

## COMMENTS

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*GRIFFIN v. ILLINOIS\**

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This paper has been prepared as a discussion of *Griffin v. Illinois*,<sup>1</sup> with special reference to its effect upon state procedures and to what must now be done to comply with its requirements.

The case came before the Supreme Court upon certiorari.<sup>2</sup> It was argued in December, 1955, and decided on April 23, 1956. Mr. Justice Black announced the judgment of the Court and an opinion in which the Chief Justice, Mr. Justice Douglas, and Mr. Justice Clark joined. Mr. Justice Frankfurter wrote a separate opinion concurring in the judgment. Mr. Justice Burton and Mr. Justice Minton dissented, joined by Mr. Justice Reed and Mr. Justice Harlan. A separate dissenting opinion was also written by Mr. Justice Harlan. It is apparent therefore that no one of the opinions can properly be taken as comprising within itself an authoritative exposition of the views of a majority of the Court, although a majority did join in vacating the judgment of the Supreme Court of Illinois and in remanding the case to that court.

In this state of the case, in order to ascertain if possible what can be deemed to have been decided, there seems no better way than to separate out the propositions contained in the several opinions and to determine which, if any, of them are favored by at least five members of the Court. I have been unable to think of any other way of translating this case into a formula that can be usefully applied to state courts in the future.

Mr. Justice Black stated the facts in his opinion and in footnotes thereto. The petitioners Griffin and Crenshaw were tried together and convicted of armed robbery in the Criminal Court of Cook County. Immediately thereafter they moved in the trial court that a certified copy of the entire record, including a stenographic transcript of the proceedings be furnished them without cost, alleging that they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal. . . ." These allegations were not denied. Under Illinois law, in order to get full direct appellate review by writ of error, the defendant must furnish the appellate court with a bill of exceptions or a report of proceedings at the trial certified by the trial judge. A writ of error may also be prosecuted on a "mandatory record" consist-

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<sup>1</sup> 351 U.S. 12 (1956).

<sup>2</sup> 351 U.S. 658 (1956).

ing of the indictment, arraignment, plea, verdict, and sentence. This "mandatory record" can be obtained free of charge by an indigent defendant, but in such instances review is limited to errors on the face of the "mandatory record" and there is no review of trial errors such as erroneous rulings on the admission of evidence. Illinois conceded that it is sometimes impossible to prepare a bill of exceptions or report without a stenographic transcript of the trial proceedings. In all criminal cases where there is no sentence of death defendants needing a transcript, whether they are indigent or not, "must themselves buy it."<sup>3</sup> Counsel for Illinois stated in oral argument that "everybody out there understands" that a bill of exceptions prepared from memory in condensed and narrative form and certified by the trial judge is available, but that nobody has heard of one being actually used in recent years; that "Illinois has not suggested in the brief that such a narrative transcript would necessarily or even generally be the equivalent of a verbatim transcript of all the trial"; and that "there isn't any way that an Illinois convicted person in a non-capital case can obtain a bill of exceptions without paying for it." In their motion before the trial court the petitioners contended that failure to provide them with the needed transcript would violate the due process and equal protection clauses of the Fourteenth Amendment. The trial court denied the motion without a hearing. Griffin and Crenshaw then filed a petition under the Illinois Post-Conviction Hearing Act; but only questions under the Illinois or the Federal Constitutions may be raised under that act. A companion state act provides that petitioners under the Post-Conviction Act may, under some circumstances, obtain a free transcript. In their post-conviction proceedings the petitioners alleged that there were non-constitutional errors which entitled them to have their convictions set aside on appeal, and that the only impediment to full appellate review was their lack of funds to buy a transcript. "These allegations have not been denied." The petitioners in their post-conviction proceeding "repeated their charge that refusal to afford a full appellate review solely because of poverty was a denial of due process and equal protection." This petition, like the first, was dismissed without hearing any evidence, and the Supreme Court of Illinois affirmed solely on the ground that the charges raised no substantial state or federal constitutional questions—the only kind of question that may be raised in post-conviction proceedings.

At the conclusion of the statement of the facts that I have closely paraphrased in the preceding paragraph, Mr. Justice Black says, "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors," and further, "We must therefore assume for purpose of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript."<sup>4</sup>

<sup>3</sup> *Griffin v. Illinois*, 351 U.S. 12, 14 (1956).

