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CRIMINAL LAW CASE NOTES AND COMMENTS

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THE GRIFFIN CASE: NEW AID FOR INDIGENT DEFENDANTS IN CRIMINAL CASES

Marvin E. Aspen

An ideal of American jurisprudence is that recourse to judicial process shall not be denied because of the lack of financial resources.[1] State courts have sought to follow this principle, but in applying it have at times fallen short of their professed standards.[2] Present criminal court procedures afford the indigent defendant varied forms of legal aid such as the assignment of counsel,[3] waiver of the cost of filing fees[4] or waiver of the posting of security bonds.[5] In addition, a majority of states provide an indigent with a free transcript of the trial court record in all criminal cases.[6] In several states, a

[1] With the passing of the sixth amendment in 1791, a federal court could not deprive an accused of his life or liberty without the assistance of counsel. In cases of indigency, such assistance was furnished free to the defendant. U.S. CONST. amend. VI. A provision of the Illinois constitution of 1818 provided that every person in Illinois "ought to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably with the laws". ILL. CONST. art. VIII, §12 (1818). A similar provision is incorporated in the present Illinois constitution. ILL. CONST. art. II, §19 (1870).

[2] Sykes v. Warden, 201 Md. 662, 93 A.2d 549 (1953.) (court refused to appoint counsel for an indigent's appeal); State v. Cater, 109 Iowa 69, 80 N.W. 222 (1899) (court has no authority to aid an indigent in preparing appeal); De Long v. Muskegon County, Mich. 568, 69 N.W. 1115 (1897) (court refused to compensate an attorney appointed to aid an indigent).

[3] See, *e.g.*, CALIF. PEN. CODE §987 (Deering 1941); ILL. REV. STAT. tit. 34 §163j, 163c, 163g (1955); N. Y. CRIM. CODE c. 883 (1949).

[4] Trovar v. State, 39 Ariz. 528, 8 P.2d 247 (1932).

[5] State v. Watson, 208 N.C. 70, 179 S.E. 455 (1935). Aid has been denied, on occasion, for technical reasons, such as failure to meet statutory requirements for, or improper filing of a formal document stating the defendant's poverty and asking for available relief in defraying court costs. State v. Sallee, 151 Ore. 483, 48 P.2d 770 (1935); State v. Pike, 205 N.C. 176, 170 S.E. 649 (1933); State v. Knight, 20 Iowa 819, 216 N.W. 104 (1927). Although it is in the discretion of the trial court to determine the defendant's pauper status, an abuse of this discretion will usually be cause for reversal by the reviewing court. Lenora v. State, 510 Okla. Crim. 291, 1 P.2d 832 (1931).

[6] ARIZ. CODE ANN. §44-2525 (1939); ARK. STAT. ANN. §22-357 (1947); CALIF. CODE OF CIV. PROC. §274 (Deering 1949); CONN. GEN. STAT. §§3615, 8796 (1949); DEL. REV. CODE c. 108, §4226 (1935); FLA. STAT. ANN. §924.23 (1944); IDAHO CODE §19-2402 (1948); IND. STAT. ANN. §4-3511 (Burns 1946); IOWA CODE ANN. §793.8 (1950); KY. REV. CODE §28.460 (1948); LA. REV. STAT. tit. 15, §555 (1950); MASS. LAWS ANN. c. 278, §33 (1933); MICH. STAT. ANN. §27.341 (1938); MISS. CODE §1640 (1944); MO. REV. STAT. §13354 (1943); MONT. REV. CODE §93-1904 (1949); NEB. REV. STAT. §24-342 (1948); NEV. STAT. XX §11029.03 (Supp. 1950); N. Y. CRIM. CODE tit. 66, §456 (McKinney 1945); N. C. GEN. STAT. §9-89 (1944); N. D. REV. CODE §27-0606 (1944); OKLA. STAT.

