin by identifying the factors that affect the grant of a continuance and then determine whether they justify the use of the standard of discretion. A principal difference between the grant of a subpoena and the grant of a continuance lies in the effect each procedure has upon the prosecution. If a subpoena is issued for a witness who cannot be produced, or for a witness who possesses no material evidence, little harm is done. The defendant may suffer some unnecessary expense but, after all, he made the decision to subpoena the witness. The court, in turn, may be forced to hear some unnecessary testimony, but this problem can be controlled at trial: If the defendant should subpoena a large number of immaterial

to lay down any fixed time periods that must always be allowed between the appointment of counsel and trial. See Chambers v. Maroney, 399 U.S. 42, 54 (1970).

witnesses to delay and disrupt the proceedings, the court can easily
detect the maneuver and either screen the testimony of such witnesses
in advance, or bar the defendant from presenting them at trial be­
cause he abused his privilege.\textsuperscript{172} On the other hand, if continuances
are improvidently granted, the state's effort to prosecute the accused
can be impaired or entirely frustrated.

Continuances may be improvidently granted in two ways. First,
a defendant may try to manipulate the timing of trial by requesting
continuances in bad faith. If continuances were freely granted upon
request, or upon a colorable showing of need for an absent witness, a
defendant could delay the trial indefinitely by requesting continu­
ances for witnesses whom he had deliberately concealed or whom he
knew to be nonexistent. Short of indefinite postponement, a defend­
ant could use such tactics to interrupt and repeatedly delay the trial
for short periods of time in order to impair the prosecution's case.
Because the state has the difficult burden of proving all elements of
the crime beyond a reasonable doubt, as well as the burden of
confronting the defendant with the witnesses against him, even minor
delays may tilt the balance in the defendant's favor by causing the
state's evidence to become stale in the jury's mind or by making it
more difficult for the state to preserve its case.

Second, even if a defendant acts in good faith, he may request
continuances to obtain witnesses who will never appear because they
have died, disappeared, suffer from prolonged illness, or lie beyond
the territorial reach of the state's process. If continuances were freely
granted in an attempt to obtain such witnesses, prosecutions would
never end, nor would the interests of compulsory process be served.
The clause does not guarantee that witnesses will eventually appear;
it merely guarantees that an effort will be made to produce them.\textsuperscript{173}
Accordingly, some limit must be placed on the granting of continu­
ces to prevent the right of compulsory process from being either
deliberately abused or called upon to deliver more than it promises.
Wigmore has summed up the two problems nicely: "The Constitution
cannot raise witnesses from the dead, nor spirit them from beds of
illness, or kennels of concealment. To interpret the Constitution into
any such pledge is to invent (as experience has shown) a guarantee

\textsuperscript{172} Just as the defendant can be deemed to have implicitly waived his right to be
present at trial by abusive conduct, see Illinois v. Allen, 397 U.S. 337 (1970), so, too,
can he be deemed to have implicitly waived his right to present witnesses by willful
(defendant deemed to have waived his sixth amendment right to present witness by
his failure to produce witness' prior notes).

\textsuperscript{173} See notes 126-29 supra and accompanying text.
that no determined offender shall be tried for his crime until he himself pleases." 174

Now that we have identified the two principal factors affecting the grant of continuances—the danger of manipulation and the inherent limitations on the state's subpoena power—we are in a position to decide whether they justify using the standard of discretion. A grant of discretion is useful in situations in which an appellate court intentionally seeks to minimize its reviewing function, in which fact-finding calls for the unique perspective of the trial court, or in which judgments are too complex to be governed by a simple formula; however, none of these features is present in the case of continuances. Appellate courts do not customarily defer to the lower courts in interpreting constitutional rights, and the fact-finding necessary to the determination whether a continuance is warranted does not usually depend upon such factors as demeanor and state of mind. Most importantly, having pinpointed the particular factors that should influence the exercise of discretion, we no longer need an indefinite standard. In place of the amorphous rule of discretion, we should be able to construct a more precise standard that will accommodate the special problems of continuances without unduly restricting the exercise of judicial judgment.

We can begin with the basic requirements: A defendant is not entitled to a continuance (nor, for that matter, a subpoena) for absent witnesses unless he can offer proof that their testimony will be competent, 175 relevant, 176 material, 177 and favorable to his defense. 178

174. 9 J. WIGMORE, EVIDENCE § 2595, at 605-06 (3d ed. 1940).
175. See United States v. Keefer, 464 F.2d 1385, 1387 (7th Cir.), cert. denied, 409 U.S. 983 (1972) (no error to deny a continuance for witness whose testimony would have been inadmissible as hearsay). It should be recalled, however, that whether hearsay evidence is sufficiently reliable to be admitted as evidence in the defendant's favor is itself a federal question to be resolved by federal standards. See Westen, supra note 4, at 149-59.
176. See State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970) (no violation of compulsory process rights to deny a continuance for witness whose testimony would have been irrelevant). See also United States v. McPhatter, 473 F.2d 1356, 1358 (5th Cir. 1973); United States v. Izzl, 427 F.2d 293, 296 (2d Cir. 1970); Warden v. United States, 391 F.2d 747 (10th Cir. 1968); People v. Arndt, 50 Ill. 2d 390, 394, 280 N.E.2d 230, 233 (1972).
177. A materiality requirement has been properly identified in cases involving nonconstitutional requests for a continuance. See, e.g., Mead v. State, 445 P.2d 229, 233 (Alaska 1968), cert. denied, 396 U.S. 855 (1969); People v. Dersa, 42 Mich. App. 322, 533, 202 N.W.2d 334, 340 (1972); Pitts v. State, 431 P.2d 449, 451-52 (Okla. Crim. App. 1966). Some courts, however, appear to require a greater showing of materiality for the purpose of granting a continuance than for issuing a subpoena or permitting an attending witness to testify. Compare Dearinger v. United States, 468 F.2d 1032, 1034-35 (9th Cir. 1972) ("When it is claimed that an error was made in denying a continuance to find such witnesses, the crucial question is whether the defendant was denied a fair trial because, had the witness testified, the defendant
In addition, because of the dangers of manipulation, he can also be required to demonstrate his good faith. Thus, if a defendant has been less than diligent in producing his witnesses (for example, by failing to make timely requests for subpoenas\(^{170}\)), if he has made repeated requests for continuances,\(^{180}\) or if he has failed to examine other available witnesses for the evidence he now seeks from absent witnesses,\(^{181}\) then the court may be justified in concluding that he seeks the continuances for illegitimate reasons.

In addition to good faith, a defendant can also be required to demonstrate that there is some likelihood that the absent witness will appear and testify at some time in the reasonably near future. Thus, if the defendant cannot indicate when the witness might be expected to
appear,\textsuperscript{182} if the defendant cannot locate the witness even after the state has conducted a serious search,\textsuperscript{183} if the witness is seriously ill with no prospects for recovery in the definite future,\textsuperscript{184} if the witness lies beyond the territorial reach of compulsory process,\textsuperscript{185} or if the witness can be expected to assert a testimonial privilege to remain silent,\textsuperscript{186} then the court may conclude that the defendant has failed to show that it is "reasonably certain that the [witness] can be procured at the time to which the trial would be postponed."\textsuperscript{187} For even

\textsuperscript{182} Requests for such predictions are not uncommon. See, e.g., United States v. Lewis, 472 F.2d 252, 255 (3d Cir. 1973); State v. Jackson, 250 La. 1100, 1103, 102 S.2d 264, 265 (1967) ("[t]here was no showing by the defendant to where this witness had gone, when he had left or when he was coming back, if ever. If this case were to be continued until such time as this witness would voluntarily return . . . , it is very possible that it would never be tried").

\textsuperscript{183} For instance, in United States v. Snyder, 505 F.2d 595 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3515 (U.S. March 17, 1975), the witness, King, was a fugitive from justice. The court considered it "highly doubtful that King, who was taking pains to avoid invitations from the FBI to appear at the trial, would have favored Snyder with his presence" and felt that it bordered "on frivolity to assert error in the court's refusal to grant a defendant's motion for continuance so that he may call a fugitive co-indictee to appear on his behalf." 505 F.2d at 598. See also United States v. Cawley, 481 F.2d 702, 705 (5th Cir. 1973).

\textsuperscript{184} For examples of the situations in which illness of the defendant's witnesses has not warranted delay in his trial, see Blackwell v. United States, 405 F.2d 625, 627 (5th Cir.), cert. denied, 395 U.S. 962 (1969); United States v. Mitchell, 385 F. Supp. 1190, 1192 (D.D.C. 1974).

\textsuperscript{185} See, e.g., McDonald v. Arkansas, 501 F.2d 385, 388 (8th Cir.), cert. denied, 419 U.S. 1004 (1974) (no error to deny a continuance for witness located in Germany); Powell v. United States, 420 F.2d 799, 801 (9th Cir. 1969) (no error to deny a continuance for witnesses in Europe and Mexico without a showing that they would be willing to return and testify); Burton v. State, 43 Ala. App. 249, 251, 187 S.2d 808, 810 (1966) (no error to deny a continuance for witnesses located in Florida). For a discussion of the extent to which the state's obligation under the compulsory process clause extends beyond the witnesses it has the coercive power to produce and includes those who may be induced to return voluntarily as well as those whom other governments may cooperate to produce, see text at notes 345-406 infra.

\textsuperscript{186} See, e.g., United States v. Gloria, 494 F.2d 477, 480 (5th Cir. 1974) (no violation of compulsory process to deny a continuance for witness who might have invoked privilege against self-incrimination). Cf. Myers v. Frye, 401 F.2d 18 (7th Cir. 1968) (no violation of defendant's right of compulsory process to deny him a subpoena for witness who would have invoked lawyer-client privilege). But see United States v. Gomez-Rojas, 507 F.2d 1213, 1220 (5th Cir. 1975); United States v. Sanchez, 459 F.2d 100, 103 (2d Cir.), cert. denied, 409 U.S. 864 (1972) (since witnesses frequently insist before trial that they will refuse to testify but change their minds under oath, the only way to test their true intentions, as well as the legitimacy of their claims of privilege, is to produce them in person and examine them under oath); Smiloff v. State, 439 F.2d 772, 776 (Alas. 1968).

Note that it has been argued elsewhere that no testimonial privilege, including the witness' privilege against self-incrimination, is sufficient to override the defendant's right to produce witnesses in his favor. See Westen, supra note 4, at 159-77. See also note 197 infra. On that reasoning, no privilege would be sufficient to override the defendant's right to obtain a continuance for the purpose of producing witnesses in his favor.

though a defendant cannot reasonably be expected to guarantee that a witness will appear,\textsuperscript{188} he can be required to show that there is "some reasonable expectation"\textsuperscript{189} of securing the presence of the witness on time.

It follows that if a defendant can show these three factors—that is, (1) that the witness’ testimony will be competent, relevant, material, and favorable, (2) that he acted in good faith, and (3) that the witness will appear and testify at the time to which the trial is to be postponed—then he is entitled to more time. Furthermore, if the defendant makes such a showing, he is entitled to a continuance not as a matter of discretion, but as a matter of right.\textsuperscript{190} Thus, if the defendant first discovers on the eve of trial the identity or whereabouts of a witness that he would ordinarily be entitled to subpoena, he is entitled to a continuance if he can show that his belated discovery is not due to a lack of diligence.\textsuperscript{191} Similarly, if a diligent defendant learns of a witness after the trial has begun, or discovers that a subpoenaed witness has not appeared, he is entitled to a short adjournment if he can show that the witness can be produced at the time the trial recommences.\textsuperscript{192}

\textsuperscript{188} But see Baeza v. State, 453 P.2d 271, 273 (Okla. Crim. App. 1969). For a discussion of how much a defendant can be required to show as a condition for producing witnesses in his favor, see text at notes 302-23 infra, where it is contended that a defendant cannot constitutionally be required to show more than he reasonably can be expected to know.


\textsuperscript{191} See State v. Eller, 8 Wash. App. 697, 508 P.2d 1045 (1973), revd. on other grounds, 84 Wash. 2d 90, 524 P.2d 242 (1974) (violation of compulsory process rights to deny a continuance requested one day before trial for witness who, despite defendant's diligence, was not discovered until one day before trial). See also People v. Crable, 33 Mich. App. 254, 257, 189 N.W.2d 740, 742 (1971) (error to deny defendant a continuance requested one day before trial when he reasonably believed until then that prosecution would produce witness as part of its case); Foster v. State, 497 S.W.2d 291, 292-93 (Tex. Crim. App. 1973) (error to deny a continuance requested on Monday, the day of trial, for witness whom defendant, despite his diligence, did not discover until preceding weekend).

\textsuperscript{192} See Johnson v. Johnson, 375 F. Supp. 872, 876 (W.D. Mich. 1974) (violation of compulsory process rights to deny a continuance to allow additional alibi witnesses to testify); State v. Watson, 69 Wash. 2d 246, 258, 419 P.2d 789, 791-92 (1966) (violation of compulsory process rights to deny a continuance to attach a witness who was known and who had been served with process, but who was reluctant to appear voluntarily); State v. Edwards, 68 Wash. 2d 246, 258, 412 P.2d 747, 754 (1966) (violation of compulsory process rights to deny a continuance for witness who could have been produced in less than an hour's time). See also, e.g., State v. McGill, 101 Ariz. 320, 322, 419 P.2d 498, 501 (1966) (error to deny a continuance for witness who was temporarily taken ill during middle of trial); People v. Foy, 32
A harder case is presented if, after the trial has commenced, a diligent defendant learns of a witness who cannot be produced in a short period of time, whether because of temporary illness, extended distances, or other complications. In this case, the trial court can no longer resolve the problem with a short adjournment; accordingly, it must either deny the defendant the benefit of the expected testimony or abort the proceedings and reschedule the trial for a future date.\(^{193}\)

Although this case presents a more difficult set of alternatives, a defendant should be entitled to adjourn the trial for a reasonable period of time (or, if necessary, have the trial rescheduled), if he can show that he has acted in good faith and that the witness can probably be produced at the time when the trial recommences. While it is commonly said that once the trial has begun a defendant is limited to “short” adjournments,\(^{194}\) that view probably reflects the natural assumption that witnesses who are likely to appear at a date in the reasonably near future are those witnesses who are readily available and therefore able to appear within a short period of time. It may also reflect the assumption that since most defendants know in advance whether their witnesses will require additional time to appear, the defendant who waits until trial to request a continuance has been less than diligent.

Nevertheless, if a defendant can show that he has acted in good faith and that his witness is likely to appear at a certain date in the reasonably near future, he should not be denied the opportunity to call the witness because the witness needs more than a short period of

\(^{193}\) The court may take the precautionary measure of preserving the testimony of the state's witnesses in the meantime, in case they become unavailable to testify at a later trial. See Fed. R. Crim. P. 15. If it proceeds with the trial and the witness does not appear after trial as predicted, then the error in denying the continuance will be deemed harmless. See United States v. Costa, 425 F.2d 950, 953 (2d Cir. 1969). But, if the witness does appear after trial and does possess material testimony in the defendant's favor—in accord with the information presented to the court at the time of the request—then the court must set aside the verdict and grant the defendant a new trial. Cf. United States v. Anderson, 509 F.2d 312, 324 n.84 (D.C. Cir. 1974), cert. denied, 43 U.S.L.W. 3515 (U.S. March 17, 1975) (defendant's right to a continuance must be determined in light of information known to trial judge at time of request); Foster v. State, 497 S.W.2d 291 (Tex. Crim. App. 1973) (defendant entitled to new trial if he can show after trial that his witness would have appeared and testified as represented in motion for continuance).

time to make his appearance. As long as the defendant was not responsible for having the trial commenced in the witness' absence, he should not be penalized for the point in time at which he learned of the witness. Thus, if the defendant would have been entitled to a reasonable continuance before trial to enable him to secure the witness' presence, he should receive a comparable adjournment of the trial (including a mistrial, if necessary) if he learns of the witness after the trial has begun.

The hardest case is presented if a defendant cannot show that the witness is likely to appear on a certain date in the reasonably near future, or if he can show only that the witness is likely to appear in the very distant future. In this situation, the court is forced to consider carefully how far the right to produce witnesses ultimately extends and whether the right eventually yields to other interests: If the court grants an indefinite continuance or adjournment, the defendant may never be prosecuted, or, by the time he is prosecuted, the state's case may have been weakened irreparably. In either case, it is possible that the defendant's witness in fact possesses no material evidence. On the other hand, if the court proceeds with the trial, it may effectively deny the defendant the benefit of evidence that would eventually prove him innocent.

The choice is not easy. It is possible, of course, to fashion an argument that the defendant is entitled to an indefinite continuance. Although the compulsory process clause does not guarantee that witnesses will be produced, it does guarantee the defendant the opportunity to attempt to have them produced. Therefore, unless a witness is wholly and forever unavailable, the state cannot deny the defendant the opportunity to produce him. Although the state has an interest in criminal prosecution, this interest must yield whenever the state suppresses exculpatory evidence. Accordingly, if the state chooses to deny the defendant the benefit of an exculpatory witness by denying him a continuance, it must accept the consequences of its choice by dismissing the prosecution.

Although this argument is not untenable, it seems inconceivable that the courts would accept it. The question, therefore, is whether the ordinary decision to suppress evidence can be meaningfully distinguished from the denial of a continuance. Furthermore, if a meaningful distinction does exist, we can examine what effect it has on the scope of compulsory process.

195. For discussion of the exculpatory evidence cases, see notes 138-39, 144, 157 supra and accompanying text.

196. Cf. note 139 supra.
One obvious difference between the denial of a continuance and
the suppression of evidence is that the suppression cases involve a
meaningful choice between suppression and prosecution. Where the
state has physical control over the evidence, or the authority to
recognize a testimonial privilege, it retains control of the prosecution:
Although the state cannot simultaneously keep the evidence secret
and prosecute the accused, it retains the option of being able to
prosecute whenever it surrenders the evidence. In the case of
absent witnesses, on the other hand, the state does not control the
evidence. The most it can do (aside from dismissing the prosecution
immediately), if the above argument is correct, is to suspend
the prosecution indefinitely in the hope that it may be able to prosecute at
some time in the distant future. Thus, the suppression cases do not
reach as far as our argument. They do not stand for the proposition
that the defendant's interest in producing exculpatory evidence out­
weighs every state interest, including its interest in criminal prosecu-
}
own privilege for state secrets) and proceeding with the prosecution. If the defendant's interest will always outweigh one of these two concerns, then perhaps it is also sufficient, if not to terminate the prosecution, at least to postpone it until an uncertain date in the future when it can be permitted to proceed.

