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Indigent Defendant--Right to Transcript: Mayer v. City of Chicago, 404 U.S. 189 (1971), Britt v. North Carolina, 404 U.S. 226 (1971)

proof beyond a reasonable doubt. *Lego* is thus significant for what it did not do.[44]

The adoption of the lower standard of proof for admissibility of constitutionally challenged evidence would be satisfactory if the fifth amendment were applicable to all accuseds collectively, rather than to defendants as individuals. Under such circumstances, allowing a confession to be used if proven voluntary by a preponderance of the evidence, would constitute a broad rule in conformity with the fifth amendment prohibition against self-incrimination, although some involuntary confessions might slip through. But the dissent in *Lego* is compelling because involuntary confessions will slip through under the lower standard of proof. To make the fifth amendment a reality for every individual defendant, the Court should reject *Lego* and adopt the higher standard of proof for admissibility of constitutionally challenged evidence

[44] Perhaps the typical case where the standard would make a difference is the so-called "swearing contest" case, in which, for example, the defendant testifies the police beat him and the police deny it. A number of the lower court cases deciding the issue presented in *Lego* were precisely that kind of case, indicating that the *Lego* question is not purely academic. *See, e.g.*, People v. Harper, 36 Ill. 2d 398, 223 N.E.2d 841 (1967); State v. Davis, 73 Wash. 2d 271, 288, 438 P.2d 185, 193 (1968).

INDIGENT DEFENDANT—RIGHT TO TRANSCRIPT

Mayer v. City of Chicago, 404 U.S. 189 (1971)
Britt v. North Carolina, 404 U.S. 226 (1971)

In *Mayer v. City of Chicago*[1] and *Britt v. North Carolina*[2] the Supreme Court undertook to clarify the standard to be applied in granting free transcripts to indigent defendants. The Court disapproved the state court denial of a transcript in *Mayer*, whereas it upheld a transcript denial in *Britt*.

In *Mayer*, appellant was convicted in state court of the non-felony offenses of disorderly conduct and interference with a police officer, and was fined $250 for each offense.[3] The trial court denied his petition for a free transcript to support an appeal,[4] pointing out that Illinois Supreme Court Rule 607(b) authorized such requests only in felony cases.[5] The state supreme court denied a similar petition.[6] Mayer appealed directly to the United States Supreme Court, challenging the constitutionality of the limitation of the rule to felony cases.[7] The Supreme Court vacated the order, remanding with directions to the state supreme court where an appeal was already docketed.[8]

In an opinion written by Justice Brennan, the Court held the felony limitation an "unreasoned distinction" violative of the due process and equal protection requirements of the fourteenth amendment.[9] The Court indicated that criminal procedures are also discriminatory when access is denied in cases where the indigent is fined rather than sentenced to a prison term.[10] In dictum the Court cautioned that its holding did not mean an appellant is automatically entitled to a complete transcript.[11]

In *Britt*, the Court, per Justice Marshall, ruled more authoritatively that indigent defendants are not always entitled to free transcripts. When Britt's three day murder trial ended in a deadlocked jury, he filed a motion for a free transcript. The trial court denied the motion, and defendant was subsequently retried, convicted and sentenced

[1] 404 U.S. 189 (1971).
[2] 404 U.S. 226 (1971).
[3] Defendant Mayer was convicted by a jury in the Circuit Court of Cook County for violations of City of Chicago ordinances which carried maximum penalties of $500 each.
[4] Petitioner appealed on the grounds of insufficient evidence for conviction and prosecutorial misconduct.
[5] ILL. REV. STAT. ch. 110A, §607(b) (1969). The rule was promulgated under legislative authority to amend code provisions governing criminal appeals, ILL. REV. STAT. ch. 110A, §121-1. A 1971 amendment further restricted the availability of a free transcript to indigents convicted of an offense punishable by imprisonment for more than six months. 1971 ILL. LEG. SERVICE No. 5 1703.
[6] Unreported order, *noted in Mayer*, 404 U.S. at 193.
[7] 401 U.S. 906 (1971).
[8] *Id.* at 199.
[9] 404 U.S. at 196.
[10] *Id.* at 197.
[11] *Id.* at 198. Chief Justice Burger concurred in a separate opinion, for the reason that essential facts were in dispute and the appeal did not center on limited aspects of the case. He emphasized that in most cases alternatives short of a complete transcript will suffice. *Id.* at 199–201. Justice Blackmun also concurred, pointing out that on remand the state should reconsider appellant's status as an indigent since he was a third year medical student at the time of trial. *Id.* at 201.

