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Criminal Procedure -- Free Transcripts for Indigents

E. Graham McGoogan Jr.

investigation on a showing of less than probable cause approaches the outer limit of a permissible governmental intrusion.

KENNETH R. KELLER

Criminal Procedure—Free Transcripts for Indigents

In *Britt v. North Carolina*[1] the United States Supreme Court, for only the second time[2] since the *Griffin v. Illinois*[3] decision in 1956, refused to grant an indigent state defendant a free transcript of a prior proceeding. Following the landmark *Griffin* case, which held that an indigent petitioner was entitled to a transcript of his trial for use on direct appeal, the Court had consistently expanded the right of indigents to free records to include use of a transcript in habeas corpus proceedings,[4] appeal of habeas corpus proceedings,[5] and *de novo* habeas corpus hearings.[6] The procedural relationship in *Britt* was entirely different from any of the prior transcript cases the Court had heard, for it was a request for a record of a mistrial for use during the second trial. The distinctions in the procedures involved could have served as a basis for the denial of the transcript, but the Court did not rest its decision on the basis of the difference in procedural posture. Instead the *Britt* fact pattern seems to have been forced into the *Griffin* line of cases in order to make clear a new policy of more limited application of *Griffin* in the future.

Britt had been indicted for first degree murder, and his first trial had ended in a hung jury. Before the start of the second trial the defendant's attorney had requested a free transcript of the mistrial, but no particular reason for the request was given other than the defendant's indigency. The trial court denied the motion, and in a second trial in the same town Britt was convicted. The North Carolina Court of Appeals affirmed the conviction, finding no error in the refusal to grant

[1]92 S. Ct. 431 (1971).

[2]The only other decision which upheld the denial of a transcript was Norvell v. Illinois, 373 U.S. 420 (1963), where the court reporter for the defendant's trial had died and no one could read his shorthand notes.

[3]351 U.S. 12 (1956).

[4]Wade v. Wilson, 396 U.S. 282 (1970).

[5]Long v. District Court, 385 U.S. 192 (1966) (per curiam).

[6]Gardner v. California, 393 U.S. 367 (1969).

the transcript.[7] The North Carolina Supreme Court refused to review the conviction,[8] but the United States Supreme Court granted a writ of certiorari.[9]

The Court stated that *Griffin* has established the principle that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal,"[10] and concluded that this principle applied to *Britt*.[11] However, the denial of Britt's request was no violation of the *Griffin* doctrine since

> [t]he trial of this case took place in a small town where, according to petitioner's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial. It appears that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request.[12]

Decided on the same day as *Britt* was another free transcript case, *Mayer v. City of Chicago*.[13] The defendant in *Mayer* was convicted on nonfelony charges of disorderly conduct and interfering with a policeman and was fined five hundred dollars. His request for a transcript for appeal was denied because Illinois provided records only for review of felony convictions. The Supreme Court held that felony-nonfelony distinctions were "unreasoned" and impermissible,[14] but instead of ordering a transcript for him it remanded the case to the Illinois Supreme Court to see if alternatives to a full record were available. *Mayer* is consistent with *Britt* in that the disposition was based on the availability of alternatives, but since the procedural relationship in *Mayer* was very close to that in *Griffin* and since no specific alternative was found in *Mayer*, the significant shift in policy by the Court is much less apparent in *Mayer* than in *Britt*.

To understand fully the implications of *Britt*, it is necessary to look

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[7]State v. Britt, 8 N.C. App. 262, 174 S.E.2d 69 (1970). The court of appeals based its decision on the fact that the appellant made no showing of any specific errors and they felt that a denial of this transcript was not a "deprivation of a basic essential of the defendant's defense." *Id.* at 265, 174 S.E.2d at 71. The United States Supreme Court opinion pointed out that a lack of particularized need is no longer a valid reason for refusing the transcript. 92 S. Ct. at 434.

[8]277 N.C. 114 (1970) (mem.).

[9]401 U.S. 973 (1971).

[10]92 S. Ct. at 433.

[11]*Id.*

[12]*Id.* at 434-35.

[13]92 S. Ct. 410 (1971).

