An Indigent Criminal Defendant Seeks An Appeal

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ly for school purposes, a large number of courts have observed that they are mere agencies of the state, established for the sole purpose of administering without profit the state system of public education.\textsuperscript{102} Several courts have pointed out that, as to tort liability, schools and school cities occupy a status different from that of municipal corporations, which ordinarily have a dual character and which may exercise proprietary as well as governmental functions.\textsuperscript{103} Some courts, however, have held schools liable for their torts. In \textit{Thomas v. Broadlands Community Consol. School Dist.},\textsuperscript{104} the Illinois court held that a school would be liable where it had purchased liability insurance, even though no statute authorized insurance and the function giving rise to injury was governmental. The same result has been reached in Kentucky and Tennessee.\textsuperscript{105} Schools have also been held liable for injuries arising from defects on the premises under the “safe place” statutes even though the act did not specifically mention schools.\textsuperscript{106} The courts in the British Empire apparently do not recognize the doctrine of immunity with respect to local educational authorities in charge of public schools. In respect to their liability in tort, they have generally been treated as private persons or corporations.\textsuperscript{107} Since the only good reason ever advanced for sustaining complete immunity for schools is the protection of the public funds, again, insurance appears to be the best solution.\textsuperscript{108} If insurance is present to protect the public funds, the reason for immunity disappears.

\section*{AN INDIGENT CRIMINAL DEFENDANT SEeks AN APPEAL}

“...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{1} These familiar words are extracted from Section 1, Article Fourteen of the Constitution of the United States. The Fourteenth Amendment is a statement of rights—a source of justice

\begin{footnotesize}
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\item[102.] Rhoades v. School Dist., 115 Mont. 352, 142 P.2d 810 (1943).
\item[103.] See Annot., 160 A.L.R. 58, n. 10 (1943).
\item[104.] 338 Ill. App. 567, 109 N.E.2d 636 (1952).
\item[105.] See note 96 \textit{supra}.
\item[106.] See Annot., 114 A.L.R. 428 (1937).
\item[107.] See cases cited at 160 A.L.R. 84, n. 14 (1943).
\item[108.] See Annot., 160 A.L.R. 1 (1943).
\item[1.] U.S. CONST. amend. XIV. § 1.
\end{itemize}
\end{footnotesize}
for the citizen of this land. Though the words are plain, their meaning at times is abstruse; the resultant effect is manifested by a constant struggle within our citizenry attempting to crystallize their elusive import. A segment of this struggle is concerned with the rights of an indigent criminal defendant. The indigent on appeal has made material gains in recent years, and a recent United States Supreme Court decision seems to be in line with this liberalized attitude toward the indigent criminal appellant. In *McCrary v. State of Indiana* the United States Supreme Court has indicated that there may be a flaw in the interpretation of the Indiana Public Defender Act as viewed in the light of *Griffin v. Illinois*.

John Clifford McCrary is a prisoner at a state penitentiary in Indiana. He sought the aid of the Indiana Public Defender to effect an appeal of his conviction. Apparently the Public Defender felt his case lacked merit, and therefore refused to aid the prisoner. Mr. McCrary then filed a transcript *pro se* with the Indiana Supreme Court. The court dismissed the appeal because of violations of the Indiana Supreme Court Rules regarding form and content of the transcript. He then filed a petition with the United States Supreme Court for a writ of certiorari and the motion to proceed *in forma pauperis*—both were granted.

The United States Supreme Court reviewed the petition of the prisoner which alleged that (1) he sought the aid of the Indiana Public Defender—a person empowered by state statute to secure the preparation of a transcript in paupers' cases—but the Public Defender refused to assist him, and that (2) the dismissal by the Indiana Supreme Court denied him the equal protection of the laws because he was and is unable to pay for the preparation of a transcript. In a per curiam decision, the Court vacated the order of dismissal by the Indiana Supreme Court and remanded the case. The basis reported for this decision was that the record before the United States Supreme Court did not disclose whether the petitioner's allegations were made to, and passed on by, the Indiana Supreme Court in light of the *Griffin* case.

This decision may come as quite a surprise to those who have always considered Indiana a leader among the states in providing aid to indigent appellants. Though it may be a surprise, a careful study of the law in-

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3. 351 U.S. 12 (1956). In this case, the United States Supreme Court held that an indigent criminal appellant must be provided with a free transcript where the transcript is essential to take an appeal. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19.
5. See note 2 supra.
interpreting the Indiana Public Defender Act may well reveal that certain adjustments may be necessary. To understand these problems fully, knowledge of the entire Indiana system of aid to indigent criminal appellants would appear essential.

