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Right to Free Transcript

Ronald E. Mallen

NOTES

RIGHT TO FREE TRANSCRIPT

A transcript of a trial is a verbatim record of the official proceedings. Under the requirements of statutes, constitutional provisions, or court policy, a criminally-convicted defendant may be entitled to a free transcript. A determination of the existence of such a right entails consideration of defendant's financial condition and the nature of his crime; whereas, the extent of the right may often be entirely determined by state and county policies.

Need for Transcript

A transcript is a highly desirable asset to the criminal defendant seeking appellate review of his conviction. Initially, counsel would find it useful for identifying and accurately describing what he alleges to be judicial error. If counsel first entered the case at the appellate level, he may be totally unable to discover any error without the aid of a transcript. Finally, a defendant is usually under an express statutory[1] requirement to provide a transcript as a part of the normal record on appeal. With its assistance, the appellate court can better determine the merits of defendant's contentions. On occasion, the judgment of a lower court has been reversed solely on the basis of error which has appeared in the record but was not submitted for argument by counsel.[2]

The Constitutional Requirements

To an indigent defendant, the cost of a transcript may be an insurmountable obstacle in his path to appellate review. Procuring a transcript could entail an average expenditure of forty-five dollars per hour of trial.[3] In the much-noted[4] case of *Griffin v. Illinois*,[5] the United States Supreme Court considered the effect of this financial impediment to an indigent felon's appeal. Indigent codefendants, Griffin and Crenshaw, convicted of armed robbery, requested a free transcript of their trial in order to prosecute an appeal. Although counsel for the state conceded that petitioners needed a transcript to receive adequate appellate review, the Illinois Supreme Court denied that they were constitution-

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[1] In California, on an appeal from a superior court, a criminal defendant must provide a reporter's transcript of the trial proceedings as part of the normal appellate record. CAL. R. CT. 33, 35. In an appeal from a municipal or justice court to a superior court, he must normally provide either a reporter's transcript (CAL. R. CT. 184) or a settled statement of the evidence (CAL. R. CT. 187).

[2] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 673 nn. 5, 6 (1961) (Harlan, J., dissenting); O'Neil v. Jones, 185 Tenn. 539, 206 S.W.2d 782 (1947); State v. Apodaca, 42 N.M. 544, 82 P.2d 641 (1938).

[3] A transcript costs 175 dollars for the average municipal court trial. Interview with Margory E. Boiler, Official Court Reporter, Hall of Justice, San Francisco, Aug. 6, 1965.

[4] *E.g.*, Qua, *Griffin v. Illinois*, 25 U. CHI. L. REV. 143 (1957); Wilcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957); Notes, 55 MICH. L. REV. 413 (1957); 30 SO. CAL. L. REV. 350 (1957); 4 U.C.L.A.L. REV. 274 (1957); Annot., 55 A.L.R.2d 1072 (1957).

[5] 351 U.S. 12 (1956).

ally entitled to one. The United States Supreme Court vacated this judgment, the opinion stating, "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[6]

This application of the equal protection clause of the fourteenth amendment requires that an indigent appellant be furnished with a free transcript whenever a state guarantees a right to appellate review, and a transcript is necessary to secure this right.[7] This does not suggest that an indigent defendant has an absolute right to a free transcript. It means only that he has a right to equal protection under the laws of the state. Such protection may not require the furnishing of a reporter's transcript, as Mr. Justice Black, speaking for the Court, carefully qualified: "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants."[8] Nor is a state under a strict duty to meet the requirements of *Griffin* where it is presently impossible, and defendant, having had counsel at the time of the trial, failed to pursue an appeal.[9]

Constitutional Right of the Misdemeanant

The United States Supreme Court has yet to decide whether the application of the equal protection clause formulated in *Griffin* is constitutionally required in the case of an indigent misdemeanant. On the other hand, the majority in *Griffin* did not limit their discussion to "felons"; instead, they talked only of indigent "defendants" and "petitioners." It is submitted that the nebulous, inconsistent line between misdemeanors and felonies[10] is too arbitrary[11] a criterion for determining who is entitled to a free transcript. This discrimination could

[6] *Id.* at 19.

[7] Norvel v. Illinois, 373 U.S. 420 (1963); Preston v. Municipal Court, 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961).

As a logical consequence of *Griffin*, it was held in Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958), that a trial court does not have discretion to deny a motion for a free transcript by an indigent defendant on the basis of its opinion that defendant was afforded a fair and impartial trial. "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of transcript." *Id.* at 216. *Accord,* Draper v. Washington, 372 U.S. 487 (1963).