[14]*Id.* at 415.

briefly at *Griffin* and its progeny. In Illinois prior to *Griffin*, appellate review was unobtainable without a stenographic transcript of the trial, a fact conceded by the attorneys for the state in *Griffin*.[15] The Court ruled that the denial to an indigent of access to the appellate process because of inability to purchase a transcript was a violation of due process since "[p]lainly the ability to pay costs in advance . . . could not be used as an excuse to deprive a defendant of a fair trial."[16] Moreover, the refusal to grant the defendant a free record violated equal protection: "There can be no equal justice where the kind of 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."[17] The Court qualified its holding with an important caveat: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example . . . bystanders' bills of exceptions . . . could be used in some cases."[18]

The important consideration to the Court in *Griffin* was that Illinois, by requiring presentation of a trial transcript to the appellate court as a prerequisite to review, was in effect denying indigents access to the appellate process entirely. The Court stated that a state was not constitutionally required to provide any appeal procedures, but where it does[19] the procedure could not be administered so as to discriminate against the poor.[20] The Court stressed the importance to a convicted defendant of this state right to appeal by noting the number of reversals resulting from the procedure.[21] The Court felt that a document potentially so valuable to the defendant must be open to all convicts even if additional state expenditures for transcripts and appellate tribunals are required.

Following *Griffin* was *Eskridge v. Washington State Board of Prison Terms and Paroles*[22] in which the Court reviewed the Washington appellate process, which required a trial transcript to be submitted as a precondition for review but which denied a free transcript to an indigent

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[15]351 U.S. at 16.
[16]*Id.* at 17-18.
[17]*Id.* at 19.
[18]*Id.* at 20.
[19]Every state now does provide some means of appellate review. *Id.* at 18.
[20]*Id.*
[21]*Id.* at 18-19.
[22]357 U.S. 214 (1958) (per curiam).

unless the trial judge determined that "justice would be promoted"[23] by furnishing it. They labeled free access to appellate review without financial discriminations a constitutional right guaranteed by the fourteenth amendment which Washington, like Illinois in *Griffin*, had denied the appellant.[24]

The Court made a major extension of the free transcript doctrine in *Draper v. Washington*[25] by holding that the Constitution requires the state to furnish an indigent a transcript of his trial for use on appeal even though appeal is available without it. The Court held that for a state indigent to get the adequate appeal to which he is entitled the State must furnish him a " 'record of sufficient completeness' for adequate consideration of the errors assigned."[26]

In *Long v. District Court*[27] the Court held that an indigent convict also has a right to sue for his liberty on equal terms with defendants able to purchase transcripts and that a state infringed upon this right when it refused to grant the request for a transcript of a habeas corpus hearing for use in appealing that post-conviction proceeding. As in *Draper*, the appellant would not have been denied access to the court without the transcript; the court simply could not have afforded him as complete a review without it.

The right to a transcript of a prior proceeding has been extended to other procedural areas in recent years. In *Roberts v. LaVallee*,[28] it was held a constitutional violation to deny a defendant a record of a preliminary hearing for use in preparing for his trial. A similar transgression was cited in *Gardner v. California*,[29] where a request for a copy of the minutes of a habeas corpus hearing for use at a *de novo* post-conviction proceeding was refused. *Williams v. Oklahoma City*[30] held that the right to a transcript for a direct appeal included appeals for petty offenses. In the last transcript case prior to *Britt, Wade v. Wilson*,[31] the Court implied that a trial transcript must be provided for use in preparing a habeas corpus petition, although it reserved decision on the question pending further lower court inquiries.

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[23] *Id.* at 215.
[24] *Id.* at 216.
[25] 372 U.S. 487 (1963).
[26] *Id.* at 497.
[27] 385 U.S. 192 (1966) (per curiam).
[28] 389 U.S. 40 (1967) (per curiam).
[29] 393 U.S. 367 (1969).
[30] 395 U.S. 458 (1969) (per curiam).
[31] 396 U.S. 282 (1970).