**The Indigent Criminal Defendant on Appeal in Indiana**

The indigent on appeal is concerned with financial problems which also beset a non-indigent on appeal, the difference being that the non-indigent is financially able to nullify these problems. Basically, the cost of appeals, which is the major problem in this area, can be broken down into three general categories:

1. Cost of trial transcript.
2. Cost of counsel fees.
3. Cost of filing fees, bonds, etc.

Considering these cost areas one at a time, what is Indiana’s position in this problem of giving aid to indigents on appeal?

**Transcript**

In 1854 the court in *Falkenburgh v. Jones* held that a poor person appealing a conviction was entitled to a transcript of the trial record without cost. The indigent here was convicted of grand larceny.

A misdemeanor case in 1872 found the court achieving the same result as in the *Falkenburgh* case. In *State ex rel. Morris v. Wallace*, the court predicated its result on interpretation of the criminal code and some intriguing analogies to wit:

> It is not questioned but that the officers of the court are bound to perform their duties for the defendant, and that witnesses for him are bound to attend upon his summons, without pay therefor, up to the time of his conviction. We can see no reason why his right to a transcript of the record upon an appeal to this court, without such payment, is not a right of equal importance and equally well secured to him. (Emphasis added.)

7. **IND. ANN. STAT. §§ 13-1401 to 13-1406 (Burns 1956).**
8. 5 Ind. 296 (1854).
9. 41 Ind. 445 (1872).
10. *Id.* at 446.
11. *Id.* at 447-448. The court made an interesting statement in regard costs. "If the defendant be compelled to pay costs for a transcript, or for any other service rendered by any officer or any witness, and the judgment of conviction should be reversed in this court, and the defendant ultimately acquitted, he can never recover the amount back or be reimbursed in any way known to the law." (*Id.* at 447-8). This type of statement would indicate that the State should assume costs in all criminal cases—both at trial and appellate stage—or else provide a means for recompense to the acquitted party.
These cases show that the problem of free transcripts for indigents on appeal was decided early in Indiana history in favor of the indigent. An ancillary problem subsequently arose, however, concerning whether the Supreme Court could mandate the trial court to supply defendant with a transcript. This was decided against the alleged indigent in *Merrick v. The State*, where the court rested its decision on a matter of trial court discretion. "These are questions depending upon the circumstances of the party, and resting within the sound judicial discretion of the court, and we must presume, nothing appearing to the contrary, that the discretion was properly exercised." A subsequent case followed the decision in the *Merrick* case on the same type of question. However a later case, *State ex rel. Pappas v. Baker, Judge*, indicated that mandamus would lie if there was a showing by the petitioner that the transcript, if furnished, would enable him to present questions on the merits which he could not otherwise present on appeal. This condition imposed by the court was not set out in the legislature's enactment in 1893. The proviso in this statute refers merely to whether or not the petitioner is a poor person. Nevertheless, the Indiana court in a recent case followed the doctrine that a mandate would lie to order

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12. 63 Ind. 327 (1878).
13. Id. at 355.
14. In re Morgan, 122 Ind. 428, 23 N.E. 863 (1890). This case also involved the appointment of counsel on appeal. Court reasoned that though the defendant was provided with counsel at the trial stage, this nor anything else (including the Constitution) gave the defendant the right to have long-hand evidence for appeal. The court held that the Constitutional requirements of a fair trial were complied with at the trial stage, and after the trial stage it was within the sound discretion of the trial court as to whether counsel will be appointed or long-hand transcripts supplied.
15. 209 Ind. 25, 30, 31, 197 N.E. 912 (1935). The court also stated that "under the statutes and the decisions of this court a transcript of the evidence heard upon the trial is not necessary to present every question of alleged error which may be urged upon an appeal from the judgment of a trial court in a proceeding."
16. IND. ANN. STAT. § 4-3511 (Burns 1946). "Poor persons—Court may order transcript.—Any person desiring to appeal to the Supreme Court or Appellate Court of this state from the decision of any circuit court or criminal court, or the judge thereof, in criminal cases, and not having sufficient means to procure the longhand manuscript or transcript of the evidence taken in shorthand, by the order or permission of any of said courts, or the judge thereof, the court or the judge thereof shall direct the shorthand notes of evidence into longhand, as soon thereafter as practicable, and deliver the same to such poor person: Provided, The Court or the judge thereof is satisfied that such poor person has not sufficient means to pay said reporter for making said longhand manuscript or transcript of evidence, and such reporter may charge such compensation as is allowed by law in such cases for making and furnishing said longhand manuscript, which service of said reporter shall be paid by the court or judge thereof out of the proper county treasury."
17. State ex rel. Ward v. Porter Circuit Court, 234 Ind. 573, 575, 130 N.E.2d 136, 137 (1955). "The remedy for refusal of a trial court to furnish a poor person with a transcript of the evidence is the application to this court for an order of mandate to the trial court."
the trial court to provide the petitioner with a transcript for appeal if a proper showing were made. *State ex rel. Ward v. Porter Circuit Court* is a landmark case for Indiana because the court clearly sets out what the appellant must show to the trial court to obtain pauper aid:

