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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 95.

JUDSON GRIFFIN AND JAMES CRENSHAW,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENTS.

PETITIONERS' REFERENCES TO THE OPINIONS BELOW AND STATEMENT OF THE BASIS OF THIS COURT'S JURISDICTION ARE CORRECT AND COMPLETE.

STATUTES INVOLVED.

In addition to the "Texts of the relevant sections of the Constitution of the United States, the Illinois Revised Statutes and Federal Statutes" set forth in Appendix A of Petitioners' Brief, the Illinois Post-Conviction Remedies Act (Ill. Rev. Stats. 1953, Chap. 38, Pars. 826-832, p. 1477) is relevant. The entire text of this Act is reprinted as Appendix A of this brief.

THE QUESTIONS PRESENTED.

Illinois conceives the questions presented to be as follows:

1. DOES EQUAL PROTECTION OR DUE PROCESS REQUIRE ILLINOIS TO PROVIDE INDIGENT PRISONERS CONVICTED IN NON-CAPITAL CASES WITH STENOGRAPHIC TRANSCRIPTS FREE OF CHARGE AS LONG AS INDIGENT PRISONERS SENTENCED TO DEATH ARE ENTITLED TO SUCH TRANSCRIPTS WITHOUT CHARGE?

2. DOES EQUAL PROTECTION OR DUE PROCESS REQUIRE ILLINOIS TO PROVIDE INDIGENT PRISONERS CONVICTED IN NON-CAPITAL CASES WITH TRANSCRIPTS OF RECORD AS LONG AS ILLINOIS AFFORDS REVIEW UPON THE BASIS OF SUCH TRANSCRIPTS IN CASES WHERE NON-CAPITAL PRISONERS HAVE THE MEANS OF PROCURING THEM?

3. IF DUE PROCESS OR EQUAL PROTECTION REQUIRES ILLINOIS TO PROVIDE A MEANS WHEREBY INDIGENT PRISONERS CONVICTED IN NON-CAPITAL CASES MAY PROCURE TRANSCRIPTS WITHOUT COST, IS THAT REQUIREMENT MET BY THE PROVISIONS OF THE ILLINOIS POST-CONVICTION REMEDIES ACT UNDER THE TERMS OF WHICH TRIAL COURTS MAY AND DO PROCURE SUCH TRANSCRIPTS UPON A SUBSTANTIAL SHOWING OF REASONABLE LIKELIHOOD THAT REVERSIBLE ERROR INHERES IN PRISONERS' CONVICTIONS?

ADDITION TO PETITIONERS' STATEMENT OF THE CASE.

Petitioners' counsel has stated the facts of this case with the fairness and clarity that would be expected of him.

We deem it important, however, expressly to note the purely negative facts that petitioners did not, either in the proceedings in which they were sentenced or in the statutory proceedings under the Illinois Post-Conviction Remedies Act (cited above and reprinted in full, this brief, Appendix A), undertake to make any concrete statement of or fairly to indicate the supposed errors, constitutional

or non-constitutional, that would appear in a stenographic transcript if such transcript were afforded. The significance of this statement will appear in the Argument, where it is shown that Illinois does afford a means, concededly subject to judicial discretion, of procuring transcripts of oral proceedings where it is made fairly to appear by petition and affidavits that the presentation of such a transcript may in reasonable likelihood disclose a violation of constitutional rights.

If, as petitioners contend, denial of a transcript to indigent prisoners *per se* denies due process even though the errors to be reflected are not in themselves of constitutional moment, then presumably Illinois' Post-Conviction Remedies Act requires the production of such transcript as a matter of constitutional right, even if the errors complained of are not intrinsically constitutional errors, upon substantial showing that such transcript will probably disclose such errors.

ARGUMENT.

I.

Petitioners Expressly Disclaim the Contention That Due Process Per Se Requires Appellate Review.

At page 38 of petitioners' brief, after suggestion that the question whether due process *per se* requires appellate review in the light of the rapid evolution of our concepts of criminal justice "is not foreclosed for all time", petitioners say:

> "But whatever may be the present—or the future—place of appellate review in our concept of due process, the question is not before the Court in the present case."

Since petitioners not only do not make but explicitly disclaim the contention that due process in and of itself requires appellate review, Illinois does not argue that question.

II.