While the fact patterns for all the transcript cases prior to *Britt* differed, all possessed a common element: without the transcript the petitioners in each case would effectively be denied a full and complete judicial proceeding. On direct appeal from trial, for example, which was the procedure involved in *Griffin*, *Eskridge*, and *Draper*, the appellant is at a serious disadvantage, for he must overcome a presumption held by the appellate court that his trial was free of prejudicial error. The defendant certainly will desire and need a closer examination of the details of the first proceeding when the presumption at the second proceeding operates to his disadvantage, rather than when the state carries the burden of proof. In trying to raise and prove possible mistakes without a record, he faces an almost hopeless task. No one's memory is good enough to remember all that happened at a trial, especially when much of the proceeding is beyond the understanding of laymen.

The petitioner for a trial transcript for use in a habeas corpus proceeding faces a similar presumption that his imprisonment is just. To free himself he must prove specific trial errors. More time has usually elapsed between the trial and the post-conviction relief hearing than between the trial and the direct appeal, so there is an even greater likelihood that the petitioners will not be able without a record to remember and to present specific trial mistakes to the reviewing body.

The only two cases the Supreme Court has decided that did not involve use of a transcript at a second proceeding that was a direct review of a first proceeding were *Roberts v. LaVallee*,[32] the preliminary hearing case, and *Gardner v. California*,[33] the *de novo* post-conviction relief hearing. These two cases are the only ones that exhibit any parallels to the *Britt* procedural pattern, for the second trial in *Britt* was not a review of the first trial. A close look at the similarities between *Britt* and these two prior cases, however, reveals that the conduct and decisions of the first proceeding in both *Roberts* and *Gardner* were very important to the subsequent one, which is not the case in *Britt*. A preliminary hearing is not a criminal prosecution but simply an inquiry to determine whether a crime has been committed and whether there is a prima facie case against the accused.[34] No punishment is inflicted on the defendant as a result of the findings of the hearing. It is not, how-

[32]389 U.S. 40 (1967) (per curiam).

[33]393 U.S. 367 (1969).

[34]People v. Smith, 45 Misc. 2d 265, 256 N.Y.S.2d 422 (New Rochelle City Ct. 1965); People v. Ehrlich, 14 N.Y.S.2d 125 (Magis. Ct. 1939).

ever, a neutral proceeding which does not affect the nature of the trial, for the very purpose of the inquest is to acquaint the accused with the charges and evidence against him and to examine the weight and credibility of that evidence. Rulings concerning these matters are binding at trial. The need for a transcript of a preliminary hearing then, is roughly equivalent to the need for a trial transcript on appeal, especially where the defendant plans to object to rulings of the hearing judge.

In *Gardner* the indigent, having lost his first habeas corpus hearing, filed a similar petition in a higher state court for a proceeding *de novo*.[35] The Court treated the second hearing as an appeal process, however, stating that the "petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions . . . were erroneous."[36] Again the defendant in this situation is faced with trying to upset a prior proceeding at a second proceeding, and it is highly improbable that he can do so without the aid of some type of record. If it were a true *de novo* hearing where the results of the first hearing would be irrelevant at the second hearing, then it is unlikely the Court would find the need for a transcript of the first proceeding. It is doubtful, however, if there ever could be a second habeas corpus review which totally ignored the first review.

The procedural relationship involved in *Britt* is quite different from any of the prior cases, because a second trial following a mistrial is a new trial entirely. The defendant is still entitled to the presumption of innocence, and nothing that happened at the first trial is binding on the subsequent proceeding. He is placed in no poorer position as a result of the mistrial and, in fact, may be in a much better position since most of the prosecution's case will have been revealed to him. Of course, the entire defense of the accused may have been revealed to the state also, but the advantage to the defendant is nonetheless greater. The prosecution still has to carry the burden of proof beyond a reasonable doubt. As a result, often the prosecution will enter a *nolle prosequi* after a mistrial. At any rate, all of the transcript cases prior to *Britt* involved consideration by subsequent tribunals of questions raised in or by an earlier proceeding. In *Britt* the two trials were independent. For this reason, the defendant's interest in obtaining a transcript of his mistrial is so minimal that the federal courts would almost certainly uphold a

[35]393 U.S. at 368.

[36]*Id.* at 370.

state law or ruling that refused to provide such a transcript even if the defendant were able to pay for it. Although *Griffin* noted that there is no absolute due process right to an appeal,[37] it is questionable, despite this dictum in *Griffin*, whether the Court would countenance the complete and uniform denial of appellate review of a state's criminal proceedings, which undeniably would be the effect of a refusal to provide a transcript to a defendant for his use on appeal, even if the defendant were willing to pay for it.