To establish his right to such relief appellant must not only show to the trial court (1) that he does not have sufficient means to procure a transcript but he must also show (2) that the merits of the questions to be raised on appeal cannot be considered without a transcript of the evidence, (3) that questions of error were presented to the trial court in his motion for a new trial by which this court could review the merits of the cause on appeal.¹⁸

In the *Ward* case the defendant was provided with counsel at the trial because of his indigency. The trial court, however, would not furnish him with a transcript with which to effect an appeal even though the defendant was immediately incarcerated after his trial. The supreme court in holding for the defendant stated that,

If he was without funds with which to employ counsel and to conduct his defense at the trial, and there has been no change in his financial status since the trial, it may reasonably be inferred that, being confined to jail and unable to work since his trial, he would not have sufficient funds to procure a transcript of the evidence for use in the appeal of his case, there being nothing to the contrary in the record. . . .¹⁹

In a case decided in 1958²⁰ the court affirmed the proposition that the petitioner makes out a prima facie case for pauper aid when he follows the requirements set out by the court in the *Ward* case.

18. *Id.* at 576, 130 N.E.2d at 138. The court further held that, "Upon a proper showing of these matters the trial court is required by the terms of the statute (IND. ADVN. STAT. § 4-351) to order the court reporter to prepare a transcript of the evidence for the use of the defendant on appeal, and place upon the county the legal duty to pay the cost thereby incurred."

19. *Id.* at 577, 130 N.E.2d at 138.

20. *State ex rel. Grecco v. Allen Circuit Court*, 238 Ind. 571, 153 N.E.2d 914 (1958). See also *State ex rel. Nicholas v. Criminal Court of Marion County*, 162 N.E.2d 445, 448 (Ind. 1959). "Mandamus is an extraordinary writ which may be issued by this court only to compel the performance of a clear and absolute duty. . . . Mandamus may not be used to control judicial discretion." The court affirmed the rule of *State ex rel. Ward v. Porter Circuit Court* (note 12 supra) with a little elaboration to wit: "While relatrix has pursued the proper remedy . . . she has, nevertheless, failed to sustain her burden of showing that she was legally entitled to the relief sought and that it was the clear and absolute duty of respondent court to grant the relief which she demands." (Emphasis added.)
Counsel

Counsel for the accused is provided for by the Constitution of The State of Indiana. This right to counsel, however, was limited by the Indiana court to the trial stage only until the landmark decision of State v. Hilgemann, where the court for the first time held that the right to counsel for the accused applied to appeals as well as to the trial stage. The court accomplished this by relying on a 1920 Indiana case which was in turn concerned with the right to counsel prior to arraignment. Thus, even though the Hilgemann case is considered the landmark case in Indiana for stating the right of the indigent to have counsel provided for him on appeal, the initial perception of the law was first made by the court in Batchelor v. State, and it took the later court twenty-one years to grasp the elastic meaning of the phrase uttered by the court in 1920:

It has been held that a constitutional right to be heard by counsel is not limited to the right to be heard by counsel at the trial, but that the spirit of the provision contemplates the right of accused to consult with counsel at every stage of the proceedings. (Emphasis added.)

This pronouncement by the court with its subsequent extension in the Hilgemann case made Indiana the state to follow in regard to giving aid to the indigent upon appeal.

A 1958 Indiana case, State v. Allen Circuit Court, affirms the Hilgemann case, and also premises its result on the statutory provisions for appeal in Indiana. Another 1958 case appealed from the Allen

22. In re Morgan, 122 Ind. 428, 23 N.E. 863 (1890).
23. 218 Ind. 572, 34 N.E.2d 129 (1941).
24. Id. at 577, 34 N.E.2d at 131. "The Batchelor case deals with the right to counsel before and during the trial, but the reasoning supports the view that the defendant is entitled to have counsel to advise him and represent him on appeal."
25. Batchelor v. State, 189 Ind. 69, 125 N.E. 773 (1920).
26. Ibid.
27. Ibid. at 76, 77, 125 N.E. at 776.
30. Ind. Ann. Stat. § 9-2301 (Burns 1956). "An appeal to the Supreme Court or to the Appellate Court, may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed." The statute's proclamation that appeal is "a matter of right" has been given an even broader scope by the Indiana Supreme Court in Schaaf v. State, 221 Ind. 563, 49 N.E.2d 539 (1943), which held that the general assembly could not deny the right of appeal to the Supreme Court by a person convicted of crime. In other words the right of appeal is a vested right provided by the
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Circuit Court, *State ex rel. Grecco v. Allen Circuit Court,* follows the holding of the court in *State v. Allen Circuit Court,* referred to above.