to 30 years imprisonment. The North Carolina court of appeals affirmed the conviction and upheld the lower court's refusal to order a free transcript, stating the record did not reveal a sufficient need.[12] The state supreme court declined review.[13] The United States Supreme Court granted certiorari to determine whether the rule requiring transcripts for indigents was applicable.[14]

The Supreme Court held that the free transcript rule, as set out in *Griffin v. Illinois*,[15] applies to a request in preparation for retrial, but that in the narrow facts of *Britt* the rule had not been violated.[16] Justice Marshall indicated that two factors are relevant to a determination of an indigent's need for a free transcript: (1) its value to the defendant in presenting an effective defense, and (2) the availability of alternatives that would adequately satisfy the defendant's need.[17] According to Marshall the state court decision rested on the second factor, the fact that an "informal alternative" to a transcript was available. He cited two substitutes indicated by the lower court: (1) the memory of appellant together with that of his attorney, since the same judge, counsel and court reporter participated in proceedings one month after the mistrial; and (2) the availability of the court reporter to read to the jury testimony from the first trial should inconsistent testimony be offered.[18] It is noteworthy that the nine Justices were not in disagreement over articulating the *Griffin* rule and holding it applicable to the mistrial context. However, Justice Douglas, in an opinion joined by Justice Brennan, dissented, taking issue with the majority's reading of the appellate court holding.[19]

Supreme Court attention to providing indigent defendants access to state appellate courts dates from its opinion in *Griffin v. Illinois*[20] in 1956. Petitioners there had requested a free trial transcript on grounds of their indigency in order to support an appeal from a robbery conviction. The request was denied because Illinois required all criminal defendants, except those sentenced to death, to purchase their own transcripts.[21] A sharply divided Court held that the state's failure to provide a means for indigent defendants to bring error to the attention of the Illinois supreme court violated the equal protection and due process clauses of the fourteenth amendment.[22]

Griffin differed from prior cases testing state statutes against the equal protection requirement[23] in that the Illinois statute was not discriminatory, did not make arbitrary classifications, and was not a source for discriminatory administration. The only constitutional inadequacy of the Illinois statute was that it did not go far enough in providing procedures for appellate review. By identifying this failure to provide access to review as a fourteenth amendment violation, the Court initiated a use of the equal protection clause which enabled application of the fourteenth amendment to requests for transcripts at other stages of criminal procedure,[24] for payment of court fees,[25] and for

[12] State v. Britt, 8 N.C. App. 262, 174 S.E.2d 69 (1970).

[13] Unpublished order, *noted in Britt*, 404 U.S. at 227.

[14] 401 U.S. 973 (1971).

[15] 351 U.S. 12 (1956).

[16] 404 U.S. at 227.

[17] *Id.*

[18] *Id.* at 228–29. Justice Blackmun concurred in the result, but felt certiorari was improvidently granted. *Id.* at 230.

[19] *Id.* Justice Douglas interpreted the state court as basing its decision on: (1) the failure of appellant to make a particularized showing of need, (2) the representation by the same attorney at both trials, and (3) the availability of the court reporter to prove suspected inconsistencies in prosecution evidence. He considered none of these grounds consistent with the equal protection inquiry demanded by the fourteenth amendment and urged reversal.

[20] 351 U.S. 12 (1956).

[21] ILL. REV. STAT. ch. 38, §769(a) (1955) (capital cases). The state conceded that purchasing a transcript was the only practical means of complying with record requirements. 351 U.S. at 14 n.4. Also excepted were cases arising under the Illinois Post Conviction Hearing Act, which comprised cases involving issues of constitutional rights. ILL. REV. STAT. ch. 37, §163(f) (1955).

[22] 351 U.S. at 17. Justice Black announced the judgement of the Court in an opinion joined by Justice Douglas, Justice Clark, and Chief Justice Warren. Justice Frankfurter concurred in a separate opinion. *Id.* at 24. It has been stated that he agreed only with the equal protection violation. Note, 70 HARV. L. REV. 126 (1957). However he did not directly express such a limitation. His additional points were that a state may provide checks to guard against waste by frivolus appeals and that the majority rule should not apply to past convictions. Justices Burton and Minton dissented in an opinion joined by Justices Reed and Harlan. 351 U.S. at 28. Justice Harlan also added a separate opinion. *Id.* at 33. The dissenters insisted that the constitution does not compel states to make all defendants equal: "[S]ome 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." *Id.* at 28–29.

[23] *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) (administration of laws must be willfully discriminatory in order to amount to a denial of equal protection).