<sup>4</sup> *Id.*, at 16.

The opinion of Mr. Justice Frankfurter contains no general statement of the facts and indicates no dissent from Mr. Justice Black's statement. It seems proper, therefore, to assume that he accepts Mr. Justice Black's statement of the facts. Indeed his opinion indicates his substantial agreement with Mr. Justice Black's statement in several references to important facts. In the opinion of the four dissenting justices there is a paragraph at the end reading as follows: "Whether Illinois would permit appeals adequate to pass upon alleged errors on bills of exception, prepared by counsel and approved by judges, without requiring that full stenographic notes be transcribed is not before us. We assume that it would."<sup>5</sup> Possibly this suggests that the dissenters did not fully accept Mr. Justice Black's construction of the record as showing that the petitioners stood in actual need of a transcript which they could not obtain because of poverty. And Mr. Justice Harlan in his separate dissent makes clear that he is not fully in accord with Mr. Justice Black's construction of the record. However, it seems reasonably plain that Mr. Justice Black's statement of facts has the support of at least five justices who joined in the decision and who constituted a majority of the Court, and that it must therefore be considered as the basis upon which the decision rests.

We may now turn to the proposition or propositions of law enunciated by Mr. Justice Black. At the outset of his opinion he states the question to be "whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer [its statute providing that writs of error in all criminal cases are writs of right and shall be issued of course] so as to deny adequate appellate review to the poor while granting such review to all others";<sup>6</sup> and later, "The sole question for us to decide, therefore, is whether due process or equal protection has been violated."<sup>7</sup> "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."<sup>8</sup> A State is not required to provide any right to appellate review, but if it does so it cannot discriminate against some defendants on account of their poverty. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."<sup>9</sup> The opinion then suggests that inasmuch as the Supreme Court of the United States now holds that the petitioners' constitutional rights have been violated, Illinois may hold that they are entitled to a transcript under its Post-Conviction Act, which applies only where constitutional rights have been violated. Just before the end of the

<sup>5</sup> *Id.*, at 29.

<sup>6</sup> *Id.*, at 13.

<sup>7</sup> *Id.*, at 16.

<sup>8</sup> *Id.*, at 17-18.

<sup>9</sup> *Id.*, at 19.

opinion are these sentences, "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. . . . We are confident that the State will provide corrective rules to meet the problem which this case lays bare."<sup>10</sup>

In my view this opinion of Mr. Justice Black stands for a proposition that may be succinctly stated in these words: If a state provides for appellate review it cannot lay down a procedure that requires the payment of money which indigent persons may be unable to pay, unless it provides an alternative that affords an adequate and effective review to such persons.

Mr. Justice Frankfurter says nothing in his opinion at variance with the proposition just stated and says much that appears to support it. He joins in a disposition of the case in accord with that statement. I think therefore that he is to be counted as the fifth justice in favor of that proposition, which I believe is established by a majority of five members of the Court.

In the course of his opinion Mr. Justice Frankfurter states two additional propositions. The first is, in substance, that where a state is required to pay the cost of appeals by indigent persons it may protect itself by sensible means against the waste of public moneys by frivolous appeals.<sup>11</sup> The second I can only interpret as meaning that in order to prevent convicts in unknown numbers now in prisons from claiming that they are illegally detained the Court should announce that the effect of the present decision is to be prospective only, so that only Griffin and Crenshaw and persons subsequently convicted can become the beneficiaries of the Constitution as now interpreted. But as no other justice appears to have joined in either of these propositions, neither can be considered as established by the case.

The four dissenting justices deny that the Constitution of the United States compels each state to supply a transcript to an indigent defendant in a case like this. They hold that the distinction in the matter of the transcript between capital cases and other cases is reasonable and valid, and they hold that the fact that some defendants may be unable to pay for a transcript is not a denial of due process or of equal protection. They say that a state is not bound to make all defendants economically equal. "Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?"<sup>12</sup> The minority state that Mr. Justice Black's opinion "is not limited to the future"<sup>13</sup> but applies to past convictions as well. It is plain that this opinion of the four dissenters shows that in the circumstances of this case they do not agree with the proposition which I consider established by the five members of the Court.