Having dealt specifically with transcripts and counsel being provided gratis to the indigent on appeal, we have eliminated the major cost factors of appealing a criminal conviction. Costs such as filing fees and appeal bonds, though important, do not carry the significance of the more expensive items and would seem to be embodied in any system providing free transcripts and counsel.

**Public Defender Act**

To enlarge the system of aid to the indigent appellant, the Indiana legislature enacted the Public Defender Act in 1945. A key section of this act is found in *Ind. Ann. Stat.* section 13-1402, which says:

Prisoners represented after time for appeal expired.—It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired. (Emphasis added.)

Along with this key section, a subsequent section sets out the right of the public defender to procure a transcript of the trial.

Transcripts of proceedings—Authority to stipulate facts.—The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard.

Constitution. This interpretation, as will be pointed out later, is not required by the United States Supreme Court interpretation of the Fourteenth Amendment.

31. 238 Ind. 571, 575, 153 N.E.2d 914, 916 (1958). "... It necessarily follows from the statutory provisions for appeal as of right, to an accused in a criminal case, that an indigent defendant's right to be represented by counsel at public expense extends to his prosecution of an appeal."

32. Filing fee—See Burns v. Ohio, 360 U.S. 252 (1959). Supreme Court Rule of Ohio prevented clerk of the Ohio Supreme Court from accepting "any paper" filed without a fee. The fee was $20. The defendant was allegedly indigent. United States Supreme Court held that a state violated Fourteenth Amendment of Federal Constitution by requiring an indigent to pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts. Appeal bond—See Barber v. Gladden, 210 Ore. 46, 298 P.2d 986 (1956). Supreme Court of Oregon held that Griffin requires the state to assume cost of an appeal bond for an indigent appellant.

involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed. 34

The question then arises as to how the Indiana courts have interpreted the Public Defender Act. In the year following the enactment of the Public Defender Act, the supreme court in State ex rel. Fulton v. Schannen held that "The defender may, with the consent of the court, appear as amicus curiae, even over relator's objection. . . ." 35 In this case the relator sent a petition for writ of error coram nobis from prison to Judge Schannen. Judge Schannen thereupon forwarded it to the Attorney General who in turn submitted it to the public defender. Though the court held that the public defender may appear as amicus curiae, the court also recognized that the public defender could not "be forced upon" the relator. 36 The court then went further to state that "the prison doors" will not be opened to any indigent to conduct coram nobis proceedings in person "on claims which he is not willing to submit to a skilled attorney paid by the State." 37 The court's position is logical. If a prisoner has a meritorious appeal it would behoove him to permit trained counsel to handle the appeal.

Subsequent decisions of the supreme court held that where the statutory time for appeal had expired, the public defender was the only recourse available to take an appeal for an indigent prisoner. 38 If the public defender was of the opinion, after studying the trial record, that no error existed to justify an appeal, the court would respect the public defender's judgment and deny public aid. 39 As evidenced from these

34. IND. ANN. STAT. § 13-1405 (Burns 1956).
35. 224 Ind. 55, 58, 64 N.E.2d 798 (1946).
36. Id. at 57, 58, 64 N.E.2d at 799.
37. See note 35 supra. The court then further exemplified the public defender system, "... With such representation the convict gains, not only the benefit of competent counsel, but also, at state expense, when the Public Defender deems advisable, transcripts necessary for appeal. Without such representation he limits his evidence in the hearing to such affidavits as he may obtain from his place of imprisonment and he may be present at the hearing only upon order made in the sound discretion of the judge."
39. In Jackson v. Reeves, 238 Ind. 708, 709, 153 N.E.2d 604, 605 (1958), the court said, "Obviously the public defender could not and should not be required to appeal all cases in which inmates of our penal institutions consider that error was committed in their respective cases. Therefore, of necessity he must be granted wide discretion as to whether the matters complained of present any appealable issue." Accord, Anderson v. State, 238 Ind. 708, 153 N.E.2d 603 (1958); Anderson v. State, 236 Ind. 700, 139 N.E.2d 197 (1957); State v. Murray, 231 Ind. 74, 106 N.E.2d 911 (1952); In re Kretchmer, 224 Ind. 559, 69 N.E.2d 598 cert. denied sub. nom., 329 U.S. 797 (1946).
decisions, the public defender possesses broad discretionary powers largely
generated because of necessity—necessity in the sense that there are so
many indigent inmates and so few public defenders. A brief look at the
statutory requirements before a public defender can be appointed in a
given area will illustrate the point.