[8] 351 U.S. at 20. See Draper v. Washington, 372 U.S. 487, 495 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214, 216 (1958); Preston v. Municipal Court, 188 Cal. App. 2d 76, 86, 10 Cal. Rptr. 301, 306 (1961).

[9] Norvel v. Illinois, 373 U.S. 420 (1963) (reporter dead, twenty-year-old trial notes not transcribable).

Mr. Justice Goldberg vigorously dissented. He felt the issue was not the present impossibility of providing a transcript, but the retroactivity of *Griffin*. "[P]etitioner . . . in 1941 because of his indigency, was *at that time* deprived of his constitutional rights. . . . Griffin was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments." *Id.* at 425. *Accord,* Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958).

[10] "A felony is a crime which is punishable with death or by imprisonment in a state prison. Every other crime is a misdemeanor." CAL. PEN. CODE § 17.

[11] See Packer, *The Case for Revision of the Penal Code,* 13 STAN. L. REV. 252 (1961). Although Mr. Packer does not discuss the right to free transcript, he does

result in such patently absurd situations as an indigent felon securing relief from a judgment of probation, while a misdemeanant spends a year or more[12] in the county jail because he could not afford the cost of a transcript. Any meaningful difference between misdemeanors and felonies is further eroded by the fact that in certain instances, under California Penal Code section 1203.4, a convicted felon may be relieved of all collateral penalties and disabilities, such as loss of the right to vote.[13] It would seem incongruous to base denial of a right to full appellate review on such an insubstantial distinction between the two classes of crime. So far it appears that this view has found judicial expression only in California.[14] In *Preston v. Municipal Court*,[15] after discussing *Griffin*, Justice Tobriner said: "While there are many obvious differences between the misdemeanor and the felony, and the former, of course, imposes a lighter penalty, we do not believe the difference justifies the mutilation of the right of appeal by deprivation of the transcript."[16] Hence, *Preston* makes it clear that an indigent defendant's right to a free transcript does not depend on the classification of his crime. Similarly, it would seem inconsistent with *Preston* to limit this right to particular courts. The indigent defendant should be allowed a free transcript regardless of whether he is tried in a superior, municipal, or justice court.

As in *Griffin*, the application of *Preston* is limited to instances in which alternative means of prosecuting an appeal are inadequate. Hence, on appeal, the indigent misdemeanant must utilize a settled statement of the evidence whenever it would be sufficient to present the alleged errors.[17]

Statutes

Notwithstanding the constitutional ramifications, the right to a free transcript is largely governed by statute. Even at the time of *Griffin* many states,[18] and the federal government,[19] had legislation on the subject.

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review other collateral effects of classifying a crime. "It is questionable whether the legislature, in prescribing whether a given offense shall be a felony or a misdemeanor, reaches a conclusion after evaluating all the collateral consequences of the classification. It is even more questionable whether the same considerations would be thought to apply to each of the varied consequences. . . . In short, the factors governing a determination as to these 'collateral consequences' need to be faced separately, with respect to each such consequence." *Id.* at 257.

[12] CAL. PEN. CODE § 19(a) provides that the maximum imprisonment for a misdemeanor shall not exceed one year in a county jail. But there is theoretically no limit to the number of consecutive one-year sentences which may be imposed on a single defendant at one trial for the commission of several misdemeanors.

[13] Truchon v. Toomey, 116 Cal. App. 2d 736, 254 P.2d 638 (1953).

[14] *In re* Henderson, 61 Cal. 2d 541, 39 Cal. Rptr. 373, 393 P.2d 685 (1964); Preston v. Municipal Court, 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961).

[15] 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961).

[16] *Id.* at 85, 10 Cal. Rptr. at 306.

[17] Before he is entitled to a free transcript, the indigent defendant must fulfill two procedural obligations. First, he must make a bona fide attempt to procure a settled statement. Green v. Superior Court, 191 Cal. App. 2d 484, 12 Cal. Rptr. 796 (1961). Second, in consideration of an expedient appellate system, he should allege his indigency at the time of his request. *In re* Henderson, 61 Cal. 2d 541, 39 Cal. Rptr. 373, 393 P.2d 685 (1964).

[18] See, *e.g.*, N.Y. CODE CRIM. PROC. § 456; WASH. REV. CODE, § 2.32.240 (1951).