transcript is awarded without cost to the indigent only in special cases.[7] The remaining states have no provision for free transcripts of the trial court record for indigent defendants.[8] However, in the recent case of *Griffin v. Illinois*, the United States Supreme Court has set forth new requirements upon the states in regard to the issuance of transcripts to indigents and, perhaps, in regard to other costs of appeal as well.[9]

GRIFFIN V. ILLINOIS

After an indigent was convicted of a felony, the trial court in the *Griffin* case refused his request for a free transcript of the trial record. The defendant had alleged that he required this transcript in order to prepare a bill of exceptions which was needed to obtain appellate review.[10] In Illinois, the trial judge was required to grant a free transcript only where review of constitutional issues was sought[11] or where the defendant had been sentenced to death.[12] Free transcripts were not obtainable under any other circumstances.[13] After the Illinois Supreme Court had affirmed the trial judge's denial of the request for a free transcript, the defendant petitioned for and was granted a writ of certeriori by the United States Supreme Court. That Court, with four members dissenting, reversed the Illinois ruling, holding that destitute defendants in criminal cases must be afforded as adequate appellate review as defendants who are able to pay the cost of transcripts required for full review of their convictions. The due process and equal protection clauses of the fourteenth amendment,[14] the Court declared, require that a state afford equal opportunity of appellate review to all defendants in criminal cases, without regard to their financial status.[15]

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tit.20 §111 (1937); ORE. COMP. L. ANN. §93-276 (1940); S. C. CODE §596 (1942); TENN. CODE §§1108, 8819 (Williams 1934) (Defendant may use narrative bill of exceptions, thus obviating necessity of written transcript); TEX. CODE OF CRIM. PROC. art. 760 (6) (Vernon 1950); UTAH CODE ANN. §21-0-8 (1943); VA. CODE ANN. §8-330 (1950) (narrative bill of exceptions permitted in lieu of stenographic transcript); WASH. REV. STAT. §42-5 (Remington 1932); W. VA. CODE §5251 (Michie 1949); WIS. STAT. §252.20 (1945).

[7] N. J. STAT. ANN. §2:195-22 (1939) (only when conviction is for first degree murder and sentence is death); PA. STAT. ANN. tit. 19, §1232 (Purdon 1954) (only when conviction is for first degree murder); VT. REV. STAT. §1421 (1947) (only in sentences of death or imprisonment of ten years or more). In Ohio, the awarding of a free transcript is apparently left to the discretion of the trial court. See, *e.g.* State v. Trunzo, 137 N.E. 2d 511 (Ohio 1956).

[8] Alabama, Colorado, Georgia, Kansas, Maine, Maryland, Minnesota, New Hampshire, New Mexico, Rhode Island, South Dakota, and Wyoming have no statute authorizing free transcripts of the trial court record to indigent defendants in any type of criminal case.

[9] Griffin v. Illinois, 351 U.S. 12 (1956).

[10] The transcript of the trial court record is incorporated in the appellant's bill of exceptions, a document essential for review in most cases in Illinois and other jurisdictions. People ex. rel. Iasello v. McKinlay, 409 Ill. 120, 98 N.E.2d 728 (1951).

[11] ILL. REV. STAT. tit. 27, §163 f (1955).

[12] ILL. REV. STAT. tit. 28, §769a (1955).

[13] People v. LaFrana, 4 Ill.2d 261, 122 N.E.2d 583 (1954); People v. O'Connell, 411 Ill. 591, 104 N.E.2d 825 (1952); People v. Yetter, 386 Ill. 594, 54 N.E.2d 532 (1944). For a review of the past practice of Illinois courts in handling requests for free transcripts not authorized by statute, see Comment, *Post Trial Remedies*, 42 J. CRIM. L., C.&P.S. 636, 645 (1952).

[14] U.S. CONST. AMEND. XIV.