A second, and more persuasive distinction between the suppression of evidence and the denial of a continuance is that, in the case of a continuance, the defendant's interest may be perceived as less important. When the defendant requests the production of privileged evidence or evidence in the prosecutor's possession, the court can readily determine the value of such evidence by examining it in camera. If the court concludes that the evidence tends to exculpate the defendant, it can make the evidence available at trial; if the evidence is not exculpatory, the court can withhold it without having substantially abridged the interests protected by the privilege. In the case of a continuance, on the other hand, the value of the evidence is necessarily speculative. A court cannot determine whether an absent witness really possesses material evidence; even if such determinations could be made, the court would still be unable to ascertain whether the witness would ever be available to testify. In reality, of course, the absent witness may indeed possess exculpatory evidence, and it may some day become certain that, if the defendant had been

198. Since most privileges are asserted against the whole world, they are necessarily compromised to some extent even by restricted disclosure to a single judge in camera; accordingly, the defendant is not even entitled to an in camera inspection of allegedly privileged information unless he can make some showing that he may be entitled to produce the evidence at trial. By the same token, however, since most privileges are also principally designed to protect against disclosure to the public at large, or disclosure to particular third persons, they are not substantially affected by a restricted disclosure in camera. Accordingly, once the defendant has shown that he may be entitled to produce the evidence at trial, the courts order an in camera inspection to determine whether the privilege has been properly asserted. See United States v. Nixon, 418 U.S. 683, 715-16 (1974); Taglianetti v. United States, 394 U.S. 316 (1969); Palermo v. United States, 360 U.S. 343, 354 (1959). At some point, moreover, depending on the sufficiency of the showing and the nature of the privilege and the issue to be determined, the defendant has a right to participate in the determination on an adversary basis, rather than relying on the court's ex parte determination. See Alderman v. United States, 394 U.S. 165, 182 (1969); Dennis v. United States, 384 U.S. 855, 874-75 (1966).

The only privilege that may be abridged as much by an in camera inspection as by public disclosure is the privilege against self-incrimination. On the one hand, one might argue that since the privilege protects the accused from being prosecuted on the basis of coerced statements, it remains intact even after the court forces the witness to testify in camera as long as the court is able to keep the evidence from the prosecutor. On the other hand, given the difficulty of convincing witnesses to trust the security of an in camera proceeding, we may conclude that the only way to ensure the witness' privilege is to guarantee him immunity in advance for anything he discloses and then examine him in open court. In that event, since the court is forced to grant immunity before knowing whether the information is truly exculpatory, the defendant may be required to make a greater showing of need to justify the complete disclosure.
granted a continuance, the witness would have appeared and testified in the defendant's favor. Nevertheless, at the time the court must decide if a continuance is merited, the defendant's interest is merely speculative.

If, in fact, the courts have no constitutional obligation to grant the defendant an indefinite continuance because of an absent witness, or even a definite continuance to a date in the very distant future, it must be because there is a constitutional concept of "fairness" that permits us to resolve a defendant's rights with finality as long as the decision has been made rationally on the basis of the facts known at the time. If we did not have this concept, we would grant the defendant an indefinite continuance, or, at the very least, we would set aside any verdict against the defendant if his witness later appeared and were shown to possess material evidence in his favor.199 If we are unwilling to go this far, it must be because we consider it constitutionally fair to convict a person who may later be revealed to be innocent as long as we acted reasonably at the time of trial on the basis of what was known at that time.200

In summary, a defendant has a clear and nondiscretionary right to a continuance if he can show that he is otherwise entitled to produce the witness, that he has acted in good faith, and that the witness is reasonably likely to appear at the time to which the trial is postponed.

199. As a nonconstitutional rule of practice, a defendant in some jurisdictions may obtain a new trial on the basis of newly discovered evidence. For example, FED. R. CRIM. P. 33 permits a defendant to demand a new trial within two years of his conviction if he can show that, through lack of diligence on his part, he discovered new evidence after the trial that would "probably produce an acquittal." 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 557, at 515 (1969). However, as far as the Constitution is concerned, a defendant has no right to demand a new trial on the basis of newly discovered evidence unless he can show that the prosecutor is responsible for the delayed discovery. See Burks v. Egele, 512 F.2d 221, 224-30 (6th Cir. 1975) (defendant has no constitutional right to demand new trial on basis of newly discovered evidence unless prosecution was responsible for failure of evidence to come to light earlier); 8A J. MOORE, FEDERAL PRACTICE § 33.06[2] (2d ed. 1975). As one court has stated, "[I]f a new trial could be predicated as of right upon a codefendant's [or any witness'] change of heart after failure to take the stand [at the defendant's original trial], there could always be a second chance for everyone." Dirring v. United States, 353 F.2d 519, 520 (1st Cir. 1965).

200. See cases cited in notes 115-16 supra. A similar attitude is reflected in the reluctance of courts to give the defendant the benefit of exculpatory evidence when it has been lost. See generally Comment, Judicial Response to Governmental Loss or Destruction of Evidence, 39 U. Chi. L. Rev. 542 (1972). Unless the prosecutor can be shown to have acted negligently or in bad faith, see note 128 supra, the defendant has the difficult burden of justifying dismissal on the basis of evidence the value of which is only speculative. In the lost-evidence situations, as with requests for continuances, we are willing to resolve the defendant's rights on the basis of evidence as it appears at the time of trial despite the possibility that the defendant might have been acquitted if the evidence had been preserved. See United States ex rel. Parson v. Anderson, 354 F. Supp. 1060, 1073-74 (D. Del. 1972), affd., 481 F.2d 94 (3d Cir.), cert. denied, 414 U.S. 1072 (1973).
In setting a future date, moreover, while the defendant cannot demand an indefinite continuance or a continuance to the very distant future, he is entitled to postpone the trial (and to adjourn or recommence the trial if it has already commenced) to a date that will provide him with a reasonable amount of time in which to produce witnesses in his favor.\footnote{201}

Having defined the standard that governs the granting of continuances, we can return to the question whether the defendant has a right to demand pretrial subpoenas returnable before trial. It should be clear that if, during trial, a diligent defendant discovers either the existence of a favorable witness or that he does not have the time necessary to examine subpoenaed documents, he can demand a continuance to gather the evidence together. To avoid such interruptions, some courts permit the defendant to subpoena documents\footnote{202} and to depose witnesses before trial in order to compel the disclosure of favorable information that the defendant cannot obtain in other ways.\footnote{203} In effect, these pretrial procedures give the defendant the time before trial that he would otherwise be constitutionally entitled to demand in the midst of trial.\footnote{204}

\footnote{201. See Shirley v. North Carolina, — F.2d — (4th Cir., Oct. 6, 1975) (defendant has constitutional right to obtain a continuance for a reasonable period of time, including several months, if necessary to produce material witness on his behalf). Cf. Peterson v. United States, 344 F.2d 419, 425 (5th Cir. 1965) (defendant was constitutionally entitled to a continuance of several months to permit government to produce in person an adverse witness who was physically unable to testify at trial because of pregnancy, but was reasonably certain to be able to appear and testify at a certain date in the future following birth of the child).

\footnote{202. See, e.g., United States v. Nixon, 418 U.S. 683, 699 (1974) ("[I]n order to require production prior to trial [under rule 17(b)], the moving party must show . . . that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial").


\footnote{204. See cases cited in note 160 supra. The practice under the Jencks Act, 18 U.S.C. § 3500 (1970), illustrates the trade-off between granting the defendant production before trial and granting a continuance during trial. The Act, which entitles a defendant to demand that the prosecution disclose the prior statements of its witnesses for his use in cross-examining them, has been interpreted to entitle a defendant to receive the statements in sufficient time to make effective use of them. See Sendejas v. United States, 428 F.2d 1040, 1046 (9th Cir.), cert. denied, 400 U.S. 879 (1970). Yet, the Act prohibits the courts from ordering disclosure until the government witnesses have taken the stand and thus leaves the courts with no alternative for granting the defendant the time to which he is entitled except to grant a continuance at trial. See United States v. Leeds, 457 F.2d 857, 859 (2d Cir. 1972). In order to avoid the inevitable delays caused by such continuances, at least one court
The fact that some courts choose to allow the defendant time before trial to gather his evidence, however, does not mean they are required to do so. The defendant may have a constitutional right to take pretrial depositions in the rare case in which he seeks to preserve favorable evidence that might otherwise become unavailable for trial.205 In most cases, however, his right to demand sufficient time to marshal evidence at trial can be satisfied either by granting him time before trial or by granting him a trial continuance. For the time being, courts tend to prefer the latter alternative (particularly in contrast to pretrial depositions), perhaps in the belief that some of the defendant’s evidentiary problems will wash out before trial, or perhaps on the assumption that criminal cases can better be expedited by granting continuances. In any event, as long as the courts are willing to allow a defendant the time he needs at trial by granting him a continuance (or, if necessary, a mistrial), a defendant has no constitutional right to insist on the pretrial alternative.

B. The Price of Subpoenas

Every jurisdiction appears to produce at least some witnesses free of charge for defendants too poor to pay for them. In federal court, for example, the government pays the costs of serving subpoenas and paying witnesses for defendants who are “financially unable to pay the fees.”206 Yet existing practices still impose a substantial burden on indigent defendants: some courts place an absolute ceiling on the number of witnesses they will produce free of charge;207 some refuse to produce free witnesses in the case of certain minor offenses;208 has gone so far as to “encourage” the prosecutor to disclose the statements “voluntarily” before trial. See United States v. Goldberg, 336 F. Supp. 1, 3 (E.D. Pa. 1971).

205. See, e.g., Fed. R. Crim. P. 15 (permitting the defendant to take pretrial depositions to preserve testimony that might otherwise become unavailable at trial). Furthermore, the holding in Evans v. Superior Ct., 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974), that the defendant had a right to a line-up shortly after the crime where the witness’ identification testimony might be tainted by subsequent viewings, suggests that a defendant also has a constitutional right to demand that the government use its coercive authority before trial to preserve evidence that might otherwise disappear.


208. See, e.g., Miss. Code Ann. § 99-15-15 (1972) (providing free witnesses only for felonies and for misdemeanor prosecutions punishable by more than 90 days in jail); Neb. Rev. Stat. § 29-1903 (1964) (providing free witnesses only for felony prosecutions). See also State ex rel. Morgan, 31 Utah —, 529 P.2d 800 (1974) (juveniles charged with traffic offenses have no statutory right to produce out-of-state witnesses free of charge). Massachusetts denied free witnesses to all

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205. See, e.g., FED. R. CRIM. P. 15 (permitting the defendant to take pretrial depositions to preserve testimony that might otherwise become unavailable at trial). Furthermore, the holding in Evans v. Superior Ct., 11 Cal. 3d 617, 114 Cal. Rptr. 121, 522 P.2d 681 (1974), that the defendant had a right to a line-up shortly after the crime where the witness' identification testimony might be tainted by subsequent viewings, suggests that a defendant also has a constitutional right to demand that the government use its coercive authority before trial to preserve evidence that might otherwise disappear.

206. FED. R. CRIM. P. 17(b).

207. See, e.g., NEB. REV. STAT. § 29-1903 (1964) (limiting indigent defendants to fifteen witnesses). See also ARK. STAT. ANN. § 43-2001 (1964) (limiting indigent defendants to six character witnesses).

208. See, e.g., MISS. CODE ANN. § 99-15-15 (1972) (providing free witnesses only for felonies and for misdemeanor prosecutions punishable by more than 90 days in jail); NEB. REV. STAT. § 29-1903 (1964) (providing free witnesses only for felony prosecutions). See also STATE ex rel. MORGAN, 31 Utah —, 529 P.2d 800 (1974) (juveniles charged with traffic offenses have no statutory right to produce out-of-state witnesses free of charge). MASSACHUSETTS denied free witnesses to all
some refuse to produce out-of-state witnesses free of charge; some give the trial court largely unreviewable discretion to decide how many, if any, witnesses to produce free of charge; and some courts, while producing the witnesses at trial, require the defendant to reimburse the state for its costs, even if this means sending him to prison for failing to pay.

In addition, courts use different standards of "indigency" to determine which defendants are too poor to pay the costs of producing witnesses: some courts produce witnesses free of charge for defendants too poor to retain counsel; some waive witness fees and costs for defendants who cannot pay them "without undue hardship"; some leave the standard of indigency undefined; and defendants except those tried for offenses punishable by death or life imprisonment until the practice was found to violate the compulsory process clause. Blazo v. Superior Ct., — Mass. —, 315 N.E.2d 857 (1974).


211. New Jersey, for example, provides for the imprisonment of indigents who are unable to reimburse the state for the costs of an unsuccessful defense, including the costs of producing witnesses. N.J. STAT. ANN. §§ 22A:3-4, :3-6 (1969), as amended, (Supp. 1975). See Casenote, 2 SETON HALL L. REV. 504, 520-23 (1971). It is questionable, however, whether the New Jersey practice is constitutional if it denies defendants (as public debtors) the exemptions they would otherwise enjoy as private debtors. See James v. Strange, 407 U.S. 128 (1972). Compare Fuller v. Oregon, 417 U.S. 40 (1974) (upholding a reimbursement statute that does not discriminate between public and private debtors, and that requires reimbursement, including imprisonment, from those able to pay without "manifest hardship"). It is also questionable whether the state may imprison a defendant for failing to repay the costs of his defense if he is unable to pay a lump sum but can pay in installments. Cf. Tate v. Short, 401 U.S. 395 (1971).

212. See, e.g., ALA. R. CRIM. P. 17(b), 39(b); Miss. Code Ann. § 99-15-15 (1972). Some jurisdictions produce a certain number of witnesses free of charge for all defendants regardless of their ability to pay. See, e.g., ARK. STAT. ANN. § 43-2001 (1964) (providing six free witnesses for all misdemeanor defendants and twelve free witnesses for all felony defendants); LA. CODE CRIM. P. art. 738 (West 1966) (same).


some courts produce witnesses free of charge only for defendants who have no property worth more than $50 or other property beyond their wearing apparel. 215

Standards also vary with respect to the showing a defendant must make in order to have witnesses produced free of charge: some courts produce some witnesses free of charge without requiring the defendant to show any need for them; 216 other courts require the defendant to demonstrate that the witnesses are “material and necessary for the defense,” 217 or that “such facts [for which he seeks the witnesses] cannot be adequately established by the witnesses for whom he has had subpoenas issued”; 218 some courts go still further and require the defendant to show that he “cannot safely go to trial without the witness.” 219

The constitutional problems in this area are threefold: first, to determine whether the compulsory process clause bears on the issue of the production of witnesses free of charge; second, if the clause does apply to this issue, to define the constitutional standard that determines whether witnesses must be produced free of charge; and, third, to apply this standard to the practices enumerated above in order to determine their validity.

The Supreme Court has never directly decided whether the compulsory process clause entitles a defendant to have witnesses produced

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217. See, e.g., Iowa Code Ann. § 781.2 (Supp. 1975). See also Fed. R. Crim. P. 17(b) (“The court shall order at any time that a subpoena be issued . . . upon . . . a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense”). Until 1966, rule 17(b), 18 U.S.C. app. (1964), required a defendant to show that “the evidence of the witness is material to the defense [and] that the defendant cannot safely go to trial without the witness.” The rule was amended in 1966 to facilitate the defendant’s showing of materiality. See 1 C. Wright, supra note 199, § 272, at 540-41; Note, Compulsory Process in Federal Courts Under Rule 17, 13 How. L.J. 155 (1967).


219. See, e.g., Colo. R. Crim. P. 17(b). This was the original standard under Fed. R. Crim. P. 17(b) until it was amended in 1966. See note 217 supra.
free of charge. However, the Court did once express the view (in dictum) that the sixth amendment merely secured those rights that the ancient common law had denied the defendant and created no obligation that such rights be secured at the government's expense.\(^{220}\) Accordingly, some courts have held that the compulsory process clause does not place any specific obligation on the government to pay the costs of producing witnesses.\(^{221}\) The conventional wisdom, as expressed by Wigmore, supports the same conclusion: If the compulsory process clause merely extends to the accused the benefits of process already granted by law to the prosecutor and to parties in civil cases, then the defendant is entitled to obtain witnesses free of charge only if such other parties can obtain them at no charge.\(^{222}\)

The trouble with these views is that they both depart from the treatment of indigents in other areas of the law,\(^{223}\) and rest upon assumptions that were repudiated in *Washington v. Texas*. By invalidating a rule of competency that was well-established in 1791, the Court in *Washington* rejected the historical view of the compulsory process clause. Rather than assuming that the framers intended to codify the common law of witnesses in all its specific detail, the Court implicitly held that the compulsory process clause (like other clauses of the sixth amendment) was designed to embody a fundamental principle: the defendant must be allowed to defend himself through the production of witnesses. In construing the clause, therefore, we must put aside the historical reports and analyze the particular issue in light of the framers' general intent to guarantee a defendant the right to produce and present witnesses in his favor.\(^{224}\)

\(^{220}\) United States v. Van Duzee, 140 U.S. 169, 173 (1891) ("The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to [defendants]; but it was not contemplated that this should be done at the expense of the government").


\(^{223}\) In a series of cases beginning with Powell v. Alabama, 297 U.S. 45 (1932), it has been held that defendants in criminal cases are entitled to sixth amendment protection despite their inability to pay. These cases have involved the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972), the right to a speedy trial, Smith v. Hooey, 393 U.S. 374, 380 n.11 (1968), and the right to confront witnesses, United States v. Edwards, 469 F.2d 1362, 1369 (5th Cir. 1972).

