

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

UNITED STATES OF AMERICA,))	CRIMINAL ACTION NO.
)	
Plaintiff,)	5:03-CR-34(2)
)	
v.)	
)	
XXX XXX,)	
)	
Defendants.)	
<hr/>)	

**MOTION FOR PREPARATION OF TRANSCRIPT PURSUANT TO THE CRIMINAL
JUSTICE ACT**

Defendant, XXX XXX, hereby moves this Court to order that the transcripts for his pretrial, trial and sentencing proceedings be prepared pursuant to the Criminal Justice Act (18 U.S.C. § 3006A) for purposes of his appeal in the above referenced case. In support of this motion, Mr. XXX sets forth the following facts and argument.

1. Pretrial hearing was held in this case on April 5 and 8, 2004. Trial in this case was held on April 6 and 12, 14, 2004. Sentencing in this case was held on April 1, 2005.

2. Mr. XXX was previously found to be indigent by United Magistrate Judge Caroline M. Craven for purposes of appointing Mr. XXX counsel. In addition, the Presentence Report prepared in this case by the Probation Department for the Eastern District of Texas found that Mr. XXX “does not possess the ability to pay a financial status.”

3. Mr. XXX received a 151 month imprisonment sentence and, therefore, will be without a significant source of income for more than a decade.

4. The undersigned law firm has been partially paid for legal representation on appeal by Mr. XXX's mother. Nevertheless, the attorney fees do not include the costs of the transcript.¹ In any event, fees paid by family members cannot be taken into account when determining a defendant's indigent status.² Indeed, without the assistance of Mr. XXX's mother, Mr. XXX

¹ The total appellate legal fees charged is \$18,000 and counsel agreed to undertake all printing costs as well as travel costs in connection with oral argument in New Orleans, Louisiana and also agreed to undertake all legal representation in connection with Mr. XXX's sentencing. To date counsel has been paid \$13,400.

² See *Fullan v. Commissioner of Corrections*, 891 F.2d 1007, 1111-12 (2d Cir. 1989) ("The determinative consideration is that a state has no right to dictate how the defendants' family and friends will spend their money. Insofar as the state's prosecution of a defendant is concerned, family and friends are bystanders. Bystanders have no obligation to the state; they have no responsibility for the expenses of the person convicted. The state, however, once it has provided a right of appeal generally, does have an obligation to provide the wherewithal for an appeal by an indigent prisoner. Since the state has no right to dictate how the benefactors' money will be spent, it has no right to require that the defendant choose between forgoing retained counsel and forgoing an appeal." (citations omitted)), *cert. denied*, 496 U.S. 942 (1990); *United States v. Sacco*, 430 F.3d 1304, 1305 (2d Cir. 1971); *Hill v. State*, 802 S.W.2d 144 (Ark. 1991) (citing *Fullan*); *Pendry v. State*, 367 A.2d 624, 626 (Del. 1976) (holding that an indigent's right to all necessary portions of a trial transcript "is not lost by an indigent [appellant] who has parents financially able to pay the expenses of appeal") (citation omitted); *Arline v. State*, 277 So. 2d 791, 792 (Fla. Ct. App. 1974) ("We know of no rule of law that precludes a person from being adjudicated and proceeding as an insolvent solely because he has the services of private counsel."); *People v. Arquette*, 202 Mich. App. 227, 507 N.W.2d 824, 826 (Mich. Ct. App. 1993) (stating that "the fact that a third party provided funds to retain counsel does not change this indigent defendant's status and, therefore, does not trigger the general policy denying transcripts [to non-indigent appellants] at public expense"); *State v. Pederson*, 600 N.W.2d 451, 454 (Minn. 1999) ("even though an indigent criminal appellant chooses not to accept one thing to which his indigency status entitles him--representation by the public defender--he may still choose to accept another thing to which his indigency status entitles him--all or necessary parts of his trial transcript."); *State v. Breen*, 100 Nev. 85, 675 P.2d 996, 997 (Nev. 1984) (holding that "the acceptance of representation by counsel provided by a third party does not, in and of itself, affect an appellant's indigency status, at least insofar as that status relates to payment for trial transcripts"); *State v. Morgenstein*, 147 N.J. Super. 234, 371 A.2d 96, 98 (N.J. Super. Ct. App. Div. 1977) (holding that the state must provide a trial transcript at public expense to an indigent appellant whose parents offered to pay the attorney's fees of private counsel and stating that to hold otherwise "would, in effect, be sanctioning the practice * * * of withholding the required assistance as a constraint upon parents or other close friends and relatives who also sense a moral duty to bear this cost"); *Snoke v. State*, 780 S.W.2d 210, 213-14 (Tex. Crim. App. 1989) (holding that an appellant is indigent and entitled to a trial transcript at public expense despite the fact that others were willing to pay the attorney's fees of private counsel); *State v. Bosworth*, 105 S.E.2d 1

would also be unable to retain undersigned counsel and, therefore, Mr. XXX would likely move the Court to provide for legal representation under the Criminal Justice Act *in addition to* the costs of the transcript. *See Fullan*, 891 F.2d at 1011 ("The expense here would be greater if the State were required to pay the attorney's fee as well as the cost of the transcript.")

5. Similar motions have been routinely granted. Motions have been granted by the Honorable Paul Brown, United States District Judge for the Eastern District (*United States v. XXX*), Honorable Walter Smith, United States District Judge for the Western District of Texas (*United States v. XXX*); Honorable Donald Walter, United States District Judge for the Western District of Louisiana (*United States v. XXX*); Honorable Terry Means, United States District Judge for the Northern District of Texas (*United States v. XXX*); Honorable Maurice Hicks, United States District Judge for the Western District of Louisiana (*United States v. XXX*); Honorable Stephen Capelle, United States Magistrate Judge for the Western District of Texas (*United States v. XXX*); Honorable Jerry Buchmeyer, United States District Judge for the Northern District of Texas (*United States v. XXX*).

6. It is also noted that all of the transcripts, with the exception of the sentencing transcript has previously been prepared in this case.

6. To the extent that the Court believes an indigency affidavit from Mr. XXX is necessary, that affidavit has been requested and will be filed upon receipt.

(W.Va. 1958) (Where counsel was employed by defendant's relatives, indigent defendant qualified for transcript at public expense). *Cf. United States v. Trevino*, 679 F. Supp 636 (S.D. Tex. 1987) (Defendants found not indigent as to their request to have counsel appointed but Court ordered that the appellate transcript be prepared under the Criminal Justice Act).

WHEREFORE, XXX XXX respectfully requests this Court to order that a transcript of the trial and sentencing proceedings be prepared under the Criminal Justice Act in this case for purposes of appeal.

Respectfully submitted,

/s/

F. Clinton Broden
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Attorney for Defendant
XXX XXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on August 5, 2005 I caused the foregoing document to be served by electronic means, on:

Barry A Bryant
US Attorney's Office
500 N. Stateline Ave.
Suite 402
Texarkana, TX 75501

Mark H Allenbaugh
Mark Allenbaugh
15381 Assembly Lane
Huntington Beach, Ca 92646

_____/s/_____
F. Clinton Broden

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ORDER

Upon consideration of Defendant's Motion for Preparation of Transcript Under Criminal Justice Act, said motion is this ____ day of August, 2005 GRANTED.

ORDERED that the pretrial, trial and sentencing proceedings shall be prepared in this case by the court reporter and paid for under the Criminal Justice Act (18 U.S.C. § 3006A).

**DAVID FOLSOM
UNITED STATES DISTRICT JUDGE**