[24] *See, e.g.*, United States v. Amabile, 395 F.2d 47 (7th Cir. 1968) (federal defendants' absolute right to grand jury minutes); United States *ex rel.* Wilson v. McMann, 408 F.2d 896 (2d Cir. 1969) (mistrial tran-

providing appeal counsel.[26] Prior to *Mayer* and *Britt*, however, at least four issues regarding *Griffin's* applicability remained unresolved.

An initial question arose as to what types of proceedings the free transcript rule of *Griffin* was meant to apply. Some courts and statutes limited its applicability to the appeal process.[27] However, under various circumstances the Supreme Court required states to provide transcriptions of proceedings under collateral attack[28] and testimony by key witnesses from earlier proceedings.[29] Lower courts had extended *Griffin* to requests for mistrial transcripts,[30] but the Supreme Court had not spoken on its applicability.

Subsequent to *Griffin* the question also arose of which offenses and penalties mandated transcription at state expense.[31] Courts generally felt that inability to pay should not entitle the defendant to a transcript in situations where privately employed counsel would forgo the expense.[32] The Supreme Court rejected the argument that an indigent convicted of a "petty" offense should not be entitled to a free transcript in *Williams v. Oklahoma City*.[33] A corollary argument could be made that the severity of the penalty imposed, apart from the classification of the offense, should also distinguish *Griffin* from transcript requests in lesser cases. *Griffin* and all subsequent cases before *Mayer* involved requests where the petitioner was facing the possibility of a prison term.[34]

Thirdly, it was unsettled whether alternatives to a complete stenographic transcript would satisfy the *Griffin* requirement. In dictum in *Draper v. Washington*[35] the Court had set out its fullest treatment of possible alternatives. The Court suggested that an agreed statement of facts, a narrative statement based on the trial judge's minutes or on the court reporter's notes, or a bystander's bill of exceptions might enable indigents to maintain an equally effective appeal.[36] It also urged courts to limit transcript grants to portions relevant to appeal issues.[37] No case subsequent to *Draper* had authoritatively ruled that an alternative did satisfy *Griffin*.

A final uncertainty about the free transcript rule concerned whether a defendant must show the inadequacy of possible alternatives. Courts applying *Griffin* often required a showing of need by the defendant, particularly where the state had established procedures short of providing a verbatim transcript.[38] On the other hand, at least one court held that indigent defendants have an absolute right to a free transcript in some circumstances.[39]

script); Roberts v. La Vallee, 389 U.S. 40 (1967) (transcript of preliminary hearing at which a key state witness testified).

[25] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (payment of court and service-of-process fees); Smith v. Bennett, 365 U.S. 708 (1961) (payment of filing fee to docket writ of habeas corpus).

[26] *See, e.g.*, Anders v. California, 386 U.S. 738 (1967) (court-appointed trial counsel required to aid in appeal effort); Douglas v. California, 372 U.S. 353 (1963) (counsel required when requested after a jury conviction, defended pro se).

[27] *See, e.g.*, Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965); IND. STAT. ANN. ch. 2, §4–7309 (Burns 1968).

[28] *E.g.*, Smith v. Bennett, 365 U.S. 708 (1961).

[29] *E.g.*, Roberts v. LaVallee, 389 U.S. 40 (1967).

[30] *E.g.*, United States *ex rel.* Wilson v. McMann, 408 F.2d 896 (2d Cir. 1969). *But see* Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963).

[31] *See* remarks of former Chief Justice Qua of the Massachusetts Supreme Court, in an address on *Griffin* before the Conference of Chief Justices, July 10, 1957, *reprinted*, 25 U. CHI. L. REV. 143, 149 (1957).

[32] *See, e.g.*, the experience of Chief Justice Burger, 404 U.S. at 199–200.

[33] 395 U.S. 458 (1969). However *Williams* did not fully eliminate the severity distinction because the denial of the transcript was not criticized independent of a general denial of appellate review. Under the Oklahoma rule, as in Illinois before *Griffin*, a transcript was a prerequisite to prosecuting an appeal. It could have been argued that where other methods existed of bringing issues before a reviewing court, defendants convicted of minor offenses could be denied a free transcript in spite of their indigency.

[34] Wade v. Wilson, 396 U.S. 282 (1970); Williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Long v. Dist. Ct. of Iowa, 385 U.S. 192 (1966); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Ross v. Schneckloth, 357 U.S. 575 (1958); and Escridge v. Washington Prison Bd., 357 U.S. 214 (1958).

[35] 372 U.S. 487 (1963). Petitioners were convicted of robbery and, acting pro se, requested from the trial judge transcripts to support their appeal. The judge denied their motion on the grounds that the appeal issues were frivolous, and the state supreme court agreed. The Court did not hold the Washington transcript rule unconstitutional but struck down its application to the *Draper* facts. *Id.* at 498. Equal protection required the state to provide a record sufficient to permit appellate review of the standard the trial court applied in denying the request.