\(^{224}\) For a discussion of the Court's use of history in *Washington*, see Westen, *supra* note 4, at 113-15, 119-20. Similarly, the Court has held that the sixth amendment right to jury trial was intended to incorporate only the most basic principle of a trial by the community and not to freeze into constitutional form all the
Washington also repudiated Wigmore's second basic tenet—namely, that even in areas where the clause presumptively applies, it merely extends to the defendant the benefits of process already available to the prosecution and to civil parties under local law. As previously noted, Wigmore believed that the compulsory process clause has no bearing on the competence of the defendant's witnesses—that whether persons are "witnesses in his favor," within the latter part of the clause, is not a federal question at all, but rather a question governed entirely by local law.225 As we have seen, this view was explicitly rejected in Washington.226 In addition, Wigmore believed that, in areas where it does apply, the clause merely operates to equalize for the defendant the benefits of process already extended to others under local law. Thus, in his view, whether the defendant has a claim of "compulsory process" within the first part of the clause may initially be a federal question to be resolved by constitutional standards, but, since the clause does not require anything more than "equality" of treatment, the standard is satisfied simply by showing that the defendant has received the same benefits as are routinely available to the prosecution and to parties in civil cases.227

Wigmore's conception of the compulsory process clause as a mere guarantee of equality was implicitly rejected in Washington. There the Court was presented with a local rule of evidence that prohibited the defendant from calling certain persons as witnesses in his favor, yet permitted the prosecution to call the very same persons as witnesses against him. If equality were all that the sixth amendment required, the rule would have been invalid for its unequal treatment of the prosecution and the defense in the production of witnesses. Indeed, in his separate opinion, Justice Harlan urged the Court to base its decision on a finding of "discrimination between the prosecution and the defense in the ability to call the same person as a witness,"228 and to refrain from deciding whether such a rule would be invalid if extended to both the prosecution and the defense.229 The Court rejected Justice Harlan's suggestion. If Harlan were right, and equal treatment were all the sixth amendment required, the defendant could be arbitrarily denied witnesses in his favor simply by showing
that the same arbitrary limitations also applied to the prosecution. Yet, as the Court recognized, the defect in the Texas rule was not that it was discriminatory but that it was arbitrary—that is, that it imposed an unnecessary burden on the defendant’s right to produce witnesses in his favor. Thus, even if the Texas rule were extended to apply equally to the prosecution, it would still be invalid for arbitrarily denying the defendant the benefit of favorable witnesses.230

Thus, reasoning from Washington, whether an indigent defendant is entitled to compulsory process free of charge should depend neither on the scope of the common law of 1791, nor on the relative benefits of process enjoyed by the prosecution and civil parties. Rather, the issue should be resolved by focusing on the framers’ intent that a defendant have the general means to produce witnesses in his favor regardless of how other parties might be treated under the laws of evidence as defined by Congress or fashioned by the federal courts.231

230. For further discussion of the implications of construing the defendant’s right to produce witnesses as independent of the particular opportunities available to the prosecution, see Westen, supra note 4, at 177-82. This “independent” construction of the clause is consistent with historical evidence. The framers of the sixth amendment implicitly refrained from limiting the defendant’s rights to the benefits available to the prosecution. The New Jersey Constitution of 1776 was formulated in such a fashion and guaranteed that “all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.” N.J. Const. art. XVI (1776), in 1 B. Schwartz, The Bill of Rights: A Documentary History 260 (1971) (emphasis added). This New Jersey provision, along with the other colonial bills of rights, was before James Madison when he drafted the sixth amendment. See J. Gorbey, Antecedents and Beginnings to 1801, at 427-28 (1971), Vol. 1 of History of the Supreme Court of the United States (The Oliver Wendell Holmes Devise, P. Freund ed.); R. Rutland, The Birth of the Bill of Rights 1776-1791, at 202 (1955); 2 B. Schwartz, supra, at 1008. Indeed, the same Congress that adopted the Bill of Rights in 1789 later enacted a statute in 1790 guaranteeing the accused “the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution against him.” Act of April 30, 1790, ch. 9, § 29, 1 Stat. 119, as amended, 18 U.S.C. § 3005 (1970) (emphasis added). Thus, the framers of the compulsory process clause certainly knew how to formulate the clause on a principle of equality and, presumably, would have done so if they had so desired. We can assume, therefore, that in refraining from doing so they intended that the defendant’s right to produce witnesses in his favor be independent of the particular opportunities available to the prosecution in producing its witnesses.

231. See note 230 supra. In constitutionalizing the defendant’s right to produce witnesses, the framers intended to safeguard the defendant’s interests against actions by the federal government—that is, against federal laws of evidence, fashioned by Congress and by the federal courts—that might abridge his interests. Cf. Barron v. Mayor & City Council, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights applies only to actions by federal government, not to states or their subdivisions). Nevertheless, in the particular area of criminal evidence, it is not unfair to say that the framers of the Bill of Rights were also concerned about the effect of the states’ “local” rules of evidence. For, shortly before Congress adopted the Bill of Rights in the fall of 1789, it enacted the Judiciary Act of 1789, Act of Sept. 24, 1789, 1 Stat. 73, which directed the federal courts in criminal cases to apply the laws of evidence of the various states where they presided. See United States v. Reid, 53 U.S. (12 How.) 361 (1851). Thus, by the time they adopted the sixth amendment, the framers in Congress
We can begin to define the ramifications of the defendant's general right to have the means to produce witnesses in his favor by examining the Supreme Court's treatment of indigent defendants in other areas of criminal procedure. The Court has long held that the sixth amendment right to counsel is so fundamental to a fair trial that a defendant who cannot afford counsel must be appointed counsel free of charge. Furthermore, the Court has held that, although a defendant has no explicit right to an appeal, once appellate review becomes "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," an indigent defendant is entitled to free counsel, a free trial transcript (or its equivalent), and a waiver of filing fees, whenever necessary to ensure "adequate and effective appellate review."

At the very least, these cases stand for the proposition that the criminal defendant cannot be denied a fair determination of guilt or innocence because he is too poor to pay for "the basic tools of an adequate defense." The Constitution does not guarantee indigents "absolute equality or precisely equal advantages," but it does require "that indigents have an adequate opportunity to present their claims fairly within the adversarial system." Applying this standard to the trial stage of the criminal proceeding, the right to produce witnesses is presumed to be a fundamental one. It is thus fair to say that the framers of the sixth amendment were genuinely concerned with the effect of state rules of evidence on the defendant's right to produce witnesses—at least until the federal government might begin to fashion independent rules of evidence of its own.

232. The Court first held in Powell v. Alabama, 287 U.S. 45 (1932), that the right to a fair trial under the due process clause of the fourteenth amendment includes the right to appointed counsel in certain cases. It has since held that the sixth amendment right to counsel includes the right to appointed counsel for indigent defendants in all felony prosecutions, Johnson v. Zerbst, 304 U.S. 458 (1938), and in all criminal proceedings resulting in imprisonment, Argersinger v. Hamlin, 407 U.S. 25 (1972).


witnesses would seem equally as fundamental to the presentation of the defendant's claims within the adversarial system as is the right to counsel. First, because the right to produce witnesses has its impact at the trial stage, the ability to exercise this right is "integral" to the determination of guilt or innocence: "The purpose of the trial stage from the State's point of view is to convert . . . a person presumed to be innocent to one found guilty beyond a reasonable doubt." Second, the right to produce witnesses and the right to counsel have generally been treated as equally essential in safeguarding the defendant's ability to receive a fair trial: both are specifically enumerated in the sixth amendment, both apply to the states through the fourteenth amendment as "fundamental" elements of due process, and both apply in felony and misdemeanor proceedings alike. In short, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Nevertheless, two arguments might be advanced to distinguish the right to free counsel from the right to free subpoenas. First, it is arguable that, because the expense of producing witnesses is less than the cost of retaining counsel, it is not unfair for the state to place the cost of producing witnesses upon the defense. Second, it is also arguable that, because the danger of frivolous requests for witnesses is much greater than the danger of frivolous requests for counsel, the state can use the imposition of witness fees as a device for deterring vexatious requests.

Neither of these arguments, however, can withstand analysis. The first argument is initially undercut by the fact that the cost of producing witnesses can be quite substantial. Although most jurisdictions

240. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court, in determining the extent of the right to counsel, assumed that the rights of compulsory process apply in all criminal proceedings:

The Sixth Amendment . . . provides specified standards for "all criminal prosecutions."

One is the requirement of a "public trial."

. . . And another, compulsory process for obtaining witnesses in one's favor. . . . We have never limited these rights to felonies or to lesser but serious offenses.

. . . Respecting the right to . . . compulsory process for obtaining witnesses, it was recently stated, "It is simply not arguable, nor has any court ever held, . . . that [in] the trial of a petty offense . . . the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf."

charge a rather small fee (if any at all) for issuing the subpoena itself, the cost of serving the subpoena and the expense of witness fees can be considerable. In the federal courts, for example, it costs $2 to serve a subpoena through the marshal's office, and 10¢ per mile and $20 per day to pay for a witness.\textsuperscript{242} If a witness comes from out of state, the witness fees alone can amount to many hundreds of dollars.\textsuperscript{243} If a defendant wishes to produce an expert witness, moreover, he may have to pay for the witness' time at prevailing professional rates. Hence the cost of producing witnesses can easily equal the cost of retaining counsel.

Even if the cost of producing the witnesses were minor, however, that factor would not distinguish it from the other services to which an indigent defendant is constitutionally entitled. Appellate review, for example, cannot be conditioned on a filing fee of even $4 if the defendant is financially unable to pay.\textsuperscript{244} The controlling factor is not the absolute cost of the particular service but the financial ability of the defendant in relation to the cost of the particular defense service.\textsuperscript{245} Thus, a defendant is not necessarily indigent in all circumstances: If a defendant has sufficient funds to hire a lawyer, yet insufficient funds to subpoena witnesses, he may be required to retain counsel but not to pay for witnesses. Similarly, if a defendant has funds to subpoena only one witness, it would be consistent with the concept of indigency to require him to pay for one witness but not for any others he may wish to produce.\textsuperscript{246}

\begin{itemize}
\item \textsuperscript{243} \textit{See}, e.g., United States v. Hathcock, 441 F.2d 197, 198 (5th Cir. 1971) ($800 to produce a single witness from federal prison); Smiloff v. State, 439 P.2d 772, 775 n.12 (Alas. 1968) ($2000 to produce five witnesses for the defense); State v. Blount, 200 Ore. 35, 40, 264 P.2d 419, 422 (1953) ($200 to produce an out-of-state witness).\textsuperscript{244}
\item \textsuperscript{244} \textit{See} Smith v. Bennett, 365 U.S. 708 (1961). \textit{See also} Burns v. Ohio, 360 U.S. 252 (1959) (appellate filing fee of $20 invalid as applied to an indigent who cannot pay).\textsuperscript{245}
\item \textsuperscript{245} "Indigence 'must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.' . . . An accused must be deemed indigent when 'at any stage of the proceedings [his] lack of means . . . substantially inhibits or prevents the proper assertion of a [particular] right or a claim of right.'" \textit{Hardy v. United States}, 375 U.S. 277, 289 n.7 (1964) (Goldberg, J., concurring).\textsuperscript{246}
\item \textsuperscript{246} \textit{See} Hardy v. United States, 375 U.S. 277 (1964) ("Indigence must be

The second argument—that the state can use witness fees as a device for screening frivolous requests for subpoenas—is also unsupported. The Supreme Court has repeatedly rejected the use of fees as a screening device in related contexts, such as the use of filing fees to deter frivolous election candidates, frivolous litigation, or frivolous appeals. The defect in using witness fees in this manner, as with other fees, is that they are "too crude": they have no deterrent effect on wealthy defendants who are able to purchase as many frivolous subpoenas as they wish, yet they totally preclude indigent defendants from producing even the most vital witnesses. If the state wishes to screen frivolous subpoenas, therefore, it must use alternative means that have a less drastic impact on the defendant's right to produce witnesses, such as requirements that the witnesses be shown to be material, professional sanctions against the defendant's lawyer, recoupment provisions, or "penalties for false . . . affidavits, and actions for . . . abuse of process, to mention only a few."

To return now to our first problem, the defendant who is unable to pay costs and fees for producing witnesses surely has a constitutional right, at least under some circumstances, to have them produced free of charge. The second problem, then, is to define the

defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources . . . to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer"). Similarly, while a defendant who is able to pay for only a portion of a particular service cannot be required to pay for it all, he can be required to pay what he can afford. See the discussion of partial payment under the Criminal Justice Act, § 3006A(e) (1967), as amended, in Oaks, The Criminal Justice Act in the Federal District Courts—A Summary and Postscript, 7 AM. CRIM. L.Q. 210, 213-14 (1969).


249. See Blazo v. Superior Ct., — Mass. —, 315 N.E.2d 857, 860 (1974) (witness fees held unconstitutional, as unnecessary abridgement of defendant's right to produce witnesses, because state's interest in avoiding frivolous requests can be served by showing of materiality). For a discussion of the doctrine of less drastic means as applied to access fees, see Brickman, Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services, 48 N.Y.U. L. Rev. 595, 639 (1973).

250. Chief Justice Burger has suggested, in connection with the provision of free transcripts on appeal, that the defense lawyer is responsible for ensuring that the appeal is not frivolous. Mayer v. Chicago, 404 U.S. 189, 201 (1971) (concurring).


constitutional standard that determines the circumstances in which this right can be exercised. Here again the lower courts are divided: some courts hold that an indigent defendant has an absolute right to subpoena any witness, free of charge, who is material to his defense;253 other courts hold that the trial court has discretion to decide how many, if any, subpoenas to issue at the state’s expense.254

The use of the standard of discretion is no more justified here than it is in the area of continuances.255 Courts probably tend to rely on discretion as the standard because they recognize that a request to have witnesses produced at no charge (like a request for a continuance) should not be granted in every case, and because they realize (as in the case of continuances) that various factors enter into the decision to grant the defendant’s request. However, those features do not justify making constitutional rights depend on a trial judge’s unmeasured discretion, especially where the various factors entering into the proper exercise of discretion can be more precisely identified and weighed.

It is possible to identify and evaluate the controlling elements of the decision to produce a defendant’s witnesses free of charge. Initially, a defendant can be required to show that he is “unable to pay”256 for the witnesses.257 Unfortunately, because the Supreme

253. See, e.g., Preston v. Blackledge, 332 F. Supp. 681, 684 (E.D.N.C. 1971); People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (expert witness); Blazo v. Superior Ct., — Mass. —, 315 N.E.2d 857 (1974); State ex rel. Plummer v. Gideon, 119 Mo. 94, 99, 24 S.W. 748, 749 (1893) (violation of state compulsory process rights to “let a few paltry dollars outweigh the life or liberty of the citizen”). Cf. Davis v. Coiner, 356 F. Supp. 695 (N.D. W. Va. 1973) (violation of equal protection and right to counsel to deny indigent defendant funds to permit his attorney to take deposition of out-of-state witness); Wells v. McCullock, 13 Ill. 606, 607 (1852) (violation of state right to compulsory process to require any acquitted defendant, rich or poor, to pay for witnesses in advance). Following similar reasoning, similar limitations on other sixth amendment rights have also been rejected. See Smith v. Hooey, 393 U.S. 374, 380 n.11 (1968) (defendant's right to speedy trial cannot be made to depend on expense of producing him for trial); United States v. Edwards, 469 F.2d 1362, 1369 (5th Cir. 1972) (defendant's right of confrontation cannot be made to depend on cost of producing adverse witnesses).


255. See generally text at notes 162-201 supra.

256. "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court." Griffin v. Illinois, 351 U.S. 12, 17 (1956) (opinion of Black, J.) (emphasis added).

257. See United States v. Spouse, 472 F.2d 1167 (6th Cir.), cert. denied, 411 U.S.
Court has never defined a constitutional test for indigency,268 the lower courts have reached no consensus about when a defendant is “unable to pay.” Thus, some courts have required a defendant to show that he is completely destitute, while other courts have required a defendant to show that he cannot pay “without undue hardship.”269 It seems likely, however, that in setting out a constitutional test for indigency the Supreme Court would not require a defendant to prove himself “wholly destitute”; rather, the test would probably be whether he could pay for the requested service “and still be able to provide himself and dependents with the necessities of life.”270 If that, indeed, is the test, any stricter definition of indigency is unconstitutional and cannot be applied to deny a defendant the opportunity to produce witnesses in his favor.271

A defendant can also be required to show that his request is nonfrivolous. Again, courts differ about the kind of showing required of a defendant: some courts require a defendant to show that his witnesses are necessary to his defense;272 others require him to show that he “cannot safely go to trial without the witness.”273 Yet here, in contrast to indigency, we have an objective standard of comparison—namely, the kind of showing that a nonindigent defendant is required to make in order to obtain a continuance or to resist a motion to quash. In those cases, a nonindigent defendant is not required to show that his witnesses are “necessary”; it is sufficient for him to show that they are material to his defense—that is, that their testimony could reasonably affect the judgment of the jury.274

In order to have his witnesses produced, the indigent defendant should not be required to make any greater showing of materiality

970 (1973) (defendants have no right to demand free subpoenas unless they make some showing of indigency); People v. Virella, 55 Ill. 2d 192, 302 N.E.2d 327 (1973) (nonindigent defendants have no constitutional right to produce witnesses free of cost).


259. See, e.g., N.M. STAT. ANN. § 41-22-2 (1953).


261. See, e.g., Anaya v. Baker, 427 F.2d 73, 75 (10th Cir. 1970) (reversing a state conviction on ground that, by requiring defendant to be a “pauper” to qualify for appointed counsel, state court had applied too rigid a standard).

262. See authorities cited in note 217 supra.

263. See authorities cited in note 219 supra.

264. See text at notes 98-105 supra.
than the nonindigent defendant. In *Coppedge v. United States*, the Supreme Court was asked to decide what kind of showing an indigent must make in order to appeal in forma pauperis. The government argued that the defendant should be required to show that, if permitted to appeal, he would be "likely" to prevail on the merits. The Court rejected this argument and held (in what can be interpreted as a constitutionally based decision) that an indigent defendant cannot be required to make a pre-appeal showing of merit that would be more rigorous than the showing a nonindigent defendant must make to avoid a summary dismissal. Thus, the government cannot deny an indigent defendant the right to proceed with the briefings of his appeal unless it is able to demonstrate that his appeal "is so lacking in merit that the court would dismiss the case on motion of the Government, if the case had been docketed and record been filed by an appellant able to afford the expense..." The same reasoning should apply to an indigent's right to produce witnesses. If a nonindigent defendant is permitted to subpoena and present witnesses by showing that their testimony could reasonably affect the judgment of the jury, an indigent defendant should not be required to make any greater showing; rather, the same standard of materiality should govern both requests. Thus, unless the state can demonstrate that the prevailing standard of materiality entirely fails to screen frivolous requests for free witnesses, an indigent defendant is entitled to proceed under that standard; requiring him to meet a more rigorous standard would be invalid as an unnecessary burden upon his right to produce witnesses.

It has been suggested, however, that treating the requests for process of indigent and nonindigent defendants on an equal basis would obligate the court to produce witnesses at no charge upon the mere demand of indigent defendants. The argument is that, as long

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267. 369 U.S. at 448 (footnote omitted).
268. See text at notes 294-95 infra. Cf. *Welsh v. United States*, 404 F.2d 414, 417 (5th Cir. 1968) ("[A]s between those financially able and those financially unable to pay the fees of witnesses, there should be no more discrimination than is necessary to protect against the abuse of process"); *Greenwell v. United States*, 317 F.2d 108, 110 n.5 (D.C. Cir. 1962) (indigent cannot be required to make any showing of materiality more rigorous than "necessary" to serve state's interest in screening frivolous requests for witnesses).
as nonindigent defendants are issued subpoenas automatically upon demand (as is the case in federal court), an indigent defendant would also be entitled to demand subpoenas without a prior showing of materiality.\textsuperscript{269} This suggestion is unsound for several reasons. To begin with, although some courts do issue subpoenas to nonindigent defendants upon request, a witness can always move to quash a subpoena in advance of trial by showing that his testimony is immaterial.\textsuperscript{270} Moreover, even if a witness appears and testifies, the prosecution can always move to strike his testimony from the record.\textsuperscript{271} In each case, in order to defeat the motion, the nonindigent defendant must make precisely the same showing of materiality that the indigent defendant would have been required to make in order to have the witness produced.