[19] 28 U.S.C. § 1915 (1964).

Federal

In federal courts the indigent appellant is entitled to a free appeal as well as a free transcript.[20] However, before he is allowed to proceed in forma pauperis, he must secure the trial court's certification that his appeal is taken in "good faith."[21] This is determined by an objective standard: the issues raised by the indigent appellant must not be so frivolous that if raised by a nonindigent, the appeal would be dismissed as being without merit.[22]

If defendant's request to proceed in forma pauperis is denied, he is entitled to a "record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error . . . ."[23] But *Ingram v. United States*[24] requires that he first make "some showing of error, [even] if only vague and conclusory . . . ."[25] This would seem to be properly interpreted as an attempt to prohibit the use of free transcripts for discovery purposes. Counsel may well argue that he needs a transcript for careful study to determine adequately what constitutes prejudicial error. However, it is difficult to conceive of actual error existing and any trial counsel's being unable to make the minimal showing required by *Ingram*. Nor, in such circumstances, has a court held that due process requires furnishing an indigent defendant with a free transcript for discovery purposes.[26] The *Ingram* limitation is desirable, since unnecessary government expenditures are avoided by dissuading appellate review based upon mere suspicion or hope of error. However, when new counsel represents an indigent defendant on direct appeal, a general need for a transcript is apparent.[27] This does not apply to the defendant himself, seeking to attack the judgment collaterally and desiring a free transcript for his own perusal.[28]

[20] 28 U.S.C. § 753 (1964) (Court Reporter Act); 28 U.S.C. § 1915 (1964) (Proceedings in Forma Pauperis).

[21] *Ibid.* See Young v. United States, 246 F.2d 901 (8th Cir. 1957); United States v. Gicinto, 114 F. Supp. 929 (W.D. Mo. 1953).

[22] Coppedge v. United States, 369 U.S. 438 (1961). Where, under the policy of a particular Circuit Court of Appeals, a nonindigent is entitled to hearing of oral arguments on an adverse ruling when his appeal is screened for frivolity, an indigent must be allowed the same privilege before a district court's certification of bad faith, based on its finding of frivolity, is conclusive. United States v. Deaton, 349 F.2d 664 (6th Cir. 1965).

[23] Coppedge v. United States, 369 U.S. 438, 446 (1961).

[24] 315 F.2d 29 (D.C. Cir. 1962).

[25] *Id.* at 31.

[26] If due process required the availability of a transcript to a defendant for discovery purposes, equal protection would seem to require allowing an indigent the same right at county expense. The financial implications are painfully obvious. A county would be burdened with the immense cost of furnishing all indigents with transcripts of their trials, even though many of them would never pursue an appeal.

[27] Hardy v. United States, 385 U.S. 277 (1964).

[28] In United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964), defendant alleged in good faith that he believed there was error in the record. The court pointed out that this was not sufficient. Many errors which may be reviewed on direct appeal are not subject to review on collateral attack, since the usual basis for collateral attack arises from matters outside the trial. Furthermore, there is doubt whether a defendant could recognize as error that which he and his trial counsel did not think prejudicial at the time of the trial. However, the court suggested that if defendant filed a petition showing some nonfrivolous

California

California has gone well beyond the scope of *Griffin* in its statutory scheme by providing free transcripts to nonindigent, as well as indigent felons. By 1909 the felon was given an express statutory right to a transcript at county expense.[29] This right has been reiterated in subsequent decisions,[30] and is protected today by California Government Code section 69952, which enables the trial court to order a free transcript, and California Rules of Court, Rules 33 and 35, which eliminate the court's discretion in criminal cases.[31] Of course, the unexercised right to free transcript expires with the time for appeal.[32]

There is no manifested legislative intent to provide a misdemeanant with a free transcript on appeal. Under Code of Civil Procedure section 274c, which describes the duties of reporters in municipal courts, the trial judge may require the reporting and transcribing of the proceedings;[33] however, it is entirely within

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ground for collateral attack, a transcript of the trial would be provided to the extent it was relevant to the issues raised. See also United States v. Glass, 317 F.2d 200 (4th Cir. 1963).