The Public Defender Act as passed in 1945 was defective because it
failed to provide for assistants to the public defender. The legislature
rectified this in 1951. The Act as passed in 1951 stated in part “The
judge of the criminal court or any division thereof in the counties having
a population of four hundred thousand (400,000) or more . . . is hereby
authorized to appoint one or more public defenders, as he may deem
necessary. . . .” The 1950 census showed Marion County was the
only eligible county.

In 1953 the legislature enlarged the appointment powers as follows:

Appointment.—The judge of the circuit court in counties
having a population of not less than one hundred ten thousand
(110,000) and not more than one hundred and seventy-five
thousand (175,000) . . . is hereby authorized to appoint a
public defender. . . .

A 1959 amendment of the 1953 act set the population limits at not less
than one hundred thousand (100,000) and not more than one hundred
and seventy-five thousand (175,000). Counties within these require-
ments, according to 1950 census, are Madison, Vanderburgh and Vigo.
Therefore, a total of four counties (Marion, Madison, Vanderburgh
and Vigo) are provided with powers to appoint public defenders at state
expense.

In summation, the public defender system in Indiana is available
to all indigent inmates desiring to appeal, and it is the only recourse for
an indigent appellant after the statutory time for appeal has run. The
prisoner must be an indigent, and he must present a meritorious case for
appeal. This determination of merit is made by the public defender
himself and here the court allows broad discretion.

The Indiana system would appear to be grounded on the theory
of justice for all, and Indiana’s leadership in this area among the states
has frequently been acknowledged in the past. Leadership or prominence,

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40. IND. ANN. STAT. § 13-1404 (Burns 1956).
41. IND. ANN. STAT. § 4-2316 (Burns Supp. 1959).
42. IND. ANN. STAT. § 9-3501 (Burns 1956).
44. This broad discretion exercised by the Public Defender is a point of issue in
the McCrary case.
however, are subject to decadence in a stagnant climate. Changing political, economic and social attitudes constantly serve as a challenge to man-made laws. The United States Supreme Court has monitored these attitudes diligently in recent years as is evidenced by its numerous decisions embodying new principles and demands upon existing laws.\footnote{Brown v. Board of Education, 347 U.S. 483 (1954) (school segregation case holding that racial classification is per se irrational); Smith v. Allwright, 321 U.S. 649 (1944) (a political party which was given a special place in the state's electoral system could not, consistent with the Fourteenth and Fifteenth Amendments, discriminate against Negroes); United States v. Darby, 312 U.S. 100 (1941) and NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) (key decisions under the Commerce Clause that resulted in expansion of federal authority to deal with the nation's economic problems.)}

These decisions must be studied to ferret out and repeal or adjust existing laws which are not compatible. Indiana may well face this task as a result of the McCrery decision. The magnitude of this task will be evident after a study of the United States Supreme Court decisions in two recent cases—Griffin v. Illinois\footnote{351 U.S. 12 (1956).} and Eskridge v. Washington Prison Bd.\footnote{357 U.S. 214 (1958).}

THE GRIFFIN CASE AND STATE LAW

The petitioners in the Griffin case were convicted of armed robbery by an Illinois court. They then petitioned the trial court for a certified copy of the entire record including a stenographic transcript of the proceedings, to be furnished without cost, to be used for an appeal. The petitioners alleged poverty. The petition was denied. Subsequently, after higher state court affirmance, the United States Supreme Court received the case. The Supreme Court reversed and remanded the Griffin case in a precedent making decision and held that once a state sets up an appellate system, it cannot discriminate against some defendants because of their poverty; and if a transcript is necessary to provide adequate and effective appellate review to indigent defendants, the state must provide one.

A question now arises as to the scope and general importance of the Griffin decision. Briefly stated, the answer would seem to be that the Court has pronounced that poverty should not be a bar to the constitutional rights guaranteed under the Fourteenth Amendment.\footnote{Willcox and Bloustein, The Griffin Case—Poverty and Fourteenth Amendment, 43 Cornell L.Q. 1 (1957).} The Court made this plain:

To deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust con-
victims which appellate courts would set aside. . . . There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.\(^4\)

The Court has seemingly elevated the poor man to the plateau occupied by the rich man before the throne of justice. Comprehending the importance of the \textit{Griffin} decision is not difficult. The problem for the states is to ascertain the scope of the decision so as to determine its effect on their existing laws. Since the \textit{Griffin} case was specifically concerned with transcripts, this seems to be a fine way to enter the area.