Furthermore, as the courts have repeatedly held, the fact that a rich defendant is permitted to “waste his money on unnecessary and foolish trial steps . . . does not . . . give the indigent the right to squander government funds merely for the asking.”\textsuperscript{272} As far as the compulsory process clause is concerned, every defendant, rich or poor, could be required to make a prior showing of materiality as a condition for obtaining subpoenas.\textsuperscript{273} The fact that some defendants are permitted to waste their money on immaterial witnesses is irrelevant unless the indigent defendant can show that the difference in treatment places him at a constitutionally significant disadvantage. Yet, by definition, neither he nor any other defendant has a constitutional interest in producing witnesses whose testimony could not reasonably affect the judgment of the jury.\textsuperscript{274}


\textsuperscript{272} Slawek v. United States, 413 F.2d 957, 960 (8th Cir. 1969). \textit{See also} Blazo v. Superior Ct., \textit{---} Mass. \textit{---}, 315 N.E.2d 857, 860 (1974). \textit{Cf.} Draper v. Washington, 372 U.S. 487, 496 (1963) ("[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review").

\textsuperscript{273} “Even where the defendant is not proceeding in forma pauperis, the court may refuse to permit the issuance of subpoenas which it appears may be an abuse of process, until it has been informed what may be expected of the prospective witness.” United States v. Kinzer, 98 F. Supp. 6, 9 (D.D.C. 1951). \textit{See also} Bacon v. State, 215 Tenn. 268, 385 S.W.2d 107 (1964).

\textsuperscript{274} It is a separate question whether an indigent defendant suffers constitutional prejudice by being forced to make the showing in the presence of the prosecutor or in
The third problem now falls into place. We have concluded that every indigent defendant has a constitutional right to produce witnesses free of charge if he can show (1) that he is "unable to pay," within the meaning of the constitutional test, and (2) that his witnesses could reasonably affect the judgment of the jury. If a defendant makes this showing, he is entitled to obtain subpoenas not as a matter of discretion, but as a matter of right. Accordingly, once a defendant has demonstrated that he is constitutionally entitled to have his witnesses produced free of charge, any statute or rule of court that attempts further to restrict this right is unconstitutional as applied—whether it denies the defendant free subpoenas altogether, limits him to a certain number of free subpoenas, permits the trial court to deny him subpoenas in its discretion, defines "indigency" more narrowly than the constitutional test, or requires the defendant to show that his witnesses were necessary or vital, rather than simply material, to his case.

Of course it is impossible, and probably undesirable, to eliminate all discretion from decisions to produce witnesses free of charge or to grant continuances. The trial judge will always be called upon to make close judgments that ultimately depend upon such factors as a witness' demeanor or the probative value of conflicting evidence. In deciding whether a defendant is truly unable to pay, or whether he has been diligent in seeking absent witnesses, for example, the trial judge ultimately relies on his "professional competence, good sense, fairness, and courage."275 The appellate courts, in turn, will continue to defer to the trial court's unique perspective on such matters. What we have attempted here is to pinpoint the elements that should control the trial court's decision and to make appellate courts aware of their duty to exercise the kind of review that properly attends the resolution of constitutional issues.

C. The Manner of Obtaining Subpoenas

The defendant's right to compulsory process is the right to demand that the government use its coercive powers to compel witnesses

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to appear and testify on his behalf. Although the government has the
burden of confronting the defendant with the witnesses against him,
and perhaps the obligation to advise him of his right to request
witnesses in his favor, it has no obligation to take the initiative in
producing his witnesses. If the defendant fails to request the
government to produce witnesses on his behalf, he forgoes the bene-
fits of compulsory process.

A defendant can also be required to support his request for the
production of witnesses with some showing of particularized need.
The right of compulsory process differs in that respect from other
guarantees, such as the right to counsel, that are activated without a
special showing of need. During the tenure of Betts v. Brady, an
indigent defendant charged with a noncapital offense had no right to
counsel in state court unless he could show that the lack of counsel
placed him at a "serious disadvantage." Since the Court's decision
in Gideon v. Wainwright, however, indigents have been granted
counsel automatically, presumably on the assumption that the defend­
ant may be prevented from making a proper showing by lack of the

276. For instance, the court may have an obligation to advise the defendant of his
sixth amendment rights before accepting a guilty plea. Cf. Johnson v. Ohio, 419 U.S.
924, 926 (1975) (Douglas, J., dissenting to a denial of certiorari); Aderhold v.

277. See United States v. Prieto-Olivas, 419 F.2d 149, 151 (1st Cir. 1969); United States v. Washington, 275 F.2d 687, 690 (5th Cir. 1960); Thomas v. United
States, 158 F.2d 97, 99 (D.C. Cir. 1946), cert. denied, 331 U.S. 822 (1947); Deaver v.
United States, 155 F.2d 740, 744 (D.C. Cir. 1946), cert. denied, 329 U.S. 766
(1946); Wolfson v. United States, 322 F. Supp. 798, 822 (D. Del. 1971), aff'd., 454
F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972). The prosecution, however,
may have a nonconstitutional obligation under state law to produce all res gestae
witnesses, regardless whether requested by the defendant. See People v. Crable, 33
Mich. App. 254, 189 N.W.2d 740 (1971). But, as long as the government does not
deliberately suppress favorable evidence, it satisfies its duty under the federal Consti-
tution by confronting the defendant with the witnesses necessary to prove its case. See Morton v. United States, 147 F.2d 28, 31 (D.C. Cir.), cert. denied, 324 U.S. 875
(1945).

278. See, e.g., McGuinn v. United States, 239 F.2d 449, 451 (D.C. Cir. 1956)
(defendant waived his right of compulsory process by failing to request witnesses);
Tompsett v. Ohio, 146 F.2d 95 (6th Cir.), cert. denied, 324 U.S. 869 (1944)
(defendant waived his right of compulsory process by failing to request subpoenas for
his witnesses); United States v. DiGregorio, 148 F. Supp. 526 (S.D.N.Y. 1957)
(defendant waived his right of compulsory process by pleading guilty); State v.
Horne, 215 Kan. 448, 524 P.2d 697 (1974) (defendant waived his right of compulso-
ry process for out-of-state witnesses by failing to comply with statute when requesting
their production).

280. 316 U.S. at 472.
teenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U.
Chi. L. Rev. 1, 53, 65 (1962),
very thing he seeks—the assistance of counsel. Some courts also provide free transcripts on appeal without a showing of particularized need; again, it seems likely that the courts that do this assume that a defendant cannot reasonably be expected to justify his need for the transcript until he has a copy of the transcript. In each case, the courts presume that the defendant has a need for the service because of the obvious difficulty in proving specific prejudice from the lack of it.

In the case of the production of witnesses, however, a defendant is not necessarily placed at a disadvantage by the requirement that he demonstrate, in advance, some particularized need. The defendant is invariably advised before trial of the charges against him, and knows, in his own mind, the nature of his defense. He should have some idea, however general, about what he expects or hopes his witness to say. Thus, he can be expected to support his requests for witnesses with some showing that they are important to his case. This showing is necessary to assist the trial court in passing on his requests and to give appellate courts a basis for reviewing lower-court decisions. Accordingly, courts commonly require that a defendant make an offer of proof before they allow him to appeal the denial of a witness, to obtain a writ of attachment for a nonappearing witness, to produce witnesses free of charge, to produce witnesses from out of state, or to obtain a continuance for absent witnesses.


283. The same rationale explains why certain constitutional errors are deemed reversible per se without any showing of prejudice. See note 90 supra.

284. See, e.g., Braswell v. Wainwright, 463 F.2d 1148, 1155 (5th Cir. 1972); Hoskins v. Wainwright, 440 F.2d 69, 71 (5th Cir. 1971); O'Rourke v. State, 166 Neb. 866, 871, 90 N.W.2d 820, 823 (1958).


The requirement of a prior showing, nevertheless, presents two questions: first, whether, in order to have witnesses produced free of charge, indigent defendants can be required to make a showing in an adversary proceeding and under oath, if no such showing is required of nonindigent defendants; and, second, whether a defendant can be required to support his showing of need for a witness with a specific statement of what the witness will say.

1. The Procedure for Indigents

We have seen that no defendant has a constitutional interest in having immaterial witnesses produced, and that the cost-free production of witnesses for indigent defendants can be conditioned upon a showing of the materiality of the witnesses to the defendant's case. The more serious problem concerns the procedure by which the showing is required to be made. Some jurisdictions require the indigent defendant to support his showing with a personal affidavit, thereby forcing him to make statements under oath that might later be used against him at trial; some jurisdictions further require the defendant to make his showing in the presence of the prosecutor, thereby forcing the defendant to disclose his witnesses in advance of trial. In each case, even if the required disclosure does not violate the defendant's privilege against self-incrimination, it nevertheless places him at a disadvantage vis-à-vis wealthier defendants who are able to produce witnesses without disclosing their names and expected testimony to the prosecutor.

289. See text at notes 71-73 supra.
290. See text at note 274 supra.
291. See, e.g., La. Code Crim. P. Ann. art. 739 (West 1966). See also Smith v. United States, 312 F.2d 867 (D.C. Cir. 1962) (defendant impeached at trial when he testified inconsistently with his proposed alibi as set forth in affidavit, filed as then required by Fed. R. Crim. P. 17(b), 18 U.S.C. app. (1964)).
292. See, e.g., D.C. Code § 23-106 (1973), which was modeled after Fed. R. Crim. P. 17(b), but which specifically eliminated the feature of rule 17(b) that permits the defendant to make his showing ex parte. For a criticism of the statute, see 8 J. Moore, supra note 199, § 17.05, at 17-14 n.2.
293. It is now well established that disclosure requirements do not abridge the defendant's privilege against self-incrimination if their only effect is to force him to accelerate disclosures that he will make anyway during the course of trial. Williams v. Florida, 399 U.S. 78, 80-86 (1970). To that extent, it does not abridge the defendant's fifth amendment privilege to force him to list his witnesses or their expected testimony in advance of trial. See Chavers v. State, — La. —, 294 S.2d 489, 493 (1974). The more serious question is whether it violates the defendant's fifth amendment privilege to require him (as a condition for producing witnesses in his favor) to make a personal statement under oath specifying his witnesses' testimony if the statement can be used to impeach him at trial for putting on an inconsistent defense. Compare United States v. Brinker, 418 F.2d 378 (2d Cir. 1969), with Smith v. United States, 312 F.2d 867 (D.C. Cir. 1962). The defendant's argument is that the state cannot force him to choose between his sixth amendment right to
The practice of placing special disclosure requirements upon indigent defendants can be analyzed in two ways. First, it might be argued that this practice violates the principle of equal protection, both because it discriminates against defendants on the basis of wealth (a suspect classification), and because it restricts the defendant's exercise of his right to produce witnesses (a fundamental right). The equal-protection approach, however, is not very useful here. Because economic status is no longer thought to be a suspect classification,294 the fact that defendants are treated differently on the basis of wealth is insufficient by itself to trigger strict judicial scrutiny. In addition, the fundamental rights analysis should probably be reserved for constitutional interests (like the right to vote) that are not explicitly protected by the Constitution; it merely complicates matters to use the equal protection clause to reach fundamental rights (like the right of compulsory process) that are explicitly mentioned in the Bill of Rights. If the problem must be analyzed in terms of the "fundamental right" to produce witnesses, the best approach is to put aside the equal protection clause and to proceed directly under the authority of the sixth amendment and the compulsory process clause.

The defect in the requirements is not that they treat indigent and nonindigent defendants differently, but that they appear to impose an unreasonable burden on the defendant's right to have witnesses produced. If the requirements are necessary to further a legitimate interest in the production of witnesses, then they are valid and can be applied to any class of defendants. On the other hand, if the requirements are excessive, then they cannot validly be applied to any defendant, rich or poor, either as a condition for producing witnesses free of charge or as a condition for obtaining writs of attachment or continuances. The controlling factor, therefore, is not the economic class of defendants to whom the requirements apply, but the reasonableness of the requirements themselves. Thus, the


fact that the requirements are applied only to indigents is irrelevant, except in so far as it suggests that by permitting other defendants to make comparable requests without such disclosures the state has implicitly conceded that the requirements are not a necessary device for protecting the integrity of its processes.

If the requirements are analyzed in terms of reasonableness, they appear to be invalid because they impose an unnecessary burden on the defendant's right to produce witnesses. The state has a legitimate interest in preserving public funds from frivolous requests for immaterial witnesses; in order to further that interest, it can legitimately require the defendant to justify his request with some kind of showing of need. However, there is no necessary connection between the state's interest in having the defendant make a showing of need and the requirements that this showing be made in the presence of the prosecutor or by means of a personal affidavit. The showing of need for witnesses differs in this respect from other disclosures, such as notices of alibi, that are designed to help the prosecutor prepare his case and that must be revealed to the prosecutor to serve their purpose. Because the showing of need for witnesses is designed to help the court, rather than the prosecutor, it need not be made public to serve its purpose.

Indeed, if experience is any guide, such requirements are unnecessary. For several years, the federal courts required indigent defendants to make a showing of need for witnesses by means of a personal affidavit given in an adversary context. After considerable criti-

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295. The disclosure requirement is unconstitutional unless explicitly justified, not as an offer of proof, but as part of a scheme of reciprocal discovery by which the prosecutor, in turn, discloses the names and expected testimony of his witnesses to the defense. See Wardius v. Oregon, 412 U.S. 470 (1973). Unless it is part of a scheme of reciprocal discovery, the disclosure requirement is invalid if applied to any defendant, rich or poor, as an unnecessary burden on his right to produce witnesses. See Aikin v. State, 58 Ark. 544, 25 S.W. 840 (1894) (violation of state compulsory process clause to require any defendant to make a showing of materiality in the presence of the prosecutor); State ex rel. Plummer v. Gideon, 119 Mo. 94, 24 S.W. 748 (1893) (same).

The same analysis applies to the affidavit requirement: Unless the state can justify requiring the defendant, rather than his lawyer, to file the affidavit, the requirement should be declared invalid as an unnecessary burden on the defendant's right to produce witnesses. Even if circumstances require the defendant to file the affidavit himself, as when he proceeds pro se, he may be entitled to immunity from having his affidavit later used against him at trial. See note 293 supra.


297. Until amended in 1966, rule 17(b) provided in pertinent part as follows: Indigent Defendants. The court . . . may order . . . that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by
cism, the rule was amended in 1966 to permit the defendant to make the showing to the court ex parte, thus avoiding advance disclosure to the prosecutor of the defendant's witnesses and their expected testimony. Furthermore, the amendments permit the showing to be made either by the defendant or by counsel. The federal procedure appears to work well: if the trial court finds the defendant's representations "inherently incredible on their face," it can deny the request outright; if the court finds the ex parte representations false, it can arrange for the witnesses to be investigated to its satisfaction before they appear; if the court concludes that defense counsel has made statements in bad faith, it can impose professional sanctions; as a last resort, the parties can be punished for abuse of process. In short, neither the defendant's personal affidavit, nor the adversary hearing in the presence of the prosecutor, appear necessary to further the state's interest.

2. The Specificity of the Showing

The second problem presented by the requirement that the defendant make a prior showing of need (whether as a condition to producing the witness free of charge, or to obtaining a continuance)

the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, [and] that the defendant cannot safely go to trial without the witness . . . .


298. Rule 17 now permits an indigent defendant to obtain subpoenas "upon an ex parte application . . . upon a satisfactory showing that . . . the witness is necessary to an adequate defense." The Advisory Committee Notes explain the change:

Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and the defendants able to pay may have subpoenas issued in blank without any disclosure. . . . In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. Smith v. United States, 312 F.2d 867 (D.C. Cir. 1962). . . .

The amendment makes several changes. . . . An ex parte application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit.

3 C. Wurmbr, supra note 199, 470-71. For a history of the rule, see United States v. Meriwether, 456 F.2d 498, 505-06 (5th Cir. 1973), cert. denied, 417 U.S. 948 (1974); Note, supra note 217.


300. For instance, in United States v. Eskridge, 456 F.2d 1202, 1204 (9th Cir.), cert. denied, 408 U.S. 926 (1972), the judge ordered the FBI to secure statements from the defendant's witnesses in advance of issuing subpoenas for them. If the trial judge orders such investigation, however, he should not disclose the results to the prosecutor, for that would undercut the purpose of the ex parte procedure. See 456 F.2d at 1204. See also Holden v. United States, 393 F.2d 276, 277-78 (1st Cir. 1968). But see United States v. Sanden, 322 F. Supp. 947 (D.C. Pa. 1971), aff'd, 459 F.2d 86 (3d Cir.), cert. denied, 409 U.S. 860 (1972).

is to determine the extent to which a defendant can be required to show the content of a prospective witness' testimony. The discussion here assumes that the defendant is neither required to make the showing by personal affidavit nor required to make the showing in the prosecutor's presence, and focuses upon the amount of detail the defendant can be required to show about a prospective witness' testimony. The discussion also assumes that the validity of the requirement does not depend upon the economic class to which it is applied; thus, the showing, if valid, can be applied solely to indigents as a condition to the cost-free production of witnesses.

Current practices vary among jurisdictions: some courts require a defendant to make a satisfactory showing that the witness' testimony is material and leave the sufficiency of the showing to the discretion of the trial court; other courts specifically require a defendant to set forth the facts to which the witness will testify. In either case, it would probably be insufficient merely to allege that the witness will testify "for impeachment purposes," or testify to "the whereabouts of the defendant at the time [the] crime was committed," without describing the testimony in greater detail. The question, therefore, is how much more detail, if any, a defendant can be required to show in order to have his witness produced.

The question here is analogous to the issue whether a defendant can be required to make any prior showing in order to obtain a constitutionally protected service. As we have seen, courts do not require a defendant to make a prior showing of particularized need to obtain counsel at trial or a transcript on appeal because they recognize that, in order to make such a showing, he needs the benefit of

302. See notes 289-301 supra and accompanying text.
303. See text at notes 256-71 supra.
304. See Fed. R. Crim. P. 17(b); United States v. Rigdon, 459 F.2d 379, 380 (6th Cir.), cert. denied, 409 U.S. 1116 (1972); Findley v. United States, 380 F.2d 752, 754 (10th Cir. 1967). But cf. Welsh v. United States, 404 F.2d 414, 417 (5th Cir. 1968) ("The breadth of discretion to be exercised by the trial court . . . is considerably narrowed by two constitutional rights . . . (1) the Sixth Amendment right 'to have compulsory process for obtaining witnesses in his favor'; and (2) the Fifth Amendment right to protection against unreasonable discrimination which means that, as between those financially able and those financially unable to pay the fees of the witnesses, there should be no more discrimination than is necessary to protect against abuse of process" (footnotes omitted)).
precisely the service he is seeking. In contrast, a defendant can be required to justify the production of witnesses because he is expected to know something about their potential testimony and its relationship to the case. It follows that, if the validity of requiring any showing is based on what a defendant is expected to know about potential witnesses, then a defendant can be required to provide the court with only so much information about the witness' testimony as he reasonably can be expected to know.

