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SUPREME COURT, U. S.

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES



JACK L. MAYER,

Appellant,

v.

THE CITY OF CHICAGO,

Appellee.

No. 70-5040



Washington, D.C.
October 14, 1971

Pages 1 thru 49

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Washington, D. C.,

Thursday, October 14, 1971.

The above-entitled matter came on for argument at 10:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

HENRY F. FIELD, ESQ., 231 South La Salle Street, Chicago, Illinois 60604, for the Appellant.

RICHARD L. CURRY, Corporation Counsel of the City of Chicago, for the Appellee.

# C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 5040, Mayer against the City of Chicago.

Mr. Field.

ORAL ARGUMENT OF HENRY F. FIELD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. FIELD: Mr. Chief Justice, and may it please the Court:

This case raises once again the issue first raised and decided by this Court 15 years ago in Griffin vs. Illinois, of whether the Fourteenth Amendment requires that a State, which provides appeals of right and reporters who transcribe trials, provide a poor person, who is unable to pay for, that transcript, and who needs that transcript to demonstrate crucial trial errors, so that he may have an adequate and effective review and may adequately exercise his right of appeal.

This case today arises under Illinois Supreme Court Rule 607 which, at the time of trial and until very recently, provided that only defendants in felony cases had -- indigent defendants had a right to apply for free transcript from the State of Illinois.

As of July 1st of this year, that rule has been amended so that it now provides that any defendant who, at the time of trial, faced a penalty greater than six months in jail, could apply to Illinois for a transcript.

Q Would that new rule have reached this case?

MR. FIELD: Pardon me?

Q Would the new rule apply to this case?

MR. FIELD: No, Your Honor, it did not.

Q No, I said would it?

MR. FIELD: No, I don't believe it affects the case in any way.

Q What was the possible penalty?

MR. FIELD: Here the possible penalty, at the time of trial, was $1,000 fine and no jail term, at least initially.

Q Well, I'm not sure I follow what that means, "initially".

MR. FIELD: Well, Illinois does --

Q That means if he didn't pay the fine?

MR. FIELD: Yes.

Q And how much of a jail term?

MR. FIELD: Illinois provides that a defendant has to pay off or work off a fine at $5 a day, and that's the contingency in the case which leaves a possible jail sentence. But after this Court's decision in Tate vs. Short of last year, this question is perhaps removed from the case, although there's still some uncertainty, I believe, as to the construction of that case.

Q Well, would it be removed from the case automatically, or would just the $5 a day be under question?

MR. FIELD: Well, the effect of Tate vs. Short, were it applied to this case, would be, as I understand the case, that the defendant here could not be put in jail at the rate of $5 a day, if he did not -- was not able to pay the fine that he was sentenced to.

Q So the new rule doesn't reach anything measured by the amount of the fine?

MR. FIELD: No.

Q Only if the fine is not --

MR. FIELD: Only if the defendant, at the time of trial, faced a penalty of greater than six months in jail, and does not include the contingency of six months worked off through fines.

Q You are suggesting we keep this case to the so-called petty advantage, rather than one that might have more than a six-months jail sentence?

MR. FIELD: I don't believe that even at the $5 rate this defendant would be in jail for more than six months. So that point would not be raised.

Q Would not?

MR. FIELD: Yes.

Q From the $5 rate that would be 200 days, wouldn't it? If my arithmetic is correct.

MR. FIELD: He was sentenced at trial to $500 fine. He faced a thousand but was sentenced to 500; and I believe

that he could not be put in jail then, at the Illinois rate, for more than 100 days.

I won't belabor the Court with any kind of discussion or lengthy discussion of the rule of law in this case. You all are familiar with Griffin, that established the principle that destitute defendants must be afforded as adequate appellate review as persons who can afford transcripts.

Just last year, in Williams vs. Oklahoma City, this Court decided a drunk driving case, where the defendant faced 90 days in jail, and in a unanimous per curiam opinion had no trouble applying Griffin to the facts.

Rule 607 of the Illinois Supreme Court --

Q Mr. Field, where is Mr. -- is it Dr. Mayer, where is he now?

MR. FIELD: He is now in California. I am not fully possessed of his circumstances, but he has moved from New York, where he originally was.

Q I am just curious, is he practicing medicine now?

MR. FIELD: I prefer not to make representations about his current status, because I really am not too fully informed. The record has nothing in it concerning his present circumstances, and I haven't made myself too aware of them.

Q Do you know whether he is indigent today?

MR. FIELD: It's my belief that he is, Your Honor, indigent today, yes, sir.

Q Even though he has an M.D. degree?

MR. FIELD: Yes, he has -- I do have some information concerning him, and that information, to my knowledge, has not changed his indigency status; he still cannot pay for the transcript. He is not living at anything above necessaries.

But, as I want to emphasize, I am not fully informed on that fact, on that point.

Q Well, I suppose there were apt to be trials in connection with the petition here? For indigency.

MR. FIELD: Yes. The -- after the trial, the petitioner filed an affidavit, and there was a full hearing on this question of his indigency, where the City was represented and attacked it, and the acting chief judge of the Circuit Court of Cook County found that he was indeed indigent and unable to pay for the $300 transcript.

Q I suppose you got leave to proceed here as a pauper?

MR. FIELD: Yes.

Rule 607 of the Illinois Supreme Court wholly denies a transcript to this appellant, who faced $1,000 fine, and, regardless of his need for it, and he needs that transcript, as I will demonstrate, in order to raise the really central point of his trial.

And Rule 607 also wholly denies an opportunity to all indigent persons to show, to demonstrate to Illinois that they

need a transcript in order to raise points at evidence and possibly unconstitutional conduct of their trials. And it completely insulates trials of indigents from review in cases involving less than six months in jail.

It's appellant's contention that this blanket prohibition of all indigent now under six months, six months and under, appeals, and violates the Fourteenth Amendment in several respects.