[15] The Supreme Court reiterated the rule of McKane v. Durston, 153 U.S. 684 (1894). which held that appellate review is not a right guaranteed to the individual by the United States Constitution. However, the *Griffin* case modified the *Durston* rule by holding that once a state sets up a system of review, it cannot offer this privilege on a discriminatory basis. Illinois afforded appellate review on equal terms to both indigents and nonindigents. There was therefore no affirmative descrimination against indigents by the state. However, the Court held that, by affording appellate review only to those who could afford to pay the necessary costs, the state had acted in a discriminatory manner. The state was thus required to correct an inequity produced by economic circumstances.

REQUIREMENTS OF THE GRIFFIN RULING

The Court did not expressly formulate the procedure that a state must follow in affording full appellate review to indigent defendants. However, the Court indicated that conformity to its ruling would not necessarily require the granting of a free transcript in every appeal by an indigent. The Court implied that a state must provide a defendant with whatever means are essential in each particular case for full appellate review.

Appeals which involve the issue of whether a conviction is against the weight of the evidence generally require a full transcript of the trial court record.[16] However, in cases involving other alleged errors, full review can often be obtained without the necessity and expense of reproducing the entire or a substantial part of the trial court record. In these cases, such devices as a "bystander's bill of exceptions,[17] a "judge's note"[18] or an "appendix system"[19] would serve as a less expensive, but nevertheless adequate, mode of preparing the appellant's bill of exceptions. Where these alternative methods of specifying errors in the trial court are used, their cost of preparation, under the policy of the *Griffin* ruling, must be borne by the state in cases involving indigents. The cost of these alternative devices, however, would likely be far less than that of transcripts.

In addition to a transcript or other method of describing the pertinent parts of the trial, a brief, setting forth the defendant's arguments in regard to the alleged errors, is usually required for full review by an appellate court.[20] In most states this brief must be in printed form.[21] Since this printed brief is usually equally as essential to full review as the bill of exceptions, in instances where the indigent defendant could not afford the cost of such a brief, denial of a free printed brief may constitute a violation by the state of the fourteenth amendment. Thus, a reasonable application of the *Griffin* principle would require a state to pay the cost of preparing printed briefs, in addition to transcripts, in appeals by indigents.[22] An inex-

[16] Where the jury's evaluation of the weight of the evidence or the court's instruction to the jury in regard to the evidence is presented for review, all the evidence must be set out in the appellant's bill of exceptions. See, *e.g.*, Ellis v. Central Trust Co. of Owensboro, 307 Ky. 794, 211 S.W. 808 (1948); Kelley v. Cannon, 22 Tenn. App. 34, 117 S.W.2d 760 (1938); Law v. Gulf States Steel Co., 229 Ala. 305, 156 So. 835 (1934).

[17] "Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at the trial, and, in short, from any and all sources which will contribute to an accurate account of the trial judge's action." Miller v. United States, 317 U.S. 192, 198 (1942). See, *e.g.*, People v. Joyce, 1 Ill.2d 225, 115 N.E.2d62 (1953); 162 East Ohio Street Hotel Corp. v. Lindheimer, 368 Ill. 294, 13 N.E.2d 970 (1938). Comment, *Bills of Exception*, 1 S.T.L.J. 401 (1955).

[18] A judge's note is an account of the proceedings prepared by the judge while a bystander's bill may be prepared by any witness to the trial. See note 18 *supra*.

[19] This procedure has been used in New York where the entire record is not essential to the appeal. After the typewritten record is sent up to the appellate court, the adversaries then print their brief and, as an appendix to the brief, print so much of the record as each party desires the court to read. The appellant must also print in the appendix of his initial brief the judgment or order appealed from, the opinion of the lower court, findings of fact, and conclusions of law. 17 N.Y.S.B.A. BULL. 14 (1955).

[20] Since questions not presented and argued in the assignment of errors are considered as waived, a brief is often essential for appeal. Harrison v. State, 231 Ind. 147, 106 N.E.2d 912 (1952); Nelson v. Dodge, 76 R.I. 1, 68 A. 2d 51 (1949); Crampton v. Osbord, 356 Mo. 125, 201 S.W.2d 336 (1947).

