1972

The Indigent's Right to a Transcript of Record

Larry Yackle

COMMENTS

THE INDIGENT'S RIGHT TO A TRANSCRIPT OF RECORD

> "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."[1]

There is no more fascinating subject in the field of federal constitutional law than the relationship between due process and equal protection, concepts brought together in the fourteenth amendment.[2] Governmental action that is fundamentally unfair and a denial of due process may also involve discriminatory treatment and a denial of equal protection.[3] Accordingly, in a number of cases the distinction between the two concepts has been blurred. In *Douglas v. California,*[4] the Supreme Court held that on first appeal counsel must be furnished to indigents at state expense because the failure to provide professional representation is both fundamentally unfair and an invidious discrimination on the basis of wealth. Similarly, *Griffin v. Illinois*[5] held that when the "adequate and effective" review of a criminal conviction depends upon the availability of a written trial record, an indigent is entitled to a free transcript. These two cases, taken together, state what has been called the *Griffin-Douglas* equality principle,[6] which is based upon a blend of due process and equal protection considerations.

Importantly, the equality principle does not guarantee indigents the *same* treatment afforded affluent defendants.[7] The indigent who desires to appeal a criminal conviction is not entitled to demand the services of the most successful attorney in the district. He has a right to be represented by a member of the bar, but only if the court-appointed attorney is so incompetent that his assistance is ineffective can the indigent defendant object. Nor is the indigent automatically entitled to a free verbatim transcript of the trial or other proceeding that he desires to challenge. Thus, paupers need not be afforded the *same* review offered to affluent defendants; it is only necessary that they be given equivalent and fundamentally fair treatment.[8] The Court has consistently

[1] Mr. Justice Douglas writing for the Court in Harper v. Virginia Board of Elections, 383 U.S. 663, 669 (1966).

[2] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[3] *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163 (1964).

[4] 372 U.S. 353 (1963).

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

[6] L. HALL, Y. KAMISAR, W. R. LAFAVE & J. H. ISRAEL, MODERN CRIMINAL PROCEDURE 84 (3d ed. 1969).

[7] Comment, *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review,* 55 MICH. L. REV. 413, 418 (1957).

[8] Professor Kamisar has written: "The root idea of the *Griffin* and *Douglas* cases may not be that every inequality of any consequence in the criminal process is taboo, but only that due process incorporates a basic notion of equality. It may be that the *Griffin-Douglas* principle does not come into play unless and until 'discriminations' based on wealth work an inequality so significant in the criminal process as

held that "adequate and effective" review does not always require a verbatim transcript and that an indigent need only be furnished a record that will allow him access to the courts.[9] The notion that, within the meaning of the equal protection clause, an indigent may be afforded treatment with regard to transcripts which is equal though not identical to that afforded nonindigents is at the core of *Griffin* and its progeny. That proposition, it will be seen, is open to criticism.

This comment begins with the Supreme Court's most recent decision in point and traces the line of "transcript cases" from *Griffin* to the present, focusing upon the question whether these cases actually satisfy the demands of both due process and equal protection. The conclusion reached is that the poor still suffer from discriminatory treatment. In order to satisfy the equal protection clause, the Court should require the production of free verbatim transcripts without a showing of need in all cases where an indigent seeks to challenge his criminal conviction.[10]

I. THE LATEST STATEMENT

The most recent Supreme Court case dealing with the duty to furnish transcripts to indigents is *Mayer v. City of Chicago*.[11] The defendant was convicted of disorderly conduct and interference with a police officer and, pursuant to Illinois law,[12] a verbatim record of his jury trial was kept. The maximum penalty for each offense was a $500 fine, but the defendant was sentenced to pay only $250 for each of his two convictions. Mayer, desiring to exercise his right of appeal guaranteed by the Illinois constitution,[13] alleged

---

to amount to 'fundamental unfairness.'" Kamisar & Choper, *The Right to Counsel in Minnesota*, 48 MINN. L. REV. 1, 10 (1963). If that interpretation is correct, it is unclear why the equal protection clause was mentioned at all. The cases can stand solely upon the due process ground as Mr. Justice Harlan suggested. Griffin v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting); Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting); *cf.* Boddie v. Connecticut, 401 U.S. 371 (1971). The Court's rejection of that view and its reliance upon equal protection theory indicate that something more than fairness alone is required.

[9] There have been moments of wavering. *See e.g.*, Long v. District Court of Iowa, 385 U.S. 192 (1966); Roberts v. LaVallee, 389 U.S. 40 (1967); Britt v. North Carolina, 404 U.S. 226, 228 (1971) (dictum). These cases are discussed *infra* as lending support to the view that a new rule regarding transcripts should be adopted.

[10] If such a rule were adopted it would almost certainly affect the indigent's right to counsel. *Douglas* concerned only first appeal cases and as yet no general constitutional right to counsel has been recognized in discretionary appeals or in collateral proceedings. *See* Kamisar & Choper, *supra*, n.8. Counsel may be furnished in such proceedings by statute. *E.g.*, 28 U.S.C. § 1915 (1970); Doherty v. United States, 404 U.S. 28 (1971). The Supreme Court has recently, however, shown a willingness to extend the constitutional right to counsel. *E.g.*, Argersinger v. Hamlin, 92 S.Ct. 2006 (1972). Further extensions on due process and equal protection grounds may be expected. For example, the issue of an indigent's right to counsel at a parole revocation hearing was not reached in Morrissey v. Brewer, 92 S.Ct. 2593, 2604 (1972), but the Court clearly left that door open. 92 S.Ct. at 2605 (Brennan, J., concurring).

In practical experience the distinction between indigent and nonindigent defendants is, of course, not always clear. The discussion here assumes that, if a defendant is determined not to be an indigent, he will be financially able to purchase a transcript. No attempt is made to deal with the marginal case where the defendant *can* afford to pay for his own defense but must stretch his meager resources in order to do so. For a general discussion in point, *see* OAKS & LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT: A STUDY OF CHICAGO AND COOK COUNTY 150-51 (1968).

[11] 404 U.S. 189 (1971).

[12] ILL. REV. STAT., ch. 37, §§ 651 *et seq.* (1969).

[13] ILL. CONST. art. 6, §§ 5, 7 (1870).

indigency and petitioned the trial court for a transcript prepared at state expense. He contended that he needed a full record of the events at trial to support his assigned errors involving prosecutorial misconduct and insufficient evidence. Alternatives to a transcript, such as an agreed statement of facts, were inadequate though available in Illinois.[14] The trial court found Mayer to be indigent but denied his request. The court cited an Illinois statute which made verbatim transcripts available only in felony cases.[15] Mayer then moved the Illinois Supreme Court to order the production of a free transcript. The motion was denied, and Mayer sought review in the Supreme Court of the United States[16] which reversed, holding that the refusal to supply the requested transcript violated the defendant's rights under the due process and equal protection clauses of the fourteenth amendment.

The majority opinion by Mr. Justice Brennan reaffirmed the holdings of prior cases: A state must provide an indigent with a trial transcript or at least with a record of sufficient completeness to allow him to obtain adequate appellate review of his conviction. Alternatives, such as those provided in Illinois, are sufficient only if effective review does not require a verbatim record. When the appellant shows a colorable need for the full record, the state has the burden to show that only a part of the transcript or some substitute would be adequate. The Court then held that the Illinois rule allowing free transcripts only in felony cases made an "unreasoned distinction"[17] in violation of the fourteenth amendment. It was considered irrelevant that the defendant neither was, nor could have been, subject to imprisonment for the nonfelony offenses charged.

The significance of *Mayer* lies more in what the Supreme Court failed to do than in the little new ground which was broken. States that provide a right of appellate review in criminal cases had since 1956 been required to furnish indigent defendants some form of trial record.[18] It had previously been recognized that whenever a colorable need for a full verbatim transcript is shown, the government bears the burden of proving otherwise.[19] And it was predictable on the basis of earlier cases that the Court would reject any rule that based the right to a transcript on the distinction between felonies and misdemeanors or that denied that right in cases where the defendant is not exposed to imprisonment.[20] Importantly, however, the Court failed to take advantage of the opportunity this case presented to go further by requiring the production of free verbatim transcripts without a showing of even colorable need whenever an indigent seeks to challenge his criminal conviction.[21]

[14] ILL. REV. STAT., ch. 110A, § 323(c) and (d) (1969).
[15] ILL. REV. STAT., ch. 110A, § 607(b) (1969).
[16] *Cert. granted*, 401 U.S. 906 (1971).
[17] *See* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).
[18] Griffin v. Illinois, 351 U.S. 12 (1956).
[19] Gardner v. California, 393 U.S. 367, 370 (1969); Eskridge v. Washington Prison Board, 357 U.S. 214, 215 (1958).
[20] Groppi v. Wisconsin, 400 U.S. 505 (1971); Williams v. Oklahoma City, 395 U.S. 458, 459 (1969).
[21] In Britt v. North Carolina, 404 U.S. 226, 228 (1971), decided with *Mayer*, the Court expressed doubt as to the constitutional validity of requiring an indigent to make a showing of need before the

An analysis of prior cases is essential to an understanding of the issues presented but left unresolved in *Mayer*.