Instead of deciding *Britt* on the basis of these procedural distinctions and basing the refusal to grant the transcript on the grounds that no interest of the defendant had been violated, the Court discussed the case entirely in terms of *Griffin* and premised the denial on the availability of the adequate alternative. Despite the marked dissimilarity between Britt's request and those of the indigents in prior Supreme Court cases, the Court seems to have chosen the case to reveal a new policy in the transcript area. Without overruling *Griffin*, the Court[38] apparently wanted to retard what it deemed to be the somewhat excessively liberal trend the Court had been following in granting records to almost anyone who asked, a burden that has become fairly material to the states.[39] The vehicle it used to impose the limitation was the concept of an alternative. Implicit in the finding of an adequate alternative is a recognition of the procedural differences.

It is doubtful that the Court was altogether unconscious of the fact that Britt's need for the document he requested was less demonstrable than that of prior defendants whose requests had been granted. Nevertheless, it is only by inference that one can interpret the decision as saying that the alternative is adequate because of the limited nature of the interest injured by refusing a transcript. Nowhere does the Court express any relation between the doubtful utility of a transcript to Britt and the adequacy of the alternative. Rather, the Court seems content to permit a more disturbing inference: that the alternative is found adequate because of its essential virtues. In other words, it is possible to interpret the case as authority for the proposition that where similar circumstances prevail—where the community is small and

[37]351 U.S. at 18.

[38]*Britt* was a five-to-two decision, Justices Powell and Rehnquist had not taken the oath at the time of the decision. Justice Marshall wrote the opinion, with Justices Douglas and Brennan dissenting.

[39]In North Carolina it is already approximately $75,000 annually. Brief for Respondent at 8, Britt v. North Carolina, 404 U.S. 226 (1971).

there is sufficient familiarity between defense counsel and the court reporter—the alternative would do service for any transcript, including a transcript to be used to prepare a case for direct appeal. This interpretation is reinforced by the fact that the decision was rendered in company with *Mayer*, which was remanded with instructions to determine whether there was an alternative.

After *Griffin* had established the principle that a state did not have to buy a transcript in every case if the courts could find equivalent alternatives,[40] *Eskridge v. Washington State Board of Prison Terms and Paroles*[41] and *Draper v. Washington*[42] reiterated the idea and enumerated a few more possible substitutes—a statement of facts agreed on by both sides or a full narrative statement prepared from the judge's minutes.[43] The court in *Long* possibly diminished the alternative principle by saying "[w]e need not consider a possible situation where a transcript cannot reasonably be made available . . . by the State."[44] Since *Long* was a *per curiam* opinion, arguably this statement should not be given as much credence and should be confined to the facts of the case. However, the policy of ignoring the possibility of an alternative was continued in *Roberts v. LaVallee*,[45] the preliminary hearing case, which did not even mention that possibility. The dissenting opinion revealed that the transcript of the grand jury proceeding was available, but the majority did not even note that fact. In *Gardner v. California*[46] no alternatives were suggested by the Court other than the memories of the defendant and his lawyer, and they were held insufficient. One of the most recent cases, *Wade v. Wilson*,[47] similarly mentioned no alternatives to a transcript.

Britt and *Mayer* then seem to be major reversals of the trend the Court had been following. These two cases not only gave lip service to the idea of alternatives, but actually applied the doctrine. Even in the pre-*Long* decisions which had suggested alternatives,[48] none were ever found acceptable. It is not possible to distinguish the finding of the

[40]351 U.S. at 16.
[41]357 U.S. 214 (1958) (per curiam).
[42]372 U.S. 487 (1963).
[43]372 U.S. at 495; 357 U.S. at 215.
[44]385 U.S. at 195.
[45]389 U.S. 40 (1967).
[46]393 U.S. 367 (1969).
[47]396 U.S. 282 (1970).
[48]Draper v. Washington, 372 U.S. 487 (1963); Eskridge v. State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958) (per curiam); Griffin v. Illinois, 351 U.S. 12 (1956).