Neither Equal Protection Nor Due Process Requires Illinois to Afford Complete Stenographic Transcripts to Indigent Prisoners in Non-Capital Cases Merely Because Such Transcripts Are Provided for Prisoners Who Are Sentenced to Death.

"The difference between capital and non-capital offenses" that "is the basis of differentiation in law in diverse ways in which the distinction becomes relevant" (*Williams* v. *Georgia,* 349 U. S. 375, 391) is manifested by this Court's consistent holdings as to the right of counsel, the very right to which petitioners seek to analogize their claim of right to a full transcript of proceedings.

Although this Court holds that the right to counsel in capital cases is absolute (*Powell* v. *Alabama,* 287 U. S. 45), it consistently holds that there is no such categorical right in non-capital cases, it being necessary affirmatively to show "substantial prejudice" by denial of the right. *Betts* v. *Brady,* 316 U. S. 455, *Foster* v. *Illinois,* 332 U. S. 134.

Yet there can be no doubt that throughout the civilized world there is a far more profoundly "felt necessity" for the right to advocacy in that *nisi prius* hearing in which due process *does* guarantee the absolute right to counsel in capital cases, the guaranty being contingent in non-capital cases upon the affirmative showing of "special circumstances", than is any "felt necessity" for appellate review, whether in capital or non-capital cases and whether absolute or contingent.

Thus we need go no further than petitioners' own most strongly presented claim of analogy, the claim of analogy between the constitutional right to counsel and the alleged constitutional right to a stenographic transcript of proceedings for the purposes of appellate review, to perceive that this analogy supports Illinois, not petitioners; for the constitutional right to counsel *is* absolute in capital cases and is *not* absolute in cases in which the death penalty may not be inflicted.

Moreover, *even in cases in which the death penalty may be imposed,* there is no categorical constitutional right to counsel on the part of an indigent prisoner who pleads guilty with full cognizance of the consequences of his plea. The right is dependent upon an affirmative showing of special circumstances. It is not presumed. See *Carter* v. *Illinois,* 329 U. S. 173, in which this Court refused to set aside the conviction of a defendant who pleaded guilty to murder, a capital offense in Illinois, without counsel. This Court indicated, however, that Carter was entitled to a

hearing as to whether in the particular exigencies of his case, he was fairly in need of counsel at the time of his plea.*

Thus it is very clear that the fact that Illinois affords transcripts *gratis* to indigent prisoners sentenced to death does not render the denial of such transcripts to indigent non-capital prisoners a denial of equal protection or due process, it being conceded that due process does not *per se* require provision for such transcripts.

III.

Neither Equal Protection Nor Due Process Requires Illinois to Afford Complete Stenographic Transcripts to Indigent Prisoners in Non-Capital Cases Merely Because Such Transcripts Are Reviewed at the Instance of Non-Capital Prisoners Able to Procure Them.

Petitioners' counsel candidly recognizes that

> "it is unfortunately true that the indigent criminal defendant, and even the criminal defendant of modest means, suffers handicaps in defending against criminal charge"

and with equal candor enumerates many of such disadvantages.

Petitioners' counsel briefly notes that impecunious prisoners may be denied bail that is available to more affluent defendants. In connection with the matter of bail, it should be observed that the Constitution of the United States itself provides that excessive bail shall not be required. (Amendment VIII.) Thus the very text of the Constitution of the United States sanctions this differentiation between relatively opulent and relatively impoverished prisoners.

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* Carter was afforded a hearing at which this claim was investigated. The claim was rejected by the Trial and Supreme Courts of Illinois. *People* v. *Carter,* 403 Ill. 567.

Petitioners' counsel does not note the most palpable and in the vast majority of cases the most onerous differentiation between relatively well-to-do and relatively poor defendants: the expiation of fines by penal servitude on the part of convicted persons who do not have the means to pay the fine. In Illinois, for example, fines must be discharged by imprisonment for a period of one day for each one dollar and fifty cents of fine and costs. (Ill. Rev. Stat. 1953, Ch. 38, Par. 391, p. 1411.) A fine of ten thousand dollars requires from a penniless defendant over seventeen years of imprisonment in a county jail. Petitioners do not suggest that this differentiation between solvent and insolvent convicted persons is invidious within the constitutional concepts of "equal protection" or "due process of law."