II. DIRECT APPEALS IN STATE CASES

Beginning with the landmark decision in *Griffin v. Illinois*,[22] the United States Supreme Court has consistently held that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[23] Griffin and Crenshaw had been tried together and convicted of armed robbery. Then, as now, Illinois law provided a right of direct appeal in criminal cases.[24] However, trial transcripts were supplied free of charge to indigent defendants only in capital cases.[25] Nevertheless, Griffin and Crenshaw moved the trial court for a full verbatim transcript of all proceedings. They argued that they were unable to pay for a transcript and that they needed one for their appeal. In order to obtain review of assigned nonconstitutional trial errors, a bill of exceptions that contained the portions of the transcript showing the alleged errors had to be filed with the appellate court.[26] Persons who could not afford transcripts were provided a free "mandatory record" which included only the indictment, arraignment, plea, verdict and sentence. For indigents, therefore, review was limited to errors appearing on the face of the mandatory record; trial errors could not be considered.[27]

The trial court denied the motion for transcript without a hearing. A motion was then filed under the Illinois Post-Conviction Hearing Act,[28] alleging that failure to provide the transcript violated the equal protection

---

transcript of a mistrial must be provided at state expense. A majority of the Court speaking through Mr. Justice Marshall said: "We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case." The Court then cited Long v. District Court of Iowa, 385 U.S. 192 (1966) and Roberts v. LaVallee, 389 U.S. 40 (1967) as examples of cases in which the Court had "simply found it unnecessary to discuss the question." The Court ruled that the *Britt* transcript had been properly denied because the mistrial had ended only a month earlier. With the proceedings on mistrial fresh in counsel's mind and with the court reporter available to read prior testimony, a transcript was deemed unnecessary to petitioner's defense.

Mr. Justice Douglas, in dissent joined by Mr. Justice Brennan who wrote the opinion in *Mayer* for a unanimous Court, cited *Roberts* and Justice Goldberg's concurring opinion in Hardy v. United States, 375 U.S. 277 (1964) in support of the view that a full transcript should have been provided without a showing of need. *Britt* was distinguished and the transcript of a mistrial granted in People v. Glass, 197 N.W.2d 140 (Mich. App. 1972). *But see* State v. Kelley, 209 Kan. 699, 498 P.2d 87 (1972).

If a showing of need becomes unnecessary for indigents requesting transcripts, it is difficult to imagine how substitutes for verbatim records will be constitutionally adequate. The sufficiency of a substitute has always been judged according to the indigent's predicted needs in presenting his arguments. If need is to be presumed, the conclusion which must be reached is that verbatim transcripts must be furnished in all cases. These questions will be more fully explored *infra*.

[22] 351 U.S. 12 (1956).

[23] *Id.* at 19 (opinion of Mr. Justice Black).

[24] However, the federal constitution does not require the states to provide appellate review. McKane v. Durston, 153 U.S. 684 (1893).

[25] ILL. REV. STAT., ch. 38, § 769(a) (1955).

[26] ILL. REV. STAT., ch. 110, § 259.70(a) (1953). Constitutional errors were reviewable in a separate proceeding pursuant to the Illinois Post-Conviction Hearing Act, ILL. REV. STAT., ch. 38, §§ 826-32 (1955).

[27] Griffin v. Illinois, 351 U.S. 12, 13 n.2 (1956) (opinion of Mr. Justice Black).

[28] ILL. REV. STAT., ch. 38, §§ 826-32 (1955).

and due process clauses of the fourteenth amendment. That motion was also denied, and the Illinois Supreme Court affirmed. The case was reversed and remanded by the United States Supreme Court, although a majority of the Justices could not agree in any single opinion. Mr. Justice Black wrote the main opinion in which Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Clark concurred. Mr. Justice Frankfurter's concurring opinion provided the majority of five necessary to remand the case. Mr. Justice Burton, Mr. Justice Minton, Mr. Justice Reed and Mr. Justice Harlan dissented together, with Mr. Justice Harlan adding a separate dissenting opinion.

Mr. Justice Black concluded that the Illinois procedure violated both the equal protection and due process clauses of the fourteenth amendment. However, it has been suggested that the due process considerations were more basic to Justice Black's analysis.[29] On the other hand, Justice Frankfurter apparently considered the equal protection argument dominant.[30] Justice Harlan, in a cogent dissent, found the equal protection ground of the Black opinion "simply an unarticulated conclusion" that the Illinois procedure violated that fundamental fairness traditionally required by due process.[31] Therefore, he limited his discussion of the merits to the due process considerations, and, finding no arbitrary or capricious state action, dissented.

Justice Harlan's dissent is the most relevant of the *Griffin* opinions for purposes of the present discussion because of his belief that the merits should not have been reached. He pointed out that the record was unclear on at least one major point. Did Griffin and Crenshaw contend they "needed" a transcript because, under Illinois law, one must be filed with the appeal? If not, did they contend that as a practical matter they could not adequately prepare their case for appeal without a transcript? If the latter, Justice Harlan would have required a showing of need based on more than indigence alone.[32] Justice Black merely relied upon the concession by Illinois that "it is sometimes impossible to prepare such bills of exceptions or reports [that must be filed with the writ of error] without a stenographic transcript of the trial proceedings."[33] Justice Black assumed for purposes of the decision that the defendants were denied appellate review of possible nonconstitutional errors solely because they could not pay for a transcript.

Griffin clearly held that, if appellate review is made available to affluent defendants, it must also be provided to indigents. In Illinois, where a bill of exceptions must be filed with an appeal and where a transcript is necessary to the preparation of such a bill, transcripts must be supplied without cost to indigents. Justice Black, however, appears to have contradicted himself when he stated that poor people must be afforded "as adequate appellate review"

[29] Comment, *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review*, 55 MICH. L. REV. 413, 417 (1957).
[30] *Id.*
[31] Griffin v. Illinois, 351 U.S. 12, 36 (1956) (Harlan, J., dissenting).
[32] *Id.* at 32.
[33] *Id.* at 13-14 (opinion of Mr. Justice Black).

as nonindigents,[34] but did not hold ". . . that Illinois must purchase a stenographer's transcript in every case where a defendant cannot afford to buy it."[35]

The *Griffin* case must stand for the proposition that the fourteenth amendment requires a state to supply a trial record of some kind to indigent appellants. Perhaps there is a continuum stretching from no record at all to a verbatim transcript of all proceedings, with the minimum constitutional requirement lying somewhere between the two extremes. The Illinois "mandatory record" which allowed review of only the most obvious matters of form, did not satisfy the minimum. According to *Griffin,* certain "bystanders' bills of exceptions or other methods of reporting trial proceedings,"[36] if available, may be found to be between the minimum as defined by *Griffin* and the verbatim transcript extreme. The position of a reporting method on the continuum is determined by its sufficiency to provide adequate appellate review. But what is adequacy? Is an indigent's review adequate simply because he has access to the appellate court, or must he be afforded an equal opportunity to present the arguments available to him, as reflected in the trial record? If the latter is the case, can the indigent's review really be *equal* if he is denied the identical tools with which to work, that is, if he is denied the verbatim transcript his affluent cellmate can purchase? In Illinois at the time of *Griffin* a full transcript was required to prepare the bill of exceptions demanded by statute for appeal.[37] Therefore, under the particular facts of the case, the fourteenth amendment required that indigents be provided no less than a verbatim transcript. Still, the Court's refusal to hold that verbatim transcripts must always be supplied left a nagging question. In a state with no statutory requirement that a bill of exceptions be filed, what would be considered in determining whether an indigent had been afforded adequate review by some alternative to a verbatim transcript? One possibility was that the indigent defendant would first state his grounds for appeal. Then a record adequate for review of those grounds would be required.

Cases subsequent to *Griffin* shed some light on this question. In *Eskridge v. Washington Prison Board,*[38] the Supreme Court, in a *per curiam* opinion,

---

[34] *Id.* at 19.