<sup>10</sup> *Id.*, at 20.

<sup>11</sup> *Id.*, at 24.

<sup>12</sup> *Id.*, at 28-29.

<sup>13</sup> *Ibid.*

Mr. Justice Harlan in his separate dissent takes the position that the constitutional question ought not to be decided, since the record does not clearly show whether the petitioners' need of a transcript was because Illinois *law* made such a transcript a prerequisite to appellate review or because as a *factual* matter the petitioners could not prepare an adequate bill of exceptions without it. He cites many Illinois decisions to show that as far as the law is concerned Illinois will permit a bill of exceptions prepared from any available sources and certified by the trial judge. If, on the other hand, the need of a transcript was a need in fact rather than in law Mr. Justice Harlan is of the opinion that the record is insufficient as a basis for such a "sweeping constitutional pronouncement"<sup>14</sup> as that made by the majority. He then goes on to state his disagreement with that pronouncement. He suggests that it may actually require the state to discriminate by assuming the economic burden in favor of some persons and not of others. He asks whether if that pronouncement is sound for felony cases it is not equally sound for misdemeanor cases or for civil cases. He submits that the issue is not one of equal protection but rather is one of due process. He then goes on to show that the failure of Illinois to provide transcripts to the petitioners is not the denial of a right "implicit in the concept of ordered liberty," so that such failure constitutes a "denial of fundamental fairness, shocking to the universal sense of justice."<sup>15</sup> Rather, he says, that the furnishing of a free transcript to indigents is no more than a desirable reform in criminal procedure which many states have not yet adopted.

These appear to be the several propositions put forth in each of the several opinions. Although mention is made of the due process clause, particularly in the opinion by Mr. Justice Black, much more prominence is given to the equal protection clause, and the decision seems to me to rest primarily but not exclusively upon that clause.

When nine men split four ways and no opinion has the complete support of any five, I humbly submit that the implications are a matter for a Delphic oracle, and I am not any kind of an oracle. Changes in the personnel of the Court may well produce changes in the line-up. Practical considerations may impinge heavily and divert the development of theory from its straight logical course. We all know that this occurs from time to time in our own courts and sometimes to the great advantage of the law and the community. Similar forces operate in Washington.

Still, a discussion of the "implications" of this decision require that I should tread at least a little distance upon the rough path of prophecy, being well aware that the path stretches over a bed of quicksand. At any rate, I shall try to avoid the Delphic habit of saving prestige by making pronouncements that are capable of being interpreted either way as the event may subsequently turn out.

First: It seems clear that no special significance attaches to the fact that the

<sup>14</sup> *Id.*, at 33.

<sup>15</sup> *Id.*, at 38.

expense in the *Griffin* case happened to be the cost of a transcript instead of some other comparable expense necessary to a fair and adequate appeal under state law. I should therefore expect that the rule of the *Griffin* case would apply to cash outlay for appeal papers, such as printing or typing, when required (perhaps including a reasonable sum for briefs), cost of appeal bonds, entry fees in the appellate court, officers' fees for the service of process, if any, and any other similar cash charges. In fact the definition of the *Griffin* rule that I have already attempted to formulate is so phrased as to cover such items as these.

A related question, though seldom involved in appeals, is whether the State must pay for the expense of summoning witnesses for an indigent defendant. It would seem that the answer should be in the affirmative with reasonable safeguards, in all types of cases to which the *Griffin* case applies.