[29] Cal. Stat. 1909, ch. 710, § 1, at 1084 (*repealed*, Cal. Stat. 1927, ch. 620, §§ 4-8, at 1048; now incorporated in CAL. R. CT. 30-38). This section was enacted after Richards v. Superior Court, 145 Cal. 38, 78 Pac. 244 (1904), interpreted Code of Civil Procedure section 274 (*repealed*, Cal. Stat. 1953, ch. 206, § 7, at 1342; now incorporated in CAL. GOV'T CODE §§ 69947-69953) as permitting the trial judge to determine when a felon is entitled to a free transcript. Cal. Stat. 1909, ch. 710, § 1, at 1084, eliminated the court's discretion as to felons.

[30] People v. Smith, 34 Cal. 2d 449, 211 P.2d 561 (1949); *In re* Paiva, 31 Cal. 2d 503, 190 P.2d 604 (1948).

[31] In particular, CAL. R. CT. 33(b)(3): "[T]he judge, within 5 days after the filing of such application, [for inclusions in the transcript] shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by the appellant in his application. *If the judge fails to make any order within five days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcript without such order.*" (Emphasis added.) CAL. R. CT. 35(b): "Where a reporter's transcript is required, the clerk immediately, on the filing of the notice of appeal, shall notify the reporter. . . . He shall deliver the original and all copies to the clerk immediately on their completion, *and in no case more than 20 days after the filing of the notice of appeal* unless such time is extended as provided in subsection (d) of this rule." (Emphasis added.)

[32] People v. Tucker, 61 Cal. 2d 828, 40 Cal. Rptr. 609, 395 P.2d 499 (1964) (dictum); People v. Sparks, 112 Cal. App. 2d 120, 246 P.2d 64 (1952).

[33] A misdemeanant may have difficulty in obtaining a transcript. In many of the smaller counties there is no official reporter assigned to a municipal court. It is possible to have a reporter pro tempore in such cases, since a reporter may be "borrowed" from the county superior court. CAL. GOV'T CODE § 72196. The requesting party would apparently be required to pay for both the reporting and transcribing. CAL. GOV'T CODE § 69947. The reporting fee is $35 per day, CAL. GOV'T CODE § 69948, and the transcription fee is $.35 per 100 words, CAL. GOV'T CODE § 69950. Most of the larger counties routinely provide reporters for a municipal court under statutory requirements. The reporting is done at county expense, and the defendant pays only for what he requests transcribed. *E.g.*, CAL. GOV'T CODE §§ 74511, 74514 (San Francisco County); § 73342 (Contra Costa County); § 72709 (Los Angeles County).

the court's discretion whether this be done at county expense.[34] Despite any statutory references to Government Code section 69952,[35] a misdemeanant in a municipal court[36] is without its advantages, since that section expressly operates

A defendant tried in a small county may be unable to have the proceedings reported. Although, under CAL. CODE CIV. PROC. § 269, counsel in a superior court may directly order the reporting done, § 274c, governing municipal court reporters, provides that in criminal proceedings only the trial judge shall have this power. See Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (1954). If defendant's motion to have a reporter present were denied, he could still use a settled statement on appeal. CAL. R. CT. 127. But because of the length of the trial, the complexity of the evidence, or the imperfect memory of counsel, a settled statement may not clearly show the alleged errors. In that event, the defendant would not be able adequately to present his contentions on appeal. See Preston v. Municipal Court, 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961). If the appellate court found that the trial court abused its discretion, a new trial might be ordered. But it would seem unfair to require a defendant to undergo a second trial because he was tried in a county which did not provide for the routine presence of a reporter in its municipal court. Furthermore, a misdemeanant's right to adequate appellate review should not be subject to the discretion of a trial judge who may not think that defendant's case merits the effort required to secure a reporter. There should be a legislative change in CAL. CODE CIV. PROC. § 274c to allow counsel the right to order the proceedings reported.

If this be done, there is still the question of an indigent's right to have the reporting charged to the county. A defendant's right to order the proceedings reported would be illusory if he could not exercise this power because of financial inability. Although it is debatable whether the equal protection clause requires that the county bear the cost of reporting, it would seem that under proper circumstances a transcript would be necessary for adequate appellate review. In these cases it is within the discretion of the trial court whether any of the costs under § 274c be charged to the county. Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (1954).

[34] County of San Diego v. Milotz, 46 Cal. 2d 761, 300 P.2d 1 (1956) (dictum); Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (1954).

[35] Several references are found in the Government Code. *E.g.*, § 72195 provides that "Government Code sections 69942 to 69953, inclusive . . . are hereby made applicable to the qualifications, duties, . . . and fees of official reporters of municipal courts," and § 74514 states that "upon order of the court . . . fees for transcription of testimony and proceedings in criminal cases as provided in sections 69947 to 69953, inclusive . . . shall be paid from the city and county treasury." Furthermore, CAL. CODE CIV. PROC. § 274c expressly referred to section 69952 until the repeal of that clause by Cal. Stat. 1955, ch. 1424, § 1, at 2592.