"The case, then, lays down the proposition that indigents must be afforded *as* 'adequate and effective appellate review' as other criminal defendants; it does not prescribe the *same* review procedure." Comment, *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review,* 55 MICH. L. REV. 413, 418 (1957).

[35] 351 U.S. at 20 (opinion of Mr. Justice Black). At the time, two reasonable interpretations might have been given this sentence. It could have meant only that some cases do not require a verbatim transcript but can be adequately reviewed with the use of some substitute. Alternatively, Justice Black might have been hinting at a distinction to be drawn between serious and petty offenses. Convictions in serious cases would require verbatim transcripts while convictions of petty offenses would not. Comment, *Griffin v. Illinois: The Right to "Adequate and Effective" Appellate Review,* 55 MICH. L. REV. 413, 419 (1957). Subsequent cases have established that the former interpretation was correct. *See* Williams v. Oklahoma City, 395 U.S. 458 (1969).

[36] 351 U.S. at 20 (opinion of Mr. Justice Black).

[37] In the course of oral argument counsel for Illinois stated: "There isn't any way that an Illinois convicted person in a noncapital case can obtain a bill of exceptions without paying for it." 351 U.S. at 14 n.4 (opinion of Mr. Justice Black). It was also admitted that no alternatives were then available to indigents in Illinois.

[38] 357 U.S. 214 (1958).

held Washington's procedure for indigent appeals unconstitutional.[39] State law expressly required a transcript to be filed with an appeal, but a free transcript could be provided only if the trial court found that the appeal would promote justice. Though the appellant alleged that "substantial errors" had occurred at his trial, he had, in the opinion of the trial judge, received a trial free of prejudicial error. On oral argument the Prison Board maintained that the appellant might have used notes kept by someone other than the official court reporter. However, the state courts had apparently assumed that a transcript was necessary, and the case was decided by the Supreme Court on that basis. Following *Eskridge,* the Supreme Court of Washington fashioned a new set of rules governing transcripts prepared at state expense.[40] In his request for a free transcript, an indigent defendant was required by these rules to state the errors that he believed had been committed. The state could then show that a portion of the transcript, or some alternative such as a narrative statement, would permit adequate review. After any necessary hearing, the trial judge was to make findings of fact as to the defendant's indigency and the type of record needed for appeal. If he found that an alternative to a verbatim transcript would be adequate, his order could be limited to compelling the state to provide that alternative. Importantly, if he found the defendant's arguments frivolous, he could decline to require a transcript of any kind so long as he supplied the appellate court with a statement of reasons for his action.[41]

In *Draper v. Washington,*[42] the new Washington procedure came up for review. There the trial judge found the defendants' allegations of error to be frivolous and denied their motions for a free transcript. His order made findings of fact and stated his reasons for finding the defendants' arguments frivolous. However, it contained no portion of the verbatim transcript nor any narrative statement of the evidence. The Supreme Court of Washington, on the basis of the trial court's order alone, quashed the defendants' writ of certiorari. In a five to four decision,[43] the United States Supreme Court reversed. The trial court's order and prosecutor's affidavit were treated as an attempt to provide a narrative statement as a substitute for a verbatim transcript. Speaking for the majority Mr. Justice Goldberg found that the order was not a "record of sufficient completeness"[44] to permit adequate appellate

---

[39] The facts of the case showed that the petitioner in *Eskridge* had been denied a requested transcript in 1935, twenty years before *Griffin* was decided. The Supreme Court's action made clear that *Griffin* would be applied retrospectively. Mr. Justice Whittaker joined Mr. Justice Harlan in dissent on the ground that *Griffin* should not apply to the earlier conviction.

[40] Two weeks after deciding *Eskridge,* the Supreme Court remanded another case, Woods v. Rhay, 357 U.S. 575 (1958), to the Washington Supreme Court for reconsideration. In a new opinion, Woods v. Rhay, 54 Wash. 2d 36, 338 P.2d 332 (1959), new rules governing the availability of free transcripts were promulgated.

[41] Woods v. Rhay, 54 Wash. 2d 36, 44-45, 338 P.2d 332, 337 (1959).

[42] 372 U.S. 487 (1963).

[43] The dissenters were Mr. Justice White, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart. They believed the trial court's order to be adequate.

[44] This language was taken from Coppedge v. United States, 369 U.S. 438 (1962), a case involving federal appeals *in forma pauperis.*

review. Moreover, the fact recitals in the prosecutor's affidavit were in "the most summary form, were prepared by an advocate seeking denial of a motion for a free transcript, and were contested by petitioners and their counsel at the hearing on the motion."[45]

Like *Griffin* and *Eskridge,* the *Draper* decision did not require a verbatim record in all cases. Justice Goldberg suggested no fewer than four alternatives which would suffice[46] if they provided an adequate record for review. The Supreme Court clearly contemplated that an indigent appellant must first state his arguments before a decision on the type of record required is made. An indigent is entitled to "means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant *with similar contentions.*"[47] The Court rejected the contention that an indigent has an aboslute constitutional right to a verbatim transcript to aid him in preparing his arguments on appeal. An indigent is not entitled to a transcript in order to search it for error. Instead, he must first allege errors and then be satisfied with a "record of sufficient completeness" to afford adequate review of those errors.

The Court has not abandoned the *Draper* position, although it has consistently held that financial requirements that impede an indigent's access to appellate review violate due process and equal protection. *Burns v. Ohio*[48] held that a state may not, by requiring a docket fee, deny an indigent the opportunity to invoke an appellate court's discretionary review. Nor may *counsel's* exercise of discretion prevent review of an indigent's trial. The Court so held in *Anders v. California,*[49] where appointed counsel had declined to prosecute an appeal he believed to be without merit. The Supreme Court, in reversing, set down guidelines to be followed by state courts. Before withdrawing from a case, appointed counsel must supply the defendant with a brief of anything in the record supporting the contentions raised. The right to a transcript of a preliminary hearing was sustained in *Roberts v. LaVallee,*[50] in which the Court stated: "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate

[45] Draper v. Washington, 372 U.S. 487, 497 (1963).

[46] They were: a statement of facts agreed to by both sides, a narrative statement based on the trial court's minutes, a statement based on the reporter's untranscribed notes and a bystander's bill of exceptions.

[47] Draper v. Washington, 372 U.S. 487, 496 (1963) (emphasis supplied).

[48] 360 U.S. 252 (1959), decided before *Draper.*

[49] 386 U.S. 738 (1967).

[50] 389 U.S. 40 (1967). In dissent, Mr. Justice Harlan pointed out that Roberts had not stated the use to which he expected the hearing transcript to be put. Because the cases cited by the majority did not declare an unconditional right to a transcript, Justice Harlan would have required a showing of need. Roberts v. LaVallee, 389 U.S. 40, 43-44 (1967) (Harlan, J., dissenting). The *per curiam* opinion in the case was brief and did not mention any necessary showing of need. However, in view of other cases decided prior to *Roberts* and since, it is clear that the Court did not intend to set a new standard, whatever the merits of such a course. *See* Morgan v. Graham, 497 P.2d 464 (Okla. Crim. 1972); Commonwealth v. Britt, ... Mass. ...., 285 N.E.2d 780 (1972). Preliminary hearing transcripts are now available in the federal system upon motion by indigent defendants. FED. R. CRIM. P. 5.1(2).

Kansas law provides for a preliminary hearing transcript to be prepared and furnished free to an indigent defendant. KAN. STAT. ANN. § 22-2904 (Supp. 1971). *But see* State v. Serviora, 206 Kan. 29, 476 P.2d 236 (1970) on the question of an absolute right to such a transcript. *See also* State v. Kelley, 209 Kan. 699, 498 P.2d 87 (1972) interpreting § 22-2904 and relying on the trial court's determination that a transcript was unnecessary. *See generally* KAN. STAT. ANN. § 22-4509 (Supp. 1971).

legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."[51]

There is a significant gap between this constitutional principle and the rule that requires indigents to state their grounds for appeal before a transcript, limited to the proceedings involving those grounds, is provided. An affluent defendant, not trusting his memory or that of counsel to recall each instance of possible error in lengthy and complex legal proceedings, will always purchase a verbatim trial transcript to be gone over time and time again to garner every error that might be argued on appeal. Nor will he limit his search to the objections of record. Instead, he will comb the transcript for errors possibly overlooked during trial in the hope of finding a basis for appellate relief. Various rules of appellate procedure allow errors to be considered on appeal although no objection was raised at trial.[52] Only then, after an exhaustive search of the record, will the affluent defendant prepare his appellate brief. In contrast, the indigent is left at the outset to his own resources. From his memory or notes of trial must come specific assignments of error. Even if he is able to state his arguments well enough to obtain portions of the transcript, those parts of the verbatim record not concerned with his stated contentions will continue to be denied. If there are errors in the omitted portions, the appellate court will never review them.