First, Illinois has chosen to draw an invidious line between rich and poor, in violation of this Court's clear mandate in Griffin, and Williams, and many cases elaborating those principles.

Secondly, it hides and insulates from any appellate correction unconstitutional errors, in this case a denial of a fair trial.

The facts of the case,necessarily skimpy, can be briefly stated.

Q Mr. Field, before you go on, I'm not sure how important this is, but I'm a little surprised that you seem to think that the present status of the petitioner, his financial status, is not relevant, and that it must stand on his status at the time the case arose. What if, hypothetically, he had inherited a million dollars between now and then? I am not using a demonstrative rule, I'm just demonstrating.

MR. FIELD: Well, that's of course --

Q Would that not have something to do with whether this Court should be devoting its time to the case on the grounds of indigency?

MR. FIELD: That could be true, Your Honor. That's not, of course, this situation.

Q Well, maybe it isn't, but wouldn't it be rather remarkable to think of a young man, a relatively young man, who has a degree of Doctor of Medicine, today in the United States being indigent?

MR. FIELD: Well, it's my understanding that he had tremendous debts and that -- I just feel very strongly that this case has gone through the full hearing of indigency and that his situation basically hasn't changed. And I know nothing that would change that, and would raise the --

Q Well, I don't mean to suggest that we would hold you to knowing at the present instant his financial situation; I don't mean that at all.

MR. FIELD: If the Court would please --

Q Do I understand you to be suggesting that that situation is irrelevant to this case?

MR. FIELD: Well, were he a millionaire, I could conceive how it could be irrelevant, because of the method that Illinois has chosen to completely deny transcripts to indigents in non-six-months cases.

Q Well, would we be concerned about what they're

doing in other cases, or are we to deal with what they're doing in this case?

MR. FIELD: Well, I think this case is of course important, and it's -- his ability to pay now might indeed change to the Court the whole posture on the situation. However, this Court has a record before it, which I believe is complete. If Illinois can frustrate this Court's enforcement of the Fourteenth Amendment by, as it has in this case, forcing defendants to appeal and, because time is always money, raise in any indigent case a question as to his ability to pay for a transcript.

Q Well, I understood the last affidavit -- that's the one, isn't it, at page 26 -- that apparently was sworn to on the 3rd day of February 1970, at that time he was -- I don't understand that he was a physician but a medical student.

MR. FIELD: That's true.

Q Well, is he now a physician or a student?

MR. FIELD: Frankly, Your Honor, I'm not certain what a physician is. He has, it's my understanding, graduated from school.

Q He has graduated from medical school?

MR. FIELD: From school. And he's --

Q Since 1970, well, I suppose he'd have an internship to serve.

MR. FIELD: Well, this -- I believe it was this

summer, and he's been working in a hospital for several months.

Q Internship.

Q As an intern?

MR. FIELD: Yes, I suppose that's correct.

Q Do you know what interns are paid these days?

MR. FIELD: I don't know what he's getting, I have no knowledge of that.

Q Do you know what interns are paid these days?

MR. FIELD: No. He has only been working very, very briefly.

Basically, what happened was that this defendant was a participant as a medical presence while he was in medical school, a first-aid assistant at the scene of a demonstration in Chicago, march and rally, which was sponsored by SDS and various other antiwar, at that time, groups. And he came upon an injured victim, and interacted with the police under circumstances which were the subject of a two-day jury trial.

Q You say he interacted, what do you mean? Or is that a euphonism for what? What did he think was going to happen?

MR. FIELD: Well, that, of course, is the transcript, which is not present in the case. And what happened --

Q What was he charged with?

MR. FIELD: He was charged with two City of Chicago municipal offenses.

Q Like what?

MR. FIELD: Disorderly conduct and interfering with the police.

Q All right.

MR. FIELD: And he was sentenced to $500, and I represented this defendant at trial. After the trial --

Q $500 fine and no imprisonment?

MR. FIELD: No jail. No jail was possible, except as we have discussed, contingently.

Q Right. Right.

MR. FIELD: After the trial he filed a post-trial motion which raised several substantial contentions attacking the legitimacy of the verdict, and the judgment in the case.

His basic point was that he was convicted on insufficient evidence, compounded of grossly prejudicial prosecutorial misconduct, which denied him a fair trial. And the cumulative effect was to override, wholly override the evidence in the case.

As is stated in the affidavit of counsel, in the post-trial motion and the motion in the Illinois Supreme Court, it was our feeling that the defendant was convicted not for what he did but for the sins of SDS and for wholly unrelated but contemporaneous injury to one Richard Elrod, who vaulted -- who had been an obscure city lawyer in the prosecutor's office, who vaulted into the front page of Chicago papers all during

the preliminary portion of this trial, and the time between his arrest and trial, and proceeded from the front pages of the Chicago papers to elective office. He's now Sheriff of Cook County.

After this motion was denied, and we learned the cost of the transcript was well beyond his means, we moved in the Circuit Court of Cook County for three things: appointment of counsel; production of a transcript; and the waiver of filing fees.

After lengthy hearing, the court found that he was indigent and unable to pay, but refused to grant him access to the transcript, on the ground that Rule 607 applies only to felony cases. The order reads:

"Order, that the motion of the defendant for leave to proceed as a poor person be and is hereby denied on the grounds that defendant was found guilty of ordinance violations and that Rule 607 of the Supreme Court applies to felony cases."

We renewed the motion in the Illinois Supreme Court, and urged the unconstitutionality of the approach taken by Illinois in Rule 607. The motion, after due consideration, for counsel and transcript was denied and filing fees were waived.

Q Mr. Field, does the rule provide any alternative methods of reporting proceedings?

MR. FIELD: Yes, that is provided in other sections of the Illinois Supreme Court rules, and there are two basic methods for proceeding. The first method is to get an agreed statement, and the second method is to get a -- if you can't agree -- to get a settled statement. Agree with the prosecution as opposed to the court.

Q Was either method pursued by him?