[36] A misdemeanor may be tried in a superior court. The California Constitution provides for the jurisdiction of a superior court "in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for." CAL. CONST., art. 6, § 5. When there is no municipal court in the judicial district, and the misdemeanor is not within the jurisdiction of the justice court, it must be tried in superior court. See People v. Zadro, 20 Cal. App. 2d 320, 66 P.2d 1204 (1937) (justice court had no jurisdiction over misdemeanor).

In such cases, it would seem that the misdemeanant would have the same rights as a felon. Both CAL. GOV'T CODE § 69952 and CAL. R. CT. 33, 35, apply to criminal cases in the superior court, not merely to felonies.

Today, a misdemeanant will rarely be tried in a superior court. Formerly, CAL. PEN. CODE § 1425 limited the jurisdiction of a justice court to misdemeanors for which the maximum punishment was a 1,000 dollar fine and/or six months in the county jail.

pursuant to Code of Civil Procedure section 269,[37] describing the duties of a *superior court* reporter. In providing only misdemeanants[38] with the alternative of using a settled statement on appeal,[39] the legislature has evinced further intent to limit the need for a transcript.[40]

The Procedural Complication of Preston

If a settled statement is inadequate to present the alleged errors, a misdemeanant is entitled to a free transcript, but only if he can satisfactorily establish his indigency.[41] In announcing this right to free transcript, *Preston v. Municipal Court*[42] has implicitly created a new problem—how shall a municipal court handle a request for a trial transcript in a case of multiple defendants, only some of whom are indigent?

The difficulty lies in the fact that all the defendants may utilize the same transcript on appeal,[43] yet only the indigents are entitled to one at county expense.[44] It would be violative of *Preston*, and perhaps *Griffin*, to deprive the indigent of this right. Such deprivation could occur if the trial court required the indigents to use the transcript of the others; for, if the nonindigents failed to procure one, the indigents could not pursue their appeal.[45] Of course, under Code

A recent amendment to that section allows a justice court to try misdemeanors, with one exception, punishable by a year's imprisonment, thereby extending the court's jurisdiction to almost all misdemeanors.

[37] See also People v. Miller, 161 Cal. App. 2d Supp. 842, 327 P.2d 236 (App. Dep't Super. Ct. Los Angeles, 1958); Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (1954).

[38] In rare cases an appeal from a superior court may be taken by a settled statement of the evidence. It is necessary that the desired part of the oral proceedings be unobtainable without the fault of the appellant. CAL. R. CT. 4, 36(b).

[39] CAL. R. CT. 184.

[40] Hidalgo v. Municipal Court, 129 Cal. App. 2d 244, 277 P.2d 36 (1954).

[41] Unfortunately, there is no standardized test of indigency in California; hence, criteria will vary from county to county. The United States Supreme Court dictated a test for indigency sufficient for the in forma pauperis statute, 28 U.S.C. § 1915 (1964): "[A]n affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" Adkins v. Dupont Co., 335 U.S. 331, 339 (1948). The Public Defender's office in Alameda County utilizes a similar test, weighing several factors which include defendant's assets, debts, family, and the cost of private counsel. Since a misdemeanant usually requires the services of counsel for a shorter time than a felon, he would have a more difficult time qualifying as an indigent. Such a "fluid test" does provide a realistic means of establishing indigency, since it entails a full consideration of an individual's financial peculiarities. Telephone interview with Mr. J. Munes, Public Defender for Alameda County, August 23, 1965.

[42] 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961).

[43] CAL. R. CT. 131.

[44] This problem does not exist when the multiple defendants are felons, since all are entitled to free transcript. CAL. GOV'T CODE § 69952; CAL. R. CT. 33, 35; People v. Smith, 34 Cal. 2d 449, 211 P.2d 561 (1949).

[45] See Pearlman v. State, 226 Md. 395, 172 A.2d 395 (1961). *Cf.* Adkins v. DuPont Co., 335 U.S. 331, 340 (1948), concerning 28 U.S.C. § 1915 (1964): "We do not think that this petitioner can be denied a right of appeal under the statute merely because other claimants will neither give security for costs nor sign an affidavit of poverty."

of Civil Procedure section 274c, a free transcript could be provided for all,[46] but an obvious rebuttal would be that financially-able defendants are being allowed an appeal at county expense. On the other hand, the indigents could be supplied with a transcript and the nonindigents required to purchase a second copy for their own use. Either of these two extremes would satisfy *Preston*, but both place an unnecessary financial burden on the other party.