To some extent, the Supreme Court came to grips with this problem in *Hardy v. United States,*[53] a case that dealt with the federal judicial system. It was held that, in the federal courts, an attorney newly appointed on appeal was entitled to a full verbatim transcript of prior proceedings. Otherwise, counsel who did not represent an indigent defendant at trial could not discharge his duty to bring to the appellate court's attention every error that might support reversal. Under a federal statute,[54] any appointed attorney was entitled to those portions of the trial transcript relevant to assigned errors. However, the Court held that, in the case of newly appointed counsel, a full transcript was necessary to search out "plain errors or defects affecting substantial rights" which would be cognizable on appeal even though no objection to them had been raised at trial.[55] In order to give meaning to the federal statutes and to Federal Rule 52(b), the Court reasoned that a verbatim transcript must be furnished an attorney who was not present at trial.

The majority opinion was narrow and couched in terms of the applicable federal statutes. However, Mr. Justice Goldberg wrote a concurring opinion in which he urged that "in the interests of justice this Court should require, under our supervisory power, that full transcripts be provided, without limitation, in all federal cases to defendants who cannot afford to purchase them,

[51] Roberts v. LaVallee, 389 U.S. 40, 42 (1967).
[52] *E.g.*, FED. R. CRIM. P. 52(b).
[53] 375 U.S. 277 (1964).
[54] 28 U.S.C. §§ 1915, 753(f) (1970). *See also* Coppedge v. United States, 369 U.S. 438 (1962).
[55] FED. R. CRIM. P. 52(b).

whenever they seek to prosecute an appeal."[56] Describing the trial transcript as a "basic and fundamental tool of the [legal] profession,"[57] Justice Goldberg argued that full transcripts must be provided even if the same attorney who represented the indigent at trial is appointed on appeal. He examined the much-feared costs of such a rule, but concluded that "a system of free transcripts will, in the long run, be less expensive than the present system with its multiple proceedings [involving requests for transcripts] and frequent delays."[58] Three other Justices agreed that any financial burden created would be outweighed by the elimination of the delays and other burdens now placed upon indigent appellants.[59]

The Supreme Court has not applied the *Hardy* rule, which was admittedly limited to federal prosecutions, to the states.[60] Although it is more clear in some cases[61] than in others,[62] the law apparently is that there is no unlimited right to a verbatim trial transcript. By approving the use of alternatives other than full transcripts the Court has implicitly required an indigent to compose a list of possible trial errors before seeking a record of sufficient completeness to allow review of those alleged errors.[63] *Mayer* did not retreat from that position. The Court there expressly held that a full verbatim record must be provided only if the indigent's grounds for appeal show a colorable need for a complete transcript and if the government is unable to show otherwise.[64]

III. STATE COLLATERAL PROCEEDINGS

The constitutional principle of *Griffin* has been extended to direct appeals from collateral proceedings.[65] The extension first occurred in *Smith v. Ben-*

---

[56] Hardy v. United States, 375 U.S. 277, 282 (1964) (Goldberg, J., concurring).

[57] *Id.* at 288.

[58] *Id.* at 292.

[59] *Id.* at 292-93.

[60] Noting that Hawaii has a statute substantially similar to 28 U.S.C. § 1915 and a rule of procedure similar to FED. R. CRIM. P. 52(b), the Hawaii Supreme Court has adopted the *Hardy* rule. *See* State v. Pence, 488 P.2d 1177 (Haw. 1971).

[61] *E.g.*, Draper v. Washington, 372 U.S. 487 (1963).

[62] *See* discussion of Mr. Justice Harlan's dissent in Roberts v. LaVallee, *supra* note 50.

[63] The weakness of this logic was pointed out by Mr. Justice Goldberg, concurring in *Hardy*.

> As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy. . . . No responsible retained lawyer who represents a defendant at trial will rely exclusively on his memory (even as supplemented by trial notes) in composing a list of possible trial errors which delimit his appeal. Nor should this be required of an appointed lawyer.

Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring).

[64] Mayer v. City of Chicago, 404 U.S. 189, 195 (1971). And, of course, the states are following this rule. *See e.g.*, Colbert v. Municipal Court, ... Cal. App. 2d ...., 101 Cal. Rptr. 283 (1972).

[65] The Court said in Lane v. Brown, 372 U.S. 477, 484-85 (1963):

> The present case falls clearly within the area staked out by the Court's decisions in *Griffin, Burns, Smith,* and *Eskridge*. To be sure, this case does not involve, as did *Griffin,* a direct appeal from a criminal conviction, but *Smith* makes clear that the *Griffin* principle applies to state collateral proceedings, and *Burns* leaves no doubt that the principle applies even though the state has already provided one review on the merits.

Although there has been some discussion of a distinction between criminal and civil cases for purposes of applying the "equality principle," it is now generally agreed that the rule developed in the *Griffin-Douglas* criminal setting applies as well to collateral proceedings, even though they are civil in nature.

nett,[66] in which an indigent was precluded from petitioning for state habeas corpus relief because he could not pay the statutory filing fee. While it did not hold that the state must provide a postconviction remedy for convicted prisoners,[67] the Supreme Court did rule that any such remedy once made available must not be administered so as to "interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty."[68] The decision was grounded upon a fourteenth amendment equal protection rationale. In *Lane v. Brown,*[69] a state prisoner had petitioned a state trial court for a writ of *coram nobis.* After a hearing at which the petitioner was represented by the public defender, the writ was denied. The public defender believed that an appeal was useless and refused to order a transcript of the hearing to be prepared at state expense.[70] Because Indiana Supreme Court rules provided that a transcript must be filed with an appeal,[71] the petitioner was precluded from appellate review. The United States Supreme Court reviewed the case on appeal from a denial of federal habeas corpus relief. Because violation of the fourteenth amendment was found, the case was remanded with an order to release the petitioner if he was not granted an appeal on the merits of his *coram nobis* claim in the state courts of Indiana. It was not clear whether Indiana was required to furnish Lane a free transcript; waiver of the requirement that a transcript be filed with an appeal might have been sufficient in that Lane would have been afforded access to the appellate court. In *Long v. District Court of Iowa,*[72] however, it was held that an indigent state habeas petitioner was entitled to a transcript of the hearing on his petition in order to appeal a denial of the writ.[73]

The Supreme Court has not specifically decided whether indigent state prisoners must be provided free transcripts of their original trials for use in collateral proceedings. That question was raised, but not reached, in *Wade v. Wilson.*[74] There the petitioner and a codefendant had been convicted of murder in a California state court. Under applicable California law,[75] the two indigent prisoners were required to share a transcript of trial for use on appeal. The codefendant received the transcript but refused to allow the petitioner to see it. The petitioner's appointed counsel was able to borrow a different copy from the State Attorney General and an unsuccessful direct appeal

See Cruz v. Hauck, 404 U.S. 59, 63-64 (1971) (Douglas, J., concurring); Boddie v. Connecticut, 401 U.S. 371 (1971).

[66] 365 U.S. 708 (1961).

[67] Though most states now provide such a remedy, the Supreme Court still has not made it mandatory. *See* Case v. Nebraska, 381 U.S. 336 (1965); KAN. STAT. ANN. § 60-1507 (1964).

[68] Smith v. Bennett, 365 U.S. 708, 709 (1961).

[69] 372 U.S. 477 (1964).

[70] Without the public defender's order, Indiana would not furnish a transcript to an indigent defendant.

[71] IND. SUP. CT. R. 2-40 (1958).

[72] 385 U.S. 192 (1966).

[73] It was established that a full transcript of the hearing was available. Therefore, the Court did not consider whether a substitute would suffice. Presumably, if Iowa had produced a narrative statement and had shown why the petitioner needed no more, that would have been sufficient.

[74] 396 U.S. 282 (1970).

[75] CALIF. R. CT. 35(c) and 10(c).

was taken. Five years later the petitioner, desiring to attack his conviction collaterally, again tried unsuccessfully to obtain the transcript from his codefendant. Since the borrowed copy had been returned to the Attorney General, the petitioner applied to the trial court for a free transcript of his own. When his request was denied by the state courts, the petitioner applied for a writ of habeas corpus in federal district court.