MR. FIELD: Neither method was pursued in this case, and the reason goes to the heart of the contention here. It's the position of the defendant, the appellant here, that very clearly, on the face of his contentions, neither alternatives are adequate. Neither alternative is adequate.

The two contentions, one of insufficiency of evidence and one of grossly prejudicial misconduct, both require the kind of detailed survey of the facts of the case, the words used, the questions posed, the answers and responses, which only a transcript could provide and which no one connected with the case, having total recall, could possibly reconstruct.

Q How long did the case take to try?

MR. FIELD: My best recollection is that it was two days. But there was possibly some spillover to a third day for --

Q Will you suggest a hypothesis as to how appeals were fairly conducted years ago when there was no reporter and there was no transcript, but the bill of exceptions, or

by whatever name it was called, the claims of error were reproduced for the appellate court by counsel, relying on their recollection, with or without total recall?

MR. FIELD: Well, there would be no way to adequately present an appeal on these contentions in that circumstance.

Q You mean for 150 years we were, in this country, processing all appeals inadequately, including appeals for rich men?

MR. FIELD: Well, if there were scribes at trial, or the people helping attorneys who could take down the detailed testimony, that could have not been true; but in this case the problem was that he was poor and he had only his counsel and --

Q Are you representing that in a two-day a trained lawyer cannot reproduce -- two trained lawyers cannot reproduce the substance and the essence of the testimony that was given in the trial? Is that your suggestion?

MR. FIELD: That may be possible. I think in most cases. But that certainly is not the case here, because of the nature --

Q Did you do it? Did you take notes? Careful notes.

MR. FIELD: No, I didn't take careful notes, I took some notes; but I was conducting the cross-examination and I knew that the transcript was -- I mean a reporter was present,

and --

Q Did you have an associate with you?

MR. FIELD: No, there was no one else on the case.

I think that the nature of the contentions is the key to why that transcript is required in this case. Because the police -- the contention on the insufficiency of evidence was that -- is that the police, some certain police testimony which -- the purport of which was to show this man, the defendant, to be a violent man was inherently incredible, and was demonstrated to be such by other testimony at the trial. And by the cross-examination, by myself, lengthy cross-examination of the police witnesses.

Q Well, do you represent that the day after, or the week after, you could not sit down, yourself, and make a synopsis of the testimony of each witness at that trial?

MR. FIELD: That's absolutely true as to these two contentions, Your Honor.

Q You could not do it?

MR. FIELD: I could do -- I could make a synopsis of much of the testimony. There's no doubt that I can recall a great deal that went on, but there's no way that I can recall the kind of detailed questioning and the words used, the precise words used, that go to show the nature of the prejudicial attack of the prosecutor, and his intensive, systematic effort to hang this defendant, not for the facts of what

happened with his interaction with the police, but for wholly unrelated matters, and sins of others, and the injury to Mr. Richard Elrod, which was really the prime focus of the prosecution.

I believe that I can show that with a transcript. I could show that the first witness in the case was put on solely for the reason of interjecting into this trial the name well known to everyone, of Richard Elrod.

Q Who is Richard Elrod?

MR. FIELD: Richard Elrod is now the Sheriff of Cook County.

Q Oh, yes.

MR. FIELD: At the time of the incident here, out of which this case arises, he was an obscure city lawyer in the Corporation Counsel's office, a prosecutor for the City of Chicago. But he was -- this appears in the affidavit, these facts appear in the affidavit of counsel in the brief, at 12.

He vaulted from obscurity into the front pages and into elective office on the basis of his injury which occurred during the same antiwar demonstration.

Two rules of Illinois law also combine to make overwhelming the impossibility of this defendant reconstructing the nature, the words used, the inadequate or minimally adequate factual predicate for presenting these two contentions.

First of all, under Illinois law, the defendant, if

there is any disagreement as to the facts, must prove his version of the facts at a hearing on the facts, under Illinois Supreme Court Rule 323, I believe, which is the settled statement rule. And in this situation there is no way that I could, or anyone could prove the detailed and intensive prejudicial conduct of the prosecutor, the words used. How could I prove, how could anyone prove something they cannot recall?

The second rule of law, creating a hurdle to an adequate review, an adequate alternative, is that the appellate courts of Illinois presume the facts against the defendant if an adequate record is not provided with which to support the contentions on appeal. And there is no way that this defendant can create a minimally adequate factual predicate for these two contentions. He could create, through a settled or agreed statement, many other facts in the case, but there is no way for him to --

Q Do I understand that you are not arguing that if it were possible to pursue one of these alternative methods -- if it were; you say it was not -- but if it were, you don't argue that nevertheless constitutionally you are entitled to a copy of the transcript, do you?

MR. FIELD: No, I don't argue that, Your Honor, in this case.

Q Well, what have we to do with the fact, as I

understand it, that you do not pursue, made no attempt to pursue one of the alternative methods?

MR. FIELD: That point is made by the State's attorney in the capacity as amicus, and I think that the answer to that has to be a clear recognition that, based on the affidavit and other facts of record, --

Q That the affidavits make out a case --

MR. FIELD: They make out a very clear case.

Q -- which precludes you from attempting either of the alternative methods?

MR. FIELD: They show, or they demonstrate --

Q Well, is that your position?

MR. FIELD: That is my position. I would change the words slightly. They demonstrate that it's impossible for -- it was impossible for this defendant to proceed without being caught in a bind of either submitting a settled or agreed statement, which he knew to be wholly inadequate, which couldn't start to create the minimum factual predicate for these two points.

And if it's agreed upon, if the prosecutor and if I were the prosecutor I would think it very smart to agree to the statement, knowing full well that it's inadequate. Or if he meets the burden --

Q How can you say it's inadequate if you never tried to do it?

MR. FIELD: Well, I have to -- the counsel and the defendant have to create the factual statement, and there's no way, without total recall, that I can demonstrate and create a factual record on these two points. They require close attention to the words used and the questions posed, on cross-examination and on direct examination.