[21] The appellate court rules of most states require that an appellant's brief must be in printed form. See, e.g., N.Y. CT. OF APP. RULE V; ILL. SUP. CT. RULE 39; ILL. APP. CT. RULE 7.

[22] Of course only a brief adequate for full review should be furnished without cost to the indigent by the state. If, for example, the indigent appellant can state his arguments adequately in a fifteen page brief, the state should not be obliged to furnish an elaborate two hundred page brief. In a jurisdiction, such as Alabama, which makes the right of appeal in criminal cases one of substance, a brief is not essential to the consideration of errors on review. In these states the appellate court has the duty to

pensive solution to this problem would be the relaxation of the requirement that briefs be printed. In cases involving indigents an appellate court should allow the appellant to submit a less costly typewritten brief.

Another expense often involved in an appeal is the cost of obtaining counsel to prepare and argue the appellant's case. The *Griffin* principle should not require that a court furnish free counsel to the indigent. Counsel, unlike the bill of exceptions and the appellate brief, is helpful but generally not essential to the defendant in securing appellate review since an indigent may personally prepare and argue his case on appeal.[23]

Following the United States Supreme Court's decision in the *Griffin* case, the Illinois Supreme Court promulgated a court rule which provided that a free transcript shall be furnished to all indigent appellants in all criminal cases.[24] Certainly the Illinois court should be commended for promptly adopting the principles of the *Griffin* holding. However, the Illinois ruling failed to distinguish between cases in which a transcript is essential for review and cases in which such a transcript would be merely superfluous. Where a "judge's note" might be adequate for the preparation of the indigent's bill of exceptions, Illinois is now obliged to furnish the more expensive partial or complete trial court transcript. Illinois, by awarding free transcripts for appellate review regardless of what type of error is alleged, has perhaps burdened itself with an unnecessary expense.[25]

APPLICATION OF THE GRIFFIN RULING TO MISDEMEANORS

The *Griffin* case involved a felony. For this reason, a narrow interpretation of the holding would limit its application to criminal cases involving felonies. However, the Court did not expressly confine its holding to felony cases and, in addition, made no mention of a distinction between felonies and misdemeanors.[26] The *Griffin* case held, in effect, that a state cannot discriminate between capital and non-capital cases in affording an indigent access to the appellate courts.[27] The significant difference

search the record for errors. Therefore, exceptions not argued in the appellant's brief would not be waived. See, *e.g.*, Walker v. State, 90 So.2d 221 (Ala. 1956).

[23] See, *e.g.*, People v. Clark, 9 Ill.2d 46, 137 N.E.2d 54 (1956); State v. Eckles, 137 N.E.2d 157 (Ohio 1956). It does not appear that the *Griffin* rule has altered the present requirement that a state need furnish an indigent with free counsel at the trial only when denial of counsel would deny the defendant a fair trial. Betts v. Brady, 316 U.S. 455 (1942). Where absence of counsel at the trial would not deny the indigent a fair trial, a state's failure to provide such assistance would not constitute discrimination against the indigent. Of course, as a practical matter most states do assign counsel to all indigent criminal defendants. See note 3 *supra*.

[24] Following the *Griffin* decision, the Supreme Court of Illinois proclaimed a rule authorizing the trial judge to award free transcripts to indigent appellants. "In case of any defendant sentenced to imprisonment after April 23, 1956, when upon verified petition of the defendant, judge who imposes sentence, or in his absence any other judge of the court, finds that the defendant is without financial means with which to obtain a transcript of the proceedings of his trial, the judge shall order the reporter to transcribe his notes, in whole or part, as is appropriate, and to deliver the transcript to the defendant without charge. . . ." ILL. SUP. CT. RULE 65-1, 135 N.E. 2d XXXII (1956).

[25] In Illinois the printing cost is twenty cents per transcription of one hundred words. Charges in excess of $500 per completed transcript are common. ILL. REV. STAT. tit. 37, §163 b, f. (1955).