The states at the time of the \textit{Griffin} decision (April 23, 1956) could be divided into four groups with regard to furnishing transcripts on appeal:\(^5\)

Free transcripts to:
1. All defendants in all criminal cases. (six (6) states.)
2. All indigent defendants convicted of any criminal offense. (twenty-seven (27) states—Indiana included.)
3. All indigent defendants convicted of a capital offense. (eight (8) states—Illinois included.)
4. No defendants in any criminal proceeding. (seven (7) states.)

Plainly, the decision in the \textit{Griffin} case directly affects the states in groups three and four as far as providing transcripts on appeal.\(^6\)

The Supreme Court's emphasis on “adequate and effective appellate review,”\(^7\) however, would imply that the indigent appellant should also be provided with counsel.\(^8\) Nevertheless the Court did not refer to the counsel problem in its opinion. If the \textit{Griffin} case should stand for more than mere provision of free transcripts,\(^9\) then the states in groups one and

\(^4\) See note 46 \textit{supra} at 19.
\(^6\) After the \textit{Griffin} decision, the Illinois Supreme Court adopted a new rule of court on June 19, 1956: Ill. Supreme Court Rule 65-1 as amended, S.H.A. ch. 110, § 101.65-1. "Any person sentenced to imprisonment" who is "without financial means with which to obtain the transcript of the proceedings at his trial" will be furnished with the same if "necessary to present fully the errors recited in the petition. . . ."
\(^7\) Majority in 351 U.S. 20. "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants."
\(^9\) Willcox and Bloustein, \textit{The Griffin Case—Poverty and the Fourteenth Amendment}, 43 Cornell L.Q. 1, 23 (1957)."There is a probability that the Griffin decision will eventually be construed to require a state to furnish reasonably competent counsel to all indigent persons accused of serious crimes."
two, with the exception of Indiana,\textsuperscript{55} are presented with a problem. Two of the states in group two, New York and Oregon, have recently encountered the free counsel for an appeal problem.

The New York Court of Appeals in \textit{People v. Kalan}\textsuperscript{56} held that a failure to appoint counsel for an indigent appellant violated the New York Constitutional guarantees of due process and equal protection. The court did not cite the \textit{Griffin} case. In 1958, however, the New York Court of Appeals in \textit{People v. Breslin}\textsuperscript{57} held that the \textit{Griffin} decision did not require appointment of counsel in every case,\textsuperscript{58} and when a copy of the trial minutes is made available to the defendant and to the court to which he takes his appeal, he has received all the constitutional protection to which he is entitled. Finally in 1959 the Court of Appeals in \textit{People v. Pitts},\textsuperscript{59} a case which had similar facts to those presented in \textit{People v. Kalan}, followed the \textit{Kalan} case, and relied on the \textit{Griffin} case as authority for the proposition that once a state sets up an appellate system, a defendant must be afforded adequate and effective appellate review. The \textit{Kalan} and \textit{Pitts} decisions hinged on the fact that the indigent defendant was "physically unable to inspect the minutes of the trial"\textsuperscript{60} because he was incarcerated at the time he was taking the appeal. The court held "... in situation where a destitute defendant is physically unable to inspect the record on file ... the assignment of counsel on his appeal is required in order to make certain that that task is performed for him."\textsuperscript{61}

The court's reason for this decision was that "there is no statutory or constitutional provision by which we may make available to the destitute a copy of the trial minutes free of charge."\textsuperscript{62} On the basis of the \textit{Kalan} and \textit{Pitts} decisions, the New York Court of Appeals cannot be said to be extending the \textit{Griffin} case to cover aid of counsel in every case. The court in these two cases is appointing counsel to accomplish a task because the court has no alternative—physical prevention from taking an appeal would seem to be a clear case of violation of equal protection. From the position the court has taken in \textit{Kalan}, \textit{Breslin} and \textit{Pitts} it is apparent that counsel aid to an indigent on appeal is not deemed by the New York court to be a requisite extension of the \textit{Griffin} case.