Q Well, were you pressed to say in the Illinois court why it was you had not pursued the alternative method?

MR. FIELD: Pardon me, Mr. Justice Brennan?

Q Were you pressed in the Supreme Court --

MR. FIELD: No.

Q Where did you go besides the Supreme Court? Only to the Supreme Court of Illinois?

MR. FIELD: Well, we had the hearing and the denial in the circuit court and then in the Supreme Court.

Q Well, didn't you argue in the federal court that you had to have a transcript because the alternative methods would be inadequate?

MR. FIELD: I don't have a transcript of that, I frankly have forgotten what I argued, but I was totally foreclosed from seeking a transcript because of the judge's legal ruling that I could not, regardless of my need for it and the nature of the contentions raised, get one under Rule 607.

Q Because the rule did not apply in this case?

MR. FIELD: Because the rule applied only to felony cases.

Q Well, now, what -- did you argue this orally in the Supreme Court?

MR. FIELD: No. This was submitted on papers.

Q And what you submitted, did it make any effort to say why it is you had to have the transcript rather than use an alternative method?

MR. FIELD: Yes. In the Supreme Court, this was the Illinois Supreme Court, this was fully briefed, this point, and demonstrated why --

Q And the matter of the alternatives was fully briefed?

MR. FIELD: Oh, yes. This was -- and in fact the excerpt from the affidavit of counsel appears in the brief as to why it's impossible.

Q Would you say that your presentation to the Supreme Court of Illinois was substantially the presentation which you have made to us here?

MR. FIELD: I believe so, Your Honor.

That the course of trial as to the prejudicial conduct of the prosecution, which denied him a fair trial; the course of trial was -- has to be examined. Illinois requires that in order to judge the impact of a prejudicial conduct, or remarks, you must survey the whole record. There is no way

that I could, or anyone could reconstruct the record. Although they could, as you point out, reconstruct many things in the record, there is no way that he can reconstruct this point, and the point of insufficiency of evidence inherent in credibility of certain police testimony, which would permit him to be acquitted on appeal.

Q Mr. Field, how far do you carry your argument? Would you take it down to any kind of a proceeding, including the traffic offense?

MR. FIELD: I think that Williams vs. Oklahoma City indicates that wherever an appeal is granted to all defendants, that the appeal may not be denied, in effect, to poor defendants because of their inability to buy a transcript.

Now, of course, your hypothetical doesn't -- isn't this case.

Q No, but I'm asking you because this is what we have to struggle with.

MR. FIELD: Yes, I realize that.

Q I'm asking you where you draw the line, if you draw any line.

MR. FIELD: Yes. I think that you have to examine the real life impact on the defendant in a particular case, and at some point -- the point your question raises is that at some point certain offenses are so trivial and unimportant that even the Fourteenth Amendment should not be applied to

require a transcript. And I wouldn't be able to say, hypothetically, without an examination of a real case, and I would want to sit on that case and listen to the --

Q Well, would it draw it between offenses for which imprisonment is possible and those for which it is not? I take it you wouldn't draw it there.

MR. FIELD: No, I definitely would not, Your Honor. I think that this case demonstrates the crudity and injustice of that rule, that is, it --

Q Well, would you draw it between a monetary figure above $50 or below $50?

MR. FIELD: I think that I would look at the realities of the detriment. That is, if it's a fishing license case, to take a hypothetical, it might well be that a fishing license -- fishing without a license in a certain area of the world is the next most heinous sin to murder, and in that situation I would think that a transcript would be required, although a small fine perhaps was involved.

I would look at the particular impact on the particular defendant in the cases that arise.

Q Mr. Field, isn't it true that the courts just don't have the time? Do you agree?

MR. FIELD: Yes.

Q Do you have reporters in Illinois?

MR. FIELD: Yes.

Q But you do acknowledge that it's difficult?

MR. FIELD: Yes. The appendix to the Reply Brief does have a brief synopsis of what I believe to be the situation with regard to reporting of trials generally.

Q But it's not throughout the country, that's my problem.

MR. FIELD: Yes, I know. Throughout the country, at least in the States that we surveyed, it's my understanding that in many jurisdictions there are no -- there is no stenographically transcribed --

Q That's what I mean.

MR. FIELD: -- at trial. But in those jurisdictions you have de novo review through usually a circuit court or a court of general jurisdiction where you can be retried. And universally in those cases there is stenographic help.

Q That's what I was trying to get to. Your position is that if you don't have a transcript, but you do have de novo, that's okay.

MR. FIELD: Well, if you have a trial de novo --

Q You get a transcript, don't you?

MR. FIELD: -- you get a transcript, and I don't think that there would be a problem.

Q That's what I was trying to get at.

MR. FIELD: The important thing, when you examine the impact on this defendant here -- excuse me, my time is up --

is that he needs to wipe his slate clean, and, as the briefs examine, his future livelihood is really at stake.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Field.

MR. FIELD: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Curry.

ORAL ARGUMENT OF RICHARD L. CURRY, ESQ.,

ON BEHALF OF THE APPELLEE

MR. CURRY: Mr. Chief Justice, and may it please the Court:

The issues, as the City of Chicago sees them, in this case are two:

First, should the rule of Griffin vs. Illinois and Williams vs. Oklahoma City be extended to afford free transcripts to indigents appealing cases involving convictions of what are generally recognized as merely petty offenses?

And secondly, does the classification between serious and petty violate the Fourteenth Amendment in a fashion which this Court has considered in the past, and in other cases, to be invidious?

We believe that both these questions ought to be answered in the negative.

This Court, in Boddie vs. Connecticut, has recently noted that the Griffin rule has had a sturdy growth, and I submit that that growth was nourished greatly by the fact that each subsequent application of the rule in Griffin has been

based upon a fact situation which found (1) the personal liberty of the petitioner in jeopardy and/or upon (2) the invidious exclusionary consequences of the particular appellate practice as it was applied to an indigent.