This point can be illustrated by examining the trial of Aaron Burr. Burr had been charged with treason, largely on the basis of letters that a certain General Wilkinson had written President Jefferson from New Orleans. To prepare for Wilkinson's expected testimony at trial, Burr moved the court to subpoena the correspondence. The United States attorney opposed the request on the ground that, while Burr had stated that the correspondence "may be material" to his defense, he had not made a sufficient showing that the contents of the correspondence would be useful in impeaching Wilkinson's testimony.

Presiding Circuit Justice Marshall, basing the decision on his interpretation of the defendant's right to compulsory process, rejected the government's contention. He held that, although a defendant can be required to give the court "reasonable satisfaction of the probable materiality of the evidence asked for," the precise nature of this showing "must depend on the nature of the case." In this case Burr could not be expected to describe letters he had not yet seen or relate them to testimony he had not yet heard:

Now, if a paper be in the possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? If the opposite party be required to produce his books on a particular subject, it is not necessary that the entries on those books

308. See text at notes 281-83 supra.


310. 25 F. Cas. at 35. The question of materiality was argued twice: first on June 9-12, 1807, in connection with Burr's motion to subpoena President Jefferson to produce the correspondence, including Wilkinson's letter of Oct. 21, 1806, for use in the pending treason prosecution, 25 F. Cas. at 30-38; and later on Sept. 4, 1807, in connection with Burr's motion to postpone the misdemeanor prosecution until the United States attorney produced Wilkinson's letter of Nov. 12, 1806, 25 F. Cas. at 190-93. For a complete and verbatim account of the arguments, see J. D. Robertson, Reports of the Trials of Colonel Aaron Burr 112-75 (1808); 2 id. at 504-33.

311. 25 F. Cas. at 191.

312. 25 F. Cas. at 191.
should be stated in order to entitle the applicant to his motion. He cannot be expected to make such a statement. 313 However, Marshall found that, although Burr could not be required to describe the evidence in detail, he could be required “to state its materiality to the case in some degree.” 314 Accordingly, in Burr’s case it sufficed to show that the letters had been written by a principal witness for the prosecution and concerned the subject of the witness’ future testimony.

The analysis in Burr can be used to construct a general constitutional standard: although a defendant has no right to subpoena witnesses “merely to discover whether they might have information helpful to him,” 315 the extent to which he can be required to describe their testimony in advance depends on the nature of the case. Thus, if he has interviewed his witnesses, or otherwise knows what they will say, it is reasonable to require the defendant to describe their testimony at length or provide an affidavit of their testimony. 316 On the other hand, if the defendant has been unable to interview witnesses, or if they have refused to cooperate with him, then it is entirely unreasonable to expect him to set forth their testimony precisely, 317 furthermore, under the Burr analysis, to require the defendant to make a precise showing under such circumstances would be to place

313. 25 F. Cas. at 191. 314. 25 F. Cas. at 191. 315. Conte v. Cardwell, 475 F.2d 698, 700 (6th Cir. 1972), cert. denied, 414 U.S. 873 (1973). Accord, McKinney v. Wainwright, 488 F.2d 28, 29-30 (5th Cir. 1973), cert. denied, 416 U.S. 973 (1974) (insufficient to allege that “there may be witnesses who could aid in the defense of the case”). 316. See State v. Rigsbee, 285 N.C. 708, 711, 208 S.E.2d 656, 659 (1974). 317. “An affidavit of materiality . . . or an oral offer of proof with request for leave to file an affidavit of materiality later . . . are not the exclusive standards by which the application for . . . compulsory process may be judged. A party in a criminal cause believing what the testimony ought to be but unable to ascertain in advance what the witness will say, may find it necessary to risk forcing the witness to appear and give evidence. . . . No rule of criminal procedure can or ought to be construed or applied so as to abridge a fundamental constitutional right.” State v. Edwards, 68 Wash. 2d 246, 257-58, 412 P.2d 747, 753 (1966). Accord, Braswell v. Wainwright, 463 F.2d 1148, 1155 (5th Cir. 1972) (“The purpose of the proffer rule . . . is to provide the trial court with an adequate basis for the exercise of its discretion and the appellate court with a basis for reviewing that exercise. In our view the record before the . . . court provided such a basis. . . . The failure to make a formal proffer cannot be used to deprive Braswell of his sixth amendment right”); Murphy v. State, 132 Ga. App. 654, 655-56, 209 S.E.2d 101, 102 (1974) (“In the context of this case, where the doctor witness was totally unco-operative and uncommunicative, refusing to discuss the matter, to answer letters, to converse over the telephone or to come to court, it is our view that these requirements [of a formal offer of proof] are at war with the accused’s constitutional guarantee of compulsory process to obtain the testimony of witnesses”); White v. State, 517 S.W.2d 543, 545-46 (Tex. Crim. App. 1974). Cf. United States v. Hathcock, 441 F.2d 197, 199-200 (5th Cir. 1971) (defendant cannot constitutionally be required to state in advance that he will put subpoenaed witness on stand).
an unconstitutional burden upon his right to compulsory process.\textsuperscript{318} Accordingly, in those situations in which it is unreasonable to expect the defendant to be able to relate the precise nature of a potential witness’ testimony, it should suffice if he can show that there is “any reason for supposing that the testimony may be material.”\textsuperscript{319} For example, it should be sufficient if the defendant can show that the witness was present at the scene of the crime,\textsuperscript{320} participated in the crime,\textsuperscript{321} or was one of the defendant’s alleged accomplices.\textsuperscript{322} To put it another way, if the most a diligent defendant can do is provide some factual basis to support the belief that a witness may be material to his case, the right to compulsory process includes the opportunity to \textit{discover} at trial precisely what the witness will say.\textsuperscript{323}

In summary, the constitutional standard represents an accommodation between the state’s interest in avoiding the unnecessary expenditure of time and expense involved in producing immaterial witnesses, and the defendant’s interest in producing favorable witnesses. The state has a legitimate interest in determining in advance if the defendant’s witnesses are truly material—whether as a condition to producing them free of charge, or bringing them from out of state, or releasing them from confinement in order to testify, or postponing the trial because of their absence; furthermore, the state’s interest is best served by requiring the defendant to make a showing of need with a maximum degree of detail. The defendant, on the other hand, has an interest in having any witness produced who may influ-

\textsuperscript{318} See also Calley v. Callaway, 519 F.2d 184, 230 (5th Cir. 1975) (Bell, J., dissenting) (arguing that it is a violation of compulsory process rights to require the defendant to show the specific contents of a document he has never seen, where he is able to show that it contains the prior statements of witnesses who will testify against him at trial).


\textsuperscript{320} See, \textit{e.g.}, State v. Edwards, 68 Wash. 2d 246, 257-58, 412 P.2d 747, 753 (1966).

\textsuperscript{321} \textit{See, e.g.}, White v. State, 517 S.W.2d 543, 545-56 (Tex. Crim. App. 1974). This is evidently also the rationale for automatically producing government informers merely upon a showing that they participated in the criminal act. \textit{Cf.} Roviaro \textit{v. United States}, 353 U.S. 53, 64 (1957).

\textsuperscript{322} \textit{See, e.g.}, United States \textit{v. Wyler}, 487 F.2d 170, 175 (2d Cir. 1973) (Oakes, J., dissenting) (“while perhaps the offer of proof was not explicit, the Government, having alleged that Nash was a coconspirator, should not be permitted to deny the relevance of his testimony as one of the alleged conspirators . . . [and] the burden should be on it to show the irrelevancy of Nash’s testimony”); United States \textit{v. Hathcock}, 441 F.2d 197 (5th Cir. 1971).

\textsuperscript{323} \textit{See} Orfield, \textit{supra} note 221, at 29. \textit{See also} State \textit{v. Humphrey}, --- Kan. ---, 537 P.2d 155, 162-63 (1975) (defendant’s right of compulsory process for witnesses in his favor includes right to discover content of their testimony). For a discussion of the usefulness of conceptualizing the compulsory process clause as a discovery device, see Westen, \textit{supra} note 3, at 121-26. For the extent to which a defendant has a right to \textit{pretrial} discovery, see text at notes 161, 202-05 \textit{supra}. 
ence the jury in his favor; and while he invariably has some reason to believe the witness is material, his degree of knowledge prior to trial necessarily varies. Accordingly, while the state can require a defendant to make some advance showing of need for a witness, it cannot require that a defendant provide greater detail than is reasonable under the circumstances.

III. THE ENFORCEMENT AND TERRITORIAL SCOPE OF COMPULSORY PROCESS

The defendant's right to compulsory process is the right to demand that the government exercise its authority to produce witnesses in his favor. A central problem, therefore, is determining the amount of effort the government is required to expend in producing witnesses for the defense. Is it sufficient, for example, simply to issue subpoenas, or must the state also attempt to enforce them by attachment and contempt? Is it sufficient to serve only those witnesses who can be readily found, or must the state also undertake a search for witnesses whose whereabouts are uncertain? Is it sufficient to produce witnesses who can be found within the territory of the jurisdiction, or must the state also attempt to produce witnesses from elsewhere? In short, if the state must do more than issue subpoenas for readily available witnesses, what is the extent of its obligation?

The conventional wisdom provided a ready answer to these questions: Because the compulsory process clause guarantees the defendant the benefit of only those practices that are enjoyed by the prosecution and by parties in civil cases, it has no independent force of its own; it operates entirely by reference to the existing local law. Thus, under the conventional wisdom, the scope of the state's obligation to produce the defendant's witnesses is ultimately defined by local law.324

The conventional wisdom is not only inconsistent with the framers' original understanding of the compulsory process clause, but was implicitly rejected by the Supreme Court in Washington v. Texas.325 The framers did not intend to commit the futile act of guaranteeing the defendant the issuance of subpoenas that could be

324. Wigmore assumed that the defendant's right, if any, to have his subpoenas enforced depended on local law. See 8 J. WIGMORE, EVIDENCE § 2191, at 69 (J. McNaughton rev. 1961). He also assumed that the state's constitutional obligation to produce witnesses does not extend beyond its territorial borders. See 5 J. WIGMORE, EVIDENCE § 1404, at 149 (3d ed. 1940) (discussing the defendant's sixth amendment right to confront witnesses). See also 8 J. WIGMORE, EVIDENCE § 2195a, at 89 (J. McNaughton rev. 1961). For the meaning of "local law," see note 231 supra.

325. See text at note 6 supra. See also notes 225-30 supra and accompanying text.
rendered ineffective by arbitrary local standards of enforcement. The scope of the state's duty to make efforts to produce witnesses for the defense, like the scope of its duty to produce defense witnesses at no charge, is ultimately to be resolved by reference to federal constitutional standards. The present task, therefore, is to define the federal standard and then to apply it to some of the more common limitations on the enforcement and territorial reach of compulsory process.

A. The Enforcement of Subpoenas

The questions that are most commonly raised about the enforcement of subpoenas are, first, whether a defendant can demand that the state actively search for his witnesses in order to serve them with process; and, second, whether the state has a duty to enforce its process by initiating arrest and contempt proceedings for those witnesses who have been served but have failed to appear. These two questions form part of the broader issue of the extent to which the state is obligated, if at all, to render its process effective.

We can begin by examining the view—commonly expressed by some courts—that the state's constitutional obligation to produce witnesses includes only the duty to serve subpoenas on witnesses who can readily be found; under this view the state is neither obligated to search for elusive witnesses, nor to initiate enforcement proceedings against recalcitrant witnesses. The view deserves thoughtful examination, for although sometimes overstated, it reflects what appears to be a genuine dilemma.

On the one hand, if narrowly stated, the view that the state need only serve readily available witnesses is obviously untenable. Suppose, for example, that a defendant requests the state to produce a witness who lives in an undisclosed apartment in an extended housing complex. It seems inconceivable that the marshal could refuse to serve the subpoena on the ground that he had no duty to inquire into the witness' particular apartment number, to wait for the witness to return if he happened to be out, or to search for the witness' new apartment if he had moved. Or, suppose a defendant requests the

326. See also United States v. Upchurch, 286 F.2d 516, 518 (4th Cir. 1961) (no constitutional challenge made); Ferrari v. United States, 244 F.2d 132, 141 (9th Cir.), cert. denied, 355 U.S. 873 (1957); United States v. Wolfson, 322 F. Supp. 798, 819 (D. Del. 1971), aff'd., 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972); Lancaster v. Green, 175 Ohio St. 203, 205, 192 N.E.2d 776, 778 (1963) (state constitution).


state to produce a witness who happens to be incarcerated in a state institution. Again, it seems inconceivable that the state could refuse to dispatch an officer to take custody of the prisoner on the ground that it had no duty to enforce its process.\footnote{See Roberts v. State, 72 Ga. 673, 676-77 (1884) (denial of defendant's state right of compulsory process to issue order to produce witness from prison without dispatching officer to enforce order).} \footnote{Poe v. Turner, 490 F.2d 329, 331 (10th Cir. 1974).} In each of the above examples, allowing the state to refuse to make any real effort toward enforcing its process would, in effect, render meaningless the defendant's right to compulsory process. Accordingly, the state's constitutional duty to issue subpoenas must include at least some duty to render them effective.

On the other hand, there must be limits on what the state can reasonably be expected to do. Suppose, for example, that a defendant requests the state to produce a witness whose whereabouts are entirely unknown and who could be anywhere in the world. It seems inconceivable that the state could be required to demand of its investigative force that "every lead, no matter how nebulous, must be tracked to the ends of the earth . . . "\footnote{Cf. United States v. Lockwood, 386 F. Supp. 734, 738 (E.D.N.Y. 1974) (government has no obligation under sixth amendment "speedy trial" clause to make diplomatic demands for extradition or deportation of draft resisters from countries that would probably not cooperate).} Or, suppose a defendant seeks a witness from a foreign country under a statute that authorizes extraterritorial subpoenas. It is scarcely conceivable that the state could be required to enforce the witness' failure to appear by making unconditional demands for his extradition or by threatening to use force unless the witness were produced.

While it is thus clear that the state has at least some constitutional duty to render its subpoenas effective, the more difficult problem is to define the standard that governs the scope of this duty. It may be possible to formulate a general standard in this area by looking to the standard that governs the granting of continuances, for the two subjects share much in common. The state, in each case, has a legitimate interest in limiting the scope of its duty—in the case of continuances, to prosecute effectively; in the case of the enforcement of process, to utilize its police power effectively. Similarly, in each case the defendant's interest remains necessarily speculative because (in contrast to cases dealing with the suppression of evidence and evidentiary privileges) the court cannot accurately determine the true value, if any, of an absent witness' testimony. Despite the state's best
efforts, the witness may never be produced; if produced, the witness may fail to possess material testimony in the defendant's favor.

Hence, if the analogy is sound, we should be able to apply the standard governing the granting of continuances to the enforcement of process. A defendant, acting in good faith, is entitled to demand that the state postpone his trial for a reasonable period of time if he can show some likelihood that a witness he is entitled to subpoena will be produced by the time trial recommences.\textsuperscript{332} Thus, a defendant should be entitled to demand that the state make a reasonable, good-faith effort to serve and enforce his subpoenas if he can show some likelihood that the effort will be successful.\textsuperscript{333}

This standard is entirely consistent with the state's responsibility to the defendant in related areas of procedure. Thus, when the government relies on information from an informer who has witnessed the defendant's actions, "fundamental fairness" requires that the government attempt to identify and locate the informer so that the defendant may call him as a witness at trial.\textsuperscript{334} Furthermore, in making this attempt, it is not enough to make routine telephone calls or casual inquiries; rather, the state must "undertake reasonable efforts in good faith to locate the informer,"\textsuperscript{335} and, if these efforts are unsuccessful, the state must "show that reasonable efforts to produce him were fruitless."\textsuperscript{336}

The "reasonable good-faith effort" standard also governs the scope of the state's sixth amendment duty to confront the defendant with the witnesses against him. Before the government can introduce prior recorded testimony of an unavailable witness, it is required to make "a good-faith effort to obtain his presence at trial."\textsuperscript{337} Again, it is insufficient simply to serve the witness with a subpoena and rely upon him to appear at trial. If the witness fails to appear, the state must try to enforce the subpoena by dispatching officers to arrest the witness, and, if these efforts are unsuccessful, the state "must demon-

\textsuperscript{332} See text at note 190 supra.


\textsuperscript{334} Roviaro v. United States, 353 U.S. 53 (1957).


\textsuperscript{337} Barber v. Page, 390 U.S. 719, 725 (1968).
strate that it has been unable to obtain the witness' presence through a
search exercised both in good faith and with reasonable diligence and
care.\textsuperscript{338}

The government-informer and the confrontation cases both pro­
vide persuasive support for the proposition that the state must make
reasonable efforts in good faith to produce witnesses for the defense.
The analogy to the informer cases is particularly appropriate because
some courts have recognized that the state's duty to produce inform­
ers is derived from the defendant's constitutional right to produce and
present witnesses in his favor.\textsuperscript{339} The analogy to the confronta­tion
cases is equally strong. The confrontation clause and the compulsory
process clause are parallel provisions for securing the attendance of
witnesses in criminal cases. Both require the state to exercise its
authority on the defendant's behalf in order to produce witnesses at
trial; both rely on the state to make a good-faith effort to render its
authority effective. The major difference between the two clauses is
in their allocation of initiative: the confrontation clause requires the
state to take the initiative in producing the witnesses it will rely upon
to prove its case against the defendant, while the compulsory process
clause requires the defendant to take the initiative in requesting the
production of witnesses he will rely upon to defeat the state's case.\textsuperscript{340}
Once the state's duty to produce witnesses has been invoked, how­
ever, the constitutional scope of this duty should be governed by the
same standard under both clauses.

In conclusion, the defendant can demand not only that the state
use its process to produce witnesses in his favor, but that it make
reasonable efforts in good faith to render its process effective. It
follows that the extent of the state's obligation will depend upon the
nature of the case. If the defendant requests the state to serve or
arrest a witness who might be anywhere, and if the defendant fails to
provide any information about where the state should concentrate its
search, then the state's duty may be minimal.\textsuperscript{341} On the other hand,

\begin{itemize}
  \item \textsuperscript{338} United States v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974).
  \item \textsuperscript{339} See United States v. Fernandez, 506 F.2d 1200, 1205 (2d Cir. 1974). See
also Westen, supra note 4, at 165-66 nn.460-62.
  \item \textsuperscript{340} See Westen, supra note 4, at 183; note 65 supra.
  \item \textsuperscript{341} See United States v. Upchurch, 286 F.2d 511, 518 (4th Cir. 1961); State v.