The trial court ordered the prisoner freed unless he was provided a trial transcript for use in the collateral proceeding. The unreported opinion was based on a number of Supreme Court decisions including *Griffin* and *Smith v. Bennett.*[76] The Court of Appeals reversed, holding that the petitioner "was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw."[77] The Supreme Court avoided the issue by returning the case to the California courts for a determination of whether the petitioner could once again borrow a transcript.[78]

As a result, the Court failed to consider the clear analogy that could be drawn between *Wade* and *Gardner v. California,*[79] decided one year earlier. In *Gardner* a California prisoner had petitioned for a writ of habeas corpus in a state trial court. The writ was denied after a hearing. California did not allow an unsuccessful habeas applicant to appeal directly but did permit a new petition to be filed at the next appellate level.[80] The second application was not an appeal from denial of the first; it initiated a new proceeding. To aid him in preparing the second petition, Gardner requested a free transcript of the first hearing. That request was denied, partly on the ground that the *Griffin* rule did not apply if no direct appeal was involved. The Supreme Court reversed. Speaking for the majority, Mr. Justice Douglas observed that California law required that a statement of prior habeas corpus applications be filed with any subsequent petition.[81] Perhaps indicating his predisposition toward a more liberal rule, Justice Douglas held that that requirement alone created sufficient need for the requested transcript to make its denial to an indigent a violation of the fourteenth amendment.[82] California was ordered

[76] 365 U.S. 708 (1961).

[77] Wilson v. Wade, 390 F.2d 632, 634 (9th Cir. 1968) *citing* McGarry v. Fogliani, 370 F.2d 42 (9th Cir. 1967).

[78] Mr. Justice Brennan, writing for the Court, said:

> Petitioner argues that in any event, contrary to the Court of Appeals, the District Court was correct in holding that because "it may not be possible to pinpoint . . . alleged errors in the absence of a transcript," petitioner was entitled to a transcript for use in petitioning for habeas corpus even though he did not specify what errors he claimed in his conviction. To pass on this contention at this time would necessitate our decision whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief. This is a question of first impression which need not be reached at this stage of the case. . . . We think consideration of that contention should be postponed until it appears that petitioner cannot again borrow a copy from the state authorities, or successfully apply to the California courts to direct his codefendant, Pollard, or some other custodian of a copy to make a copy available to him.

Wade v. Wilson, 396 U.S. 282, 286 (1970).

[79] 393 U.S. 367 (1969).

[80] *See* Loustalot v. Superior Court, 30 Cal. 2d 905, 913, 186 P.2d 673, 677-78 (1947).

[81] CALIF. PENAL CODE § 1475.

[82] The majority opinion in *Gardner* emphasized, perhaps more than in any case since *Hardy,* the importance of a full transcript of record. Mr. Justice Douglas wrote both opinions, and it seems fair to assume that his recognition of a transcript's value lead him to decide in *Gardner* that sufficient need had been shown.

to furnish the verbatim record of the hearing because it had not shown that a portion of the transcript or some alternative would be an adequate substitute.

An analogy can be drawn between the factual situations in *Gardner* and *Wade*. The transcript of the habeas corpus hearing in *Gardner* corresponds to the trial transcript in *Wade*. Gardner wanted the hearing transcript in order to prepare arguments for a new and entirely different proceeding, not for a direct appeal. His second habeas corpus petition, attacking the trial court's judgment denying his first, was the functional equivalent of Wade's collateral motion challenging his original conviction. If Gardner was entitled to a transcript of his first hearing, Wade should have been provided a transcript of his trial. There is no persuasive reason for distinguishing the two situations. Of course, collateral motions and petitions are limited generally to the alleged violation of constitutional rights, while mere procedural errors may be reviewed on quasi-direct appeal as in *Gardner*. Still, errors which have constitutional importance may occur at any stage, and particularly at trial as in *Wade*. There is no reason to assume that a trial transcript will not reveal violations of constitutional rights. Nevertheless, the question was not reached in *Wade,* and courts that have subsequently considered similar cases have declined to articulate any general rule.[83] It does appear, however, that if a state prisoner first shows that he has been denied a constitutional right which a postconviction (collateral) remedy is designed to protect, the states may be required to produce a transcript of the pertinent proceedings.[84] Such a rule is consistent with the Supreme Court's requirements in direct appeal cases.

IV. FEDERAL HABEAS CORPUS FOR STATE PRISONERS

The availability of transcripts of state proceedings for use by indigents in petitioning for federal habeas corpus relief is governed by statute[85] and by the Supreme Court's decision in *Townsend v. Sain*.[86] That case held that a federal district court must hold an evidentiary hearing, to make its own findings of fact and conclusions of law, if the applicant did not receive a full and

---

[83] *E.g.*, Harlow v. Supreme Court of Appeals of Virginia, 328 F. Supp. 296, 297 (W.D. Va. 1971). In Briggs v. Missouri, 321 F. Supp. 649, 651 (W.D. Mo. 1971) it was said that no transcript need be supplied where it was not shown to be necessary "to the presentation or determination of particularized issues." Prisoners' dissatisfaction with the current practice is illustrated in Carpenter v. Oldham, 314 F. Supp. 1350 (W.D. Mo. 1970) where the prisoner brought a federal civil rights action for damages against a state judge who refused him a transcript. The Kansas Court has denied a trial transcript to an indigent prisoner seeking to challenge his criminal conviction on motion to vacate sentence pursuant to KAN. STAT. ANN. § 60-1507 (1964). Jackson v. State, 204 Kan. 823, 465 P.2d 927 (1970). *But see* KAN. STAT. ANN. § 22-4506 (Supp. 1971) which now requires that trial transcripts be furnished upon a showing of need.

[84] Harris v. Nebraska, 320 F. Supp. 100, 104 (D. Neb. 1970).

[85] 28 U.S.C. § 2254(e) (1970): If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official.

[86] 372 U.S. 293 (1963).

fair hearing on the merits of his claim in a state court.[87] In order to determine whether such a hearing was provided, the federal habeas court must of necessity have access to the record of the state court proceeding. It was said in *Townsend* that "[a] District Court sitting in habeas corpus clearly has the power to compel production of the complete state-court record."[88] The Court emphasized the indispensability of the state-court record, which must include a transcript of testimony (or some adequate substitute), the pleadings, court opinions and other documents. If such a complete record is not provided, a hearing *de novo* on the merits is required.[89] The effect of this rule is to allow, even to require, the federal district courts to find state-court records inadequate and to hold hearings even though the state records would satisfy the *Draper* constitutional standard.[90]

Congress has only required the production of "that part of the [state-court] record pertinent to a determination of the sufficiency of the evidence to support such determination [of a fact contested by the federal habeas applicant]."[91] No statutory provision requires that free verbatim transcripts be supplied to all state prisoners who petition the federal courts for habeas corpus relief. In light of *Townsend* the statute must be read to require the states to produce state-court records for examination by the federal district courts if ordered to do so. But nothing in the statute or in *Townsend* requires either the states or the United States to provide the prisoner himself with a transcript to aid him in *preparing* a federal habeas petition. That is, there is no right to a transcript for the purpose of combing it for error.

This has been the holding of a number of federal courts, even after the Supreme Court's decisions in *Wade* and *Gardner*.[92] The familiar rule requir-

[87] "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following conditions: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

[88] *Id.* at 318-19.

[89] Special problems have arisen where the clerk has died, Norvell v. Illinois, 373 U.S. 420 (1963); where portions of the proceedings were not recorded, United States *ex rel.* Hunter v. Follette, 307 F. Supp. 1023 (S.D.N.Y. 1969); or where the reporter's notes were stolen, United States v. Robinson, 460 F.2d 1164, 1176 (D.C. Cir. 1972). If the federal habeas court has any doubts about the adequacy of the state-court hearing, an evidentiary hearing will be held. Where a hearing is not mandatory it is discretionary, so that a new hearing may be held even if a verbatim transcript of the state proceeding is made available.

[90] It has been suggested, however, that federal courts should be satisfied with records meeting the *Draper* standard. "*Draper* in effect tells the states they may constitutionally use certain transcript substitutes, and the states will undoubtedly rely upon this statement of the law. It would be incongruous, therefore, for the habeas courts to impose some higher standard in deciding whether the transcript substitute is sufficiently reliable to make a hearing unnecessary." Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 926 (1966).

[91] 28 U.S.C. § 2254(e) (1970).