[26] Just as the application of the *Griffin* ruling to misdemeanors might be questioned, an extension of the ruling to civil proceedings would not be reasonable. A distinction may be drawn between criminal and civil cases. In criminal cases the need for appeal arises as a result of some prior affirmative act on the part of the state. In a civil case, the plight of the contestants has normally not been brought about through any affirmative act by the state. Therefore, the state should be held responsible for the appeals of indigents in the former cases, but not in the latter. In addition, as a practical matter it is unlikely that an indigent would be sued and equally unlikely that an indigent possessing a valid claim for a money judgment would be without aid to press his claim.

[27] In the *Griffin* case, a state statute which au-

between misdemeanors and felonies, as between capital and non-capital offenses, lies in the degree of punishment.[28] For this reason, the *Griffin* interpretation of the fourteenth amendment may require that a state afford aid in securing appellate review to the indigent misdemeanant as well as to the indigent felon.

Nevertheless, there may be little demand for the assistance which is available to the indigent misdemeanant by virtue of the *Griffin* holding. Conviction for a misdemeanor usually carries with it a sentence not exceeding one year's imprisonment.[29] The indigent misfeasor could in many instances serve his sentence and regain his freedom in a period shorter than that between the dates of conviction and review. He might often prefer this to the inconvenience of an appeal. A defendant normally can avoid imprisonment entirely by appealing and remaining free on bail. However, since an indigent would not have funds to secure a transcript, he would probably be equally unable to post bail. A problem would exist only in the case of an indigent misdemeanant who would insist upon clearing his record by appellate review. However, a misdemeanant interested in clearing his record would in all probability be able to pay the costs attendant upon an appeal.

The Illinois court rule, which was promulgated after the *Griffin* decision, did not expressly indicate to which type of criminal case it should apply.[30] However, the rule stated that it shall apply to "any defendant sentenced to imprisonment." Narrowly defined, "imprisonment" might refer exclusively to those incarcerated in the penitentiary. Normally, only those persons convicted of a felony would receive a penitentiary sentence. On the other hand, a broader definition of "imprisonment" would include inmates of the county jail, most of whom would be misdemeanants. If it were to be interpreted narrowly so as to exclude misdemeanants, the Illinois ruling may not be in conformity with the dictates of the *Griffin* holding.

THE RETROACTIVE APPLICATION OF THE GRIFFIN RULING

The majority of the United States Supreme Court in the *Griffin* case failed to indicate whether its holding should be applied to those indigents who were denied appeals prior to that decision, as well as to those indigents who are convicted subsequent to that case.[31] The Court's lack of unanimity on the issue is evidenced by the conflicting views of the concurring opinion, which indicated that the majority had erred in not declaring the ruling retroactive,[32] and the minority opinion, which felt that the majority had erroneously formulated a retroactive ruling.[33]

If interpreted retrospectively, the *Griffin* ruling would have application to two types of situations: (a) where the indigent had requested and was refused a transcript subsequent to his conviction, and (b) where the indigent did not request a transcript following his conviction. In both instances, in order to obtain a free transcript or other appellate assistance, a defendant must show that he had not waived his right to a transcript at his original trial. Where the defendant subsequent to his sentence had made a timely request for a transcript of

thorized the award of free transcripts only in cases where the death sentence was involved was considered an inadequate compliance with the dictates of the fourteenth ammendment.

[28] See, *e.g.* ILL. REV. STAT. tit. 38, §586 (1955).

[29] *Ibid.*

[30] See note 24, *supra.*

[31] Justice Black, in authoring the majority opinion, failed to indicate the scope of the ruling. "The sole question for us to decide, . . . is whether due process or equal protection has been violated" in this instance. 351 U.S. at 16.

[32] Justice Frankfurter implied that, while the majority holding did not make the ruling retroactive, the law should allow those convicted prior to the decision to avail themselves of the new law. "We should not indulge in the fiction that the law now announced has always been the law, and therefore, that those who did not avail themselves of it waived their rights". 351 U.S. at 26.