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\item \textsuperscript{55} State v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129 (1951) (Indiana allows indigent counsel for a timely appeal); Ind. Ann. Stat. \S\ 13-1402 (Burns Replacement 1956) (public defender available where appeal by indigent is not timely.)
\item \textsuperscript{56} 159 N.Y.S.2d 480, 140 N.E.2d 357 (1957).
\item \textsuperscript{57} 172 N.Y.S.2d 157, 149 N.E.2d 85 (1958).
\item \textsuperscript{59} 189 N.Y.S.2d 650, 160 N.E.2d 523 (1959).
\item \textsuperscript{60} \textit{Id.} at 654, 160 N.E.2d at 525.
\item \textsuperscript{61} \textit{Id.} at 654, 160 N.E.2d at 526.
\item \textsuperscript{62} \textit{Id.} at 654, 160 N.E.2d at 525.
\end{itemize}
NOTES

The Oregon Supreme Court, with two judges dissenting, ruled against counsel aid to an indigent in *State v. Delaney.* The court recognized its discretionary power to appoint counsel but wished to survey the transcript first before exercising this power in an apparent attempt to eliminate frivolous appeals. The Oregon Legislature in 1959 remedied the problem by enacting the Post Conviction Hearing Act. The Oregon Law Review, in a very cogent comment on the statute, has said:

Sec. 23 of this act provides that an indigent defendant in a criminal action, as well as a petitioner in a post conviction proceeding, who wishes to pursue an appeal may present a timely request to the circuit court from which the appeal would be taken to appoint counsel to represent him on such appeal. This request shall include a brief financial statement by the defendant. If the circuit court finds that the defendant is without funds to employ counsel on appeal, it shall appoint such counsel. Section 23 also provides that the circuit court may determine a reasonable fee for counsel on appeal.

This pronouncement by the Oregon legislature would seem to be in character with the overall meaning of the *Griffin* case. The Court's not mentioning the counsel problem in its opinion in the *Griffin* case can be explained by the fact that this point was not in issue. It is reasonable to expect that without too much time passing the Supreme Court will be faced squarely with the counsel problem. The result should be in harmony with the *Griffin* decision's mandate of adequate and effective appellate review—i.e., free counsel for the indigent appellant.

Although a State may be required to provide the indigent appellant with the "elements" essential for an adequate review, the States should be able to maintain discretionary powers to obviate the taking of frivolous

64. 38 Ore. L. Rev. 281 (1959).
66. See note 64 *supra* at 282.
67. 351 U. S. 18. "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." (Emphasis added.)
68. Burns v. Ohio, 360 U.S. 252 (1959). The Court has recently encountered the "filing fee" problem and held that the State could not bar the gates for appellate review to an indigent unable to pay $20 filing fee.
69. *Griffin* v. Illinois, 351 U.S. 12, 18 (Citing McKane v. Durston, 153 U.S. 684 (1894).) The Court, however, did recognize "that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." 351 U.S. 18. However, "All of the States now provide some method of appeal from criminal convictions. . . ."
appeals. This discretionary power brings up a further problem of what person or institution can exercise this discretion.

In *Eskridge v. Washington Prison Bd.*, the United States Supreme Court settled the issue that the discretion cannot be lodged in the trial court. The Court held that "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants—who can afford the expense of a transcript." In other words the trial judge cannot have the final word as to the presence or absence of error in the trial, or as to the merit of a defendant's case.

Analogous to a trial court rendering a final determination as to whether the indigent appellant's appeal has merit is the procedure employed in the Public Defender system. Although giving such broad discretion to the public defender is not subject to the same evil the Supreme Court was striking at in *Eskridge*, a real question might arise as to whether or not *Eskridge* could be extended so as to eliminate this discretion even as to the public defender unless it is subject to review. As has been previously discussed, the Indiana Supreme Court has interpreted the Public Defender Act as clothing the public defender with broad discretion in ascertaining the merit of a prisoner's case for appeal. The Act does not expressly require this interpretation. The limited number of public defenders allowed by the statute, however, necessitates this Indiana Supreme Court interpretation because the Act does not

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70. 351 U.S. 24. Justice Frankfurter in concurring opinion, "When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent." (Emphasis added.)


72. Id. at 216.

73. It would seem that the Court was striking at a system which would allow the trial judge to determine whether or not he had committed error at the trial. The Court was merely re-applying the old adage that "no man should be the judge of his own cause." It would indeed be a remarkable occurrence when a judge could deny a defendant's motion for a new trial and in the same breath determine that the case had sufficient merit for appeal to justify the expense and administrative burden involved in furnishing the indigent with a transcript and counsel for an appeal. The public defender, on the other hand, is not in this apparent position of conflict of interest; and his exercise of discretion in determining the merit of an indigent's case may well be justified and proper.