Neither of these threshold conditions exist in this case. Appellant here is not faced with the prospect of incarceration, because he was charged with an ordinance violation for which the only sanction was a fine.

And, secondly, the appellant himself has cavalierly ignored alternate available avenues to perfect his appeal.

Mayer's Illinois Supreme Court appeal of the lower court jury conviction has been docketed, and is awaiting the disposition of this question in this Court. He is not, therefore, in the posture of Williams vs. Oklahoma City; and your decision in that case ought not to be considered as controlling.

Q Well, Mr. Curry, if it's been docketed, on what record of the Supreme Court of Illinois -- is it in the Supreme Court of Illinois?

MR. CURRY: It's in the Supreme Court of Illinois, Justice Brennan, yes, sir.

Q On what record will the appeal be decided?

MR. CURRY: It is hoped, quite frankly, Your Honor, that the verdict in this case will require that Mr. Field use his considerable talent, as was exhibited in his post-trial

motion of 14 pages, and reconstruct a settled statement, so that the matter can be brought to the attention of the court.

It's our hope and expectation that the rule of Griffin will not be expanded by this Bench.

Q A settled statement, does that require agreement between the parties?

MR. CURRY: Yes, sir; it requires agreement similar to the agreements, I submit, that are necessary to have instructions to a jury. It's a bargaining session, I submit.

Q If there is disagreement, who settles in your State?

MR. CURRY: The judge would settle the disagreement between the parties in a settled statement under the rules of Illinois.

Q And that may still be done even at this late stage?

MR. CURRY: That would have to be done in order to go forward with his Illinois Supreme Court appeal.

Q How long ago was this trial?

MR. CURRY: This trial was October of 1968 or '9 -- '69. October 11, 1969.

Q And tell me, will the trial judge, if you follow that method, and you and Mr. Field could not agree on a settled statement, and the trial judge has to construct it, would he have available a transcript for that purpose?

MR. CURRY: The transcript is not available in this case, and therein lies the distinction.

Q But my question, Mr. Curry, was: would the trial judge -- would it be made available to the trial judge so that he could resolve the disagreement between, say, you and Mr. Field on what the settled statement should be?

MR. CURRY: I really don't know that, Your Honor.

Q Well, couldn't he call the reporter in and ask the reporter to read --

MR. CURRY: I was going to suggest -- thank you, Chief Justice -- that that avenue of reviewing the untranscribed portion of the reporter's notes is also an avenue which is available to the appellant in this case.

I direct your attention to the --

Q What was that again?

Q Give us some of that, yes, we're both interested in that. Could he -- let me put a specific question: Could Mr. Field, or someone representing the petitioner here, require the court reporter to read his notes?

MR. CURRY: I submit that it would be his obligation to point out to the court that he had tried that and that that avenue was not available, that he was in fact effectively foreclosed from the reasonable avenues to go forward with his matter, and try to present an alternative to the court.

Q Mr. Curry, I'm troubled with the fact that the

circuit court judge said, "Frankly, I don't care what you do, you're not entitled to it.

"The rule says you can't get it." He didn't mention anything about any alternative, he made a rule on -- his ruling was based on the rule of the court, and that's what we have before us. Am I right?

MR. CURRY: The rule of the court spoke in terms of a felony at that time, Justice Marshall.

Q And wasn't that where it was in the circuit court? When the ruling in this case was made, the judge wasn't interested in any other thing. Am I right or wrong?

MR. CURRY: You're right. At the lower level, Your Honor.

Q And do you think he was right or do you think he was in error?

MR. CURRY: He then went to the Supreme Court --

Q But do you think he was in error?

MR. CURRY: I think he was correct with his ruling, Your Honor.

Q Do you think he's correct now?

MR. CURRY: I do, sir.

Q Why? Because he ruled?

MR. CURRY: No, no, not because he ruled, because there is, in the Supreme Court of Illinois, Rule 323, clear and unmistakable language which finds as its derivation the

case of Duncan vs. Louisiana, where alternates are specifically suggested as ways that they state can allow an indigent to proceed other than by a full verbatim transcript.

Q But the circuit judge didn't. He didn't give him this opportunity.

MR. CURRY: The circuit judge denied his motion for a free transcript, you're right, on the basis, I submit though, Your Honor, that an extension post-trial motion running 14 pages here indicating the depth of perception that Mr. Field exhibited at that time --

Q I'm afraid I haven't made myself clear. I think you're arguing about the Supreme Court, the difference between the ruling of the circuit court, as between courts; and as I understand there is not too much disagreement between you and Mr. Field on the Supreme Court, obviously, because he did page after page of arguing this point. In that I understand that there is no disagreement.

I was just saying that the original ruling, I think, was wrong. Now, the Supreme Court's ruling, I think was a different matter. That was my only point.

MR. CURRY: I submit, Your Honor, that it's my contention that at the lower level it was one question: is he indigent? And the court found, at the lower level, that he was not qualified to apply for a free transcript under the rule because he wasn't a felony.

When this question was brought to the attention of the Illinois Supreme Court, the Illinois Supreme Court, Your Honor, found that for the purposes of fees and filing fees, they would waive because the expenses of the administrator of the court, the court clerks, they are there for the State to incur; but the State Supreme Court, in my interpretation of what they've done, has said we ought not in this case provide, at the expense of the State of Illinois, a transcript when the petitioner has not shown any attempt to avail himself of the other alternatives available.

Q And that's the judgment we have before us.

MR. CURRY: Right, sir.

Q Whether to let him. Right.

MR. CURRY: Clearly.

We say that petitioner in this case is not in the posture of Williams vs. Oklahoma City, and your decision in that case ought not to be controlling, because Williams was locked out of his Supreme Court by reason of the unavailability of a verbatim transcript, and had faced a 90-day jail sentence. In that case the trial court made specific findings that Williams' argument had merit, that his appeal could not be properly prepared without a transcript, that neither Williams nor his attorney could make up an adequate record from memory, that a transcript was in fact in existence and available.