[92] The most recent case is Jones v. Superintendent, 460 F.2d 150, 153 (4th Cir. 1972) where the court clearly stated the present rule as follows: "We hold the right to a transcript *when needed* to collaterally attack a conviction does not depend upon a balancing of the expense and administrative inconvenience to the state against the interest of a defendant in securing a trial free from constitutional error. The right is absolute, irrespective of expense or inconvenience to the state. Conversely, *if no need is shown*, there is no constitutional right to a transcript, regardless of how easily and inexpensively the state could furnish it" (emphasis supplied). *See also*, Hines v. Baker, 422 F.2d 1002, 1006-07 (10th Cir. 1970); Grace v. Dillow, 296 F. Supp. 311 (E.D. Tenn. 1968).

ing the indigent prisoner to state his arguments before requesting a transcript to support those arguments has generally been followed. In *Chavez v. Sigler*[93] the Eighth Circuit held that, when a state prisoner shows a reasonably compelling need for a transcript to support substantive allegations, the state must provide him with a transcript. The Tenth Circuit in *Jackson v. Turner*[94] held that "petitioners who seek a transcript or who seek appointed counsel must do more than allege conclusory allegations."[95] And in *United States ex rel. Williams v. Zelker*[96] the Second Circuit ordered New York to supply a partial transcript where the petitioner had alleged perjury in certain testimony at trial.

V. ORIGINAL FEDERAL PROCEEDINGS

The constitutional basis for the Supreme Court's landmark decisions concerning free transcripts for indigents has been the fourteenth amendment, with both the due process and equal protection clauses being cited. The federal government, however, is not bound by the literal language of those provisions. Still, the fifth amendment,[97] federal statutes,[98] and "considerations beyond the corners" of federal statutes[99] have, in various instances, led the Court to impose fourteenth amendment standards upon the federal government.

Section 1915(a) of Title 28, *United States Code* allows any court of the United States to authorize "the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs . . . ." An appeal, however, may not be taken *in forma pauperis* if the district court judge certifies that the appellant is not proceeding in good faith. In *Coppedge v. United States*[100] the Court applied an objective standard, saying, "We consider a defendant's good faith in this type of case demonstrated when he seeks appellate review of any issue not frivolous." Accordingly, it was held that leave to proceed *in forma pauperis* must be granted unless the issues raised by the indigent are so frivolous that the appeal would be dismissed in the case of a nonindigent.[101] This test placed the burden of showing issues to be frivolous on the government.

Under section 1915 and the *Coppedge* rule, federal prisoners who desire to appeal their criminal convictions, contest their detention by a writ of habeas corpus, or challenge their convictions by a motion to vacate sentence, without prepayment of fees, must first assert nonfrivolous arguments. That much is

[93] 438 F.2d 890 (8th Cir. 1971). *See also* Snyder v. Nebraska, 435 F.2d 679 (8th Cir. 1970) where the same court had earlier hinted at a similar rule before directing the prisoner to request a transcript from state courts before arguing a violation of the fourteenth amendment on federal habeas corpus.

[94] 442 F.2d 1303 (10th Cir. 1971).

[95] *Id.* at 1305.

[96] 445 F.2d 451 (2d Cir. 1971).

[97] *See* discussion in United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964).

[98] 28 U.S.C. §§ 753(f), 1915 and 2250 (1970).

[99] Coppedge v. United States, 369 U.S. 438, 446 (1962). The Court no doubt felt that no more stringent standards could be required of the states than those applicable to the national government.

[100] *Id.* at 455.

[101] *See* FED. R. CRIM. P. 39(a) and Ellis v. United States, 356 U.S. 674, 675 (1956). Mr. Justice Douglas has recently criticized the rule requiring indigent defendants to first satisfy the threshold requirement of non-frivolity before proceeding on appeal proper. Cruz v. Hauck, 404 U.S. 59 (1971) (Douglas, J., concurring).

clear. The test for determining what is and what is not frivolous, however, is liberal. Probability of success is not demanded so long as a rational argument can be made on the indigent's behalf. Equal treatment of poor and affluent persons has been emphasized in the federal courts; therefore, in all cases the government has the burden of showing frivolity.[102]

If the indigent prisoner obtains leave to proceed *in forma pauperis,* another statute assures that he will receive any necessary transcript of prior proceedings without cost. Section 753 of Title 28, *United States Code* requires that a verbatim record be kept of all criminal proceedings in open federal court. Subsection (f) provides:

> Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.

In addition, section 2250 of the same title directs the clerk of any federal court to furnish an indigent petitioner copies of any documents or records on file in that court as may be required by the judge who is considering the petition or appeal.

Appeal from a criminal conviction is a matter of right in the federal system.[103] If an indigent defendant desires to exercise that right, counsel is appointed and, "as a minimum," a transcript relevant to his assigned errors is supplied at government expense.[104] *Hardy v. United States*[105] held that a full verbatim transcript must be provided to any new counsel who is appointed on appeal.[106] There is also a federal right of appeal from a denial of habeas corpus relief.[107] The statutory provisions referred to above establish the habeas appellant's right to a free transcript of the relevant portions of his unsuccessful habeas hearing.

Cases involving transcripts for use in preparing motions to vacate sentence under section 2255[108] present additional questions. Section 753(f) now covers

---

[102] Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases,* 43 F.R.D. 343, 347 (1967).

[103] Coppedge v. United States, 369 U.S. 438, 441 (1962).

[104] Hardy v. United States, 375 U.S. 277, 279 (1964).

[105] *Id.*

[106] As mentioned heretofore, four concurring members of the Court would have gone further and required free verbatim transcripts to be furnished to all federal prisoners.

[107] 28 U.S.C. § 2253 (1970).

[108] 28 U.S.C. § 2255 (1970). Enacted in 1948, § 2255 requires a federal prisoner to seek post-conviction relief from his criminal conviction in the court which sentenced him. Because an inmate must apply for a writ of habeas corpus in the jurisdiction where he is physically confined, federal prisoners had overburdened the district courts located near the federal penitentiaries while other district courts received very few such applications. The Congress designed the motion procedure under § 2255 to establish a more efficient division of labor. Now a federal prisoner can use the writ of habeas corpus only where he challenges some condition of his incarceration. Such an application is properly addressed to the court

the furnishing of transcripts in section 2255 proceedings, but this has not always been the case. The sentence in section 753(f) that refers to section 2255 motions was added by amendment in 1965.[109] Prior to that time there had been a division of opinion among the federal circuits as to whether the courts had the power, under the sentence referring to habeas corpus petitions, to order transcripts for section 2255 proceedings. In *United States v. Stevens*,[110] the Third Circuit gave section 753(f) a narrow and almost certainly incorrect construction, holding that courts had no such power.[111] Because it had generally been agreed that the section 2255 motion is the statutory equivalent of the writ of habeas corpus,[112] the *Stevens* approach was doomed from the outset. Soon, in *United States v. Glass*[113] and *United States v. Shoaf*,[114] the Fourth Circuit held that courts could require transcripts for section 2255 purposes.

The court in *Glass* rejected the view expressed in *Stevens* and held that a federal prisoner could be furnished a transcript of his trial if he first stated a proper ground for relief and if the transcript was indispensable to the presentation of his arguments. The court emphasized, however, that an indigent was not entitled to a transcript at government expense "merely to comb the record in the hope of discovering some flaw."[115] Shortly after *Glass*, the Supreme Court decided *Hardy v. United States*.[116] The strong language in that case concerning the near necessity of a trial transcript prompted the Fourth Circuit to reexamine *Glass*. In *United States v. Shoaf*[117] the holding in *Glass* was reaffirmed. Judge Haynsworth, speaking for the court, pointed out that *Hardy* involved a direct appeal, while the petitioner in *Shoaf* was seeking to challenge his conviction collaterally with a section 2255 motion. There was a distinction to be drawn because most trial errors which might be appealed are not cognizable in a collateral proceeding. And Judge Haynsworth believed that, accordingly, in most cases a defendant pursuing a direct appeal has a

---

sitting in the district of confinement. If he wishes to attack his conviction, however, he must move the sentencing court to vacate sentence pursuant to § 2255. *See Developments—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1062 (1970).

[109] PUB. L. 89-167, Sept. 2, 1965.

[110] 224 F.2d 866 (3d Cir. 1955).

[111] The court construed § 753(f) as allowing a free transcript to be provided only on appeal from a proceeding of which the transcript is a record. *See* Sokol, *The Availability of Transcripts for Federal Prisoners*, 2 AMER. CRIM. L.Q. 63 (1964). *See generally* R. SOKOL, FEDERAL HABEAS CORPUS 215-21 (1969).

[112] United States v. Hayman, 342 U.S. 205 (1952).

[113] 317 F.2d 200 (4th Cir. 1963).

[114] 341 F.2d 832 (4th Cir. 1964).