In most cases, the whereabouts of the witness is not something peculiarly within
the prosecutor's knowledge; in most cases, therefore, the government's principal
problem is, not to find the witness in order to serve him with process (which is a
responsibility the defendant can be expected to share), but to find the witness and
enforce his appearance once he has been served. On the other hand, if the witness'
whereabouts is within the particular knowledge of the prosecutor—as with govern-
if the defendant can show that the witness is reasonably likely to be located in a particular area, the state may be required to undertake an intensive search\textsuperscript{342} that could include making inquiries in neighboring jurisdictions. Finally, the reasonableness of the state's efforts to produce a witness whom the defendant has requested can be ultimately measured against the efforts it would undertake to produce a critical witness against the accused as part of the prosecution's case.\textsuperscript{344}

B. The Territorial Reach of the Subpoena

It was once assumed that the jurisdiction of a court was inherently limited to matters and persons within its territorial boundaries and, thus, that a court had no power to summon witnesses from beyond the territorial limits of its jurisdiction. Furthermore, proceeding from the premise that they had no power to subpoena foreign witnesses, courts concluded that there could be no constitutional obligation to do so. For example, in \textit{Minder v. Georgia},\textsuperscript{345} decided in 1902, the defendant argued that the courts of Georgia had denied him a fair trial under the fourteenth amendment by failing to afford him process for securing the attendance of certain witnesses then residing in Alabama. The Supreme Court rejected the argument on the ground, among others, that the Georgia courts had no power to obtain the presence of foreign witnesses:

\begin{itemize}
\item \textsuperscript{342} Compare People v. Beyea, 38 Cal. App. 3d 176, 191, 113 Cal. Rptr. 254, 263 (1974) (government satisfied its duty to produce adverse witness by making visits to his home, his former place of work, his parents' home, and making inquiries of his neighbors, his girl friend, his acquaintances, law enforcement agencies, public utilities, and post office), with State v. Pereda, 111 Ariz. 344, —, 529 P.2d 695, 697 (1974) (government failed to satisfy its duty to produce adverse witness by relying on a few telephone calls without visiting witness' residence or place of business). See Johnson v. Walker, 199 F. Supp. 86, 95 (E.D. La. 1961), affd., 317 F.2d 418 (5th Cir. 1963) ("Certainly compulsory process was had by the petitioner insasmuch as the witness requested by him was subpoenaed and every effort [including the issuance of a statewide pickup order] was made to produce this witness in Court"); Commonwealth v. Blair, — Pa. —, 331 A.2d 213, 214 (1975) (effort to produce adverse witness included visits to her residence, her parents' residence plus all-night vigil outside her residence).
\item \textsuperscript{343} Compare Poe v. Turner, 490 F.2d 329, 331 (10th Cir. 1974) ("[W]e conclude . . . that the Utah authorities did make a good faith effort to locate [the adverse witnesses]. They did not stop at state boundaries, but went into Nevada, as they should have, in their efforts"), with Williams v. Maryland, 375 F. Supp. 745, 755-56 (D. Md. 1974) (state failed to fulfill its duty to produce adverse witness by failing to pursue leads into neighboring jurisdiction). See also State v. Kim, 55 Hawaii 346, 349-51, 519 P.2d 1240, 1244-45 (1974); State v. Green, — La. —, 296 S.2d 290 (1974).
\item \textsuperscript{344} See United States v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974).
\item \textsuperscript{345} 183 U.S. 559 (1902).
\end{itemize}
The requirements of the Fourteenth Amendment are satisfied if the trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws . . . do not subject the individual to the arbitrary exercise of the powers of government. Because it is not within the power of the Georgia courts to compel the attendance of witnesses who are beyond the limits of the State . . . we cannot interfere with the administration of justice in that State on the ground of a violation of the Fourteenth Amendment in these particulars.346

This rigid territorial view of jurisdiction has since given way to a more expansive view. Courts now regulate the conduct of persons located beyond their territorial boundaries,347 exercise extraterritorial subpoena power over foreign witnesses,348 enforce reciprocity statutes for the mutual exchange of witnesses with other jurisdictions340 and cooperate in the exchange of witnesses on the basis of comity.350

Nevertheless, with respect to the right of compulsory process, the territorial concept still underlies four common assumptions: (1) that, if a state has vested its courts with formal authority to produce foreign witnesses, this authority is discretionary and a defendant cannot complain if the court refuses to exercise it in his favor; (2) that, if a state has not adopted formal procedures to compel foreign witnesses

346. 183 U.S. at 562. It is not entirely clear from the opinion of the Court whether the Court believed that the Georgia legislature lacked the power to adopt extraterritorial legislation or whether the Court was merely referring to the fact that the legislature had taken no steps to exercise its power. However, the Court recited at great length from the opinion of the court below, in which it was assumed that the legislature lacked the power. 183 U.S. at 562.


349. See note 352 infra.

350. See note 352 infra.
to appear, a defendant cannot complain if the state fails to make informal requests for the cooperation of foreign authorities; (3) that, if a state has not adopted formal procedures for producing foreign witnesses and if its informal requests go unanswered, a defendant cannot complain that the court has refused to extend its coercive subpoena power extraterritorially; and (4) that, if everything in the state's power has been done—both formally and informally—to compel a foreign witness to appear, a defendant cannot complain if a foreign jurisdiction fails to cooperate. These four assumptions require analysis; some of them are clearly erroneous, and the rest are overstated.

1. The Constitutional Obligation To Give the Defendant the Benefit of Existing Authority for the Production of Foreign Witnesses

Many jurisdictions have adopted statutes giving their courts authority to produce foreign witnesses. The federal courts have the authority to subpoena persons from throughout the United States and to subpoena United States citizens from anywhere in the world.351 In addition, most states have adopted reciprocal statutes for the production of witnesses: Forty-eight states have adopted the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Uniform Act To Secure Witnesses),352 under which the adopting state agrees to compel local witnesses to appear in the courts of any requesting state that will honor a reciprocal request; nineteen states have adopted the Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act (Uniform Rendition of Prisoners Act),353 under which the adopting state agrees to compel local prisoners to appear as witnesses in the courts of any requesting state that will honor a reciprocal request. In addition, federal law provides for the arrest and extradition of witnesses who have been subpoenaed in one state and have subsequently fled to another state to avoid testifying.354

351. See FED. R. CRIM. P. 17(e).

352. Section 2 of the Uniform Act To Secure Witnesses permits the rendering state to refuse to compel its witnesses to appear in the requesting state if it determines that their testimony is not material or that appearing would cause them undue hardship, or if the laws of the requesting state do not provide them with immunity from arrest and service of process in connection with matters proceeding from their appearance in the requesting state. Alabama and Georgia are the only states that have not yet adopted the Act. See 11 UNIFORM LAWS ANN. 7 (Supp. 1975).


354. The Constitution provides for the interstate extradition of persons "charged
Despite the existence of these schemes for the production of witnesses, some courts steadfastly deny that a defendant has a constitutional right to have them invoked on his behalf. Thus, in a typical case, a California defendant was denied the opportunity to subpoena witnesses from Massachusetts, notwithstanding that California and Massachusetts had both adopted the Uniform Act To Secure Witnesses and that Massachusetts would have honored a request to produce the witnesses. The court rejected the defendant's compulsory process argument; it reasoned that because California had no constitutional obligation to adopt the Act in the first place, it had no obligation to apply the Act on the defendant's behalf.\(^{355}\)

The court's reasoning was faulty. Even if we assume that a state has no constitutional obligation to enact legislation authorizing its courts to issue subpoenas for witnesses located outside of its territorial boundaries, once it has done so, it cannot deny a defendant the benefit of its "process." If the states have a constitutional duty to make a reasonable good-faith effort to enforce their process on the defendant's behalf, it follows that they must use all formal instruments at their disposal to produce witnesses in his favor, including instruments for the production of foreign witnesses.

The propriety of applying the reasonable good-faith effort standard to the production of foreign witnesses finds support in the state's analogous sixth-amendment duty to confront a defendant with the witnesses against him. In Barber v. Page,\(^{356}\) the prosecution, without making any effort to produce the witness in person, introduced the prior recorded testimony of a witness who was then confined in federal prison in another state. The state contended that it had no power and, therefore, no duty to produce the witness from a federal prison beyond its borders. The Supreme Court reversed, finding that the state had an obligation to make "a good faith effort"\(^{357}\) to use all formal instruments at its disposal to produce the witness, including

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357. 390 U.S. at 725.
state writs of habeas corpus ad testificandum (which it noted are routinely honored by the United States Bureau of Prisons) and, under appropriate circumstances, the Uniform Act To Secure Witnesses.\(^{358}\)

The same standard must also govern the state's companion duty to produce witnesses in the defendant's favor, for the two clauses of the sixth amendment are complementary devices for producing witnesses in criminal cases.\(^{350}\) Thus, a defendant can demand that the state make a reasonable effort in good faith to invoke all the formal instruments at its disposal for producing witnesses in his favor, including statutes providing for the issuance of extraterritorial subpoenas,\(^{360}\) the Uniform Act To Secure Witnesses,\(^{361}\) the Uniform Rendition of Prisoners Act,\(^{362}\) the Federal Extradition Act (for witnesses who flee after being subpoenaed within the forum), the Uniform Criminal Extradition Act (for witnesses who refuse to appear after being subpoenaed outside the forum),\(^{363}\) and writs of habeas corpus ad testificandum.\(^{364}\)

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358. 390 U.S. at 723 n.4 (dictum). The Uniform Act To Secure Witnesses was not directly applicable in *Barber* because it has never been adopted by the federal government and has no effect on persons held in federal custody. Even if the witness had been held in sister-state custody, moreover, the Act would not have applied because it does not cover witnesses who are incarcerated. See note 326 *supra*. Nevertheless, lower courts have taken the Court's dictum to mean that the Uniform Act must be resorted to whenever applicable. See *Gorum v. Craven*, 465 F.2d 443, 445 (9th Cir. 1972); *State v. Kim*, 55 Hawaii 346, 349-51, 519 P.2d 1240, 1244-45 (1974).

359. See note 65 *supra*.


362. See, e.g., *People v. Moscatello*, 114 Ill. App. 2d 16, --, 251 N.E.2d 532, 544 (1969) (once state has adopted Uniform Rendition of Prisoners Act it has obligation under compulsory process clause to apply it on defendant's behalf).

363. Section 6 of the Uniform Criminal Extradition Act (adopted by 47 states) provides for the extradition of persons who violate the laws of the forum through acts committed outside the forum. See *Commonwealth ex rel. Kelly v. Santo*, 436 Pa. 204, 259 A.2d 456 (1969) (co-conspirator may be extradited under Act for acts committed in asylum state constituting crime in forum). Accordingly, if the forum has authorized its courts to subpoena witnesses from other states and the witnesses refuse to comply, the forum may invoke the Act to extradite them for committing the crime of contempt against the laws of the forum.

364. See, e.g., *Barber v. Page*, 390 U.S. 719, 724 (1968) (dictum); *Curran v. United States*, 332 F. Supp. 259, 261 (D. Del. 1971) (defendant in state court seeking a witness held in federal custody should apply to state court for writ of habeas corpus ad testificandum, which will be honored "as a matter of policy" by federal officials); *State v. Gann*, 254 Ore. 549, 566-69, 465 P.2d 570, 577 (1969) (court has obligation
2. The Obligation, in the Absence of Formal Procedures, To Request the Voluntary Assistance of Foreign Authorities in Producing Witnesses

The second common assumption linked to the territorial conception of jurisdiction is that, if a state lacks a formal scheme for producing foreign witnesses, it has no obligation to request foreign authorities to assist in compelling witnesses to appear. Thus, in a state that had not adopted the Uniform Act To Secure Witnesses, it was held that "in the absence of an interstate compact," there was no constitutional obligation to produce a witness located in another state.\textsuperscript{365} The question presented by such decisions is whether the state's duty to make a reasonable good-faith effort to produce witnesses includes the obligation to enlist the voluntary cooperation of foreign authorities.

The answer lies in reconciling two apparently conflicting Supreme Court decisions on the scope of the state's duty to request foreign cooperation in producing adverse witnesses. In \textit{Barber v. Page},\textsuperscript{366} the Court held that the state was obliged, not only to invoke formal statutory obligations on the defendant's behalf, but also to seek the voluntary assistance of foreign authorities. The defendant in \textit{Barber} sought to confront a witness who was in federal custody in another state. The Court held that the state's duty to make a "good-faith effort" to produce the witness included the duty both to request the United States Bureau of Prisons to release the prisoner for purposes of testifying, and to request the federal courts to produce the witness by means of a federal writ of habeas corpus \textit{ad testificandum}. Furthermore, the Court noted that, had the prisoner been held in sister-state custody, the state would have been required to request the courts of its sister state to produce the witness by state writ of habeas corpus.\textsuperscript{367}
The possibility that the foreign authority might refuse to cooperate was considered an insufficient excuse for not making a request: “‘the possibility of a refusal is not the equivalent of asking and receiving a rebuff.’”

On the other hand, in *Mancusi v. Stubbs*, the Court found that the duty to make a reasonable good-faith effort to produce witnesses did not include the obligation to request the cooperation of foreign authorities in Sweden. The defendant, who had been sentenced as a second offender on the basis of a prior conviction in Tennessee, attacked the Tennessee conviction on the ground that the state had relied upon the prior recorded testimony of a witness, then residing in Sweden, without making a sufficient effort to produce the witness in person. Although he conceded that Tennessee had no formal procedure for compelling the witness to appear, the defendant argued that Tennessee was obliged to request the Swedish authorities to produce the witness voluntarily. The Court rejected this argument and held that the state had no obligation to make such a request in the absence of “established procedures depending on the voluntary assistance of another government.”

There is an apparent inconsistency between the holdings in *Barber* and *Mancusi*: the former decision required Texas authorities, in order to produce witnesses on the defendant's behalf, to request cooperation from both the federal government and (by implication) from sister states; the latter decision found no obligation on the part of Tennessee authorities to request such cooperation from authorities in Sweden. Indeed, this inconsistency led the dissenters in *Mancusi* to argue that the two cases were irreconcilable and that the Court was retreating from *Barber*.

Nevertheless, it is possible to reconcile the cases both with one another and with the rationale underlying the requirement that the state make a reasonable good-faith effort to produce the defendant’s witnesses. The reasonable good-faith effort standard represents an accommodation between the state's interest in the effective enforcement of its laws and the necessarily speculative interest of the defendant in producing foreign witnesses. If the defendant seeks a witness located in a sister state or in the custody of the federal government (as in *Barber*), the forum can reasonably be expected to request foreign cooperation in producing the witness—the tradition of comity

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368. 390 U.S. at 724, quoting 381 F.2d 479, 481 (1st Cir. 1967) (Aldrich, J., dissenting).
369. 408 U.S. 204 (1972).
370. 408 U.S. at 212.
371. 408 U.S. at 220 (Marshall, J., dissenting).
among the states and federal government is sufficiently established that the requesting state loses little by making the request and is reasonably likely to be accommodated. State and federal governments routinely exchange prisoners to provide testimony\(^{372}\) and to facilitate speedy trials;\(^{373}\) there is no reason to believe that the same tradition of cooperation would not support the exchange of unincarcerated witnesses.

On the other hand, when a defendant seeks a witness from a foreign country (as in Marcusz), it is unreasonable to expect the forum to request extranational assistance, at least in the absence of established procedures for cooperation. Without a tradition of comity or established practice, diplomatic requests of this type not only are likely to impose a burden upon the forum's international relations, but are not reasonably likely to be very fruitful.\(^{374}\)

In conclusion, the divergent holdings in Barber and Mancusi were not due to an inconsistent approach to the basic problem of producing witnesses from other jurisdictions; rather, the divergence was a function of the difference between a case in which the forum could base its request for assistance on established procedures that rendered it reasonably likely that the witness would be produced, and one in which no such likelihood existed. If international relations ever reach a state of comity similar to that presently existing within our federal system, there may be no remaining difference between the forum's national and international obligation to request assistance in obtaining witnesses. In the meantime, a defendant will be able to produce his witnesses on the basis of national authority in the great majority of cases: If he is being tried in federal court, he can rely on the court's nationwide subpoena power, its national habeas-corpus authority, and its authority to subpoena United States citizens from anywhere in the world;\(^{375}\) if tried in state court, he can expect

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\(^{372}\) The Court in Barber noted that many states would "quite probably" be willing to produce state prisoners by writ of habeas corpus and make them available "at the request of prosecutorial authorities of a sister state upon a showing that adequate safeguards to keep the prisoner in custody would be maintained." 390 U.S. at 723-24 n.4.

\(^{373}\) For a discussion of interstate exchange of prisoners for speedy-trial purposes, see Y. Kamisar, W. Lalive & J. Israel, Modern Criminal Procedure 1070-71 (4th ed. 1974).

\(^{374}\) Cf. United States v. Lockwood, 386 F. Supp. 734, 737 (E.D.N.Y. 1974) (federal government has no obligation under speedy-trial clause of sixth amendment to request foreign governments to extradite draft resisters for purposes of trial if it is unlikely that request would be honored).

the state to request the federal courts to place their nationwide and international subpoena power and national habeas corpus authority at its disposal, and to request sister states to produce witnesses from within their borders. 376

3. The Obligation To Adopt Legislation Authorizing the Production of Foreign Witnesses

A third common assumption linked to the territorial conception of jurisdiction is that, although a state may have a duty to exercise existing authority to produce a defendant's foreign witnesses, it has no obligation to enact legislation providing for the production of foreign witnesses. Thus, it has been said that, regardless of whether the states must invoke the Uniform Act To Secure Witnesses once they have adopted it, they have no obligation to adopt it in the first instance. 377

The validity of this assumption must be re-examined in light of modern developments in the analysis of jurisdictional limitation. In contrast to the territorial view espoused in Minder v. Georgia, it is now understood that the forum can regulate the conduct of persons located beyond its boundaries and can require that such persons

376. Sections (a) and (e) of FED. R. CRIM. P. 17, which authorize the federal courts to issue subpoenas to persons anywhere in the United States commanding them “to attend and give testimony at the time and place specified therein,” appear broad enough to permit the federal courts to subpoena persons to appear in state court. Similarly, rule 17(e)(1) and 28 U.S.C. § 1783 (1966), which permit the federal court to subpoena United States citizens from anywhere in the world to appear “before it, or before a person or body designated by it,” are presumably broad enough to permit the federal courts to subpoena persons to appear in state court. See Mancusi v. Stubbs, 408 U.S. 204, 212 n.2 (majority opinion), 222 (Marshall, J., dissenting) (1972).