alternative in *Britt* from the failure to find one in *Long, Gardner*, and *Wade* on the basis that the attorneys in *Britt* pushed the concept: no substitute was mentioned in either of the briefs submitted in the *Britt* case.[49]

The very tenuous nature of the alternative actually found enforces the idea that the Court was using *Britt* to reveal a new policy. Two federal courts of appeals had held that allowing the court reporter to read to the defense counsel during the second trial any pertinent portions of the minutes of the first trial was a sufficient alternative to a full transcript.[50] The courts, however, began to realize that the transcript was valuable not only for impeachment, but also as a discovery instrument. Consequently, the Second Circuit, in *United States ex rel. Wilson v. McMann*,[51] rejected as an adequate alternative the reference to the minutes of mistrial during the second trial, calling it "too little, too late."[52] The court in *Britt* distinguished its holding from *Wilson* by stating that the defense attorney could have asked the court reporter to read the minutes prior to the trial, not during.[53] After *Britt*, courts may be more likely to find adequate alternatives in all transcript cases, including those in which the documents are requested in anticipation of direct appeals and habeas corpus petitions. If the adequacy of the substitute in *Britt* was a result of the procedural relationship involved, the Court was certainly not at pains to say so. For this reason the cases may presage a significant change in policy by the Court.

The nature of the decision in *Britt* has left open some questions. The practical availability of this alternative is very questionable. Court reporters' offices, especially in small towns where the opinion implies that this alternative will be most relevant, do not have the staff to record every case and read minutes of prior trials to any attorneys who "informally ask." Problems will arise as to how large the district must be before it is no longer a valid substitute or how close the relationships between the reporter and lawyer must be to qualify. Certainly discriminations between the reporter's friends and those whom he does not know raise equal protection questions. How these questions will be answered

[49]Brief for Petitioner, Britt v. North Carolina, 404 U.S. 226 (1971); Brief for Respondent, Britt v. North Carolina, 404 U.S. 226 (1971).

[50]Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), *cert. denied*, 383 U.S. 950 (1966); Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964).

[51]408 F.2d 896 (2d Cir. 1969).

[52]*Id.* at 897.

[53]92 S. Ct. at 434-35.

and what the full impact of *Britt* and *Mayer* will be, of course, are still only matters of speculation. Analysis of the decisions does indicate, however, that indigent defendants are likely to face more opposition than they have faced in the past to their requests for transcripts for whatever purpose the transcripts are desired.

E. GRAHAM MCGOOGAN, JR.

Criminal Procedure—Restricting Right to Counsel at Lineups

In *Kirby v. Illinois*,[1] the United States Supreme Court confronted the problem of whether identification evidence is admissible when the accused was exhibited to identifying witnesses in the absence of counsel before he had been indicted or otherwise formally charged with a criminal offense. A sharply divided Court[2] refused to extend the sixth amendment guarantee of counsel[3] to preindictment identification confrontations. Thus *Kirby* considerably restricts the role of counsel in protection of the pretrial rights of the accused.

A brief examination of the history of the right to counsel clause is helpful in analyzing *Kirby*. Beginning with *Powell v. Alabama*,[4] the Supreme Court construed the sixth amendment guarantee to apply to "critical stages" of proceedings against an accused.[5] In *Powell*, the Court recognizes that the period from arraignment to trial was "perhaps the most critical period of the proceedings."[6] Furthermore,in *Hamilton*

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[1]92 S. Ct. 1877 (1972).

[2]Justice Stewart, joined by Justices Blackmun, Rehnquist, and Chief Justice Burger, announced the judgment of the Court. *Id.* at 1879. Chief Justice Burger filed a concurring statement on the basis that right to counsel attaches as soon as the accused is formally indicted. *Id.* at 1883. Justice Powell filed a statement concurring in the result as he would not extend the *Wade-Gilbert per se* exclusionary rule. *Id.* Justice White dissented on the basis that United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), compelled a reversal. *Id.* at 1980. Justice Brennan, joined by Justices Marshall and Douglas also dissented on the basis of *Wade* and *Gilbert*. *Id.* at 1883.

[3]U.S. CONST. amend. VI. The guarantee states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[4]287 U.S. 45, 57 (1932).

[5][T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

United States v. Wade, 388 U.S. 218, 224 (1967).

[6]287 U.S. at 57.