[115] United States v. Glass, 317 F.2d 200, 202 (4th Cir. 1963). Professor Ronald P. Sokol, Director of the Appellate Legal Aid Project at the University of Virginia School of Law, argued for petitioner in *Glass* and later in *Shoaf*. His position in *Glass* was based in part on the proposition that, because § 2255 was the statutory equivalent of habeas corpus, transcripts for § 2255 proceedings were authorized by the portion of § 753(f) referring to habeas corpus. It was unclear whether the court accepted this view because its opinion seemed to rely on the constitutional ground. If the court had clearly held that the statute itself empowered the courts to furnish transcripts to indigent § 2255 movants, the later amendment of § 753(f) might have been unnecessary. For a fuller discussion of the *Glass* appeal *see* Sokol, *The Availability of Transcripts for Federal Prisoners*, 2 AMER. CRIM. L.Q. 63 (1964).

[116] 375 U.S. 277 (1964). There it was held that newly appointed counsel on appeal in federal cases was entitled to a full verbatim transcript of trial.

[117] 341 F.2d 832 (4th Cir. 1964).

greater need for a transcript.[118] Further, the usual grounds for collateral relief concern events outside the courtroom that would not be reflected in the transcript. In any event, Judge Haynsworth felt that a defendant could remember the events at trial well enough and did not need a transcript to refresh his memory.

While Judge Haynsworth's distinction may have some factual validity, it is unnecessary that cases be decided differently on that basis. Regardless of whether the "usual" grounds for collateral relief involve events outside the courtroom—and one may argue whether that is true—in any given case the question must be whether a particular transcript contains a basis for relief. Certainly mistakes at trial are not always limited to mere procedural errors; constitutionally protected rights may be affected at any stage. The prisoner in *Shoaf* argued both constitutional and statutory [section 753(f)] grounds. Nevertheless, the court again ruled that, before a free transcript of trial can be furnished in a section 2255 proceeding, the indigent prisoner must show that a transcript is needed to support his grounds for relief.

In 1965 Congress added to section 753(f) the sentence referring to section 2255 motions. Notably, the new provision, while clearly contemplating that transcripts will be supplied in section 2255 as well as habeas corpus proceedings, placed an additional requirement on prisoners in the former situation. The government must pay for transcripts in section 2255 cases only when the prisoner is permitted to proceed *in forma pauperis* and the trial or circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed. No such requirement of affirmative certification is placed on direct appeals or, more importantly, on habeas corpus petitions. What Congress intended to accomplish by this distinction is unclear.[119] After *Coppedge v. United States,*[120] anyone allowed to proceed *in forma pauperis* has presumably asserted nonfrivolous grounds, and the Supreme Court has not yet held that any federal prisoner, even on direct appeal, has an absolute right to a verbatim transcript without a showing of colorable need.[121]

The certification requirement may only force the federal judge to state affirmatively what he necessarily held by implication when leave to proceed *in forma pauperis* was granted. If, however, the certification requirement is more than a restatement of *forma pauperis* standards serious constitutional

[118] The grounds for collateral relief are described by the statute as follows: "A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255 (1970).

[119] Indeed, then Deputy Attorney General Ramsey Clark wrote the Chairman of the Committee on the Judiciary on May 27, 1965, to say: "The reason for this distinction is not apparent if the motion remedy under section 2255 is to be a remedy commensurate with a writ of habeas corpus." 1965 U.S. CODE CONG. & AD. NEWS, 89th CONG., *1st* SESS., pp. 2920-21. One writer has suggested that the committee gave little consideration to the distinction. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases,* 43 F.R.D. 343, 357 (1967).

[120] 369 U.S. 438 (1962).

[121] That is, unless new counsel who did not represent appellant at trial is appointed on appeal. *See* Hardy v. United States, 375 U.S. 277 (1964).

questions are raised.[122] The United States Constitution prohibits the suspension of the writ of habeas corpus except in the case of rebellion or invasion.[123] Though section 2255 by its terms makes habeas corpus unavailable to most federal prisoners, it is not a suspension of the Great Writ because the motion to vacate sentence provides an equivalent remedy.[124] However, if access to a transcript is made more difficult in section 2255 proceedings than in habeas cases, the argument might be made that section 2255 is not the equivalent of habeas and the writ has, in effect, been suspended. Additionally, the added requirements in section 2255 cases may be inconsistent with the due process considerations of *Griffin v. Illinois*[125] and subsequent cases.

In practice transcripts are furnished at government expense to indigent federal prisoners who assert nonfrivolous grounds for relief and show a need for a transcript of record.[126] Some courts, however, have held that a transcript will not be furnished unless a motion under section 2255 is pending.[127] The rule places the indigent prisoner in a quandry. He knows that he has only one opportunity to advance a particular contention. If his first motion fails to allege sufficient facts, it will be denied and he will be barred from making the same argument a second time.[128] Accordingly, he is hesitant to prepare and file a motion based solely upon incomplete and imperfect memory; he needs to review the trial transcript in order to support his allegations as best he can. Moreover, in the course of his review he may discover constitutional arguments which he did not recognize at the time of trial or has since forgotten.[129] The inmate is told, however, that any application for a transcript before a section 2255 motion is pending will be denied. The circle is complete. He must frame the arguments in his motion before he can be given access to the transcript which he rightly believes is necessary to frame his arguments.

The rule that a section 2255 motion must be pending before a trial tran-

---

[122] In his dissent in *Gardner,* Mr. Justice Harlan compared this certification requirement with the ability of California courts to obtain needed transcripts they would not make available to indigent state habeas corpus applicants. The majority there held the California practice to violate the fourteenth amendment. Gardner v. California, 393 U.S. 367, 373 (Harlan, J., dissenting).

[123] U.S. CONST., art. I, § 9.

[124] "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255 (1970). *See* United States v. Hayman, 342 U.S. 205 (1952).

[125] 351 U.S. 12 (1956).

[126] Benthiem v. United States, 403 F.2d 1009 (1st Cir. 1968); Lucas v. United States, 423 F.2d 683 (6th Cir. 1970); Skinner v. United States, 434 F.2d 1036 (5th Cir. 1970). Different solutions to the problem of the appropriate remedy when the government does not willingly supply an ordered transcript have been found. In Poe v. United States, 229 F. Supp. 6 (D.D.C. 1964) the court reporter was required to produce the transcript without prepayment and to sue, if necessary, for reimbursement. In Henderson v. United States, 231 F. Supp. 177 (N.D. Cal. 1964), however, the court determined that the only adequate remedy was the relief requested. The prisoner was ordered released from custody.

[127] Ketcherside v. United States, 317 F.2d 807 (6th Cir. 1963); Dorsey v. United States, 333 F.2d 1015 (6th Cir. 1964). This is also the rule followed by the United States District Court for the District of Kansas. Letter to the writer from Judge George Templar of the Kansas District Court. February 29, 1972.

[128] 28 U.S.C. § 2255 (1970); Sanders v. United States, 373 U.S. 1 (1963).

[129] The general rule has been that the indigent has no right to a transcript merely to "comb it for error." United States v. Glass, 317 F.2d 200, 202 (4th Cir. 1963). *See* discussion of the *Glass* case *supra* and the criticism below.

script can be furnished has created similar difficulties for inmate legal assistance projects. Charged with the dual purpose of identifying meritorious arguments and screening out frivolous claims, such programs are often unable to function according to plan. Given the opportunity to examine a transcript, an attorney or student may be able to form a judgment as to whether arguable points are presented. If no such arguments can legitimately be raised, counsel can discourage the inmate and focus his attention on more profitable pursuits such as job training and early parole. The result is efficient use of the prisoner's effort as well as the court's time. On the other hand, if a transcript is not made available in the preparation stage, the attorney or student cannot fairly evaluate the inmate's case. Lack of access to a transcript encourages suits based upon unverified allegations. If counsel decides to assert claims on the mere hope that they will be supported by the transcript once it is prepared, he comes dangerously close to defeating his purpose of handling only those cases with substantial merit. In many instances the transcript will not sustain the arguments made, and the legal assistance project will have increased rather than reduced the number of burdensome, frivolous collateral motions which now clog many court calendars.[180]

Other courts have indicated that a transcript may be made available, on a showing of need, before a motion to vacate sentence is filed.[181] However, according to the dictum in *Glass* that there is no right to a transcript solely for the purpose of searching it for errors, a showing of need is still required.[182] That is, although an affluent inmate may purchase his trial transcript and discover any postconviction arguments that may be based upon its contents, the indigent is not constitutionally entitled to the same opportunity. He must first raise the contentions he *expects* the transcript to support. The effect is to require paupers to have better memories than wealthy inmates.