[33] Justice Burton stated that: "Mr. Justice Black's opinion is not limited to the future. It holds that a past as well as a future conviction of crime in a state court is invalid when the state has failed to furnish a free transcript to an indigent defendant. . . ." 351 U.S. at 29.

the trial record and this request was denied, he should not be considered to have waived his opportunity to avail himself of the *Griffin* ruling. Since a defendant who had requested a transcript at the time of his trial would not have waived his right to a free transcript, he would now, under the *Griffin* ruling, be entitled to such assistance.

The case of a convict who did not apply for a free transcript following his sentence, but who now asserts a claim under the *Griffin* ruling to such assistance poses a different problem. The indigent must answer the argument that since he did not request a free transcript following his conviction, he waived his right to now assert this claim.[34] The United States Supreme Court has declared that an effective waiver of the right to appellate process must be conscious, that is, made with knowledge of that right.[35] Knowledge of a right assumes the existence of that right. The *Griffin* principle is new law, in that it affords indigents rights heretofore nonexistent. Therefore, since a defendant could reasonably have presumed at the time of his conviction that a free transcript was unobtainable, failure to request such aid could not have constituted a conscious waiver of financial assistance.

After establishing that he has not waived his rights created by the *Griffin* decision, a defendant must show that he was indigent during the period immediately following his trial when petition for review should have been filed.[36] The fact that he is now impoverished or had been a pauper before his trial should not satisfy the proof of indigency required to obtain a transcript or other appellate assistance. However, if a defendant had requested a free transcript at the time of his conviction and this request was denied on grounds other than failure to meet the forma pauperis requirements,[37] his contention of prior indigency should be presumed to be true, a presumption which could be rebutted by contrary evidence presented by the state. This presumption is based upon the difficulty of resurrecting the past in order to establish a defendant's indigence at the time of his trial. However, if a defendant had made no request for a free transcript following his sentence, he should have the burden of substantiating his allegations of prior indigency.[38]

Illinois, several months after it had enacted a court rule which afforded free transcripts prospectively to indigents, amended that ruling so that it would apply retroactively.[39] This amendment did not require a defendant to have made a request for a free transcript at the time of his conviction. In addition, the

[34] See, *e.g.*, People v. Heirens, 4 Ill.2d 131, 122 N.E.2d 231 (1954); ILL. REV. STAT. tit. 38, §828 (1955).

[35] See Dowd v. United States, 340 U.S. 206, 209 (1951). In that case, it was held that a prisoner did not waive his right to post-conviction review by *coram nobis* and *habeas corpus* petitions when, because of the lax enforcement of prison rules, he filed a tardy motion for appeal.

[36] By Illinois statute, in order to petition for review, an appellant must furnish the trial judge with a bill of exceptions, including a transcript of the trial record, within one hundred days after a judgment of conviction is entered, or within such further time thereafter as shall within such one hundred days be filed by the court. ILL. REV. STAT. tit. 110, §101.65 (1955).

[37] A formal application declaring poverty and requesting aid. See note 5 *supra*.

[38] This contention could be supported by affidavits from the defendant's attorney, friends, or family, as well as by a sworn statement by the defendant himself. As an added safeguard, after the indigent has been warned of the penalties of perjury, the trial court clerk should write to the defendant's next-of-kin informing them of his financial condition and requesting their aid.

[39] On September 26, 1956, the Illinois Supreme Court, amended SUP. CT. RULE 65-1 (originally adopted on June 19, 1956), 135 N.E. 2d XXXII, which allowed any indigent imprisoned after April 23, 1956 (date of the *Griffin* case) the right to free transcript of the trial court record. See note 24 *supra*. The amendment extended the benefits of rule 65-1 to indigents imprisoned prior to April 23, 1956. Amendment to Rule 65-1, 137 N.E.2d XXVIII (1956). This amendment was filed on the same date as the Illinois Supreme Court remanded the *Griffin* Case to the trial court for further proceedings in accordance with rule 65-1. People v. Griffin, 9 Ill. 2d 156 (1956).