Petitioners do take cognizance of but do not develop the full import of many inequalities in the cases of various defendants, which inequalities are dependent upon their financial means.

We have already noted under Point I that the "fair hearing" that due process *does* guarantee is the *nisi prius* hearing, at which every defendant must be allowed to produce evidence *if he can obtain it,* whether upon the issue of guilt or innocence, mitigation or if there is a jury as to the mode of compiling the panel and with respect to the disqualifications of individual talesmen. Yet petitioners do not even suggest that due process requires that the State defray the costs, often heavy indeed, of procuring expert witnesses, of bringing witnesses from beyond the State's boundaries and hence beyond the scope of its process, of retaining experts, such as psychiatrists and other physicians, not only as witnesses but as advisors in vital matters of the examination and cross-examination of those who are witnesses, or the prepa-

ration of intricate exhibits in, for example, cases involving charges of financial criminality.

Nor do petitioners even intimate that the State should defray the cost of *investigation,* whether with a view to collecting evidence or with a view to ascertaining the qualification of jurors. Investigation of the facts is far more important to the administration of justice than appellate review of those facts.

Indeed, competent investigation, if the defendant can afford or otherwise procure it, may very well result in the dismissal without trial of the charges against him.

One has but to read the record in almost any criminal anti-trust case in the annals of this Court in which questions of fact were litigated below in order to see that in such cases, the wealth of available evidence for the defense is largely determined by the wealth of the defendants.

Yet the right to evidence is far more important than the right to appellate review of that evidence! Indeed, without evidence to be reviewed, review is usually futile. This, in fact, is the very burden of petitioners' thesis; for they emphasize the need of a stenographic transcript to preserve such evidence as is presented.

Now in fact, if we contemplate the logical function rather than the technical characterization of a "bill of exceptions", a bill of exceptions is simply one species of "evidence", namely, "evidence" of what occurred at the trial, occasion of the plea of guilty, hearing in aggravation and mitigation of punishment or other proceeding culminating in conviction. There is, we submit, no more reason why the "evidence" of what occurred at the trial, that is, a bill of exceptions, should be afforded at public expense than there is why any other species of "evidence" should be provided free of charge.

We now develop the following considerations:

Although "due process" undoubtedly permits distinction of various sorts between those accused of felonies and misdemeanors, we are not aware that "equal protection" is more imperatively required with respect to all persons convicted of penitentiary offenses than it is with respect to all persons convicted of offenses punishable by imprisonment in jail or by fine. To be sure, equal protection does tolerate differentiation between "felons" and "misdemeanants" or equivalent categories of offenders, the classification being dependent upon whether the defendants, if convicted, are imprisoned in the penitentiary or in a common jail. But within each class, viz., the class of felons and the class of misdemeanants equal protection is, we presume, required.

If petitioners' contention is sound at all, that contention requires that in all criminal or quasi-criminal cases, that is, cases in which the defendant may be punished by death, imprisonment, fine (which means imprisonment if the defendant is indigent) or loss of such civil privileges as the right to hold office, or to vote, transcripts must be afforded free of charge to indigent defendants if a defendant able to purchase such a transcript may exploit the same for purposes of appellate review. Petitioners' logic would compel compulsory stenography before every justice of the peace, police court or magistrate if the State's appellate practice permits review of convictions based upon such transcripts.

In Illinois, convictions before justices of the peace and police magistrates are not reviewed upon bills of exception. Trial *de novo* is provided before higher echelons of Illinois' judiciary in such cases. But convictions in the Municipal Court of Chicago, which has displaced justices of the peace and police magistrates in that city, are reviewable upon bills of exceptions. This is true even in the

case of the most trivial misdemeanors. (Cf. *Beauharnais* v. *Illinois,* 343 U. S. 250, where petitioner was fined $200, reviewed by this Court upon a bill of exceptions from the Municipal Court of Chicago.)

The inescapable intent of petitioners' argument is that in all criminal or quasi-criminal cases, stenographic services must be provided at public expense to indigent prisoners if prisoners able to pay for such services are entitled to utilize transcripts for the purposes of appellate review.