---

[180] *See* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 496-99 (1970).

[181] Hoover v. United States, 416 F.2d 431 (6th Cir. 1969). This is an ambiguous opinion that seems to break with prior Sixth Circuit policy. *See* note 127, *supra*. The court indicated that a § 2255 motion pending might not be necessary if a proper showing of need (for a transcript) were made. However, it then attempted to distinguish Gardner v. California, 393 U.S. 367 (1969), partly on the ground that the second habeas corpus petition there sufficed for appeal from denial of the first and, therefore, a suit was pending. It should be added that *Gardner* is very difficult to distinguish from the § 2255 cases. *See* discussion of state collateral proceedings *supra*. Of course, *Gardner* did not declare an unconditional right to a transcript although a verbatim record was ordered in that case. Mr. Justice Blackmun has expressed his belief that federal courts may order transcripts furnished before granting leave to proceed *in forma pauperis*. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 358 (1967).

[182] Harless v. United States, 329 F.2d 397 (5th Cir. 1964); Martinez v. United States, 344 F.2d 325 (10th Cir. 1965); Culbert v. United States, 325 F.2d 920 (8th Cir. 1964). The Sixth Circuit Court of Appeals has also had difficulty with this question. In Bentley v. United States, 431 F.2d 250 (6th Cir. 1970), the court expressly invited the Supreme Court to take the appeal from its decision denying a transcript and to decide the "combing" question. The court said: "This, of course, still leaves to be decided whether the federal constitution gives appellant the unqualified right (one which an affluent cell mate could exercise by purchase) to a transcript at government expense for new counsel to search for constitutional error in order to file a motion for postconviction relief. We find it impossible to deny that at least theoretically an affirmative answer would serve the constitutional purpose of the equal protection and due process clauses as they have been spelled out above." The court gave the resulting financial burden as a reason for not adopting the more liberal rule for the Sixth Circuit. Certiorari was denied. 401 U.S. 920 (1971).

VI. CONCLUSION

The foregoing discussion reveals the state of the law to be as follows: A state need not establish a right of direct appeal from a criminal conviction. However, if an opportunity to appeal is provided, the due process and equal protection clauses of the fourteenth amendment require that indigents be afforded as adequate and effective appellate review as that available to non-indigents. Appellants who cannot afford to purchase transcripts of trial must be furnished free records of sufficient completeness to permit adequate review. Verbatim transcripts need not be furnished in all cases, but if an indigent's grounds for appeal show a colorable need for the full record, the state has the burden of proving that a portion of the transcript or some substitute will suffice. This rule contemplates that the indigent appellant will state his contentions before a record, pertinent to a review of only those contentions, will be provided at state expense. The same standards are applied when an indigent state prisoner seeks to appeal from denial of a collateral challenge. The fourteenth amendment entitles him to a transcript of the collateral proceeding that is sufficiently complete to afford effective review. The Supreme Court has not yet held that a state must furnish a trial transcript to an indigent prisoner seeking for the first time to challenge his conviction collaterally. However, an analogy drawn from another case supports the conclusion that a record of sufficient completeness must be furnished.

The constitutional principles applied in state transcript cases are applicable to the federal government as well. Additionally, there is federal statutory authority for requiring sufficiently complete transcripts to be furnished in direct appeals or collateral proceedings if the indigent prisoner asserts non-frivolous grounds for relief. If counsel who did not represent the indigent defendant at trial is appointed on appeal, he is entitled to a full verbatim transcript of all prior proceedings. The federal courts have power to compel the states to furnish state-court records of proceedings to be reviewed on federal habeas corpus.

Thus it has been recognized that whenever a court undertakes to review prior proceedings some sort of record must be made available. It would be fundamentally unfair, and thus a violation of due process, to deny a pauper the opportunity for effective review by refusing to provide him with such a record. And, if the indigent is to have equal protection of the laws, he must be afforded access to a record equivalent to that which his affluent cellmate can purchase. It is this contrast, between the record purchased by the non-indigent and that made available to the indigent, which poses the recurring question of the transcript cases. The language of the cases cannot be squared with reality. Under present law it is simply not true that the indigent is afforded as adequate and as effective review as the nonindigent. The indigent must first state his arguments (on appeal or in a collateral petition or motion). He is then entitled to a record of sufficient completeness to allow review of

those arguments. A portion of the verbatim transcript, a narrative statement or a bystander's bill of exceptions may be deemed sufficient. In contrast, the financially able prisoner may purchase the verbatim transcript long before he frames his arguments. Indeed, before he reveals his contentions he can satisfy himself that every possible error in prior proceedings can and will be considered by the reviewing court.

The salutary rule would require that verbatim transcripts be furnished to all indigent defendants who seek to appeal from or to challenge collaterally their criminal convictions. This would amount to extending the rule urged by the concurring Justices in *Hardy v. United States*[133] and the dissenters in *Britt v. North Carolina*[134] to all federal and state cases. The principal argument raised against such a rule concerns the expense involved. Clearly, transcribing the reporter's hand-written or machine notes in every criminal case will be expensive, but the costs should not be overestimated. The law already requires that some record be kept and made available in readable form to comply with the present "sufficient completeness" standard.[135] Additional costs will equal only the difference between the expense of furnishing verbatim transcripts and that of furnishing records meeting the current test. Under the proposed rule, transcripts need be furnished only to defendants who seek to challenge their convictions, and, presumably, many will not wish to do so. At any rate, most criminal defendants plead guilty; in the overwhelming majority of cases there is no trial, and transcripts of these pleading proceedings are brief in comparison to trial transcripts. Proceedings involving post-conviction petitions and motions are also usually not lengthy.

The costs of litigating transcript and other preliminary questions involved in *forma pauperis* cases must also be considered. During oral argument in *Hardy v. United States,*[136] the government admitted that in one district requests for transcripts valued at less than $200 are not contested; the litigation necessary to avoid producing the transcripts is more expensive than production. Mr. Chief Justice Burger has expressed his concern that preparation of transcripts causes delays in the criminal justice system. He believes, however, that the failure of the system to increase its capacity to produce transcripts is equally significant.[137] A more demanding rule might prompt an expansion of facilities

[133] 375 U.S. 277 (1964).

[134] 404 U.S. 226 (1971), *see* discussion note 21 *supra.*

[135] The United States District Court for the District of Kansas provides verbatim transcripts of criminal trials for use by indigents on direct appeal as a matter of form. A showing of need is required where transcripts of collateral proceedings are requested. Letter to the writer from Judge George Templar of the Kansas District Court. February 29, 1972. The present Kansas state practice is governed by KAN. STAT. ANN. § 22-4509 (Supp. 1971). A showing of need is necessary even on direct appeal. KAN. STAT. ANN. § 22-4505 (Supp. 1971). *See also* KAN. STAT. ANN. § 22-4506 (Supp. 1971) and Supreme Court Rule 121 which govern procedure under KAN. STAT. ANN. § 60-1507 (1964), the Kansas statute permitting post-conviction motions to vacate sentence. An indigent petitioner who raises questions which may appear in the trial record is entitled to any necessary part of the transcript. On appeal from the denial of a § 1507 motion, the indigent prisoner entitled to proceed *in forma pauperis* must be furnished without cost such portions of the transcript of the hearing on the motion as are necessary for appellate review. Kansas statutes also provide for transcripts to be made of preliminary hearing and arraignment proceedings. *See* KAN. STAT. ANN. §§ 22-2904, 3210(5) (Supp. 1971).

[136] 375 U.S. 277 (1964).

[137] Mayer v. City of Chicago, 404 U.S. 189, 200-01 (1971) (Burger, C.J., concurring).

and the use of modern equipment in recording and transcription. Long-run costs would be minimized accordingly. In light of the mass of records now kept and made available by state and federal govermental bureaucracies, it is surprising that serious objections to providing free transcripts to indigents are raised on financial grounds. Surely the protection of an individual's liberty is more important than most other reasons for keeping expensive records. As the Chief Justice has noted, "An affluent society ought not be miserly in support of justice, for economy is not an objective of the system."[138]

The transcript cases present more than a matter of economics. Statutory rights and constitutional guarantees are involved. At bottom is the question of the availability to indigents of appellate and collateral review of criminal convictions. The inescapable conclusion is that a disparity exists between the language of recent Supreme Court decisions and the actual workings of the judicial system. Even if a substitute record limited to certain contentions is sufficient to permit review that is fair and within the bounds of due process, nothing short of a verbatim transcript will afford review as adequate and effective as that available to one who can purchase such a transcript. The demands of equal protection have not been met.

LARRY YACKLE

[138] *Id.*