amended ruling required that the defendant be without financial means to pay the costs of a transcript at the time of filing his petition for a transcript, as well as at the time of his trial. This position seems unreasonable since a defendant might have been unable to pay for the transcript following his conviction, but may now, perhaps several years after that time, have the funds to do so. The fact that a convict is no longer a pauper should not prevent him from obtaining, at his own expense, the appellate review which formerly had been denied to him because of indigency. Although a convict who can now pay for a transcript should not be provided with a free one, he should nonetheless be afforded the same opportunity of obtaining review as the person who was indigent at the time of trial and has remained so. Because that convict was prevented from obtaining free transcript at his conviction, and therefore was unable to appeal within the prescribed statutory period, he should not be allowed to obtain such review.

After it has been established that the appellant has not waived his rights under a retroactive application of the *Griffin* ruling, and that he was in fact indigent subsequent to his conviction in the trial court, the indigent may proceed to assert his appeal of the case on the merits by means of the appropriate post-conviction proceeding.[40] A post-conviction appeal, under state law, must generally be brought within a limited period following the appellant's conviction.[41] However, delay in appealing is excusable unless caused by the negligence of the appellant.[42] The *Griffin* ruling is new law. Hence, the delay of an indigent, who was convicted prior to the *Griffin* case, in filing his post-conviction appeal would not be due to any negligence on his part and should be considered excusable.[43]

CONCLUSION

The *Griffin* ruling requires that a state afford indigent defendants in felony cases, and perhaps in misdemeanor cases as well, full appellate review. Whether this end can be achieved only

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[40] In the absence of a post-conviction act, several common law methods of obtaining appellate review are available. Some states have expanded the scope of *habeas corpus* beyond its traditional confinement to jurisdictional questions, so as to include review of any alleged constitutional violation. See, *e.g.*, Sneed v. Mays, 66 So.2d 865 (Fla. 1953); Foster v. State, 97 Okla. Crim. 133, 259 P.2d 542 (1953); In re Wallace, 24 Cal.2d 933, 152 P.2d 1 (1944). In other states *coram nobis* may be used as a means of asserting alleged violations of constitutional rights which cannot be reached by habeas corpus. See, *e.g.*, State ex rel MacManomon v. Blackford Circuit Court, 229 Ind. 3, 95 N.E. 2d 556 (1950); Johnson v. Williams, 244 Ala. 391, 13 So. 2d 683 (1943); Lyons v. Goldstein, 290 N.Y. 19, 47 N.E. 2d 425 (1943). Coram vobis is another common law mode of post-conviction review. A *coram vobis* petition is directed to the appellate court as opposed to coram nobis where plea is made to the trial court. See, *e.g.*, People v. Zajkowski, 121 N.Y.S.2d 586 (County Ct. 1953); Leavitt v. State, 116 Fla. 738, 156 So. 904 (1934). In some jurisdictions *audita querela* is available to present an affirmative defense which could not reasonably have been raised at the trial court level. See, *e.g.*, Robertson v. Commonwealth, 279 Ky. 762, 132 S.W.2d 69 (1939); Keith v. State, 121 Fla. 432, 163 So. 884 (1935). However, the present trend is toward modern post-conviction statutes. See, *e.g.* ILL. REV. STAT. tit. 38, §826–32 (1955); N.C. GEN. STAT. §15–217 to -22 (1953). The Uniform Post-Conviction Procedure Act, proposed by the Commissioners on Uniform State Laws and approved by the American Bar Association, included a section bearing directly upon aid to indigents. U.P.C.P.A. §5 (1955). For a discussion of this proposal see, *The Uniform Post-Conviction Procedure Act*, 69 HARV. L. REV. 1289 (1956). If a state does not provide an adequate post-conviction procedure, the defendant may proceed directly in the federal courts. See Comment, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143 (1953).

[41] Modern post-conviction acts commonly establish this period as five years. See, *e.g.*, ILL. REV. STAT. tit. 38, §826 (1955); N. C. GEN. STAT. §15–217 (1953).