In the light of those implications, the following considerations become exigent:

The cost of affording typewritten transcriptions of such shorthand notes as are actually taken in the Criminal Court of Cook County and the Circuit Courts of cognate jurisdiction in Illinois' one hundred and one other counties would alone be prohibitive. But if petitioners' contention is to be given its necessary full effect, the cost of providing a stenographer to take notes and upon demand transcribe his notes in all of the Illinois courts that have jurisdiction to imprison defendants, either by mandatory sentence of imprisonment or as alternative to the non-payment in whole or in part of fines imposed, will impose a wholly impossible financial burden upon the resources of Illinois.

We take cognizance of petitioners' suggestion, which stops just short of an overt contention, that the question as to whether the burden that would be imposed upon Illinois would be "impractical" may not be of constitutional significance.

Petitioners say at page 10 of their brief:

> "Finally, if it be significant, the experience with such provisions demonstrates that provisions by which indigent defendant may obtain the same appellate review as the non-indigent is neither impractical nor a burden on the appellate court system."

In response to this suggestion, we reply:

Unquestionably certain guaranties, expressly or impliedly declared by the Constitution, must be fulfilled regardless of cost.

But "it is the Constitution that we are expounding." To be sure, in the language of petitioners' counsel in this case, due process "is not a static concept." (*Petitioners' Brief,* p. 38.)

Nevertheless, it is inconceivable that the States, by adopting the Fourteenth Amendment, intended to command the inauguration of practices that, however intrinsically commendable, were at the time of the adoption of those amendments and still are far beyond the realm of practical feasibility.

We take note of petitioners' compilation of statutory provisions granting in some cases free transcripts to "all paupers convicted of felonies," in some cases discretionary free transcripts, in some States "a free transcript in case of particular crimes or sentences," and in some States, "No provision for providing a free transcript to indigents convicted of crime."

And we take further note of petitioners' contention that this statutory consensus, together with legislation in other English speaking nations, evinces a recognition of the disability of such free transcripts.

Our reply to the inferences drawn by petitioners from this compilation is twofold:

In the first place, the very fact that so many States found it necessary to enact legislation providing for free transcripts, while manifesting those States' appreciation of the desirability of providing such transcripts, shows equally clearly those same States' recognition that *without such legislation no such right is implied by constitutional, common law or other non-constitutional jurisprudence.* There is no need to enact by statute a right already felt to be guaranteed by the Constitution of the United States.

Our second response to so much of petitioners' argument as is based upon their compilation of legislative materials in other jurisdictions is that at the most twenty-nine States restrict free transcripts to "all paupers convicted of felonies."

Hence the vast majority of States that do afford free transcripts to prisoners restrict the benefits of this practice to cases of felony. As we have shown, if equal protection requires free transcripts at all, it requires them in all cases that may culminate in imprisonment. *Hence these statutes refute rather than confirm petitioners' thesis that equal protection requires free transcripts to all indigent prisoners.* The distinction between cases of felony and cases of misdemeanors is illicit if petitioners' argument is sound.

And if "equal protection" requires the State to afford stenographic minutes in all criminal cases, why does it not enjoin a like requirement with respect to civil cases? In civil cases, defendants who can afford transcripts are accorded plenary appellate review. No corresponding privilege is granted to indigent defendants. While due process of law has never required the same safeguards in civil cases that it requires in criminal cases, the command of "equal protection" has never been regarded as more attenuated in civil than in criminal matters.

Finally, it must be recalled that civil cases do not always involve money or property. They often involve liberty. We think particularly of adoption cases, cases involving the custody of children and cases involving internment in mental institutions for wholly non-criminal mental disabilities. Does "equal protection" require, even if "due process" does not require, free transcripts in all of these cases as long as transcripts are available to those who can procure them?

We think that the answer is in the negative.

We are constrained to conclude, then, that petitioners' claims to a right to a free transcript are not of Federal constitutional dignity.

IV.

If Petitioners' Contention That Denial of Free Transcripts to Indigent Non-Capital Prisoners Denies Equal Protection or Due Process of Law Where the Errors Relied Upon as Vitiating Convictions Are in Themselves Not of Constitutional Moment Is Correct, Then Illinois' Post-Conviction Remedies Act Will Almost Certainly Be Construed as Granting Such Transcripts, Even Where the Errors Are Not Constitutional in Character Upon a Substantial Showing That Such Errors Probably Will Appear By the Transcript.