None of these conditions exist in the present case.

Although a complete verbatim transcript has been denied, Mayer makes no attempt whatsoever to avail himself of the alternate methods available to present a record to the Illinois Supreme Court.

The Illinois Supreme Court Rule 323 (c) and (d) is in clear and unmistakable harmony with this Court's observations in Draper versus Washington --

Q May I ask, Mr. Curry, you are suggesting in connection with the pending appeal in the Supreme Court, it is still open to Mayer to demonstrate that the alternative methods are inadequate? That's still open in connection with that appeal in the Supreme Court?

MR. CURRY: I believe he would not be foreclosed from making that point.

Q Now, then, if he succeeded in persuading the Supreme Court that the alternative method would not be adequate to present his appeal, would it follow that the Supreme Court would then order a transcript?

MR. CURRY: I believe that that would be the case.

Q Notwithstanding the language of the rule that limits the transcript to felony case?

MR. CURRY: The language has now been reduced, Your Honor, to 90 days. The change is not germane to this case.

Q Well, but I'm thinking of this case.

MR. CURRY: Yes.

Q If Mr. Field, in connection with the pending appeal, were to demonstrate that an alternative method would be inadequate, would the Supreme Court require that he be furnished a transcript?

MR. CURRY: I believe they would, sir; yes, sir.

Q Well, why would they?

MR. CURRY: Because I believe, Justice White --

Q Because your new rule wouldn't reach this case on the basis, I take it, that Illinois doesn't think transcripts are required in any case where the penalty is under six months.

MR. CURRY: I believe Illinois would be influenced greatly by what transpired in Williams vs. Oklahoma, and be very cautious, Your Honor, to see that the doors to the appellate court were not foreclosed.

Q If it were found that a verbatim transcript were necessary for a decent appeal, you think that your Supreme Court would think Williams required it?

MR. CURRY: I certainly do believe that, Your Honor.

Q Are you suggesting that the Supreme Court of Illinois would have, among other powers, the power to order a transcript under its supervisory jurisdiction over all lesser courts in the State?

MR. CURRY: They certainly are.

Q Independent of whatever the rule would provide?

MR. CURRY: Exactly. The rule is not an absolute to

the extent that the Supreme Court then would be in an impossible position that it would recognize that a meaningful appeal could not be brought, but its hands would then be effectively tied to allow such an appeal to come forward.

I don't believe that that's a tenable situation, and I don't think the Illinois Supreme Court would so interpret their own rules.

The petitioner here, I submit, rejects out of hand what Draper suggests, and it's not a hand to help the court understand why the alternative courses are found wanting. Instead he asks this Court to expand Griffin beyond the clear and meaningful limits of that rule, and its successors, beyond the bounds of logic and beyond what I submit to be the capabilities of the appellate processes in Illinois and perhaps throughout the nation.

The troubled journey which Griffin and its successors seek to alleviate for the indigent criminal defendant, as he struggles to maintain his liberty, cannot abide, I submit, his purposeful meandering off the path. The record must clearly disclose the inadequacies or unavailability of multiple remedies.

Appellant makes no attempt in this regard, and I submit that counsel errs in his brief, at page 37, when he suggests that California requires no such showing. The California rule as to a free transcript in misdemeanor cases

is set forth in the 1970 case of Majasus vs. Superior Court, reported at 3 Cal. 3d, page 54, wherein the court in that case held that before an indigent misdemeanor is entitled to a free transcript on appeal he must first attempt to reach an agreement upon a settled statement. A transcript will be provided only if the parties cannot agree, or if a settled statement would be inadequate. The misdemeanor then, the court quotes, "must show in a reasonably particularized presentation the reason why he cannot inform the reviewing court by a settled statement of the claimed inadequacies and errors."

I submit to you that it's impossible to determine whether the parties cannot agree or whether a settled statement would be inadequate unless there has first been a real attempt at an agreement.

It's the burden of indigency that the cases seek to relieve. Mayer in this case would champion that cause into a calculated disregard for the alternate methods of presenting an appeal which this Court has previously approved of in both Griffin and Draper, and which the Illinois Supreme Court has, by rule, subsequently adopted.

If a full stenographer's transcript must be produced as a matter of right or as a matter of simple preference, unrelated to cost, unrelated to convenience or necessity or even unrelated to rule of court, then the alternatives to the extravagance suggested in Draper must be overruled.

Q I didn't understand that the claim in this case is unrelated to particularized need in this case; as I understood the petitioner, his claim is that because of the two claimed errors in this case, insufficiency of the evidence and prosecutorial misconduct, this happens to be one of those rare cases, if you will, where a settled statement of facts is simply inadequate.

MR. CURRY: These two points were brought to the Illinois Supreme Court on motion, not on brief, Your Honor. And the extensive fashion in which they were discussed in the brief in this Court, I submit, was not brought to the attention of the court to that extent: That he alleged prosecutorial error and prejudicial treatment in the manner that charges to the jury were given in the broadest terms, in the same terms that he has raised them in this Court.

Q I didn't realize there were claims about the instructions to the jury, I thought the questions were insufficiency of the evidence and prosecutorial misconduct.

MR. CURRY: Right. Insufficiency of the evidence.

Q And I further understood appellant's basic claim to be that while in perhaps 99 and a half percent of the cases of this kind an adequate and fair appeal could be had on an agreed statement of facts or a settled statement, there do exist some rare cases where that's insufficient; and that, therefore, the rule of the Illinois Supreme Court

which just is a blanket rule, saying that in no case can there be a transcript, as that violates the Fourteenth Amendment.

It's a little bit analogous to a case we had last term, Groppe vs. Wisconsin, involving a rule of Wisconsin law that said that in no misdemeanor case, in no misdemeanor case could there ever be a change of venue. And the claim was made that in 999 out of 1,000, or perhaps more, misdemeanor cases there wouldn't need to be a change of venue in order to accord a fair trial. But there could be the rare case where only a change of venue could satisfy the Fourteenth Amendment and provide a fair trial.