[42] See note 35 *supra*.

[43] Because of the lapse of time between trial and post-conviction review, a bill of exceptions prepared from memory, *e.g.*, judge's notes, probably would be inadequate. Therefore, in most retroactive applications a state would be bound to furnish the indigent appellant with a free transcript.

by means of a free transcript depends upon the nature of the exceptions being taken. The state, in any event, must afford the indigent without cost all the essentials for full review in each particular case.

Since the United States Supreme Court has not declared itself on the issue of retroactivity,[44] it appears that state courts must decide for themselves whether to apply the *Griffin* ruling retroactively.[45] Although Illinois has recently seen fit to declare the *Griffin* ruling retroactive,[46] some jurisdictions have implied that they favor limiting the ruling to the prospective,[47] while other courts appear to have entirely ignored the decision.[48]

[44] The Court's lack of unanimity in the *Griffin* case renders it difficult to prophesy with any certainty what the Court will do if they choose to decide the issue of retroactivity. Justice Frankfurter stands squarely for a retroactive interpretation of the ruling. Justices Burton, Harlan, and Reed, since they oppose the rule on principle would probably vote against its retroactive application. That leaves in doubt the votes of Chief Justice Warren and Justices Black, Douglas, Clark, and Brennan, who has recently been appointed to replace the retired Justice Minton. It will take four out of the remaining five votes to make the ruling retroactive. Justice Frankfurther might have difficulty in converting four of his colleagues to his viewpoint.

[45] Where the United States Supreme Court has not indicated whether its ruling is to be applied retroactively, a state may apply such a ruling prospectively without violating due process. Great Northern Ry. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932).

[46] See note 39 *supra*.

[47] In United States v. Sanders, 142 F.Supp. 638 (D.Md. 1956) a federal district court implied that the *Griffin* principle should be applied prospectively. The court reasoned that the defendant's counsel must request a free transcript following the trial court proceedings, and failing to do this, counsel waived any future right to such transcript.

[48] In State v. Trunzo, 137 N.E. 2d 511 (Ohio 1956), the Ohio Court of Appeals held that an indigent "defendant is not entitled, as a matter of law, to a bill of exceptions transcribed at the State's expense for his use in an appeal from a judgment of guilty." The court ruled that an Ohio statute, allowing a transcript to be granted in the discretion of the court, rendered final the trial court's denial of a free transcript. This court apparently was either unaware of the *Griffin* case or felt that its action did not come within the scope of that ruling.

Illinois, through the adoption of a court rule, has complied with the *Griffin* doctrine in a manner which appears inadequate in several respects. First, the Illinois ruling requires that the indigent be given a partial or complete transcript no matter what type of error is alleged. Second, the ruling is ambiguous as to whether it is to be applied both in cases of felonies and misdemeanors. Third, the retroactive amendment to the ruling sets forth a discriminatory test in regard to proof of indigency.

State courts, which must now deal with this problem, should exercise great care in granting free transcripts to indigents. A promiscuous granting of free transcripts might encourage frivolous appeals at a considerable cost to the state.[49] At the same time, there are an impressive number of inmates who might deservedly win their freedom if given an opportunity to appeal.[50] For this reason, a state court rule or statute which would substantially limit the scope of the *Griffin* principle would be both violative of the spirit of that decision and inconsistent with the liberal trend of American jurisprudence toward a justice free from economic discrimination. Therefore, both in its prospective and retroactive application, the *Griffin* decision should be promulgated into state law with a full appreciation of the problems which a carelessly formulated ruling might create.

A Proposed Statute or Court Rule

Any indigent person, convicted of a felony or a misdemeanor, may file, in the court in which he was convicted, a petition requesting that he be furnished without cost a complete steno-

[49] See note 25 *supra*. See also, Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 & n. 31 (1956).

[50] Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. See, *e.g.*, Comment, *Reversals in Ilinois Criminal Cases*, 42 HARV. L. REV. 566 (1929).