If a state can request a federal court to issue a writ of habeas corpus under 28 U.S.C. § 2241(c)(5) (1970) to compel a federal prisoner to appear in state court, it should be able to request a federal court to issue subpoenas under federal rule 17 to compel persons to appear and testify in state court. Cf. Curran v. United States, 332 F. Supp. 2959 (D. Del. 1971). By the same token, if a state may request a sister state to issue a writ of habeas corpus ad testificandum to compel a prisoner to appear and testify in the requesting state, it should be able to request the sister state to issue subpoenas for the same purpose. Even if the fact that the two states have not adopted the Uniform Act To Secure Witnesses or the Uniform Rendition of Prisoners Act excuses the sister state from complying with the request (but see text at notes 390-405 infra), it does not excuse the forum state from asking. See Barber v. Page, 390 U.S. 719 (1968), at 723-24 & n.4.


378. 183 U.S. 559 (1902).
travel to the forum to testify as witnesses. In Blackmer v. United States, for example, the Supreme Court upheld a statute authorizing the federal courts to subpoena United States citizens from foreign countries and to punish nonappearance as contempt. Similarly, courts have upheld the authority of the forum to regulate the extraterritorial conduct of nonresidents when their conduct might reasonably be expected to affect the forum's interest. In deciding whether extraterritorial regulation violates standards of substantive due process, the courts have weighed the forum's interests in extraterritorial regulation against the unfairness of subjecting the regulated person to penal sanction for failing to comply.

Under this balancing analysis, the forum should not be prohibited either from issuing subpoenas to secure the testimony of persons located anywhere in the world or from making nonappearance a criminal offense, as long as it relieves subpoenaed persons of the incidental burdens associated with rendering an appearance. The forum has an obvious interest in ensuring that its criminal judgments are based on all available testimony. Moreover, the forum's interest can be served only by compelling foreign witnesses to appear at the forum; unlike civil proceedings, in which the plaintiff with a transient cause of action can often litigate wherever the witnesses are located, criminal proceedings are local actions that can only be litigated at the forum.

With respect to the interests on the other side, the burden upon the witness of appearing at the forum to testify will often be minimal; in fact, in most cases, the witness will be testifying only to events observed while within the forum's territorial boundaries. The requirement that the witness respond to a subpoena is neither complex nor continuing, nor is it likely to subject him to conflicting duties. The witness cannot be required to appear without prior notice, and

379. 284 U.S. 421 (1932).
380. See authorities cited in note 347 supra.
381. We have elected to employ an adversary system of criminal justice in which the parties contest the issues before a court of law. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts; . . . To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. United States v. Nixon, 418 U.S. 683, 709 (1974) (emphasis added).
382. The federal Constitution guarantees all federal defendants the right to be tried "in the State where the said Crimes shall have been committed." U.S. Const. art. III, § 2, cl. 3. In addition, the sixth amendment guarantees all federal defendants a right to a jury drawn from "the State and district wherein the crime shall have been committed." The sixth amendment's implicit requirement of a jury drawn from the "vicinage" has been held applicable to the states through the fourteenth amendment. See People v. Jones, 9 Cal. 2d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).
his appearance need not cause him to incur either financial or legal liability as long as the forum compensates him for his time and travel expenses and renders him immune from civil and criminal process in connection with his appearance. Thus, in order to implement the defendant's right to compulsory process, both Congress and the states should have the authority to enact legislation empowering the courts, in criminal proceedings, to issue process to secure the presence of witnesses located anywhere in the world; furthermore, as long as such legislation is properly drafted, the due process clause would not appear to prohibit the issuance of such extraterritorial subpoenas.

If the state has the constitutional authority to issue extraterritorial process, the next question is whether the state is obligated to exercise such authority on a defendant's behalf. The problem can be illuminated by the following hypothetical. Suppose that a state adopts a statute limiting its subpoena power to witnesses who can be served within ten miles of the courthouse or to witnesses not confined in state institutions. It seems apparent that no court should hesitate in finding such a statute invalid as an arbitrary abridgment of the defendant's right to have witnesses produced. If this is true, is it then possible to distinguish our hypothetical statute from statutes that limit the subpoena power to the territorial boundaries of the state?

The distinguishing factor may be found in the varying ability of the state to enforce its authority. In the case of domestic subpoenas, the state can effectively enforce its process by arresting or attaching the nonappearing witness and prosecuting him for contempt. Thus, because statewide subpoenas are reasonably likely to be effective in producing witnesses, it is reasonable to expect the state to provide such subpoenas. In the case of foreign subpoenas, however, the forum cannot rely upon its own enforcement processes; it cannot dispatch officers to arrest and return the witness from a foreign state, nor can it prosecute the witness for contempt as long as he is physically absent. Even if the state could prosecute the witness in

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383. As sections 17 and 18 of the Uniform Act To Secure Witnesses suggest, it is clearly within a state's power to provide immunity from arrest and service of process, both civil and criminal, to witnesses who appear under compulsion from outside its territory and to compensate them for their expenses.


385. The defendant has a sixth amendment right to be present at all stages of criminal proceedings against him unless he can be shown to have intelligently and knowingly waived it. Compare Faretta v. California, 43 U.S.L.W. 5004, 5008 n.15 (U.S. June 30, 1975), with Illinois v. Allen, 397 U.S. 337 (1970). It is unlikely that a defendant would be deemed to have waived his right to be present simply for failing
absentia, the resulting penal judgment (unlike a civil judgment) would not be enforced by other jurisdictions. Accordingly, the most the state can do is to request the foreign authorities to arrest and extradite the witness for criminal proceedings in the forum.

If this distinction is valid, and thus there is no obligation to issue a subpoena that the forum cannot reasonably expect to have enforced, then we must distinguish between national and international practice. As between foreign nations, extradition is still sufficiently limited to make it reasonable for the states and the federal government to limit the reach of their subpoenas to persons found within their borders. Extradition between nations is based on individually negotiated treaties and is usually limited to enumerated offenses that do not include contempt. Hence, until relations between nations reach the point where extradition becomes routine for offenses like contempt, the states and federal government cannot be required to authorize the issuance of international subpoenas.

As between the various states, on the other hand, extradition has become routine. Various sources of authority provide for interstate extradition: The Federal Extradition Act provides for the extradition of persons who commit criminal acts within the forum and then flee to a sister state; the Uniform Criminal Extradition Act provides for the extradition of persons who violate the laws of the forum through acts that have been committed outside the forum. The Uniform


387. All the bilateral extradition treaties to which the United States is a party contain a list of extraditable offenses. M. Bassion, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 315 (1974). Contempt is not listed as an extraditable offense in any of these bilateral treaties. See Letter from K. E. Malmborg, Assistant Legal Adviser, United States Department of State, to Peter Westen, Sept. 5, 1975, on file with the Michigan Law Review. The only multilateral extradition agreement to which the United States is a party, the Pan American Convention on Extradition, Dec. 26, 1933, 49 Stat. 2111, T.S. No. 882, is in effect with eleven other countries and provides for extradition for offenses “punishable under the laws of the demanding and surrendering States with a minimum of penalty of imprisonment of one year.” See supra, at 315. Because contempt is punishable under federal law by a maximum of six months imprisonment, see 18 U.S.C. § 402 (1970), it is not covered by the Convention.

388. See note 363 supra.
Criminal Extradition Act provides for the interstate extradition of witnesses who place themselves in contempt by disregarding extraterritorial subpoenas; having now been adopted in forty-seven states, it should be as effective in enforcing nationwide subpoenas as are local provisions for enforcing domestic subpoenas. Hence, because it is now reasonably likely that nationwide subpoenas would be effectively enforced, the states either should be required to authorize such subpoenas (or to adopt some reasonable alternative such as the Uniform Act To Secure Witnesses), or should suffer the consequences that follow from the failure to make a reasonable effort to produce witnesses in the defendant's favor.389

4. The Obligation To Dismiss the Prosecution if a Sister State Fails To Cooperate in Producing the Witness

The final assumption based on the concept of territoriality is that, once a state has done everything within its power to produce a witness requested by the defendant, the defendant has no cause to complain if foreign authorities fail to cooperate in producing the witness. For example, it has been held that the state has no obligation to grant a defendant a continuance for a material witness in federal custody if the state has made reasonable but unsuccessful efforts to persuade federal authorities to release the witness.390

This view, while valid with respect to witnesses located in foreign nations, is questionable with respect to witnesses located in sister states or within the jurisdiction of the federal courts. The forum can be expected to make certain efforts to produce witnesses located in foreign nations: for example, issuing such witnesses extraterritorial subpoenas (if United States citizens),391 using established procedures

389. Because the Uniform Act To Secure Witnesses operates only when enacted by both states involved, the forum's decision to adopt it would not be equivalent to authorizing national subpoenas if the Act were enacted in only a few states. Since the Act has now been adopted by all but a few states, however, the forum's decision to adopt it now is practically equivalent to authorizing national subpoenas. Thus, while it may still be misleading to say that the states have a constitutional obligation to adopt the Uniform Act—as opposed to some other national subpoena authority—it is not inaccurate to say that, if they do not adopt the Uniform Act, they must adopt something very much like it.

With respect to the remedy, the compulsory process clause itself does not authorize a court to issue national subpoenas in the face of contrary domestic legislation; to that extent, it is not "self-enforcing." However, it does authorize a court to protect a defendant from the legislature's failure to adopt such legislation by dismissing the charges against him. See note 144 supra.


391. See text at note 351 supra.
to request the foreign nation to extradite, expel, or compel the witnesses to appear, trying to induce the witnesses to appear voluntarily, and giving the defendant an opportunity to persuade the witnesses to appear voluntarily. If those devices fail, however, the witnesses must be deemed unavailable, just as if they had died, disappeared, or lost their memory. If this were not the case, the forum's authority to prosecute would depend upon the actions of foreign nations—nations that have no constitutional connection with the forum and owe no constitutional duty to the accused.

A different situation exists, however, with respect to the governments that constitute our federal system. Unlike foreign nations, they do not interact as independent sovereignties. The states and the federal government are united by a constitutional scheme that renders them interdependent for many purposes. Under this scheme, they are constitutionally prohibited from denying a defendant the right "to compulsory process for obtaining witnesses in his favor." Although there has yet to be developed a conceptual framework for a nationwide solution of constitutional problems, the courts have given support to the view that, if the constituent governments alone cannot abridge a defendant's constitutional rights, they cannot do so by acting in combination. In this respect, the sixth amendment can be interpreted to prohibit the states and federal government from denying a defendant witnesses in his favor, either by acting individually or by acting in concert with sister governments.

Support for this "national" view of constitutional rights can be drawn from both fourth and fifth amendment cases. Thus, in Mur-

392. See text at notes 371-76 supra.

393. See, e.g., Virgin Islands v. Aquino, 378 F.2d 540, 550, 552 (3d Cir. 1967) (government's constitutional obligation to produce adverse witnesses in person includes duty to try to persuade them to return voluntarily by paying their expenses); Gillars v. United States, 182 F.2d 962, 978 (D.C. Cir. 1950) (government, which lacked power to compel witnesses to come from Germany to testify on defendant's behalf, satisfied his compulsory process rights by persuading witnesses to come voluntarily at government expense).

394. See, e.g., United States v. Sanchez-Rodriguez, 475 F.2d 61, 64 (9th Cir. 1973) (court, which lacked power to compel defendant's witness to come from Mexico to testify on his behalf, satisfied his right of compulsory process by permitting him to send investigator to try to persuade witness to come voluntarily); Johnson v. Johnson, 375 F. Supp. 872, 876 (W.D. Mich. 1974) (violation of compulsory process to deny defendant a continuance for purpose of allowing him to persuade witness to appear on his behalf).

395. See Virgin Islands v. Aquino, 378 F.2d 540, 550 (3d Cir. 1967) ("[A] witness who is beyond the jurisdiction is as unavailable to the party who wishes to call him as if he were dead"); United States v. Bentvena, 319 F.2d 916, 941 (2d Cir.), cert. denied, 375 U.S. 940 (1963) (an adverse witness is unavailable for sixth amendment purposes if he lies beyond reach of forum's subpoena power and refuses to appear voluntarily). See also authorities cited in notes 126-27 supra.
phy v. Waterfront Commission, the Supreme Court held that, in determining whether a person is being compelled to be a witness against himself in violation of the fifth amendment, a court must look not only to the isolated actions of any single state, but also to the combined effect the actions of the state and federal governments may have upon the defendant. The defendant in Murphy relied upon his fifth amendment privilege to refuse to answer questions before a bi-state commission, even after being granted immunity from prosecution in both of the states, New York and New Jersey. Murphy argued that, even if his incriminating statements could not be used against him in New York and New Jersey, they might be used against him in a subsequent prosecution by the federal government or another state. The commission and the state appellate courts responded that the fifth amendment protects a person only from being first compelled to speak in one state and then prosecuted by the same sovereign, and provides no protection from being compelled to speak in one state and then prosecuted in another. The Court rejected this argument and held that, for the purpose of the privilege against incrimination, the state and federal governments should be viewed as a single sovereignty; otherwise, the Court noted, the defendant could be "whipsawed into incriminating himself under both state and federal law even though" the constitutional privilege against self-incrimination is applicable to each.

In Elkins v. United States, the Court faced a similar problem involving the use of evidence seized in violation of the fourth amend-

397. 378 U.S. at 54-56, 77-80. Murphy involved a witness who faced the combination of interrogation by a state and potential prosecution by the federal government. The Court squarely held on the facts that a witness cannot be compelled to testify by a state unless also granted immunity from prosecution by the federal government. To this author's knowledge, the Court has never passed on a case involving a witness who faced the combination of interrogation in one state and potential prosecution in a sister state. Nevertheless, given the rationale of Murphy, the same conclusion should follow— namely, that a witness cannot be compelled to testify by a state unless also granted immunity from prosecution by sister states. See Kastigar v. United States, 406 U.S. 441, 456 (1972); Gardner v. Broderick, 392 U.S. 273, 276 (1968).

Congress has provided for grants of immunity that protect federal witnesses from prosecution by federal and state governments alike. See 18 U.S.C.A. § 6002 (Supp. 1975); Ullmann v. United States, 335 U.S. 422, 435-36 (1956). In exercise of its supervisory powers, the Supreme Court has further stated that the federal courts may not use statements obtained from state witnesses under state grants of immunity. See Murphy v. Waterfront Commn., 378 U.S. 52, 79 (1964). Absent an act of Congress, however, it does not appear that individual states have the authority to grant witnesses immunity from prosecution by sister states; until such authority is established, state witnesses would be advised to remain silent, even following state grants of immunity, for fear that they may be prosecuted by sister states on the basis of their statements.

ment. In *Elkins*, evidence that had been illegally seized from the defendant by state officials in Oregon was used against the defendant in the course of a federal prosecution. The federal government argued that the fourth amendment protects persons only from being illegally searched and prosecuted by the *same* sovereign and provides no protection from being illegally searched in one jurisdiction and then prosecuted in another jurisdiction on the basis of the illegally seized evidence. The Court rejected the government's argument and held that the defendant's right to be free from unreasonable searches and seizures should not be made to depend upon the actions of a single jurisdiction viewed in isolation; rather, the Court indicated that it would look to the actions of the jurisdictions involved viewed in combination with one another. The decision, while explicitly based on the Court's supervisory jurisdiction, is widely viewed as an implicit construction of the fourth amendment. 399

The rationale underlying both *Elkins* and *Murphy* can be applied to the defendant's right to compulsory process in cases in which either a sister state or the federal government fails to cooperate in producing defense witnesses. If two states (or a state and the federal government) cannot act in combination to deprive a person of his privilege against self-incrimination or his fourth amendment rights, they cannot act in combination to deprive him of his sixth amendment right to produce witnesses. If the forum alone cannot prosecute the accused while simultaneously suppressing a material witness in his favor, it cannot prosecute the accused while a sister state or the federal govern-

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399. The Supreme Court in *Elkins* did not have to decide whether the federal courts were constitutionally prohibited from admitting the evidence illegally seized by state officials because the Court was able to order the exclusion on the basis of its supervisory jurisdiction over the administration of justice in the lower federal courts. 364 U.S. at 216. Moreover, the Court was not in a position to decide whether state courts were constitutionally precluded from admitting evidence illegally seized by federal officials because the exclusionary rule was not held applicable to the states until *Mapp* v. Ohio, 367 U.S. 643 (1961). It is now assumed, however, that the exclusion is constitutionally compelled, regardless whether the issue arises in state or federal court. See *United States v. Schnell*, 50 C.M.R. 483, 484, 23 U.S.C.M.A. 464, 465 (1975) ("*Elkins* rejected the "silver platter" doctrine as constitutionally invalid"); People v. Superior Ct., 275 Cal. App. 2d 489, 493, 79 Cal. Rptr. 904, 907 (1969) ("*Mapp* clearly indicates that evidence unconstitutionally seized by federal agents is inadmissible in a state criminal trial" (emphasis original)); *Rinderknecht v. Maricopa County Employees Merit Sys.*, 21 Ariz. App. 419, —, 530 P.2d 332, 334 (1974) ("It is clearly established that in a criminal trial evidences seized in violation of a defendant's rights... under the Fourteenth Amendment... will be excluded, whether that trial be in a state or federal court and whether the evidence was seized by federal or state officials"). Conversely, it is also assumed that state and federal courts are *not* required to exclude evidence seized without probable cause by officials of nations to which the fourth amendment does not apply, even if the seizure was illegal there as well. *See Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969).
ment operates to suppress a material witness in the defendant's favor. Thus, even though the forum has done everything within its power to produce the witness, it should not be permitted to proceed with the prosecution if the witness is unavailable because of the unjustified actions of a sister state or the federal government.400

The principal difficulty with this analysis is the continuing existence of authority for the proposition that the states and federal government are separate sovereignties for purposes of the double jeopardy clause.401 Indeed, in some ways, the double jeopardy cases may provide a closer analogy to the problems of producing absent witnesses than either the fourth or fifth amendment cases. In the latter cases, by making use of evidence produced by an illegal search or by coercive interrogation, the forum may be deemed to have indirectly participated in the unconstitutional conduct by having encouraged the sister state to act. In contrast, when the forum requests the assistance of a sister state (or the federal government) in producing defense witnesses, it cannot be accused of aiding in the suppression of evidence; on the contrary, the forum has done everything within its power to produce the evidence. In this respect, the question whether the forum can prosecute the defendant in good faith after a sister jurisdiction has "suppressed" his witnesses may be more analogous to the question whether the forum can prosecute the defendant in good faith after he has been once held in jeopardy by a sister jurisdiction for the same offense.