Second: Does the *Griffin* rule apply to instances where no genuine question of law is presented, in other words, to what may be called frivolous appeals? There is some reason to think that a point might be reached where obviously frivolous appeals might receive no comfort. Mr. Justice Frankfurter in his opinion says, "in order to avoid or minimize abuse and waste a State may appropriately hedge about the opportunity to prove a conviction wrong. When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent."<sup>16</sup> In *People v. Lumpkin*<sup>17</sup> a New York court held that a defendant was not entitled to a free transcript more than nineteen months after an appeal had been dismissed. The judge said, "This Court does not understand the *Griffin* decision . . . to mean that an indigent defendant must be given a transcript of the minutes any time he asks for them. For what purpose does he want them? What legal remedy does he desire to enforce? Certainly he should not be given the minutes merely because it might make interesting reading for him."<sup>18</sup> The judge added that he would reconsider the matter if there were any particular proceedings which the defendant wished to follow for which a transcript was necessary. In *United States v. Johnson*<sup>19</sup> a majority of the court held that the *Griffin* case was not applicable where the trial judge had certified that the appeal had not been taken in good faith. Judge Frank dissented on the ground that the decision of the majority deprived a poor person of any means of showing that the trial judge gave the certificate in bad faith. The Supreme Court reversed, holding that, although a transcript may not be required in every case, the defendant must be assured "some appropriate means—such as the district judge's notes or an agreed statement by trial counsel—of making manifest the basis of his claim that the District Court committed error in

<sup>16</sup> *Id.*, at 24.

<sup>18</sup> *Id.*, at 611.

<sup>17</sup> 158 N.Y.S. 2d 610 (Gen. Sess., 1956).

<sup>19</sup> 238 F.2d 565 (C.A. 2d, 1956).

certifying that the desired appeal was not pursued in good faith."<sup>20</sup> As a matter of sound judicial administration it would seem that the trial judge should not have the final say as to whether his own alleged errors should be reversed. Very likely means can be devised whereby obviously frivolous appeals can be dismissed without the expense of a full transcript; but great caution should be exercised and the control should be in the appellate court, or at least not in the same trial judge.

Third: A serious question is whether the *Griffin* rule applies in cases of minor offenses commonly classed as misdemeanors. As the separate opinion of Mr. Justice Harlan in the *Griffin* case points out, the Constitution applies to all cases, and there seems no logical reason why the rule should not apply in little cases as well as more important ones. Yet a requirement that the state provide a transcript costing possibly \$200.00 for every indigent defendant charged with drunkenness, even though he might be committed for a couple of months to "dry out," to say nothing of charges of spitting on the sidewalk, parking in forbidden areas, and a host of others, seems almost a *reductio ad absurdum*. If defendants generally began insisting upon appeals and transcripts, as many of them might do, such a requirement might seriously impede the enforcement of ordinary state police regulations. Only time can give the answer. For my own part I am inclined to expect that some practical test will be discovered that will avoid these consequences. The line may approximate that usually recognized between felonies and misdemeanors, although of course no state definition can be controlling.

Moreover, Justice Black in his opinion points out an avenue of escape in the passage previously quoted. For these small offenses an adequate appeal record can usually be prepared without a transcript.

I do not anticipate great difficulty in dealing with small cases.

Fourth: How about civil cases? Here again, as Mr. Justice Harlan points out, logic would seem to place no limits upon the *Griffin* rule. It would seem to be equally applicable both to plaintiffs and to defendants. However, the concern of the Supreme Court in recent years has been with personal liberty. Civil cases seldom involve personal liberty. A clear line of distinction is available, even if not logical. The consequences of applying the rule generally in civil cases, including the vast body of personal injury cases in which plaintiffs as well as defendants are likely to be impecunious, are far-reaching. Great possibilities of delay and inordinate expense to the public are opened up. Tactics of delay and badgering for a settlement are not confined to defendants. The encouragement to litigiousness is obvious. In the long run justice would not be promoted. There must be some point where practical considerations begin to make their influence felt. I agree with the Supreme Court of Oregon, which said through Mr. Justice Brand in *Barber v. Gladden*,<sup>21</sup> "We think the Supreme Court will not carry its

<sup>20</sup> *Johnson v. United States*, 352 U.S. 565 (1957).

<sup>21</sup> — Ore. —, —, 298 P.2d 986, 990 (1956).

ruling to such coldly logical extreme as would disrupt the accepted judicial procedures of the 48 states." That was a habeas corpus proceeding and therefore a civil case, but the personal liberty of a prisoner was involved, and the court held the *Griffin* case applicable as in criminal cases. The implication seems to be that it would not be applicable in civil cases generally.