And that, as I understood it,was the petitioner's claim here. He's attacking the blanket rule of the Supreme Court of Illinois.

MR. CURRY: But he's never tried --

Q Do I misunderstand his argument?

MR. CURRY: I believe that he --

Q Do you understand it the same way I do?

MR. CURRY: -- is overstating his argument, --

Q Well, maybe I'm overstating it.

MR. CURRY: -- Justice Stewart. The point that I think is important, and I think the meaningful reason for the alternative in the Illinois Supreme Court rule is that it is incumbent upon those to whom a transcript is not available, either because of their indigency or because of their unwilling-

ness to pay for it from their own funds, that it is incumbent upon them before they ask the State to show the Illinois Supreme Court why they can't bring the record to the court in one of these alternate fashions.

He didn't do this in this case. And he is --

Q Well, how about this affidavit, part of which appears in the petitioner's brief on page 12? That was brought before the Supreme Court of Illinois, wasn't it?

MR. CURRY: I've lost you. I'm in the abstract. Are you in this abstract?

Q No, I'm on the -- in the brief for the appellant, on page 12. I called him the petitioner; it's an appeal so he's the appellant. On page 12.

Isn't that part of an affidavit that was submitted to the Supreme Court of Illinois?

MR. CURRY: I believe it was, yes.

Q So, insofar as that --

MR. CURRY: But it's conclusory.

Q Well, what would you have him do?

MR. CURRY: I would have him point out that he would have inquired of the prosecutor as to the prosecutor's willingness to be engaged in a settlement, a possible settled statement before the court.

Q I don't suppose most prosecutors would agree that they had engaged in misconduct.

MR. CURRY: I don't suppose they would, but I believe, Your Honor, that we should have an airing of that issue for the benefit of the rule, so that the Supreme Court would know that its rule was not flagrantly being disregarded but there was an attempt to adhere to the rule. If he was able to come forward and say that the prosecutor who handled this case was unavailable or unwilling to participate and negotiate a settlement, I would say that would be meaningful information for the Illinois Supreme Court to have.

Q But --

MR. CURRY: If he had said that he had gone to the trial judge and asked the trial judge what his minute book showed as to notes, or what his recollection was, I would say that those would be meaningful comments that the Illinois Supreme Court would utilize in determining, then, the appropriateness, the true meaningfulness of his application for a free transcript, that he really would not be before them in any meaningful fashion unless he was able to have one or the other.

I don't believe that the prosecutor would be able to foreclose his appeal by denying; if the prosecutor denied it, then I think the Illinois Supreme Court would remedy that by granting him the free transcript.

Q That's what you -- and I was out of the room for a moment; but I understand in colloquy you indicated that

this rule doesn't mean what it says.

MR. CURRY: I mean it's not as absolute as it's read. I mean that, in the application of the rule, the court would clearly require an exhaustion, first, of the alternates and then recognize that the mere filing would not give the person presence before them, but it would be important for --

Q And what authority have you got to say that the rule of the Supreme Court of Illinois does not mean what it seems to say?

MR. CURRY: Well, the authority would be on the basis of that court's close attention to the language of this Court's decisions in Griffin and in --

Q Yes, but do you know of any case where --

MR. CURRY: No, sir; there is no case that I know of.

Q Or have you got any direction or authority from the Supreme Court of Illinois to make this representation?

MR. CURRY: No. I have none at the Illinois Supreme Court level, Justice Stewart.

Q Right.

MR. CURRY: What I know clearly, though, at the lower level, in the trial level there are a number of instances where, despite the fact that there are alternatives available, and despite the fact that the rule calls for no transcripts over 90 days, that the trial level in many instances, in my experience as Corporation Counsel, does grant a transcript to

the indigent.

Q In other words, this is a matter of discretion on the part of the trial court?

MR. CURRY: It is utilized as a matter of discretion, and not brought into challenge by the -- in any case that I'm aware of in Illinois.

Q And I suppose your argument would be that if the trial court at that lower level has that discretion, the Supreme Court of Illinois has it within its supervisory power?

MR. CURRY: I really believe that the weight and the import of the Williams case would be so profound on the Illinois Supreme Court that it just defies belief that they would effectively render this petitioner's appeal meaningless by denying him all avenues, if he were to effectively show them that the two alternatives that they suggest are meaningless; then I do believe that they would remedy the incongruity that exists there and require a free transcript be provided.

Q Then, in other words, you're saying that the rule as written is unconstitutional?

MR. CURRY: I don't believe I'm saying that at all, sir.

Q I thought you did.

MR. CURRY: I am obviously reading into it more than the actual language is there, but I don't believe that the rule is unconstitutional. In fact, it follows --

Q Well, I thought you said that under the facts of Williams vs. Oklahoma, that the rule as written is unconstitutional; that if there is a showing that anything short of a written transcript of the evidence will not give a meaningful appeal, then there has to be a written transcript. And this rule as written doesn't provide for that.

MR. CURRY: There has to be such a showing. I said --

Q Yes. Yes, but the rule --

MR. CURRY: -- that there is nothing like that in --

Q -- doesn't make any exception for a written transcript when there is any such showing; does it?

MR. CURRY: It does not, sir.

Q So the rule is unconstitutional, as I understand it.

MR. CURRY: The rule follows very closely the language in Duncan, where alternatives were suggested by this Court as a means that the State may utilize to avoid the impact of extravagance, frivolous appeals, and what-have-you. And I submit that in following that logic, the court clearly wrestled with this subject and has a rule which is in keeping with Griffin and is in keeping with Duncan.

And when we come to a fact situation, which we really haven't come to in this case, or any case that I know of in Illinois, where the two other alternatives are shown to have been attempted and to be wanting in bringing a meaning-

ful record to the court. We haven't come to the case where then the Illinois Supreme Court would deny.