A compromise was suggested in the Maryland decision of *Pearlman v. State*,[47] providing that the nonindigents "may not use the [indigents'] transcript in an appeal . . . without paying a fair share of its cost."[48] Unfortunately, the court was not precise in detailing what this would be. Defining "fair share,"[49] entails the determination of what is fair and what is practical. It would be fair for an appellant to pay for the equivalent portion of the transcript which is applicable to him; that is, the fraction he represents of the total defendants tried. The mathematical simplicity of this technique enables the immediate determination of a nonindigent's share of the cost. The trial judge would order the reporter's notes transcribed and a copy filed with the clerk of the appellate department of the superior court. If a nonindigent desired to use the transcript on appeal, he would pay his "fair share." When the time limit to perfect appeal had expired, the remainder of the cost would be charged to the county. Thereby, the indigents would have their free transcript, and the county and nonindigents could share their mutual expenses.

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[46] The Alameda County Municipal Court did provide a free weekly transcript to the 155 defendants in the First Consolidated Trial, Cases C-7468 to C-7543, People v. Mario Savio (1965), popularly known as the "Berkeley Sit-in Trials." The trial court, in exercising its powers under CAL. CODE CIV. PROC. § 274c was undoubtedly influenced by the unprecedentedly large number of defendants, the complexity of appeal, and possibly the complication that some of the defendants would be entitled to a free transcript as indigents.

This case will present several novel problems on appeal. First, there were about 500 defendants who waived jury trial and submitted themselves to the judgment of the court based on the trial of the 155, and certain individual stipulations. Since these defendants were not parties to the First Consolidated Trial, they are not entitled to utilize the free transcript which was provided. Each one would have to purchase a separate transcript for appeal. Obviously, this would entail great expense and serve no practical end other than to meet a statutory requirement. One realistic solution suggested by Mr. D. Jensen, Deputy District Attorney for Alameda County, would be the utilization of a common technique of property law—incorporation by reference, allowing a defendant to refer back to specified portions of the transcript filed by the parties to the First Consolidated Trial. Telephone interview, August 26, 1965. The second problem results from the fact that not all the defendants were sentenced at the same time. Those who were sentenced later could be required to provide their own transcripts. Again, Mr. Jensen's suggestion would seem applicable. These defendants could refer to the pertinent sections of the transcript which was previously filed.

[47] 226 Md. 67, 172 A.2d 395 (1961).

[48] *Id.* at 76, 172 A.2d at 400.

[49] San Francisco Municipal Court Judge R. J. Drewes applied the *Pearlman* decision in two rulings, People v. Burbridge, Cases J24263-5, July 12, 1965, *amended* July 23, 1965, and People v. Hallinan, Cases J24358-61, July 20, 1965, *amended* August 13, 1965. Judge Drewes ordered a transcript, requiring the nonindigents to pay the difference between the total cost and the fractional cost, represented by the ratio of indigents

Expanding the Right to Free Transcript

The constitutional right of an indigent to a free transcript under *Griffin* has not been limited to cases of direct attack on a judgment of conviction. It is well established that *Griffin* is applicable to collateral proceedings in state courts.[50]

California has reached the same result through statutory interpretation. Since *In re Paiva*,[51] the right to free transcript has included hearings on writs of error coram nobis.[52]

The right to free transcript is not restricted to collateral proceedings. A right to a transcript of a prior mistrial was established in *People v. Hollander*.[53] Hollander gave a month's notice to have a transcript prepared, in order to impeach the people's witnesses at his second trial. At the time of his request Hollander was represented by counsel, but he had defended himself at the first trial. On appeal, the trial court's refusal to have a transcript prepared was found sufficiently prejudicial to merit reversal. Subsequent decisions have clearly defined this right to a transcript of a prior trial. *Hollander* has been held applicable only if there was timely notice to prepare a transcript,[54] new counsel in the second trial,[55] a need for impeaching witnesses,[56] and a necessary, prejudicial failure in this endeavor.[57]