[36] *Id.* at 495.

[37] *Id.*

[38] *See, e.g.*, State v. Haller, 247 Minn. 571, 78 N.W.2d 389 (1956) (dismissing for lack of jurisdiction a petition to direct trial court to furnish transcript). MINN. STAT. §632.04 ("judgement roll" and "bill of exceptions"), §640.10 ("synopsis of testimony") (1947).

[39] United States *ex rel.* Wilson v. McMann, 408 F.2d 896 (2d Cir. 1969) (indigent state defendants have absolute right to free transcripts of previous prosecutions ending in deadlocked juries).

Mayer and *Britt* go far to resolve these uncertainties. Concerning the types of proceedings to which *Griffin* is applicable, *Britt* represents an expansion of the free transcript rule. Although Justice Marshall did not specifically address the distinction between a mistrial and a direct appeal, he deliberately equated transcript requests for defense purposes at trial with appeal uses.[40] His two-pronged test for determining transcript need[41] is as relevant to the effectiveness of a defense at trial as to success on appeal. In his dissenting opinion, Justice Douglas reasoned at length[42] that a request for mistrial testimony is analogous to the request for a preliminary hearing transcript the Court approved in *Roberts v. LaVallee*.[43] His remarks do not depart from the majority opinion in so far as they recognize that *Griffin* should apply.

As to whether *Griffin* can be distinguished on the basis of the severity of the offense or penalty, the holding in *Mayer* determined that this distinction is irrelevant. Unlike the effort in *Williams*, petitioner in *Mayer* had access to appeal independent of his obtaining a free transcript.[44] In striking the felony requirement from the Illinois rule, the Court drew an analogy to the felony distinction regarding change of venue which it had invalidated in *Groppi v. Wisconsin*.[45] The comparison is apt in so far as both practices suggest an impermissible subordination of constitutional rights to public convenience and thrift.[46] In addressing the severity of punishment distinction urged by the City of Chicago, the Court in *Mayer* emphasized that *Griffin* specifically denounced a policy decision that society cannot afford the risk of encouraging frivolous appeals.[47] It stated that *Griffin* does not call for a balancing between the needs of the accused and the interests of society. The Court pointed out that even in minor cases the need for a transcript may be substantial, as in *Mayer* where a medical student was facing the collateral consequences of a criminal record.

The third area of unsettled law, whether alternatives to a complete transcript are consistent with *Griffin*, is addressed in both *Mayer* and *Britt*. In *Mayer* the Court emphasized that the *Draper* requirement of "a record of sufficient completeness" does not automatically entitle an appellant to a full verbatim transcript.[48] In *Britt* the Court showed that the *Griffin* requirements could be met in practice by alternatives short of a complete transcript.[49] Both factors indicated by the *Britt* majority, the recollections of the defendant and his attorney and the availability of the court reporter, are peculiar to transcript requests for use at subsequent fact-finding proceedings. The Court approved the state court determination that these alternatives were effective because "[t]he second trial was before the same judge, with the same counsel and court reporter, and the two trials were only a month apart." [50] While *Britt* states several sufficient alternatives, it does not present a definitive list of alternatives that may suffice in a direct appeal request. In *Mayer* the Court declined to reach a determination of whether the Illinois procedure for a "Settled Statement" [51] or an "Agreed Statement of Facts" [52] were effective alternatives for appeal purposes.[53] However, the Court's reasoning in the two opinions is significant in that it negates the inference[54] that the fourteenth amendment requires states to transcribe all proceedings at the request of all indigent defendants.

The issue of whether an indigent has the burden of showing the need for a transcript is also resolved in both *Mayer* and *Britt*. The defendant must show neither the usefulness of a transcript nor that alternatives are inadequate. The Court in *Mayer* held, apart from the felony limitation, that the denial of the motion for a free transcript constituted constitutional error because the state order denying the transcript might be read to require that the petitioner shoulder the burden of showing inadequate alternatives.[55] The Court was similarly explicit in *Britt*: "We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's