Fifth: A question raised by reviewers is whether *Griffin v. Illinois* has changed the rule of *Betts v. Brady*,<sup>22</sup> in the matter of the furnishing of counsel at state expense. I do not see why it should be assumed that *Betts v. Brady* has been superseded. Nothing is said about that case in the *Griffin* case, except for a casual reference in Justice Harlan's opinion. It would seem that *Betts v. Brady* applies in appeals as well as in other instances. That case was decided fifteen years ago. It has received frequent application in state courts. Trial judges have by this time become fairly familiar with it. A considerable body of learning has grown up about it. Necessary adjustments have been made. It is true that the justices of the Supreme Court have not been in agreement on *Betts v. Brady*, and they seem to care little for precedent. Nevertheless, it seems to me that state judges would be arrogating too much to themselves if they were to determine that *Betts v. Brady* has been overruled. They should wait for more positive directions. Indeed, taking into consideration Mr. Justice Black's remarks already quoted as to the possibility in some cases of adequate and effective review without transcripts, it might be said that the *Griffin* case provides a rule for transcripts parallel to that for counsel in *Betts v. Brady*—that transcripts must be provided if necessary to an adequate nondiscriminatory appeal just as counsel must be provided if necessary to an adequate hearing.

Sixth: I come now to the question whether the *Griffin* rule is retroactive so as to apply to convictions obtained before April 23, 1956, the date of the *Griffin* decision. I can appreciate the undesirability of a large scale jail delivery of prisoners convicted and sentenced years ago before *Griffin* was heard of; but for my part I am too old, or too conservative, or just too hide-bound, if you will, to be able to adjust myself to the idea that the Constitution of the United States gives a protection to a defendant who was convicted on or after April 23, 1956, and denies that protection to a defendant convicted in the same circumstances on April 22, 1956. It does not seem to me that a constitution can operate in that way. If any five men undertake to say that the Constitution meant one thing before a certain date fixed by them but means another thing after that date it seems to me that they are undertaking a five man amendment to the Constitution, however vehemently they may protest that they are only putting a different interpretation upon it. It may be that in a certain practical sense judges do make law; but it does not follow that sound theory should be thrown to the winds or that it may not exercise some salutary restraining influence. Abandonment of sound principle may some day lead to the loss of cherished liberties. Only one of the *Griffin* justices advocated the prospective

<sup>22</sup> 216 U.S. 455 (1942).

theory, and the Court made no order in reference to it. I believe therefore that the decision is retroactive and that state courts will have to adjust themselves to that idea, as they did after the decision in *Belts v. Brady*.

The net results of this rather inconclusive discussion seem to me to be that in all criminal prosecutions for major offenses, if the state allows transcripts of the evidence to be prepared and used by defendants who pay for them the state, in order to be on the safe side, must furnish such transcripts to defendants unable to pay for them, except in cases where it is plain either that the appeal is frivolous or that defendants without transcripts are in as favorable a position as those with transcripts. The state must also pay in behalf of indigent defendants other expenses of appeal of the kinds that I have mentioned, unless provision is made for waiving the requirements. I do not think it can be said at the present time that the "implications" of the *Griffin* decision go beyond what I have just stated. If I am right the decision is not so revolutionary as some commentators seem to believe.<sup>23</sup>

<sup>23</sup> I have written the foregoing in the first person singular. I have done so partly to avoid circumlocutions and partly to make it plain that the views expressed and the errors pronounced are entirely my own.

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#### GRIFFIN v. ILLINOIS: ANTECEDENTS AND AFTERMATH\*

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When, in the spring of 1956, the United States Supreme Court handed down its decision in *Griffin v. Illinois*,<sup>1</sup> most of those who follow the work of the Court immediately recognized that this was a case of more than passing interest and significance. The case is important, first of all, in its immediate holding. Its primary impact is felt in those states whose procedures, at the time of the decision, provided less than "adequate" opportunities for appeal to indigent defendants in criminal cases. But the decision may have a broader significance. In announcing the judgment of the Court, Mr. Justice Black says: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."<sup>2</sup> Such a principle, to say the least, contains the potentiality of growth. And its implications may extend to problems quite distinct from those involved in *Griffin v. Illinois*.

It is well, at the outset, to state as accurately as possible the holding in the case. The Court was divided 5-4. There is, strictly speaking, no Opinion of the

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<sup>1</sup> 351 U.S. 12 (1956).

<sup>2</sup> *Id.*, at 19.