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CRIMINAL LAW:
Preliminary Hearings -
Transcripts

Honorable Henry D. Sintzenich
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Dear Mr. Sintzenich:

I have your recent letter wherein you request
my opinion on the following question:

"On the basis of the case Coleman v. Alabama, 399 U.S. 1, and decisions subsequent, is it your opinion that preliminary hearings must be reported and a transcript of said hearing filed?"

No statute, court rule, or case law in this State specifically requires the presence of a court reporter or recording device at a preliminary hearing in criminal cases. It has been held that there is no constitutional requirement

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to record grand jury testimony. (See People v. Auginbaugh, 36 Ill. 2d 320; United States v. Franklin, 429 F. 2d 274 (8th Cir. 1970).

Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, was decided on June 22, 1970. The Supreme Court's decision held only that a preliminary hearing was a "critical stage" of the criminal proceedings to which the Sixth Amendment right to counsel attached and did not treat the question you now pose in any direct way.

Prior to the Coleman decision, the Illinois rule as stated in People v. Morris, 30 Ill. 2d 406, 411, was that a preliminary hearing did not constitute a "critical stage" of the proceedings and, further, that the State had no constitutional duty to supply indigent persons with free transcripts of their preliminary hearings. Following the Coleman opinion the Illinois Supreme Court held that a preliminary hearing is a "critical stage" in the criminal proceedings. (People v. Adams, 46 Ill. 2d 200, overruling

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the Morris case in pertinent part.) Neither Morris or Adams directly deal with the question whether preliminary hearing testimony must be preserved.

While the issue of recordation of preliminary hearing testimony has not been squarely decided, the possible development of the issue can be gleaned, albeit inferentially, from the Coleman opinion. In reaching the conclusion that a preliminary hearing is "critical" for Sixth Amendment purposes, the Court stated at 399 U.S. 9; 90 S.Ct. 2003;

"Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. * * * an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial." (Emphasis added)

This language from the Court's opinion contemplates the existence of a transcript or recording of the preliminary hearing. Failure to provide a method for

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preserving testimony given at a preliminary hearing could only serve to dull the effectiveness of counsel appointed to represent an indigent defendant at the preliminary hearing and frustrate the Court's purpose in deciding Coleman as it did. A non-indigent defendant, of course, may retain his own court reporter.

The United States Court of Appeals for the District of Columbia, prior to Coleman, concluded as a matter of supervisory control over the lower federal courts that transcription of preliminary hearings was necessary:

"The rampant confusion in the present case as to what happened in the Court of General Sessions, compounded by conflicting and blurred recollections, gives substance to our worst fears about the consequences of failing to record a preliminary hearing. In some cases denial of a written transcript may in fact be harmless error. But where, in contrast to the unusual circumstances of this case, there is any colorable claim of prejudice, it will be impossible for us to find the error harmless if there is no authoritative way for us to discover what actually transpired." (Gardner v. United States, 407 F. 2d 1266, 1268).

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Of course, the Gardner opinion does not control preliminary hearing practice in Illinois, but, in very practical terms, it warns us that failure to transcribe preliminary hearings may burden the integrity of criminal convictions which are validly secured.

Subsequent to the decision in Coleman v. Alabama, a group of indigent persons filed an action for declaratory and injunctive relief in the United States District Court for the Western District of Pennsylvania seeking to have the court declare that failure of Pittsburgh city magistrates to appoint counsel and provide transcripts in preliminary hearings violated their constitutional rights. After citing the aforementioned language from Coleman v. Alabama and Gardner v. United States, the Court concluded that the State must provide counsel and transcripts at preliminary hearings. (Conley v. Dauer, 321 F. Supp. 723.)

While there is no explicit Illinois holding that a preliminary hearing must be recorded, and while there is a strong possibility that any case holding that there was

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such a requirement would be given prospective application only, I am persuaded both by the authorities cited above and strong policy considerations that the far better practice is to provide for preservation of the testimony of witnesses at preliminary hearings in criminal cases where the defendant is indigent and cannot provide his own court reporter.

If this practice is followed it will then be possible to have a written transcript of the preliminary hearing typed and available for use at trial or in a later appellate proceeding if the need for such transcript becomes apparent. I can see no reason to burden the State with the expense of preparing a typed transcript until such time as the need arises. If that occurs the transcript can be prepared and filed with the court.

Very truly yours,

A T T O R N E Y G E N E R A L