Despite this seemingly conservative application of Government Code section 69952 in the intermediate courts, the California Supreme Court has liberally extended its scope. In *Gross v. Superior Court*,[58] it decided that a defendant in a sexual psychopathy proceeding is entitled to a free transcript on appeal. The majority disposed of Justice Edmonds' dissenting argument that the proceeding was a civil action,[59] and the opening requirements of section 69952 ("In criminal cases . . ."), by stating, "The proceeding is not strictly a criminal case . . . yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent."[60] In 1965, the Supreme Court, reaffirmed *Gross* in *People v. Victor*,[61] Justice Schauer stating, "similar considerations obtain here and lead

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to total defendants at the trial. The remainder of the cost was charged to the county. Although offering, apparently, the first California solution to the problem, Judge Drewes' method of fixing costs makes it difficult to determine the exact expense to one appellant because of uncertainty as to how many other nonindigents will pursue appeals.

[50] *E.g.*, Lane v. Brown, 372 U.S. 477 (1963) (coram nobis hearing); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee for writ of habeas corpus); Burns v. Ohio, 360 U.S. 252 (1958) (filing fee before filing motion for leave to appeal).

[51] 31 Cal. 2d 503, 190 P.2d 604 (1948).

[52] People v. Shipman, 62 Cal. 2d 226, 42 Cal. Rptr. 1, 397 P.2d 993 (1965); People v. Sparks, 112 Cal. App. 2d 120, 246 P.2d 64 (1952).

[53] 194 Cal. App. 2d 386, 14 Cal. Rptr. 917 (1961).

[54] People v. Sullivan, 206 Cal. App. 2d 36, 23 Cal. Rptr. 558 (1962).

[55] People v. Berry, 199 Cal. App. 2d 97, 18 Cal. Rptr. 388 (1962).

[56] *Ibid.*

[57] See People v. Goodloe, 225 Cal. App. 2d 686, 37 Cal. Rptr. 589 (1964).

[58] 42 Cal. 2d 816, 270 P.2d 1025 (1954).

[59] "All the decisions which determine the nature of a proceeding under the sexual psychopathy laws hold that it is of a civil nature . . . . Unless and until those decisions are overruled the present appeal is not 'in a criminal case.'" *Id.* at 821, 270 P.2d at 1028.

[60] *Id.* at 821, 270 P.2d at 1027.

[61] 62 Cal. 2d 280, 42 Cal. Rptr. 199, 398 P.2d 391 (1965).

us to the same conclusion, i.e., that persons involuntarily committed to the custody of the Director of Corrections under this program [narcotic rehabilitation] have a right to free transcript on appeal from the order of commitment."[62]

Conclusions

The apparent delimitation of *Hollander* and the liberality of the Supreme Court in *Gross* and *Victor* may be reconciled if one factor is emphasized—had their appeals failed, both Victor and Gross would have been committed to state hospitals against their will.[63] They would have been as substantially deprived of their liberty as any criminal.[64] In refusing to apply *Hollander*, the district courts of appeal repeatedly emphasized the need for a defendant to show that he was prejudiced by the lack of a transcript.[65] It is obvious that the courts do not want transcripts supplied for discovery purposes.[66] Therefore, particular circumstances, as in *Hollander*, are necessary to show an actual need for a transcript. Hence, these decisions do not differ in law or basic philosophy, but rather in the degree to which a transcript was essential to safeguard defendant's liberty.

The protection of liberty necessarily involves the concept of due process. The requisite due process to deprive one of his liberty is not subject to exact measurement, but is rather a fluid concept capable of proper definition only within the context of present social values. Undeniably, in today's society, with its increased awareness of civil rights and equal opportunity, the procedural requirements of due process will become more stringent. This is obvious in the recent decisions of the United States Supreme Court in *Escobedo v. Illinois*[67] and the California Supreme Court in *People v. Dorado*.[68]

As the concept of due process expands, so must the right to free transcript.

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[62] *Id.* at 288-89, 42 Cal. Rptr. at 203, 398 P.2d at 395-96.

[63] Gross faced commitment to Mendicino State Hospital as a sexual psychopath; Victor would have been confined in the medical facility at Vacaville, California as a narcotic addict.

[64] "His liberty is at stake. Since those things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of section 69952 of the Government Code . . . ." Gross v. Superior Court, 42 Cal. 2d 816, 821, 270 P.2d 1025, 1028 (1954).

[65] People v. Sullivan, 206 Cal. App. 2d 36, 23 Cal. Rptr. 558 (1962); People v. Berry, 199 Cal. App. 2d 97, 18 Cal. Rptr. 388 (1962).