And I do believe that --

Q What sort of case would you hypothecate that would be such a case?

MR. CURRY: Pardon?

I would hypothecate that there would never be such a case in Illinois.

Q You don't think there is any such case?

MR. CURRY: I don't believe there would be, sir.

Q Or could be?

MR. CURRY: There could be, surely; but I don't believe there would be. For the simple reason that the purpose of the rule, in my opinion, clearly and unmistakably indicates a willingness on the part of the Illinois Supreme Court to have the litigant available to come before him and present a meaningful record of what transpired. It does, it presents alternatives; and it seems to me that when you cavalierly say, "I don't want alternative B, I don't want alternative C, I must have alternative A", that that's just not in keeping with what the Illinois Supreme Court rule has in mind.

If you took away the first two problems, where he did meet that issue, then I do believe that in Illinois a free transcript would be forthcoming.

Q I seriously, Mr. Curry, have great problems with

how you get an agreed statement on "prosecutorial misconduct in many instances throughout the trial."

MR. CURRY: Prosecutor --

Q How you can do that without a transcript, I have great difficulty in thinking how.

MR. CURRY: One of the errors alleged is that the prosecutor limped in the courtroom. The prosecutor was also injured in that same affair. He did limp in the courtroom. And he would be, I am certain, perfectly willing to agree that he limped in the courtroom that day, if that's prosecutorial error.

I don't believe it is, but I know that --

Q But I just don't know what other -- he said "throughout the trial".

MR. CURRY: But, neither, see --

Q A two-day trial.

Now, if he puts these statements down and submits them, and they are not agreed upon, is he bound by those statements?

MR. CURRY: Is he bound by them? I believe that it would be very similar to what the -- the negotiation that would go on during an agreed statement or a settled statement would be very similar to the kind of negotiation that goes on when lawyers and the judges get together over instructions to the jury.

But the judge would settle --

Q Haven't you already told us, counsel, that on all unresolved matters of settled statements the judge resolved them?

MR. CURRY: The judge would resolve it.

Q So that if the parties put down on paper what they --

MR. CURRY: Exactly.

Q -- agree on, and the judge supplies the vacant spots, where they do not --

MR. CURRY: That's my understanding of it, and he would have available to him the notes, the minute notes that he made as he sat there. He would also have, I submit, available to him the participation of the untranscribed notes from the court reporter, if he shought them and thought they were necessary.

Q Was any request ever made by the then defendant for having the reporter read any parts of the transcript?

MR. CURRY: I know of none.

Q And is any claimed in the record on behalf of the petitioner, if you know?

MR. CURRY: There is none. There is none.

There is no showing throughout the record that any attempt has been made to secure an agreed statement. I take issue with Mr. Field's statement that despite two days of trial

he would find it impossible to prepare such a statement; and I would direct your attention to the extensive post-trial notice, which appears in your abstract at page 11 through 22, 14 pages, I might add, of in-depth analyses of what did transpire at that hearing.

I submit that this, almost in itself, would be tantamount to a record made under either one of these proposals by the Illinois Supreme Court.

The cases since Griffin give the support of the kind of balance of judicial propriety found in Duncan. That is, the consequences to the defendant from the conviction of a petty offense are insufficient to outweigh the benefits to efficient law enforcement as simplified judicial administration.

In applying the Fourteenth Amendment, Rinaldi vs. Yeager says these avenues of appeal must be kept free of unreasoned distinctions.

I believe that there is a reasoned distinction in the Illinois Supreme Court rule, the distinction being between petty and serious, and I believe that that is a very important distinction that ought be respected in future decisions by the Court.

Q And under the -- the distinction in Illinois between petty and serious is --

MR. CURRY: Under the Supreme --

Q -- offenses for which you can go to prison, and those for which you cannot?

MR. CURRY: Six months is the distinction made by --

Q Six months?

MR. CURRY: -- the Illinois Supreme Court rule. Yes, sir.

Q Up to six months?

MR. CURRY: Right, sir.

Q The same as --

MR. CURRY: Yes, sir.

Q -- the federal rules.

MR. CURRY: Right, the same as the federal rules, sir.

The classification would fail, we're told, in Shapiro vs. Thompson, unless shown to be necessary to promote a compelling governmental interest.

I submit to you that a compelling governmental interest is very real here, in the viability of the court systems, at the lower level but most apparently at the appellate level, if appeals on full transcripts to indigents are the outgrowth of the rule of this case.

And, finally, in Boddie vs. Connecticut, the court, mentioning the absence of countervailing State interest of overriding significance, the classification must fail; I say to you that a classification such as we have here between serious and petty is a countervailing State interest of over-

riding significance.

I would respectfully ask this Court to reject what is urged by the appellant and not expand the rule in Griffin into the petty offense area.

Thank you very much.

Q May I just ask one question before you sit down?

MR. CURRY: Certainly.

Q I'm looking at your Rule 323 (c), that's on the alternative --

MR. CURRY: Yes.

Q -- at page 4a --

MR. CURRY: Right.

Q -- I think it's in petitioner's brief. I notice the caption of that rule is "Procedure if no verbatim transcript is available" --

MR. CURRY: That's right.

Q -- which, on the face of it, I would suppose, means that there has been no transcript taken or something like that.

MR. CURRY: It means if none is available by indigency; it means if none is available by --

Q Well, that seems -- it seems broader, because the rule itself reads "not available if no verbatim transcript of the evidence of proceedings is obtainable."

Now, are they synonymous, "available" and "obtainable"?

Because, on the face of it, your other rule says it's not obtainable unless it's a felony case.

MR. CURRY: It's not obtainable in this case because he can't pay for it, I submit, Justice Brennan.

Q Is that what it is?

MR. CURRY: Yes, sir.

Q There's no construction of this, is there?

MR. CURRY: None that I know of.

Q Thank you.

MR. CURRY: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Field; thank you, Mr. Curry.

The case is submitted.

[Whereupon, at 11:08 a.m., the case was submitted.]