The most one can say about the double jeopardy problem, however, is that it remains unresolved. Twenty years ago, in Abbate v. United States,402 the Supreme Court held that, although the federal government itself could not hold the defendant twice in jeopardy for the same offense, this same result could be accomplished when the federal government and the states, acting as "separate sovereignties,"

400. Cf. Abbate v. United States, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("I am also not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately").

The same analysis should also apply to other sixth amendment violations, such as the refusal of a sister state to produce a defendant for a speedy trial at the forum, or its refusal to produce an adverse witness for face-to-face confrontation at the forum. Thus, it has been suggested that the defendant is denied a speedy trial within the meaning of the sixth amendment if, despite the best efforts of the forum, the federal government or a sister state refuses to cooperate in making him available for trial in the forum. See Note, Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions, 77 YALE L.J. 767, 778-79 (1968).


each prosecuted the defendant for the same offense. In the intervening years, however, the Court has weakened the underpinnings of *Abbate* by holding that the double jeopardy clause applies to the states as well as the federal government403 and by rejecting the "separate sovereignties" concept for other fifth amendment purposes.404 Consequently, though the Court has yet to overrule *Abbate*, several commentators and courts have suggested that the doctrine has lost its vitality and that two sister jurisdictions cannot act in combination to impose forms of jeopardy that neither could impose acting alone.405

Even if *Abbate* is still a viable precedent, however, the issues that it dealt with can be distinguished from the compulsory process problem under analysis. Whenever a double jeopardy issue arises, it is likely that each of the two jurisdictions has a legitimate interest in prosecuting the defendant for criminal acts in violation of its laws, notwithstanding any prior prosecution in the other jurisdiction; indeed, if the two jurisdictions are deemed a single sovereignty for double jeopardy purposes, each will be induced to frustrate the other's prosecution by being the first to rush to judgment. On the other hand, for compulsory process purposes, the jurisdiction in which the witness is located is presumed to have no legitimate interest in refusing to make him available;406 in this respect, the compulsory process case is similar to the situation in *Murphy* and *Elkins*, in which the conduct of the sister jurisdiction is presumed to serve no legitimate federal purpose. Accordingly, treating the two jurisdictions as a single sovereignty for compulsory process purposes would encourage the free exchange of witnesses based on comity, rather than frustrate federal relationships between the two jurisdictions.


406. If the sister jurisdiction has a legitimate interest in holding the witness (for example, if the witness is suffering from a serious illness) then the witness' absence is excused just as if he were being withheld by the forum itself. *See* notes 114-17 supra. The fact that there are two jurisdictions involved, rather than one, should have no bearing on the validity of a refusal to produce a witness.
IV. THE USE OF SUBSTITUTE EVIDENCE IN PLACE OF LIVE TESTIMONY

The discussion, so far, has focused upon the defendant's right to obtain the personal attendance of witnesses possessing direct testimony in his favor. Yet a defendant occasionally learns that a witness cannot be produced in person, perhaps because the witness is temporarily unavailable, perhaps because of administrative difficulties in securing his attendance, or perhaps because he has become totally unavailable. The two questions that most commonly arise in such situations are whether the defendant can be forced over his objection to accept some evidentiary substitute in place of the witness' live testimony, and, conversely, whether the defendant has a right to use an evidentiary substitute in lieu of live testimony.

A. The Defendant's Right to Refuse a Substitute Form of Evidence in Place of Live Testimony

A defendant is often required to accept something less than the live testimony of an available witness. Thus, to spare certain witnesses the inconvenience of a personal appearance, some states require the defendant to record their testimony and introduce it in the form of written depositions. Similarly, instead of granting the defendant a continuance for an absent witness (to which he would otherwise be entitled), many courts require the defendant to proceed on the basis of a written statement of the testimony the witness was expected to give. In each case, if the truth of the absent witness' testimony is not conceded, the defendant is forced to use the exculpatory testimony in substitute form and the prosecutor is permitted to contradict and impeach the absent witness as if he were present.

The question raised by such procedures is whether compelling a defendant to use a substitute form of evidence in place of live

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407. See, e.g., Ala. Code Ann. tit. 45, § 226 (1958) (testimony of physician or superintendent at hospital for the insane must be taken and presented in deposition form); Ore. Rev. Stat. § 136.080 (1974) (“When an application is made for the postponement of a trial, the court may in its discretion require as a condition precedent to granting the same that the party applying therefor consent that the deposition of a witness may be taken and read on the trial of the case”).

408. See, e.g., N.M. Stat. Ann. § 21-8-11 (1970) (“If the application for continuance is . . . held sufficient, the cause shall be continued, unless the opposite party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated”). See also authorities cited in Annot., 9 A.L.R.3d 1180, 1249-65 (1966).

testimony violates his right to produce witnesses. Again, the answer depends on the constitutional approach taken to the problem. Wigmore's sharp comments on the use of stipulations to avoid a continuance reflect the conventional wisdom. As previously noted, some jurisdictions will deny a defendant a continuance if the prosecutor stipulates that the witness, if present, would testify in accord with the offer of proof; other jurisdictions, in contrast, will not deny a defendant the witness' live testimony unless the prosecutor fully protects the defendant by conceding the truth of the absent witness' testimony.410 Wigmore made no secret of his views. He not only believed, as a matter of policy, that the latter practice "serve[s] to add a powerful weapon of chicanery to the armory of unscrupulous counsel defending hardened villains," but, as a constitutional matter, he rejected the criticism of substitute forms of testimony as "totally devoid of grounds":411 "Whether the one or the other kind of admission should be required may depend on the circumstances of each community and each case; but it is impossible to regard the constitutional clause as being in any way involved."412

Wigmore's views are consistent with his basic assumption that the compulsory process clause merely extends to a defendant the benefits of process enjoyed by the prosecutor under local law and thus has no effect on questions of the competence, admissibility, or weight of evidence. The Supreme Court, in Washington v. Texas, rejected that assumption and construed the compulsory process clause in a manner that constitutionalizes the presentation of defense testimony in criminal cases.413 Consequently, whether stipulated testimony or deposition testimony is a proper substitute for live testimony is a question that must be resolved in accord with federal constitutional standards.

The federal standard of materiality is clear: A defendant has a constitutional right to present all evidence in his favor that could reasonably affect the judgment of the jury.414 The effect of a substi-
tute form of testimony is to deny a defendant the opportunity to present evidence of his witness' demeanor and credibility; however, whether such evidence is material will depend upon the nature of the case. In the rare case in which the weight of evidence depends entirely on its content, the loss of demeanor evidence may be immaterial in that it could not reasonably affect the judgment of the jury. In the great majority of cases, however, the weight of evidence depends in part on the jury's evaluation of the witness' credibility. In most cases, therefore, it violates the defendant's sixth amendment right to compulsory process to force him to use a substitute form of testimony in place of an otherwise available witness—whether the substitute is in the form of a transcript of previous trials, deposition testimony, or a stipulated statement of facts—just as it would violate his sixth amendment right of confrontation to force him to accept adverse testimony in a substitute form where the adverse witness is available to testify in person.

415. See United States v. Edwards, 469 F.2d 1362, 1370 (5th Cir. 1972). (“This test [of federal rule 17(b)] should not be resolved solely upon the ground that the testimony of the same witnesses, as recorded at a previous trial, is available. Whenever a credibility choice is crucial to the resolution of an issue of fact, the defendant is entitled to have the same jury then charged with guilt determination weigh credibility on the basis of their personal observations of the appearance and demeanor of the defendant's witnesses”); Preston v. Blackledge, 352 F. Supp. 681, 684 (E.D.N.C. 1971) (“While the recorded testimony of the previous trials gave the jury an adequate version of the substance of their testimony, it could in no way give the jury any idea of the witness' 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 the petitioners' right to receive a fair trial”).


417. See, e.g., Graham v. State, 50 Ark. 161, 6 S.W. 721 (1887); People v. Fong Chung, 5 Cal. App. 387, 91 P. 105 (1907); State v. Owens, 167 La. 1015, 120 S. 631 (1929); State v. Hickman, 75 Mo. 416 (1882); State v. Wilcox, 21 S.D. 532, 114 N.W. 687 (1907); State v. Baker, 81 Tenn. (13 Lea) 326 (1884); Medford v. State, 89 Tex. Crim. 1, 229 S.W. 504 (1921) (all involving challenges under state constitutions).

418. The confrontation clause, like the compulsory process clause, requires the government to make a good faith effort to produce witnesses in person to enable the trier of fact to consider the credibility of their testimony in light of their demeanor on the witness stand. See generally Phillips, The Confrontation Clause and the Scope of the Unavailability Requirement, 6 U. MICH. J. L. REF. 327 (1973). See also Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967). Thus, the government may not introduce the prior recorded testimony of an adverse witness—even if the testimony was taken under oath and subjected to cross-examination—if the witness is presently available to testify in person. Mancusi v. Stubbs, 408 U.S. 204, 210-13 (1972); California v. Green, 399 U.S. 149, 172-83 (1970) (Harlan, J., concurring); Barber v. Page, 390 U.S. 719, 725-26 (1968). Indeed, the only distinction between the two clauses of the sixth amendment in that respect is that the confrontation clause requires the government to produce in person all witnesses against the accused, while the compulsory process clause requires the government to produce in person all witnesses in his favor. See note 65 supra.

It remains to be seen whether videotaped depositions taken under oath and
To be sure, a defendant can only object to the use of a substitute form of testimony if he would otherwise be entitled to have the witness produced in person. Thus, if a defendant has no right to a continuance (because, for example, he has acted in bad faith or has failed to be diligent), then he cannot complain about the use of stipulated facts. Similarly, if he has no right to have the witness produced in person (because, for example, the witness is seriously ill or dead), then he cannot complain if he is required to use the witness' prior recorded testimony. By the same token, however, if a defendant is otherwise entitled to have the witness produced in person, he cannot be denied this opportunity by being forced to accept a less probative form of the witness' testimony.

B. The Defendant's Right To Introduce a Substitute Form of Evidence in Place of Live Testimony

The more important and more difficult problem is whether a defendant has a constitutional right, over the prosecutor's objection, to introduce testimony in the form of a deposition or other hearsay statement in place of live testimony. The issue commonly arises when a defendant desires to introduce the prior statements of a witness who is unavailable because he has died, or because he lies beyond the effective reach of the court's subpoena power. If the jurisdiction's evidentiary rules allow depositions or other hearsay evidence to be used in the event a witness is unavailable, the constitutional question will not arise; but if the jurisdiction renders such evidence inadmissible, the court must decide whether the defendant recorded in advance of trial can, constitutionally, be substituted for the production of available witnesses. For an illustration of the context in which the compulsory process issues may arise, see Judge Thomas MacBride's decision to order President Ford to submit to a videotaped deposition for the trial of Lynette Fromme in lieu of subpoenaing him to testify at trial. N.Y. Times, Oct. 29, 1975, at 12, col. 4 (city ed.); id., Nov. 2, 1975, § 1, at 22, col. 3; id., Nov. 15, 1975, at 1, col. 2. For a discussion of this issue in the context of the defendant's right of confrontation, see Short, Florence & Marsh, An Assessment of Videotape in the Criminal Courts, in Symposium: The Use of Videotape in the Courtroom, 1975 Brigham Young L. Rev. 423, 455; Barber & Bates, Videotape in Criminal Proceedings, 25 HAST. L. J. 1017, 1030-36 (1974); Comment, Video-Tape Trials: A Practical Evaluation and a Legal Analysis, 26 Stan. L. Rev. 619, 633-42 (1974). With respect to the right of compulsory process, the answer depends on whether the difference between viewing the witness' demeanor in person and viewing it on videotape is a difference that could reasonably affect the judgment of the jury.


420. See, e.g., Braswell v. Wainwright, 463 F.2d 1148, 1157 (5th Cir. 1972).

has a prevailing constitutional right to produce and present the evidence.

The question divides into two related issues: whether the defendant's right to the production of witnesses in his favor includes the right to the production of evidence in documentary form, and, if so, whether his right to the production of such evidence includes the right to present it to the trier of fact, notwithstanding that it is considered inadmissible under the jurisdiction's prevailing rules of evidence.

The first issue was directly presented and resolved in the trial of Aaron Burr. Bur claimed that, under the compulsory process clause, he was entitled to a subpoena duces tecum to President Jefferson to produce the Wilkinson correspondence. The government opposed the motion on the ground that the sixth amendment entitled the defendant to process only for "witnesses" in his favor, and not for papers or other documentary evidence. Marshall, comparing the purposes and effects of ordinary subpoenas and subpoenas duces tecum, rejected the constitutional distinction proposed by the government as "too attenuated to be countenanced in the tribunals of a just and humane nation":

A subpoena duces tecum varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody. It has been truly observed that the [witness] can, regularly, take no more interest in the awarding [of] a subpoena duces tecum than in the awarding [of] an ordinary subpoena. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence.

Marshall's constitutional judgment that the defendant's right to compulsory process includes the right to produce evidence in documentary form has never been questioned. The more difficult issue, therefore, is whether the right to have documentary evidence produced includes the right to present it to the trier of fact, notwith-
standing that such evidence would be inadmissible under local practice. According to the conventional wisdom, the compulsory process clause is relevant only to issues concerning the physical production of witnesses and has no bearing on questions of testimonial competence. As we have seen, however, the Court rejected that view in *Washington v. Texas* and held instead that the competence of witnesses is itself a federal question to be resolved by federal standards.

The applicable federal standard can again be found in *Washington*. The Court there held that the defendant has a constitutional right to present a witness whose ability to give reliable evidence is something about which reasonable people can differ, notwithstanding local rules that would render the witness' testimony incompetent. The same standard should apply to the presentation of documentary evidence. There is no constitutional difference between a rule of competence that arbitrarily bars a witness from taking the stand and a rule of evidence that arbitrarily excludes documentary evidence from the record. The question in each case is whether a properly instructed trier of fact could reasonably consider the offer as evidence in the defendant's favor. The defendant in each case has a constitutional right to offer the evidence unless the court concludes that the evidence is so inherently unreliable that reasonable people, properly cautioned, could not rationally rely on it.

To be sure, a defendant cannot insist on presenting the testimony of a witness in a substitute form if the witness is available to testify in person. The state has a legitimate interest in requiring the parties to present evidence, wherever possible, in its most reliable form; furthermore, a defendant cannot justifiably complain of reasonable rules of evidence that attempt to further this interest. On the other hand, if exculpatory testimony would otherwise be unavailable (whether this is due to the fact that the witness cannot be produced or because he fails to corroborate his earlier statements), the defendant has a constitutional right to introduce the evidence in its next most reliable form—whether the substitute comes in the form of a deposition, or


427. See text at notes 17-19 supra.

428. See text at notes 25-39 supra.

429. See text at notes 43-70 supra.

430. See Westen, supra note 4, at 157-58. Cf. Russell v. Commonwealth, 405 S.W.2d 683, 684 (Ky. App. 1966) (no error to refuse to permit defendant to introduce his own affidavit of absent witness, where he failed to exercise diligence in obtaining her testimony in the more reliable form of a deposition).

431. “When personal appearance of witnesses on behalf of the accused is unavail-
an out-of-court statement.\textsuperscript{432} The state, in turn, cannot exclude such “next best” evidence unless it can demonstrate that the evidence is so inherently untrustworthy that a properly instructed jury could not reasonably rely on it.\textsuperscript{433}

V. CONCLUSION

Two separate and distinct bodies of law on the production of witnesses in criminal proceedings have developed in this country. The first derives from the common law and has been developed largely by state courts to govern the production of witnesses generally—whether called by the plaintiff or the defendant, whether sought in civil proceedings or criminal proceedings. The second derives from the sixth amendment and has been developed largely by the federal courts during the past decade as a construction of the defendant’s right to “compulsory process for obtaining witnesses in his favor” in criminal proceedings. Despite their differing sources of authority, these two bodies of law represent attempts to strike a balance between essentially the same conflicting forces: the defendant’s interest in presenting evidence in his favor, the witness’ interest in avoiding the burdens of testifying, the public’s interest in the accurate determination of guilt or innocence, the trial court’s interest in resolving matters of proof with finality, the appellate court’s interest in ensuring that

\textsuperscript{432} In Braswell v. Wainwright, 463 F.2d 1148, 1157 (5th Cir. 1972), after concluding that the defendant was entitled to a new trial because the state court had wrongfully excluded an alibi witness, the court held that, since the witness had died in the meantime and could not testify in person, the defendant had a constitutional right (presumably under the compulsory process clause) to introduce a hearsay statement of what the witness would have said. For a discussion of the defendant’s constitutional right to introduce hearsay testimony in his favor, see Westen, supra note 4, at 149-59.

\textsuperscript{433} Compare Wisconsin v. Gagnon, 497 F.2d 1126, 1129-30 (7th Cir. 1974) (defendant has constitutional right to introduce uncross-examined testimony taken in open court under oath), with United States v. Figueroa, 298 F. Supp. 1215 (S.D.N.Y. 1969) (defendant has no right to take deposition, upon written interrogatories, of foreign witness whose credibility is dubious, who cannot be effectively cross-examined, and who cannot be deterred by the threat of prosecution for false testimony).
the law is correctly and uniformly applied, and the judiciary's interest in the speedy and inexpensive resolution of criminal proceedings.

The conflict between these procedural forces is persistent and, ultimately, irreducible. Thus, while one can strike a partial balance between the defendant's interest in producing the complaining witness and the witness' interest in avoiding the burdens of testifying, this balance never eliminates the conflict completely; it simply furthers one interest at the expense of the other. Indeed, in most cases, the balance represents a mutual sacrifice. For example, in striking a balance between the defendant's interest in securing a continuance for an absent witness and the court's interest in expediting the proceedings, some courts grant the defendant a continuance for a "reasonable" period of time, thus both furthering and sacrificing each interest to some extent.

The two bodies of law on the production of witnesses strike very different balances between these procedural forces. The common law, which received much of its shape in state courts in the nineteenth century, tends both to give less weight to the defendant's interest in producing witnesses than to the other procedural interests and to rely on the "discretion" of the trial judge to reach proper judgments. The constitutional doctrine, on the other hand, which has received most of its shape in federal courts in the past ten years, tends to give the defendant's interests nearly absolute weight whenever exculpatory evidence is readily available and considerable weight whenever the evidence is potentially available; furthermore, the constitutional doctrine vests substantial authority in appellate courts to review lower court judgments.

This fundamental difference in approach did not take final shape until Washington v. Texas; before Washington, it was generally assumed that the sixth amendment had no bearing on the law of evidence and simply incorporated local standards for the issuance of subpoenas. The great significance of Washington is not only that it directed the federal courts to fashion an independent constitutional standard to govern the presentation of defense witnesses in criminal cases, but also it set an example by striking a balance of procedural forces that greatly favored the accused. The federal courts, now freed from the baggage of the common law and directed to the specific interests of the accused, have further developed the new balance of forces and have proceeded to impose it everywhere as the law of the land.