[66] People v. Goodloe, 225 Cal. App. 2d 686, 37 Cal. Rptr. 589 (1964). "This motion may be regarded as in the nature of a discovery proceeding. The discovery cases, however, do not appear to look with favor on such unsupported requests. They indicate that a defendant must show some better cause for inspection than the mere desire for the benefit of all information obtained by the People." *Id.* at 688, 37 Cal. Rptr. at 591.

[67] 378 U.S. 478 (1964). Defendant had been taken into police custody and was subjected to interrogation. Because he was refused opportunity to consult with counsel, and not warned of his constitutional right to remain silent, his statements made during investigation were held inadmissible at his trial.

[68] 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361, *cert. denied*, 381 U.S. 937 (1965). The California court here interpreted *Escobedo* as requiring that police, when interrogating a suspect in custody upon whom an investigation has focused, advise him of his right to counsel and to remain silent. Statements made by him in response to interrogation after failure to give such advice are inadmissible.

However, it would seem improper to attempt any substantial delineation of this right. Except where a defendant has a statutory or constitutional guarantee, the propriety of supplying a free transcript should be a matter of judicial discretion. For it is the trial judge who is best qualified to weigh, in a particular case, the determining factors of social demands, threatened loss to the defendant, practical benefit of a transcript, and cost to the county.

Insofar as the California courts can maintain their social responsiveness, the present law is adequate. But in this sense, the limitation of Government Code sections 69952 and 69953, allowing a free transcript only in criminal cases, is undesirable. Under section 69952, the Supreme Court has stretched the meaning of "criminal cases" to include sexual psychopathy hearings,[69] and narcotic rehabilitation commitment proceedings.[70] It is uncertain how much farther this section can be judicially extended.

Therefore, a legislative change in section 69952 is needed. This section should be altered to enable a superior court judge to order a free transcript when, in his discretion, it is necessary and proper. Section 69953,[71] which places the cost of a transcript solely on the parties to a civil action, should be modified to the extent necessary to recognize the court's discretionary power.

In essence, these changes will open the door in California to a right to free transcript in civil actions.[72] It is true that rights of property are distinguishable from rights of liberty,[73] but this does not mean that they are less significant to an individual. Furthermore, it would seem arbitrary to draw a line between liberty and property, for the two are separated by a continuous spectrum of ambivalent rights. Hence, consideration must be given to "quasi-criminal" rights, such as those involved in psycopathy hearings; civil liberties, such as free speech, suffrage and religious rights; and near the other end of the gamut, "quasi-property" rights, such as privacy.[74] Therefore, it does not seem that an exact demarcation of a right to free transcript is feasible. Today, an indigent in California can lose his property and civil liberties because he cannot afford a transcript, but if he breaks a criminal

[69] Gross v. Superior Court, 42 Cal. 2d 816, 270 P.2d 1025 (1954).

[70] People v. Victor, 62 Cal. 2d 280, 42 Cal. Rptr. 199, 398 P.2d 392 (1965).

[71] It is this section which prevents a municipal court judge from ordering a free transcript in civil cases under CAL. CODE CIV. PROC. § 274c.

[72] Compare 28 U.S.C. § 1915 (1964) which allows a federal trial court to charge the cost of a transcript in civil, as well as criminal, cases to the United States. This may be done if the court finds that the appeal is taken in "good faith." N.Y. CIV. PRAC. LAW § 1102(b) entitles indigent appellants in a civil action to a copy of the transcript at county expense. See People v. Politano, 32 Misc. 2d 530, 223 N.Y.S.2d 632 (Montgomery Co. Ct. 1962).

[73] In Preston v. Municipal Court, 188 Cal. App. 2d 76, 10 Cal. Rptr. 301 (1961), the court curtailed any discussion of a right to free transcript in civil cases by stating "[W]e may properly differentiate between loss of property in civil actions and loss of liberty by incarceration for the commission of crime." *Id.* at 84, 10 Cal. Rptr. at 306. The fact that one may distinguish between the two is no basis, in itself, for denying a necessary transcript to an indigent appellant in a civil action.

[74] "Very often protection of the right of privacy involves the protection of property interests as well as the purely personal interests, but that fact is not much stressed by the courts. If they seek a property interest, it is rather as a technical basis for allowing protection to the personal interest than as a substantial economic interest to be protected on its own account." MCCLINTOCK, EQUITY 432 (2d ed. 1948).