74. See Jackson v. Reeves, supra note 39.

75. IND. ANN. STAT. § 13-1402 (Burns 1956). "It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

76. IND. ANN. STAT. § 9-3501 (Burns Supp. 1959).
merely provide for free transcripts\textsuperscript{77} but also for free counsel.\textsuperscript{78} If the Indiana Supreme Court did not allow the public defender broad discretion in the determination of the merit of an appeal, the indigent prisoners with meritorious cases would not be afforded the justice contemplated by the Act. The public defender would waste valuable time and money advocating cases with little or no merit. Thus it would appear that \textit{Eskridge} does not and should not remove all discretion in the area of determining the merit of a case for appeal.

\textbf{Conclusion}

In light of the possible weaknesses in the Indiana Public Defender system it seems that changes may have to be made. If these changes become necessary, they should conform to the holdings of the United States Supreme Court in the \textit{Griffin}\textsuperscript{79} and \textit{Eskridge}\textsuperscript{80} cases. Taken together, these decisions seem to contemplate a system consisting of these elements: First, if the indigent defendant desires to take an appeal, he should at the expense of the state, be provided with a free transcript upon a showing to the trial court, that he is a poor person, and that the merits of his case cannot be brought before the reviewing court without a transcript. Second, a test ascertaining the merit of his case may possibly be employed with the indigency test, if the decision of “no merit” by the public defender is subject to review by the state supreme court. The inclusion of a merit test without the right to review by the high court may well come within the proscription of the \textit{Eskridge} case. Adjusting Indiana’s Public Defender system to conform to the above requirements, however, does not dispose of all the problems. The financial burden of an extensive program of providing free transcripts to indigents can be great,\textsuperscript{81} and Indiana should make a realistic appraisal of its present transcript requirements in an attempt to cut costs.\textsuperscript{82} As presently set up by the Public Defender Act, the public defender is allowed to procure stipulated facts in taking an appeal.\textsuperscript{83} There are also other methods

\textsuperscript{77} IND. ANN. STAT. § 13-1405 (Burns 1956).
\textsuperscript{78} IND. ANN. STAT. § 13-1402 (Burns 1956).
\textsuperscript{79} 351 U.S. 12 (1956).
\textsuperscript{80} 357 U.S. 214 (1958).
\textsuperscript{81} Dean, \textit{Proposal Rule for Hearing of Appeals on Original Papers}, 8 F.R.D. 143, 148 (1958). “Premising my calculations on 100 cases, the statistics of my office show that the average number of pages in transcripts of records, under the present Rules, is 260, and the average cost of same under the present Rules is $104. Under the proposed Rule the average cost of a record on appeal should average not more than $4. The savings to litigants in these 100 cases would therefore be about $10,000.” See also 33 N.Y.U.L. REV. 934 (1958).
\textsuperscript{82} This entire problem is comprehensively surveyed in the article: Wilcox, Karlen and Roemer, \textit{Justice Lost}, 33 N.Y.U.L. REV. 934 (1958).
\textsuperscript{83} IND. ANN. STAT. § 13-1405 (Burns Replacement 1956).
which may be utilized to decrease the cost of transcripts on appeal.

First, the amount of written material given to the appellate court could be reduced by substituting the question and answer record for the narrative record.84

Second, the use of original papers on appeal would constitute a substantial savings.85 The Court of Appeals for the seventh circuit adopted a new set of Rules effective July 1, 1956.86 One of the new Rules sets up the use of original papers.87 Other changes are as follows: "(1) the use of a printed record is eliminated and appropriate record material is presented in an appendix to the brief on appeal and by other methods; . . . and (3) alternative reproduction methods, other than conventional letter press printing, are authorized for both appendices and briefs."88

The savings derived from any scheme to alter the transcript requirements must be balanced by the possibility that justice may be thwarted because of an inadequate transcript. The quality of justice must not be disturbed.

84. Orfield, Criminal Appeals in America, 178 (1939).
85. Dean, op. cit. supra note 81 at 148. "... The primary purpose of this proposed Rule is to save expense to litigants." See note 81 supra.
86. Belknap, The New Rules of the Court of Appeals for the Seventh Circuit, 45 Ill. B.J. 74 (1956). The rules were designed to accomplish two major objectives: "(1) making the process of taking an appeal from a District Court less expensive and (2) expediting the time within which a case being appealed to the court can be finally submitted for decision."
87. F.C.A. Rules c. 10 Court of Appeals, Seventh Cir. Rule 12 (e)—"Transmission of Record on Appeal. Promptly after notice of appeal is filed in the district court . . . the clerk of the district court shall transmit to the clerk of this court all the original papers in the file dealing with the action or proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file. . . ."
88. See note 86 supra.