[40] 404 U.S. at 227.
[41] *See* note 15 *supra*.
[42] 404 U.S. at 232–33.
[43] 389 U.S. 40 (1967).
[44] *See* notes 49 and 50 *infra* and accompanying text.
[45] 400 U.S. 505 (1971).
[46] *See generally*, Note, *Equal Protection and the Indigent Defendant: Griffin and its Progeny*, 16 STAN. L. REV. 394 (1964).
[47] 404 U.S. at 196–97.
[48] *Id.* at 198.
[49] 404 U.S. at 228–30.
[50] *Id.* at 228–29. In his dissent Justice Douglas considered the *Britt* circumstances "fortuities" on which constitutional guarantees should not depend and opted for an absolute guarantee for mistrial transcripts. *Id.* at 243 n.15.
[51] ILL. SUP. CT. R. 323(c).
[52] ILL. SUP. CT. R. 323(d).
[53] 404 U.S. at 199.
[54] *See* Wilcox & Bloustein, *The Griffin Case: Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1 (1957) (analysis of immediate impact of *Griffin* on case law).
[55] 404 U.S. at 199.

failure to specify how the transcript might have been useful to him." [56]

But the Court is inconsistent in the two opinions as to whether the state has any affirmative burden of proving that alternatives meet the requirements of *Griffin*. In *Mayer* the Court suggested:

> Where the grounds for appeal, as in this case, make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds.[57]

However in *Britt* the Court suggested, after assuming a transcript of a mistrial is ordinarily necessary, that judges can take judicial notice of facts which provide adequate alternatives.[58] The task of the lower court in *Britt* was to measure the informal alternative conceded by petitioner with the *Griffin* standard. But the Court further indicated that where no such concession has been made, a court may, on its own initiative, explore the possibility of effective alternatives.[59] Thus on the strength of the dictum in *Britt*, trial courts in future cases will not be precluded from ruling alternatives constitutionally proper even if the state does not carry its burden of proof.

In *Mayer* the Court declined an invitation to reexamine *Griffin*, instead approving its extension to transcript requests involving appeals from all criminal convictions. In *Britt* the Court articulated a concise summary of factors relevant in applying *Griffin*. It made clear that the stage of criminal procedure for which testimony at a prior proceeding is sought is irrelevant. The Court established its opinion in *Draper* as a key source for interpreting *Griffin*, and in *Britt*, for the first time, approved an alternative to a complete transcript. Although Justice Marshall was careful to limit the extension of alternatives beyond *Draper* to the "narrow circumstances" of *Britt*, the decision does enlarge the discretion of the petitioned judge to take into account alternatives to a transcript.[60] Considered together the decisions emphasize that the severity of an offense is irrelevant to transcript need. After Britt's murder conviction the Court upheld the denial of a transcript; after Mayer's fine for municipal ordinance violations the Court found error in the denial. The decision in *Mayer* invalidates those statutes and court rules in jurisdictions outside of Illinois which provide transcripts on the basis of a felony conviction or imprisonment requirement.[61]

[56] 404 U.S. at 228. An analysis of the reasoning in the majority and dissenting opinions in *Britt* points out how completely courts must articulate the "need" to which they are applying *Griffin*. The disagreement among the Court turned on different interpretations of the appellate court holding. State v. Britt, 8 N.C. App. 262, 174 S.E.2d 69 (1970). The state court identified the lack of a need for a transcript as the reason for its holding. A majority of the Supreme Court felt this determination rested on "the availability of alternative devices to fulfill the same functions as a transcript." 404 U.S. at 228. The dissent considered the opinion based on peitioner's failure to specify how a transcript might have been useful to him. *Id.* at 231. The lower court opinion was not clear as to which criteria it used; but it did cite cases since disapproved which were based on a lack of showing of value by the defendant: Nickens v. United States, 323 F.2d 808 (D.C. Cir. 1963); and Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965). It can only be said that the majority's reading is more consistent with the concluding language of the North Carolina court: "We are of the opinion and so hold that the factual situation does not reveal such a need for the transcript of the evidence at the first trial that the denial thereof was a deprivation of a basic essential of the defendant's defense." 8 N.C. App. at 26, 174 S.E.2d at 71.

[57] 404 U.S. at 195.

[58] 404 U.S. at 230.

[59] *Id.* n.6.

[60] In many states, providing a transcript is discretionary with the court. *See, e.g.*, OKLA. STAT., tit. 20, §111 (Supp. 1962); PA. STAT. ANN. tit. 17, §809–10 (Purdon Supp. 1965); and State v. Hudson, 55 R.I. 141, 179 A. 130 (1935).

[61] *See, e.g.*, MASS. L. ANN. ch. 278, §33A (Michie 1968) (free transcript mandatory for murder or manslaughter convictions, discretionary for other felonies); VA. CODE ANN. §17–30.1 (1960) (limited to felony cases, where conviction is upheld on appeal the expense "shall be assessed against the defendant"); N.J. STAT. ANN. 2A: 152–15, 16 (West 1971) (where death sentence imposed); N.C. GEN. STAT. §15–181 (1965) (capital cases).