Petitioners concede that, in the language of their counsel, the Illinois Post-Conviction Remedies Act

> "has made an adequate provision for supplying the necessary transcripts for indigent defendants"

when

> "equal protection of constitutional rights requires that a defendant be provided with a review of alleged constitutional violations in the proceedings which resulted in his conviction." (*Petitioners' Brief,* pp. 33-34.)

But, say petitioners' counsel, if the error claimed to have occurred upon petitioners' trial or in connection with his plea of guilty is not intrinsically itself of constitutional origin, the Illinois Post-Conviction Remedies Act does not make a transcript available. Upon this premise, examined below, petitioners assert the conclusion that *constitutional* equal protection is denied when Illinois affords some, but not all, defendants appellate review, of *non-constitutional* as well as constitutional errors, affording free transcripts

to non-capital indigent defendants only when a showing is made that conviction should be nullified upon constitutional grounds.

But this argument, logically considered, contains its own refutation:

> IF REFUSAL OF A TRANSCRIPT DENIES EQUAL PROTECTION, THEN DETENTION IN THE ABSENCE OF SUCH A TRANSCRIPT DENIES EQUAL PROTECTION EVEN IF THE ERRORS THAT WOULD APPEAR ON SUCH TRANSCRIPT ARE NOT CONSTITUTIONAL ERRORS.

If equal protection (or due process) requires, as petitioners contend, that indigent non-capital prisoners have a constitutional right to a transcript for the review of even non-constitutional errors as long as solvent prisoners or prisoners sentenced to death have such a right, then it is almost certain that the Illinois Supreme Court will perceive that the detention of a prisoner in violation of non-constitutional rights merely because he can not procure the transcript that would be available to him if he had means or were sentenced to death itself denies "equal protection" (or "due process of law") and therefore authorizes the production of a transcript at public expense upon substantial showing that error will appear thereon.

In other words, if we cast petitioners' own propositions in the form of syllogism, the conclusion sustains Illinois, not petitioners:

> *Major Premise*: Illinois' Post-Conviction Remedies Act provides "adequate" means of obtaining a bill of exceptions where a petitioner makes a substantial showing that such bill of exceptions would probably disclose a violation of his constitutional rights.
>
> *Minor Premise*: A prisoner whose conviction is reversible, for wholly non-constitutional grounds is nevertheless denied *constitutional* "equal protection" if he fails to obtain such reversal solely because he can not procure such a bill of exceptions.
>
> *Conclusion*: Any prisoner whose conviction is void-

able on non-constitutional grounds suffers deprivation of constitutional rights if that conviction is not reviewable solely for want of a bill of exceptions and therefore such prisoner is entitled under the Illinois Post-Conviction Remedies Act to such a transcript.

We do not concede, however, that either equal protection or due process requires that indigent non-capital prisoners be afforded free transcripts even though solvent prisoners or prisoners sentenced to death are afforded such transcripts. For the reasons argued in Points II and III, *ante,* we resist that contention.

But *if* equal protection requires review of non-constitutional as well as constitutional error so far as transcripts are concerned, then the Illinois Post-Conviction Remedies Act, implementing the equal protection clause, necessarily requires the production of transcripts in cases where such errors are likely to appear.

However, this case provides no avenue for any pronouncement upon this question BECAUSE NEITHER PETITIONER ASSERTED, SUGGESTED OR INTIMATED ANY SPECIFIC CLAIM OF SUBSTANTIAL ERROR, EITHER OF CONSTITUTIONAL OR OF LESS THAN CONSTITUTIONAL MOMENT.

CONCLUSION.

For the reasons urged in this brief, we respectfully submit that the judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX A.

Illinois Post-Conviction Hearing Act (New).

§ 826. Proceeding to determine whether constitutional rights were denied—Petition—Limitations

Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7 of the supreme court. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effective date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

§ 827. Petition—Contents—Affidavits

The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the

petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

§828. Waiver of claims

Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.

§ 829. Proceeding as poor person—Counsel

It the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

§ 830. Answer or motion to dismiss—Withdrawal of petition—Orders as to pleadings

Within thirty days after the filing and docketing of the petition, or within such further time as the court may fix, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in Rule 8 of the supreme court and section 46 of the Civil Practice Act.

§ 831. Hearing—Evidence—Order

The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

§ 832. Review

Any final judgment entered upon such a petition may be reviewed by the supreme court on writ of error brought within six months from the entry of the judgment.